



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)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT ASBURY
DEPUTY PRESIDENT O'NEILL

MELBOURNE, 4 NOVEMBER 2022

Applications to vary modern awards – work value – Aged Care Award 2010 – Nurses Award 2020 – Social, Community, Home Care and Disability Services Industry Award 2010 – Decision.

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ABBREVIATIONS

<i>2019 Aged Care Decision</i>	<i>4 yearly review of modern awards – Aged Care Award 2010 [2019] FWCFB 5078</i>
2020 Workforce Report	2020 Aged Care Workforce Census
4 Yearly Review	4 yearly review of modern awards
4 Yearly Review Amending Act	<i>Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth)</i>
ABS	Australian Bureau of Statistics
ABI	Australian Business Industrial
ACFI	Aged Care Funding Instrument
ACSA	Aged & Community Services Australia
ACQS Commission	Aged Care Quality and Safety Commission
ACQS Commission Act	<i>Aged Care Quality and Safety Commission Act 2018 (Cth)</i>
<i>ACT Child Care Decision</i>	<i>Australian Liquor, Hospitality and Miscellaneous Workers Union re Child Care Industry (Australian Capital Territory) Award 1998 and Children’s Services (Victoria) Award 1998 – re Wages rates PR954938 [2005] AIRC 28</i>
Aged Care Act	<i>Aged Care Act 1997 (Cth)</i>
Aged Care Award	<i>Aged Care Award 2010</i>
AIN	Assistant in Nursing
AIRC	Australian Industrial Relations Commission
ANMF	Australian Nursing and Midwifery Federation
APESMA	The Association of Professional Engineers, Scientists and Managers, Australia
AQF	Australian Qualifications Framework
Awards	<i>The Aged Care Award 2010, Nurses Award 2020 and Social, Community, Home Care and Disability Services Award 2010</i>
Background Document 1	Background Document 1 – The Applications dated 9 June 2022
Background Document 2	Background Document 2 – Award Histories dated 9 June 2022
Background Document 3	Background Document 3 – Witness Overview dated 20 June 2022
Background Document 4	Background Document 4 – Royal Commission into Aged Care Quality and Safety dated 20 June 2022
Background Document 5	Background Document 5 dated 5 August 2022

Background Document 6	Background Document 6 – The Commonwealth dated 22 August 2022
Background Document 7	Background Document 7 – Modern Awards Objective dated 22 August 2022
Background Document 8	Background Document 8 – Summary of Submissions dated 22 August 2022
Background Document 9	Background Document 9 – Procedural History dated 30 August 2022
BaptistCare	BaptistCare NSW & ACT
Buckland	Buckland Aged Care Services
CCIWA	Chamber of Commerce and Industry of Western Australia
Charlesworth Report	Prof Sara Charlesworth, <i>Report of Sara Charlesworth: Health Services Union of NSW – Regarding work value for aged care members</i> dated 31 March 2021
Charlesworth Supplementary Report	Prof Sara Charlesworth, <i>Supplementary Report of Sara Charlesworth</i> dated 22 October 2021
CHSP	Commonwealth Home Support Programme
CoE Survey	ABS, <i>Characteristics of Employment, Australia, August 2017</i> , Catalogue No. 6333.0
Commission	Fair Work Commission
Consensus Statement	Aged Care Sector Stakeholder Consensus Statement dated 17 December 2021
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.
DoHAC	Commonwealth Department of Health and Aged Care
Eagar Report	Professor Kathleen Eagar, <i>Report of Dr Kathleen Eagar</i> dated 29 March 2021
Eagar Supplementary Report	Professor Kathleen Eagar, <i>Supplementary Report of Dr Kathleen Eagar</i> dated 20 April 2022
ECA	Extended Care Assistant
EEH	ABS, <i>Employer Earnings and Hours, Australia, May 2016</i> , Catalogue No. 6306.0
EN	Enrolled Nurse
<i>Equal Remuneration Decision 2015</i>	<i>Application by United Voice & Australian Education Union</i> [2015] FWCFB 8200
EST Award	<i>Educational Services (Teachers) Award 2020</i>
Evergreen	Evergreen Life Care
FW Act	<i>Fair Work Act 2009 (Cth)</i>
HCP	Home Care Package

HCPP	Home Care Package Program
HCW	Home care worker or Home care employee
HSU	Health Services Union
IEU	Independent Education Union of Australia
Joint Employers	Aged & Community Services Australia, Leading Age Services Australia, 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.
Kurrle Report	Prof Susan Kurrle, <i>Report of Dr Susan Kurrle regarding work value for aged care members</i> dated 25 April 2021
LASA	Leading Age Services Australia
Lay Witness Evidence Report	Report to the Full Bench—Lay Witness Evidence Report published by Commissioner O’Neill on 20 June 2022.
Manufacturing Award	<i>Manufacturing and Associated Industries and Occupations Award 2020</i>
Meagher Report	Prof Gabrielle Meagher, <i>Changing aged care, changing aged care work: workforce and work value issues in Australian residential aged care</i> dated 31 March 2021
Meagher Supplementary Report	Prof Gabrielle Meagher, <i>Supplementary report on workforce and work value issues in Australian home care for older people</i> dated 27 October 2021, as amended 26 May 2022.
NACWCS	National Aged Care Workforce Census and Survey
NES	National Employment Standards
Nurses Award	<i>Nurses Award 2020</i>
PCW	Personal Care Worker
PCA	Personal Care Assistant or Personal Care Attendant
<i>Penalty Rates Decision</i>	<i>4 Yearly Review of Modern Awards – Penalty Rates</i> [2017] FWCFB 1001
<i>Penalty Rates Review</i>	<i>Shop, Distributive and Allied Employees Association v The Australian Industry Group</i> (2017) 253 FCR 368
Pharmacy Award	<i>Pharmacy Industry Award 2010</i>
<i>Pharmacy Decision</i>	<i>Four Yearly Review of Modern Awards – Pharmacy Industry Award 2010</i> [2018] FWCFB 7621
Principal Parties	HSU, ANMF, UWU and the Joint Employers
PSRACS	Public sector residential aged care services
QI Program	National Aged Care Mandatory Quality Indicator program

RAC	Residential aged care
RAO	Recreational Activities Officer/Lifestyle Officer
RN	Registered Nurse
Royal Commission	<i>Royal Commission into Aged Care Quality and Safety</i>
Royal Commission Final Report	<i>Royal Commission into Aged Care Quality and Safety, Final Report: Care, Dignity and Respect (Final Report 1 March 2021)</i>
<i>SCHADS 2019 Decision</i>	<i>4 yearly review of modern awards – Group 4 – Social, Community, Home Care and Disability Services Industry Award 2010 – Substantive claims [2019] FWCFB 6067</i>
SCHADS Award	<i>Social, Community, Home Care and Disability Services Award 2010</i>
<i>SCHADS Award COVID-19 Care Allowance case</i>	<i>Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010 [2020] FWCFB 4961</i>
SIRS	Serious Incident Response Scheme
STRC	Short-term restorative care
Smith/Lyons Report	Assoc Prof Meg Smith and Dr Michael Lyons, <i>Report by Associate Professor Meg Smith and Dr Michael Lyons dated October 2021, as amended 2 May 2022</i>
the Standards	Aged Care Quality Standards
Tandara Lodge	Tandara Lodge Community Care
<i>Teachers Decision</i>	<i>Independent Education Union of Australia [2021] FWCFB 2051</i>
Unions	The Australian Nursing and Midwifery Federation, Health Services Union and the United Workers' Union
UWU	United Workers' Union
WR Act	<i>Workplace Relations Act 1996 (Cth)</i>

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1. Introduction

[1] The Final Report of the Royal Commission into Aged Care Quality and Safety (the Royal Commission) was tabled on 1 March 2021. The Royal Commission received 10,574 public submissions and heard evidence from more than 600 witnesses across 99 days of hearing.¹ Over 1,000 aged care providers were surveyed² and some 12 community forums and 13 expert roundtable discussions were conducted.

[2] Modelling prepared for the Royal Commission estimated that the number of direct care workers needed to maintain current staffing levels would be approximately 316,500 full-time equivalent workers by 2050, an increase of 70 per cent.³

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

‘In a large number of residential aged care facilities there are not enough workers to provide high quality, person-centred care. In many cases the mix of staff who provide aged care is not appropriately matched to the care needs of older people. The staff in aged care are poorly paid for their difficult and important work.’⁴

[4] The Royal Commission found that aged care workers should have a ‘clear vision for career progression’ and recommended that ‘existing job classifications should be reviewed and new career pathways mapped to facilitate opportunities for nurses, personal care workers and other workers to advance in the aged care sector.’⁵

[5] The Royal Commission also found that a ‘wages gap’ exists between aged care workers and workers performing equivalent functions in the acute health sector and concluded that the ‘bulk of the aged care workforce does not receive wages and enjoy terms and conditions of employment that adequately reflect the important caring role they play.’⁶ To address the inadequacies in pay for aged care workers, the Royal Commission made the following recommendation:

Recommendation 84: Increases in award wages

Employee organisations entitled to represent the industrial interests of aged care employees covered by the Aged Care Award 2010, the Social, Community, Home Care

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

² Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.182.

³ Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.125.

⁴ Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.124.

⁵ Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 1 at p.125.

⁶ Royal Commission into Aged Care Quality and Safety, *Care Dignity and Respect* (Final Report, March 2021) Vol 2 at p.214.

and Disability Services Industry Award 2010 and the Nurses Award 2010 should collaborate with the Australian Government and employers and apply to vary wage rates in those awards to:

- a. reflect the work value of aged care employees in accordance with section 158 of the Fair Work Act 2009 (Cth), and/or
- b. seek to ensure equal remuneration for men and women workers for work of equal or comparable value in accordance with section 302 of the Fair Work Act 2009 (Cth).

[6] These proceedings arise out of Recommendation 84.

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

1. [AM2020/99](#) – an application by the Health Services Union (HSU) and a number of individuals to vary the minimum wages and classifications in the *Aged Care Award 2010* (Aged Care Award)
2. [AM2021/63](#) – an application by the Australian Nursing and Midwifery Federation (ANMF) to vary the Aged Care Award and the *Nurses Award 2010*, now the *Nurses Award 2020* (Nurses Award),⁷ and
3. [AM2021/65](#) – an application by the HSU to vary the *Social, Community, Home Care and Disability Services Award 2010* (SCHADS Award) (the Applications).

[8] In essence, the Applications in combination seek a 25 per cent rise to the minimum wage rates for all aged care employees covered by the Aged Care Award, Nurses Award and SCHADS Award (the Awards) and associated changes to the classification structures in the Awards.

[9] The ANMF supports the wage increases sought in the HSU applications for Personal Care Workers (PCWs), consistent with its own application.⁸ While the ANMF application does not seek a wage increase for employees other than nurses and PCWs, it supports the wage increases sought by the HSU for other employees affected by those applications.⁹ The UWU supports the HSU's application in respect of the SCHADS Award and submits that the SCHADS Award should be varied in the terms set out in the HSU's application (AM2021/65).¹⁰

[10] The employer interests in these proceedings are being represented by Aged & Community Services Australia (ACSA), Leading Age Services Australia (LASA) and Australian Business Industrial (ABI) (collectively, the Joint Employers).

⁷ The *Nurses Award 2010* was varied and renamed the *Nurses Award 2020* on 9 September 2021 per [2021] FWCFB 4504.

⁸ ANMF submissions dated 29 October 2021 at [5].

⁹ ANMF submissions dated 29 October 2021 at [5].

¹⁰ UWU submissions dated 29 October 2021 at [3], [5].

[11] The following overview of the relevant coverage of the Awards may assist in reading this decision.

[12] The Aged Care Award is an industry award that covers employers and their employees in the ‘aged care industry’. The aged care industry is defined as:

‘aged care industry means the provision of accommodation and care services for aged persons in a hostel, nursing home, aged care independent living units, aged care serviced apartments, garden settlement, retirement village or any other residential accommodation facility’.

[13] It follows that Aged Care Award employees work in residential aged care facilities. Employees covered by the Aged Care Award are classified in 3 separate streams:

- Personal care, which deals with Personal Care Workers (PCWs)
- Food services, which includes cooks and chefs, and
- General and administrative services, which includes cleaners, gardeners, clerks, drivers and maintenance employees.

[14] The SCHADS Award is also an industry award. It is divided into separate streams but relevantly for the Applications, it covers employers and their employees working in the ‘home care sector’. The home care sector is defined as:

‘home care sector means the provision of personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence.’

[15] Employees working in the aged care sector under the SCHADS Award are classified as ‘Home care employees’. Home care employees are also commonly referred to as Home care workers or HCWs.

[16] Generally, nurses are not covered by the Aged Care Award or the SCHADS Award, even if they work in residential aged care or the home care sector. The Nurses Award is an occupational award that covers employers and their employees who are classified as:

- Nursing assistants
- Enrolled nurses (including student enrolled nurses)
- Registered nurses
- Occupational health nurses, and
- Nurse practitioners.

[17] We note at the outset that because the Applications cover 3 different awards, there is a degree of complexity and potential overlap in the language used to describe employees working in the aged care sector.

[18] In this decision, we commonly use the award terms to refer to particular types of employees (for example, using Personal Care Worker or PCW in relation to employees working in residential aged care facilities covered by the Aged Care Award). However, we observe that a range of other terms are used by the parties and their witnesses (and therefore are reflected in this decision) in referring to different aged care sector roles — for example, some parties use the term Personal Care Assistant/Attendant or PCA to refer to PCWs covered by the Aged Care Award. Prof Charlesworth also notes that the term ‘Personal Care Assistant’ as used in the Australian Bureau of Statistics (ABS) ANZSCO 423313 classification ‘appears to blur the line’ between those providing personal care in residential facilities and those providing care in the home.¹¹ The Royal Commission Final Report also employs different terminology, including referring to employees working in the aged care sector in caring roles as ‘direct care workers’, which appears to encompass employees in caring roles covered by all 3 Awards that are the subject of the Applications. In addition, we note that some terms are used more generally as convenient descriptions or shorthand for the nature of the aged care work, such as parties using the term ‘PCW’ to refer to both Personal Care Workers under the Aged Care Award and Home care employees (HCWs) under the SCHADS Award.

[19] Evidentiary hearings were held from 26 April to 2 June 2022 and inspections were conducted by members of the Full Bench on 27 and 28 April at a range of residential aged care facilities in Sydney and Melbourne, agreed by the parties. Closing oral argument took place on 24 to 25 August and 1 September 2022. Transcripts of those hearings have been published on the Commission’s website, available [here](#).

[20] The Commission has published the following Background Documents:

- [Background Document 1 – The Applications](#) setting out, amongst other things, a summary of the Applications, the procedural history, the legislative framework relevant to the Applications and the main contentions of the principal parties.
- [Background Document 2 – Award Histories](#) setting out the history of wages and classifications in the Aged Care Award, the Nurses Award and the SCHADS Award.
- [Background Document 3 – Witness Overview](#) which contains a brief overview of each of the witness statements (including employers, union official and expert witnesses); the relevant page number of each witness statement in version 2 of the Digital Hearing Book, links to the final witness statements and transcript references; and specific paragraphs of the witnesses’ statements that they were taken to in cross-examination as well as links to any other documents referenced in the course of giving oral evidence.
- [Background Document 4 – The Royal Commission into Aged Care Quality and Safety](#) sets out links and extracts from the submissions, witness evidence and the Research Reference List (RRL) in these proceedings that are relevant to the findings and recommendations of the Royal Commission.

¹¹ Prof Sara Charlesworth, [Submission in response to the Exploring future data & information needs for aged care issues paper](#), RMIT University, 21 March 2021 at 2.

- [Background Document 5](#) summarises the parties' closing written submissions and the answers to the questions posed in Background Documents 1 and 2.
- [Background Document 6 – The Commonwealth](#) summarises the Commonwealth's submissions and the parties' submissions in reply to the Commonwealth.
- [Background Document 7 – Modern Awards Objective](#) sets out the parties' submissions in relation to the modern awards objective.
- [Background Document 8 – Summary of Submissions](#) summarises the closing submissions in reply and the answers to the questions posed in Background Document 5.
- [Background Document 9 – Procedural History](#) sets out the updated procedural history in these proceedings.

[21] The Commission has also published a Digital Hearing Book¹² and Research Reference List.

[22] [Version 3 of the Digital Hearing Book](#) was published on 24 August 2022 and indexes all material filed and published up to and including 22 August 2022. It contains approximately 480 documents, including:

- Decisions and Statements
- Notices of Listing and Directions
- Correspondence
- Submissions
- Transcripts
- Witness Statements
- Documents raised in cross-examination, and
- Tender bundles

[23] Any references to the Digital Hearing Book throughout this decision are to Version 3.

[24] The [Research Reference List](#) (RRL) contains 665 documents consisting of: 202 published research articles and books; 68 Australian working papers and reports; 9 international working papers and reports; 114 Australian government reports; 2 international government reports; 22 data sources; 189 cases referred to in submissions and witness evidence; and 59 awards, variations and determinations referred to in submissions and witness evidence.

¹² [2022] FWCFB 58 at [21]–[27]; [2022] FWCFB 94 at [8]–[9].

[25] The Research Reference List has been updated throughout these proceedings and was most recently published on 9 June 2022.¹³ In a [Statement](#) published on 9 June 2022, the President noted that the Research Reference List (RRL):

‘[sets] out all of the research materials and data sources referred to in the parties’ submissions. The RRL also includes a list of cases referred to by the parties in their submissions. We propose to have regard to the materials set out in the RRL in our consideration of the applications.’¹⁴

[26] The full procedural history, a summary of the Applications and an overview of the submissions received is set out at **Attachment A**.

¹³ Research Reference List dated 9 June 2022.

¹⁴ [2022] FWCFB 94 at [10].

2. The Decision: An Overview

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

[28] It is common ground between the parties that in order to exercise the power in s.157(2) to vary modern award minimum wages we must be satisfied that the variation is ‘justified by work value reasons’; ‘necessary to achieve the modern awards objective’, and ‘necessary to achieve the minimum wages objective’. Further, we must take into account the rate of the national minimum wage as currently set in a national minimum wage order.

[29] At the heart of these proceedings is the Applicants’ contention that the variations they seek to modern award minimum wages are ‘justified by work value reasons’ as required by s.157(2).

[30] We deal with the relevant legislative provisions in Chapter 3, including the meaning of the expression ‘work value reasons’ in s.157(2A), noting that it is not helpful or appropriate to delineate the metes and bounds of that expression divorced from a particular context and that the meaning of the expression should focus on the text of s.157(2A). The propositions distilled from the discussion in Chapter 3 are summarised at the end of that chapter.

[31] The parties’ submissions are summarised in Chapter 4. While there is a significant amount of agreement between the parties, the Joint Employers and the Unions disagree on the extent of changes to work in the aged care sector, in particular the classes of workers affected by those changes.

[32] The parties also agreed with a range of *provisional* views we expressed during the course of the proceedings; which are set out at the end of Chapter 4.

[33] We deal with the evidence in Chapter 5.

[34] The Unions relied on the evidence of some 89 lay witnesses (72 employee lay witnesses and 17 union officials) and 6 expert witnesses. The Joint Employers relied on the evidence of 9 lay witnesses.

[35] The Commission also published a [Research Reference List](#) of 665 documents consisting of: 202 published research articles and books; 68 Australian working papers and reports; 9 international working papers and reports; 114 Australian Government reports; 2 international government reports; 22 data sources; 189 cases referred to in submissions and witness evidence; and 59 awards, variations and determinations referred to in submissions and witness evidence.

[36] The expert evidence is summarised at Chapter 5.2 and at Chapter 5.3 we set out the Joint Employer objections to the expert evidence and we consider, and reject, those objections.

[37] The lay witness evidence is discussed in Chapter 5.4. We accept that the lay witness evidence is necessarily limited to the personal experience of the particular witness and cannot be extrapolated to encompass the conditions, skills and experience of all persons who work in

the aged care sector. We also accept that aspects of the lay witness evidence are hearsay or opinion and as a result subject to the appropriate limitations.

[38] The lay witness evidence presents an impression of the nature of the work, the conditions under which it is performed, and the skills utilised by direct care workers in both residential and home-based aged care and has been used to illustrate issues referred to in other evidence.

[39] Chapter 6 provides an overview of the employees, regulatory framework and funding arrangements in the aged care sector.

[40] The Aged Care Sector Stakeholder Consensus Statement (the Consensus Statement) is discussed in Chapter 7.1. The Unions, ACSA and LASA are signatories to the Consensus Statement. The content of the Consensus Statement may be viewed as broadly supportive of the Applications. We conclude that the Consensus Statement is relevant to our determination of the Applications and take it into account. The Consensus Statement represents the views of a number of stakeholders in the aged care sector and was developed in contemplation of these proceedings. The Consensus Statement is set out at Attachment C.

[41] There is considerable common ground between the parties in respect of the relevant factual matrix. Some 16 broad factual contentions are agreed between the parties. Chapter 7.2.2 then considers whether there is an evidentiary basis to support the main areas of agreement. We consider these contentions to be general in their character and that they would not necessarily apply consistently across classifications or universally in every instance to all employees concerned. That said, we conclude that there is a sound evidentiary basis for the agreed factual contentions and have made findings in the same terms. The evidentiary findings are set out at 8.1.2.

[42] The expert evidence in respect of gender undervaluation is canvassed in Chapter 7.3.1 and we accept the following propositions:

1. The valuation of work is influenced by social expectations and gendered assumptions about the role of women as workers. In turn these social practices influence institutional and organisational practices.
2. Undervaluation occurs when work value is assessed with gender-biased assumptions. The reasons for gender-based undervaluation in Australia include the continuation of occupational segregation, the weaknesses in job and work valuation methods and their implementation, and social norms, gender stereotypes and historical legacies.¹⁵
3. Gender-based undervaluation in the employment context occurs when work value is assessed with gender-biased assumptions¹⁶ which means the skill level of

¹⁵ Smith/Lyons Report at [62].

¹⁶ Smith/Lyons Report at [47] citing A-F Bender and F Pigeys, 'Job evaluation and gender pay equity: a French example' (2016) 34(4) *Equality, Diversity and Inclusion: An International Journal* 267 at 268–270. Assoc Prof Smith and Dr Lyons also note at [52]: 'Peetz (D Peetz, 'Regulation distance, labour segmentation and gender gaps' (2015) 39(2) *Cambridge Journal of*

occupations, work or tasks is influenced by subjective notions about gender and gender roles in society. Skills of the job occupant are discounted or overlooked because of gender.¹⁷

4. Gender-based undervaluation of work in Australia arises from social norms and cultural assumptions that impact the assessment of work value.¹⁸ These assumptions are impacted by women’s role as parents and carers and undertaking the majority of primary unpaid caring responsibilities. The disproportionate engagement by women in unpaid labour contributes to the invisibility and the under recognition of skills described as creative, nurturing, facilitating or caring skills in paid labour.¹⁹

5. The barriers and limitations to the proper assessment of work value in female dominated industries and occupations include:

- changes in the regulatory framework for equal pay and equal remuneration applications and the interpretation of that framework.
- procedural requirements such as the direction in wage-fixing principles that assessment of work value focus on changes in work value and tribunal interpretation of this requirement.
- conceptual considerations including the subjective notion of skill and the “invisibility” of skills when assessing work value in female-dominated industries and occupations.²⁰

6. The approach taken to the assessment of work value by Australian industrial tribunals and constraints in historical wage fixing principles have been barriers to the proper assessment of work value in female dominated industries and occupations. In particular:

- (i) The requirement for tribunals to make an adjustment to minimum rates based only on a change in work value has meant that there has been a limited capacity to address what may have been errors and flaws in the setting of minimum rates for work in female dominated industries and occupations. These limitations in the capacity of tribunals to properly value the work arise because any potential errors in the valuation of the work may have predated the last assessment of the work by the tribunals.

Economics 345) examines the impact of stereotypical gender attitudes of skill, and notes they are more subjective than objective. Peetz argues sex-based stereotyping can be a major reason for the undervaluation of jobs and tasks performed primarily by women or work perceived as intrinsically “feminine” in nature. The tasks performed by, and skills applied in, female-dominated occupations – such as care-giving, manual dexterity, human relations skills, and working with children – are often viewed as being of lesser value than the tasks and work performed in male-dominated occupations.’

¹⁷ Smith/Lyons Report at [60].

¹⁸ Smith/Lyons Report at [59].

¹⁹ Smith/Lyons Report at [56].

²⁰ Smith/Lyons Report at [93].

(ii) Errors in the valuation of work may have arisen from the female characterisation of the work, or the lack of a detailed assessment of the work. The time frame or datum point for the measurement of work value which limit assessment of work value to changes of work value, or changes measured from a specific point in time mitigated against a proper, full-scale assessment of the work free of assumptions based on gender.²¹

(iii) The capacity to address the valuation of feminised work has also been limited by the requirement to position that valuation against masculinised benchmarks. Work value comparisons continued to be grounded by a male standard, that being primarily the classification structure of the metal industry awards and to a lesser extent a suite of building and construction awards.²²

[43] A central feature of one of the expert reports produced, the Junor Report, is the application of the Spotlight Tool to the work performed by RNs, ENs and AINS/PCWs working in aged care. The Spotlight Tool is a job and skills analysis tool designed as an aid in identifying, naming and classifying ‘invisible skills’ used in undertaking service work processes that are not directly observable. ‘Invisible’ in this context means ‘hidden’, ‘under-defined’, ‘under-specified’ or ‘under-codified’.²³

[44] The Junor Report is discussed in Chapter 7.3.2.

[45] The Joint Employers contend that the Commission should be ‘cautious in readily accepting the data and analysis prepared using the Spotlight tool to support a finding of gender-based undervaluation’²⁴ and advance 3 broad propositions in support of that contention. Each of these propositions is discussed and rejected. We also reject the Joint Employers’ characterisation of certain Spotlight skills as personality traits or dispositions. In doing so we note that such characterisation is at the heart of the gendered undervaluation of work.

[46] We conclude that Assoc Prof Junor’s evidence was 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)).

[47] The evidence in respect of the gender pay gap is discussed at Chapter 7.3.3. We note that is uncontroversial that a gender pay gap exists in Australia. We accept the logic of the proposition in the expert evidence that gender undervaluation of work is a driver of the gender pay gap. We also accept as a general proposition that if all work was properly valued there would likely be a reduction in the gender pay gap. But we note that these proceedings are not a general inquiry into the drivers of the gender pay gap, and it is not necessary for the purposes of these proceedings that we determine why the relevant minimum rates in the 3 awards before us have not been properly fixed.

²¹ Smith/Lyons Report at [90].

²² Smith/Lyons Report at [92].

²³ Junor Report at [10], [138]–[140].

²⁴ Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.3].

[48] Chapter 8 sets out our consideration of the Applications in light of the evidence and submissions.

[49] In Chapter 8.2 we consider the appropriate way forward in light of the extent of agreement between the parties, the evidentiary findings and the range of complex issues that arise for determination. We conclude that 3 broad considerations weigh in favour of an interim decision providing an increase in minimum wages for discrete categories of aged care workers:

1. It is common ground between the parties that the work undertaken by RNs, ENs and Certificate III PCWs in residential aged care has changed significantly in the past 2 decades such as to justify an increase in minimum wages for these classifications. We also recognise that there is ample evidence that the needs of those being cared for in their homes have significantly increased in terms of clinical complexity, frailty and cognitive and mental health.
2. Accordingly, in respect of direct care workers (including RNs, ENs, AIN/PCW/HCWs) the evidence establishes that the existing minimum rates do not properly compensate employees for the value of the work performed by these classifications of employees. The evidence in respect of support and administrative employees is not as clear or compelling and varies as between classification.
3. A number of complex issues require further submissions (and potentially further evidence) before they can be determined and we see no reason to delay an increase in minimum wages for direct care workers while that process takes place.

[50] We conclude that the Applications will be determined in 3 stages. This decision constitutes the first stage in that process. In this decision we determine the relevant legal principles and the conceptual issues that have been canvassed by the parties in relation to the Applications and have decided that an interim increase in the modern award minimum wages applicable to direct care aged care workers is justified by work value reasons.

[51] In stage 2 the parties will have the opportunity to make submissions and adduce evidence in relation.

1. The timing and phasing-in of the interim increase in the modern award minimum wages applicable to direct care aged care employees, including the appropriateness and application of the principles.
2. Whether making the interim increases to the modern award minimum wages applicable to direct care aged care employees in these proceedings is necessary to achieve the modern awards objective; and our *provisional* views in respect of the s.134(1) considerations.
3. Whether the interim increases in the modern award minimum wages applicable to direct care employees are necessary to achieve the minimum wages objective and our *provisional* views in respect of the s.284(1) considerations.

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

[53] Stage 3 will also determine wage adjustments that are justified on work value grounds for employees not dealt with in Stage 1, and determine any further wage adjustments that are justified on work value grounds for direct care employees granted interim wage increases in Stages 1 and 2 (in the context of our decision on classification definitions and structures).

[54] Staging our decision in this way:

- ensures that the parties are informed of our decision in respect of how ss.157(2) and (2A) of the FW Act apply to the Applications, before we determine the framing of various classification definitions in the relevant Awards and the Awards' broader classification structures
- avoids unduly delaying any increase to minimum wages, pending finalisation of classification definitions and structures in the relevant Awards, and
- enables us to more quickly consider how to phase-in any initial minimum wage adjustments.

[55] As to form and quantum of the interim increase we conclude that, having regard to all of the matters canvassed in chapter 8.3, we are satisfied that a 15 per cent interim increase in minimum wages of the direct care classifications in the Aged Care and SCHADS Awards and for nurses working in aged care covered by the Nurses Award is 'plainly justified by work value reasons' as required by s.157(2).

[56] We also make it clear that this does not conclude our consideration of the Unions' claim for a 25 per cent increase for other employees, namely administrative and support aged care employees. Nor are we suggesting that the 15 per cent interim increase necessarily exhausts the extent of the increase justified by work value reasons in respect of direct care aged care employees. Whether any further increase is justified will be the subject of submissions in Stage 3 of these proceedings.

[57] We also point out that in determining the quantum of the interim increase we have *not* taken into account *all* of the material before us.

[58] We discuss the Modern Awards Objective in Chapter 8.4.

[59] We note that we are not persuaded that s.134(1)(d), (da) and (g) are relevant to the interim increase we propose to award and express some other *provisional* views in respect of the remaining s.134(1) considerations.

[60] At present, we are unable to reach a concluded view on whether the proposed interim variation determination is necessary to achieve the modern awards objective. 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)). 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 unknown at present.

[61] Given the funding arrangements in the aged care sector, the Joint Employers and the Commonwealth sought an opportunity to make further submissions regarding the timing of the implementation of any minimum wages increases arising from these proceedings. We conclude that the course proposed is a reasonable one and is comprehended within the staged approach we have adopted. To assist the parties in their submissions regarding the implementation of the interim increase, this section of our decision sets out the relevant legislative provisions and the approach taken to the phasing-in of Commission decisions in other cases.

[62] The Minimum Wages Objective is discussed in Chapter 8.5.

[63] It is common ground that the consideration in s.284(1)(e) is not relevant in the context of the Applications²⁵, we note that the consideration in s.284(1)(d) is in the same terms as s.134(1)(e) and we propose to invite further submissions on the proper construction and the relevance of the principle and we express some *provisional* views in respect of the remaining s.284(1) considerations.

[64] We deal with the next steps in this process in Chapter 9.

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

²⁵ HSU closing submissions dated 22 July 2022 at [64]; Joint Employers closing submissions dated 22 July 2022 Annexure P at [3.28]; ANMF closing submissions dated 22 July 2022 at [70].

3. Legislative Framework

3.1 Overview

[66] The Applications are made under s.158(1) for the Commission to vary a modern award under s.157 of the *Fair Work Act 2009* (the FW Act). Both of these provisions are found in Part 2-3 of the FW Act. It is uncontentionous that the ANMF and HSU have the requisite standing to make the Applications and that the Applications seek to vary ‘modern award minimum wages’ as defined in s.284(3) in that they seek to vary ‘the rates of minimum wages in modern awards’. Under Part 2-3, the Commission has the power to make, vary or revoke modern awards either on the Commission’s own motion or in response to an application. In determining the Applications, the Commission is not confined to the terms of the Applications and may, subject to according interested parties procedural fairness, determine the Applications other than in the terms sought by the ANMF and the HSU (see s.599).

[67] Section 135 is titled ‘Special provisions relating to modern award minimum wages’ and provides:

- (1) Modern award minimum wages cannot be varied under this Part except as follows:
 - (a) modern award minimum wages can be varied if the FWC is satisfied that the variation is justified by work value reasons (see subsection 157(2));
 - (b) modern award minimum wages can be varied under section 160 (which deals with variation to remove ambiguities or correct errors) or section 161 (which deals with variation on referral by the Australian Human Rights Commission).

Note 1: The main power to vary modern award minimum wages is in annual wage reviews under Part 2-6. Modern award minimum wages can also be set or revoked in annual wage reviews.

Note 2: For the meanings of *modern award minimum wages*, and *setting* and *varying* such wages, see section 284.

- (2) In exercising its powers under this Part to set, vary or revoke modern award minimum wages, the FWC must take into account the rate of the national minimum wage as currently set in a national minimum wage order.

[68] Section 135(1) constrains the capacity of the Commission to vary minimum wages in a modern award by providing that (apart from variations pursuant to ss.160 or 161, which are not presently relevant) modern award minimum wages cannot be varied under Part 2-3 of the FW Act unless the Commission is satisfied that the variation is justified by ‘work value reasons’ (as defined in s.157(2A)). Section 135(2) relevantly provides that in exercising powers to vary modern award minimum wages under Part 2-3, the Commission ‘must take into account the rate of the national minimum wage as currently set in a national minimum wage order’.

[69] The relevant power to vary modern award minimum wages under Part 2-3 is in s.157(2). So far as relevant for present purposes, s.157 provides:

Section 157 FWC may vary etc. modern awards if necessary to achieve the modern awards objective

- (1) The FWC may:
- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
 - (b) make a modern award; or
 - (c) make a determination revoking a modern award;

if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.

...

- (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
- (a) the variation of modern award minimum wages is justified by work value reasons; and
 - (b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

- (2A) *Work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
- (a) the nature of the work;
 - (b) the level of skill or responsibility involved in doing the work;
 - (c) the conditions under which the work is done.

...

[70] Section 166 relevantly deals with when determinations under Part 2-3 varying modern award minimum wages come into operation.

[71] Sections 134, 284 and 138 of the FW Act are also relevant. Section 134(2) relevantly provides that the ‘modern awards objective’ (defined in s.134(1)) applies to the performance or exercise of the Commission’s functions or powers under Part 2-3. Section 284(2) relevantly provides that the ‘minimum wages objective’ (defined in s.284(1)) applies to the performance or exercise of the Commission’s functions or powers under Part 2-3, so far as they relate to varying modern award minimum wages. Section 138 provides:

138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

[72] The general provisions relating to the performance of the Commission's functions also apply to these proceedings.²⁶ Section 578(a) provides that in performing functions and exercising powers under a part of the FW Act the Commission must take into account the object of the FW Act and any particular objects of the relevant part. The object of the FW Act is set out in s.3; in particular, ss.3(a) and (b) provide:

3 Object of this Act

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

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

...

[73] It is common ground between the parties that in order to exercise the power in s.157(2) to vary modern award minimum wages we must be satisfied that the variation is 'justified by work value reasons'; 'necessary to achieve the modern awards objective', and 'necessary to achieve the minimum wages objective'. Further, we must take into account the rate of the national minimum wage as currently set in a national minimum wage order.

[74] At the heart of these proceedings is the Applicants' contention that the variation they seek to modern award minimum wages is 'justified by work value reasons' and so it is appropriate to first turn to s.157(2). Later in this chapter we return to the modern awards objective and the minimum wages objective.

3.2 Subsections 157(2)(a) and (2A)

[75] Section 157(2) deals with the variation of modern award minimum wages and provides:

- (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
 - (a) the variation of modern award minimum wages is justified by work value reasons; and

²⁶ FW Act, ss.577–578.

- (b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

[76] The expression ‘work value reasons’ is defined in s.157(2A) which provides:

- (2A) **Work value reasons** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
- (a) the nature of the work;
 - (b) the level of skill or responsibility involved in doing the work;
 - (c) the conditions under which the work is done.

[77] Section 157(2A) was inserted into the FW Act by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (the 4 Yearly Review Amending Act).

[78] The 4 Yearly Review Amending Act repealed s.156 of the FW Act, which required the Commission to conduct 4 yearly reviews of modern awards, effective from 1 January 2018 (subject to transitional arrangements). As s.156(4) was repealed, the definition of ‘work value reasons’ in s.156(4) was inserted into s.157 as s.157(2A).²⁷

[79] Two recent Full Bench decisions have considered the operation of former ss.156(3) and (4), and ss.157(2) and (2A), respectively:

- *4 yearly review of modern awards – Pharmacy Industry Award 2010* [2018] FWCFB 7621 (the *Pharmacy Decision*), and
- *Independent Education Union of Australia* [2021] FWCFB 2051 (the *Teachers Decision*).

3.2.1 *The Pharmacy Decision*

[80] The *Pharmacy Decision*²⁸ dealt with a claim by the Association of Professional Engineers, Scientists and Managers Australia²⁹ (APESMA), in the context of the 4 yearly review of modern awards to increase the minimum wages in the *Pharmacy Industry Award 2010* (the Pharmacy Award) under then s.156 of the FW Act. APESMA’s primary claim was for wages to be increased by an amount necessary to restore what was said to be the proper relativity with the C10 classification rate now found in the *Manufacturing and Associated Industries and Occupations Award 2020* (the Manufacturing Award). In the alternative, the APESMA sought a 25 per cent increase to all wage rates in the Pharmacy Award.

²⁷ Explanatory Memorandum for the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017, at [21].

²⁸ [2018] FWCFB 7621.

²⁹ Now known as Professionals Australia.

[81] At the time of the *Pharmacy Decision*, ss.156(3) and (4) provided:

Variation of modern award minimum wages must be justified by work value reasons

- (3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.
- (4) *Work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
 - (a) the nature of the work;
 - (b) the level of skill or responsibility involved in doing the work;
 - (c) the conditions under which the work is done.

[82] The claim was opposed by the Pharmacy Guild of Australia, Australian Business Industrial and the NSW Business Chamber (ABI/NSWBC), and Business SA.

[83] The Pharmacy Guild of Australia's case in opposition to the APESMA's claim was, in summary:

- The relevant datum point for the assessment of any change in work value was the making of the pre-reform *Community Pharmacy Award 1998* on 24 December 1996, which was the last occasion when a federal industrial tribunal had determined the work value of pharmacists.
- The changes to the work of pharmacists since 1996 had been evolutionary in nature and had not resulted in a significant net addition to the work value requirements of a pharmacist.

[84] ABI/NSWBC likewise contended that the changes relied upon by the APESMA did not satisfy the test for a significant net addition to work requirements to justify the wage increases sought, and that increases of that magnitude would not meet the modern awards objective and the minimum wages objective.

[85] In relation to the merits, the Pharmacy Full Bench was *not* satisfied that there had been a fundamental change in the nature of the work of pharmacists since 1998, or in their skills or level of responsibility, in the way suggested by the APESMA. The Full Bench reached the following conclusion on the evidence considered as a whole:

‘In summary, we consider that although the mix of work being performed and skills being exercised has changed since 1998, and some skills for which pharmacists have always been trained are now utilised in a more intense and systematised fashion, there has not been the fundamental change in the work of pharmacists since 1998 which would justify wage increases of the order claimed by the APESMA.’³⁰

³⁰ *Pharmacy Decision* at [183].

[86] In a subsequent decision,³¹ the Full Bench set out 3 conclusions stated in the *Pharmacy Decision*:

‘(1) The APESMA had demonstrated that there was an increase in work value associated with the introduction of Home Medicine Reviews (HMR) and Residential Medication Management Reviews (RMMR) that justified a discrete adjustment to award remuneration by means of the introduction of a new allowance. We invited further submissions about the form of this allowance (including whether it should be an annual or weekly allowance or an allowance payable each time a HMR or RMMR is performed) and its quantum.

(2) We were satisfied that there had been an increase in the work value of pharmacists since 1998 in respect of the introduction of inoculations, the provisions of emergency contraception, the downscaling of medicines to pharmacy-only status, and a general increase in the level of responsibility and accountability. We invited parties to make further submissions as to how these findings should be reflected in an adjustment to remuneration, noting that not all pharmacists administer inoculations or dispense emergency contraception.

(3) There was a lack of alignment in pay rates and relativities as between pharmacists (who require a four-year undergraduate degree) under the *Pharmacy Award* and those for classifications requiring equivalent qualifications under the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)*, as well as a lack of a consistent relationship with the Australian Qualifications Framework (AQF). We considered that this might potentially constitute a work value consideration relevant to the 4 yearly review of the *Pharmacy Award*. We invited further submissions as to this matter, and foreshadowed the possibility that this aspect of the review might need to be referred back to the President of the Commission for consideration as to the procedural course to be taken pursuant to s 582 of the *Fair Work Act 2009 (FW Act)* since it might have implications for other awards of the Commission ...’ [Footnotes omitted]

[87] The *Pharmacy Decision* traced the genesis and development of the concept of fixing wages based on ‘work value’ from 1921 to the ‘Work Value Changes’ principle established in the National Wage Case April 1991.³²

[88] Principle 6 of the wage fixing principles set out the basis on which changes in work value may justify a change in wage rates and codified the general principles which emerged over time.³³ It provided:

‘6. WORK VALUE CHANGES

(a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.

³¹ [2019] FWCFB 3949 at [1].

³² *Pharmacy Decision* at [131]–[162]; (1991) 36 IR 120 at [183]–[184].

³³ *ACT Child Care Decision* at [186].

In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award structure but also against external classifications to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in relative position.

These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle.

(b) In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed (s.88B(3)(a)).

(c) Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification, or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.

(d) The time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the *August 1989 National Wage Case decision* (August 1989 National Wage Case) [Print H9100; (1989) 30 IR 81].

(e) Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this Principle.

(f) Where the tests specified in (a) are met, an assessment will have to be made as to how that alteration should be measured in monetary terms. Such assessment will normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work.

(g) The expression "the conditions under which the work is performed" relates to the environment in which the work is done.

(h) The Commission will guard against contrived classifications and over-classification of jobs.

(i) Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other principle of this Statement of Principles, will not be taken into account under this Principle.³⁴

³⁴ [2004] AIRC 430; [2005] AIRC 508.

[89] When the Australian Industrial Relations Commission (AIRC) was stripped of its minimum wage-fixing functions by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), the wage fixing principles became redundant and the concept of work value then played no part in wage fixation until the enactment of the FW Act in 2009.³⁵

[90] Against that historical background, the Pharmacy Full Bench stated 7 propositions in relation to the proper construction of then ss.156(3) and (4):

1. The effect of s.156(3) is to establish a jurisdictional prerequisite for the exercise of power to vary minimum wages in a modern award in the conduct of a 4 yearly review of modern awards, namely the reaching of a state of satisfaction on the part of the Commission that the variation is ‘justified by work value reasons’.³⁶
2. Because the jurisdictional prerequisite is expressed in terms of the Commission’s ‘satisfaction’ concerning whether a variation is ‘justified’ by the prescribed type of reasons – a requirement which involves an element of subjectivity and about which reasonable minds may differ – it requires the formation of a broad evaluative judgment involving the exercise of a discretion.³⁷
3. The definition of ‘work value reasons’ in s.156(4) requires only that the reasons justifying the amount to be paid for a particular kind of work be ‘related to any of the following’ matters set out in paragraphs (a)-(c). The expression ‘related to’ is one of broad import that requires a sufficient connection or association between 2 subject matters. The degree of the connection required is a matter for judgment depending on the facts of the case, but the connection must be relevant and not remote or accidental.³⁸ The subject matters between which there must be a sufficient connection are, on the one hand, the reasons for the pay rate and, on the other hand, any of the 3 matters identified in paragraphs (a)-(c) – that is, any one or more of the 3 matters.³⁹
4. Although the 3 matters identified – the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done – clearly import the fundamental criteria used to assess work value changes under the wage fixing principles which operated from 1975 to 1981 and 1983 to 2006, the legislature in enacting s.156(4) chose not to import the additional requirements contained in those wage fixing principles. In particular, s.156(4) does not contain any requirement that the work value reasons consist of identified changes in work value measured from a fixed datum point. Likewise, s.156(4) did not incorporate the test in the wage-fixing principles that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification. In

³⁵ *Pharmacy Decision* at [162].

³⁶ *Pharmacy Decision* at [163].

³⁷ *Pharmacy Decision* at [164].

³⁸ *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at 387 [87] (McHugh, Gummow, Kirby and Hayne JJ).

³⁹ *Pharmacy Decision* at [165].

substance, ss.156(3) and (4) leave it to the Commission to exercise a broad and relatively unconstrained judgment as to what may constitute work value reasons justifying an adjustment to minimum rates of pay similar to the position which applied prior to the establishment of wage fixing principles in 1975.⁴⁰

5. It would be open to the Commission to have regard, in the exercise of its discretion, to considerations which have been taken into account in previous work value cases under differing past statutory regimes. For example, although s.156(4) contains no requirement for the measurement of work value changes from a fixed datum point, it is likely the Commission would usually take into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way (that is, in a way which is free of gender bias and any other improper considerations) in assessing wages in the relevant modern award or its predecessor in order to ensure that there is no ‘double counting’.⁴¹
6. The considerations referred to in [190] of *Child Care Industry (Australian Capital Territory) Award 1998 (the ACT Child Care Decision)*⁴² may be of relevance in particular cases, as may considerations in other authoritative past work value cases.⁴³
7. Even if the jurisdictional prerequisite in s.156(3) is satisfied, it remains the case that the Commission must, as required by s.138, ensure that the inclusion of the varied minimum wages term in the relevant modern award would be necessary to achieve the modern awards objective and the minimum wages objective.

[91] The parties were invited to comment on the above 7 propositions and, broadly speaking, they accepted, or did not contest, those propositions. Propositions 4, 5 and 6 were the subject of particular comment.

[92] Propositions 4 and 5 are to the effect that while it would be open to the Commission to have regard to considerations taken into account in previous work value cases under differing past statutory regimes, in enacting s.156(4) (now s.157(2A)) the legislature chose to only import the fundamental criteria used to assess work value changes contained in earlier wage fixing principles, not the additional requirements contained in those principles.

[93] The ANMF and HSU commented on the observation in proposition 5 that ‘it is likely the Commission would usually take into account whether any feature of the nature of the work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way (that is, in a way which is free of gender bias and any other improper considerations) in assessing wages in the relevant modern award or its predecessor in order to ensure that there is no “double counting”’.⁴⁴

⁴⁰ *Pharmacy Decision* at [166]–[167].

⁴¹ *Pharmacy Decision* at [168].

⁴² [2005] AIRC 28.

⁴³ *Pharmacy Decision* at [168].

⁴⁴ ANMF closing submissions dated 22 July 2022 at [91]; See HSU closing submissions dated 22 July 2022 at [44].

[94] That observation was accepted by the ANMF and HSU on the basis that a past ‘proper’ assessment must be one which, according to the current assessment of the Commission, correctly valued the work. A past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.⁴⁵

[95] The Unions’ observations accord with our understanding of proposition 5 and on that basis we agree with proposition 5.

[96] The Joint Employers accept the propositions set out in *Pharmacy Decision* and submit:

‘In the context of an application to vary minimum award rates based on work value reasons, the position of the employer interests is that the Commission must consider the propositions in the *Pharmacy Decision* and *Independent Education Union of Australia*’.⁴⁶

[97] The Commonwealth did not contest any of the propositions in the *Pharmacy Decision* but went on to submit:

‘The Commonwealth also agrees with the observation made by the Full Bench in the *Pharmacy Decision* that the three limbs of s 157(2A) are sufficiently broad so as to import the fundamental criteria used to assess work value changes under the wage fixing principles which operated from 1975 to 1981 and 1983 to 2006.⁴⁷ There is nothing to indicate that the legislature, in enacting the FW Act, intended to change the meaning of ‘work value’ as a core concept.

Since the earliest days of the federal industrial relations system it has been accepted that an intrinsic part of a work value assessment is that the rates of pay for particular work should be understood and assessed relative to other rates of pay for comparable work.⁴⁸

The Commonwealth submits that the Commission should continue to have regard to relativities in wage rates within and between awards (internal and external wage relativities), but that such considerations should not be determinative.

Ultimately, the Commission has discretion as to whether it should vary modern award minimum wages where the criteria in s 157(2) are met.⁴⁹ [Emphasis added]

[98] In reply, the ANMF expressed a note of caution in respect of the submissions advanced by the Commonwealth:

⁴⁵ ANMF closing submissions dated 22 July 2022 at [91]; HSU closing submissions dated 22 July 2022 at [44].

⁴⁶ Joint Employers closing submissions dated 22 July 2022 Annexure P at [3.11].

⁴⁷ *Pharmacy Decision* at [166].

⁴⁸ A Preston, *The Structure and Determinants of Wage Relativities Evidence from Australia* (Routledge, 2017) at 54 citing *The Sunshine Harvester Case* (1907) 2 CAR 1 at 11–12.

⁴⁹ Commonwealth submissions dated 8 August 2022 at [84]–[87].

‘...Expressed at that level of generality—*i.e.*, some aspects of former approaches may be relevant—there is nothing objectionable in the submission. But the Commission would not treat earlier approaches as any kind of “*step*,” whether first, last, or middle.

For reasons set out by the ANMF in its opening submissions at [32]–[38] (which submissions it presses), some of the principles set out in the *ACT Child Care Decision* at [190] can probably be safely applied, but many cannot, and the application of some (*i.e.*, those that call up the “*significant net addition*” language) will lead into error.

It is undesirable to overlay statutory expressions with a multiplicity of expositions, functioning as “*tests*,” which might carry the consequence that the words of the statute are overlaid and forgotten. The result can be that, as Kitto J put it in *Ballas v Theophilus (No.1)* (1957) 97 CLR 186 at 196, “*expressions which have been used in other cases [are carried] to such a length as to desert the language of the statute.*”

The question—the only question at this stage of the analysis—for the Commission is whether work value reasons exist so as to justify an increase in minimum award wages. [T]he statute contains no words of limitation so that only certain kinds of work value reasons (*e.g.*, those demonstrating “*significant net addition*”), *etc.*, qualify. The Commission would artificially narrow the scope of its broad discretion were it to import any limitations on its power.⁵⁰

[99] The extent to which external and internal relativities and the selection of a datum point for the assessment of work value change are relevant to the Commission’s task under s.157(2) are addressed later in this chapter. Suffice to record here our broad agreement with the ANMF’s submissions. It is undesirable to overlay the words of ss.157(2) and (2A) with additional requirements.

[100] Proposition 6 is that the considerations referred to in [190] of the *ACT Child Care Decision* may be of relevance in particular cases, as may considerations in other authoritative past work value cases. This proposition was contentious in the matter before us and we return to it shortly.

3.2.2 *The Teachers Decision*

[101] The *Teachers Decision*⁵¹ concerned 2 applications made by the Independent Education Union of Australia (IEU). The first was for an equal remuneration order to apply to early childhood teachers employed in long day care centres and preschools who are covered by the *Educational Services (Teachers) Award 2020* (EST Award). The second was to increase the minimum salaries for all teachers covered by the EST Award on work value grounds under s.157(2). We need only concern ourselves with the work value application.

⁵⁰ ANMF closing submissions in reply dated 17 August 2022 at [472]–[475].

⁵¹ [2021] FWCFB 2051.

[102] The Teachers Full Bench adopted the conclusions in the *Pharmacy Decision* and decided they were applicable to ss.157(2)(a) and (2A) on the basis that those provisions are in terms relevantly identical to the former ss.156(3) and (4).⁵²

[103] Later, the Full Bench returned to the *Pharmacy Decision* noting it established that:

‘the judgment required under s 157(2) of the FW Act as to whether a variation to minimum award wages is “*justified by work value reasons*” is relatively broad and unconstrained in nature. It may include but is not confined to whether the work value of the relevant class of employees has changed since a past “datum point” in time when there was last a consideration of the work value of the employee, and may extend to a wider consideration of whether the work of the employees in question has been undervalued. Undervaluation in a broader sense may arise because the award rates of pay for the relevant class of employees have never been fixed on the basis of any assessment of their work value or in accordance with the established principles for the proper fixation of minimum rates.’⁵³

[104] On the basis of the history of the federal award regulation of teachers, the Full Bench decided to assess the issue of whether there has been any work value change by reference to a datum point of 1996, consistent with the IEU’s primary case. The IEU contended that there had been significant changes since 1996 in the work value of teachers covered by the EST Award, including early childhood teachers, that had not been taken into account in the fixing of minimum wage rates for such teachers. The IEU identified 3 major categories of change in this respect: increased professionalism that had given rise to higher quality teachers; an increase in the complexity of teachers’ work, and substantially more intense and demanding work. The IEU’s claim was for the pay scale in the EST Award to be adjusted first to remove inappropriate internal compression at the higher pay levels, and second to increase wages by 17.5 per cent. Alternatively, the IEU sought a flat 25 per cent increase to the current award rates.

[105] The Full Bench was satisfied that an adjustment to the minimum rates of teachers covered by the EST Award was justified by the following work value reasons:

1. The rates for teachers under the EST Award and its federal predecessors had never been fixed on the basis of a proper assessment of the work value of teachers nor were they properly fixed minimum rates. In particular, the rates of pay did not recognise that teachers are degree-qualified professionals and accordingly did not have an appropriate relativity with the Metal Industry classification structure.
2. There had been substantial changes in the nature of the work of teachers and the level of their skills and responsibility since 1996, which constituted a significant net addition to their work value which has not been taken into account in the rates of pay in the EST Award.

⁵² *Teachers Decision* at [218].

⁵³ *Teachers Decision* at [538].

[106] In respect of the second conclusion above, the Full Bench was satisfied that there had, since 1996, been a significant net addition to the work value of teachers covered by the EST Award in all classifications, in the following main areas:

1. additional training requirements for entry into the profession
2. increased professional accountability associated with registration requirements, standardised testing and greatly increased expectations concerning reporting and being accessible to parents and families
3. greater complexity of work resulting from a shift to outcomes-based education and differentiated teaching, with associated requirements for greater documentation and analysis of individual educational progress, and
4. teaching and caring for a more diverse student population including, in particular, additional needs children.⁵⁴

[107] In respect of these changes the Teachers Full Bench also observed:

‘as is typically the case, work value change has occurred as part of a continuum of change and must be assessed as a matter of degree. It is not the case that, simply because the occurrence of some of these developments can be detected as early as the time of the 1996 datum point or before, such developments are to be discounted and the conclusion reached that no change of significance has happened at all. Many of the policy developments affecting the work of teachers have had a long genesis and have taken a considerable period to be implemented and affect the work of teachers in practice. In respect of outcomes-based learning and differentiated teaching, for example, the evidence suggests that this was occurring to some degree at the beginning of the period under consideration. However this does not gainsay the proposition that, since 1996, the degree to which this has been implemented in teaching practice has increased the complexity of teachers’ work and contributed to an increase in work value.’⁵⁵

[108] The Full Bench went on to consider whether the wage rates in the EST Award have been properly fixed:

‘The history of wage fixation for teachers in the federal industrial relations system also gives rise to another relevant consideration: whether the wage rates in the EST Award have ever been properly fixed as minimum rates. In the *Pharmacy Award decision*,⁵⁶ the Full Bench described in detail the development by the AIRC of an approach whereby the proper fixation of award minimum rates of pay required an alignment between key classifications in the relevant award and classifications with equivalent qualification and skill levels in the classification structure in what was originally the *Metal Industry Award 1984 – Part I* and subsequently became the *Metal, Engineering and Associated Industries Award, 1998* (Metal Industry classification structure). We endorse and adopt

⁵⁴ *Teachers Decision* at [605].

⁵⁵ *Teachers Decision* at [607].

⁵⁶ [2018] FWCFB 7621; 284 IR 121 at [150]–[161].

that analysis without repeating it. It is sufficient for present purposes to refer to the following passage from the *ACT Child Care decision*:

“[155] In the context of the matter before us, the principles established in the *Paid Rates Review decision* mandate a three step process for the determination of properly fixed minimum rates:

1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA process with particular reference to the current rates for the relevant classifications in the *Metal Industry Award*. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.
2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.
3. If the existing rates are too low they should be increased so that they are properly fixed minima.” ...

It is clear from the industrial history earlier described that the minimum rates in the EST Award are not the product of any proper fixation of minimum rates in accordance with the principles stated in the *ACT Child Care decision*. The ... [*Teachers (Victorian Government Schools Interim) Award 1993* and the *Independent Education (Victoria) Interim Award 1994*] were first awards based on pre-existing actual rates, and all subsequent adjustments were made by reference to those first award rates without any proper minimum rate assessment process.⁵⁷

[109] The Full Bench did not state any final conclusion concerning whether a variation to the EST Award to introduce a new classification structure was necessary to achieve the modern awards objective in s.134(1) of the FW Act or would be consistent with the minimum wages objective in s.284(1) of the FW Act. It considered that it was not in a position to make findings in respect of ss.134(1)(f) and (h) and s.284(1)(a), having regard to the evidence before it concerning the cost of the IEU’s claim and the effects the grant of the claim would have on the viability, profitability and prices of employers in the early childhood education and care sector, particularly for-profit employers.

[110] The Full Bench considered that the appropriate course was to afford interested parties the opportunity to adduce further evidence and make further submissions – which responded to the modifications to the remuneration structure in the EST Award justified by work value reasons and which addressed ss.134(1)(f) and (h) and s.284(1)(a) – before it made findings concerning whether the variation of the EST Award to give effect to those modifications was necessary to achieve the modern awards objective and would be consistent with the minimum wages objective.

⁵⁷ *Teachers Decision* at [560], [562].

3.2.3 ‘Reconciling’ the Pharmacy and Teachers Decisions

[111] The submissions in this matter address an apparent ‘tension’ between the *Pharmacy Decision* and the *Teachers Decision*, particularly regarding the application of past work value decisions and the extent to which the *ACT Child Care Decision* remains relevant.

[112] Proposition 4 from the *Pharmacy Decision* notes that the 3 matters identified in then s.156(4) — the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done — ‘clearly import the fundamental criteria used to assess work value changes under past wage fixing principles’⁵⁸, but that the legislature chose *not* to import 2 additional requirements from those past principles, namely:

- that the ‘work value reasons’ justifying an increase in minimum wages consist of identified changes to work value from a fixed datum point, and
- that the changes should constitute such ‘a significant net addition to work requirements as to warrant the creation of a new classification.’⁵⁹

[113] In proposition 5, the Pharmacy Full Bench notes that it would be open to the Commission to have regard, in the exercise of its discretion, to considerations taken into account in previous work value cases under different past statutory regimes and mentions the measurement of work value changes from a fixed datum point in this context.⁶⁰

[114] In the *Teachers Decision*, the Full Bench adopted 1996 as a datum point for assessing work value changes and at [605] and [645] expressed its satisfaction that the changes in the work of teachers covered by the EST Award constituted a ‘significant net addition’ to their work value. The adoption of a datum point and the use of the expression ‘significant net addition’ to work value suggests a degree of tension with some of the propositions set out in the *Pharmacy Decision*. But, in our view, when viewed in context there is no conflict with the *Pharmacy Decision*.

[115] The first point to note is that at [538] of the *Teachers Decision*, the Full Bench endorses the proposition from the *Pharmacy Decision* that s.157(2) requires a relatively broad and unconstrained judgment as to whether a variation in minimum wages is justified by work value reasons.

[116] Second, the adoption of a datum point in the *Teachers Decision* was consistent with the primary case put by the IEU and, further, the Full Bench did not suggest that a datum point was a necessary step in considering whether a minimum wage increase was justified by work value reasons under s.157(2).

[117] Similarly, in referring to ‘a significant net addition to work requirements’ the Teachers Full Bench was simply characterising its factual findings on the evidence; it was not suggesting

⁵⁸ *Pharmacy Decision* at [166].

⁵⁹ *Pharmacy Decision* at [167].

⁶⁰ *Pharmacy Decision* at [168].

that a significant net addition to work requirements was necessary to justify a minimum wage increase under s.157(2).

[118] The relevance of the *ACT Child Care Decision* might also be seen as a point of difference between the *Pharmacy* and *Teachers Decisions*.

[119] At [197] of the *Pharmacy Decision* the Full Bench noted:

‘This outcome [i.e. the outcome reached by the Pharmacy Full Bench] appears to be inconsistent with the principles stated and the approach taken concerning the proper fixation of award minimum rates in the *ACT Child Care Decision*, to which we have earlier made reference. However we note that the *ACT Child Care Decision* was made under a different statutory regime and pursuant to wage-fixing principles which no longer exist.’ [Emphasis added]

[120] In the *Teachers Decision*, the Full Bench observed that ‘the correct approach is to fix wages in accordance with the principles stated in the *ACT Child Care decision*,’ having earlier observed that ‘this requires us to identify a key classification or classifications [and] align it with the appropriate classifications in the Metal Industry classification structure.’⁶¹

[121] The Joint Employers submit the *Teachers Decision* confirms that the exercise of properly setting minimum rates involves considering the C10 framework and the Australian Qualifications Framework (AQF),⁶² and maintains that the process by which minimum rates have been properly fixed is the following:

(a) *First*, the classifications in the relevant award(s) were fixed by reference to the relevant classifications in the *Manufacturing Award*, specifically, the relationship between the “*key classification*” to the C10 level as the starting point. The alignment process is informed by reference to the training and qualification levels attached to the classifications between the awards (regard may also be had to the AQF).

(b) *Second*, the other rates in the relevant award(s) are set by applying “*the internal award relativities*” (which may have been established, agreed or maintained), by reference to the key classification.’⁶³

[122] The Joint Employers submit that this ‘principled approach to setting minimum rates seeks to establish a consistent system of awards, each with properly set minimum rates’ and ‘was applied in the *Teachers Case*.’⁶⁴

[123] In the course of closing oral argument, senior counsel for the HSU addressed this apparent conflict between the *Pharmacy Decision* and the *Teachers Decision*:

⁶¹ *Teachers Decision* at [653].

⁶² Joint Employers closing submissions dated 22 July 2022 Annexure M at [1.1].

⁶³ Joint Employers closing submissions dated 22 July 2022 Annexure M at [1.30].

⁶⁴ Joint Employers closing submissions dated 22 July 2022 Annexure M at [1.31].

‘We don't read that, particularly in the context of the earlier observations about broad and unconstrained discretion, as being anything other than a statement as to how it was appropriate to resolve that case and to set the rates in that case. It could not be said, and cannot be sensibly understood as suggesting that that is the required approach in any particular case. It is an approach which might be appropriate in a particular case, depending upon the nature of the evidence which was disclosed and the outcome that would be produced by the application of the three steps in the ACT Child Care decision.

If understood in that way, it avoids any tension and we think that's how it's properly understood, particularly given the express endorsement of the approach in the pharmacists decision earlier on in the teachers decision.

In short, in that context, we think that the use of the C10 framework, in the way in which the joint employers, at least on a stricter reading of their submissions, suggest, is something that the Commission may adopt in a particular case. It may be appropriate because the work value reasons that are relied upon, as was the case in the ACT Child Care case, as justifying increases or variations in Modern Award wages are a disparity on qualification type grounds. That might be an approach that is available in a particular case, if that is the nature of the case which is brought. Or and only if - if work value reasons of another nature are found to justify a variation of Modern Award wages, only if the outcome of that process were such as to, in the view of the Commission, provide for fair wages which properly reflect the value of the work performed.

That is the extent to which use could be made of it, particularly if, and to some degree, and again there's been a moderation, perhaps, in the joint employers submissions, in this respect, to the extent that there is reliance upon qualification level, as either the only or, at least, the most significant element in identifying relativity between awards.

That approach would, if adopted strictly, or even if requiring close adherence to it, fail to undertake the statutory tasks that the Commission is given, under section 157(2A), in that it would not and could not properly capture matters which fall within the potential of being work value reasons, including the nature of the responsibilities involved and the conditions under which work is performed.’⁶⁵

[124] We accept and adopt the analysis advanced by the HSU and on that basis find that there is no conflict between the *Pharmacy Decision* and the *Teachers Decision*.

3.3 Consideration

[125] We begin this section of the chapter by making some general observations about the task of statutory construction.

[126] Ascertaining the meaning of ss.157(2) and (2A) necessarily begins with the ordinary and grammatical meaning of the words used.⁶⁶ These words must be read in context by reference to the language of the FW Act as a whole and to the legislative

⁶⁵ Transcript, 24 August 2022, PN14464–PN14468.

⁶⁶ *Australian Education Union v Department of Education and Children's Services* (2012) 285 ALR 27 at [26].

purpose.⁶⁷ Section 578(a) of the FW Act also directs attention to the objects of the FW Act. Of course it must be borne in mind that the purpose or object of the FW Act is to be gleaned from a consideration of all of the relevant provisions of the FW Act.⁶⁸ Section 15AA of the *Acts Interpretation Act 1901* (Cth) requires that a construction that would promote the purpose or object of the FW Act is to be preferred to one that would not promote that purpose or object. The purpose or object of the FW Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the purpose or object of the FW Act, and another does, the latter interpretation is to be preferred. Of course, s.15AA requires us to construe the FW Act in light of its purpose, not to rewrite it.⁶⁹

[127] We now turn to the text of ss.157(2) and (2A), which is extracted above.

[128] Section 157(2) confers a discretion to make a determination varying modern award minimum wages which is enlivened if the Commission is satisfied as to the matters in both s.157(2)(a) and (b). So much is clear from the use of ‘may’ in the prefatory words and the use of the conjunctive ‘and’ between paragraphs 157(2)(a) and (b). Further, the matters in respect of which the Commission must be ‘satisfied’ involve a degree of subjectivity and hence, in a broad sense can be described as discretionary.⁷⁰

3.3.1 Section 157(2)(b)

[129] For convenience, we first consider s.157(2)(b). Prior to their amendment by the 4 Yearly Review Amending Act, ss.157(1) and (2) were relevantly as follows:

157 FWC may vary etc. modern awards if necessary to achieve modern awards objective

- (1) The FWC may:
- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
 - (b) make a modern award; or
 - (c) make a determination revoking a modern award;

if the FWC is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

...

⁶⁷ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

⁶⁸ *Municipal Officers' Association of Australia v Lancaster* (1981) 37 ALR 559 at 579; *Bowling v General Motors Holden Ltd* (1980) 33 ALR 297 at 304.

⁶⁹ *Mills v Meeking* (1990) 169 CLR 214 at [235] (Dawson J); *R v L* (1994) 49 FCR 534 at 538.

⁷⁰ *Coal and Allied Operations Pty Ltd v AIRC* [2000] HCA 47 at [20] (Gleeson CJ, Gaudron and Hayne JJ).

- (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
- (a) the variation of modern award minimum wages is justified by work value reasons; and
 - (b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wage objective also applies (see section 284).

[Emphasis added]

[130] The underlined words above were removed by the 4 Yearly Review Amending Act. Under s.157(1) as it was, the Commission could make a determination varying a modern award (other than varying minimum wages or a default fund term) if satisfied that making the determination outside the system of 4 yearly reviews was necessary to achieve the modern awards objective. This condition appears intended to support the primacy of 4 yearly reviews of modern awards as the means of maintaining awards as a fair and relevant minimum safety net.⁷¹ Similarly, s.157(2)(b) appears intended to support the primacy of annual wage reviews as the means by which minimum wages are set⁷² and the role of 4 yearly reviews.

[131] The Explanatory Memorandum for the *Fair Work Bill 2008* described s.157(1) as follows:

‘611. FWA may vary a modern award (other than in relation to modern award minimum wages), make a modern award or revoke a modern award outside the 4 yearly reviews if it is satisfied that to do so is necessary to achieve the modern awards objective (subclause 157(1)).

612. The modern awards objective requires FWA to take account of a number of matters, including the need to ensure a stable modern award system. It is intended that in deciding whether to vary, make or revoke a modern award outside the 4 yearly reviews, FWA will balance the considerations contained in the modern awards objective to determine whether it is necessary to exercise the power outside the system of 4 yearly reviews.’⁷³

[132] The Full Bench in *Appeal by National Retail Association; Appeal By Master Grocers Australia Limited* [2010] FWAFB 7838 suggested that s.157(1) as it then was ‘permits the tribunal to vary a modern award other than in the 4 yearly review if it is “satisfied” that the variation “is necessary to achieve the modern awards objective”.’⁷⁴ The construction of

⁷¹ Explanatory Memorandum, Fair Work Bill 2008 (Cth) at [600]–[610].

⁷² Explanatory Memorandum, Fair Work Bill 2008 (Cth) at [1136].

⁷³ Explanatory Memorandum, Fair Work Bill 2008 (Cth) at [611]–[612].

⁷⁴ [2010] FWAFB 7838 at [6].

s.157(1) was also considered by Tracey J in *Shop, Distributive and Allied Employees Association v National Retail Association (No. 2)*:⁷⁵

‘The statutory foundation for the exercise of FWA’s power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is “necessary” in order “to achieve the modern awards objective”. That objective is very broadly expressed: FWA must “provide a fair and relevant minimum safety net of terms and conditions” which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.

The subsection also introduced a temporal requirement. FWA must be satisfied that it is necessary to vary the award at a time falling between the prescribed periodic reviews.

The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective’.⁷⁶

[133] The construction of then s.157(1) clearly can be extended to s.157(2)(b) as it now is. It follows that s.157(2)(b) will be met if the Commission is satisfied that making the proposed variation determination in these proceedings is necessary to achieve the modern awards objective.

3.3.2 Section 157(2)(a)

[134] Turning to s.157(2)(a), the Commission must be satisfied that ‘*the variation* of modern award minimum wages is *justified* by work value reasons’ (emphasis added). The use of the word ‘variation’ in s.157(2)(a) directs attention to the content of the determination, that is, the new rate of minimum wages provided for under the determination. It is that new rate of minimum wages that must be ‘justified by work value reasons’.

[135] The word ‘justify’ has been the subject of some, albeit limited, judicial consideration. In *R v Naizmand*,⁷⁷ Harrison J considered s.15AA of the *Crimes Act 1914* (Cth) which provides that bail must not be granted to a person charged with a terrorism offence unless the Court is satisfied that ‘exceptional circumstances exist to justify bail’. As to the meaning of ‘justify’ in that context his Honour held:

‘The word “justify” in s 15AA (1) is to be given its ordinary meaning, but subject to the other provisions of s 15AA (1). Whilst the Oxford English Dictionary meaning of “justify” includes “make right, proper or reasonable”, “give adequate grounds for”,

⁷⁵ (2012) 205 FCR 227.

⁷⁶ (2012) 205 FCR 227 at [35]–[37].

⁷⁷ [2016] NSWSC 836.

“warrant”, in the context of s 15AA (1), I consider that to justify a grant of bail, the circumstances must be such as to warrant a grant of bail.’⁷⁸

[136] The word ‘justified’ is the adjective of the verb ‘justify’. The ordinary dictionary definitions of ‘justify’ include ‘to show (an act, claim statement, etc) to be just, right or warranted’ and to ‘to show a satisfactory reason or excuse for something done.’⁷⁹ We see no reason not to give the word ‘justified’ in s.157(2) its ordinary meaning.

[137] ‘Justified’ in the context of s.157(2)(a) means that the ‘work value reasons’ show the variation of modern award minimum wages to be just, right or warranted, or provide a satisfactory reason for the variation.

[138] As we have mentioned, the expression ‘work value reasons’ is defined in s.157(2A). The reasons which justify the amount employees should be paid for doing a particular kind of work must be ‘related to’ any of the 3 matters in s.157(2A)(a)–(c); that is, any one or more of the 3 matters specified.

[139] The ANMF submits that s.157(2A) ‘exhaustively defines work value reasons as being reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to: (a) the nature of the work; (b) the level of skill or responsibility involved in doing the work; and (c) the conditions under which the work is done.’⁸⁰

[140] In essence, the ANMF contends that for something to constitute a ‘work value reason’ it must be related to the matters specified in paragraphs (a), (b) or (c). This is said to be so because of the language used in s.157(2A): the work value reasons specified ‘are reasons’ justifying the amount employees should be paid and the later reference to those reasons ‘being reasons related to’ the particular matters specified in paragraphs (a), (b) and (c). The ANMF submits that the words ‘are’ and ‘being’ are both forms of the verb ‘to be’ and are indicative of the definition being exclusive rather than inclusive.⁸¹

[141] The Joint Employers submit that the subject matters specified in s.157(2A) ‘are plainly exhaustive in the sense that if the matter is not related to one of the three prescribed criterion it is not relevant to the assessment of work value reasons.’⁸²

[142] The HSU takes a different position and submits it is ‘not clear’ that s.157(2A) is intended to confine the types of reasons the Commission may consider justify the amount employees should be paid for performing particular kinds of work. The HSU submits that the language of the provision contemplates those reasons will relate to the nature of the work, the skills or responsibility involved or the conditions under which the work is done, but submits:

‘the use of the word “being”, in context, is better understood as intended to provide an indication of the type of matters which are likely to be relevant to an assessment of work

⁷⁸ [2016] NSWSC 836 at [29].

⁷⁹ *Macquarie Dictionary* (online at 30 September 2022) ‘justify’ (def 1 and 5a).

⁸⁰ ANMF submissions dated 29 October 2021 at [23].

⁸¹ ANMF closing submissions in reply dated 17 August 2022 at [27].

⁸² Joint Employers closing submissions dated 22 July 2022 Annexure P at [3.5].

value, rather than as limiting the matters which the Commission might consider justify the amount employees should be paid for doing particular kinds of work.’⁸³

[143] The HSU maintains that this approach is consistent with historical approaches to the assessment of work value ‘which have emphasised the breadth of the considerations capable of being relevant’ and relies on *Re Crown Employees (Scientific Officers) Award* (1962) 61 AR (NSW) 250 to support this assertion.⁸⁴

[144] The HSU further submits that, in any event, if work value reasons are confined to the matters in s.157(2A) the type of matters which are capable of constituting work value reasons are ‘obviously very broad’ and argues:

“‘Work value reasons’ do not need to directly concern the nature of the work, the skills or responsibility involved or the conditions under which the work is done, but need only “relate to” one of those matters. The phrase “relate to” is of broad import and generally denotes a connection or relationship, direct or indirect, between one subject matter and another although the degree of connection required will depend upon the statutory context.’⁸⁵ [Footnotes omitted]

[145] The Commonwealth agrees with the ANMF that s.157(2A) exhaustively defines work value reasons as there are no other express provisions which inform the meaning of s.157(2A); but also submits that the Commission is specifically required to take into account the objects of the FW Act when performing its functions or powers, including when assessing whether variations to modern awards are justified by work value reasons.⁸⁶

[146] During the course of oral argument, the Commonwealth was invited to address how it reconciled the 2 propositions put; that is, s.157(2A) is a comprehensive or exhaustive definition of ‘work value reasons’ and the Commission should have regard to the objects of the FW Act in assessing work value. The Commonwealth responded as follows:

‘The Commonwealth submits that s 157(2A) is an exhaustive definition. However, it is a definition that includes a number of broad concepts in each of its subsections, which are not defined and that require interpretation. Consistently with the *Pharmacy Decision* (at [165]-[168]), the Commonwealth submits that those concepts leave it to the Commission to exercise a broad evaluative judgment as to what may constitute work value reasons. The Commonwealth’s point is that in either interpreting the meaning of the words of the subsection of s 157(2A) or exercising such a broad evaluative judgment, the Full Bench would have regard to the objects of the FW Act to guide it in the correct interpretation and application of s 157(2A). The short point is that the objects merely inform the interpretation and application of the concepts contained therein.’⁸⁷

⁸³ HSU closing submissions dated 22 July 2022 at [34].

⁸⁴ HSU closing submissions dated 22 July 2022 at [35].

⁸⁵ HSU closing submissions dated 22 July 2022 at [36].

⁸⁶ Commonwealth submissions dated 8 August 2022 at [83], [122].

⁸⁷ Commonwealth submissions – responses to questions from the Full Bench dated 29 August 2022 at [21].

[147] In reply, counsel for the ANMF acknowledged that little practical difference flowed from whether or not s.157(2A) was characterised as a code given that the provision requires the Commission to exercise a broad and relatively unconstrained judgment as to what may constitute work value reasons justifying an adjustment to minimum wages.⁸⁸

[148] In our view, characterising s.157(2A) as a ‘code’ is not particularly helpful; it suggests that the provision is to be read in isolation from its statutory context. Such an approach would be contrary to principle. We accept that s.157(2A) can be said to exhaustively define work value reasons in the sense that there are no other express provisions which inform the meaning of s.157(2A), though the objects of the FW Act will inform the interpretation and application of the concepts within s.157(2A).

[149] Section 157(2A) defines ‘work value reasons’ as reasons *related to* any of the 3 matters identified in s.157(2A)(a) to (c).

[150] The *Pharmacy Decision* considered the meaning of ‘related to’ in the definition of ‘work value reasons’ in what was then s.156(4), now s.157(2A):

‘The expression “related to” is one of broad import that requires a sufficient connection or association between two subject matters. The degree of the connection required is a matter for judgment depending on the facts of the case, but the connection must be relevant and not remote or accidental. The subject matters between which there must be a sufficient connection are, on the one hand, the reasons for the pay rate and, on the other hand, one of the three matters identified in paragraphs (a)–(c) — that is, any one or more of the three matters.’⁸⁹

[151] The meaning of the connecting expression ‘related to’ and similarly framed expressions has been the subject of judicial consideration in a number of different contexts.⁹⁰

[152] Ordinarily the term ‘related to’ is taken to be an expression of broad or wide import, but whether it is necessary that the relationship between the 2 subject matters be direct or substantial, or whether an indirect or less than substantial connection will suffice, will depend on the context.⁹¹

[153] In *Australian Competition and Consumer Commission v Maritime Union of Australia*,⁹² Hill J was concerned to interpret s.6(2)(b) of the *Trade Practices Act 1974* (Cth) which confined the operation of s.60 of that Act to conduct which took place in the course of or in relation to trade or commerce between Australia and places outside Australia. At [487]–[488] his Honour said:

⁸⁸ Transcript, 24 August 2022, PN14802–PN14803.

⁸⁹ *Pharmacy Decision* at [165].

⁹⁰ *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at 387 [87] (McHugh, Gummow, Kirby and Hayne JJ); *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620 (Taylor J); *Perlman v Perlman* (1984) 155 CLR 474 at 484; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 196–197; *O’Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356 at 367; *Travellex Ltd v Commissioner of Taxation* (2010) 241 CLR 510 at 519 [25].

⁹¹ *Joye v Beach Petroleum NL* (1996) 67 FCR 275 at 285 (Beaumont and Lehane JJ).

⁹² (2001) 114 FCR 472.

‘It may be accepted that there will always be a question of degree involved where the issue is the relationship between two subject matters. The words ‘in relation to’ are wide words which do no more, at least without reference to context, than signify the need for there to be some relationship or connection between two subject matters: see *Smith v Commissioner of Taxation (Cth)* (1987) 164 CLR 513 at 533 per Toohey J and *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 328 per Toohey and Gummow JJ. But the phrase is both ‘vague and indefinite’: see per Taylor J in *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620. Like the phrase ‘in respect of’, the phrase ‘in relation to’ will not, at least normally, apply to any connection or relationship no matter how remote: see *Technical Products Pty Ltd v State Government Insurance Office (Qld)* (1989) 167 CLR 45 at 51 per Dawson J. The extent of the relationship required will depend upon the context in which the words are used.’⁹³

[154] In our view, there is nothing in the present context to suggest that the expression ‘related to’ in s.157(2A) was not intended to have a wide operation or that an indirect, but relevant, connection would not be a sufficient relationship for present purposes.

[155] We agree with the observation in the *Pharmacy Decision* that the expression ‘related to’ is one of broad import that requires a sufficient connection or association between the 2 subject matters; the connection must be relevant and not remote or accidental.

[156] We also agree with proposition 2 from the *Pharmacy Decision*:

‘because the jurisdictional prerequisite [in s.157(2A)] is expressed in terms of the Commission’s “satisfaction” concerning whether a variation is “justified” by the prescribed type of reasons a requirement which involves an element of subjectivity and about which reasonable minds may differ it requires the formation of a broad evaluative judgment.’⁹⁴

[157] The most significant point of contention in the present proceedings is the extent to which the definition of ‘work value reasons’ in s.157(2A) can be said to encompass work value considerations from previous wage fixing principles. This issue is canvassed in propositions 4, 5 and 6 from the *Pharmacy Decision*. It is in this context that the Commonwealth advanced the following submission:

‘the three limbs of s 157(2A) are sufficiently broad so as to import the fundamental criteria used to assess work value changes under the wage fixing principles which operated from 1975 to 1981 and 1983 to 2006. There is nothing to indicate that the legislature, in enacting the FW Act, intended to change the meaning of “work value” as a core concept.’⁹⁵ [Emphasis added]

[158] That submission begs the question of what is meant by the ‘fundamental criteria used to assess work value changes under the wage fixing principles’ and the meaning of “work value” as a core concept’.

⁹³ (2001) 114 FCR 472 at 487–488 [68].

⁹⁴ *Pharmacy Decision* at [164].

⁹⁵ Commonwealth submissions dated 8 August 2022 at [84].

[159] At [166] of the *Pharmacy Decision*, the Full Bench referred to the ‘fundamental criteria’ from earlier wage fixing systems:

‘the three matters identified - the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done - clearly import the fundamental criteria used to assess work value changes under the wage fixing principles which operated from 1975 to 1981 and 1983 to 2006, the legislature in enacting s 156(4) chose not to import the additional requirements contained in those wage-fixing principle. For example, as was observed in the *Equal Remuneration Case 2015*, s 156(4) does not contain any requirement that the work value reasons consist of identified *changes* in work value measured from a fixed datum point.’⁹⁶ [Footnote omitted]

[160] It seems to us that in referring to the ‘fundamental criteria’ from earlier wage fixing regimes, the Pharmacy Full Bench meant, and only meant, the specific matters identified in s.157(2A)(a), (b) and (c), that is; the nature of the work, the level of skill or responsibility involved in doing the work and the conditions under which the work is done.

[161] The Pharmacy Full Bench expressly stated that s.156(4) (now s.157(2A)) contains no requirement for the measurement of work value changes from a fixed datum point and, further:

‘Likewise, s 156(4) did not incorporate the test in the wage-fixing principles that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification. In substance, section 156(3) and (4) leave it to the Commission to exercise a broad and relatively unconstrained judgment as to what may constitute work value reasons justifying an adjustment to minimum rates of pay similar to the position which applied prior to the establishment of wage fixing principles in 1975.’⁹⁷

[162] These observations are referred to as proposition 4 at [90]above.

[163] We agree with the proposition that s.157(2A) does *not* incorporate the requirement in past wage fixing principles that the change in the nature of work should constitute ‘such a significant net addition to work requirements as to warrant the creation of a new classification.’

[164] In *Kelly v Construction, Forestry, Maritime, Mining and Energy Union*,⁹⁸ in interpreting paragraph (c) of the definition of ‘separately identifiable constituent part’, a Full Court of the Federal Court first noted that the text of the paragraph was not expressed to be limited in the way contended by the CFMMEU before observing:

‘82. Of course, context and purpose must also be taken into account. We will come to those matters shortly. But as the Commission observed, if para (c) was intended to be limited ... [in the way contended by the CFMMEU], words giving effect to that intention

⁹⁶ *Pharmacy Decision* at [166].

⁹⁷ *Pharmacy Decision* at [167].

⁹⁸ [2022] FCAFC 130 at [82], [85].

could easily have been included ... The express inclusion of limiting words in the related clauses suggests that the omission of these or similar words from para (c) was deliberate.

...

85. The CFMMEU’s construction is not supported by the contextual matters either. The whole of the relevant context needs to be considered in order to determine whether the general words in para (c) should be read down: *DCT v Clark at 143* [127]. See also *Vella v Minister for Immigration and Border Protection* (2015) 230 FCR 61 at 77 [63]. That includes the legislative context, history, and purpose or intention.’

[165] In *Commissioner of Taxation v Warner*,⁹⁹ Perry J said:

‘43. Under established principles of statutory construction, “[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention”: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 (**Alcan**) at 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ). This does not exclude a “consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy”: *Alcan* at 47 [47]; see also *Commissioner of Taxation v Unit Trend Services Pty Ltd* [2013] HCA 16; (2013) 250 CLR 523 at 539-540 [47] (the Court); and *Quickfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd* [2014] FCAFC 70; (2014) 222 FCR 13 at 30 [75] (the Court). Nor does it exclude the possibility that a purposive construction may permit reading a provision as if it contained additional words (or omitted words) with the effect of expanding or contracting its field of operation: *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 88 ALJR 473 (**Taylor**) at 482-483 [37] (French CJ, Crennan and Bell JJ). However, as French CJ, Crennan and Bell JJ held in *Taylor* at 483 [38]:

“The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills “gaps disclosed in legislation” or makes an insertion which is “too big, or too much at variance with the language in fact used by the legislature”. (Citations omitted.)’

[166] In our view there is simply no basis for the imposition of such an additional requirement on the exercise of the discretion in s.157(2), which might have been, but which was not, enacted. To incorporate such a requirement would be to add words to the text of s.157 where it is not necessary to do so in order to achieve the legislative purpose.¹⁰⁰

⁹⁹ (2015) 244 FCR 479 at 490 [43].

¹⁰⁰ See *JJ Richards and Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297 at 307 [30] (Jessup J) and at 307 [33] (Tracey J); *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* [2014] FWCFB 2042 at 22 [101]; *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* (2015) 228 FCR 297 at 313 (Buchanan J, with whom Barker J agreed).

[167] As mentioned earlier, propositions 5 and 6 from the *Pharmacy Decision* were also the subject of submissions.

[168] Proposition 5 states, relevantly:

‘It would be open to the Commission to have regard, in the exercise of its discretion, to considerations which have been taken into account in previous work value cases under differing past statutory regimes.’¹⁰¹

[169] Two particular considerations from previous work value cases have been the subject of submissions in the matter before us. The first concerns the requirement that identified changes in work value be measured from a fixed datum point and the second concerns the relevance of external and internal relativities.

(i) *A fixed datum point*

[170] As noted in proposition 4 from the *Pharmacy Decision*, s.157(2A) does not contain any requirement that the ‘work value reasons’ consist of identified changes in work value measured from a fixed datum point.

[171] Proposition 5 from the *Pharmacy Decision* states:

‘although s.156(4) contains no requirement for the measurement of work value changes from a fixed datum point, it is likely the Commission would usually take into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way (that is, in a way which is free of gender bias and any other improper considerations) in assessing wages in the relevant modern award or its predecessor in order to ensure that there is no “double counting”.’¹⁰²

[172] As discussed earlier, we agree with proposition 5 on the basis that a past ‘proper’ assessment must be one which, according to the current assessment of the Commission, correctly valued the work in question. A past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.

[173] The Pharmacy Full Bench also noted that in the *4 yearly review of modern awards – Real Estate Industry Award 2010* the Full Bench said that where the wage rates in a modern award have not previously been the subject of a proper work value consideration, there can be no implicit assumption that at the time the award was made its wage rates were consistent with the modern awards objective.¹⁰³

[174] In their closing submissions dated 22 July 2022 the Joint Employers submit:

¹⁰¹ *Pharmacy Decision* at [168].

¹⁰² *Pharmacy Decision* at [168].

¹⁰³ *Pharmacy Decision* at [169] citing [2017] FWCFB 3543 at [80].

‘the absence of a prescribed datum point in legislation does not prohibit that approach. It simply affords the Commission greater discretion to have regard to a more temporal consideration, which in these proceedings has been the last two decades. Indeed, the evidence before the Commission allows for evaluation of change over that period. Furthermore, that timing aligns with introduction of the *Aged Care Act* in 1997 and the first round of accreditation emanating from this in 2000.’¹⁰⁴

[175] We agree 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. In the present case—where the parties agree that the award rates have not been properly set—the evidence canvasses changes in the aged care sector over the past 20 years and we consider that provides an appropriate evidentiary basis on which to assess ‘work value reasons’ in this matter.

(ii) *Relativities*

[176] In the *Pharmacy Decision*, the Full Bench described in detail the development by the AIRC of an approach whereby the proper fixation of award minimum rates of pay required an alignment between key classifications in the relevant award and classifications with equivalent qualification and skill levels in the classification structure in what was originally the *Metal Industry Award 1984 – Part I*, subsequently became the *Metal, Engineering and Associated Industries Award, 1998* and is now the Manufacturing Award.¹⁰⁵

[177] This approach was described in the *ACT Child Care Decision* as a 3 step process for determining properly fixed minimum rates:

1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA process with particular reference to the current rates for the relevant classifications in the *Metal Industry Award*. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.
2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.
3. If the existing rates are too low they should be increased so that they are properly fixed minima.¹⁰⁶

[178] It is convenient to refer to this process as the C10 Metals Framework Alignment Approach. C10 in this context refers to the C10 Engineering/Manufacturing Level 1 (or recognised trade certificate or Certificate III) classification level in the Manufacturing Award.

¹⁰⁴ Joint Employers closing submissions dated 22 July 2022 at [7.29].

¹⁰⁵ *Pharmacy Decision* at [150]–[161].

¹⁰⁶ *ACT Child Care Decision* at [155].

[179] It is important to observe at the outset that the C10 Metals Framework Alignment Approach did not mandate that wages for employees with qualifications equivalent to C10 must be set so as to be equal to the C10 wage rate and nor did it require that qualifications be the only means for considering appropriate relativities. In the *ACT Child Care Decision*, the AIRC stated that a comparison of the qualifications required at particular classification levels ‘is one method for establishing properly fixed minimum rates’¹⁰⁷ [Emphasis added]. The AIRC stated:

‘Prima facie, employees classified at the same AQF levels should receive the same minimum award rate of pay unless the conditions under which the work is performed warrant a different outcome.’¹⁰⁸

[180] The ACT Child Care Full Bench found that there had been a ‘significant net addition’ to work requirements since a 1990 datum point such as to satisfy the requirements of the then work value changes principle. The Full Bench also decided, based on the AQF, that minimum pay alignments should be established between the child care awards under consideration and the then *Metal Industry Award*, between classifications with equivalent training and qualification levels:

‘[181] A central feature of this case is the alignment of the Child Care Certificate III and Diploma levels in the *ACT* and *Victorian Awards* with the appropriate comparators in the *Metal Industry Award*.

[182] We have considered all of the evidence and submissions in respect of this issue. In our view the rate at the AQF Diploma level in the *ACT* and *Victorian Awards* should be linked to the C5 level in the *Metal Industry Award*. It is also appropriate that there be a nexus between the CCW level 3 on commencement classification in the *ACT Award* (and the Certificate III level in the *Victorian Award*) and the C10 level in the *Metal Industry Award*.

[183] In reaching this conclusion we have considered - as contended by the Employers - the conditions under which work is performed. But contrary to the Employers’ submissions this consideration does not lead us to conclude that child care workers with qualifications at the same AQF level as workers under the *Metal Industry Award* should be paid less. If anything the nature of the work performed by child care workers and the conditions under which that work is performed suggest that they should be paid more, not less, than their *Metal Industry Award* counterparts.’

[181] The relevance of the C10 Metals Framework Alignment Approach was a matter of some contention in these proceedings.

[182] The position of the Joint Employers in respect of this issue has evolved somewhat over time. In their submissions of 22 July 2022, the Joint Employers contend that comparing the rates under examination with the C10 Framework ‘is a principled starting point in this case’

¹⁰⁷ *ACT Child Care Decision* at [172].

¹⁰⁸ *ACT Child Care Decision* at [372].

and ‘also acts as a key tool in undertaking the evaluative exercise underpinning the assessment of the value of work.’¹⁰⁹ At 7.8 of those submissions the Joint Employers submit:

‘given that the notion of a datum point and the progressively updating of work value is no longer a statutory consideration and given that the notion of stability is invested in s 134(g) of the *FW Act*, the Commission should be strongly guided by the C10 Framework in properly setting minimum wages in modern awards.’¹¹⁰ [Emphasis added]

[183] Annexure O to the Joint Employers’ submissions gives detailed attention to identifying the relevant classifications in the awards before us which can be benchmarked to the C10 Framework and the outcome of such an exercise on internal relativities. We return to this material in Chapter 8.3.

[184] At [4.48] of the Joint Employers’ closing submissions of 22 July 2022 it is suggested that only a ‘marginal departure’ from the C10 Framework would be warranted by ‘work value reasons’:

‘In any exercise apportioning value to a classification, clearly, the C10 Framework will be an effective starting point (and for some an end point). However, whether any marginal departure is then warranted will be determined by the Commission based upon its satisfaction that the variation is justified by the work value reasons and a consideration of the modern awards objective and minimum wages objective.’¹¹¹ [Emphasis added]

[185] The Joint Employers’ position was contested by the Unions, with the HSU submitting:

‘Identifying and preserving award relativities is not a perfect science. The C10 scale is a useful starting point, but no more than that: the relativities it prescribes do not even guide the rates within the Manufacturing Award. Its usefulness is further limited here, where the only real commonality between the C10 classification and the equivalent classifications in the Aged Care and SCHADS awards is the type of qualification.’¹¹²

[186] In its submissions of 22 July 2022, the HSU submits:

‘The C10 system is not a direct fetter on the Commission’s discretion in setting minimum wages. To apply it in this way would be inconsistent with the broad discretion now conferred by section 157(2) and (2A). It is merely one consideration; the relevance of which in any case will depend on the nature of the work to be compared and its translatability. In this respect, it is important to recognise that the relativities between the positions on the C10 scale are not purely referable to AQF qualifications. Instead, the scale cannot be properly understood without reference to the National Metal and

¹⁰⁹ Joint Employers closing submissions dated 22 July 2022 at [4.14]–[4.15].

¹¹⁰ Joint Employers closing submissions dated 22 July 2022 at [7.8].

¹¹¹ Joint Employers closing submissions dated 22 July 2022 at [4.48].

¹¹² HSU submissions in reply dated 21 April 2022 at [22].

Engineering Competency Standards Implementation Guide – particularly in respect of classifying workers above or below the relevant “Certificate III” level.’¹¹³

[187] The ANMF submits that ‘the Commission would treat the Metals Framework [as] a tool which may assist in determining these applications. But it would not apply it mechanically by selecting a key classification, adjusting that to the comparable classification in the Manufacturing Award by reference to the Australian Qualifications Framework, and then stopping.’¹¹⁴

[188] In its closing submissions in reply of 17 August 2022, the ANMF submits:

‘The proper approach to the Metals Framework is that it may, in some cases, be relevant in addressing the statutory questions thrown up by section 157—but it is not the statutory question. The starting point *and* end point in any exercise apportioning value to a classification are the identified work value reasons. Any application of the Metals Framework should not distract from the Commission’s statutory task.

... the Metals Framework is inherently situated in an industrial sector context not a health sector context. As such, the utility of the Metals Framework for assessing work values in the health sector is particularly limited.

Likewise, the AQF alone cannot serve as a satisfactory proxy for determining work value. The task of the Commission remains to determine the applications having regard to “*work value reasons*” and the necessity to achieve the modern awards objective.’¹¹⁵

[189] The Commonwealth adopts what might be described as a middle path between the Joint Employers’ and Unions’ positions; submitting that the proper fixation of minimum rates according to the approach in the *ACT Child Case Decision* ‘should not be considered a necessary precursor or a “gateway” to the Commission’s exercise of its powers under s.157’¹¹⁶, but that:

‘the Commission should continue to have regard to relativities in wage rates within and between awards (internal and external wage relativities), but that such considerations should not be determinative.

...

Assessing work value in a manner which continues, as a starting point, to align rates of pay in one modern award with classifications in other modern awards with similar qualification requirements would support a system of fairness, certainty and stability in assessing the relative value of work between awards. However, a strict alignment of award relativities based on qualifications, without proper consideration of the true work

¹¹³ HSU closing submissions dated 22 July 2022 at [72].

¹¹⁴ ANMF submissions in reply dated 21 April 2022 at [62].

¹¹⁵ ANMF closing submissions in reply dated 17 August 2022 at [118], [128]–[129].

¹¹⁶ Commonwealth submissions dated 8 August 2022 at [79.2].

value of the cohort of employees in question, would result in award minimum rates of pay which could not be said to be fair or relevant.

While the Commonwealth does not consider that qualifications should be the only determinant of appropriate award relativities, qualifications provide a useful indicator of the level of skill involved in particular work for the purposes of s 157(2A)(b).

The Australian Qualifications Framework (AQF) has the benefit of providing a relatively objective point of comparison that can be drawn upon across industries and occupations.

...

The AQF can be a useful means of assessing the skill involved in work and differentiating between the work at different levels when designing award classification structures. The Commonwealth endorses the HSU's submission (at [71] of its outline of closing submissions) that the AQF is a "useful starting point".

There are likely to be aspects of the skill involved in performing work that are not captured by the AQF. Therefore, the Commonwealth submits that the Commission should not rely on the AQF as the only means to assess these matters.

...

Consistent with the above, the Commonwealth submits that a comparison to rates in the Metal Industry classification structure with equivalent qualification levels may be of some assistance when the Commission is dealing [with] an application under s 157 of the FW Act to vary modern award minimum wages on work value grounds but is not a complete answer. In addition to the level of skill involved in doing the work, s 157 requires the Commission consider whether there are work value reasons related to the nature of the work, the level of responsibility involved in doing the work and the conditions under which the work is done.

It would be open to Commission to align modern award wages rates for employees with equivalent AQF qualification levels in the absence of any countervailing work value reasons. However, there may be reasons justifying different wage rates for employees, despite their having attained equivalent AQF qualifications. For example, employees may have different levels of responsibility, perform work of a different nature or under different conditions. There may also be factors other than qualification that have a bearing on the level of skill involved in doing the work.¹¹⁷

[190] During the course of the proceedings the Commonwealth was asked whether it contended that a comparison of relativities was a *necessary* element of assessing work value under s.157. The Commonwealth replied:

¹¹⁷ Commonwealth submissions dated 8 August 2022 at [86], [125]–[127], [141]–[142], [151]–[153].

‘a comparison of relativities is not necessary in that it is not a prescribed mandatory requirement, but ... having regard to relativities across awards and within awards remains an appropriate and relevant exercise. The Commonwealth accepts that an examination of relativities should not be seen as a constraint on the statutory task, which involves an exercise of discretion.’¹¹⁸

[191] As mentioned earlier, the position of the Joint Employers with respect to the relevance of alignment with the C10 Metals Framework has evolved over time. During closing oral argument Mr Ward, for the Joint Employers, encapsulated the position of the Joint Employers in these terms:

‘The C10 Framework is a very useful guiding tool. It is not the beginning, it is not the end and it doesn’t substitute for the statutory discretion in s.157.’¹¹⁹

[192] It seems to us that when dealing with applications to vary modern award minimum wages it is appropriate and relevant to have regard to relativities within and between awards. We agree with the Commonwealth that aligning rates of pay in one modern award with classifications in other modern awards with similar qualification requirements will support a system of fairness, certainty and stability. The C10 Metals Framework Alignment Approach and the AQF are useful tools in this regard. However, such an approach has its limitations, in particular:

- alignment with external relativities is not determinative of work value
- while qualifications provide an indicator of the level of skill involved in particular work, factors other than qualifications have a bearing on the level of skill involved in doing the work, and
- alignment with external relativities is not a substitute for the Commission’s statutory task of determining whether a variation of the relevant modern award rates of pay are justified by ‘work value reasons’ (being reasons related to the nature of the employees’ work, the level of skill and responsibility involved and the conditions under which the work is done).

(iii) *Pharmacy Decision: Proposition 6*

[193] Proposition 6 of the *Pharmacy Decision* was also the subject of submissions. Proposition 6 states:

‘The considerations referred to in [190] of *Child Care Industry (Australian Capital Territory) Award 1998* (the *ACT Child Care Decision*)¹²⁰ may be of relevance in particular cases, as may considerations in other authoritative past work value cases.’¹²¹

[194] Paragraph [190] of the *ACT Child Care Decision* states:

¹¹⁸ Commonwealth submissions – Responses to Questions from the Full Bench dated 29 August 2022 at [6].

¹¹⁹ Transcript, 1 September 2022 at PN15523.

¹²⁰ *ACT Child Care Decision*.

¹²¹ *Pharmacy Decision* at [168].

‘Previous decisions of the Commission suggest that a range of factors may, depending on the circumstances, be relevant to the assessment of whether or not the changes in question constitute the required “*significant net addition to work requirements*”. The following considerations are relevant in this regard:

- Rapidly changing technology, dramatic or unanticipated changes which result in a need for new skills and/or increased responsibility may justify a wage increase on work value grounds. But progressive or evolutionary change is insufficient.
- An increase in the skills, knowledge or other expertise required to adequately undertake the duties concerned demonstrates an increase in work value.
- The mere introduction of a statutory requirement to hold a certificate of competency does not of itself constitute a significant net addition to work requirements. It must be demonstrated that there has been some change in the work itself or in the skills and/or responsibility required. However, where additional training is required to become certified and hence to fulfil a statutory requirement a wage increase may be warranted.
- A requirement to exercise care and caution is, of itself, insufficient to warrant a work value increase. But an increase in the level of responsibility required to be exercised may warrant a wage increase on work value grounds. Such a change may be demonstrated by a requirement to work with less supervision.
- The requirement to exercise a quality control function may constitute a significant net addition to work requirements when associated with increased accountability.
- The fact that the emphasis on some aspects of the work has changed does not in itself constitute a significant net addition to work requirements.
- The introduction of a new training program or the necessity to undertake additional training is illustrative of the increased level of skill required due to the change in the nature of the work. But keeping abreast of changes and developments in any trade or profession is part of the requirements of that trade or profession and generally only some basic changes in the educational requirements can be regarded, of itself, as constituting a change in work value.
- Increased workload generally goes to the issue of manning levels not work value. But, where an increase in workload leads to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration.’
[Emphasis added] [Footnotes omitted]

[195] The underlined passages from [190] of the *ACT Child Care Decision* are particularly contentious.

[196] We note at the outset that proposition 6 from the *Pharmacy Decision* simply states that the considerations referred to in [190] of the *ACT Child Care Decision* ‘may be of relevance in particular cases’.¹²²

[197] Plainly, the *Pharmacy Decision* Full Bench was not suggesting that these considerations were to be adopted and applied in every case. Consistent with the approach adopted in the *Pharmacy Decision* we think there are good reasons to be cautious in the application of the considerations referred to at [190] of the *ACT Child Care Decision*.

[198] As noted in the *Pharmacy Decision*, ‘the *ACT Child Care Decision* was made under a different statutory regime and pursuant to wage-fixing principles which no longer exist’.¹²³ The Work Value Changes principle in the wage fixing principles at the time the *ACT Child Care Decision* was decided is extracted in full earlier in this chapter.

[199] The prefatory words of [190] of the *ACT Child Care Decision* make clear the link between the requirements of the wage fixing principles operating at that time and the considerations that follow:

‘Previous decisions of the Commission suggest that a range of factors may, depending on the circumstances, be relevant to the assessment of whether or not the changes in question constitute the required “significant net addition to work requirements”.’

[Emphasis added]

[200] As mentioned earlier, the former requirement that the change in the nature of the work constitute a significant net addition to work requirements forms no part of the definition of ‘work value reasons’ in s.157(2A). The current statutory framework does not require that the work value reasons justifying the variation of modern award minimum wages constitute a significant net addition to work requirements.

[201] While acknowledging that the *ACT Child Care Decision* was made under a different statutory regime, the Joint Employers submit that its principles are still useful in assessing work value. Relying on the *ACT Child Care Decision*, the Joint Employers contend that the following factors generally do *not* support a finding of work value change in these matters:

- ‘(a) the evolution of methods and/or modifications over time is not “genuine work value change”;
- (b) the mere introduction of a statutory requirement to hold a certificate of competency does not itself constitute a significant net addition to work requirements;
- (c) a requirement to exercise care and caution is, of itself, insufficient to warrant a work value increase;

¹²² *Pharmacy Decision* at [168].

¹²³ *Pharmacy Decision* at [197].

- (d) the fact that the emphasis on some aspects of the work has changed does not in itself constitute a significant net addition to work requirements; and
- (e) increased workload generally goes to the issue of manning levels not work value.¹²⁴
[Emphasis added]

[202] It is apparent that paragraphs (b) and (d) above draw a direct link with the former requirement that changes in work constitute a significant net addition to work requirements. Further, it cannot be assumed that the failure to expressly mention this requirement in one of the above factors means that it is irrelevant to that factor; a point to which we return shortly.

[203] The Joint Employers also contend that ‘caution should be exercised in assuming that the [FW] Act now stands for the notion that any and all change warrants the re-evaluation of work’¹²⁵ and submit:

‘Such an approach would be inconsistent with the notion of “justification” which suggests an evaluative exercise. All jobs will change in some way, work substitution, one process being replaced by another, technology replacing manual processes etc. None of these types of changes (evolution) would ordinarily suggest a change in the value of work.’¹²⁶

[204] In their written submissions the Joint Employers clearly distinguish between evolutionary change (which they contend does not constitute a change in work value) and rapidly changing technology, dramatic or unanticipated changes which result in a need for new skills or increased responsibility (which may justify a wage increase on work value grounds). This position was moderated somewhat in the course of closing oral argument. Mr Ward, representing the Joint Employers, accepted that the Joint Employers were *not* inviting the Commission to draw a dichotomy between evolutionary and revolutionary change, but were simply submitting that ‘you need to look at the evidence and some changes are more significant than others, and some, of themselves, wouldn’t justify an increase.’¹²⁷

[205] The ANMF submits reliance upon or application of the underlined matters in the extract from [190] of the *ACT Child Care Decision* set out above would tend to lead into error. The central point advanced by the ANMF is that at the time that the ACT Child Care Full Bench set out those propositions, it was still necessary to show a ‘significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification’ whereas now it is not necessary to do so:

‘Because it is not necessary so to demonstrate, principles stated in terms of whether a particular change in work, “*in itself constitute[s] a significant net addition to work requirements*” (e.g., principle (f) from the *ACT Child Care Decision* quoted above), are addressed to the wrong question.

¹²⁴ Joint Employers closing submissions dated 22 July 2022 at [1.17].

¹²⁵ Joint Employers closing submissions in reply dated 19 August 2022 at [2.39].

¹²⁶ Joint Employers closing submissions in reply dated 19 August 2022 at [2.40].

¹²⁷ Transcript, 1 September 2022 at PN15711–PN15712.

And even those principles that do not expressly call up the “*significant net addition*” test will tend to lead into error. The only question that the FWC now needs to consider is whether reasons related to any of the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done, justify payment of a particular amount.’¹²⁸

[206] The ANMF divides the propositions in [190] of the *ACT Child Care Decision* into 2 categories – those which the Commission ‘may safely rely on’ so far as they are relevant and those which if relied upon would tend to lead to error.¹²⁹ The propositions the ANMF places in the latter category are:

- (a) ... But progressive or evolutionary change is insufficient.¹³⁰
- (d) A requirement to exercise care and caution is, of itself, insufficient to warrant a work value increase.¹³¹
- (f) The fact that the emphasis on some aspects of the work has changed does not in itself constitute a significant net addition to work requirements.¹³²
- (h) Increased workload generally goes to the issue of manning levels not work value. But, where an increase in workload leads to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration.¹³³

[207] Conversely, the propositions which the ANMF submits the Commission may safely rely upon as evidencing a change in work value are:

- (a) Rapidly changing technology, dramatic or unanticipated changes which result in a need for new skills and/or increased responsibility may justify a wage increase on work value grounds.
- (b) An increase in the skills, knowledge or other expertise required to adequately undertake the duties concerned demonstrates an increase in work value.
- (c) The mere introduction of a statutory requirement to hold a certificate of competency does not of itself constitute a significant net addition to work requirements. It must be demonstrated that there has been some change in the work itself or in the skills and/or responsibility required. However, where additional training is required to become certified and hence to fulfil a statutory requirement a wage increase may be warranted.

¹²⁸ ANMF submissions dated 29 October 2021 at [35]–[36].

¹²⁹ ANMF submissions dated 29 October 2021 at [33]–[34].

¹³⁰ ANMF submissions dated 29 October 2021 at [37](1).

¹³¹ ANMF submissions dated 29 October 2021 at [37](2).

¹³² ANMF submissions dated 29 October 2021 at [37](3).

¹³³ ANMF submissions dated 29 October 2021 at [37](4).

- (d) ... But an increase in the level of responsibility required to be exercised may warrant a wage increase on work value grounds. Such a change may be demonstrated by a requirement to work with less supervision.
- (e) The requirement to exercise a quality control function may constitute a significant net addition to work requirements when associated with increased accountability.
- (g) The introduction of a new training program or the necessity to undertake additional training is illustrative of the increased level of skill required due to the change in the nature of the work. But keeping abreast of changes and developments in any trade or profession is part of the requirements of that trade or profession and generally only some basic changes in the educational requirements can be regarded, of itself, as constituting a change in work value.
- (h) ... where an increase in workload leads to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration.

[208] Similar submissions are advanced by the HSU.

[209] As we have mentioned, a number of the propositions in [190] of the *ACT Child Care Decision* draw a direct link between the asserted statement of principle and the requirement that change constitute a significant net addition to work requirements. Further, the authorities cited in support of the proposition that ‘progressive or evolutionary change’ is insufficient to justify a wage increase on work value grounds clearly link that proposition to the strict requirement of the then wage fixing principles (namely, the requirement that a change constitute a significant net addition to work requirements). We now briefly turn to those authorities.

[210] In *Printing & Kindred Industries Union v Public Service Commissioner for the NT*¹³⁴ Commissioner Palmer said:

‘In respect to all other work and new equipment in the printing section I have reached the conclusion that whatever has been occasioned by the introduction of new equipment that there is insufficient change either in skill or responsibility to warrant any change in wage rates. The changes in my view are evolutionary in nature and insufficient to satisfy the strict test of the National Wage case principles.’¹³⁵ [Emphasis added]

[211] In *Municipal Officers (Glenorchy City Council) Award 1981*,¹³⁶ Commissioner Johnson said:

‘In respect of the evidence and inspections generally the Commission was invited by the respondents to be mindful of the fact that an engineer brings his profession to the employer and rarely will he be called upon to use all of his abilities and knowledge at a

¹³⁴ 23 IRJ [1987].

¹³⁵ *Printing & Kindred Industries Union v Public Service Commissioner for the NT* [1987] 23 IRJ at 385.

¹³⁶ (1986) 302 CAR 203 at 207(a).

given time. Certainly, it was said, the emphasis on some aspects of the work might change from time to time; however, such a change of emphasis, does not in itself constitute a net addition to work requirements. What such change does operate to achieve is the bringing into play of an ability which the engineer already possesses but hitherto has not been required to utilize or utilize to the same extent.¹³⁷ [Emphasis added]

[212] In *State Electricity Commission of Victoria v The Federated Ironworkers' Association of Australia*,¹³⁸ the Full Bench stated:

‘In many claims for higher wages on grounds of work value change, evidence is given for example of changes in work methods, of changes involved in the need to give more attention to detail or to work changes entailed in the use of new equipment. In the course of many such cases one feels that the real essence of work value change is lost sight of, as the evidence of mere change unfolds. *In all categories of work except perhaps the most simple, changes become evident with time.* It is in the nature of things that new methods of doing the same thing evolve with time, and that skills which qualify a person for a particular category of work may become fully tested, or in some cases the work may thereby be made easier. *However it is essential that such changes are not mistaken for genuine work value change. "The strict test for an alteration in wage rates is that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification."* Principle 4 – (1986) 14 IR 187 at 2918; Print G3600 p.76¹³⁹ [Emphasis added]

[213] Finally, in *Graphic Arts Award (1978)*,¹⁴⁰ Justice Alley said:

‘In considering the question of award rates in this inquiry it is essential to keep in mind the principle established by the Commission in National Wage cases in respect of pay increases for changes in work value ... The vital portion of principle 7(a) is placitum (ii) whereby any change must constitute a significant net addition to work requirements to warrant a wage increase.¹⁴¹ [Emphasis added]

[214] It seems to us that the wage fixing principles in operation at that time – particularly the requirement that a change constitute a significant net addition to work requirements – cast a long shadow over the propositions set out at [190] of the *ACT Child Care Decision*.

[215] Even where there is no direct link to the previous ‘significant net addition’ requirement caution is warranted. For example, the proposition relied on by the Joint Employers that ‘increased workload generally goes to the issue of manning levels not work value’, needs to be qualified.

¹³⁷ *Municipal Officers (Glenorchy City Council) Award 1981* (1986) 302 CAR 203 at 207[a].

¹³⁸ Print G7498, 22 May 1987.

¹³⁹ *State Electricity Commission of Victoria v The Federated Ironworkers' Association of Australia*, Print G7498, 22 May 1987 at 75.

¹⁴⁰ 213 CAR 146.

¹⁴¹ *Graphic Arts Award (1978)* 213 CAR 146 at 151–152.

[216] The evidence before us paints a picture of chronic understaffing across the aged care sector which has contributed to increasing workloads and work intensity. The relevance of work intensification to ‘work value’ was given some consideration in the *SCHADS Award COVID-19 Care Allowance case*.¹⁴²

[217] On 28 April 2020, a joint application was made by the HSU and UWU (together with the Australian Municipal, Administrative, Clerical and Services Union and National Disability Services) to vary the SCHADS Award to add a new clause ‘COVID-19 Care Allowance’. The application was in the context of the disability services sector.

[218] The purpose of the application was to mitigate the impact of the pandemic on employees covered by the *SCHADS Award* and one of the propositions advanced in support of the allowance was to ‘appropriately compensate employees for the extra skill and responsibility required in dealing with clients who have contracted or are suspected of having contracted COVID-19, including managing client behaviour, the maintenance of infection control measures and more rigorous hygiene protocols.’¹⁴³

[219] In considering the utilisation of ‘*extra skill and responsibility*’, the Commission stated:

‘[84] We wholly accept the fourth proposition. Although the COVID-19 pandemic has not led to the exercise of any wholly new skills and, as earlier stated, dealing with infectious diseases in the residential context has always formed part of the duties of disability support employees, the evidence of Mr Hyland, Ms Brown and Ms Fata demonstrates that providing support for a client with an actual or suspected COVID-19 has led to existing skills and responsibilities being exercised at an unprecedented level. This includes simultaneous requirements to maintain infection control protocols, rigorous hygiene procedures and physical distancing, to wear and safely dispose of PPE, to impose an isolation regime on clients and appropriately communicate the need for this to clients, to create modified systems of care and support in residential settings, and to appropriately manage the behaviour of clients and interaction between clients in response to the significant disruption to normal routines. Work intensification to this degree may constitute an increase in work value because it represents an effective change to the nature of the work and the degree of responsibility involved.’¹⁴⁴

[220] We accept that work intensification may constitute an increase in work value. The more complex issue is the assessment of whether work intensification is a permanent feature of the work in question; or a transitory phenomenon which will abate when staffing levels increase. In the context of this case, it is common ground that attracting and retaining aged care employees is a significant issue for the sector and that an increase in minimum wage rates would assist in this regard. So, if we decide to increase minimum wages and that action addresses the current understaffing will it also reduce work intensification? And, if that is the consequence can it be said that the work value of those employees now experiencing less work intensity, has declined? A cautious approach to the assessment of workload and work value is warranted. However, we also note the overwhelming evidence that the needs of those living in residential aged care facilities and those being cared for in their homes, have significantly increased in terms of clinical complexity, frailty and cognitive and mental health. There is no evidence that

¹⁴² *Application to vary the Social, Community, Home Care and Disability Services Award 2010* [2020] FWCFB 4961.

¹⁴³ [2020] FWCFB 4961 at [77].

¹⁴⁴ [2020] FWCFB 4961 at [84].

these factors are transitory or that they can be entirely mitigated by increased staffing levels, particularly where the skills necessary to deal with these needs are not appropriately recognised and valued.

[221] In our view, statements of principle from work value cases decided under different statutory regimes and pursuant to wage fixing principles which no longer exist need to be carefully considered before being relied on in giving effect to the Commission's statutory task under s.157(2). It is apparent that some of those statements of principle have no relevance at all, given they are grounded in the principle that a change in work value had to constitute a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification. But even those the ANMF suggests could safely be relied upon are likely to be of only limited assistance.

[222] The adoption of observations such as those at [190] in the *ACT Child Care Decision* runs the risk of obfuscating the Commission's statutory task of determining whether a variation of modern award minimum wages is justified by work value reasons, being reasons related to the matters in s.157(2A) (a) to (c). To adopt such statements of principles may also be said to be adding to the text of s.157 in circumstances where it is not necessary to do so to achieve the legislative purpose.

[223] The adoption of such proposed 'tests' may also be an unwarranted fetter on the exercise of what the legislature clearly intended would be a discretionary decision. As Bowen LJ observed in *Gardner v Jay*:¹⁴⁵

'When a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised it is a mistake to lay down any rules with a view to indicating the particular grooves in which the discretion should run, for if the Act or the Rules do not fetter the discretion of the Judge why should the court so do.'¹⁴⁶

[224] It is not helpful or appropriate to seek to delineate the metes and bounds of what constitutes 'work value reasons' divorced from a particular context. In our view the meaning of 'work value reasons' should focus on the text of s.157(2A). Any elaboration will develop over time, on a case-by-case basis as the Commission determines particular issues as and when they arise. We now turn to consider 3 such issues which have arisen in these proceedings.

3.3.3 *Particular issues in contention*

(i) *The 'social utility' of the work*

[225] The HSU contends that the expression 'the nature of the work' in s.157(2A) includes the social context of the work and 'the status of the work' which it submits, 'is intended to

¹⁴⁵ (1885) 29 ChD 50 at [58].

¹⁴⁶ Applied in *Evans v Bartlam* [1937] AC 473 at 488 per Lord Wright and cited with approval in *Kostokanellis v Allen* [1974] VR 596 ad *Dix v Crimes Compensation Tribunal* [1993] 1 VR 297. Also see *JJ Richards and Sons Pty Ltd v FWA* [2012] FCAFC 53 (20 April 2012) at [30] (Jessup J, with whom Tracey J agreed) and at [63] (Flick J, with whom Tracey J agreed); *Eso Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Ors* [2015] FWCFB 210 at [58]–[59].

convey the social utility or worth of particular kinds of work has been considered to be relevant to the assessment of work value.¹⁴⁷

[226] A question posed in Background Document 5 invited the HSU to identify the authorities in support of that contention. In response, the HSU referred to a series of cases¹⁴⁸ in the NSW jurisdiction which relied on the concept of the social utility or value of the work performed as a ‘corrective’ to a tendency to undervalue the work because it was performed out of the public eye or perceived in a particular way.¹⁴⁹ The HSU contends that its submission ‘is directed to achieve the same end.’¹⁵⁰

[227] In particular, the HSU submits that a consideration of the ‘social context of the work’ will ensure that all the reasons justifying an increase to minimum rates under s.157(2A) are identified and evaluated, including:

- the cohort of older persons and the physical, mental and emotional challenges of caring for a cohort with complex physical and social needs
- the increasing demands imposed by quality standards and models of person-centred care and the impact on workers of their dealings with clients and their families, and
- the increasing burden of responsibility involved in providing care for older Australians following the ‘social reckoning and watershed’ of the Royal Commission.¹⁵¹

[228] In our view to interpret the expression ‘the nature of the work’ in s.157(2A)(a) as encompassing some notion of ‘social utility’ is apt to confuse and obfuscate the Commission’s statutory task. The notion of ‘social utility’ is itself value-laden and subjective; and no means of measuring ‘social utility’ was proffered in the proceedings.

[229] Further, as elaborated in the HSU’s response to the question posed in Background Paper 5, the ‘social utility’ of the work is not propounded as a stand-alone measure of work value which is to be accorded a numerical value:

‘Rather, that term is a proxy for the requirement, in undertaking an evaluation of the work, to carry out a clear-eyed and comprehensive assessment, informed by the expert evidence, which rectifies its historical undervaluation.’¹⁵²

[230] Our assessment of the work value of the employees who are the subject of the Applications will be a comprehensive assessment informed by the evidence and will take

¹⁴⁷ HSU closing submissions dated 22 July 2022 at [42].

¹⁴⁸ *Re Crown Employees (Scientific Officers, etc – Departments of Agriculture, Mines etc) Award* [1981] AR (NSW) 1091; *Crown Librarians, Library Officers and Archivists Award Proceedings* (2002) 111 IR 48; *Crown Employees (Teachers – Department of Education) Award* [1970] 70 AR (NSW) 345.

¹⁴⁹ HSU closing submissions in reply dated 19 August 2022 at [200].

¹⁵⁰ HSU closing submissions in reply dated 19 August 2022 at [201].

¹⁵¹ HSU closing submissions in reply dated 19 August 2022 at [202].

¹⁵² HSU closing submissions in reply dated 19 August 2022 at [203].

account of the matters identified by the HSU. In such circumstances we see no utility in the adoption of a proxy term for this process.

(ii) *Dangerous work*

[231] The ANMF and HSU contend that the conditions under which aged care work is performed involves unacceptably high levels of occupational violence and aggression. Workers are said to be routinely exposed to the risk of violence, from residents and home care clients, and incidents of violence have increased over time as the proportion of patients with dementia and related illnesses has significantly increased.¹⁵³ As the HSU put it:

‘It is ... an environment in which workers are routinely exposed to a risk of violence, from both clients and their family members. Carers are witness to acts of violence between family members and clients, are pushed, threatened, and verbally abused, and sexually harassed. They carry on with their work anyway, conscious that clients need care.

This has increased steadily over the decades, as in particular the proportion of patients with dementia and related illnesses has significantly increased.’¹⁵⁴ [Footnotes omitted]

[232] Similarly, the ANMF submits:

‘Aged-care workers deal with more violence and aggression in the workplace than previously, including because of increased dementia, and because of decreased chemical and physical restraint (see Part E.9). Greater skill is required in de-escalating situations where violence and aggression is threatened.’¹⁵⁵

[233] As to the relevance of this evidence to work value, the ANMF submits:

‘The conditions under which aged care work is done involves the increasing prevalence of occupational violence and aggression. Direct care workers attend to residents with dementia or other altered mental states which can lead to them being kicked, bitten, scratched, punched, being subjected to sexual assault and verbal abuse. Direct care workers can also be subjected to violence and aggression perpetrated by residents or their family/visitors, where the behaviour is intentional. This can lead to physical and psychological injuries.

The evidence supports a finding that occupational violence and aggression is increasing with:

- (1) The increased prevalence of dementia or other altered mental states; and
- (2) The reduced use of physical and chemical restraints.

¹⁵³ HSU submissions dated 1 April 2021 at [58]–[59]; ANMF submissions dated 29 October 2021 at [107].

¹⁵⁴ HSU submissions dated 29 October 2021 at [88]–[89].

¹⁵⁵ ANMF closing submissions dated 22 July 2022 at [9].

As such, the nature of the work and conditions under which the work is done have become more challenging and dangerous.

Likewise, direct care workers must now exercise greater levels of skills and responsibility to identify, prevent and de-escalate violence and aggression.¹⁵⁶

[234] The ANMF relies on the evidence in Part E.9 of its closing submissions regarding the dangers faced by aged care workers.

[235] It is uncontroversial that residents and clients at times display violence and aggression towards care workers.¹⁵⁷

[236] The results from the 2019 ANMF National Aged Care Survey, discussed in the evidence of Paul Gilbert (Assistant Secretary of the Victorian Branch of the ANMF) provide an insight into the incidence of occupational violence in the aged care sector. In January and February 2019, the survey was sent to 13,253 Victorian ANMF aged care workers and to 312 agency nurses. Responses were received from 1,476 Registered Nurses (RNs), Enrolled Nurses (ENs) and Assistants in Nursing (AINs/PCWs). The survey respondents were asked whether certain events had occurred in the past week. The responses included that:

- 28.99 per cent of respondents (365) said that a resident had been injured because of aggression by another resident, and
- 38.13 per cent of respondents (480) said that a nurse or carer had been injured because of aggression by a resident.

[237] Mr Gilbert was not cross-examined in respect of this aspect of his evidence.¹⁵⁸

[238] Kathryn Chrisfield, Manager of the Occupational Health and Safety Unit at the ANMF, is responsible for triaging all incidents of occupational violence and aggression notified to the ANMF.¹⁵⁹ At [34] of her statement, Ms Chrisfield says:

‘The ANMF OH&S Unit have had numerous reports of staff experience kicking, biting, scratching, punching, items being thrown at them, and regularly sexual assault, as well as verbal abuse denigrating them. Members report that this can be particularly offensive as there are often racist, sexist and sexual overtones to the abuse. In my experience few facilities have implemented adequate controls to deal with it and staff continue to suffer the consequences. These physical and psychological injuries suffered by staff at the hands of residents can be significant as is evident from some workers compensation matters and staff are on occasion blamed for their part in “causing” the behaviour.’¹⁶⁰

¹⁵⁶ ANMF closing submissions dated 22 July 2022 at [568]–[571].

¹⁵⁷ Transcript, 3 May 2022, PN3808.

¹⁵⁸ Transcript, 3 May 2022, PN4007–PN4050.

¹⁵⁹ Amended witness statement of Kathryn Chrisfield dated 3 May 2022 at [31].

¹⁶⁰ Amended witness statement of Kathryn Chrisfield dated 3 May 2022 at [34].

[239] Ms Chrisfield also gave evidence that ‘aged care workers are required to attend to these residents, irrespective of their violence, and are regularly the subject of aggressive outbursts, which manifest in verbal and physical assault.’¹⁶¹ During the course of cross-examination Ms Chrisfield said that at least once per month she or her team would have occasion to call ‘Safe Work Victoria’ because of a safety incident in an aged care facility, a majority of which were in relation to occupational violence or aggression risks that were not being managed.¹⁶²

[240] Various lay witnesses gave evidence about their experiences of violence and aggression in aged care and its prevalence in the industry. Witnesses commonly identified that they had learnt strategies, including in their formal training, about how to deal with aggressive and dangerous behaviour such as using de-escalation and distraction strategies. This evidence is set out at Section D.9 of the Report to the Full Bench—Lay Witness Evidence Report published by Commissioner O’Neill on 20 June 2022 (Lay Witness Evidence Report). The examples set out below illustrate the nature of this evidence.

[241] Many witnesses stated that there was a real risk of violence when in the aged care setting.¹⁶³ For an example, Lisa Bayram, RN, stated that:

‘The work for nurses and PCAs involves occupational violence and aggression. There are two types of occupational violence and aggression we experience in the facility. Firstly, there is a clinical aspect to occupational violence and aggression from residents with cognitive impairment. The most prevalent source of this is residents with dementia. Staff have become more adept at recognising trigger points, understanding how aggression manifests in individual residents, how to react when it happens and then how to de-escalate. There is a high level of skill required to reduce these incidences. Secondly, we also experience occupational violence and aggression from visitors and families.’¹⁶⁴

[242] Donna Kelly (Extended Care Assistant (Personal carer)) gave evidence that physical aggression depends on the mood of the resident, but can happen weekly. Ms Kelly also stated that emotional abuse happens everyday, which is harder to deal with.¹⁶⁵

[243] Dianne Power’s evidence was that she would suffer some sort of occupational violence or aggression on most shifts.¹⁶⁶ Another witness, Patricia McLean, gave evidence that she had been assaulted about 150 times while working in residential aged care between 1972 and 2009.¹⁶⁷

[244] AIN Christine Spangler’s evidence was that violence and verbal abuse are much more common than when she first started this work. She has personally had her shoulder dislocated

¹⁶¹ Amended witness statement of Kathryn Chrisfield dated 3 May 2022 at [33].

¹⁶² Transcript, 3 May 2022, PN3829–PN3831.

¹⁶³ Amended witness statement of Carol Austen dated 20 May 2022 at [31]–[36].

¹⁶⁴ Witness statement of Lisa Bayram dated 29 October 2021 at [86].

¹⁶⁵ Witness statement of Donna Kelly dated 31 March 2021 at [35]–[37].

¹⁶⁶ Witness statement of Dianne Power dated 29 October 2021 at [81].

¹⁶⁷ Amended witness statement of Patricia McLean dated 9 May 2022 at [105].

which required surgery, and has been scratched, pinched, bitten and slapped, and a colleague has had her wrist broken.¹⁶⁸

[245] A number of witnesses explained that there was an increased risk of violence and aggression with dementia patients given the nature of the condition. For example, Sally Fox, an ECA, gave evidence that:

‘Dementia patients in particular can become violent because they are upset, confused, angry or just don't understand what is happening. Residents have grabbed me by the hair, pulled me into their laps, refused to let go of me, bitten me, and tried to punch and kick me. It's not their fault, they have dementia. But it is very scary and upsetting.’¹⁶⁹

[246] Witnesses working in community care similarly gave evidence about feeling unsafe on occasions.¹⁷⁰

[247] For example, Catherine Evans gave the following evidence:

‘I had one elderly client who was an alcoholic ... He was a tricky one to manage as his behaviour was very unpredictable. Sometimes I would arrive, and he would be ok, and sometimes he would be inebriated. If he was inebriated, he was a bit iffy. He could sometimes fly off the handle. There were occasions when it got a bit scary being alone in his house when he would become aggressive. We aren't really taught how to handle those situations, and it is not something you can really plan for or control. You just have to do your best to extract yourself from the situation calmly and carefully.’¹⁷¹

[248] Ms Evans also described how she would be on alert when she was in the kitchen, conscious of being cornered as there was only one entry and exit,¹⁷² and gave evidence on the risks from clients in a community care setting:

‘Because I provide aged care to people in their private homes, my ‘workplace’ changes sometimes up to 10 times a day. This can create challenges as you never quite know what you're going to be walking into. We deal with anything from clients with dementia to clients needing palliative care to those with poor mobility. Some clients may be having a bad day and exhibit behavioural issues or abusive language or behaviour. As we are, most of the time, alone in the house this means we have to be able to think on our feet and deal on our own with situations as they arise. You have to learn to be able to juggle all sorts of different scenarios in one day.

...

¹⁶⁸ Witness statement of Christine Spangler dated 29 October 2021 at [34]–[35].

¹⁶⁹ Witness statement of Sally Fox dated 29 March 2021 at [165].

¹⁷⁰ Amended witness statement of Pauline Breen dated 9 May 2022 at [29]; Amended witness statement of Susan Digney dated 19 May 2022 at [41], Witness statement of Catherine Evans dated 26 October 2021 at [41]–[51]; Witness statement of Ngari Inglis dated 19 October 2021 at [25], Witness statement of Marea Phillips dated 27 October 2021 at [36]; Amended witness statement of Jennifer Wood dated 20 May 2022 at [135]–[137].

¹⁷¹ Witness Statement of Catherine Evans dated 26 October 2021 at [45].

¹⁷² Witness Statement of Catherine Evans dated 26 October 2021 at [46].

Another client had a lot of aggression due to dementia; because he would sometimes pull knives on his carers, Regis made sure there were always two carers on this job.’¹⁷³

[249] The ANMF’s argument was neatly encapsulated by its counsel during the course of closing oral argument:

‘The provision of aged care is a service that provides care to vulnerable older people, that can't be stopped when dangerous situations arise. Aged care workers can't walk away from residents and clients in need of assistance. The requirement for care is continuous, regardless of the danger, and so it might be distinguished from other industries where work can simply be stopped until the danger is removed.

Additionally, some of the dangers involved in the provision of direct care can't be eliminated as there will always be some risk in providing direct personal care to persons suffering from cognitive impairment. Whilst it would be possible to mitigate or remove some of the dangers in aged care, legitimate policy reasons have prevented those dangers from being removed, and in some circumstances made the work more dangerous. This is exemplified by the reduced use of physical and chemical restraints ...

Navigating dangerous work conditions has involved the development of skills, as has been identified in the lay evidence report. Several witnesses gave evidence that they have learnt how to deal with behaviours and aggression in residents, including developing strategies such as distraction, de-escalation, and some of those having been identified in the Certificate III and Certificate IV training.

Witnesses commonly identified that they had learned strategies including formal training about how to deal with aggressive and dangerous behaviour, such as using de-escalation and distraction strategies. The evidence leaves little doubt that a high level of skill is required to identify, prevent and de-escalate violence and aggression and there is no basis to ignore that skill in assessing work value.

Direct care workers also bear heavily the responsibility to protect other residents from the risk of violence and aggression, and for example, Shelly Clark, an AIN, gave oral evidence about the responsibility she had to a potential victim where a resident was acting aggressively, going towards another vulnerable older person. She described it, you can't just walk away but rather, you've got to do what you can to get the attention back on you and away from the vulnerable person.

As the prevalence of dementia and other cognitive impairment increases in aged care, so too will the danger of the work and the need for direct care staff to have and exercise additional skill and responsibility for their own health and safety, and that of the residents and clients. The nature of the aged care work and conditions under which it is done have become more dangerous, which in various ways relates to work value reasons.’¹⁷⁴

¹⁷³ Witness Statement of Catherine Evans dated 26 October 2021 at [41], [43].

¹⁷⁴ Transcript, 24 August 2022, PN15000–PN15007.

[250] The evidence broadly supports the Unions' contentions regarding the incidence of occupational violence and aggression in the aged care sector. In relation to direct care workers, we accept that the nature of the work and the conditions under which the work is done has become more challenging and dangerous.

[251] As a general proposition, the Commission and its predecessor bodies have approached the issue of 'dangerous work' from an occupational health and safety perspective — that is; as far as practicable the risk should be removed or mitigated, rather than seeking to compensate employees for the risk posed from being required to work in dangerous conditions. This approach is encapsulated in the following statement of Commissioner Bennett in *Vickers Cockatoo Dockyard Pty Ltd v The Federated Engine Drivers' and Firemen's Association of Australasia*:

'I am of the opinion that if the work in question is dangerous then it should be a matter of removing the danger rather than the fixing of a penalty amount.'¹⁷⁵

[252] However, as the Full Bench recently observed in the *SCHADS Award COVID-19 Care Allowance case*:

'this principle has its limitations where the danger cannot be removed and employees are nonetheless required to perform the work as an essential service.'¹⁷⁶

[253] We accept that while the dangers encountered by direct care workers in the aged care sector are capable of being mitigated to some extent, they cannot be entirely removed given the nature of the work performed. It is appropriate that this consideration be taken into account in our assessment of the work value reasons justifying the amount direct care workers should be paid.

[254] It is also apparent that direct care workers are called upon to exercise considerable skill in order to identify, prevent and de-escalate violence and aggression. This too is a work value consideration to be taken into account.

(iii) *Attraction and retention*

[255] The ANMF submits that evidence going to attraction and retention is relevant to both:

- the identification and assessment of 'work value reasons' under s.157(2A), and
- achieving the modern awards objective and minimum wages objective.¹⁷⁷

[256] In this part of the decision we are only dealing with the first proposition; we deal with the second proposition in Chapter 8.

¹⁷⁵ (1981) 250 CAR 338 at 338.

¹⁷⁶ *Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010* [2020] FWCFB 4961 at [86].

¹⁷⁷ ANMF closing submissions in reply dated 17 August 2022 at [30].

[257] As to the first proposition, the ANMF submits that the Commission has evidence from direct care workers arising from their own assessment of the value of the work they are performing.¹⁷⁸ That evidence is said to consistently be to the effect that the remuneration received by direct care workers fails to properly value their work:

‘Evidence about the adequacy of wages paid that is related to the nature of the work, the level of skill or responsibility involved in doing the work and/or the conditions under which the work is done, will be relevant to an assessment of “*work value reasons*” and to determining whether a minimum wage variation is justified by work value reasons.’¹⁷⁹

[258] In particular, the ANMF submits:

‘Direct care workers are leaving the aged care industry in droves. A reasonable hypothesis about why this is occurring is that workers have conducted their own assessment of the value of the work they are performing and decided that the amount they are paid is not sufficient, having regard to:

- (1) the nature of the work;
- (2) the level of skill or responsibility involved in doing the work; and/or
- (3) the conditions under which the work is done.

Here, the Commission has evidence from direct care workers about their own assessment of the value of the work they are performing. Witnesses in this proceeding have told the Commission that:

(1) *“The work we do is undervalued and people don’t realise the amount or complexity of the work and the range of skills involved by all of us in the nursing team.”*¹⁸⁰

(2) *“I do not think my work is valued. I do not think people know the real circumstances of aged care work, unless they work in it.”*¹⁸¹

(3) *“I think aged care work is undervalued for the amount of care and energy that we put in; people don’t see the extra work that AINs put in.”*¹⁸²

(4) *“I do not think that the pay is adequate for the work that is done.”*¹⁸³

¹⁷⁸ ANMF closing submissions in reply dated 17 August 2022 at [31].

¹⁷⁹ ANMF closing submissions in reply dated 17 August 2022 at [32].

¹⁸⁰ Amended witness statement of Rose Nasemena dated 6 May 2022 at [56].

¹⁸¹ Statement of Christine Spangler dated 29 October 2021 at [40].

¹⁸² Statement of Dianne Power dated 29 October 2021 at [91].

¹⁸³ Statement of Linda Hardman dated 29 October 2021 at [71].

(5) *“I love caring for old people, but I don’t do it for the money. I think if we want to offer better quality care, people working in aged care need to be better paid.”*^{184,185}

[259] The ANMF submits that the nature of this evidence was perhaps best encapsulated by Gerard Hayes (President of the HSU and Secretary of the HSU NSW/ACT Branch) who, under cross-examination, described aged care workers as:

‘Underpaid compared to someone working at Bunnings, someone working at a pub, someone working twisting a sign on the road. It’s one thing in my mind to, you know, drop a can, you know, when you’re stacking shelves in Woollies, it’s another thing to drop a person, fracture their hip and they die.’¹⁸⁶

[260] During the course of the hearing on 24 August 2022, the Commission asked the ANMF’s counsel to identify where workers had given evidence of people leaving aged care work based, in effect, on their own work value assessment. In reply, the ANMF identified the following evidence:

‘As referred to at ANMF CS [531], Suzanne Hewson (EN) said in her statement that she intended to go into a more remunerative field of nursing work, and by the time of her oral evidence she had in fact done so.

Irene McInerney (RN) said at [45] that many staff decided it was too hard on them mentally and physically and left aged care because the pay is not attractive enough for a difficult work environment.

Dianne Power (AIN / PCW) said at [99] that, “Staff are leaving Regis for higher paid work in the disability sector and public sector aged care facilities,” and that, “In my view, based on my own experience, if wage rates were higher there would be a better retention of staff at Regis.”

Pauline Breen (EN) said at [33] that she is considering retiring but would likely delay this if her pay increased. Christine Spangler (AIN / PCW) said the same thing (at [41]).

Wendy Knights (EN) said at [95] as follows:

“My observations is that level of wages means it is difficult to retain staff. Nurses are often talking about workloads and pay rates. The work is hard and demanding, and sometimes dangerous. You are sometimes abused by residents, or families. You are exposed to bodily fluids and waste. But you could earn as much or more doing a job that did not have any of these difficulties. At the moment, it seems to me that the people that tend to be retained in aged care are people who really have a passion for caring work.”

¹⁸⁴ Witness Statement of Sheree Clarke dated 29 October 2021 at [83]–[84].

¹⁸⁵ ANMF closing submissions in reply dated 17 August 2022 at [189]–[190].

¹⁸⁶ Transcript, 26 April 2022, PN570.

Hazel Bucher (NP) said at [32] that aged care work is often the second choice for graduate nurses if they are unable to obtain a graduate position in an acute hospital, and is also evidenced by the lower pay rate for nurses in this (i.e., the aged care) sector.

Mark Castieau, an HSU witness and chef, said at [20] of his reply statement dated 20 April 2022 that people who were leaving aged care had said to him, “I’m going to get a job stacking shelves at Woolworths, you get paid more money.”

In the Royal Commission Final Report, Volume 2, page 214, the Commission said this: “According to the 2016 National Aged Care Workforce Census and Survey, 30% of the residential direct care workforce and 40% of the home care workforce work fewer hours than they would like to. The survey showed that a desire for better pay and preferred working hours are among the most common reasons that aged care workers leave their jobs. Aged care is widely perceived to be a low status job which offers poor rates of pay.”¹⁸⁷

[261] The ANMF’s contention that attraction and retention is a matter relevant to work value attracted little support from other parties.

[262] The Joint Employers concede that the notion of attraction and retention may be a relevant consideration in relation to the modern awards objective but submit ‘it would not be a relevant consideration to the assessment of work value and the determination of the quantum arising.’¹⁸⁸

[263] We begin our consideration of the ANMF’s submission by observing that wage fixing tribunals, at federal and state level, have consistently refused to set minimum award wages on the basis of attracting and retaining employees.¹⁸⁹ As Commissioner Winter put it in *Re Metal Trades Award; Re State Electricity Commission of Victoria*:

‘It seems that it is difficult for anyone other than an employer of labour to make out a case for an attraction wage. Only the employer is in a position to know whether he wants to attract labour or not. If he does, he either pays higher salaries or wages or offers some other cardinal inducement. It is an inherent part of the inexorable law of supply and demand. To say to an employer that he must have an attraction wage when he does not want an attraction wage is like trying to force food down some one who does not want it.

He is the one who must make the decision as to whether he wants to attract labour and any question of an attraction wage is bound up with his decision.

¹⁸⁷ ANMF submissions – evidence of workers having left aged care for work value reasons dated 25 August 2022 at [2]–[9].

¹⁸⁸ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 at [6.5].

¹⁸⁹ See *Re Railways Professional Officers Award* (1958) 89 CAR 40; *Re Metal Trades Award; Re State Electricity Commission of Victoria* (1964) 106 CAR 535; *Local Courts Anomaly Case* [1989] AR (NSW) 638 at 645; *Re Equal Remuneration Principle* [2000] NSWIRComm 113, 97 IR 177 at 215; *Health Employees Pharmacists (State) Award and other Awards* [2003] NSWIRComm 453, 132 IR 244 at [46]–[47].

The Commission is not persuaded that wage margins should be increased herein on this ground.¹⁹⁰

[264] The only exception to this general approach has been where a long-term shortage of employees has a consequential effect on the work value of the employees performing the work.¹⁹¹

[265] The ANMF acknowledges that decisions of industrial tribunals have considered ‘attraction rates’ to have no proper role to play in the fixation of minimum wages but submits:

‘The ANMF’s submission is not that the Commission would set “*attraction rates*”—*i.e.*, wage rates set at a level which are perceived as necessary for an employer to attract and retain sufficient labour. The submission is rather than the Commission is entitled, in deciding whether particular rates properly reflect the skill involved in doing a work, its nature, and the conditions in which it is done, to look to evidence of workers voting with their feet, or workers’ assessments of the comparability of different kinds of work.’¹⁹²

[266] It seems to us that the submission put amounts to little more than a reframing of the basic proposition: that workers are leaving the sector due, in part at least, to low pay and such workers may remain in the sector (and other workers attracted) if wages were increased. It seems to us that the proposition advanced is contrary to the long standing approach taken to the assessment of work value and the fixation of minimum wages.

[267] Further, the evidence upon which the ANMF relies is opinion evidence based on the perceptions of direct care workers, a point acknowledged by the ANMF. But the ANMF contends that:

‘Those workers know the nature of their work, the level of skill and responsibility involved in doing their work and the conditions under which their work is done. They know only too well what they are paid for that work, the costs of living and, it may be inferred, what they could be paid for performing different work. This evidence from direct care workers is necessary to obtain an adequate understanding of the value of their work.’¹⁹³

[268] We reject the proposition in the last sentence of the above extract. Contrary to that proposition, it is not necessary that we take account of the subjective opinions of some aged care workers in order to obtain an adequate understanding of the value of their work. The value of the work of the employees who are the subject of the Applications is to be ascertained by reference to the evidence relating to the matters in s.157(2A)(a)–(c).

¹⁹⁰ *Re Metal Trades Award; Re State Electricity Commission of Victoria* (1964) 106 CAR 535 at [566].

¹⁹¹ See *Public Hospital Nurses (State) Award (No.3)* [2002] NSWIRComm 325, 121 IR 28. Also see generally *Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010* [2020] FWCFB 4961 at [80].

¹⁹² ANMF closing submissions in reply dated 17 August 2022 at [34].

¹⁹³ ANMF closing submissions in reply dated 17 August 2022 at [191].

[269] Contrary to the ANMF's contention, we are not persuaded that evidence as to the impacts of wages on job attraction and retention relied on by the ANMF is relevant to the identification or assessment of 'work value reasons' as defined in s.157(2A).

3.4 Modern Awards Objective

[270] The modern awards objective is defined in s.134:

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (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; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.'

This is the **modern awards objective**.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's **modern award powers**, which are:

- (a) the FWC’s functions or powers under this Part; and
- (b) the FWC’s functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

[271] The obligation to take into account the matters in ss.134(1)(a)–(h) (the s.134 considerations) means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.¹⁹⁴ No particular primacy is attached to any of the s.134 considerations,¹⁹⁵ and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[272] It is not necessary for the Commission to make a finding that an award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.¹⁹⁶ Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated — many of them may be characterised as broad social objectives.¹⁹⁷ In giving effect to the modern awards objective, the Commission is performing an evaluative function taking into account the s.134 considerations and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[273] While the considerations in ss.134(a)–(h) inform the evaluation of what might constitute a ‘fair and relevant minimum safety net of terms and conditions’, they do not necessarily exhaust the matters which the Commission might consider to be relevant to the determination of a fair and relevant minimum safety net. The range of relevant matters ‘must be determined by implication from the subject matter, scope and purpose of the’ FW Act.¹⁹⁸

[274] Fairness in the context of providing a ‘fair and relevant minimum safety net’ is to be assessed from the perspective of the employees and employers covered by the modern award in question. As the Full Court observed in the *Penalty Rates Review*:

‘it cannot be doubted that the perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances within a permissible conception of a “fair and relevant” safety net taking into account the s.134(1)(a)-(h) matters.’¹⁹⁹

¹⁹⁴ *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]–[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56].

¹⁹⁵ *Penalty Rates Review* (2017) 253 FCR 368 at [33].

¹⁹⁶ *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]–[106].

¹⁹⁷ *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]–[106].

¹⁹⁸ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39–40. See also *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [48].

¹⁹⁹ (2017) 253 FCR 368 at [53].

Further, in the *4 Yearly Review of Modern Awards – Penalty Rates*²⁰⁰ (the *Penalty Rates Decision*), the Full Bench rejected the proposition that the reference to a ‘minimum safety net’ in s.134(1) means the ‘least ... possible’ to create a ‘minimum floor’:

‘the argument advanced pays scant regard to the fact the modern awards objective is a composite expression which requires that modern awards, together with the NES, provide “a fair and relevant minimum safety net of terms and conditions”. The joint employer reply submission gives insufficient weight to the statutory directive that the minimum safety net be “fair and relevant”. Further, in giving effect to the modern awards objective the Commission is required to take into account the s.134 considerations, one of which is “relative living standards and the needs of the low paid” (s.134(1)(a)). The matters identified tell against the proposition advanced in the joint employer reply submission.’²⁰¹

[275] Section 138 was considered by the Full Court in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd*²⁰²:

‘Section 138 is entitled “Achieving the Modern Awards Objective” and is as follows:

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

Terms that “it is permitted to include” are dealt with in subdiv B of Div 3 (ss 139–142), and terms that “it is required to include” are dealt with in subdiv C of Div 3 (ss 143–149D). The words “only to extent necessary” in s 138 emphasise the fact that it is the minimum safety net and minimum wages objective to which modern awards are directed. Other terms and conditions beyond a minimum are to be the product of enterprise bargaining, and enterprise agreements under Part 2-4.’²⁰³ [Emphasis added]

[276] Going on to describe the operation of s.138 in the context of a 4 yearly review of modern awards under then s.156, the Full Court said:

‘The [4 yearly] review is at large, to ensure that the modern awards objective is being met; that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 — terms may and must be included only to the extent necessary to achieve such an objective.

Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern awards objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the

²⁰⁰ [2017] FWCFB 1001.

²⁰¹ [2017] FWCFB 1001 at [128].

²⁰² [2017] FCAFC 123; (2017) 252 FCR 337.

²⁰³ [2017] FCAFC 123; (2017) 252 FCR 337 at [22]–[23].

purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.²⁰⁴ [Emphasis added]

[277] There is a distinction between what is ‘necessary’ and what is merely ‘desirable’. Necessary means that which ‘must be done’; ‘that which is desirable does not carry the same imperative for action’.²⁰⁵

[278] What is ‘necessary’ to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances of the particular modern award, the terms of any proposed variation and the submissions and evidence.²⁰⁶ Reasonable minds may differ as to whether a proposed variation is necessary (within the meaning of s.138), as opposed to merely desirable.²⁰⁷

[279] The only contentious issue with respect to the foregoing observations concerns the meaning of the phrase ‘fair and relevant’ in s.134(1) in the context of an application to vary minimum wages.²⁰⁸

[280] The HSU submits that in the context of minimum wages the phrase ‘fair and relevant’:

‘should be interpreted as referring to rates which properly remunerate workers for the value of their work, taking into account all surrounding factors, and are not so low compared to general market standards as to have no relevance to the industry, for example in the context of bargaining.’²⁰⁹

[281] The ANMF agrees with the HSU’s submission and also submits that it is ‘not an exhaustive statement of the meaning of the phrase ‘fair and relevant’ in the context of minimum wages.’²¹⁰

[282] The Joint Employers submit that the Commission has previously considered the concept of ‘fair and relevant’ in the *Penalty Rates Decision* and says that the submissions of the HSU go ‘beyond the scope of that decision and ask the Commission to set rates which are “market rates”’. The Joint Employers argue that the Commission ‘should act cautiously if considering departing from the approach in the [*Penalty Rates Decision*].’²¹¹

²⁰⁴ [2017] FCAFC 123; (2017) 252 FCR 337 at [28]–[29]; cited with approval in *Shop, Distributive and Allied Employees Association v National Retail Association (No. 2)* (2012) 205 FCR 227 at [35].

²⁰⁵ *Shop, Distributive and Allied Employees Association v National Retail Association (No. 2)* (2012) 205 FCR 227 at [46].

²⁰⁶ See generally *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161; (2017) 253 FCR 368.

²⁰⁷ *4 Yearly Review of Modern Awards –Penalty Rates* [2017] FWCFB 1001 at [136], citing *Shop, Distributive and Allied Employees Association v National Retail Association (No. 2)* (2012) 205 FCR 227 at [46].

²⁰⁸ The HSU, the ANMF and the Joint Employers do not contest the propositions set out at [89] to [107] in Background Document 1.

²⁰⁹ HSU submissions dated 1 April 2021 at [45].

²¹⁰ ANMF closing submissions dated 22 July 2022 at [64].

²¹¹ Joint Employers closing submissions dated 22 July 2022 Annexure P at [3.21].

[283] The Joint Employers maintain that:

‘the meaning of the word “fair” in relation to establishing a fair and relevant safety net is founded in the *Equal Remuneration Decision 2015* which states:

“We consider, in the context of modern awards establishing minimum rates for various classifications differentiated by occupation, trade, calling, skill and/or experience, that a necessary element of the statutory requirement for ‘fair minimum wages’ is that the level of those wages bears a proper relationship to the value of the work performed by the workers in question.”²¹²

The Commission then goes onto consider what is meant by “relevant” by stating:

“[120] Second, the word ‘relevant’ is defined in the Macquarie Dictionary (6th Edition) to mean ‘bearing upon or connected with the matter in hand; to the purpose; pertinent’. In the context of s.134(1) we think the word ‘relevant’ is intended to convey that a modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s.138:

‘527 ... the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net that accords with community standards and expectations.’ (emphasis added)^{213,214}

[284] The Joint Employers submit that from the above statements ‘it can be ascertained that the concept of “fair and relevant” is about providing a protective minimum safety net, that is suited to the contemporary circumstances of the employer and employee, not minimum wages that are in line with general market standards.’²¹⁵

[285] A ‘fair and relevant minimum safety net of terms and conditions’ is a composite phrase within which ‘fair and relevant’ are adjectives describing the qualities of the minimum safety net to which the Commission’s duty relates. This composite phrase requires that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’, taking into account the s.134 considerations.²¹⁶ As the Full Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*:

‘Those qualities are broadly conceived and will often involve competing value judgments about broad questions of social and economic policy. As such, the FWC is to perform the required evaluative function taking into account the s 134(1)(a)-(h) matters and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance. It is entitled to conceptualise those criteria by reference to the potential universe of relevant facts, relevance being determined by implication from the subject matter, scope and purpose of the Fair Work

²¹² [2015] FWCFB 8200 at [272].

²¹³ [2017] FWCFB 1001 at [120].

²¹⁴ Joint Employers closing submissions dated 22 July 2022 Annexure P at [3.22]–[3.23].

²¹⁵ Joint Employers closing submissions dated 22 July 2022 Annexure P at [3.24].

²¹⁶ *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) 253 FCR 368 at [41]–[44].

Act ... As discussed “fair and relevant”, which are best approached as a composite phrase, are broad concepts to be evaluated by the FWC taking into account the s 134(1)(a)-(h) matters and such other facts, matters and circumstances as are within the subject matter, scope and purpose of the Fair Work Act. Contemporary circumstances are called up for consideration in both respects, but do not exhaust the universe of potentially relevant facts, matters and circumstances.²¹⁷

[286] We accept that a fair and relevant safety net is one which provides minimum wage rates at a level which bears a proper relationship to the value of the work performed by the workers in receipt of those wages.

[287] The second element of the proposition advanced by the HSU is that in the context of minimum wages the phrase ‘fair and relevant’ should be interpreted as referring to wage rates which ‘are not so low compared to general market standards as to have no relevance to the industry, for example in the context of bargaining.’

[288] We do not propose to adopt that element of the proposition advanced. As formulated it is vague and uncertain. What is meant by ‘general market standards’? Is it intended to be reference to the actual rates paid in a particular industry and, if so, is the proposition that the minimum award rate should not be ‘so low... as to have no relevance to the industry’? In other words, is the proposition directed at a circumstance where all or most of the employees in an industry are in receipt of wages substantially higher than the minimum award rates? If that is the proposition being advanced then it does not seem to have any practical relevance to the matter before us, given that the evidence is that, with limited exceptions, most aged care workers are paid at or only slightly above the minimum rates prescribed in the relevant Awards.²¹⁸

3.5 Minimum Wages Objective

[289] The minimum wages objective is defined in s.284:

284 The minimum wages objective

What is the minimum wages objective?

- (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
- (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
 - (b) promoting social inclusion through increased workforce participation; and
 - (c) relative living standards and the needs of the low paid; and
 - (d) the principle of equal remuneration for work of equal or comparable value; and

²¹⁷ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) 253 FCR 368 at [49], [65].

²¹⁸ Commonwealth submissions dated 8 August 2022 at [170].

- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the *minimum wages objective*.

When does the minimum wages objective apply?

- (2) The minimum wages objective applies to the performance or exercise of:
 - (a) the FWC's functions or powers under this Part; and
 - (b) the FWC's functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the modern awards objective also applies (see section 134).

Meaning of *modern award minimum wages*

- (3) *Modern award minimum wages* are the rates of minimum wages in modern awards, including:
 - (a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and
 - (b) casual loadings; and
 - (c) piece rates.

Meaning of setting and varying modern award minimum wages

- (4) **Setting** modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award. **Varying** modern award minimum wages is varying the current rate of one or more modern award minimum wages.

[290] As noted by the Expert Panel in the *2019-20 Annual Wage Review decision*,²¹⁹ 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. Both the minimum wages objective and the modern awards objective require the Commission to take into account:

²¹⁹ [2020] FWCFB 3500 at [205].

- promoting social inclusion through increased workforce participation²²⁰
- relative living standards and the needs of the low paid²²¹
- the principle of equal remuneration for work of equal or comparable value,²²² and
- various economic considerations.²²³

[291] Similarly to the modern awards objective, the Commission’s task in s.284 involves an ‘evaluative exercise’ which is informed by the considerations in ss.284(1)(a)–(e).²²⁴ No particular primacy attaches to any of the s.284(1) considerations, and a degree of tension exists between some of these considerations.²²⁵ It is common ground that the consideration in s.284(1)(e) is not relevant in the context of the Applications.²²⁶

[292] A safety net of ‘fair minimum wages’ includes the perspective of employers and employees, and the Commission is required to take into account all of the relevant statutory considerations,²²⁷ but those expressly listed in s.284(1) do not necessarily exhaust the matters which the Commission might properly consider to be relevant.²²⁸

3.6 Summary

[293] The following propositions can be distilled from the discussion in this chapter:

Section 157(2)

1. Section 157(2) confers a discretion to make a determination varying modern award minimum wages which is enlivened if the Commission is satisfied as to the matters in both ss.157(2)(a) and (b).
2. Section 157(2)(a) provides that the Commission must be satisfied that the new rate of minimum wages provided for under the determination must be ‘justified by work value reasons’. ‘Justified’ is to be given its ordinary meaning and in the context of s.157(2)(a) means that the ‘work value reasons’ show the variation of modern award minimum wages to be just, right or warranted, or provide a

²²⁰ FW Act s.284(1)(b) and s.134(1)(c).

²²¹ FW Act s.284(1)(c) and s.134(1)(a).

²²² FW Act s.284(1)(d) and s.134(1)(e).

²²³ FW Act s.284(1)(a) and ss.134(1)(d), (f) and (h).

²²⁴ *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [208]; *Re IEU* [2021] FWCFB 2051 at [221], citing *Re Annual Wage Review 2017–18* (2018) 279 IR 215 at [14].

²²⁵ *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [210].

²²⁶ HSU closing submissions dated 22 July 2022 at [64]; Joint Employers closing submissions dated 22 July 2022 Annexure P at [3.28]; ANMF closing submissions dated 22 July 2022 at [70].

²²⁷ *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [208]; *Re IEU* [2021] FWCFB 2051 at [221], citing *Re Annual Wage Review 2017–18* (2018) 279 IR 215 at [17].

²²⁸ *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [209]; *Re IEU* [2021] FWCFB 2051 at [221], citing *Re Annual Wage Review 2017–18* (2018) 279 IR 215 at [14].

satisfactory reason for the variation. Whether a variation is justified by work value reasons requires the formation of a broad evaluative judgment.

3. Section 157(2)(b) provides that the Commission must be satisfied that ‘making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.’ This condition will be met if the Commission is satisfied that making the proposed variation determination in these proceedings is necessary to achieve the modern awards objective.

Section 157(2A)

1. Section 157(2A) can be said to exhaustively define ‘work value reasons’ in the sense that there are no other express provisions in the FW Act which inform the meaning of s.157(2A), although the objects of the FW Act will inform the interpretation and application of the concepts within s.157(2A).²²⁹
2. The reasons which justify the amount employees should be paid for doing a particular kind of work must be ‘related to’ any one or more of the 3 matters in s.157(2A)(a) to (c). There is nothing in the statutory context to suggest that the expression ‘related to’ in s.157(2A) was not intended to have a wide operation or that an indirect, but relevant, connection would not be a sufficient relationship for present purposes. The expression ‘related to’ is one of broad import that requires a sufficient connection or association between the 2 subject matters; the connection must be relevant and not remote or accidental.
3. Section 157(2A) does not contain any requirement that the ‘work value reasons’ consist of identified changes in work value measured from a fixed datum point. But, in order to ensure there is no ‘double counting’, it is likely the Commission would adopt an appropriate datum point from which to measure work value change, where the work has previously been properly valued. The datum point would generally be the last occasion on which work value considerations have been taken into account in a proper way, that is, in a way which, according to the current assessment of the Commission, correctly valued the work. A past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.
4. Where the wage rates in a modern award have not previously been the subject of a proper work value consideration, there can be no implicit assumption that at the time the award was made its wage rates were consistent with the modern awards objective or that they were properly fixed.
5. Section 157(2A) does not incorporate the test which operated under wage fixing principles of the past that the change in the nature of work should constitute ‘such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.’ There is simply

²²⁹ As we note in the overview to this chapter, the general provisions relating to the performance of the Commission’s functions also apply to these proceedings.

no basis for introducing such an additional requirement to the exercise of the discretion in s.157(2), which might have been, but which has not been, enacted.

6. In the *Pharmacy Decision*,²³⁰ the Full Bench described in detail the development by the AIRC of an approach whereby the proper fixation of award minimum rates of pay required an alignment between key classifications in the relevant award and classifications with equivalent qualification and skill levels in the Metal Industry classification structure.
7. Having regard to relativities within and between awards remains an appropriate and relevant exercise in performing the Commission's statutory task in s.157(2). Aligning rates of pay in one modern award with classifications in other modern awards with similar qualification requirements supports a system of fairness, certainty and stability. The C10 Metals Framework Alignment Approach and the AQF are useful tools in this regard. However, such an approach has its limitations, in particular:
 - alignment with external relativities is not determinative of work value
 - while qualifications provide an indicator of the level of skill involved in particular work, factors other than qualifications have a bearing on the level of skill involved in doing the work, including 'invisible skills' as discussed in Chapter 7.2.6
 - the expert evidence supports the proposition that the alignment of feminised work against masculinised benchmarks (such as in the C10 Metals Framework Alignment Approach) is a barrier to the proper assessment of work value in female-dominated industries and occupations (see Chapter 7.2.5), and
 - alignment with external relativities is not a substitute for the Commission's statutory task of determining whether a variation of the relevant modern award rates of pay is justified by 'work value reasons' (being reasons related to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is done).
8. In exercising the powers to vary modern award minimum wages, the Full Bench must take into account the rate of the national minimum wage as currently set in a national minimum wage order (s.135(2)).
9. Statements of principle from work value cases decided under different statutory regimes and pursuant to wage fixing principles which no longer exist are likely to be of only limited assistance in the Commission's statutory task under s.157(2). Some of those statements of principle have no relevance at all, given they are grounded in wage fixing principles which required a change in work value to constitute a significant net addition to work requirements. The adoption

²³⁰ *Pharmacy Decision* at [150]–[161].

of the observations such as those at [190] in the *ACT Child Care Decision* runs the risk of obfuscating the Commission's statutory task of determining whether a variation of modern award minimum wages is justified by work value reasons, being reasons related to the matters in s.157(2A)(a)–(c). To adopt such an approach may also be said to be adding to the text of s.157(2A) in circumstances where it is not necessary to do so in order to achieve the legislative purpose, and may also be an unwarranted fetter on the exercise of what the legislature clearly intended would be a discretionary decision.

10. It is not helpful or appropriate to seek to delineate the metes and bounds of what constitutes 'work value reasons' divorced from a particular context. In our view the meaning of 'work value reasons' should focus on the text of s.157(2A). Any elaboration will develop over time, on a case-by-case basis as the Commission determines particular issues as and when they arise.

Section 157(2A) particular issues

(i) The 'social utility' of the work

1. Interpreting the expression 'the nature of the work' in s.157(2A)(a) as encompassing some notion of 'social utility' is apt to confuse and obfuscate the Commission's statutory task. The notion of 'social utility' is itself value-laden and subjective; no means of measuring 'social utility' was proffered in the proceedings. Further, the 'social utility' of the work was not advanced as a measure of work value which could be accorded a numerical value, rather it was put as a proxy for the requirement to carry out a comprehensive assessment of the value of the work. As our assessment of the work value of the employees who are the subject of the Applications will be a comprehensive assessment informed by the evidence, we see no utility in adopting this as a proxy term for measuring work value.

(ii) Dangerous work

2. In relation to direct care workers, we accept that the nature of the work and the conditions under which the work is done has become more challenging and dangerous.
3. As a general proposition, the Commission and its predecessor bodies have approached the issue of 'dangerous work' from an occupational health and safety perspective—that is; as far as practicable the risk should be removed or mitigated—rather than seeking to compensate employees for the risk posed from being required to work in dangerous conditions. But this principle has limitations where the danger cannot be removed and employees are nonetheless required to perform the work as an essential service.
4. We accept that while the dangers encountered by direct care workers in the aged care sector are capable of being mitigated to some extent, they cannot be entirely removed given the nature of the work performed. It is appropriate that this

consideration be taken into account in our assessment of the work value reasons justifying the amount direct care workers should be paid.

5. It is also apparent that direct care workers are called upon to exercise considerable skill in order to identify, prevent and de-escalate violence and aggression. This too is a work value consideration to be taken into account.

(iii) Attraction and retention

6. The proposition that evidence from direct care workers going to attraction and retention is relevant to the identification and assessment of ‘work value reasons’ under s.157(2A) is rejected. It is not necessary that the Commission take into account the subjective opinions of some direct care workers in order to obtain an adequate understanding of the value of their work. The value of the work of the employees who are the subject of the Applications is to be ascertained by reference to the evidence relating to the matters in s.157(2A)(a)–(c).

Modern Awards Objective

1. We accept that a fair and relevant safety net is one which provides minimum wage rates at a level which bears a proper relationship to the value of the work performed by the workers in receipt of those wages.
2. We reject the proposition advanced by the HSU that in the context of minimum wages the phrase ‘fair and relevant’ should be interpreted as referring to wage rates which ‘are not so low compared to general market standards as to have no relevance to the industry, for example in the context of bargaining.’
3. As formulated the HSU proposition is vague and uncertain. To the extent the proposition is directed at a circumstance where all or most of the employees in an industry are in receipt of wages substantially higher than the minimum award rates, it does not seem to have any practical relevance to the matter before us. The evidence is that, with limited exceptions, most aged care workers are paid at or only slightly above the minimum rates prescribed in the relevant awards.

Meeting the requirements of ss.135 and 157

1. The requirements for the Full Bench to make a determination varying modern award minimum wages in these proceedings will be met if:
 - the Full Bench takes into account the rate of the national minimum wage as currently set in a national minimum wage order (s.135(2))
 - the Full Bench is satisfied that the proposed variation is justified by work value reasons (s.157(2)(a))

- the Full Bench is satisfied that making the proposed variation determination in these proceedings is necessary to achieve the modern awards objective (s.157(2)(b)), and
- making the proposed variation is necessary to achieve the minimum wages objective (together with the previous point, satisfying s.138).

4. Summary of submissions

[294] The HSU made the following submissions:

- [Outline of evidence and draft orders](#) dated 14 December 2020
- [Submission](#) dated 1 April 2021
- [Submission – information and data](#) dated 15 September 2021
- [Submission](#) dated 29 October 2021
- [Submissions in reply](#) dated 21 April 2022
- [Submissions – objections to evidence](#) dated 21 April 2022
- Closing submissions dated [22 July 2022](#) and [2 August 2022](#)
- [Submissions in reply to the Commonwealth](#) dated 17 August 2022
- [Closing submissions in reply](#) dated 19 August 2022
- [Submission – response to question on supervision](#) dated 26 August 2022
- [Submission – additions to Background Document 9](#) dated 1 September 2022

[295] The ANMF made the following submissions:

- [Submission](#) dated 1 April 2021
- [Submission](#) dated 29 October 2021
- [Submission in reply and witness statement](#) dated 21 April 2022
- [Closing submissions](#) dated 22 July 2022
- [Closing submissions in reply](#) dated 17 August 2022
- [Submission – evidence of workers having left aged care for work value reasons](#) dated 25 August 2022
- [Submission – response to question 8 of Background Document 8](#) and rates comparison dated 25 August 2022
- [Submission – removing aged care workers from the Nurses Award 2020](#) dated 30 August 2022

[296] The Uwu made the following submissions:

- [Outline of submissions and witness statements](#) dated 1 April 2021
- [Submission and witness statements](#) dated 29 October 2021
- [Submissions in reply and witness statements](#) dated 21 April 2022
- [Submissions – objections to evidence](#) dated 21 April 2022
- [Closing submissions](#) dated 25 July 2022
- [Closing submissions in reply](#) dated 19 August 2022
- [Submission – amendment to Background Document 9](#) dated 31 August 2022.

[297] The Joint Employers made the following submissions:

- [Submission dated 4 March 2022](#)
- [Witness statements and evidence dated 4 March 2022](#)
- [Reference Material Document](#) dated 4 March 2022
- [Submission – objections to evidence](#) dated 21 April 2022
- Closing submissions dated [22 July 2022](#) and [27 July 2022](#)
- [Submissions in reply to the Commonwealth](#) dated 17 August 2022
- [Closing submissions in reply](#) dated 19 August 2022
- [Submission – response to Background Documents 6, 7 and 8](#) dated 29 August 2022.

[298] The Commonwealth made the following submissions:

- [Submission](#) dated 8 August 2022
- [Submission – response to questions from the Full Bench](#) dated 29 August 2022.

[299] On 17 December 2021, a [Consensus Statement](#) was received from the following stakeholders in the aged care sector:

- ACSA
- Aged Care Industry Association (ACIA)
- Aged Care Reform Network
- ANMF
- Carers Australia
- Council on the Ageing (COTA)
- Federation of Ethnic Communities' Councils of Australia (FECCA)
- HSU
- LASA
- National Seniors Australia
- Older Persons Advocacy Network (OPAN)
- UWU

[300] Background Document 5 sets out a summary of the closing submissions of the Unions and Joint Employers. Background Document 6 sets out a summary of the Commonwealth's submissions and the parties' submissions in reply to the Commonwealth. The parties' closing submissions in reply are summarised in Background Document 8. Accordingly, we do not propose to provide a further summary of these submissions. We refer to aspects of the submissions advanced by the Unions, the Joint Employers and the Commonwealth elsewhere in this decision.

[301] The Chamber of Commerce and Industry of Western Australia (CCIWA) also made a [submission](#). The CCIWA opposes the Applications and submits that the Unions have been unable to identify the extent to which the nature, conditions, skills and responsibilities of work across all classifications in the aged care sector have changed.²³¹ Other than filing its initial submission the CCIWA did not participate in the evidentiary phase of the proceedings and filed no further material. Background Document 1 posed the following question to the CCIWA:

‘Question 17 of BD1: Noting that the CCIWA did not participate in the evidentiary phase of the hearings who do the CCIWA represent in the proceedings?’

[302] The CCIWA did not provide a response to the question posed in Background Document 1 and we put a further question to CCIWA in Background Document 5:

‘Question 3 for the CCIWA: the CCIWA is asked to respond to question 17 of BD1. If the CCIWA does not respond, the Commission may assume that the CCIWA does not represent anyone covered by any of the awards subject to these proceedings and as a result may not place weight on their submissions.’

[303] As noted in Background Document 8, the CCIWA did not make a submission in response to the question posed in Background Document 5. Background Document 8 also summarises the HSU submission of 19 August 2022 as follows:

‘The HSU notes that although the CCIWA filed lengthy submissions at the outset of proceedings, they have not been heard from since. The HSU submits that CCIWA has no direct or indirect interest in the industry and that their submissions should be entirely disregarded.’²³²

[304] The CCIWA has had numerous opportunities to clarify its interest in the proceeding and whether it represents anyone covered by any of the Awards which are the subject of the Applications. The CCIWA has not availed itself of those opportunities. In the circumstances, we accept the HSU’s unchallenged submission that the CCIWA has no direct or indirect interest in the aged care sector and on that basis we note its submission but do not propose to give it much weight.

[305] Submissions were also received from the following not-for-profit aged care providers:

- [Tandara Lodge Community Care](#) (Tandara Lodge) dated 27 August 2021
- [BaptistCare NSW & ACT](#) (Baptist Care) dated 3 March 2022
- [Uniting NSW.ACT](#) dated 4 March 2022
- [UnitingCare Australia](#) dated 4 March 2022
- [IRT Group](#) dated 4 March 2022
- [Evergreen Life Care](#) (Evergreen) dated 7 March 2022
- [MercyCare](#) dated 27 May 2022

²³¹ CCIWA submissions dated 4 March 2022 at [31.3].

²³² HSU closing submissions in reply dated 19 August 2022 at [198] as summarised in Background Document 8 at [23].

[306] These aged care providers broadly support an increase in minimum award rates for aged care workers but submit that any such increase must be fully funded by the Government.²³³ The submissions are summarised below.

(i) *Tandara Lodge Community Care submission dated 27 August 2021*

[307] Tandara Lodge is a not-for-profit provider of residential and community aged care within the Kentish Municipal Region of Tasmania. Tandara Lodge employs 83 staff, who provide services across a 46-bed residential aged care facility, a Commonwealth Home Support Programme (CHSP) adult activity day centre and 48 independent living units.²³⁴

[308] Tandara Lodge submits that it believes its staff ‘are worth more and should be better remunerated’, but emphasises that under the current funding arrangements it cannot fund an increase in wages without impacting its viability.²³⁵ Tandara Lodge notes that Government funding makes up approximately 66 per cent of its total funding, with the remainder coming from residents’ fees and estimates that wages and associated on costs comprise 80 per cent of its total running costs.²³⁶

[309] Tandara Lodge submits that the nature of the work in aged care has changed over time, with increasing levels of acuity in residents resulting in a corresponding increase in workloads and expectations.²³⁷ Tandara Lodge notes the following changes in aged care:

- increasing level of acuity
- increase in dementia
- complex health needs associated with obesity and mental health, and
- increasing levels of regulation leading to more time spent on paperwork, documentation and producing evidence.²³⁸

[310] Tandara Lodge notes that the skills required to work in aged care are also increasing, including social skills, technical skills relating to care and technological skills relating to reporting and operating complex equipment.²³⁹

(ii) *Uniting NSW.ACT submission dated 4 March 2022*

[311] Uniting NSW.ACT is a not-for-profit provider of aged care services in NSW and the ACT. Uniting NSW.ACT is the largest provider of aged care services in NSW and the ACT,

²³³ Tandara Lodge Community Care submission dated 27 August 2021 at [14]; Uniting NSW.ACT submission dated 4 March 2022 at 3; UnitingCare Australia submission dated 4 March 2022 at 1; IRT Group submission dated 4 March 2022 at [21]–[22]; BaptistCare NSW & ACT submission dated 4 March 2022 at [24]–[25]; Evergreen Life Care submission dated 7 March 2022 at 1; MercyCare submission dated 27 May 2022 at 1.

²³⁴ Tandara Lodge Community Care submission dated 27 August 2021 at [4]–[5].

²³⁵ Tandara Lodge Community Care submission dated 27 August 2021 at [14].

²³⁶ Tandara Lodge Community Care submission dated 27 August 2021 at [10].

²³⁷ Tandara Lodge Community Care submission dated 27 August 2021 at [15].

²³⁸ Tandara Lodge Community Care submission dated 27 August 2021 at [10].

²³⁹ Tandara Lodge Community Care submission dated 27 August 2021 at [16].

operating 60 residential aged care facilities with 7,200 residents, providing home care for 9,600 people and care for 3,000 people in independent living units.²⁴⁰ Uniting ACT.NSW employs 6,006 people across its residential, home and community and independent living services.²⁴¹

[312] Uniting NSW.ACT submits that aged care workers ‘should be awarded a significant wage increase’ due to the change in work value, provided such increase is ‘fully funded by the Commonwealth Government.’²⁴²

[313] Uniting NSW.ACT also supports changes in classification structures to ‘better reflect increments in work value and increase career paths for aged care workers.’²⁴³ Uniting NSW.ACT submits that any such changes in classification structure should be fully funded by the Government.²⁴⁴

[314] Uniting NSW.ACT notes that under its Enterprise Agreement it pays ‘well above’ award rates, and points out that experienced RNs in residential care are paid 40 per cent above the award, while PCWs are paid 10 per cent above the award. Uniting NSW.ACT submits that with the current funding available it is not able to further increase wages and experiences difficulty maintaining the current rates.²⁴⁵

[315] Uniting NSW.ACT argues that the value and complexity of work in aged care has significantly increased over time, and submits this is due to a range of factors including:

- increased standards of care (driven in part by community expectations, understanding of best practice and regulation)
- increased focus on cultural, identity, social and linguistic needs
- increased regulatory requirements generally including reporting
- new technologies
- new models of care
- people living longer with more complex health needs, such as dementia and greater need for the administration of prescribed medicines
- growth of home care service provision where workers are inherently required to work independently within people’s homes and the community
- most recently, COVID-19²⁴⁶

[316] Uniting NSW.ACT submits that there is a ‘huge shortage’ of aged care workers and emphasises that the workforce is fatigued by COVID-19, leading to increased pressures on the

²⁴⁰ Uniting NSW.ACT submission dated 4 March 2022 at 1.

²⁴¹ Uniting NSW.ACT submission dated 4 March 2022 at 2.

²⁴² Uniting NSW.ACT submission dated 4 March 2022 at 3.

²⁴³ Uniting NSW.ACT submission dated 4 March 2022 at 4.

²⁴⁴ Uniting NSW.ACT submission dated 4 March 2022 at 4.

²⁴⁵ Uniting NSW.ACT submission dated 4 March 2022 at 2.

²⁴⁶ Uniting NSW.ACT submission dated 4 March 2022 at 2.

available workforce supply.²⁴⁷ Uniting NSW.ACT further argues the difficulty attracting aged care employees:

‘is directly due to low wage rates which impacts the ability for us to attract workers from other sectors and retain those already in the sector. Less skilled and emotionally challenging work is either equally or better remunerated, so people are reluctant to work in the aged care sector. The relativities between award rates have clearly fallen out of alignment, or have failed to value appropriately, the high skills and emotional resilience and compassion involved in caring.’²⁴⁸

(iii) *UnitingCare Australia submission dated 4 March 2022*

[317] UnitingCare Australia is the largest network of social services providers in Australia. UnitingCare Australia has 50,000 staff, 30,000 volunteers and supports 1.4 million people each year.²⁴⁹

[318] UnitingCare Australia submits that minimum rates for aged care workers should be ‘substantially increased to reflect the true value of the work being performed’ and argues that any such increase must be fully funded by the Commonwealth.²⁵⁰

[319] UnitingCare Australia maintains that aged care consumers require increased clinical support, which has increased the complexity of the work, and notes the following changes in the aged care sector:

- increased rates of acuity
- declining function
- increased frailty
- increase in dementia
- need for specialist psycho-geriatric care
- the ‘cultural transformation’ towards consumer directed care
- complex comorbidities requiring subspecialist skills and multidisciplinary teams
- uplift across a range of skill sets including administration of prescribed medications, infection prevention and control and information technology systems
- regulatory and policy reform²⁵¹

²⁴⁷ Uniting NSW.ACT submission dated 4 March 2022 at 4.

²⁴⁸ Uniting NSW.ACT submission dated 4 March 2022 at 5.

²⁴⁹ UnitingCare Australia submission dated 4 March 2022 at 1.

²⁵⁰ UnitingCare Australia submission dated 4 March 2022 at 1.

²⁵¹ UnitingCare Australia submission dated 4 March 2022 at 2.

(iv) IRT Group submission dated 4 March 2022

[320] IRT Group is a not-for-profit, community-owned provider of residential aged care, home care and retirement living services in NSW, the ACT and Queensland. IRT Group provides care to approximately 9,000 people each year and has over 2,600 employees.²⁵²

[321] IRT Group ‘strongly supports’ an increase to minimum wages for workers in the aged care sector but submits that it is not in a financial position to fund such an increase and argues that any such increase ‘must be fully funded by the Commonwealth.’²⁵³

[322] IRT Group submits that the work value of aged care workers has increased over time, and points to the following factors:

- Residents and consumers present with more acute care needs, greater levels of frailty and increased co-morbidities.²⁵⁴
- There is a ‘significant increase’ in the incidence of dementia and mental health issues.²⁵⁵
- The increase in regulation requires additional documentation and reporting.²⁵⁶
- The expectations of resident/customers and their family around ‘person-centred care’ require employees to cater to individual physical, emotional, social and spiritual care needs.²⁵⁷
- Employees are required to cater to diverse cultural, social and linguistic needs of residents/customers, including to CALD and LGBTQI residents/customers.²⁵⁸
- Employees require additional training in areas such as dementia, mental health, advanced communication, complaint management and conflict resolution.²⁵⁹
- The growing prevalence of home care services means more employees are working with minimal supervision while performing a broader range of tasks.²⁶⁰
- Due to COVID-19, employees must be proficient in strict infection control procedures on a level not experienced previously. Employees have also been required to provide additional social support for isolating residents.²⁶¹

[323] IRT Group submits that the increased complexity of the work in aged care is not limited to PCWs but is ‘equally relevant’ to employees who provide food, laundry, cleaning and administrative support services.²⁶²

²⁵² IRT Group submission dated 4 March 2022 at [1]–[3].

²⁵³ IRT Group submission dated 4 March 2022 at [21]–[22].

²⁵⁴ IRT Group submission dated 4 March 2022 at [5].

²⁵⁵ IRT Group submission dated 4 March 2022 at [6].

²⁵⁶ IRT Group submission dated 4 March 2022 at [7].

²⁵⁷ IRT Group submission dated 4 March 2022 at [8].

²⁵⁸ IRT Group submission dated 4 March 2022 at [8].

²⁵⁹ IRT Group submission dated 4 March 2022 at [9].

²⁶⁰ IRT Group submission dated 4 March 2022 at [10].

²⁶¹ IRT Group submission dated 4 March 2022 at [11].

²⁶² IRT Group submission dated 4 March 2022 at [12].

[324] IRT Group notes that it has found it difficult to attract and retain employees and submits that the ‘primary reason’ for this is the low rates of pay in the sector.²⁶³

(v) *BaptistCare NSW & ACT submission dated 4 March 2022*

[325] BaptistCare is a not-for-profit provider of residential and home aged care services in NSW and the ACT. BaptistCare operates 18 residential care facilities with over 1,400 residents and has a further 8,000 home care clients. BaptistCare employs 3,087 employees.²⁶⁴

[326] BaptistCare submits that there should be a ‘significant increase’ to the award minimum rates for aged care workers and argues that any such increase must be fully funded by the Government.²⁶⁵

[327] BaptistCare submits that it currently pays staff 4.2 per cent above the minimum rates in the Aged Care Award, but notes that continual pay rises are challenging in circumstances where they exceed the level of Government funding. BaptistCare notes that in 2021 it offered staff a 2 per cent pay increase, however Daily Aged Care Funding Instrument (ACFI) subsidy rates only increased by 1.1 per cent.²⁶⁶

[328] BaptistCare submits that staff recruitment is a ‘significant challenge’ and notes that at the time of its submission it had more than 300 vacant positions, predominantly in frontline care roles.²⁶⁷ BaptistCare further emphasises that turnover is increasing, from 20 per cent in 2020 to 31 per cent in 2021.²⁶⁸

[329] BaptistCare maintains that the increase in acuity of aged care consumers (both residential and home care) has increased the work of frontline care workers, who are now required to engage in more clinical practices and documentation, including:²⁶⁹

- assisting with medication
- simple wound dressing
- assisting with the implementation of continence programs
- attending to regular checks, including urinalysis, blood pressure, temperature and pulse checks and blood sugar levels, and
- assisting and supporting diabetic clients in the management of their insulin and diet.

[330] BaptistCare submits that the increase in work has extended beyond PCWs and notes the following:

²⁶³ IRT Group submission dated 4 March 2022 at [13]–[14].

²⁶⁴ BaptistCare NSW & ACT submission dated 3 March 2022 at [3]–[5].

²⁶⁵ BaptistCare NSW & ACT submission dated 3 March 2022 at [24]–[25].

²⁶⁶ BaptistCare NSW & ACT submission dated 3 March 2022 at [23].

²⁶⁷ BaptistCare NSW & ACT submission dated 3 March 2022 at [9].

²⁶⁸ BaptistCare NSW & ACT submission dated 3 March 2022 at [11].

²⁶⁹ BaptistCare NSW & ACT submission dated 3 March 2022 at [16]–[17].

- The increased focus on the wellbeing of residents has meant that lifestyle stream workers are required to be cognisant of providing activities and programs that are tailored to the social and spiritual care needs of residents.²⁷⁰
- The work of food preparation staff has ‘changed significant over time’ and they are now required to ensure the provision of nutritious meals in accordance with the Aged Care Quality Standards and the individual resident’s care and dietary needs.²⁷¹
- Staffing challenges have increased the complexity of work performed by administrative staff who are principally responsible for rostering, filling vacant shifts and coordinating enquiries.²⁷²

(vi) *Evergreen Life Care submission dated 7 March 2022*

[331] Evergreen is a not-for-profit residential aged care provider in West Gosford, NSW. Evergreen operates a residential aged care facility that provides high care services to 96 residents and a retirement village with 147 units. Evergreen employees 135 staff.²⁷³

[332] Evergreen supports the increases in minimum rates in line with the HSU’s application and submits that any such increase should be supported by an equivalent increase in funding by the Commonwealth.²⁷⁴

[333] Evergreen submits the increase in level of acuity and complexity of the needs of residents means that employees are required to exercise a higher skill level.

[334] Evergreen further emphasises that staff shortages are an ‘increasing challenge’ and notes that in January 2022, 3 out of 21 shifts were staffed at lower than preferred levels as it was not possible to find any staff to fill the shifts. Evergreen submits that an increase in minimum award rates would help address the issues with staff shortages.²⁷⁵

(vii) *MercyCare submission dated 27 May 2022*

[335] MercyCare is a not-for-profit provider of aged care services in Western Australia, operating 5 residential aged care homes with 380 residents and providing home care to 2,000 people.²⁷⁶

²⁷⁰ BaptistCare NSW & ACT submission dated 3 March 2022 at [18].

²⁷¹ BaptistCare NSW & ACT submission dated 3 March 2022 at [19].

²⁷² BaptistCare NSW & ACT submission dated 3 March 2022 at [20].

²⁷³ Evergreen Life Care submission dated 7 March 2022 at 1.

²⁷⁴ Evergreen Life Care submission dated 7 March 2022 at 1.

²⁷⁵ Evergreen Life Care submission dated 7 March 2022 at 2.

²⁷⁶ MercyCare submission dated 27 May 2022 at 1.

[336] MercyCare supports a ‘significant increase’ to the minimum wages in the relevant Awards in line with the HSU’s application, provided such an increase is fully funded by the Commonwealth²⁷⁷ and submits:

‘This increase will help address inequity and the increasing complexity of the work that aged care staff perform, help ease staff shortages severely impacting the industry and provide a platform for a sustainable industry to meet care needs for elderly Australians into the future.’²⁷⁸

[337] The [Victorian Government](#) and the [Queensland Government](#) also made submissions.

(viii) Victorian Government

[338] The Victorian Government notes it is the ‘largest provider’ of public sector residential aged care services (PSRACS) in Australia. The Victorian Government operates 179 PSRACS facilities with 5,620 operational places, representing approximately 10 per cent of residential aged care in Victoria.²⁷⁹

[339] The Victorian Government submits that an increase to modern award minimum wages in the aged care sector is justified by work value reasons and is necessary to achieve the modern awards objective, and emphasises:

‘Beyond the inherent value of the work performed in the aged care sector, more recent changes to the nature of that work have caused the work value to increase, including the level of complexity, the skill, responsibility and judgement involved in performing the work, and the conditions under which the work is performed.’²⁸⁰

[340] The Victorian Government supports an ‘appropriate increase (or series of increases)’ to minimum award wages in the aged care sector, provided such an increase is ‘appropriately funded by the Commonwealth.’²⁸¹

[341] The Victorian Government notes that it has considered the Consensus Statement and submits that it ‘strongly supports’ the Consensus Statement’s observation that any increase to award minimum wages in the aged care sector ‘must be matched by increased funding from the Commonwealth, as the primary funder and regulator of aged care services in Australia, and must be linked to transparency and accountability measures as to how funding is used.’²⁸²

[342] The Victorian Government submits that if the Commission determines an increase to award minimum wages in the aged care sector is appropriate, it would ‘welcome the opportunity to provide further submissions as to quantum, or how any proposed increases might be

²⁷⁷ MercyCare submission dated 27 May 2022 at 1.

²⁷⁸ MercyCare submission dated 27 May 2022 at 1.

²⁷⁹ Victorian Government submission dated 11 April 2022 at [5].

²⁸⁰ Victorian Government submission dated 11 April 2022 at [48].

²⁸¹ Victorian Government submission dated 11 April 2022 [39].

²⁸² Victorian Government submission dated 11 April 2022 at [60].

implemented (for example, in a phased manner), should that be of assistance to the Commission.²⁸³

(ix) Queensland Government

[343] The Queensland Government ‘shares the unions’ concern’ that the work performed by aged care workers covered by the Aged Care, Nurses and SCHADS Awards has been historically undervalued.²⁸⁴ The Queensland Government notes that the Applications vary in their particulars and does not favour one application over another, but submits that it generally supports the position that minimum wages in the subject Awards should be increased, along with any other variations necessary to give effect to the recommendations of the Royal Commission.²⁸⁵

[344] An individual aged care worker also made a [submission](#).

[345] On 15 September 2022, the Property Council of Australia made a [submission](#) on behalf of the non-government retirement living sector. In its submission the Property Council of Australia raised concerns of the ‘non-government retirement living sector’ about ‘the potential impact of a significant rise in aged care workers’ wages on retirement living residents’. The submission was prompted by advice from the Minister for Aged Care to the Retirement Living Council that the Commonwealth was ‘unable to provide supplementary funding to offset the wages of operational village staff who are employed in a retirement village’. The submission goes to the impact of any exercise of modern award powers on business, including on employment costs; a matter which we are required to take into account in our consideration of the modern awards objective (see s.134(1)(f)).

[346] As we set out in Chapter 8.1.3 we are not in a position to assess the impact on business of the interim increase we propose, until further clarification is provided regarding the extent of Commonwealth funding to support the proposed increase. This issue will be the subject of the next stage in these proceedings and the Property Council of Australia will have an opportunity to participate in those proceedings.

[347] There is a significant amount of agreement between the parties; but the Joint Employers and the Unions disagree on the extent of changes to work in the aged care sector, in particular the classes of workers affected by those changes.

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

- RNs
- ENs
- Certificate (III) Care Workers, and

²⁸³ Victorian Government submission dated 11 April 2022 at [57].

²⁸⁴ Queensland Government submission dated 11 April 2022 at 1.

²⁸⁵ Queensland Government submission dated 11 April 2022 at 2.

- Head Chefs/Cooks.²⁸⁶

[349] The Joint Employers later confirmed that they contend that an increase in minimum wages is justified on work value grounds in respect of RNs, ENs, Certificate III Care Workers and Head Chefs/Cooks in residential aged care.²⁸⁷

[350] As to the quantum of such an increase, the Joint Employers do not support a uniform 25 per cent increase in minimum wages for these classifications;²⁸⁸ but provided no further clarification in relation to the quantum of any increase to be provided.²⁸⁹ In their closing submissions in reply, the Joint Employers confirmed that their submission is that the minimum rates for RNs ‘should be aligned to the C10 framework’ which would result in an increase of 35 per cent in the minimum award rates for RNs working in aged care.

[351] The Joint Employers’ concessions regarding these classes of employees for whom an increase in minimum wages is justified on work value grounds are confined to the performance of that work in a residential aged care setting. The Joint Employers submit that PCWs/AINs in home care and residential care have some ‘fairly distinct features that differentiate them’, but the Joint Employers concede that these distinctions ultimately ‘might not matter’ and the Commission might form the view that ‘while there are differences, on balance you arrive at the same conclusion’.²⁹⁰

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

[353] In our Statement dated 9 June 2022²⁹¹ we expressed the following *provisional* views based on the material set out in Background Documents 1 and 2:

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

²⁸⁶ Joint Employers closing submissions dated 22 July 2022 at [4.47].

²⁸⁷ Joint Employers closing submissions in reply dated 19 August 2022 at [5.20]

²⁸⁸ Joint Employers closing submissions in reply dated 19 August 2022 at [5.23].

²⁸⁹ Transcript, 1 September 2022, PN15556–PN15557.

²⁹⁰ Transcript 1 September 2022, PN15688–PN15697.

²⁹¹ [2022] FWCFB 94.

[354] The parties broadly agreed with the *provisional* views.²⁹² In a Statement dated 5 August 2022²⁹³ we confirmed our *provisional* views.

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

[356] That being said, we accept the expert evidence that as a general proposition work in feminised industries, including care work, has been historically undervalued and that the reason for that undervaluation is likely to be gender based. We also accept that the evidence pertaining to gender undervaluation provides a useful context for the assessment of the work value and skills utilised in feminised industries, including in the aged care industry. The proper assessment of the skills utilised in aged care work is considered in detail in Chapter 7.

[357] Finally, a number of propositions as to the nature and conditions of the work in aged care were agreed to by the parties. These are discussed in Chapter 7.

²⁹² ANMF closing submissions dated 22 July at [91]; HSU submissions dated 2 August 2022 at [1]–[3]; Joint Employers closing submissions dated 27 July 2022; Commonwealth submissions dated 8 August 2022 at [79]; Transcript, 25 August 2022, PN15385.

²⁹³ [2022] FWCFB 150.

5. The Evidence

5.1 Overview

[358] The Unions relied on the statements of 72 employee lay witnesses. Seven of the employee lay witnesses were not required for cross-examination.²⁹⁴

[359] A [Mention](#) was held on 22 April 2022. The Commission proposed that in order to facilitate the efficient use of Commission resources, the Unions' employee lay witness evidence would be heard by a single member of the Full Bench, Commissioner O'Neill, who would then prepare a report in respect of that evidence and the parties would have the opportunity to comment on the report before it was finalised. The parties did not object to the course proposed. The Full Bench determined these arrangements in a [Statement](#) published on 24 April 2022.

[360] On 20 June 2022, the Commission published the Lay Witness Evidence Report²⁹⁵ which provides an overview of the evidence of the employee lay witnesses called by the Union parties, including:

- a summary of the employee lay witnesses who gave evidence (including charts)
- an overview of each witness's evidence
- an overview of the witnesses' evidence about the duties of various roles in the aged care industry, and
- illustrative examples of the witness evidence grouped by theme.

[361] The Unions also relied on the statements of 17 union officials:

- Christopher Friend, Industrial Bargaining Officer Aged Care Division, HSU NSW/ACT Branch²⁹⁶
- David Eden, Assistant Secretary, HSU Victoria Branch²⁹⁷
- Gerard Hayes, President of the HSU & Secretary HSU NSW/ACT Branch²⁹⁸
- James Eddington, Legal and Industrial Officer, HACSU Tasmania Branch²⁹⁹

²⁹⁴ Lorri Seifert, Sally Fox, Tracy Roberts, Hazel Bucher, Maree Bernoth, Pauline Breen and Susan Toner.

²⁹⁵ Lay Witness Evidence Report dated 20 June 2022.

²⁹⁶ Amended witness statement of Christopher Friend dated 20 May 2022; Supplementary witness statement of Christopher Friend dated 29 October 2021; Transcript, 26 April 2022, PN873–PN946.

²⁹⁷ Witness statement of David Eden dated 12 October 2021; Transcript, 2 May 2022, PN3020–PN3061.

²⁹⁸ Witness statement of Gerard Hayes dated 31 March 2021; Transcript, 26 April 2022, PN519–PN589.

²⁹⁹ Witness statement of James Eddington dated 5 October 2021; Transcript, 3 May 2022, PN3491–PN3556.

- Lauren Hutchins, Divisional Manager of Aged Care and Disabilities, HSU NSW/ACT Branch³⁰⁰
- Leigh Svendsen, Senior Industrial and Compliance Officer, HSU³⁰¹
- Lindy Twyford, Senior Vice President, HSU NSW/ACT Branch³⁰²
- Marion Jennings, Organiser, HSU³⁰³
- Andrew Venosta, Industrial Organiser, ANMF³⁰⁴
- Annie Butler, Federal Secretary, ANMF³⁰⁵
- Julianne Bryce, Senior Federal Professional Officer, ANMF³⁰⁶
- Kathryn Chrisfield, Occupational Health and Safety Unit Coordinator, ANMF³⁰⁷
- Kevin Crank, Industrial Officer, ANMF³⁰⁸
- Kristen Wischer, Senior Federal Industrial Officer, ANMF³⁰⁹
- Paul Gilbert, Assistant Secretary, ANMF³¹⁰
- Robert Bonner, Director – Operations and Strategy, ANMF South Australia Branch,³¹¹ and
- Melissa Coad, Coordinator Policy, Stakeholder Engagement and Professional Development, UWU.³¹²

³⁰⁰ Amended witness statement of Lauren Hutchins dated 20 May 2022; Reply witness statement of Lauren Hutchins dated 22 April 2022; Transcript, 26 April 2022, PN598–PN857.

³⁰¹ Witness statement of Leigh Svendsen dated 22 April 2021.

³⁰² Witness statement of Lindy Twyford dated 1 April 2021; Reply witness statement of Lindy Twyford dated 20 April 2022; Transcript, 2 May 2022, PN2913–PN3006.

³⁰³ Witness statement of Marion Jennings dated 26 March 2021; Reply witness statement of Marion Jennings dated 15 April 2022; Transcript, 2 May 2022, PN2777–PN2904.

³⁰⁴ Amended witness statement of Andrew Venosta dated 3 May 2022; Transcript, 3 May 2022, PN3855–PN3964.

³⁰⁵ Amended witness statement of Annie Butler dated 2 May 2022; Transcript, 2 May 2022, PN3384–PN3451.

³⁰⁶ Witness statement of Julianne Bryce dated 29 October 2021; Transcript, 3 May 2022, PN3717–PN3749.

³⁰⁷ Amended witness statement of Kathryn Chrisfield dated 3 May 2022; Transcript, 3 May 2022, PN3761–PN3847.

³⁰⁸ Witness statement of Kevin Crank dated 29 October 2021.

³⁰⁹ Witness statement of Kristen Wischer dated 14 September 2021; Amended supplementary witness statement of Kristen Wischer dated 9 May 2022.

³¹⁰ Amended witness statement of Paul Gilbert dated 3 May 2022; Transcript, 3 May 2022, PN3975–PN4051.

³¹¹ Witness statement of Robert Bonner dated 29 October 2021; Transcript, 9 May 2022, PN8959–PN9259.

³¹² Witness statement of Melissa Coad dated 7 October 2021.

[362] The evidence of the union official lay witnesses was heard by the Full Bench. Four of the Unions' official witnesses were not required for cross-examination.³¹³

[363] The Joint Employers relied on the statements of 9 lay witnesses:

- Anna-Maria Wade, National Manager of Employee Relations, State Manager (NSW/ACT), Acting Executive Director of Membership & Services, ACSA.³¹⁴
- Cheyne Woolsey, Chief Human Resources Officer, KinCare³¹⁵
- Craig Smith, Executive Leader Service Integrated Communities, Warrigal³¹⁶
- Emma Brown, Special Care Project Manager, Warrigal³¹⁷
- Johannes Brockhaus, CEO, Buckland Aged Care Services (Buckland)³¹⁸
- Kim Bradshaw, General Manager, Warrigal Stirling Residential Aged Care Facility³¹⁹
- Mark Sewell, CEO and Company Secretary, Warrigal³²⁰
- Paul Sadler, CEO, ACSA,³²¹ and
- Sue Cudmore, Chief Operations Officer, Recruitment Solutions Group Australia (Health Solutions).³²²

[364] The evidence of the employer lay witnesses was heard by the Full Bench. One of the employer lay witnesses was not required for cross-examination.³²³

[365] The ANMF and the HSU also relied on the reports and statements of 6 expert witnesses.

[366] The HSU relied on the evidence of the following expert witnesses:

- Prof Sara Charlesworth
- Prof Gabrielle Meagher

³¹³ Leigh Svendsen, Kevin Crank, Kristen Wischer and Melissa Coad.

³¹⁴ Amended witness statement of Anna-Maria Wade dated 23 May 2022; Transcript, 11 May 2022, PN12470–PN12573.

³¹⁵ Witness statement of Cheyne Woolsey dated 4 March 2022.

³¹⁶ Amended witness statement of Craig Smith dated 23 May 2022; Transcript, 12 May 2022, PN13147–PN13312.

³¹⁷ Witness statement of Emma Brown dated 2 March 2022; Transcript, 12 May 2022, PN13319–PN12503.

³¹⁸ Witness statement of Johannes Brockhaus dated 3 March 2022; Transcript, 12 May 2022, PN13755–PN13897.

³¹⁹ Witness statement of Kim Bradshaw dated 4 March 2022; Transcript, 12 May 2022, PN12953–PN12834.

³²⁰ Witness statement of Mark Sewell dated 3 March 2022; Transcript, 12 May 2022, PN12855–PN13139.

³²¹ Witness statement of Paul Sadler dated 1 March 2022; Transcript, 11 May 2022, PN12202–PN12453.

³²² Witness statement of Sue Cudmore dated 4 March 2022; Transcript, 12 May 2022, PN13513–PN13749.

³²³ Cheyne Woolsey.

- Prof Kathleen Eagar, and
- Prof Susan Kurrle

[367] The ANMF relied on the evidence of the following expert witnesses:

- Assoc Prof Smith and Dr Lyons, and
- Honorary Assoc Prof Anne Junor

[368] As mentioned earlier, the Commission also published a [Research Reference List](#) of 665 documents consisting of: 202 published research articles and books; 68 Australian working papers and reports; 9 international working papers and reports; 114 Australian Government reports; 2 international government reports; 22 data sources; 189 cases referred to in submissions and witness evidence; and 59 awards, variations and determinations referred to in submissions and witness evidence.

[369] The Research Reference List has been updated throughout the proceedings and was most recently published on 9 June 2022.³²⁴ As mentioned in a Statement published on 9 June 2022 we propose to have regard to the materials set out in the Research Reference List in our consideration of the Applications.

5.2 The Expert Evidence

5.2.1 Professor Charlesworth

[370] Prof Sara Charlesworth is a Professor of Gender, Work & Regulation at the School of Management at RMIT University and the Director of the Centre of People, Organisation & Work at RMIT's College of Business and Law. Prof Charlesworth prepared 2 expert reports: the [Charlesworth Report](#) and the [Charlesworth Supplementary Report](#).

[371] The Charlesworth Report was prepared in response to the HSU's request that Prof Charlesworth provide an expert report addressing the following matters:

- (a) the nature of the industrial history of setting the terms and conditions of workers covered by the [Aged Care] Award and in residential settings in Australia;
- (b) the nature of the workforce in residential aged care including the demographics and whether the workforce is female dominated
- (c) the challenges faced by unions and employees in achieving higher wage rates in residential aged care through industrial arbitration and enterprise bargaining.
- (d) whether you believe there has been an historical undervaluation of work performed in the industry, how that has affected wage rates contained in the Award and, if so, what factors have contributed to any historical undervaluation of work in residential aged care, including any contribution the gender

³²⁴ 'Research Reference List' dated 9 June 2022.

composition of the workforce may have had to the undervaluation of work performed;

- (e) whether there has been a change in the composition of the workforce in residential aged care;
- (f) if you are of the view that there has been a change in the composition of the workforce in residential aged care, the nature of those changes, and the impact (if any) the change in composition has had on the duties, responsibilities and skills required of workers in residential aged care;
- (g) the nature of the work performed (being care work) in the aged care sector (including in the Personal Care worker, General and Administrative Services, and Food Services streams covered by the [Aged Care] Award);
- (h) the skills required to perform work in residential aged care (including in the Personal Care worker, General and Administrative Services, and Food Services streams covered by the [Aged Care] Award);
- (i) whether there has been a change in the nature, level of skill and responsibility involved in doing work in residential aged care over time (including in the Personal Care worker, General and Administrative Services, and Food Services streams covered by the [Aged Care] Award);
- (j) if you are of the view that there has been changes in the nature of work, responsibility and/or skills required in residential aged care over time, please provide a description and explanation of, the reasons for and nature of, those changes;
- (k) the benefits and consequences of improving rates of pay and conditions for employees working in residential aged care; and
- (l) any other information that you consider relevant.³²⁵

[372] The Charlesworth Supplementary Report was prepared in response to the HSU's request that Prof Charlesworth provide a further report in relation to HCWs.³²⁶

[373] The Charlesworth Report and Charlesworth Supplementary Reports address the following areas:

- the industrial history of setting the terms and conditions of PCWs in residential aged care covered by the Aged Care Award and HCWs covered by the SCHADS Award³²⁷

³²⁵ Witness statement of Sara Charlesworth dated 31 March 2021 Annexure SC-2.

³²⁶ Supplementary witness statement of Sara Charlesworth dated 22 October 2021 Annexure SC-6.

³²⁷ Charlesworth Report at [9]–[15]; Charlesworth Supplementary Report at [1]–[21].

- the conditions under the Aged Care and SCHADS Awards relating to the scheduling of part-time workers³²⁸
- the demographics of the aged care workforce³²⁹
- the role of enterprise bargaining in residential aged care³³⁰
- Prof Charlesworth’s opinions on whether there has been historical undervaluation of work in aged care³³¹
- the change in the composition of the workforce in residential aged care and any impact this change has had on the duties, responsibilities and skills of PCWs³³²
- the changing nature of the work performed by home care workers³³³
- the skill required by PCWs and home care workers and the value attached to those skills,³³⁴ and
- Prof Charlesworth’s opinions on the benefits associated with improving the rate of pay and conditions for PCWs.³³⁵

[374] A key finding of both the Charlesworth Report and the Charlesworth Supplementary Report is that there ‘has been an historical as well as an ongoing undervaluation’ of work performed by PCWs in residential aged care and by HCWs and that this undervaluation is ‘profoundly gendered’.³³⁶

[375] Prof Charlesworth notes the overwhelming majority of aged care workers are female and observes that as a result the nature of the work performed by aged care workers has historically been ‘viewed as quintessentially “women’s work” and therefore of little economic value.’³³⁷ Prof Charlesworth states:

‘The gendered norms that underpin the devaluation of care work are premised on an “ideology of domesticity” that positions the care that women do, both in home and as paid work, as natural and therefore unskilled. In particular, it is the link assumed between unpaid care work in the family and paid care work that means aged care work has been significantly undervalued in government funding, in employment protections and in

³²⁸ Charlesworth Report at [16]–[18]; Charlesworth Supplementary Report at [22]–[26].

³²⁹ Charlesworth Report at [19]–[32]; Charlesworth Supplementary Report at [27]–[46].

³³⁰ Charlesworth Report at [33]–[41]; Charlesworth Supplementary Report at [47]–[60].

³³¹ Charlesworth Report at [42]–[46]; Charlesworth Supplementary Report at [61]–[65].

³³² Charlesworth Report at [47]–[51].

³³³ Charlesworth Supplementary Report at [66]–[69].

³³⁴ Charlesworth Report at [52]–[57]; Charlesworth Supplementary Report at [70]–[73].

³³⁵ Charlesworth Report at [58]–[65].

³³⁶ Charlesworth Report at [42]; Charlesworth Supplementary Report at [61].

³³⁷ Charlesworth Report at [43]; Charlesworth Supplementary Report at [62].

societal, industrial and organisational recognition of the increasingly complex skills required to undertake the work of aged care, including in residential settings.³³⁸

[376] Prof Charlesworth goes on to identify the skills required by PCWs in residential care and HCWs and argues that these skills ‘tend to be viewed as somehow “natural” attributes of the predominantly female workforce, requiring the “right” attitude or personality rather than demonstrable skill’³³⁹ and contends:

‘The capacity to know how to provide care in diverse situations with individual people, whose needs might change on a daily basis, requires the type of specific and demonstrable knowledge and skills as outlined above as well as a high degree of autonomy, responsibility and judgment. I note that these responsibilities and skills are not currently outlined in personal care worker classifications in the Aged Care Award and are certainly not reflected in the low pay rates that adhere to those classifications.’³⁴⁰

5.2.2 Professor Kurrle

[377] Prof Susan Kurrle is a Curran Professor in Health Care of Older People at the University of Sydney and a Senior Staff Specialist Geriatrician within the Hornsby Ku-ring-gai and Eurobodalla Health Services NSW. From March 2019 to February 2021, she was the Medical Adviser to the Royal Commission. Prof Kurrle prepared the [Kurrle Report](#) in response to instructions from the HSU.³⁴¹ The Kurrle Report is based on her specialised knowledge and experience in geriatric health care and from her observations gained in her role on the board of not-for-profit aged care provider, HammondCare, from 1998 to 2014.

[378] The Kurrle Report largely describes the nature of the work performed, the skills and knowledge required in the aged care sector and discusses how these have changed over time.

[379] A key finding of the Kurrle Report is that there has been a significant change in the composition of the residential aged care workforce over time with RNs falling from 21 per cent to 14.5 per cent, ENs falling from 13 per cent to 10 per cent, and PCWs increasing from 58 per cent to 70 per cent of the workforce, resulting in many of the duties traditionally performed by nurses now being performed by PCWs.³⁴²

[380] The Kurrle Report finds that at least 50 per cent of aged care residents are considered to be frail, and as a result have a high level of physical care needs. This can be demonstrated by the increase in high care needs on the ACFI with an increase across activities of daily living, cognition and behaviour, and complex health care from 2009 to 2019.³⁴³

³³⁸ Charlesworth Report at [43].

³³⁹ Charlesworth Report at [54]; Charlesworth Supplementary Report at [72].

³⁴⁰ Charlesworth Report at [55]; see also Charlesworth Supplementary Report at [74].

³⁴¹ Witness statement of Susan Kurrle dated 25 April 2022 Annexure SK-2.

³⁴² Kurrle Report at 2–3.

³⁴³ Kurrle Report at 7.

[381] The increase in level of care needs is illustrated below:³⁴⁴

Chart 1: Care need ratings of people in permanent residential care for complex health care, 30 June 2009-2019

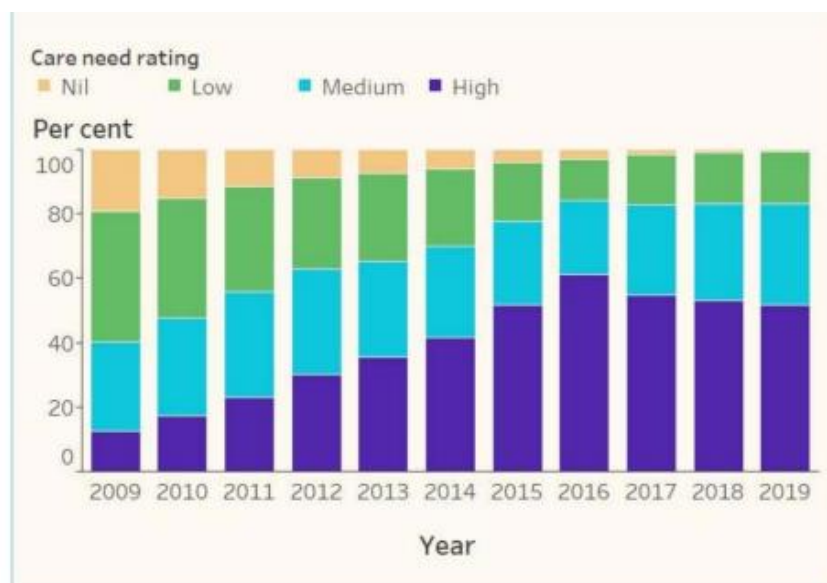


Figure 2: Care need ratings of people in permanent residential care for complex health care, 30 June 2009–2019

Source: Kurrle Report at p.7.

[382] The Kurrle Report concludes that the level of care, skills and responsibilities required to perform work in residential aged care has increased and this is driven by the increase in age, acuity and complex health needs of residents,³⁴⁵ the shift towards the home care model, and the introduction of the National Aged Care Mandatory Quality Indicator Program.³⁴⁶

[383] The Kurrle Report does not draw any conclusions as to whether the work performed by workers in residential aged care is undervalued.³⁴⁷

5.2.3 Professor Eagar

[384] Prof Kathleen Eagar is a Professor of Health Services Research and the Director of the Australian Health Services Report Institute of the University of Wollongong. Prof Eagar led a study commissioned by the Royal Commission involving an analysis of national and international staffing profiles in residential aged care facilities.

³⁴⁴ Australian Institute of Health and Welfare, 'People's Care Needs in Aged Care' (GEN Fact Sheet 2018–2019, 2020) 1 <https://www.gen-agedcaredata.gov.au/www_ahwgen/media/Factsheets-for-2019%e2%80%932020-GEN-update/Peoples-care-needs-in-aged-care-factsheet.pdf?ext=.pdf>.

³⁴⁵ Kurrle Report at 6.

³⁴⁶ Kurrle Report at 10.

³⁴⁷ Kurrle Report at 11.

[385] The HSU engaged Prof Eagar to prepare the [Eagar Report](#). Prof Eagar was asked to provide her expert opinion on a range of matters including the nature and size of residential aged care providers; the regulation of the aged care system; the nature of the work performed; the skill and responsibility involved in the work; whether the work had changed over time; the composition of the workforce; any increases in the acuity of aged care residents and the drivers of any such increase and any other information she considers to be relevant.

[386] On 21 April 2022, as part of its reply submissions, the HSU filed the [Eagar Supplementary Report](#). Prof Eagar was requested to respond in the Eagar Supplementary Report to the witness statements of employer lay witnesses Paul Sadler (dated 1 March 2022) and Mark Sewell (dated 3 March 2022).

[387] The Eagar Report addresses the following matters:

- the changing legislative context governing the provision of residential aged care as set out in the *Aged Care Act 1997 (Cth)* (Aged Care Act) and the *Aged Care Quality and Safety Commission Act 2018 (Cth)* (ACQS Commission Act) and the Aged Care Principles³⁴⁸
- the changing policy context for residential aged care, including recent changes in response to challenges associated with demographic trends, resource availability and consumer expectations³⁴⁹
- the funding context for residential aged care, consisting of a mix of government subsidies (approx. 80 per cent of all funding) and consumer contributions (the remaining approx. 20 per cent)³⁵⁰
- the profile of aged care workers in residential aged care, including a breakdown of direct care workers according to professional designation³⁵¹
- an assessment of the needs of people living in residential aged care, including statistics based on the De Morton Mobility Index (DEMMI) and the Rockwood Clinical Frailty Scale (RCFS) and a range of ‘dependency profiles’ detailing the percentage of residents who need help from a carer in performing various tasks,³⁵² and
- the impact governance and management, staff numbers, staff skill mix and staff continuity have on the quality and safety of aged care.³⁵³

[388] The Eagar Report concludes with Prof Eagar’s opinion that there is a ‘strong case for improved pay and conditions for aged care workers based on 3 factors:

³⁴⁸ Eagar Report at 2–3.

³⁴⁹ Eagar Report at 3–4.

³⁵⁰ Eagar Report at 4–6.

³⁵¹ Eagar Report at 6–8.

³⁵² Eagar Report at 8–11.

³⁵³ Eagar Report at 11–12.

- that aged care work has been historically undervalued, largely due to a female dominated workforce performing duties seen as low value ‘women’s work’
- aged care residents are more clinically complex and frail, and with more cognitive and mental health issues than in the past, and
- there are less RNs supervising care work, resulting in greater responsibility falling on the remaining aged care workforce.³⁵⁴

[389] The Eagar Supplementary Report consists of Prof Eagar’s comments on aspects of the statements of employer lay witnesses Paul Sadler and Mark Sewell. Prof Eagar agrees with the statement of Paul Sadler at paragraph 29, concerning the impact of the Standards on how work is performed.³⁵⁵ Prof Eagar also agrees with Mr Sadler’s statement concerning residential care funding arrangements.³⁵⁶ Prof Eagar makes a number of comments in respect of not-for-profit aged care providers³⁵⁷ in response to the witness statement of Mark Sewell.³⁵⁸

5.2.4 Professor Meagher

[390] Prof Gabrielle Meagher is an Emerita Professor in the School of Social Sciences at Macquarie University. The HSU engaged Prof Meagher to prepare the [Meagher Report](#). Prof Meagher was asked to provide her expert opinion on a range of matters including:

- the nature and size of residential aged care providers
- whether and, if so, how the nature of the aged care industry has changed over time
- the nature of the workforce in residential aged care including the demographics and whether it is female dominated
- the nature of the work performed in the aged care sector
- whether the work performed by workers in residential aged care has been historically undervalued. If so, how and in what way has the work performed by workers been historically undervalued and what factors have contributed to undervaluation.
- the skills and responsibility required in aged care work, and whether this has changed over time,

³⁵⁴ Eagar Report at 13.

³⁵⁵ Witness statement of Paul Sadler dated 1 March 2022 at [29]: “The 2019 standards require providers to ensure “the organisation has a workforce that is sufficient, and is skilled and qualified to provide safe, respectful and quality care and services.” As such, the Aged Care Quality Standards do not directly require particular actions be undertaken by care employees and nurses, but they do impact the way the work is performed.”

³⁵⁶ Eagar Supplementary Report at [6].

³⁵⁷ Eagar Supplementary Report at [8]–[13].

³⁵⁸ Witness Statement of Mark Sewell dated 3 March 2022.

- a description and explanation of the reasons for any changes to the nature of work, level of responsibility, and/or skills required in residential aged care
- whether there has been a change to the composition of the workforce in residential aged care. If so, the nature of the changes and the impact of any such changes on the duties, responsibilities and skills required of workers in residential aged care.
- a description and explanation of the reasons for any changes to the composition of the workforce in residential aged care
- whether there has been an increase in the frailty and acuity of the needs of residents in aged care
- the conditions under which the work is performed in residential aged care, and whether there has been a change to those conditions and the effect this has had on the work performed,
- whether there has been a shift in the model of care in the aged care industry, and if so, the effect of this on the nature of work, responsibilities and skills required in residential aged care
- whether she [Prof Meagher] is of the view that the wage rates contained in the Aged Care Award adequately reflect the value of the work being performed in residential aged care, and
- any other information she [Prof Meagher] considers to be relevant.³⁵⁹

[391] On 29 October 2021, the HSU filed the Meagher Supplementary Report. Prof Meagher was asked to provide her expert opinion on a range of matters including:

- the history of the evaluation of wages rates for aged care workers
- any challenges faced by unions in securing higher wage rates for workers in home aged care
- whether the work performed in aged care is properly valued by reference to work value reasons set out in s.157(2A) of the FW Act, and
- whether there has been a change in the skills and responsibility required to perform work in the aged home care sector or the conditions under which this work is performed and, if so, what these changes are and including explanations for any changes.

[392] On 26 May 2022, the HSU filed an amended version of the Meagher Supplementary Report ([the Amended Meagher Supplementary Report](#)).

³⁵⁹ Witness statement of Gabrielle Meagher dated 31 March 2021 Annexure GM-2 at [5].

[393] The Meagher Report presents research on the nature and valuation of aged care work performed in residential aged care settings, focussing on the work carried out by employees covered by the Aged Care Award. The Meagher Report's findings include that:

- There is strong evidence that the needs of those living in residential aged care has increased during the last 10 to 15 years, with residents older, sicker and frailer than before³⁶⁰
- The workforce in residential aged care, across direct care, ancillary support and administrative roles, is overwhelming female³⁶¹
- The occupational structure of the residential care workforce has undergone considerable change in recent years, notably through increased proportion of FTE (full-time equivalent) PCWs, a fall in the share of nurses and allied health FTE workers and a reduced proportion of workers involved in the provision of direct care against ancillary and administrative workers, on a headcount measure³⁶²
- The structure of the residential aged care sector has changed resulting in larger facilities operated by fewer, but larger, providers, more of which operate on a for-profit basis (which has implications on the quality of care offered) and that these trends are linked³⁶³
- Some residential aged care facilities offer a 'household', or 'clustered domestic' model of care (as opposed to an institutional 'hospital-like' model) which emphasises more 'person-centred' care resulting in better quality of life and clinical outcomes for residents, and that facilities organised on this model employ a higher proportion of PCAs relative to RNs and ENs³⁶⁴
- Prevailing regulatory and community standards, increased expectations, combined with higher care needs and greater diversity among residents and shorter turnover of stay have significantly increased the skill and judgment demands and level of responsibility required of workers in residential aged care, across the coverage of the Aged Care Award,³⁶⁵ and
- Aged care work is undervalued by the Aged Care Award, including by reasons of occupational sex-segregation, gendered undervaluation of care work, worker motivations and preferences, the low social status of recipients of aged care work and the ownership and funding of residential aged care.³⁶⁶

³⁶⁰ Meagher Report at 3.

³⁶¹ Meagher Report at 5.

³⁶² Meagher Report at 6–8.

³⁶³ Meagher Report at 8–11.

³⁶⁴ Meagher Report at 17–18.

³⁶⁵ Meagher Report at 19.

³⁶⁶ Meagher Report at 25–31.

[394] The Amended Supplementary Meagher Report presents research on the nature and valuation of care work performed in the home care and support sector, that being work performed by employees working for organisations funded by either the CHSP or the Home Care Package (HCP) Program (HCPP) who are covered by the SCHADS Award (HCWs).³⁶⁷ The findings it makes include that:

- The home care and support system is growing and the profile of the recipients of home care is becoming more diverse and complex, with many frail and suffering from multiple health conditions. In addition, there is evidence those entering the home care system are becoming more frail and less healthy over time.³⁶⁸
- Around 830,000 older people receive some form of care, assistance and support through the CHSP, whereas around 167,000 receive a HCP, and around one quarter of those receiving a HCP also receive services through the CHSP.³⁶⁹
- The role of home care within the aged care system is growing, with the share between residential and HCPs shifting in favour of HCP's in the last decade, and the HCPP increasingly developing as a viable alternative to residential care.³⁷⁰
- A major driver of change in home care and support is the expectation that older people can be maintained longer at home, despite significant ill-health and frailty. Concepts of consumer choice, and the take-up of digital technologies are also driving change.³⁷¹
- The direct care workforce in home care is overwhelming female.³⁷²
- The trends in home care in respect of increasing skills, responsibilities and judgment required of workers largely mirror those seen in residential care (detailed in the first Meagher Report). This is occurring as a result of the increasing needs profiles, higher levels of diversity and significant turnover of those receiving home care; as well as the prevailing regulatory and community standards and expectations of care quality and support; new technologies and the impact of the COVID-19 pandemic.³⁷³
- The delivery of home care and support to meet community standards and government-mandated quality requirements requires that care workers carry out work requiring a variety of technical and interpersonal skills, be responsible for the safety and well-being of vulnerable clients and exercise judgment about a client's condition, priorities in their work and ethical courses of action.³⁷⁴

³⁶⁷ Meagher Supplementary Report at 1.

³⁶⁸ Meagher Supplementary Report at 2–3.

³⁶⁹ Meagher Supplementary Report at 2, 5.

³⁷⁰ Meagher Supplementary Report at 7.

³⁷¹ Meagher Supplementary Report at 13, 15.

³⁷² Meagher Supplementary Report at 16.

³⁷³ Meagher Supplementary Report at 19–20.

³⁷⁴ Meagher Supplementary Report at 26.

- The problem of undervaluation of care work discussed in the first Meagher Report applies to work in both residential aged care and home care and support.³⁷⁵

[395] The HSU cite Prof Meagher's reports to support its claim that the wages of aged care workers have been historically undervalued, with past approaches to wage fixation having failed to recognise and remunerate occupations perceived to involve 'caring' and 'nurturing' skills such as those utilised by aged care workers.³⁷⁶

5.2.5 Associate Professor Smith and Dr Lyons

[396] Assoc Prof Meg Smith is the Deputy Dean of the School of Business at Western Sydney University. Dr Michael Lyons is a senior lecturer in the School of Business at Western Sydney University. Assoc Prof Smith and Dr Lyons prepared the [Smith/Lyons Report](#). Assoc Prof Smith and Dr Lyons were asked to provide their expert opinion on a range of matters including the concept of, and the contributing factors to, the gender pay gap and gender-based undervaluation in Australia, the barriers to proper work value assessment by tribunals in female dominated industries and the impact of these on setting award minimum rates.

[397] A key finding of the Smith/Lyons Report is that under the respective awards the work of RNs, ENs and PCWs working in residential aged care is undervalued, and that the gender profile of the workforce and the gendered assumptions about the skill level required in care giving work suggest that this undervaluation is gender based.³⁷⁷

[398] The Smith/Lyons Report relies on Australian Bureau of Statistics (ABS) data which indicates that, at the time of writing the Report, the average weekly ordinary full time earnings (excluding overtime earnings and part-time employees) for men and women differed by 14.2 per cent, and while the gap varies across states and industries, the data suggests a persistent gender pay gap in Australia.³⁷⁸ As the data in the Report is from May 2021, Assoc Prof Smith and Dr Lyons produced updated tables on 29 April 2022 so as to incorporate the most recent ABS data. This data indicates the gender pay gap is 13.8 per cent.³⁷⁹

[399] The below tables are current as of November 2021:

Table 1: Measures of pay differentials between females and males from ABS Average Weekly Earnings and Employee Earnings and Hours surveys.³⁸⁰

Measure of earnings	Females (\$)	Males (\$)	Ratio of female to male earnings
Average Weekly Earnings (AWE) survey measure (November 2021) (seasonally adjusted excluding AWOTE)			
Average weekly earnings (AWE) Average weekly total earnings of all employees	1093.80	1577.10	0.69

³⁷⁵ Meagher Supplementary Report at 26.

³⁷⁶ HSU closing submissions dated 22 July 2022 at [52](b) and [369].

³⁷⁷ Smith/Lyons Report at [157].

³⁷⁸ Smith/Lyons Report at [10]–[13].

³⁷⁹ ANMF correspondence dated 29 April 2022.

³⁸⁰ Assoc Prof Smith and Dr Lyons, 'Updated ABS Data – Tables 1 and 2' dated 29 April 2022, Table 1.

Average weekly earnings for full-time adults (FTAWE)	1618.00	1934.80	0.84
Average weekly ordinary time earnings (AWOTE) for full-time adults	1591.20	1846.50	0.86

Employee Earnings and Hours Survey measure (May 2021)			
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Average weekly ordinary time cash earnings (AWOTCE) for full-time non-managerial employees paid at the adult rate	1617.10	1809.10	0.89
Average hourly ordinary time cash earnings (AHOTCE) for full-time non-managerial employees paid at the adult rate	43.10	47.10	0.92
Average weekly total cash earnings (AWCE) for non-managerial employees	1131.80	1552.40	0.73
Average hourly total cash earnings (AHCE) for non-managerial employees	40.20	44.50	0.90
Average weekly total cash earnings (AWCE) for all full-time non-managerial paid at the adult rate	1639.70	1910.10	0.86
Average hourly total cash earnings (AHCE) for all full-time non-managerial employees paid at the adult rate	43.30	47.50	0.91

Source: Based on Pointon, Wheatley, and Ellis et al(2012), Layton, Smith and Stewart (2013, p. 80) and updated to include more recent data from ABS Cat. No. 6302.0 (Average Weekly Earnings Survey) (ABS 2022a) and from ABS Cat. No. 6306.0 (Employee Earnings and Hours Survey) (ABS 2022b).

Source: Smith/Lyons Report at 4.

Table 2: Differing measures of the gender pay gap (GPG)³⁸¹

Measure	GPG (%)	Main features and limitations
Average weekly earnings (AWE) Average weekly total earnings of all employees	30.6	Includes all weekly earnings for all employees but makes no adjustment that a much larger proportion of women work part-time than men – and are therefore paid for fewer working hours.
Average weekly earnings for full-time adults (FTAWE)	16.4	Includes all weekly earnings for all full-time adult employees but makes no adjustment for the fact that men are more likely to work and be paid overtime than women.
Average weekly ordinary time earnings (AWOTE) for full-time adults	13.8	Excludes overtime earnings. Part-time employees are also excluded, the majority of whom are women in lower paid occupations.
Average weekly ordinary time cash earnings (AWOTCE) for full-time non-managerial adult employees	10.6	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly ordinary time earnings thus excluding overtime.
Average hourly ordinary time cash earnings (AHOTCE) for full-time non-managerial adult employees	8.5	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on hourly earnings.
Average weekly total cash earnings (AWCE) for all non-managerial adult employees	27	Includes all weekly earnings for all non-managerial employees but makes no adjustment for the fact that a much larger proportion of women work part-time than men – and are therefore paid for fewer working hours
Average hourly total cash earnings (AHCE) for all non-managerial adult employees	9.7	Includes all weekly earnings for all non-managerial employees. Based on hourly earnings thus takes account, to an extent, of the larger proportion of women who work part-time.
Average weekly total cash earnings (AWCE) for full-time non-managerial adult employees	14.2	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly total earnings thus including overtime.
Average hourly total cash earnings (AHCE) for full-time non-managerial adult employees	8.8	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly total earnings thus including overtime. Based on hourly earnings,

Source: Based on Pointon, Wheatley and Ellis et al (2012), Layton, Smith and Stewart (2013, p. 80) and updated to include more recent data from ABS Cat. No. 6302.0 (Average Weekly Earnings Survey) (ABS 2022a) and from ABS Cat. No. 6306.0 (Employee Earnings and Hours Survey) (ABS 2022b).

Source: Smith/Lyons Report at 5.

[400] Assoc Prof Smith and Dr Lyons describe 2 broad approaches to assessing the contributing factors to the gender pay gap. The first approach is known as the ‘standard’ or ‘orthodox’ economics approach, which assumes that women make a rational choice to work in lower-paying occupations because of their limited investment in human capital. The second is

³⁸¹ Assoc Prof Smith and Dr Lyons, ‘Updated ABS Data – Tables 1 and 2’ dated 29 April 2022, Table 2.

the ‘institutional’ or ‘sociological’ approach which suggests organisational, social and labour-market factors impact women’s occupational choices.³⁸² Their expert opinion is that the gender pay gap cannot be fully explained by the standard economics approach and that research which applies the institutional approach is better able to detect the reasons for the gender pay gap. In their expert opinion, the gender pay gap arises from the intersection of:

- differences in returns received by women compared to men for productivity related characteristics
- occupational segregation, and
- undervaluation of feminised work.³⁸³

[401] The Smith/Lyons Report explores various interpretations of gender-based undervaluation and how this can occur. The Smith/Lyons Report ultimately finds that gender-based undervaluation refers to work value practices that are impacted by gender and which contribute to the failure to recognise work value in assigned wages.³⁸⁴

[402] Assoc Prof Smith and Dr Lyons conclude that there is evidence of gender-based undervaluation of work, and that this is influenced by social expectations, gendered assumptions and the disproportionate engagement by women in unpaid labour.³⁸⁵ In their expert opinion, barriers and limitations to the proper assessment of work value in female dominated industries and occupations include:

- changes in the regulatory framework for equal pay and equal remuneration applications and the interpretation of that framework
- procedural requirements such as the direction in wage-fixing principles that assessment of work value focus on changes in work value and tribunal interpretation of this requirement, and
- the subjective notion of skill and the ‘invisibility’ of skills when assessing work value in female-dominated industries and occupations.³⁸⁶

[403] The Smith/Lyons Report summarises the regulatory history of work value and equal pay proceedings and principles in Australia in what they describe as the 4 epochs:³⁸⁷

- 1969 and 1972 Equal Pay Principles and the Comparable Worth Proceedings
- Legislative entitlement to equal remuneration (1993-2008)

³⁸² Smith/Lyons Report at [16].

³⁸³ Smith/Lyons Report at [41].

³⁸⁴ Smith/Lyons Report at [55].

³⁸⁵ Smith/Lyons Report at [56].

³⁸⁶ Smith/Lyons Report at [93].

³⁸⁷ Smith/Lyons Report at [71]–[83].

- Equal remuneration regulation initiatives in state jurisdictions (NSW and Queensland), and
- Equal remuneration under the FW Act.

[404] Assoc Prof Smith and Dr Lyons contend that a consequence of these epochs is a binary and gendered comparison of work value which limits the capacity of tribunals to assess the weaknesses in previous work value assessments.³⁸⁸

[405] The Smith/Lyons Report suggests that the absence of work value assessments or restraints in work value assessments can contribute to limitations in the skills classifications in awards relevant to feminised industries.³⁸⁹ The classification structures may lack relevant descriptions of what is required in jobs, including the detailed specifications of the skills required at different levels, and these omissions mean that the work undertaken is not properly described, recognised and valued. Weaknesses in classification structures may also mean that there is no mechanism to recognise additional skills.³⁹⁰

[406] In relation to PCWs covered by the Aged Care Award, the Smith/Lyons Report finds that the workers are low paid workers,³⁹¹ that low pay cannot be explained by work value reasons,³⁹² (in particular because the award classification descriptors do not reflect the work and work value of contemporary employees);³⁹³ and that there has been no work value assessment undertaken since the Aged Care Award was introduced,³⁹⁴ despite there being substantial material showing significant changes in the work value of aged care employees.³⁹⁵ These changes in work value include the soft skills that are traditionally overlooked such as interpersonal skills, emotional labour, patience and empathy, the need to regularly undertake training to improve skills and the increased importance of specialised skills such as dementia care and infection control.³⁹⁶

[407] In relation to RNs, ENs, and AINs covered by the Nurses Award, the Smith/Lyons Report concludes that there has been no attempt at a work value assessment in relation to the Award despite work value having changed over that time.³⁹⁷

[408] Assoc Prof Smith and Dr Lyons consider that the barriers to proper work value assessment include:

- historical wage fixing principles;
- industry funding;

³⁸⁸ Smith/Lyons Report at [84]–[87].

³⁸⁹ Smith/Lyons Report at [91].

³⁹⁰ Smith/Lyons Report at [91].

³⁹¹ Smith/Lyons Report at [113]–[118].

³⁹² Smith/Lyons Report at [119]–[123].

³⁹³ Smith/Lyons Report at [120].

³⁹⁴ Smith/Lyons Report at [132].

³⁹⁵ Smith/Lyons Report at [135]–[143].

³⁹⁶ Smith/Lyons Report at [137]–[140].

³⁹⁷ Smith/Lyons Report at [151], [153]–[157].

- how tribunals have considered the issue of increased workloads;
- legislative policy shift to have awards as a key part of an employment safety net system; and
- a preference for comparisons to be made between workers performing similar work under similar conditions, which in their view, ignores the realities of occupational gender-segregation.³⁹⁸

5.2.6 Associate Professor Junor

[409] Assoc Prof Junor provided expert evidence in the form of a Report produced on 28 October 2021 (and amended on 5 May 2022): [‘Fair Work Commission Matter AM2021/63, Amendments to the Aged Care Award 2010 and the Nurses Award 2010’ \(the Junor Report\)](#). Assoc Prof Junor’s main research field is ‘skill identification, particularly in the growing and feminised service and care sectors.’³⁹⁹

[410] The Spotlight Tool is a job and skills analysis tool designed as an aid in identifying, naming and classifying ‘invisible skills’ used in undertaking service work processes that are not directly observable. ‘Invisible’ in this context means ‘hidden’, ‘under-defined’, ‘under-specified’ or ‘under-codified’.⁴⁰⁰ A skill might be hidden because it is diplomatically kept unnoticed or downplayed because it is ‘behind the scenes’.⁴⁰¹ A skill might be under-defined because it is hard to pin down in words, is non-verbal, or is applied in rapidly-changing situations.⁴⁰² A skill might be under-specified because it is ‘soft’ or ‘natural’ and is misdescribed as something innate and personal rather than as a skill.⁴⁰³ A skill might be under-codified because it is integrative, or involves interweaving one’s own activities with others’ activities.⁴⁰⁴

[411] The Spotlight Tool measures skill in 2 dimensions: skill *content* and skill *level*. These terms are set out and defined in Annexure 4 to the Junor Report. The content dimensions are:

- Awareness – of contexts and situations; of reactions and ways of shaping them; and of impacts
- Communication and Interaction – managing boundaries; verbal and non-verbal communication; intercultural communication and inclusion, and

³⁹⁸ Smith/Lyons Report at [171]–[184].

³⁹⁹ Junor Report at [5].

⁴⁰⁰ Junor Report at [10], [138]–[140].

⁴⁰¹ Junor Report at [33], [140](a).

⁴⁰² Junor Report at [33], [140](b).

⁴⁰³ Junor Report at [33], [140](c).

⁴⁰⁴ Junor Report at [33]. Further description of what is meant by each of these kinds of invisibility appears in Annexure 8 at [16]. Examples of each kind of invisibility, separated out into classifications, are also in Annexure 8 at [21]–[40] for RNs, [41]–[59] for ENs, and [60]–[74] for AINs/PCWs.

- Coordination – of own work; interweaving one’s own line of work with those of others; maintaining and restoring workflow.

[412] The Spotlight skill levels are:

- orienting
- fluently performing
- problem-solving
- solution-sharing, and
- expertly system-shaping.

[413] The relevance of the Spotlight taxonomy to ‘work value’ is explained by Assoc Prof Junor in these terms:

‘If the range and level of skills in the Spotlight taxonomy are not fully *identified* and *recognised*, the results will be failure to assign a full and accurate *value* to a job classification. This is quite likely associated with underestimation of the job’s *size*, and its demands for *effort* and *responsibility*.’⁴⁰⁵

[414] As to the relevance of the Spotlight taxonomy to care work, Assoc Prof Junor states:

‘I consider that the Spotlight skill identification methodology is particularly relevant to care work. This is work defined by five key criteria: (1) contribution to physical, mental, social, and/or emotional well-being; (2) a primary labour process based on person-to-person relationships; (3) a degree of dependency on the part of care recipients based on age, illness, or disability; (4) contribution to a human infrastructure that cannot be adequately produced through unpaid work or unsubsidised markets and (5) a predominantly female workforce.’⁴⁰⁶ [footnotes omitted]

[415] We discuss the application of the Spotlight Tool to the work performed by RNs, ENs and AINs/PCWs in aged care in detail in Chapter 7.3.2.

5.3 Joint Employers’ objections to the expert evidence

[416] The Joint Employers submit that the Commission ‘should be cautious with respect to the weight placed’ on the expert evidence regarding the gender pay gap and gender undervaluation; sociological theories for undervaluation (including the notion of ‘women’s work’) and the ‘spotlight tool’ and ‘invisible skills’ and argue:

‘the Commission needs to be particularly cautious about that evidence because it did not relate to minimum award rates. In such circumstances, without critiquing the substance of the theories explored by the experts, the content is ultimately of minimal assistance

⁴⁰⁵ Junor Report at [14].

⁴⁰⁶ Junor Report at [72].

in the context of a work value assessment determining how to properly set minimum wages in the awards.⁴⁰⁷

[417] In relation to the Smith/Lyons Report, the Joint Employers submit that the Commission should take a ‘cautious’ approach to the evidence on the gender pay gap and its connection to undervaluation and argue:

- (a) ‘the utility of the analysis based on *average weekly earnings* is limited on two bases:
 - (i) the generality of the data can only provide a crude comparison based on gender, it is void of any relevant compositional factors that may impact hours worked because the statistics concern *total earnings* across *all industries*; and
 - (ii) is not concerned with minimum rates of pay in awards; and
- (b) there is no evidence of a gender pay gap within the modern award framework.⁴⁰⁸

[418] Further, the Joint Employers submit that the ‘institutional sociological approach’ utilised by Assoc Prof Smith to analyse the gender pay gap presents no more than an ‘interesting academic exercise’ and when ‘matched with the broad comparisons highlighted in gender pay gap statistics, the imprecision ultimately impacts any weight that can be put on it.’⁴⁰⁹

[419] In relation to the contention in the Smith/Lyons Report that there have historically been barriers to the proper assessment of work value in female-dominated industries, the Joint Employers submit:

‘The aspects of the award modernisation process summarised do not establish that the minimum rates fixed during the modernisation process were infected by improper practices and gender bias. The development of modern awards was an intensely consultative process, marked by reviews and the opportunity for industry stakeholders and peak bodies to be heard.’⁴¹⁰

[420] In response to the observation in the Smith/Lyons Report that the low rates of pay in the aged care industry are indicative of undervaluation of work, the Joint Employers submit that the Smith/Lyons Report fails to identify the ‘low’ rates by reference to comparative work and argue:

‘By the Smith Report, the authors undertake a connect-the-dots exercise based on a host of generalised observations to connect current minimum award rates to the gender pay gap and gender-based undervaluation. It is *generalised* because the data relied upon to

⁴⁰⁷ Joint Employers closing submissions dated 22 July 2022 at [6.5].

⁴⁰⁸ Joint Employers closing submissions dated 22 July 2022 Annexure J at [2.2].

⁴⁰⁹ Joint Employers closing submissions dated 22 July 2022 Annexure J at [2.12].

⁴¹⁰ Joint Employers closing submissions dated 22 July 2022 Annexure J at [2.17].

establish undervaluation, as set out above, does not distinguish between industry (for the most part) or minimum award rates.⁴¹¹

[421] The Joint Employers argue that each of the expert witnesses, with the exception of Prof Kurrle, addressed ‘sociological theories for undervaluation of wages for work performed by women’ and submit that the Commission should be ‘cautious’ in respect of this evidence because:

- (a) ‘absent consideration of minimum award rates, conclusions and analysis built on actual pay rates (or a conflation of both) is of minimal utility to the precise task to be undertaken by the Commission;
- (b) comparison of the rates between female and male dominated occupations, without consideration of minimum award rates, does not assist the Commission assess whether minimum award rates should be adjusted based on work value reasons;
- (c) the Commission’s historical approach to work value assessment has not been informed by gender; to accept “*caring work*” as inherently undervalued is to find the Commission was biased in previous work value assessments based on gender; and
- (d) the conflation of data and/or analysis renders the related conclusions of limited assistance.⁴¹²

[422] In respect of Prof Meagher’s evidence that ‘female-dominated occupations tend to be paid less than male-dominated occupations’, the Joint Employers submit that Prof Meagher accepted during cross-examination that the supporting research looked at ‘actual rates’ rather than ‘minimum rates’ and as a result the ‘generality of the data’ underpinning Prof Meagher’s analysis is of ‘limited utility’ to the Commission.⁴¹³

[423] Further, in respect of Prof Meagher’s evidence that the Aged Care Award does not recognise the range of skills and responsibilities exercised by aged care workers, the Joint Employers submit that Prof Meagher’s analysis was undertaken ‘at a very high level and without close correlation to the existing classifications in the award’ and ‘cannot substantiate a finding that a failure to expressly refer to every skill used in a role means that skill was not factored into the minimum rates.’⁴¹⁴

[424] In respect of the evidence that minimum rates in the aged care industry have been historically undervalued due to gender bias and the value attributed to ‘women’s work’, the Joint Employers submit that the evidence should be treated with ‘caution’ as it is not based on an analysis of minimum award rates and would require an acceptance that the Commission has

⁴¹¹ Joint Employers closing submissions dated 22 July 2022 Annexure J at [2.23].

⁴¹² Joint Employers closing submissions dated 22 July 2022 Annexure J at [3.3].

⁴¹³ Joint Employers closing submissions dated 22 July 2022 Annexure J at [3.7].

⁴¹⁴ Joint Employers closing submissions dated 22 July 2022 Annexure J at [3.22].

‘historically failed’ in assessing minimum rates in the awards.⁴¹⁵ The Joint Employers further submit:

‘If male dominated and female dominated modern awards are already largely aligned around the C10 Framework but “*women’s work*” is however undervalued, it suggests that all women’s work is of greater value than all “*men’s work*” which seems to highlight the problem of transferring concepts of equity into minimum award rates of pay historically based on the gender neutral ground of the C10 scheme and the AQF.’⁴¹⁶

[425] At the outset we note that a number of the criticisms raised by the Joint Employers were not put to the expert witnesses in cross-examination and the ANMF submits that the rule in *Browne v Dunn* requires the Commission to avoid findings not put to the witnesses.⁴¹⁷

[426] The rule in *Browne v Dunn* was described in *MWJ v The Queen* as follows:

‘The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person’s witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party’s or a witness’ credit.’⁴¹⁸

[427] In response to the *Browne v Dunn* point the Joint Employers did not press the criticisms or ask the Commission to make findings on matters that were not put to the expert witnesses.⁴¹⁹

[428] We note that very little was in fact put to the expert witnesses in cross-examination, and observe that the majority of their evidence remains untouched. The extent of cross-examination was as follows:

- Prof Charlesworth was cross examined on 2 May 2022.⁴²⁰ Prof Charlesworth was cross examined in relation to her qualifications and expertise and on paragraphs [40], [42] – [46], [58] and [62] of the Charlesworth Report. Prof Charlesworth was not cross examined in relation to the Supplementary Charlesworth Report.
- Assoc Prof Junor was cross examined on 2 May 2022.⁴²¹ Assoc Prof Junor was cross examined generally on the design and implementation of the Spotlight Tool, the meaning of ‘soft skills’, the skill sets identified using the Spotlight methodology, the 5 ‘levels’ in the Spotlight Tool and in relation to Annexure 4 and paragraphs [223], [257], [259] and [275] of the Junor Report. Assoc Prof Junor was not cross examined in respect of the other 8 Annexures to the Junor Report.

⁴¹⁵ Joint Employers closing submissions dated 22 July 2022 Annexure J at [3.17].

⁴¹⁶ Joint Employers closing submissions dated 22 July 2022 Annexure J at [3.18].

⁴¹⁷ ANMF closing submissions in reply dated 17 August 2022 at [321].

⁴¹⁸ *MWJ v R* (2005) 222 ALR 436; 80 ALJR 329; [2005] HCA 74 at [38] (Gummow, Kirby and Callinan JJ).

⁴¹⁹ Joint Employers submission – response to Background Documents 6, 7 and 8 dated 29 August 2022 at [3.19].

⁴²⁰ Transcript, 2 May 2022, PN2486–PN2566.

⁴²¹ Transcript, 2 May 2022, PN3111–PN3232.

- Prof Meagher was cross examined on 2 May 2022.⁴²² Prof Meagher was cross examined in relation to the first two paragraphs in section 7 and the final paragraph of the conclusion to the Executive Summary of the Meagher Report. She was then cross examined on the final paragraph of section 6, and on aspects of sections 6.1, 6.2 and 6.4 of the Meagher Report. Prof Meagher was not cross examined in relation to the Supplementary Meagher Report.
- Prof Eagar was cross examined on 9 May 2022.⁴²³ Prof Eagar was cross examined in relation to the following paragraphs of the Eagar Report: paragraph [6] of section 2, paragraphs [1], [4], [6] of section 3, paragraph [2] section 4, paragraph [6] of section 5, paragraphs [6] and [7] of section 7.3 and paragraph [1] of section 8. Prof Eagar was also cross examined in respect of Figure 1 and Tables 2, 3, 5, 6 and 7. Prof Eagar was not cross examined in relation to the Supplementary Eagar Report.
- Assoc Prof Smith was cross examined on 2 May 2022. Assoc Prof Smith was cross examined in relation to the difference between standard econometric analysis and institutional and sociological analysis and on paragraphs [34], [60], [105] – [106], [163] and [169] and Tables 1 and 2 of the Smith/Lyons Report.
- Prof Kurrle was cross examined on 3 May 2022.⁴²⁴ Prof Kurrle was cross examined in relation to her experience working in the aged care sector and her specialisation in geriatric medicine and in relation to the following paragraphs of the Kurrle Report: Section (b) paragraph [2], Section (e) paragraph [2]–[3], Section (i) paragraph [5], Section (k) paragraph [2], Section (m) paragraph [2], Section (n) and Section (r).

[429] Of the criticisms of the expert evidence advanced by the Joint Employers, the following were not put to the witnesses:

- It was not put to Prof Charlesworth, Prof Kurle, Prof Eagar or Assoc Prof Junor that their reports did not concern minimum award rates.
- It was not put to any of the expert witnesses that they were incorrect in finding that ‘women’s work’ has been historically undervalued.
- It was not put to Assoc Prof Smith that ‘there is no gender pay gap in the modern awards framework’.
- It was not put to Prof Meagher that her analysis of the current award classification structure was undertaken ‘at a very high level and without close correlation to the existing classifications in the award’ nor was it put to her that a failure to expressly refer to a skill in a role does not mean that it was not factored into the minimum rates.

⁴²² Transcript, 2 May 2022, PN2616–PN2735.

⁴²³ Transcript, 9 May 2022, PN8736–PN8929.

⁴²⁴ Transcript, 3 May 2022, PN3582–PN3685.

- The proposition that the expert evidence leads to the ‘troubling’ conclusion that ‘all women’s work is of greater value than all men’s work’ within the modern award system, was not put to any of the expert witnesses.
- It was not put to Assoc Prof Smith that the Smith/Lyons Report undertakes a ‘connect-the-dots exercise based on a host of generalised observations.’
- It was not put to Assoc Prof Junor that the application of the Spotlight Tool is an ‘academic exercise’.
- It was not put to Assoc Prof Junor that the application of the Spotlight Tool is ‘highly selective and self-serving’.

[430] Given the limited scope of the cross-examination we find the Joint Employers criticisms of the expert evidence generally unpersuasive. We do not propose to give any weight to the criticisms which were not put to the expert witnesses.

5.4 The Lay Witness Evidence

[431] On 6 April 2022, a [Statement](#) directed the parties to file any objections to the evidence contained in the witness statements by Thursday 21 April 2022. The parties’ responses noted that they considered that parts of the material upon which other parties proposed to rely were objectionable (including on the grounds of relevance and hearsay), but they did not propose to take any formal objection to that material.⁴²⁵ Each of the parties reserved their right to address such matters in their closing submissions in terms of the weight, if any, to be given to parts of the witness statements. The Commission proceeded on that basis.

[432] As mentioned earlier, the Commission published a Lay Witness Evidence Report which provides an overview of the evidence of the employee lay witnesses.

[433] In their closing submissions, the HSU and the ANMF drew on and emphasised different aspects of the summary of evidence contained in the Lay Witness Evidence Report, but did not depart from the findings of the Report in any material way.

[434] The Joint Employers did not comment on the summary of evidence contained in the Lay Witness Evidence Report, but submitted that many aspects of the lay witness evidence should be given little, if any, weight.⁴²⁶ The Joint Employers challenged elements of the lay witness evidence on the basis of relevance, opinion and hearsay.

[435] The Joint Employers submitted that the lay witness evidence regarding the COVID-19 pandemic and staff shortages should attract little to no weight. The Joint Employers also submitted that lay witness evidence in which witnesses described financial pressure they experience or associate with working in the aged care sector should be given little to no weight,

⁴²⁵ Joint Employers submissions – objections to evidence dated 21 April 2022; UWU submissions – hearing plan and evidence dated 21 April 2022; HSU submissions – hearing plan and objections to evidence dated 22 April 2022; ANMF submissions in reply dated 21 April 2022.

⁴²⁶ Joint Employers closing submissions dated 22 July 2022 Annexures A–G and I.

on the basis that such statements are not relevant to work value assessment or are not corroborated by objective evidence.⁴²⁷

[436] We accept that the lay witness evidence is necessarily limited to the personal experience of the particular witness and cannot be extrapolated to encompass the conditions, skills and experience of all persons who work in the aged care sector. We also accept that aspects of the lay witness evidence are hearsay or opinion and as a result subject to the appropriate limitations.

[437] The lay witness evidence presents an impression of the nature of the work, the conditions under which it is performed, and the skills utilised by direct care workers in both residential and home-based aged care. The lay witness evidence has been used to illustrate issues that have been brought to life in other evidence.

⁴²⁷ Joint Employers closing submissions dated 22 July 2022 Annexures A–G and I.

6. The Aged Care Sector

6.1 Overview

[438] This Chapter of our decision provides an overview of the employees, regulatory framework and funding arrangements in the aged care sector. We have updated the aged care workforce profile set out in the *2019 Aged Care Decision*⁴²⁸, based on the most recent ABS data.

[439] In a Statement⁴²⁹ published on 20 June 2022 we requested that the Commonwealth provide data on the composition of the aged care workforce, including a profile of the employees employed in the aged care sector (by classification and qualification, if available); and an overview of the aged care regulatory framework. As requested, Part B (and Annexures A and B) of the Commonwealth's submission of 8 August 2022 addressed the nature of the aged care sector including:

- data on the composition of the aged care workforce (set out in Annexure A)
- a profile of the employees employed in the aged care sector (by classification and qualification, where available) (set out in Annexure B)
- the Commonwealth's regulation of the aged care sector, and
- the current funding model (the ACFI and the transition to the new funding model (the Australian National Aged Care Classification)).

[440] Any interested party was invited to comment on the Commonwealth's submission, including the material set out in Part B and the annexures to the submission. Background Document 6 summarises the Commonwealth's submission and sets out the parties' submissions in reply. No substantive issues were raised with respect to Part B and Annexures A and B of the Commonwealth's submission; the limitations in the data are acknowledged and noted.

6.2 Data Sources

[441] In its submission, the Commonwealth (as well as some expert witnesses) referred to the 2020 Aged Care Workforce Census (the 2020 Workforce Report), undertaken by the Commonwealth Department of Health, which provides a 'point-in-time snapshot of the size of the workforce, the numbers of each type of worker, additional qualifications of workers, and some key demographic features'.⁴³⁰ We have also drawn on data sources set out in the Research Reference List and from the evidence and submissions filed in the proceedings.

[442] The benefit of the 2020 Workforce Report over some data from the ABS is that it can isolate aged care workers from other types of support workers.⁴³¹ The Commonwealth submits that the 2020 Workforce Report 'provides the best quantitative descriptions of the aged care workforce over time', although it has limitations related to response rates, the exclusion of aged

⁴²⁸ [2019] FWCFB 5078 at [19]–[42].

⁴²⁹ [2022] FWCFB 102.

⁴³⁰ Commonwealth submissions dated 8 August 2022 at [11].

⁴³¹ Commonwealth submissions dated 8 August 2022 at [13].

care workers not working for a provider, and the duplication of workers across different types of aged care.⁴³² These limitations are discussed further below.

[443] The Commonwealth referred to data from the 2003, 2007, 2012, 2016 and 2020 Workforce reports.⁴³³ We will focus on the data for 2020 where possible; not only because it is the most recent, but also because of changes to the Workforce report over time which limits any direct comparisons to be made between the 2020 data and earlier data.⁴³⁴ Changes over time will focus on the period between 2003 and 2016 where data are more comparable.

[444] The 2020 Workforce Report is divided into 3 parts for each of the service care types—residential aged care, HCPP and the CHSP. Because of an overlap between workers in the HCPP and CHSP, these data cannot be added to calculate a ‘total workforce’. For example, a part-time worker at 2 separate residential aged care facilities may work across both the HCPP and CHSP and be counted twice. These programs are collectively referred to as ‘in-home aged care’ in the 2020 Workforce Report.⁴³⁵

[445] Although it is referred to as a Census, the Workforce Report notes that ‘[t]he Census was sent to 2,716 RAC [Residential Aged Care] facilities across Australia. Of these, 1,329 (49 per cent) responded’.⁴³⁶ In addition, 834 HCPP providers were asked to complete separate responses for each aged care planning regions they operated in (1,308 responses), of which 616 responses were received, and 630 CHSP providers were also asked to complete separate responses for each aged care planning regions they operated in (for a total of 1340 census requests) of which 505 responses were received.⁴³⁷ Responses were provided in relation to the workforce current in the month of November 2020.⁴³⁸ Respondents to the 2020 Workforce Report therefore resemble a survey sample rather than the entire population of aged care providers.

6.3 The Aged Care Workforce

[446] There are approximately 365,000 aged care workers across residential and in-home care.⁴³⁹ Of these, approximately 58 per cent are PCWs and 9 per cent are RNs (including nurse practitioners). Around two-thirds of direct care workers are employed on a permanent part-time basis (65 per cent).⁴⁴⁰

⁴³² Commonwealth submissions dated 8 August 2022 at [12].

⁴³³ The earlier Censuses were undertaken by the National Institute of Labour Studies on behalf of the Department.

⁴³⁴ Commonwealth submissions dated 8 August 2022 Annexure A at [4].

⁴³⁵ Commonwealth submissions dated 8 August 2022 Annexure A at [2]–[3].

⁴³⁶ Department of Health, *2020 Aged Care Workforce Census Report* (Report, 2 September 2021) 8. The report also notes that responses were weighted to estimate result for all RAC facilities.

⁴³⁷ Department of Health, *2020 Aged Care Workforce Census Report* (Report, 2 September 2021) 38.

⁴³⁸ Department of Health, *2020 Aged Care Workforce Census Report* (Report, 2 September 2021) 4–5. Providers in the scope of the survey included all active registered providers who employed staff involved in direct care services (nurses, personal care workers or allied health staff). CHSP providers who solely provided non-direct care services such as gardening, cleaning, and meals (referred to as ancillary staff) were not in-scope.

⁴³⁹ Commonwealth submissions dated 8 August 2022 at [15].

⁴⁴⁰ Commonwealth submissions dated 8 August 2022 at [16].

[447] The direct care workforce for each of residential aged care, HCPP and CHSP is shown in Table 3 by occupation. The vast majority of direct care workers in both residential and in-home aged care services (over 83 per cent) identify as female.⁴⁴¹

Table 3: Size of residential aged care and in-home care workforce, direct care

	Residential Aged Care		HCPP		CHSP	
	Headcount	FTE	Headcount	FTE	Headcount	FTE
Total	208 903	129 151	64 019	25 308	59 029	21 141
Nurse practitioner	203	163	60	28	184	131
Registered nurse	32 726	20 154	3022	1241	5008	2298
Enrolled nurse	16 000	9919	887	357	1699	813
Personal care worker	146 378	93 115	56 242	23 251	47 861	15 818
Allied health professional	10 604	4081	3376	766	4306	1834
Allied health assistant	2992	1720	432	147	705	249

Note: Direct care employees provide care directly to care recipients as a core component of their work and includes nurses, personal care workers and allied health. Hours worked by staff were converted to full-time equivalent (FTE) based on a standard 35-hour week.

Source: Commonwealth submissions dated 8 August 2022, Annexure A, Tables A1 and A2.

[448] Table 3 shows that around 70 per cent of residential aged care direct care workers were PCWs. According to the 2020 Workforce Report, over three-quarters of residential aged care direct care workers (77 per cent) were employed in a permanent position, 19 per cent in a casual/contract position and 4 per cent employed as agency staff or subcontractors. Direct care staff working on a permanent basis were most likely to work part-time (93 per cent), particularly PCWs (96 per cent).⁴⁴²

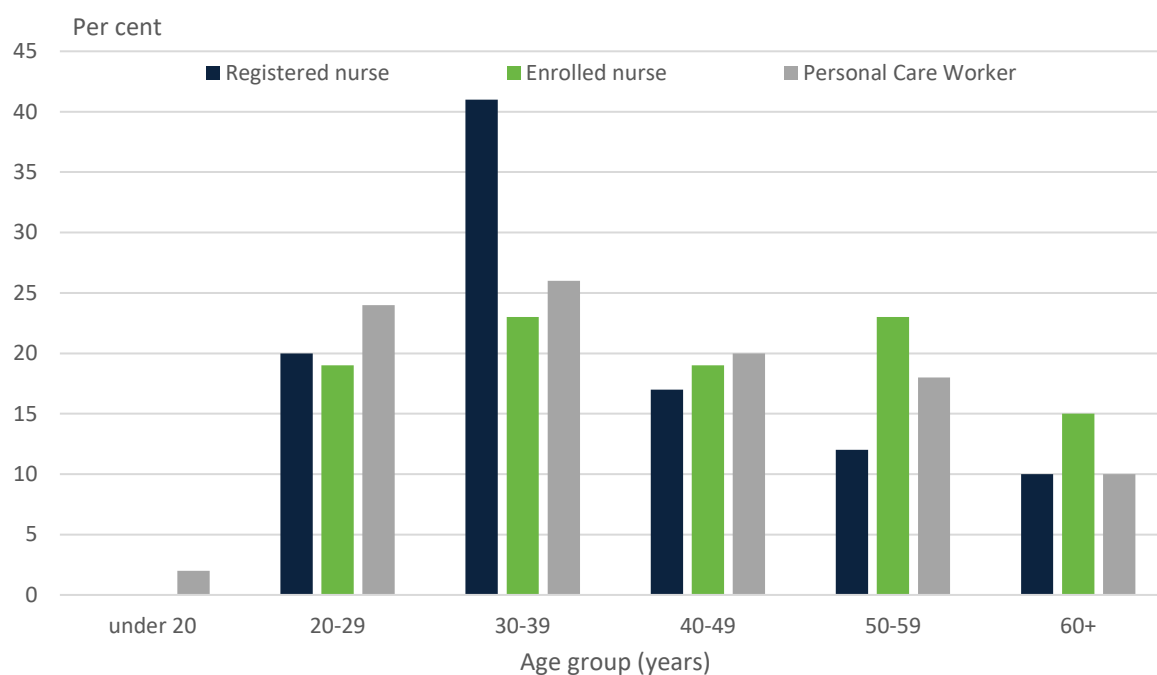
[449] Around half of the direct care workforce in residential aged care was aged under 40 years (51 per cent)⁴⁴³ and the residential aged care workforce became younger between 2016 and 2020.⁴⁴⁴

⁴⁴¹ Commonwealth submissions dated 8 August 2022 Annexure A at [13], Tables A3 and A4.

⁴⁴² Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) 12–13. Some workers were noted to have several part-time positions which when combined are equivalent to or greater than a single full time employment engagement.

⁴⁴³ Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021), 13–14.

⁴⁴⁴ Commonwealth submissions dated 8 August 2022 Annexure A at [19].

Chart 2: Age of residential aged care workforce, direct care

Source: Aged Care Workforce Census Report 2020, pp. 13–14; Australian Government submission, Appendix A, Table A7.

[450] The majority of PCWs (66 per cent) in residential aged care held a Certificate III level qualification or higher in a relevant direct care field.⁴⁴⁵

[451] Among direct care workers in the HCPP, around 88 per cent were personal care workers and 6 per cent were nurses.⁴⁴⁶ Around half of direct care workers in HCPP worked on a permanent part-time basis, and around one-third were casual/contractors working part-time. Around one-third of direct care workers were aged below 40 years⁴⁴⁷ and most were female.⁴⁴⁸

[452] Providers reported that 63 per cent of their personal care workers in HCPP held a Certificate III or higher in a relevant direct care field, with a further 4 per cent reported to be studying for a Certificate III or higher.⁴⁴⁹

[453] PCWs comprised 80 per cent of direct care roles in the CHSP.⁴⁵⁰ The majority (three-quarters) of direct care roles were permanent positions, and more than 90 per cent of these positions were on a part-time basis.⁴⁵¹

⁴⁴⁵ Commonwealth submissions dated 8 August 2022 Annexure B at [16].

⁴⁴⁶ Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 26–27.

⁴⁴⁷ Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 29.

⁴⁴⁸ Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 30.

⁴⁴⁹ Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 32.

⁴⁵⁰ Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 41.

⁴⁵¹ Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 42. The Census noted that Workers may be employed by multiple providers or service care types and work full-time hours but be counted as part-time at each.

[454] Almost three-quarters (71 per cent) of PCWs in the CHSP hold a Certificate III or higher in a relevant direct care field, with a further 2 per cent studying for a Certificate III qualification.⁴⁵²

[455] Prof Charlesworth highlighted the following findings from the 2020 Workforce Report regarding PCWs:⁴⁵³

- 89 per cent of PCWs were women in both the HCPP and CHSP;
- the median age for PCWs was 40–49 years for both the HCPP and the CHSP;
- in the HCPP, 52 per cent of PCWs were permanent part-time, 44 per cent were casual or contractors, 1 per cent were agency or subcontract workers and 3 per cent were permanent full-time; and
- in the CHSP, 73 per cent of PCWs were permanent workers (97 per cent of these were part-time), 25 per cent were employed as a casual or contractor and 2 per cent were employed as an agency/subcontractor.

[456] Prof Charlesworth noted limitations of the 2020 Workforce Report, including that workers may be counted more than once across providers as well as across service care types.⁴⁵⁴ Prof Meagher also highlighted the overlap in staff across both HCPP and CHSP, with 27 per cent of HCPP community care workers also working in CHSP operations, and 36 per cent of CHSP community care workers also working in HCPP operations.⁴⁵⁵

[457] The *2019 Aged Care Decision* noted that the 2016 National Aged Care Workforce Census and Survey (NACWCS data sets) found there were 240,317 PAYG aged care workers in direct care roles with the following characteristics:⁴⁵⁶

- 87 per cent female
- median age 46 years
- 70 per cent are Personal Care Attendants (PCA's)
- 78 per cent are employed on a permanent and part-time basis
- 10 per cent are casual or contract employees (down from 19 per cent in 2012)
- 90 per cent hold post-secondary qualifications. Two thirds of facilities reported that more than 75 per cent of their PCA's hold a Certificate III in Aged Care, and

⁴⁵² Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at45.

⁴⁵³ Charlesworth Supplementary Report at [44].

⁴⁵⁴ Charlesworth Supplementary Report at [43].

⁴⁵⁵ Meagher Supplementary Report at 16.

⁴⁵⁶ *2019 Aged Care Decision* at [29].

- a regular daytime shift was the most common work schedule for all direct care occupations. Rotating shift patterns were the norm for a 5th of nurses and PCA's.

[458] As explained by Prof Charlesworth, the 2016 NACWCS was the 4th conducted by the National Institute of Labour Studies at Flinders University, on behalf of the Commonwealth Department of Health. All aged care-funded residential facility and home care support providers were invited to participate. Each organisation was sent a package, which included the employer census, a set of surveys for direct care workers, and information about how to distribute the surveys to obtain a random sample of workers. Responses were received from 7024 workers in community outlets (a response rate of 26 per cent) including 4355 home care workers (HCWs) in community-based outlets. Sampling weights were constructed and applied to the worker survey data based on data on direct care worker numbers and occupational categories and these data were used in the published 2016 report and as the best available workforce data by the Royal Commission.⁴⁵⁷

[459] Prof Charlesworth's evidence is that because the 2020 Census did not survey aged care workers (as opposed to providers), it is not comparable with the 2016 NACWCS.⁴⁵⁸ Further, the 2016 NACWCS dataset did not cover non-PAYG personal care workers employed in residential facilities, so it includes employees in a direct employment relationship with the facilities, but does not include all workers.⁴⁵⁹

6.3.1 *Changes in occupational composition*

[460] According to several expert witnesses, the occupational composition of the residential aged care workforce has shifted over time. Prof Charlesworth highlighted evidence from the 2016 NACWCS report that between 2003 and 2016 there was a decline in the share of RNs in the direct aged care workforce from 21 per cent in 2003 to 14.6 per cent in 2016, and a decline also in ENs, from 13.1 per cent in 2003 to 10.2 per cent in 2016. Over the same period, PCWs increased from 58.5 per cent in 2003 to 70.3 per cent of the direct care workforce in 2016.⁴⁶⁰ By drawing on NACWCS data, the Royal Commission estimated that the proportion of the residential aged care workforce in direct care roles fell significantly: from 74 per cent of residential aged care employees in 2003 to 65 per cent in 2016.⁴⁶¹

[461] Prof Meagher also reported these data in terms of FTE workers. Prof Meagher noted that FTEs capture 'the size of the workforce in terms of the available labour time' and that while headcounts and FTEs have different strengths and weaknesses, it is preferable to compare changes in occupations over time using FTE workers where possible. Prof Meagher showed that the share of PCWs in the direct care workforce increased from 57 per cent in 2003 to 72 per cent in 2016.⁴⁶²

⁴⁵⁷ Charlesworth Supplementary Report at [38].

⁴⁵⁸ Charlesworth Supplementary Report at [30].

⁴⁵⁹ Charlesworth Report at [30].

⁴⁶⁰ Charlesworth Report at [47]. Similarly the Kurrle Report at 2–3 and the Meagher Report at 7.

⁴⁶¹ Charlesworth Report at [48].

⁴⁶² Meagher Report at 6.

[462] Similarly, Prof Eagar summarised the proportion of FTE direct care employees at Table 2 of the Eagar Report (provided below as Table 4). Prof Eagar noted that there had been a decline in FTE qualified nursing and allied health staff, with a reduction in RNs, ENs and allied health workers over the period from 2003 to 2016.⁴⁶³

Table 4: Full-time equivalent direct care employees in residential aged care, per cent

Occupation	2003	2007	2012	2016
Nurse practitioner	n/a	n/a	190	293
Registered nurse	16 265	13 247	13 939	14 564
Enrolled nurse	10 945	9856	10 999	9126
Personal care attendant	42 943	50 542	64 669	69 983
Allied health professional			1612	1092
Allied health assistant	5776	5204	3414	2862
Total number of employees (FTE)	76 006	78 849	94 823	97 920
As a share of total employees (per cent)	2003	2007	2012	2016
Nurse practitioner	n/a	n/a	0.2	0.3
Registered nurse	21.4	16.8	14.7	14.9
Enrolled nurse	14.4	12.5	11.6	9.3
Personal care attendant	56.5	64.1	68.2	71.5
Allied health professional			1.7	1.1
Allied health assistant	7.6	6.6	3.6	2.9

Source: Eagar Report at p. 7.

[463] Prof Charlesworth stated that according to NACWCS 2016 data, HCWs have become a larger share of the home care support workforce as there is a decreasing proportion of both registered and enrolled nurses working in community-based aged care.⁴⁶⁴ HCWs were 84 per cent of the home care support workforce in 2016 compared to 81 per cent in 2012.

[464] Noting that the ABS Census data is the only data source publicly available that can be used to cross-tabulate industry and occupation classifications at a fine level of detail,⁴⁶⁵ Prof Charlesworth found that, based on an analysis of the ABS Census for 2016, there were 211,625 people employed in Aged care residential services (at the 4-digit ANZSIC level), with 46,851 (or 22 per cent) working as Nursing support and PCWs (at the 4-digit ANZSCO level). More detailed data at the 6-digit ANZSCO level showed that there were 28,897 PCAs.⁴⁶⁶

[465] Prof Charlesworth's opinion is that '[c]ompared to the 2016 NACWCS estimates of directly employed personal care workers [in the] 2016 Census data would appear to underestimate the numbers of personal care workers in residential aged care even if the more

⁴⁶³ Eagar Report at 7.

⁴⁶⁴ Charlesworth Supplementary Report at [68].

⁴⁶⁵ Charlesworth Report at [23].

⁴⁶⁶ Charlesworth Report at [24].

aggregated 4-digit Nursing Support and Personal Carer Workers ANZSCO classification was used'.⁴⁶⁷

[466] For the PCA occupation category in the 2016 ABS Census, Prof Charlesworth found that:⁴⁶⁸

- women make up 85.4 per cent of the PCA workforce compared with 47.5 per cent of the entire Australian workforce
- PCAs tend to be older, with the median age of these workers being 45–49 years, compared with the Australian workforce where the median age is 40–44 years
- half of the PCA workforce were born outside Australia (50 per cent), a substantially higher proportion than the Australian workforce (31 per cent)
- more than half of the PCA workforce arrived in Australia in the 10 years prior to the Census (55.9 per cent)
- two-thirds of the PCA workforce work part-time (less than 35 hours per week) (68.9 per cent), with more women (70.8 per cent) than men (58.1 per cent) working part-time
- PCAs are more likely than the total workforce to work ‘very short’ part-time hours (15 hours or less per week) (19.0 per cent) and much more likely to work ‘short’ part-time hours (16–24 hours) (21.8 per cent), and
- Certificate level qualifications (62.8 per cent) were the most common category of post-school qualifications amongst PCAs. This pattern is the same for both male and female PCAs. Another 15.5 per cent held Advanced Diploma and Diploma Level qualifications, 6.6 per cent held bachelor’s degree qualifications, while another 3.9 per cent held post-graduate degree qualifications.

[467] According to Prof Charlesworth, the occupation Aged and disabled carers ‘is inadequately described as people who provide “general household assistance, emotional support, care and companionship for aged and disabled persons in their own homes” and holding a level of skill commensurate with the AQF Certificate II or III (ANZSCO Skill Level 4)’.⁴⁶⁹

[468] Prof Charlesworth’s analysis of the 2016 ABS Census indicates that HCWs or ‘aged and disabled carers’ in the ANZSCO4231 occupational category have the following characterisation:⁴⁷⁰

⁴⁶⁷ Charlesworth Report at [25].

⁴⁶⁸ Charlesworth Report at [26].

⁴⁶⁹ Charlesworth Supplementary Report at [35].

⁴⁷⁰ Charlesworth Supplementary Report at [36].

- between 2011 and 2016, the number of aged and disabled carers increased from 106,101 to 129,343
- women make up 80.1 per cent of the HCW workforce (and only 47.5 per cent of the entire Australian workforce)
- the median age of these workers is 47 years, older than the Australian workforce (40 years)
- over one-third of the HCW workforce were born outside Australia (36 percent), higher than the Australian workforce (30 per cent)
- more than half of the HCW overseas born workforce arrived in Australia in the 10 years prior to the Census (54 per cent)
- two-thirds (66 per cent) of the HCW workforce work part-time (less than 35 hours per week), with more women (70 per cent) than men (55 per cent) working part-time
- compared to the total workforce, HCWs are more likely to work very short part-time hours (15 hours or less per week)—17 per cent of HCWs compared with 12 per cent of the total workforce, and
- three quarters (76 per cent) of HCWs have post school qualifications, with Certificate level qualifications (62 per cent) the most common category of post-school qualifications amongst HCWs. A further 19 per cent held Advanced Diploma and Diploma Level qualifications and 15 per cent held bachelor’s degree qualifications.

6.3.2 *Estimates of workers covered by modern awards*

[469] The Commonwealth estimated the number of workers allocated to each award classification and pay point level in 2022–23. The total number of workers for each award is shown below, however, as some job titles may be classified across multiple awards, these estimates likely overstate the number of workers.

Table 5: Estimated number of workers on each classification within the Aged Care Award, Nurses Award and SCHADS Award, 2022-23⁴⁷¹

Modern award	Classification	Number of workers
Aged Care Award	All	124 226
Nurses Award	Enrolled nurses	13 210
	Registered nurses	67 059
SCHADS Award	All	110 384

⁴⁷¹ Commonwealth submissions dated 8 August 2022 Annexure B, Tables B1–B11.

Note: Some job titles may be classified across multiple awards.

Source: Commonwealth submissions dated 8 August 2022 Annexure B, Tables B1–B11.

[470] The majority of workers covered by the Aged Care Award are PCWs (75,100 or 60 per cent). Across the classifications, 30 per cent were classified as Aged Care Employee level 4, 23 per cent as Aged Care Employee level 3 and 19 per cent as Aged Care Employee level 2.⁴⁷² However, only 24.2 per cent of in-scope employees covered by the Aged Care Award were estimated to be award-reliant, with enterprise agreements applying to the remainder.⁴⁷³

[471] Almost half of ENs covered by the Nurses Award (48 per cent) were classified as Enrolled nurse–pay point 4 or 5, while just over half of RNs were classified as levels 1 and 2.⁴⁷⁴ However, only 14.3 per cent of in-scope employees covered by the Nurses Award were estimated to be award-reliant.⁴⁷⁵

[472] Over half of the workers covered by the SCHADS Award were home care employees (52 per cent). Around one-third of workers covered by the SCHADS Award were at classification levels 1 and 2 and one-fifth were classified as being level 3.⁴⁷⁶ Around two-thirds (68 per cent) of in-scope employees covered by the SCHADS Award were estimated to be award-reliant.⁴⁷⁷

6.3.3 ‘Low paid’ aged care workers

[473] The Commission has consistently determined that a threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid’,⁴⁷⁸ within the meaning of s.134(1)(a) of the FW Act. The classifications for each of the modern awards are compared below with two measures of low pay. As there is no accepted measure of two-thirds of median (adult) ordinary time earnings, we use two main ABS surveys that capture a distribution of earnings. These are the *Characteristics of Employment Survey* (the CoE Survey) and the *Employee Earnings and Hours Survey* (the EEH Survey).⁴⁷⁹ The most recent data for median earnings from the CoE Survey is for August 2021 and from the EEH Survey is for May 2021. The classifications for each of the modern Awards are compared below with the 2 measures of low pay.

[474] Chart 3 below compares the measures of median earnings from these data sources with the minimum weekly wages in the Aged Care Award 2010 as at 1 July 2022 following the Annual Wage Review 2021–22.

⁴⁷² Commonwealth submission, Appendix B, Table B2.

⁴⁷³ Commonwealth submission, Appendix B at [19].

⁴⁷⁴ Calculations based on Commonwealth submission dated 8 August 2022, Appendix B, Table B4 and B8.

⁴⁷⁵ Commonwealth submission dated 8 August 2022 Appendix B at [21].

⁴⁷⁶ Commonwealth submission dated 8 August 2022 Appendix B, Table B10.

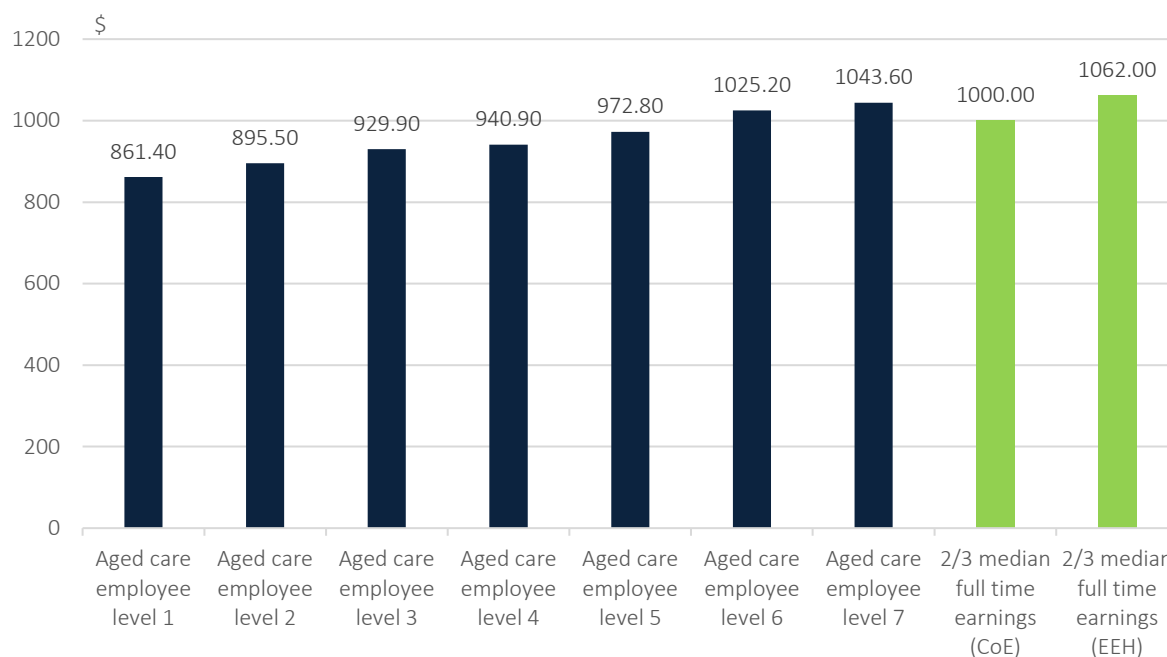
⁴⁷⁷ Commonwealth submission dated 8 August 2022 Appendix B at [23].

⁴⁷⁸ *Penalty Rates Decision* at [166].

⁴⁷⁹ ABS, *Characteristics of Employment, Australia, August 2017* (Catalogue No. 6333.0, 26 February 2018); ABS, *Employee Earnings and Hours, Australia, May 2016* (Catalogue No. 6306.0, 19 January 2017).

[475] The chart shows that the full-time weekly wage for all classifications in the Aged Care Award was below the EEH measure of two-thirds of median full-time earnings. Most classifications were also below the CoE measure, other than Aged care employee Levels 5 to 7.

Chart 3: Comparison of minimum full-time weekly wages in the *Aged Care Award 2010* and two-thirds of median full-time earnings

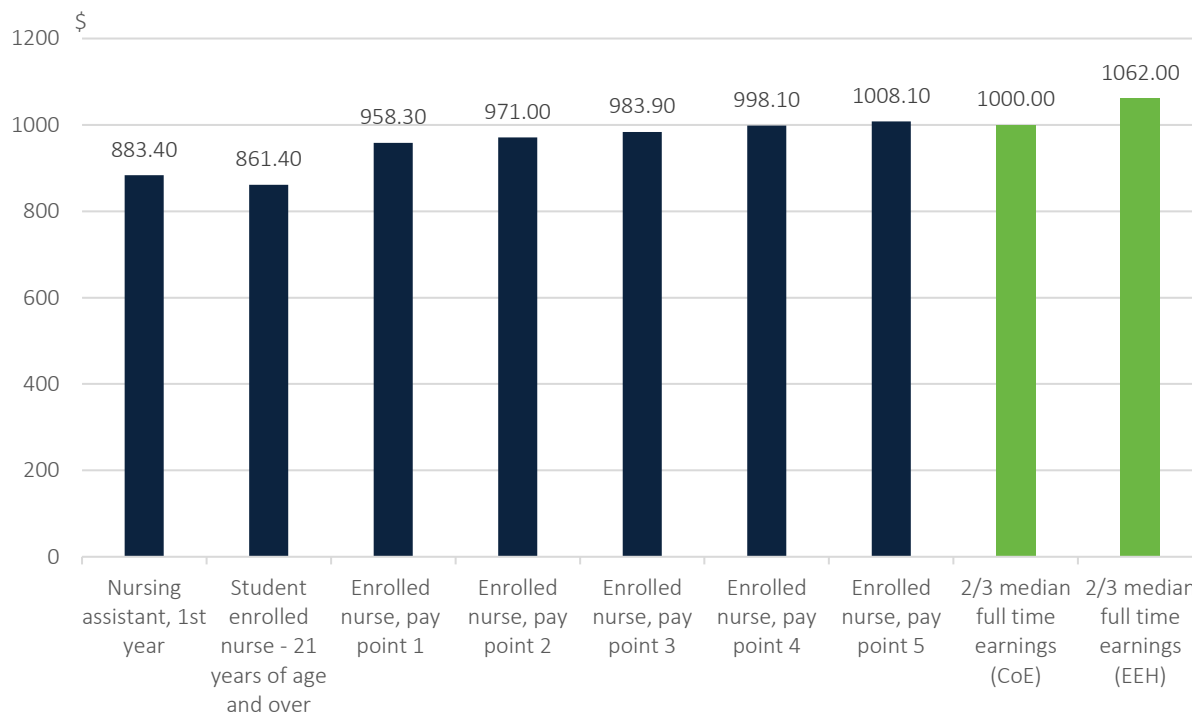


Note: Weekly earnings from the CoE Survey are earnings in the main job for full-time employees. Weekly earnings from the EEH Survey are weekly total cash earnings for full-time non-managerial employees paid at the adult rate.

Source: MA000018; ABS, *Characteristics of Employment, Australia*, August 2021; ABS, *Employee Earnings and Hours, Australia*, May 2021.

[476] Classifications in the *Nurses Award* are compared in Chart 4 with two-thirds of median earnings. Like the Aged Care Award, all pay points in the Nurses Award are below the EEH measure of two-thirds of median earnings and most were also below the CoE measure, except for Enrolled nurse pay point 5.

Chart 4: Comparison of minimum full-time weekly wages in the *Nurses Award 2020* and two-thirds of median full-time earnings, Enrolled nurses

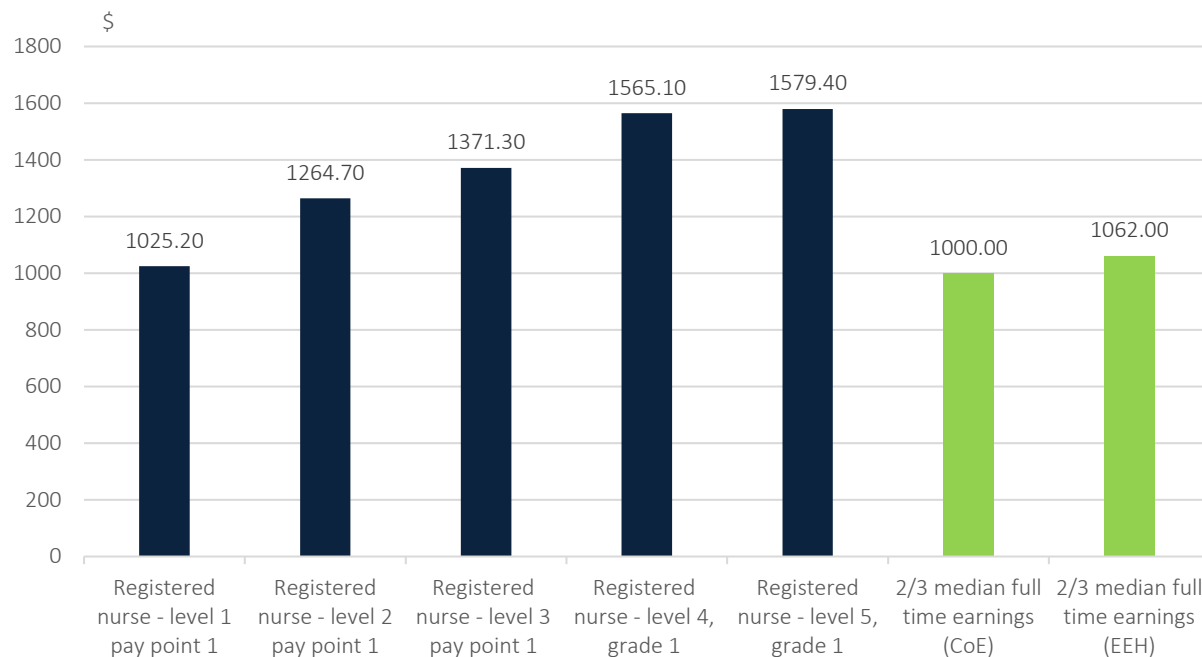


Note: Weekly earnings from the CoE Survey are earnings in the main job for full-time employees. Weekly earnings from the EEH Survey are weekly total cash earnings for full-time non-managerial employees paid at the adult rate.

Source: MA000034; ABS, *Characteristics of Employment, Australia*, August 2021; ABS, *Employee Earnings and Hours, Australia*, May 2021.

[477] Chart 5 compares the measures of two-thirds of median earnings with pay point/grade 1 for each level of Registered nurses. Each pay point/grade is above the measure of two-thirds of median earnings based on the CoE measure, and all except pay point 1 for Registered nurse—level 1 are also above the EEH measure.

Chart 5: Comparison of minimum full-time weekly wages in the *Nurses Award 2020* and two-thirds of median full-time earnings, Registered nurses

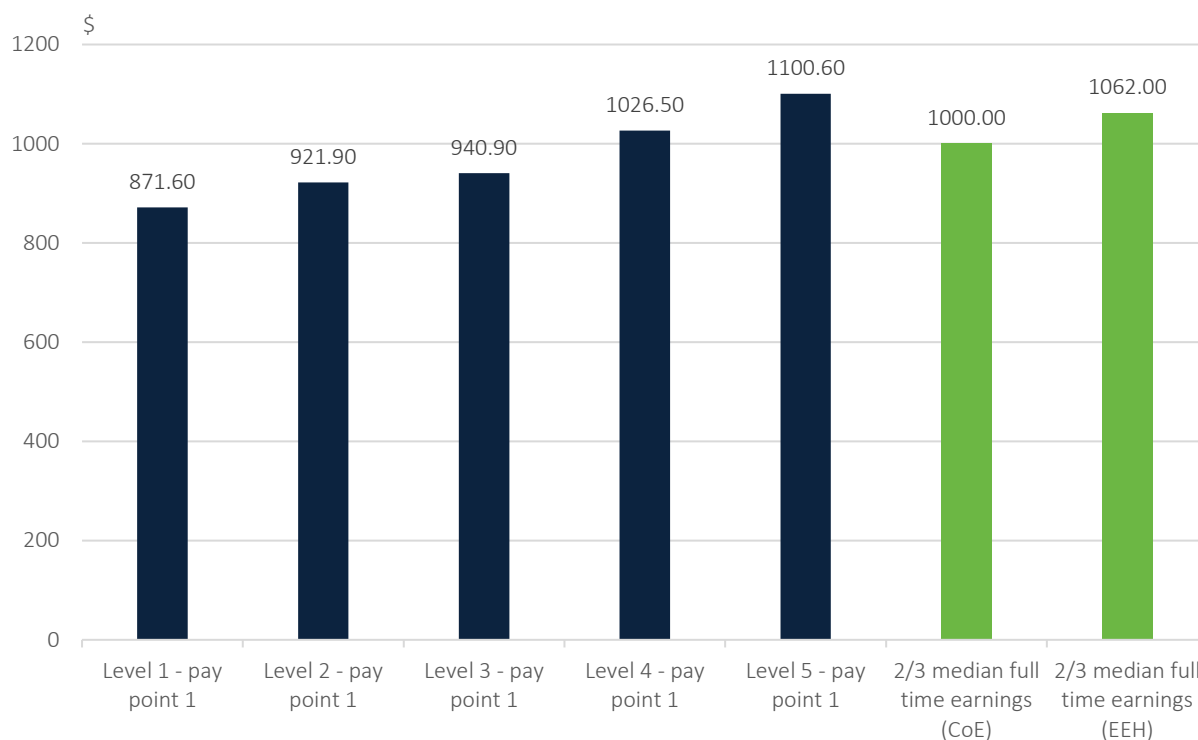


Note: Weekly earnings from the CoE Survey are earnings in the main job for full-time employees. Weekly earnings from the EEH Survey are weekly total cash earnings for full-time non-managerial employees paid at the adult rate.

Source: MA000034; ABS, *Characteristics of Employment, Australia*, August 2021; ABS, *Employee Earnings and Hours, Australia*, May 2021.

[478] For Home care employees (HCWs) pay point 1 for levels 1 to 3 are below two-thirds median earnings based on the CoE measure and the EEH measure (Chart 6). Pay point 1 for level 4 is above the CoE measure but below the EEH measure, while pay point 1 for levels 5 and above are higher than both measures.

Chart 6: Comparison of minimum full-time weekly wages in the SCHADS Award 2010 and two-thirds of median full-time earnings, home care employees



Note: Weekly earnings from the CoE Survey are earnings in the main job for full-time employees. Weekly earnings from the EEH are weekly total cash earnings for full-time non-managerial employees paid at the adult rate.

Source: MA000100; ABS, Characteristics of Employment, Australia, August 2021; ABS, Employee Earnings and Hours, Australia, May 2021.

6.4 Regulation of the Aged Care Sector

[479] The Commonwealth plays a key role in the regulation of the aged care sector, with the Department of Health and Aged Care (DoHAC) implementing the Commonwealth's policy settings for the sector and the Aged Care Quality and Safety Commission (ACQS Commission) acting as the regulator of the sector. The ACQS Commission approves for providers to deliver aged care services, subsidised by the Commonwealth, ensures compliance with providers' regulatory obligations and performing an educative role for providers, families and aged care consumers. Approved providers may be subject to some regulation under state and territory legislation, for example, vaccination requirements for aged care workers in residential aged care facilities. However, the vast majority of regulatory obligations in the sector are imposed by the Commonwealth.

6.4.1 *The Aged Care Quality Standards (the Standards)*

[480] The Standards are set out in Schedule 2 to the *Quality of Care Principles 2014* (Quality of Care Principles), a legislative instrument made under the Aged Care Act. The Standards were registered in 2018 and commenced from 1 July 2019.⁴⁸⁰

[481] All approved providers are required to comply with the Standards. Compliance with the Standards is a responsibility of approved providers under Chapter 4 of the Aged Care Act.

[482] Providers delivering services under the National Aboriginal and Torres Strait Islander Flexible Aged Care Program and services under the CHSP, are required to comply with the Standards in accordance with their respective funding agreements.

[483] The Standards replaced the former Accreditation Standards, Home Care Standards and Flexible Care Standards (together, the Former Standards).

[484] The Quality of Care Principles set out the care and services to be provided by an approved provider of residential care, home care and flexible care in the form of short-term restorative care (STRC) provided in a residential care setting. The care and services must be provided by the approved provider in a way that complies with the Standards. '

[485] The Standards place the consumer at the centre of every decision, focus on the outcomes that each consumer experiences, and give consumers greater control over their care. This is often referred to as 'consumer directed care'.

[486] While there was a requirement under the Form5er Standards to have a 'care plan', which is referred to as a 'care and services plan' in the Standards, there is a greater emphasis on the individual needs of consumers under the Standards.⁴⁸¹

[487] The evidence before us indicates that the care and service plans in residential aged care are generally signed off by RNs.⁴⁸² This has resulted in aged care workers, including RNs, spending more time with each resident to assess their needs and identify their goals and preferences.⁴⁸³ With increasing changes in acuity and care needs of residents, the requirement has led to greater complexity in care planning and has led to an increase in workloads on RNs, ENs and PCWs to maintain care plans.⁴⁸⁴

[488] The evidence in the proceedings demonstrates that there has been an increase in auditing and reporting required by approved providers to demonstrate compliance with the Standards.⁴⁸⁵

⁴⁸⁰ *Quality of Care Amendment (Single Quality Framework) Principles 2018* (Cth), s 2.

⁴⁸¹ See for example Witness statement of Paul Sadler dated 1 March 2022 at [25]; Witness statement of Emma Brown dated 2 March 2022 at [24]–[25].

⁴⁸² Item 3.8 of Part 3 of Schedule 1 of the Quality of Care Principles require initial assessment and care planning to be carried out by a nurse practitioner or registered nurse, and ongoing management and evaluation carried out by a nurse practitioner, registered nurse or enrolled nurse acting within their scope of practice. See, for example Transcript, 29 April 2022 at PN1270–PN1273 (XXN of Paul Jones) and PN1663–PN1666 (XXN of Virginia Ellis).

⁴⁸³ Witness statement of Emma Brown dated 2 March 2022 at [26].

⁴⁸⁴ See the summation of this evidence in the ANMF's closing submissions dated 22 July 2022 at [374]–[380].

⁴⁸⁵ Witness statement of Johannes Brockhaus dated 3 March 2022 at [26]–[29].

In addition, providers are subject to announced or unannounced visits by assessors from the ACQS Commission to ensure compliance with the Standards.

[489] The evidence also shows the practical impact of compliance with the Standards on the work conducted by aged care workers to ensure they are providing person-centred care.⁴⁸⁶ For example:

- Emma Brown, Special Care Project Manager at Warrigal, explained with the changes to the Standards, PCWs need to ensure they are providing consumers with choices in their daily activities, such as deciding when they would like to be showered. This means that aged care workers need to have an understanding and knowledge of each of their consumers to ensure their choices and preferences are followed.⁴⁸⁷
- Johannes Brockhaus, CEO of Buckland, noted in his evidence that the requirement of placing the person receiving care at the centre of every decision extends to the provision of food, cleaning and other services that the resident receives.⁴⁸⁸
- Craig Smith, Executive Leader Service Integrated Communities at Warrigal, noted that the main impact for PCWs and nurses was moving from a task based and regimented role, to the consumer having greater involvement. This has meant that there is a need for increased communication and to work flexibly, for example; a consumer may advise a worker that they would like to eat in their room instead of the dining room.⁴⁸⁹ This impacts on the nature and complexity of the work performed by aged care workers, particularly those in direct care roles.

[490] As with the Former Standards, non-compliance with the Standards may trigger a response from the ACQS Commission under Part 7B of the ACQS Commission Act. The ACQS Commission may take administrative action or enforceable regulatory action to manage non-compliance (see Part 8A of the ACQS Commission Act).

6.4.2 Requirements relating to the use of physical or chemical restraints

[491] *The Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Act 2021* and the *Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021* amended the Aged Care Act and the Quality of Care Principles which detail the responsibilities of approved providers of residential care and flexible care in the form of STRC provided in a residential care setting relating to restrictive practices. The amendments also limit the circumstances in which a restrictive practice can be used in relation to a care recipient in these settings.

[492] These amendments built on earlier amendments to the Quality of Care Principles and commenced on 1 July 2019.

⁴⁸⁶ See also HSU closing submissions dated 22 July 2022 at [246]–[271].

⁴⁸⁷ Witness statement of Emma Brown dated 2 March 2022 at [25]–[26].

⁴⁸⁸ Transcript, 12 May 2022, PN13814–PN13817 (XXN of Johannes Brockhaus).

⁴⁸⁹ Amended witness statement of Craig Smith dated 23 May 2022 at [31]–[33].

[493] The reforms introduced stricter requirements for the use of a restrictive practice in relation to care recipients in certain residential aged care settings and expanded on the types of restraints to be regulated to include environmental restraints, mechanical restraints and seclusion.

[494] Under the amendments, it is a responsibility of an approved provider under Chapter 4 of the Aged Care Act to ensure that restrictive practices in relation to care recipients are only used in the circumstances set out in the Quality of Care Principles. Approved providers could be subject to regulatory action by the Commissioner under Part 7B and Part 8A of the ACQS Commission Act (including sanctions) if they fail to comply with their Chapter 4 responsibilities. Inappropriate use of restrictive practices in relation to a care recipient is also a reportable incident under the Serious Incident Response Scheme (SIRS) discussed below.

[495] These amendments also introduced civil penalties for those approved providers who fail to comply with compliance notices given by the ACQS Commissioner in relation to a breach of restrictive practice responsibilities under the Aged Care Act.

[496] The amendments implemented additional requirements, under s.15FC of the Quality of Care Principles, for an approved provider to use chemical restraints, including that a medical practitioner or Nurse Practitioner must have:

- assessed the patient as posing a risk of harm to themselves or others
- assessed that the chemical restraint is necessary, and
- prescribed the medication.

[497] Division 3 of Part 4A of the Quality of Care Principles lists other additional requirements an approved provider must satisfy to use chemical restraints, including:

- documenting in the behaviour support plan for the care recipient a number of matters including the practitioner's decision to use the chemical restraint and the reasons the chemical restraint is necessary, and
- ensuring informed consent has been given by the care recipient for the prescribing of the medication in an agreed way.

[498] From 1 September 2021, approved providers of residential care and STRC in a residential care setting are also required to assess a care recipient to determine if a restrictive practice is needed and record in the care recipient's behaviour support plan whether this assessment has taken place and whether a restrictive practice is used.⁴⁹⁰

[499] These amendments have introduced additional requirements for the use of restrictive practices in residential care settings, which aim to improve the health, safety and well-being of residents. The evidence before us suggests that the increased regulation of the use of restrictive practices has led to a change in the roles performed by aged care workers in residential aged care facilities, and in particular RNs.

⁴⁹⁰ *Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021*, sch 2.

[500] For example, according to Ms Brown, these amendments have led to increased documentation and assessments by RNs to undertake restrictive practices and supervision of care staff to assist in implementing alternative interventions before any restrictive practice is used.⁴⁹¹

[501] Annie Butler, Federal Secretary of the ANMF states that while these reforms are welcome steps, they have increased work complexity and required changes to the way work is performed.⁴⁹² For instance, the amendments include a requirement that a behaviour support plan must set out a number of matters, including alternative strategies for addressing behaviours of concern.⁴⁹³ The intention of this requirement is to ensure that approved providers take a more preventative approach in relation to the use of restrictive practices by considering alternative strategies in the first instance, while examining and seeking to understand the cause of the behaviours.

6.4.3 The National Aged Care Mandatory Quality Indicator Program (QI Program)

[502] The QI Program has been in development since 2012 following a recommendation in the Productivity Commission's report, *Caring for Older Australians* (2011) and the Australian National Audit Office's report, *Monitoring and Compliance Arrangements Supporting Quality of Care in Residential Aged Care Homes* (2011).

[503] The QI Program was launched on a voluntary basis in January 2016 and became mandatory on 1 July 2019. At introduction of the mandatory QI Program, it required approved providers of residential care to report on 3 quality indicators (pressure injuries, physical restraint and unplanned weight loss) every 3 months.

[504] As part of the 2019-20 Budget, expansions to the mandatory QI Program were announced to include 2 new quality indicators: falls and fractures, and medication management. These changes also included updates to the 3 existing quality indicators referred to above.

[505] As a result, from 1 July 2021, approved providers of residential care have been required, under s.26 of the *Accountability Principles 2014* (Accountability Principles), to collect and report information to the Secretary, in accordance with the QI Program Manual,⁴⁹⁴ on 5 quality indicators for each care recipient every 3 months. Approved providers must submit quality indicator data no later than the 21st day of the month after the end of each quarter.

[506] The information is collected and submitted at a service level, meaning each approved provider must submit data for each residential aged care service it operates.

[507] The QI Program involves specific methods for collecting, recording, submitting and interpreting information about the quality indicators. In accordance with the aged care legislation, residential care services must collect data consistently using the methods prescribed in the QI Program Manual. A data recording template is available for each quality indicator to

⁴⁹¹ Witness statement of Emma Brown dated 2 March 2022 at [17].

⁴⁹² Witness statement of Annie Butler dated 29 October 2021 at [239].

⁴⁹³ *Quality of Care Principles 2014* (Cth), s 15HB.

⁴⁹⁴ Department of Health, *National Aged Care Mandatory Quality Indicator Program (QI Program)* (Guideline June 2021).

automatically calculate and summarise the quality indicator data to enter and submit. Residential care providers record and submit their quality indicator data for each service into the My Aged Care provider portal.

[508] The approved provider is responsible for ensuring that quality indicator data is submitted. This remains the responsibility of the approved provider despite any other organisation or mechanism, such as a commercial benchmarking service, being used in the submission of the data.

[509] Under to s.26(a) of the Accountability Principles, approved providers must make measurements or other assessments that are relevant to indicating the quality of residential care, exactly as described in the QI Program Manual. Information from existing data sets (eg incident reporting systems) must not be used where information has been collected differently to what is described in the QI Program Manual.

[510] For each quality indicator, an approved provider must keep records relating to measurements and assessments and information compiled for the purposes of ss.26(a), (b) and (c) of the Accountability Principles.⁴⁹⁵

[511] The impact of the mandatory QI Program on aged care workers was raised in the evidence of a number of witnesses. For example:

- Alison Curry, AIN at Warrigal, stated that RNs are the most impacted by mandatory QI Program reporting, and this flows through to impact on ENs and AINs,⁴⁹⁶ and
- Ms Brown, also from Warrigal, gave evidence that managers of the residential aged care facility and RNs now spend more time gathering the required information for mandatory QI Program reporting, which means that the role of RNs has become more administrative.⁴⁹⁷

6.4.4 The Serious Incident Response Scheme

[512] The SIRS commenced on 1 April 2021 and introduced new arrangements for approved providers of residential care and flexible care delivered in a residential setting to manage and take reasonable steps to prevent incidents.

[513] From 1 December 2022, compliance with the SIRS arrangements will also be extended to providers of in-home care and flexible care delivered in a home or community setting.⁴⁹⁸ This commitment formed part of the 2021-22 Budget. The Commonwealth undertook public consultation on the proposed extension, and most stakeholders supported the introduction of

⁴⁹⁵ *Records Principles 2014* (Cth), s 7(v).

⁴⁹⁶ Witness statement in reply of Alison Curry dated 20 April 2022 at [66]–[67].

⁴⁹⁷ Witness statement of Emma Brown dated 2 March 2022 at [31]–[32].

⁴⁹⁸ This measure forms part of the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* (Cth) (Schedule 4), which received Royal Assent on 5 August 2022.

SIRS for in-home care services. Most stakeholders also supported an approach that aligned the scheme as much as possible with the existing requirements for residential care providers.⁴⁹⁹

[514] The SIRS currently requires providers of residential care to report all reportable incidents to the ACQS Commission via the My Aged Care provider portal and requires reports to be made in accordance with the Quality of Care Principles. What is a reportable incident is set out in ss.54-3(2) of the Aged Care Act and is further defined in s.15NA of the Quality of Care Principles, and includes unreasonable use of force, unlawful sexual contact or inappropriate sexual conduct, psychological or emotional abuse of the care recipient, unexpected death, unexplained absence, stealing and financial coercion, use of a restrictive practice other than in accordance with the Quality of Care Principles, and neglect.

[515] The SIRS was implemented in a staged approach, with Priority 1 incidents being required to be reported to the ACQS Commission from 1 April 2021 and Priority 2 incidents required to be reported to the ACQS Commission from 1 October 2021.

[516] A Priority 1 incident is: a reportable incident that has caused or could reasonably have been expected to have caused a care recipient physical or psychological injury or discomfort requiring medical or psychological treatment; where there are reasonable grounds to report the incident to police, or is an unexpected death or unexplained absence. It is anticipated that from October 2022, all incidents of unlawful sexual contact or inappropriate sexual conduct will be a Priority 1 incident, with the obligation to report Priority 1 incidents for providers of in-home care and flexible care in a home or community setting commencing from 1 December 2022. Priority 1 incidents are required to be reported to the ACQS Commissioner within 24 hours of the provider becoming aware of the incident.

[517] A Priority 2 incident is a reportable incident that has not been reported as a Priority 1 incident and must be reported to the ACQS Commissioner within 30 days of the provider becoming aware of the incident.

[518] The SIRS replaced the previous responsibilities of approved providers of residential care in relation to reportable assaults and unexplained absences. The SIRS requires reporting of a wider range of incidents by a wider range of providers.

[519] The SIRS also goes further than the previous reporting requirements as it includes both incident management and reportable incident responsibilities for providers, including through implementing and maintaining effective organisation-wide governance systems for the management and reporting of relevant incidents (see, for example, Division 3 of Part 4B of the Quality of Care Principles).

[520] The SIRS also removed the exception for reporting assaults where the alleged perpetrator is a residential aged care recipient with a cognitive or mental impairment and the victim is another care recipient. This was in direct response to the findings of the Royal Commission.

⁴⁹⁹ Department of Health, *Serious Incident Response Scheme for Commonwealth funded in-home aged care services: Report on outcomes of consultation* (Report, 24 August 2021)
<https://www.health.gov.au/sites/default/files/documents/2021/09/report-on-the-outcome-of-public-consultation-on-sirs-for-in-home-aged-care.pdf>.

[521] Compliance with the SIRS arrangements, as set out in the Quality of Care Principles, is a responsibility of approved providers under Chapter 4 of the Aged Care Act. As noted above, this responsibility currently only extends to approved providers of residential care and flexible care delivered in a residential setting but will extend to all approved providers by 1 December 2022.

[522] As above, non-compliance with an approved provider's responsibilities may trigger the ACQS Commission's compliance functions under Part 7B (Sanctions) of the ACQS Commission Act and specified enforcement powers under Part 8A.

[523] Wendy Knights, casual EN, gave evidence that the SIRS has added to the responsibilities of RNs, as they then have to assess whether an incident (referred to by the witness as 'emergencies') is a reportable incident or not.⁵⁰⁰ The role of RNs in reporting for SIRS was corroborated by the evidence of AIN Linda Hardman, who also states that her responsibilities have also changed as a result of SIRS and that her observation skills have needed to increase.⁵⁰¹

[524] Ms Brown gave evidence that the current SIRS arrangements primarily impact the work performed by PCWs as they have to document the incidents and report to the RNs to investigate, and to the management team to report to the ACQS Commission.⁵⁰²

[525] This view was reiterated by Virginia Ellis, a Homemaker at Uniting Aged Care Springwood, who gave evidence that a serious incident report would usually be made by a PCW before reporting it to the RN, and once the incident has been reported, PCWs have an important role to play in ensuring the resident is getting appropriate medical care.⁵⁰³

[526] Allison Curry, AIN, also gave evidence that it is usually the AIN of the care service who makes the SIRS report as the RN on duty is usually busy completing documentation in an office.⁵⁰⁴

6.5 Commonwealth Funding in the Aged Care Sector

6.5.1 The Aged Care Funding Instrument (ACFI)

[527] Until recently the basic subsidy for residential care was determined by the ACFI. The ACFI was completed by facility staff whenever a new resident entered a residential aged care facility. This initial assessment resulted in the resident being classified on each ACFI domain to one of 4 levels of need – nil, low, medium or high need. The ACFI domains were:

- Activities of Daily Living – covering nutrition, personal hygiene, mobility, toileting and continence

⁵⁰⁰ Transcript, 9 May 2022 at PN9178–PN9183.

⁵⁰¹ Transcript, 9 May 2022 at PN9821–PN9828

⁵⁰² Witness statement of Emma Brown dated 2 March 2022 at [35]–[39].

⁵⁰³ Witness statement in reply of Virginia Ellis dated 20 April 2022 at [55].

⁵⁰⁴ Witness statement in reply of Alison Curry dated 20 April 2022 at [77]–[78].

- Behavioural Domain – covering cognitive skills, cognition, wandering, verbal and physical behaviour and depression, and
- Complex Health Care – covering medications and complex health care needs.

[528] The evidence before us suggests that there were substantial issues with the ACFI funding model.⁵⁰⁵ In recognition of these issues the Commonwealth has replaced the ACFI with a new funding model.

6.5.2 New funding model — Australian National Aged Care Classification (AN-ACC) Model

[529] The AN-ACC funding model was developed by the Australian Health Services Research Institute within the University of Wollongong as part of work undertaken for the Commonwealth. It was developed to address concerns in relation to the ACFI and comprises:

- a new assessment tool and method for classifying and funding permanent residents
- independent assessments to determine classification levels and care funding, and
- independent analysis each year to inform changes in funding.

[530] The Commonwealth expects that implementation of the AN-ACC funding model will address the issues with the ACFI, as noted in Prof Eagar’s evidence,⁵⁰⁶ and improve funding certainty for Government, approved providers and investors.

[531] The AN-ACC funding model replaced the ACFI on 1 October 2022, consolidating the basic subsidy for residential care, the amounts provided through various supplements (including the Basic Daily Fee supplement, the homeless supplement and the viability supplement) and the additional funding for care minutes. Other individual supplements such as the oxygen, enteral feeding, veterans and accommodation supplements continue under the AN-ACC funding model, with some minor rationalisation of the overall structure of supplements.

[532] Subsidy payments under the AN-ACC funding model comprise 3 components:

- Fixed — the characteristics of a residential aged care facility, such as location or specialisation, will determine a fixed amount of funding (for example, a facility catering to those at risk of homelessness or in a remote location). This recognises that some facilities, for example, those in rural and remote locations, may require more additional funding than those in metropolitan areas.
- Variable — each aged care resident is assessed by an independent assessment workforce as discussed in Prof Eagar’s evidence.⁵⁰⁷ The resident’s care needs are aligned with one of the AN-ACC case mix classifications, or classes of care. The AN-ACC classification defines the amount of funding allocated for the aged care resident.

⁵⁰⁵ Amended witness statement of Craig Smith dated 23 May 2022 at [74]; Witness statement of Paul Sadler [37]–[41]; Transcript, 9 May 2022, PN8764, PN8939.

⁵⁰⁶ Transcript, 9 May 2022, PN8939.

⁵⁰⁷ Transcript, 9 May 2022, PN8943.

In contrast to the ACFI, the AN-ACC funding model also covers care recipients who receive respite care in residential aged care facilities, with different classes of care according to need.

- A one-off entry payment — each time an aged care resident enters a residential aged care facility, a one-off payment is made. The payment aims to cover one-off costs related to transitioning into a new care environment. As discussed in Prof Eagar’s evidence, this payment recognises that there are additional care needs when someone first enters care.⁵⁰⁸

[533] The legislative amendments to the Aged Care Act which support the introduction of the AN-ACC funding model are included in the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022*, which received Royal Assent on 5 August 2022. The AN-ACC commenced on 1 October 2022.

⁵⁰⁸ Transcript, 9 May 2022, PN8869.

7. Our Findings

[534] This chapter deals with:

- the Aged Care Sector Stakeholder Consensus Statement
- the 16 uncontentious propositions
- the contentious issues:
 - gender undervaluation
 - invisible skills
 - gender pay gap

7.1 The Aged Care Sector Stakeholder Consensus Statement

[535] The Unions, ACSA and LASA are signatories to the Aged Care Sector Stakeholder Consensus Statement (the Consensus Statement). The content of the Consensus Statement may be viewed as broadly supportive of the Applications. In the present proceedings the Applicants were directed to file any agreed position involving Union parties and, relevantly, employer associations.⁵⁰⁹ The Consensus Statement was lodged in response to that direction and is at Attachment C.

[536] The Consensus Statement was the product of meetings of stakeholders in the period September to December 2021. The meetings were convened by the Aged Care Workforce Industry Council (ACWIC), to consider the Applications in response to the recommendations of the Royal Commission. Recommendation 76 (2) (e) recommended that:

(2) By 30 June 2022, the Aged Care Workforce Industry Council Limited should:

...

(e) lead the Australian Government and the aged care sector to a consensus to support applications to the Fair Work Commission to improve wages based on work value and/or equal remuneration, which may include redefining job classifications and job grades in the relevant awards. [Emphasis added]

[537] The Unions contend that some of the content of the submissions made by the Joint Employers may be read as departing from the matters agreed in the Consensus Statement. As mentioned earlier, ACSA and LASA (2 of the 3 parties comprising the Joint Employers) are signatories to the Consensus Statement. The HSU argued that given the status of ACSA and LASA as signatories to the Consensus Statement, it can be taken that where the Joint Employers' submissions are inconsistent with the Consensus Statement they should be taken to

⁵⁰⁹ The Consensus Statement notes that the parties would participate in discussions to attempt to reach a Statement of Agreed Facts in relation to the applications in early 2022 but no such statement was lodged with the Commission.

be submissions being advanced by ABI alone, rather than putting forward a position on behalf of the actual industry groups,⁵¹⁰ and limited weight should be given to those submissions.⁵¹¹

[538] The ANMF submits that the Consensus Statement was made ‘in express contemplation of these proceedings’ and that as ACSA and LASA have not expressed an intention to abandon their status as parties to the Consensus Statement or to renounce any part of the Consensus Statement,⁵¹² the position of ACSA and LASA in the proceedings should be understood consistently with the Consensus Statement.⁵¹³ In particular, the ANMF submits:

‘... the position of ACSA and LASA in these proceedings should be understood consistently with the Consensus Statement. Making inconsistent submissions would be akin to seeking to withdraw an admission. In the absence of clear evidence, parties to litigation and a Court or tribunal are entitled to assume that admissions were properly made, so that where leave to withdraw a submission is sought an explanation should be given.⁵¹⁴ No explanation has been given here.’⁵¹⁵

[539] In support of its position the ANMF cites *Celestino v Celestino*⁵¹⁶ in which the Full Court made the following observation (at [12]) in respect of withdrawal of admissions:

‘in the absence of clear evidence to the contrary, a court is entitled to assume that counsel who makes an admission in the course of the conduct of a trial, has satisfied himself that the admission was, on his client’s version of the facts, a proper admission to make. In our opinion a court, and other parties to litigation, are similarly entitled to make that assumption about admissions made by solicitors on their client’s behalf in the course of litigation whether in pleadings or in correspondence. For this reason, where leave to withdraw an admission is sought, a court will require an explanation for the making of the admission. The explanation must be a sensible one based on evidence of a solid and substantial character ...’ [Citations omitted]

[540] The Consensus Statement was lodged at the direction of the Commission to file any agreed position and was clearly created in contemplation of these proceedings. But, contrary to the position advanced by the Unions, we are not required to treat the Consensus Statement as a formal admission from ACSA and LASA; nor are we required to treat the Joint Employers’ submissions as only the submissions of ABI to the extent that they are inconsistent with the Consensus Statement.

[541] The authority relied on by the ANMF in support of its position concerns a judicial *inter partes* proceeding. In that context, s.191 of the *Evidence Act 1995* (Cth) deals with ‘agreed facts’:

⁵¹⁰ ANMF closing submission dated 22 July 2022 at [28].

⁵¹¹ ANMF closing submission dated 22 July 2022 at [28].

⁵¹² ANMF closing submission dated 22 July 2022 at [28].

⁵¹³ ANMF closing submission dated 22 July 2022 at [28].

⁵¹⁴ See, e.g., *Celestino v Celestino* [1990] FCA 449 at page 8 (Spender, Miles and von Doussa JJ).

⁵¹⁵ ANMF Closing submission 22 July 2022 at [28].

⁵¹⁶ [1990] FCA 449.

191 Agreements as to facts

(1) In this section:

agreed fact means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.

(2) In a proceeding:

(a) evidence is not required to prove the existence of an agreed fact; and

(b) evidence may not be adduced to contradict or qualify an agreed fact;

unless the court gives leave.

(3) Subsection (2) does not apply unless the agreed fact:

(a) is stated in an agreement in writing signed by the parties or by Australian legal practitioners, legal counsel or prosecutors representing the parties and adduced in evidence in the proceeding; or

(b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.

[542] In *Damberg v Damberg*⁵¹⁷ (*Damberg*), Heydon JA (with whom Spigelman CJ and Sheller JA agreed) considered how far admissions or agreements between the parties are binding on the Court. His Honour observed that admissions designed to permit concentration only on what is bona fide in dispute can have the effect of restricting the evidence to be tendered and can prevent contrary evidence being called.⁵¹⁸ His Honour also observed that the court is not bound to act on admissions made by the parties or on a ‘fact’ agreed between the parties,⁵¹⁹ stating:

‘In short, the courts are averse to pronouncing judgments on hypotheses which are not correct. To do so is tantamount to giving advisory opinions and to encouraging collusive litigation. On the other hand, the courts will act on admissions of or agreements about matters of fact where there is no reason to doubt their correctness. But they are reluctant to do so where there is reason to question the correctness of the facts admitted or agreed...’⁵²⁰

[543] As noted in *Damberg*, a court is not bound to act on facts agreed by the parties; and, we think, nor is a tribunal like the Commission.

[544] The Commission is not bound by rules of evidence and procedure. While such rules may provide guidance, various Full Benches, primarily in the context of 4 yearly review decisions,

⁵¹⁷ [2001] NSWCA 87.

⁵¹⁸ [2001] NSWCA 87 at [154].

⁵¹⁹ [2001] NSWCA 87 at [157].

⁵²⁰ [2001] NSWCA 87 at [160].

have expressed doubts about the applicability of rules of evidence in respect of administrative tribunals generally, but particularly proceedings that are not *inter partes*.⁵²¹

[545] The matter before us is not an *inter partes* proceeding. The parties to civil proceedings have considerable freedom to choose the issues in dispute; but that is not the case with proceedings concerning applications to vary modern awards. Such proceedings are plainly different in character to *inter partes* proceedings. The Commission's role in the current proceedings is not to determine a dispute between the parties but to be satisfied as to the relevant statutory prerequisites relating to the variation of the modern awards, including whether the variation is necessary to achieve the modern awards objective. The Commission is not constrained by the terms of the Applications and nor is it required to make a decision in the terms applied for.

[546] The Consensus Statement is relevant to our determination of the Applications and we propose to take it into account. It represents the views of a number of stakeholders in the aged care sector and was developed in contemplation of these proceedings. No party contends that we are bound to accept as fact the statements made in the Consensus Statement. That said, we propose to accept the factual assertions in the Consensus Statement where there is no reason to doubt the correctness of those assertions; but do not propose to do so where there is reason to doubt their correctness, for example if they are inconsistent with other, probative, evidence.

[547] The effort expended in written submissions and in oral argument debating the consequence of any departure from the terms of the Consensus Statement has been disproportionate to the identified issue. In short, none of this debate may amount to much.

[548] It seems to us that, save in one respect, the Joint Employers' closing submissions do not depart in any significant way from the Consensus Statement.⁵²² The contentious part of the Consensus Statement is paragraph 22, which states:

‘The changes in the characteristics of aged care consumers (increased acuity, frailty and incidence of dementia) mean the conditions under which work is done are more challenging for employees providing indirect care support services (such as food services, cleaning or general/administrative work). These workers are an important part of the aged care team. Their work necessitates higher levels of skill when compared to similar workers in other sectors, or to aged care in the past.’

[549] In respect of paragraph 22 Mr Ward, on behalf of the Joint Employers, advanced the following submission in closing oral argument:

‘It's paragraph 22 that is probably the issue and we accept that, and I've said that in our opening submissions. We do [not] believe that the evidence in this case supports the view that those people in the support functions should be considered to be on a par with the personal care workers. We think the evidence is, with respect to my friends, very clear on that particularly the evidence from the people who work in the laundry, the gardening, some of the people who were undertaking jobs that I think were colloquially described as sort of handy people. It seems to us to be very clear that, with one exception which I will come to, those people had not been exposed

⁵²¹ See for example *4 yearly review of modern awards – Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001 at [49]–[53].

⁵²² Transcript, 1 September 2022, PN15611, PN15614–PN15660

to the great majority of things that all parties seem to have acknowledged about personal care workers. So, we think the evidence does distinguish that group.

To the extent that that submission is at odds with paragraph 22, we accept that. My clients acknowledge that it is at odds.⁵²³

[550] As will become apparent at this stage it is not necessary for us to decide whether a minimum wage increase for indirect or support workers is justified by work value reasons as we have decided to defer consideration of that issue. That aspect of the Applications will be decided in a subsequent stage of these proceedings; see **Chapter 9 Next Steps**.

7.2 The Uncontentious Propositions

7.2.1 Overview

[551] Based on the parties' submissions, Background Document 1 suggested that the following 16 propositions were uncontentious.⁵²⁴

1. The workload of nurses and personal care employees in aged care has increased, as has the intensity and complexity of the work.
2. The acuity of residents and clients in aged care has increased. People are living longer and entering aged care later as they are choosing to stay at home for longer and receive in-home care. Residents and clients enter aged care with increased frailty, co-morbidities and acute care needs.
3. There is an increase in the number and complexity of medications prescribed and administered.
4. The proportion of residents and clients in aged care with dementia and dementia-associated conditions has increased.
5. Home care is increasing as a proportion of aged care services.
6. Since 2003, there has been a decrease in the number of Registered Nurses (RN) and Enrolled Nurses (EN) as a proportion of the total aged care workforce. Conversely, there has been an increase in the proportion of Personal Care Workers (PCW) and Assistants in Nursing (AIN).
7. Registered Nurses have increased duties and expectations, including more administrative responsibility and managerial duties.
8. PCWs and AINs operate with less direct supervision. PCWs and AINs perform increasingly complex work with greater expectations.

⁵²³ Transcript, 1 September 2022, PN15661–PN15662.

⁵²⁴ Background Document 1 at [116].

9. There has been an increase in regulatory and administrative oversight of the Aged Care Industry.
10. More residents and clients in aged care require palliative care.
11. Employers in the aged care industry increasingly require that PCWs and AINs hold Certificate III or IV qualifications.
12. The philosophy or model of aged care has shifted to one that is person-centred and based on choice and control, requiring a focus on the individual needs and preferences of each resident or client. This shift has generated a need for additional resources and greater flexibility in staff rostering and requires employees to be responsive and adaptive.
13. Aged care employees have greater engagement with family and next of kin of clients and residents.
14. There is an increased emphasis on diet and nutrition for aged care residents.
15. There is expanded use and implementation of technology in the delivery and administration of care.
16. Aged care employees are required to meet the cultural, social and linguistic needs of diverse communities including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and members of the LGBTQIA+ community.

[552] In their closing submissions of 22 July 2022, the HSU, ANMF and the Joint Employers all agreed that these 16 propositions were uncontentious,⁵²⁵ with the HSU proposing an additional 2 propositions which it contended were also uncontentious.⁵²⁶

‘17. Clustered domestic and household models of care are growing in prevalence in the industry and require greater numbers of staff with a broad range of skills and responsibilities.

18. Home care workers work with minimal supervision, and the increase in acuity and dependency of recipients of aged care services means that these workers are exercising more independent decision-making, problem solving and judgment on a broader range of matters.’

[553] While the ANMF broadly agreed that the additional propositions proposed by the HSU were uncontentious (although they should not be afforded the same weight as the other agreed

⁵²⁵ HSU closing submissions dated 22 July 2022 at 49; ANMF closing submission dated 22 July 2022 at [71]; Joint Employers closing submission dated 22 July 2022 Annexure P at [3.32].

⁵²⁶ We note that the first of these additional propositions is similar to paragraph 5 of the Consensus Statement, and the second is identical to paragraph 19.

propositions),⁵²⁷ the Joint Employers did not agree (but later accepted the second proposition in oral submissions when discussing the Consensus Statement).⁵²⁸

[554] The Joint Employers later sought to qualify their earlier acceptance of the 16 propositions set out in Background Document 1, as summarised below:

- **Contention 1** - accept as a general proposition that *the workload of nurses and personal care employees in aged care has increased, as has the intensity and complexity of the work*, however now add that the evidence does not support that the level of increase is consistent across all classifications
- **Contention 8** - accept as a general proposition that *PCWs and AINs perform increasingly complex work with greater expectations*, however now add that the evidence does not establish this conclusion is available with respect to all PCWs/AINs (only those with Certificate III or IV qualifications or with appropriate experience)
- **Contention 13** - accept as a general proposition that aged care employees have greater engagement with the family and next of kin of clients and residents, however now add that the frequency and intensity of engagement is not consistent across all aged care employees, and
- **Contention 16** - accept as a general proposition that aged care employees are required to meet the cultural, social and linguistic needs of diverse communities including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and members of the LGBTQIA+ community, however now add that aged care employees receive training in the Certificate III regarding this.⁵²⁹

[555] We note the Joint Employers' qualification that their acceptance of contentions 1, 8, 13 and 16 is confined to the 'general proposition'. We accept these contentions are general in their character and that they would not necessarily apply consistently across classifications or universally in every instance to all employees concerned.

[556] The next section considers whether there is an evidentiary basis to support each of the 16 contentions, as general propositions.

7.2.2 Evidentiary basis for the agreed propositions

Contention 1: The workload of nurses and personal care employees in aged care has increased, as has the intensity and complexity of the work.

[557] The expert evidence supports a finding that the workload of nurses and PCW/AINs has increased, as has the intensity and complexity of their work.

⁵²⁷ ANMF closing submission in reply dated 17 August 2022 at [5].

⁵²⁸ Joint Employers closing submission in reply dated 19 August 2022 at [5.4]; Transcript, 1 September 2022, PN15609–PN15691.

⁵²⁹ Joint Employers closing submission in reply dated 19 August 2022 at [5.37].

[558] Prof Meagher identifies 5 trends that have increased work demands in residential aged care:

1. The needs of older people in residential care have increased over the last decade, with residents requiring more complex and varied assistance with their physical, psychological, social and emotional lives.
2. Higher turnover of residents in aged care facilities means that care workers meet, care for, and part from more residents than they did a decade ago.
3. Increased diversity among residents in aged care, who are recognised as having special needs.
4. Prevailing regulatory requirements and community standards have increased the expectations of care.
5. New regulatory requirements have increased the amount and quality of assessment and documentation required in the provision of care.

[559] Prof Meagher states that these changes have significantly increased the skill demands and level of responsibility required of workers in the residential aged care sector.⁵³⁰ Prof Meagher also notes that the increased level of need and diversity among aged care recipients has not corresponded with a larger workforce, which means that ‘the same number of workers is caring for a group of people with much higher needs, and so the amount of care work needed is greater, as well as the content of the work being more skilled, complex and demanding.’⁵³¹

[560] Prof Meagher also details how the trends evident in residential settings are largely mirrored in home care, and result in a corresponding increase in the skill, judgment and demands required of in-home carers.⁵³²

[561] Prof Meagher’s evidence is corroborated by that of Prof Eagar⁵³³ and Prof Charlesworth.⁵³⁴

[562] Prof Kurrle’s evidence was that PCWs are required to be more flexible⁵³⁵ and switch between everyday tasks such as showering, dressing and grooming⁵³⁶ and more specialised clinical duties such as management of different types of hearing aids, administration of fluids through a naso-gastric tube and maintaining knowledge and understanding of mental and physical conditions and symptoms.⁵³⁷

⁵³⁰ Meagher Report at 18–19.

⁵³¹ Meagher Report at 20.

⁵³² Meagher Supplementary Report at 19–26.

⁵³³ Eagar Report at 3, 4, and 12.

⁵³⁴ Charlesworth Report at [49] and [51].

⁵³⁵ Kurrle Report at 10.

⁵³⁶ Kurrle Report at 4.

⁵³⁷ Kurrle Report at 4.

[563] The Royal Commission cited research that the number of residential care places available has *increased* by 44 per cent between 2003 and 2020; while the estimated proportion of the residential aged care workforce in direct care roles *fell* from 74 per cent in 2003 to 65 per cent in 2016.⁵³⁸ The Royal Commission acknowledged the high workloads placed on aged care workers, and referred to research prepared for the Aged Care Workforce Strategy Taskforce in 2018, which characterised the workload pressures on aged care workers as follows:.

‘Inadequate numbers of staffing and the complex care needs of residents within residential settings, and travel time between appointments and a lack of adequate time allocated to tasks in community aged care contributed to workload pressures. High levels of, and inefficiencies in, administrative paperwork were also frequently reported across both settings. Consequently, workers frequently described a lack of time with clients, being unable to take breaks and undertaking considerable amounts of unpaid work.’⁵³⁹

[564] A large number of nurses and PCW/AIN lay witnesses gave evidence about the high workload and increasing skills required of them, as well as the physical, mental and emotional demands of their roles.⁵⁴⁰ Much of this evidence is summarised in the Lay Witness Evidence Report.⁵⁴¹

[565] Maree Bernoth, Assoc Prof in the School of Nursing, Paramedicine and Healthcare Sciences at Charles Sturt University and RN gave the following evidence about the demands of aged care work:

‘I know from personal experience and my ongoing observations that work in aged care is very emotionally demanding. It often involves coping with the multiple needs of the

⁵³⁸ Royal Commission Final Report Vol 1 at 29.

⁵³⁹ Royal Commissioner Final Report Vol 2 at 213, citing L Isherwood et al., ‘Attraction, Retention and Utilisation of the Aged Care Workforce’, Working paper prepared for the Aged Care Workforce Strategy Taskforce, 2018, 34.

⁵⁴⁰ Amended witness statement of Carol Austen dated 20 May 2022 at [14], [16]; Witness statement of Maree Bernoth dated 29 October 2021 at [57]–[62]; Amended witness statement of Pauline Breen dated 9 May 2022 at [30]; Amended witness statement of Hazel Bucher dated 10 May 2022 at [31]; Witness statement of Sherree Clarke dated 29 October 2021 at [71]–[77]; Witness statement of Lyn Cowan dated 31 March 2021 at [124]; Amended witness statement of Susan Digney dated 19 May 2022 at [31]; Witness statement of Virginia Ellis dated 28 March 2021 at [149]–[150]; Witness statement of Catherine Evans dated 26 October 2021 at [76]–[78]; Witness statement of Sally Fox dated 29 March 2021 at [177]–[179]; Amended witness statement of Sanu Ghimire dated 19 May 2022 at [64]–[65]; Witness statement of Jade Gilchrist dated 31 March 2021 at [10]; Witness statement of Theresa Heenan dated 20 October 2021 at [96]; Amended witness statement of Suzanne Hewson, 6 May 2022 at [20]; Witness statement of Ross Heyen, 31 March 2021 at [47]; Witness statement of Jocelyn Hofman dated 29 October 2021 at [8]; Witness statement of Ngari Inglis dated 19 October 2021 at [30]–[34]; Witness statement of Virginia Ellis dated 28 March 2021 at [34]–[37]; Amended witness statement of Wendy Knights dated 23 May 2022 at [84]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [18], [32]; Amended witness statement of Irene McInerney dated 10 May 2022 at [45]; Witness statement of Maria Moffat dated 27 October 2021 at [32]; Amended witness statement of Rose Nasemena dated 6 May 2022 at [16], [47]; Witness statement of Bridget Payton dated 26 October 2021 at [70], [78], [84], [99]; Witness statement of Marea Phillips dated 27 October 2021 at [58]; Amended witness statement of Micheal Purdon dated 19 May 2022 at [59]; Witness statement of Kathy Sweeney dated 1 April 2021 at [49]; Amended witness statement of Veronique Vincent, 19 May 2022 dated [79]; Witness statement of Susanne Wagner dated 28 October 2021 at [23], [155]–[159]; Amended witness statement of Jennifer Wood dated 19 May 2022 at [76], [101].

⁵⁴¹ Lay Witness Report, [385], [512] and [615].

residents, especially those that cannot be met. It is very distressing to finish your shift and leave, knowing that you have not been able to provide the best care that you can.

Aged care work is cognitively, physically, emotionally, and spiritually very demanding work. This work is getting more and more stressful as staff are not properly supported with mentors and inadequate staffing generally.⁵⁴²

[566] The lay witness evidence provides insight into the volume and intensity of aged care work. For example, EN Suzanne Hewson gave evidence about the impact of high workloads:

‘The workload is heavy and ever-increasing, and it can become more complicated if we are short-staffed, working with new or inexperienced workers, or working with agency staff. This is often the case.

My rostered shift starts at 0700, but I try to start at least 30 minutes early. This time is unpaid. But if I do not start early, I am unable to complete my tasks on time.

My job is stressful and very physically and emotionally demanding. We have so much to do and, because of this, I often feel like I am unable to give the residents the quality time that they need.⁵⁴³

[567] Several lay witnesses gave evidence that due to increases in the complexity and amount of work they have less time to spend with each resident.⁵⁴⁴ For example, Sally Fox stated:

‘I used to be able to do little, but important things for residents, like put their hair in rollers or paint their nails, so they felt nice and put together. Unfortunately, I simply do not have time to do these things for residents any more, and that makes me sad. It is a drop in the quality of life for the residents as well.’⁵⁴⁵

[568] The Consensus Statement states that the work demands of aged care workers are ‘changeable’ and are performed to ‘rigorous time and performance standards.’⁵⁴⁶

[569] The remaining 15 contentions provide further detail of the nature of the work of direct care workers, including relating to high levels of acuity, frailty and co-morbidities, dementia and palliative care among residents and home care clients, as well as changes in the demographic makeup of the aged care workforce. These factors all contribute to the intensity of work and workload of aged care workers.

Contention 2: The acuity of residents and clients in aged care has increased. People are living longer and entering aged care later as they are choosing to stay at home for longer and

⁵⁴² Witness statement of Maree Bernoth dated 29 October 2021 at [58], [60].

⁵⁴³ Amended witness statement of Suzanne Hewson dated 6 May 2022 at [18]–[20].

⁵⁴⁴ Witness statement of Sally Fox dated 29 March 2022 at [174]–[175]; Witness statement of Sheree Clarke dated 29 October 2021 at [75]–[77]; Witness statement of Patricia McLean dated 9 May 2022 at [63]–[64].

⁵⁴⁵ Witness statement of Sally Fox dated 29 March 2022 at [175].

⁵⁴⁶ Consensus Statement at [13].

receive in-home care. Residents and clients enter aged care with increased frailty, co-morbidities and acute care needs.










[570] The expert evidence supports a finding that the level of acuity of residents in aged care has increased.

[571] Prof Eagar and her research team assessed the care needs of approximately 5,000 people in residential aged care in 2018 and found that there has been a movement away from nursing homes as a ‘lifestyle choice’ towards residents now entering care when they are very frail, with complex physical, cognitive and social care needs.⁵⁴⁷

[572] Using the De Morton Mobility Index, Prof Eagar found that only 15 per cent of aged care residents are independently mobile, while 50 per cent require physical assistance with mobility; 35 per cent of all residents have no mobility.⁵⁴⁸

[573] Prof Eagar also measured the frailty profile of residents using the Rockwood Clinical Frailty Scale (see Table 6 below) and found that 38 per cent of residents were severely frail or very severely frail, while a further 38 per cent were mildly frail or moderately frail.⁵⁴⁹

Table 6 Rockwood Clinical Frailty Scale profile

Rockwood score		Percentage of residents
1 Very fit		2%
2 Well		4%
3 Well with comorbid disease		7%
4 Apparently vulnerable		10%
5 Mildly frail		15%
6 Moderately frail		23%
7 Severely frail		31%
8 Very severely frail		7%
9 Terminally ill		0%
Unknown		1%
All residents		100%

[574] Using the Australian Modified Functional Independence Measure, Prof Eagar measured the dependency profile of aged care residents in terms of self-care tasks.

⁵⁴⁷ Eagar Report at 3–4.

⁵⁴⁸ Eagar Report at 9.

⁵⁴⁹ Eagar Report at 9, Table 4.

[575] Prof Eagar found that nearly 90 per cent of residents need assistance showering and dressing, while 64 per cent need assistance eating.⁵⁵⁰ Almost three quarters of all residents need assistance due to problems associated with sphincter control.⁵⁵¹ Further, residents need assistance transferring between tasks and more than two thirds of residents need assistance transferring for bathing and toileting and/or moving between a bed and a chair.⁵⁵² In cross-examination, Prof Eagar clarified that the definition of ‘needing help from a carer’ is of very broad scope, ranging from supervision and coaxing through to a 2-person physical assist.⁵⁵³

[576] Prof Eagar also found that residents needed support due to communication, cognitive and social limitations; 65 per cent of residents need help with comprehension and expression, while about three quarters of residents need help with problem solving, memory and social interaction.⁵⁵⁴

[577] Prof Meagher also provides the following data in relation to the health and care needs of people who live in residential aged care:⁵⁵⁵

- In 2015, most older people living in residential aged care had multiple long-term health conditions; more than three quarters (77 per cent) had at least 5 conditions, and nearly a quarter (23 per cent) had at least 9 conditions.⁵⁵⁶
- In 2019, around half of older people living in residential aged care had a diagnosis of dementia.⁵⁵⁷
- Older people living in residential aged care are at significant risk of malnutrition. A recent research review found that around half of all residents were malnourished,⁵⁵⁸ while the Royal Commission Final Report cites prevalence of between 22 and 50 per cent.⁵⁵⁹
- A study published in 2015 found that 40 per cent of older people living in residential aged care had sarcopenia, which is ‘a progressive loss of skeletal muscle and muscle function, with significant health and disability consequences’.⁵⁶⁰

⁵⁵⁰ Eagar Report at 9–10.

⁵⁵¹ Eagar Report at 10, Table 6.

⁵⁵² Eagar Report at 10, Table 7.

⁵⁵³ Transcript, 9 May 2022, PN8874–PN8875.

⁵⁵⁴ Eagar Report at 10, Table 8 and Table 9.

⁵⁵⁵ Meagher Report at 2.

⁵⁵⁶ Diane Gibson, ‘Who uses residential aged care now, how has it changed and what does it mean for the future?’ (2020) 44(6), *Australian Health Review* 820, Table 5, based on data from the Australian Bureau of Statistics Survey of Disability, Ageing and Carers; see also Lind et al. (2020), which reports data from 2014–2017.

⁵⁵⁷ Diane Gibson, ‘Who uses residential aged care now, how has it changed and what does it mean for the future?’ (2020) 44(6), *Australian Health Review* 820, 823.

⁵⁵⁸ Ekta Agarwal et al, ‘Optimising nutrition in residential aged care: A narrative review’ (2016) 92, *Maturitas* 70.

⁵⁵⁹ Royal Commission Final Report Vol 2, 115.

⁵⁶⁰ Hugh Senior et al, ‘Prevalence and risk factors of sarcopenia among adults living in nursing homes’ (2015) 82(4), *Maturitas* 418.

- Nearly a quarter (23 per cent) of older people in residential aged care had diabetes, which was twice the rate for people living in the community, according to a study published in 2018.⁵⁶¹
- Older people living in residential care are particularly susceptible to infectious diseases, such as gastroenteritis, influenza⁵⁶² and other respiratory infections, not least COVID-19, due to their frailty, close living arrangements and contact with staff and other visitors.⁵⁶³ In 2017, a severe flu season, there were more than 500 influenza outbreaks reported in residential aged care in NSW alone.⁵⁶⁴

[578] Prof Meagher analysed data from the ABS Survey of Disability, Ageing and Carers conducted in 2015 to determine the level of support residents need in relation to activities of daily living and found:⁵⁶⁵

- Only one in twenty (5 per cent) of permanent residents was able to prepare to eat, and to eat, without assistance. Fully three quarters (75 per cent) required physical assistance in eating or preparing to eat, or both.⁵⁶⁶
- Fewer than one in five (17 per cent) permanent residents had no need of daily assistance with managing incontinence; almost three quarters (74 per cent) needed assistance 4 times daily or more.⁵⁶⁷
- More than half of all residents needed to use aids or equipment to get out of a chair or bed (55 per cent), and nearly two thirds needed aids or equipment for toileting (63 per cent). Around three quarters needed aids or equipment for moving about the residential facility (75 per cent), for managing incontinence (70 per cent) and for showering or bathing (76 per cent).⁵⁶⁸

⁵⁶¹ Oliver Farrer et al, 'Characteristics of older adults with diabetes: What does the current aged care resident look like?' (2018) 75(5), *Nutrition and Dietetics* 494. The authors do not state when they collected the data.

⁵⁶² Essi Huhtinen et al, 'Understanding barriers to effective management of influenza outbreaks by residential aged care facilities' (2019) 38(1), *Australian Journal on Ageing*, 60.

⁵⁶³ Rachel Latta et al, 'Outbreak management in residential aged care facilities –prevention and response strategies in regional Australia' (2019) 35(3), *Australian Journal of Advanced Nursing* 6, 7.

⁵⁶⁴ NSW Government, 'Influenza Monthly Epidemiology Report, NSW' (December 2017) <<https://www.health.nsw.gov.au/Infectious/Influenza/Publications/2017/december-flu-report.pdf>>

⁵⁶⁵ Meagher Report at 2–3.

⁵⁶⁶ Data for 2015, the latest year available. Calculated from data in Australian Government, Australian Institute of Health and Welfare, 'Residential Aged Care and Home Care 2014–15', supplementary table S1.32, <https://www.gen-agedcaredata.gov.au/www_aihwwgen/media/images/Residential-aged-care-2014-15.xls>

⁵⁶⁷ Data for 2015, the latest year available. Calculated from data in Australian Government, Australian Institute of Health and Welfare, 'Residential Aged Care and Home Care 2014–15', supplementary table S1.31, <https://www.gen-agedcaredata.gov.au/www_aihwwgen/media/images/Residential-aged-care-2014-15.xls>

⁵⁶⁸ Data from the 2015 ABS Survey of Disability, Ageing and Carers, <<https://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/4430.0Main%20Features1022015?opendocument&tabname=Summary&prodno=4430.0&issue=2015&num=&view=>>. The most recent SDAC (2018) has not reported data about people living in residential aged care.

- Overall, nearly three quarters (73 per cent) had at least 5 impairments in relation to these activities; 38 per cent had at least 9.⁵⁶⁹

[579] Prof Meagher also found strong evidence to support the proposition that the care and support needs for people living in residential aged care has increased in the last 10-15 years.⁵⁷⁰ Citing ACFI data from the period between 2009 and 2019, Prof Meagher found that complex health needs quadrupled, from 13 per cent to 52 per cent while cognition and behaviour needs increased from 36 per cent to 64 per cent. The data also showed that the number of people needing support in carrying out activities of daily living nearly doubled, from 33 per cent to 60 per cent⁵⁷¹ and that overall, the share of people who have high care needs across all three domains of activities of daily living, cognition and behaviour, and complex health care, increased from just 4 per cent to almost one third, 31 per cent.⁵⁷²

[580] These findings were supported by Prof Kurrle who found that more older people are surviving past their average life expectancy (81 years for men and 85 years for women in 2019) with the average age of aged care residents increasing from 50 per cent of residents being 85 years and over in 2000, to 59 per cent being 85 years and over in 2018.⁵⁷³ Prof Kurrle concurred with Prof Meagher that a significant increase in high care needs of residential aged care recipients between 2009 and 2019 is evidenced in ACFI data. Prof Kurrle set out the increase in the level of care needs based on ACFI ratings of low, medium and high, reproduced in this Decision at Chart 1.

[581] Assoc Prof Junor gave corroborative evidence, stating that that there are increased numbers of aged care facility residents with ‘serious co-morbidities or in the late stages of their life journey and moving towards palliative care’⁵⁷⁴ and that, ‘as elderly people now on average enter residential care only in their last 20 months of life, acuity of care need has increased significantly across the residential aged care sector.’⁵⁷⁵

[582] The expert evidence also supported a finding that as people are choosing to stay at home longer, their care needs in home and community care are increasing.

[583] Prof Eager and Assoc Prof Junor gave evidence that policy changes toward home care services, or ‘ageing in place’, and the expectation that older people can delay or avoid entering residential aged care has played a role in the increasing reliance on in-home care, over care provided in a residential facility.⁵⁷⁶ Similarly, Prof Meagher found that 64 per cent of recipients of home care packages are 80 years or over and 41 per cent are aged 85 and over, with recipients of aged home care becoming more frail and less healthy, citing the following data in support:

⁵⁶⁹ Diane Gibson, ‘Who uses residential aged care now, how has it changed and what does it mean for the future?’ (2020) 44(6), *Australian Health Review* 820, Table 5, based on data from the Australian Bureau of Statistics Survey of Disability, Ageing and Carers.

⁵⁷⁰ Meagher Report at 3.

⁵⁷¹ Meagher Report at 3.

⁵⁷² Meagher Report at 3.

⁵⁷³ Kurrle Report at 6.

⁵⁷⁴ Junor Report at [43].

⁵⁷⁵ Junor Report Annexure 9 at [11].

⁵⁷⁶ Eager Report at 3; Junor Report at [110]; Junor Report Annexure 9 at [11]; Supplementary Meagher Report at 13.

- In 2015, 61 per cent of HCP recipients had at least 5 health conditions, up from 53 per cent in 2006, while one in 14 had 10 or more health conditions, up from one in 17 in 2006.
- Half (51 per cent) had a high frailty score in 2015, up from 15 per cent in 2006.
- More than a third were assessed as having depression in 2015 (36 per cent), up from 32 per cent in 2006, and a third had pain (34 per cent) in 2015, up from a quarter (24 per cent) in 2006.
- The median number of medications prescribed for HCP clients within one year of entering home care was 9; identical to that of older people entering residential care.
- A fifth (20 per cent) had an urgent attendance after hours at a health care service during the first year of services in 2015, up from 15 per cent in 2006.⁵⁷⁷
- Around one in 20 recipients died within 3 months of entering home care services and more than a third (35 per cent) died within 3 years.

[584] As discussed in the Lay Witness Evidence Report, the vast majority of lay witnesses gave evidence that recipients of aged care have increased acuity and more complex needs than in the past.⁵⁷⁸ This evidence included that residents in both residential facilities and community

⁵⁷⁷ Supplementary Meagher Report at 3.

⁵⁷⁸ Lay Witness Report at [258]. See amended reply witness statement of Carol Austen dated 20 May 2022 at [19]; Witness statement of Lisa Bayram dated 29 October 2021 at [42]-[44], [66]; Witness statement of Maree Bernoth dated 29 October 2021 at [31]-[35]; Witness statement of Geronima Bowers dated 1 April 2021 at [22], [35]; Amended witness statement of Kerrie Boxsell dated 19 May 2022 at [58]-[61], [65]; Amended witness statement of Pauline Breen dated 9 May 2022 at [15]; Amended witness statement of Hazel Bucher dated 10 May 2022 at [39]; Witness statement of Donna Cappelluti dated 21 April 2022 at [43]; Witness statement of Mark Castieau dated 29 March 2021 at [88]-[93]; Reply witness statement of Mark Castieau dated 20 April 2022 at [22], [27]; Witness statement of Judeth Clarke dated 29 March 2021 at [16], [24]-[25]; Amended witness statement of Susan Digney dated 19 May 2022 at [27]; Witness statement of Virginia Ellis dated 28 March 2022 at [210]-[213]; Witness statement of Sally Fox dated 29 March 2021 at [150]; Witness statement of Fiona Gauci dated 29 March 2021 at [42], [60]-[62]; Amended witness statement of Sanu Ghimire dated 19 May 2022 at [59]; Witness statement of Jade Gilchrist dated 31 March 2021 at [21]; Witness statement of Catherine Goh dated 13 October 2021 at [20], [28]; Witness statement of Lillian Grogan dated 20 October 2021 at [47]; Amended witness statement of Linda Hardman dated 9 May 2022 at [26]-[32]; Witness statement of Ross Heyen dated 31 March 2021 at [19]-[22], [35]-[38]; Witness statement of Jocelyn Hofman dated 29 October 2021 at [31], [37]-[41]; Witness statement of Paul Jones dated 1 April 2022 at [48]; Witness statement of Donna Kelly dated 31 March 2021 at [31]-[32]; Reply witness statement of Donna Kelly dated 20 April 2022 at [21]; Reply witness statement of Darren Kent dated 21 April 2022 at [48]; Amended witness statement of Wendy Knights dated 23 May 2022 at [13], [34]-[38], [50]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [38]; Amended witness statement of Irene McInerney dated 10 May 2022 at [25], [38]; Amended witness statement of Patricia McLean dated 9 May 2022 at [40], [104]; Witness statement of Susan Morton dated 27 October 2021 at [39]-[40]; Amended witness statement of Rose Nasemena dated 6 May 2022 at [51a], [51c], [51e]; Witness statement of Sandra O'Donnell dated 25 March 2022 at [94]-[99]; Witness statement of Lyndelle Parke dated 31 March 2021 at [21]-[22]; Witness statement of Josephine Peacock dated 30 March 2022 [138]-[141]; Witness statement of Marea Phillips dated 27 October 2021 at [33]-[34]; Witness statement of Dianne Power dated 29 October 2021 at [40]-[51]; Witness statement of Antoinette Schmidt dated 30 March 2021 at [119]-

care were frailer, had more advanced disease, higher physical needs, reduced mobility including with higher levels of obesity, and exhibited higher instances of dementia, depression and behavioural issues when admitted into residential aged care facilities than in the past. Several in-home carers also gave evidence that their clients had greater acuity.⁵⁷⁹

[585] RN Jocelyn Hofman gave evidence of her 20 years in the aged care industry and her experience of the increasing complexity and acuity of residents' conditions on admission. In her experience, residents at the time of admission are more likely to present with and develop the following:⁵⁸⁰

- varying forms of dementia
- complex or chronic wounds
- mental health conditions
- chronic disease and co morbidities
- increased frailty
- mobility issues and as a consequence the increased prevalence of falls, and
- multiple complex medication regimes.

[586] A number of witnesses working in home care settings also reported higher acuity in their clients.⁵⁸¹ For example, Susan Morton, an in-home care worker, gave evidence that:

‘Over time, I have witnessed an increase to the age of clients in home care. Clients are now typically older. There is greater incentive to stay at home, rather than go into permanent residential care.

The older age of clients in home care means an increased usage of hoists, shower chairs, commodes etc, which is far more common now compared to the past.’⁵⁸²

[587] The employer lay witnesses also gave evidence that the level of acuity in aged care is increasing.⁵⁸³ For example, Mark Sewell, CEO and Company Secretary of Warrigal, stated that residents entering care at Warrigal are older, clinically frailer, less mobile and have more

[120]; Witness statement of Susan Toner dated 28 September 2021 at [39]; Amended witness statement of Stephen Voogt dated 9 May 2022 at [49]-[50], [58]; Witness statement of Susanne Wagner dated 28 October 2021 at [110], [112], [117]-[118]; Witness statement of Jane Wahl dated 21 April 2022 at [42]; Witness statement of Paula Wheatley dated 27 October 2021 at [50]-[51], [56]-[57]; Witness statement of Kristy Youd dated 24 March 2021 at [41], [45].

⁵⁷⁹ Witness statement of Catherine Goh dated 13 October 2021 at [28]; Witness statement of Marea Phillips dated 27 October 2021 at [33]; Witness statement of Susan Morton dated 27 October 2021 at [39]-[40].

⁵⁸⁰ Witness statement of Jocelyn Hofman dated 29 October 2021 at [37].

⁵⁸¹ Witness statement of Catherine Goh dated 13 October 2021 at [28]-[29]; Witness statement of Marea Phillips dated 27 October 2021 at [33].

⁵⁸² Witness statement of Susan Morton dated 27 October 2021 at [39]-[40].

⁵⁸³ See Amended witness statement of Craig Smith dated 23 May 2022 at [60]-[66]; Witness statement of Mark Sewell dated 3 March 2022 at [46]-[57]; Witness statement of Johannes Brockhaus dated 3 March 2022 at [30]-[38]; Witness statement of Emma Brown dated 2 March 2022 at [44]; Witness statement of Paul Sadler dated 1 March 2022 at [53]-[59].

complicated health conditions than 2 decades ago, with a ‘large proportion’ having dementia, cognitive conditions or mental health issues.⁵⁸⁴

[588] Paul Sadler, CEO of ACSA, pointed to a noticeable shift in the types of consumers accessing aged care in the last 20 years, stating that the trend in the last decade has been for residential aged care recipients to fall into one of 3 categories:⁵⁸⁵

- (i) consumers that can no longer live comfortably at home and need daily living assistance/have complex health care needs who will stay between 6 and 18 months
- (ii) consumers with dementia/cognitive impairment who stay for between 2 and 5 years, and
- (iii) consumers who are considered palliative and will stay for anywhere from days to 12 months.

[589] During cross-examination, Mr Sadler clarified that many people fall into more than one of these categories.⁵⁸⁶

[590] Mr Sadler also said that a significant increase in the availability of HCPs has contributed to consumers staying in their homes for longer and entering residential aged care facilities when older⁵⁸⁷ and during cross-examination confirmed that the age, frailty and acuity of home care clients has increased,⁵⁸⁸ with home care clients increasingly accessing the highest funding package, Level 4. Mr Sadler’s evidence is that generally, those accessing aged care services are less mobile, have more than one co-morbidity and are increasingly experiencing incontinence.⁵⁸⁹

[591] Johannes Brockhaus, CEO of Buckland,⁵⁹⁰ and Kim Bradshaw, General Manager at Warrigal; Stirling Residential Aged Care Facility,⁵⁹¹ gave similar evidence.

[592] The Royal Commission found that the average care needs of older Australians were increasing, owing to longer life expectancies and a preference among older people to receive care in their own home, resulting in people entering residential services later in life.⁵⁹² It found that people in residential aged care are frailer and have chronic or complex health conditions, including high levels of dementia.⁵⁹³

⁵⁸⁴ Witness statement of Mark Sewell dated 3 March 2022 at [50]–[51].

⁵⁸⁵ Witness statement of Paul Sadler dated 1 March 2022 at [54].

⁵⁸⁶ Transcript, 11 May 2022, PN12423-PN12424.

⁵⁸⁷ Witness statement of Paul Sadler dated 1 March 2022 at [55]–[57]; Transcript, 11 May 2022, PN12346.

⁵⁸⁸ Transcript, 11 May 2022, PN12345.

⁵⁸⁹ Witness statement of Paul Sadler dated 1 March 2022 at [58].

⁵⁹⁰ Witness statement of Johannes Brockhaus dated 3 March 2022 at [31]–[32].

⁵⁹¹ Witness statement of Kim Bradshaw dated 4 March 2022 at [13]–[14].

⁵⁹² Royal Commission Final Report, Vol 1 at 24, 66.

⁵⁹³ Royal Commission Final Report, Vol 1 at 100.

‘With advanced age comes greater frailty. Older people are more likely to have more than one health condition (comorbidity) as their life expectancy increases. As the population of older people increases, more people are expected to have memory and mobility disorders. About 550,000 to 559,000 Australians are expected to be living with dementia by 2030 compared to the estimated 400,000 to 459,000 Australians who were living with dementia in 2020. These changing demographics, together with changes in the patterns of disease and dependency, and in the expectations of older people and society, will affect the future demand for aged care in a number of ways, including: the length of stay in residential aged care; the type of care that will be required; the increase in care needs; the demand for a variety of care choices; and the desire of older people to remain in their own homes for as long as possible.’⁵⁹⁴

[593] The Consensus Statement stated that there has been an increase in acuity, frailty and co-morbidities amongst aged care consumers:

‘Australians are living longer. The proportion of Australians over the age of 65 is set to increase from 15 per cent to 23 per cent by 2066. With advanced age often comes increased frailty which is associated with increased morbidity, declining function and a concurrent need for supports. As a result, aged care consumers are entering aged care with more frailty, co-morbidities and acute care needs. Thus, the acuity of recipients of aged care services has increased and this trend is expected to continue.’⁵⁹⁵

[594] The Consensus Statement further noted that in both residential and home care, aged care recipients are increasingly requiring and receiving care to meet more complex needs, including acute and sub-acute care.⁵⁹⁶

Contention 3: There is an increase in the number and complexity of medications prescribed and administered.

[595] The evidence supports the proposition that there has been an increase in the number and complexity of medications prescribed and administered to recipients of aged care.

[596] A study on the trends in medication use in residential aged care services in Australia between 2016 and 2021⁵⁹⁷, included data demonstrating an increase in the use of depression medication, and a decline in the use of other psychotropic medications such as anti-anxiety medications (see Chart 7 below).⁵⁹⁸ The study shows that the proportion of polypharmacy increased from 43.6 per cent in 2016 to 54.3 per cent in 2021;⁵⁹⁹ polypharmacy is defined as 9 or more medications.⁶⁰⁰

⁵⁹⁴ Royal Commission Final Report, Vol 2 at 5–6.

⁵⁹⁵ Consensus Statement at [1].

⁵⁹⁶ Consensus Statement at [7].

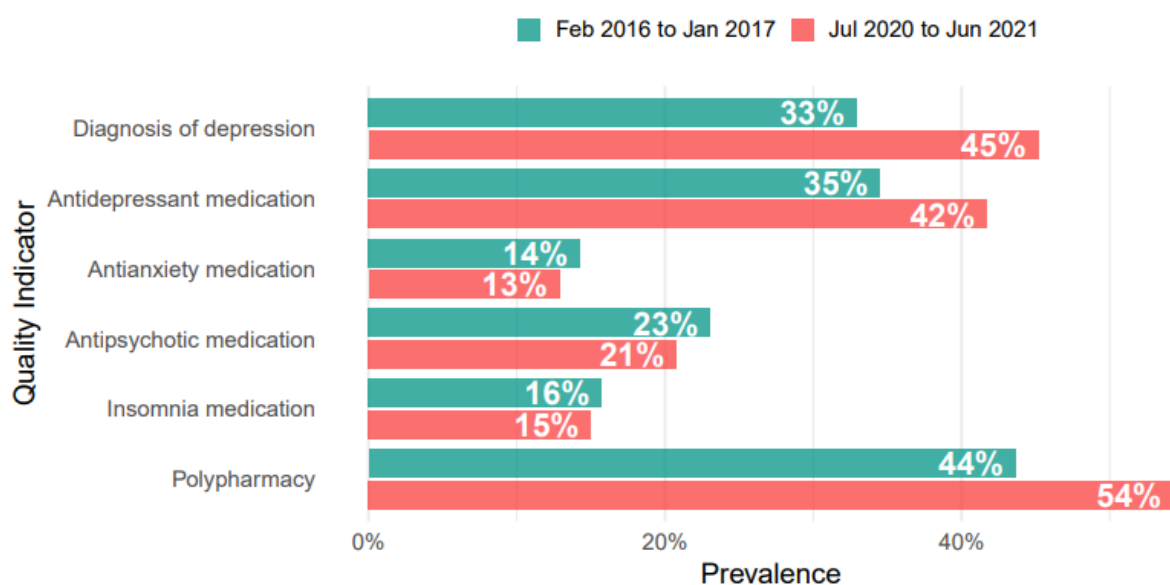
⁵⁹⁷ Filip Reiersen, *Trends in Medication Use 2016-2021* (Report, September 2021).

⁵⁹⁸ Filip Reiersen, *Trends in Medication Use 2016-2021* (Report, September 2021) 2, 7.

⁵⁹⁹ Filip Reiersen, *Trends in Medication Use 2016-2021* (Report, September 2021) 2, 7.

⁶⁰⁰ Filip Reiersen, *Trends in Medication Use 2016-2021* (Report, September 2021) 1.

Chart 7: Prevalence of the studied quality indicators standardised by state and benchmarking group during February 2016 to January 2017 and July 2020 to June 2021



Source: Reiersen F (2021), ‘Trends in Medication Use 2016-2021’, p.2.

[597] An increase in the number and complexity of medications prescribed and administered is also supported by lay witness evidence. There was extensive evidence about the administration of medication, the processes involved in both residential care and community care, and the challenges and complexity involved.

[598] EN, Wendy Knights gave evidence that there has been a change in the kinds of medications used, and the number of medications prescribed:

‘since I did my Diploma things have changed significantly with medications. There are a lot more cancer drugs used. Some residents can be on up to 15 medications at a time. The management of drug administration has also changed. For example, medications used to be in webster packs and then loose PRN medications. There was a drug chart which we had sign on sheets for each drug. Now it is a combination of the webster packs and we also have to use MedSig – a computer program which details every resident and each of their medications, including the time to be given.’⁶⁰¹

[599] EN, Suzanne Hewson gave evidence that:

‘There are multiple residents who are on 8 or more medications. I have one resident who takes 13 tablets in the 0800 drug round. All medications react differently with each other,

⁶⁰¹ Amended witness statement of Wendy Knights dated 23 May 2022 at [39].

so it is important to be aware of what is being given at all times. This requires a lot of skill, experience and concentration to do it properly and, most importantly, safely.⁶⁰²

[600] Paul Jones, PCW in a residential care facility, gave detailed evidence in his statement about the medication he is required to administer:

‘There is a two-hour window for each medication round (dinnertime round and bedtime round). There are also some residents who have medication at specific times outside of these rounds (known as “out-of-routine”). There are 18 residents I am directly responsible for. Some take more time than others to administer medication to.

It is really important that the medications are administered in this time frame, because if they are not, this can have negative health impacts on the residents. Residents that need medication for Parkinson’s disease for example, are particularly impacted if medications are not given within the requisite time frame. They start locking up, which really impacts on their mobility and comfort.

For this reason, during the medication round, I have to manage my time effectively to ensure that time-critical medications are administered at the prescribed time, and the remainder of the medications are administered within the two-hour window.”⁶⁰³

[601] Paul Sadler, CEO of ACSA, gave evidence that until 15 years ago the work undertaken by medication-trained PCWs in residential care facilities would have generally been undertaken by a registered nurse.

Contention 4: The proportion of residents and clients in aged care with dementia and dementia-associated conditions has increased.

[602] The expert evidence supports contention 4.

[603] Prof Meagher states that the majority of people in residential aged care suffer from multiple forms of ill health, with around half having a diagnosis of dementia.⁶⁰⁴ Similarly, Prof Eagar states that while the exact number of aged care residents with dementia is not known, estimates range from between 50 to 80 per cent.⁶⁰⁵ Prof Meagher cites research published in 2020 that between 2008 and 2016 mental health disorders amongst older people living permanently in residential care increased from 54 per cent to 68 per cent.⁶⁰⁶ Prof Meagher’s expert opinion is that these increased needs require aged care staff to exercise judgment, responsibility and assessment skills, along with strong interpersonal skills, in their interactions with residents.⁶⁰⁷

⁶⁰² Amended witness statement of Suzanne Hewson dated 6 May 2022 at [24a].

⁶⁰³ Witness statement of Paul Jones dated 1 April 2021 at [22]–[24].

⁶⁰⁴ Meagher Report at 2.

⁶⁰⁵ Eagar Report at 12.

⁶⁰⁶ Meagher Report at 3; A T Amare, GE Caughey, C Whitehead, CE Lang, SC Bray, et al, ‘The prevalence, trends and determinants of mental health disorders in older Australians living in permanent residential aged care: Implications for policy and quality of aged care services’ (2020) *Australian & New Zealand Journal of Psychiatry*, 54(12), 1200–1211.

⁶⁰⁷ Meagher Report at 23.

[604] The Royal Commission made similar findings, noting that more than half of the people living in residential aged care in 2019 had a diagnosis of one of the forms of dementia, but that the real figure is likely higher due to the under-diagnosis of dementia,⁶⁰⁸ and could be as high as 70 per cent.⁶⁰⁹

[605] Prof Eagar emphasises that good communication skills have become increasingly important due to the significant number of people with dementia, particularly as those with dementia are at high risk of developing challenging behaviours.⁶¹⁰

[606] Similarly, Prof Kurrle stated that PCWs require greater knowledge of the health conditions of older people, particularly of dementia and frailty, and that there is a need for good communication skills as well as the ability to provide care to the increasingly frail and cognitively impaired population.⁶¹¹

[607] In relation to home care, Prof Meagher notes that in 2015 an estimated 22 per cent of home care clients had dementia, with older people with dementia significantly more likely to use a HCP than those without.⁶¹² Prof Meagher described the impact on HCWs of assisting people with dementia:

‘Working with older people with dementia in combination with other chronic diseases further increases the skill and responsibility demands of home care and support work. These older people typically have difficulty undertaking aspects of routine self-management of their health, including understanding their condition, taking medication, and following action plans on exacerbation. These limitations make additional demands on community care workers, who observe and make decisions about how to meet the person’s needs outside the structured context of a residential aged care facility where disease management would not be delegated to the older person.’⁶¹³

[608] Several lay witnesses, including Assoc Prof and RN Maree Bernoth, gave evidence of the increasing proportion of residents and clients in aged care with dementia and dementia associated conditions.⁶¹⁴ Assoc Prof Maree Bernoth stated:

‘My research and personal observations indicate that dementia in aged care facilities is increasing. Dementia presents many challenges. For example, it can be difficult to distinguish between dementia, delirium and depression. All may present in similar ways. A critical role of an RN and any aged care worker to identify symptoms so that this can be treated.

⁶⁰⁸ Royal Commission Final Report Vol 1 at 100.

⁶⁰⁹ Royal Commission Final Report Vol 1 at 127.

⁶¹⁰ Eagar Report at 12.

⁶¹¹ Kurrle Report at 6.

⁶¹² Meagher Supplementary Report at 3.

⁶¹³ Meagher Supplementary Report at 24.

⁶¹⁴ See, for example Witness statement of Paul Jones dated 1 April 2022 at [48]; Witness statement of Ngari Inglis dated 19 October 2021 at [28], Witness statement of Susan Toner dated 28 September 2021, [27]–[29]; Witness statement of Maree Bernoth dated 29 October 2021 at [42]–[43]; Witness statement of Linda Hardman dated 9 May 2022 at [32], [46]–[52]; Witness statement of Wendy Knights dated 29 October 2021 at [49]–[54].

...

There are more and more issues with dementia because of the reduced use of psychotropic drugs since the Royal Commission. With the reduced use of psychotropic drugs there has also been an increase in resident-on-resident violence, another source of distress for the staff.⁶¹⁵

[609] Donna Kelly described the skills PCWs/AINs are required to exercise in managing residents with dementia:

‘The increased dementia and behaviours in residents means that [personal carers] need to be more observant, and do more assessments of their health and conduct. We need to be warier as dementia residents are unpredictable. We need to prepare for the unknown and consider what type of behaviour we are going to meet when we walk into a resident’s room. We then need to manage residents by selecting and using careful communications, distraction and persuasive strategies. This has become an increasing issue in comparison to when I started at Karingal thirteen years ago.’⁶¹⁶

[610] Lay witnesses also gave evidence regarding the increasing prevalence of dementia in home care.⁶¹⁷ For example, PCW Ngari Inglis stated that there are more clients living at home with dementia and staying at home for longer. She described aspects of the work involved in assisting a client with dementia in the home:

‘The same client always refused to shower. So, you have to use gentle powers of persuasion and get them to do something they don’t want to do in the kindest most encouraging way possible. Often people with dementia hate being uncomfortable. An environment conducive for this client to shower had to be created. So, you warm the bathroom up with heat lamps, place bath mats onto the floor so they don’t get cold feet, keep him warm, keep encouraging and persuading. You have to have a lot of patience, and you can’t stress about the clock because you can’t rush dementia. But if you weren’t confident and hadn’t worked with dementia before, you may have panicked and probably not provided the best care possible. You may have felt pressured to do what you could do and get out in 30 minutes but you can’t do that.’⁶¹⁸

[611] Cheyne Woolsey, Chief Human Resources Officer at KinCare gave evidence that as a result of customers staying in their homes longer, a higher proportion present with dementia, experience cognitive decline and have multiple health issues which has directly impacted on the time spent by HCWs and additional complexity and challenges in the personal care tasks being performed compared to 5 years ago.⁶¹⁹

⁶¹⁵ Witness statement of Maree Bernoth, 29 October 2021 at [42]–[43].

⁶¹⁶ Reply witness statement of Donna Kelly, 20 April 2022 at [25].

⁶¹⁷ See Witness statement of Ngari Inglis dated 19 October 2021 at [25]–[29]; Witness statement of Susan Toner dated 28 September 2021 at [27]–[29].

⁶¹⁸ Witness statement of Ngari Inglis dated 19 October 2021 at [27].

⁶¹⁹ Witness statement of Cheyne Woolsey dated 4 March 2022 at [25]–[27].

[612] The Consensus Statement also states that the proportion of people with dementia and dementia-associated conditions receiving aged care services has increased.⁶²⁰

Contention 5: Home care is increasing as a proportion of aged care services.

[613] The expert evidence supports a conclusion that home care has increased as a proportion of aged care services.

[614] Prof Meagher states that over a million older people receive care and support in their own home through an Australian Government funded program. In March 2021, more than 167,000 older people were receiving a HCP, while in June 2020 around 830,000 older people received some form of care, assistance and support the CHSP.⁶²¹

Table 7: New entrants, system growth and turnover in the HCP program, 2018-2021

	A	B	C	D	E
	In a HCP at 31 March	Entered a HCP for first time in year to 31 March	Growth in no. of HCP holders since previous year (system growth)	Net new entrants (Total entrants less system growth)	Net new entrants as a share of all HCP holders at year's end
2021	167,124	63,192	30,215	32,977	20%
2020	136,909	65,638	37,799	27,839	20%
2019	99,110	41,451	14,139	27,312	28%
2018	84,971	-	-	-	-

Source: Meagher Supplementary Report at p.4.

[615] Prof Meagher states that home care is playing an increasing role relative to residential care due to Government policy and funding that has shifted the distribution of resources towards home care and away from residential care.⁶²² She found that the share of people aged 65 and over who lived permanently in residential care during the year fell from 65 per 1,000 in 2011-12 to 56 per 1,000 in 2019-20, while the share receiving a HCP increased from 23 per 1,000 to 41 per 1,000 across the same period.⁶²³ According to Prof Meagher, home care has 'increasingly developed as a viable alternative to residential aged care'.⁶²⁴ This is supported by a finding that there has been a 'rapid growth' in higher level HCPs, with the number of packages more than doubling from 80,000 in 2016 to nearly 170,000 in 2021 (see Figure 1).

⁶²⁰ Consensus Statement at [2].

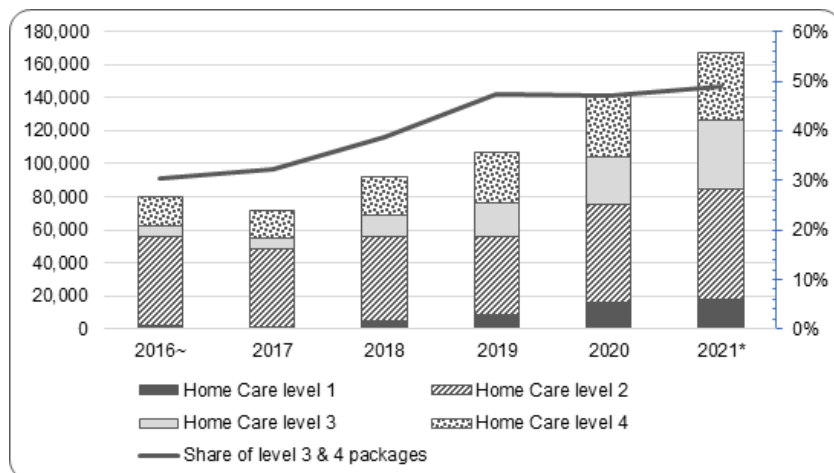
⁶²¹ Meagher Supplementary Report at 2.

⁶²² Meagher Report at 6.

⁶²³ Meagher Supplementary Report at 7.

⁶²⁴ Meagher Supplementary Report at 7.

Chart 8: Number of home care packages at 30 June 2016-2020, and at 31 March 2021 (left axis), and share of level 3 and 4 packages 2016-2020 (right axis)



Notes: In 2016, the reported numbers are operational HCP places. Following the introduction of ‘consumer-directed care’ in 2017, reported numbers are people in packages as at 30 June.

* Data are available only to 31 March for 2021.

Source: Meagher Supplementary Report at p.8.

[616] Prof Charlesworth and Prof Eagar also support a finding that there has been an expansion of home care services, as older people are staying at home for longer.⁶²⁵

[617] A number of lay witnesses working in home care settings reported people are staying in home care longer⁶²⁶ and experience a higher level of acuity.⁶²⁷ For example, Susan Morton, an in-home PCW, gave evidence that:

‘Over time, I have witnessed an increase to the age of clients in home care. Clients are now typically older. There is greater incentive to stay at home, rather than go into permanent residential care.

The older age of clients in home care means an increased usage of hoists, shower chairs, commodes etc, which is far more common now compared to the past.’⁶²⁸

⁶²⁵ Charlesworth Supplementary Report at [67]; Eagar Report at 3.

⁶²⁶ See Witness statement of Theresa Heenan dated 20 October 2021 at [110]–[111]; Witness statement of Catherine Evans dated 26 October 2021 at [84]–[85]; Witness statement of Catherine Goh dated 13 October 2021 at [28].

⁶²⁷ See Amended witness statement of Susan Digney dated 19 May 2022 at [27]; Witness statement of Catherine Goh dated 13 October 2021 at [28]; Witness statement of Marea Phillips dated 27 October 2021 at [33].

⁶²⁸ Witness statement of Susan Morton dated 27 October 2021 at [39]–[40].

[618] The Consensus Statement also noted that home care is increasing as a proportion of aged care services,⁶²⁹ and that the proportion of HCPs at levels 3 and 4 have increased.⁶³⁰

Contention 6: Since 2003, there has been a decrease in the number of Registered Nurses (RN) and Enrolled Nurses (EN) as a proportion of the total aged care workforce. Conversely, there has been an increase in the proportion of Personal Care Workers (PCW) and Assistants in Nursing (AIN).

[619] Prof Meagher provides evidence of the change in the occupational structure of the residential aged care workforce, and finds that the share of PCWs in the direct care workforce has increased from 57 per cent to 72 per cent between 2003 and 2016, while the corresponding share of nurses and allied health workers has fallen.⁶³¹ Tables reproduced from the Meagher Report below set out the changing occupation structure from 2003 to 2016.

Table 8: Full-time equivalent direct care employees in the residential aged care workforce, by occupation: 2003, 2007, 2012 and 2016⁶³²

	2003	2007	2012	2016	% change, 2003-2016
Registered Nurses	16,265	13,247	14,129	14,857	-9
Enrolled Nurses	10,945	9,856	10,999	9,126	-17
Allied Health Workers	5,776	5,204	5,026	3,954	-32
Personal Care Attendants	42,943	50,542	64,669	69,983	63
<i>Personal Care Attendants (%)</i>	57%	64%	68%	72%	
<i>All direct care workers (FTE)</i>	76,006	78,849	94,823	97,920	29

Source: Meagher Report, Table 1, p.6

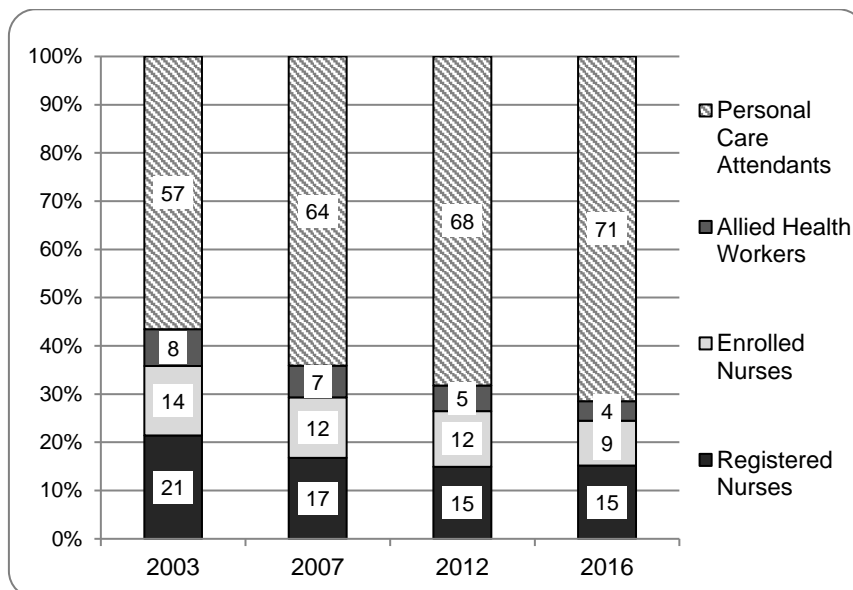
⁶²⁹ Consensus Statement at [4].

⁶³⁰ Consensus Statement at [17].

⁶³¹ Meagher Report at 6–7.

⁶³² Meagher Report at 6, Table 1. Data reported in K Mavromaras, G Knight, L Isherwood, A Crettenden, J Flavel, et al. (2017), '2016 National Aged Care Workforce Census and Survey - The Aged Care Workforce', (2016 Department of Health).

Chart 9: Occupational structure of the direct care workforce in residential care, 2003, 2007, 2012, 2016, per cent of total full-time equivalent workforce⁶³³



Source: Meagher Report, Table 1, p.6.

[620] Prof Meagher observed a similar change in the occupational structure of the home care workforce, with the share of community care workers (HCWs) increasing from 78 per cent to 83 per cent from 2007 to 2020, with a corresponding 39.2 per cent *decline* in the number of RNs, as shown in Table 4.⁶³⁴

⁶³³ Meagher Report at 7; K Mavromaras, G Knight, L Isherwood, A Crettenden, J Flavel, et al. (2017), '2016 National Aged Care Workforce Census and Survey - The Aged Care Workforce', (2016 Department of Health) Table 3.3.

⁶³⁴ Meagher Supplementary Report at 17.

Table 9: Full-time equivalent direct care employees in the home care and support workforce, by occupation: 2007, 2012, 2016 and 2020⁶³⁵

	2007	2012	2016	2020	% change, 2007-2020
Registered Nurses	6,079	6,599	4,692	3,698	-39.2
Enrolled Nurses	1,197	2,345	1,143	1,170	-2.3
Allied Health Workers	2,948	4,199	3,540	2,995	1.6
Community Care Workers	35,832	41,394	34,712	39,069	9.0
<i>Community Care Workers (%)</i>	78%	76%	79%	83%	
<i>All direct care workers (FTE)</i>	46,056	54,537	44,087	46,932	1.9

Source: Meagher Supplementary Report, Table 4, p.17.

[621] These trends are evident in the 2020 Workforce Report data. The 2020 Workforce Report is divided into parts for each of the 3 service care types—RAC, HCPP and the CHSP.

[622] In residential aged care, PCWs accounted for 70 per cent of the workforce, compared with RNs (15.7 per cent) and ENs (7.7 per cent). HCPPs and CHSPs have even higher ratios of HCWs to nursing staff than those found in residential care, with HCWs making up 87.9 per cent and 81.1 per cent of their respective workforces compared with RNs (4.7 per cent HCPP, 8.5 per cent CHSP) and ENs (1.4 per cent HCPP and 2.9 per cent CHSP).⁶³⁶

[623] Prof Charlesworth, Prof Eagar, Prof Kurrle and Assoc Prof Smith and Dr Lyons similarly find that the composition of the aged care workforce has changed, with the number of RNs and ENs reducing, resulting in an increased reliance on PCWs.⁶³⁷

[624] In 2019, Prof Eagar undertook a study of the care needs of 1,877 residents in 30 aged care facilities across Queensland, NSW and Victoria to measure the time in minutes each staff member spent with a resident each day.⁶³⁸ Prof Eagar found PCWs account for 74 per cent of total staff time, compared with just 9 per cent for RNs and 5 per cent for ENs. On average residents receive 188 minutes of direct care per day, equating to 36 minutes by RNs, 8 minutes by allied health and 144 minutes by PCWs/AINS.

⁶³⁵ Sources: K Mavromaras, G Knight, L Isherwood, A Crettenden, J Flavel, et al. (2017), '2016 National Aged Care Workforce Census and Survey - The Aged Care Workforce', (2016 Department of Health) Table 3.3; Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) Tables 3.1 and 4.1.

⁶³⁶ Commonwealth submissions dated 8 August 2022 Annexure A, Tables A1 and A2.

⁶³⁷ Kurrle Report at p.2; Charlesworth Report at [47]; Eagar Report at pp.6–8; Smith/Lyons Report at [109].

⁶³⁸ Eagar, K et al, *How Australian Residential Aged Care Staffing Levels Compare with International and National Benchmarks*, (Research Study Commissioned by the Royal Commission into Aged Care Quality and Safety, September 2019).

Table 10 Percentage of staff time by professional designation in the RUCS study

Designation	% of total time
Personal Care Assistant	74%
Registered Nurse	9%
Other	7%
Enrolled Nurse	5%
Recreation Officer/ Diversional Therapist	4%
Allied Health	1%
Total	100%

Source: Eagar Report, Table 3, p.8.

[625] Prof Eagar concluded that in practice, PCWs perform ‘the significant majority of work in meeting the needs of the older people in their care.’⁶³⁹

[626] The expert evidence is supported by the findings of the Royal Commission.

[627] The Royal Commission found that aged care providers engage in costs saving by reducing the number of nursing staff and replacing them with lower paid PCWs:

‘For some years there has been a relative decline in the proportion of nurses in the residential aged care workforce and a corresponding increase of personal care workers. The proportion of registered nurses in the workforce dropped from 21% in 2003 to 14.6% in 2016, and enrolled nurses dropped from 13.1% to 10.2%. In the same period, personal care worker representation has increased from 58.5% to 70.3% of the workforce. The 1997 changes resulted in providers replacing nursing staff with personal care workers to reduce costs. There has also been a decline in the proportion of the workforce who are allied health professionals or assistants, from 7.4% in 2003 to 4.6% in 2016.’⁶⁴⁰

[628] A significant number of lay witnesses gave evidence that the composition, staffing levels and skill mix in the aged care workforce has changed significantly over time,⁶⁴¹ in particular that there are fewer RNs, resulting in an increased reliance on ENs, PCWs and AINs.

⁶³⁹ Eagar Report at 8.

⁶⁴⁰ Royal Commission Final Report Vol 2 at [4.10].

⁶⁴¹ Amended reply witness statement of Carol Austen dated 20 May 2022 at [14]-[17]; Witness statement of Lisa Bayram dated 29 October 2021 at [27]-[31]; Witness statement of Maree Bernoth dated 29 October 2021 at [45]-[48]; Witness statement of Geronima Bowers dated 1 April 2021 at [17]-[20], [27], [37]; Amended witness statement of Kerrie Boxsell dated 19 May 2022 at [62]; Amended witness statement of Pauline Breen dated 9 May 2022 at [23]; Amended witness statement of Hazel Bucher dated 10 May 2022 [42]-[44]; Witness statement of Donna Cappelluti dated 21 April 2022 [22]; Witness statement of Sherree Clarke dated 29 October 2021 at [54], [63]-[67]; Witness statement of Judeth Clarke dated 29 March 2021 at [15]-[17]; Witness statement of Peter Doherty dated 28 October 2021 at [148]-[149]; Witness statement of Sally Fox dated 29 March 2021 at [149]-[151]; Reply witness statement of Sally Fox dated 14 April 2022 at [39]-[40]; Reply witness statement of Fiona Gauci dated 19 April 2022 at [48]-[57]; Reply witness statement of Michelle Harden dated 13 April 2022 at [22]-[26]; Amended witness statement of Linda Hardman dated 9 May 2021 at [63]-[65], [78]; Witness statement of Ross Heyen dated 31 March 2021 at [14]; Witness statement of Jocelyn Hofman dated 29

[629] Assoc Prof and RN Maree Bernoth, gave the following evidence on the skill mix in aged care facilities:

‘The skill mix in aged care facilities has certainly changed over time. Over the past 20 years I have seen a reduction in the ratio of RNs, especially educators and mentors, in aged care. There are generally now no mentors in aged care facilities and so staff and students go into facilities without adequate mentoring and support. Likewise, there are not enough RNs to manage residents and to manage requirements of facilities. There are now not enough staff to work with, supervise or mentor care staff (PCAs and AINs) to show them what is important and what can be left for example, or how to prioritise care. PCAs and AINs are working very hard and very fast doing the best they can but may not be prioritising time to insure they do the most important thing.

As a result of staffing levels there is limited supervision of care workers (AINs and PCAs) by RNs. There is often no supervision of RNs. New RNs going into aged care usually do not have the benefit of a mentor. They are usually rostered on without another RN and so have to find their own way.’⁶⁴²

[630] Lay witnesses who work in the community home care sector also gave evidence that the numbers of RNs have reduced.

[631] RN Pauline Breen, who works in the community care sector, gave evidence that she sees fewer RNs working in aged care than when she started, approximately 15 years ago, and when they resign they are not replaced by another RN.⁶⁴³ Lyndelle Park, a PCW who works in community care, gave evidence that there are fewer nurses available in the community home care sector.⁶⁴⁴

[632] The Consensus Statement also agreed that since 2003, there has been a decrease in the number of RNs and ENs as a proportion of the total aged care workforce and an increase in the proportion of PCWs and AINs.⁶⁴⁵

October 2021 at [24], [28], [33]-[36]; Witness statement of Paul Jones dated 1 April 2021 at [29]; Amended witness statement of Wendy Knight dated 23 May 2022 at [16], [26]; Witness statement of Julie Kupke dated 28 October 2021 at [109]; Witness statement of Pamela Little dated 30 March 2021 at [39]-[42]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [35], [46]; Amended witness statement of Irene McInerney dated 10 May 2022 at [32], [41], [44]- [46]; Amended witness statement of Patricia McLean dated 9 May 2022 at [81]-[82]; Witness statement of Lyndelle Parke dated 31 March 2021 at [19]-[20]; Witness statement of Josephine Peacock dated 30 March 2021 at [142]; Witness statement of Helen Platt dated 29 March 2021 at [81]-[82], [87], [92]-[93]; Witness statement of Dianne Power dated 29 October 2021 at [15]-[19], [78]; Amended witness statement of Michael Purdon dated 19 May 2022 at [22]; Witness statement of Antoinette Schmidt dated 30 March 2021 at [123]-[128]; Witness statement of Christine Spangler dated 29 October 2021 at [21]-[22], [36]; Amended witness statement of Veronique Vincent dated 19 May 2022 at [108]-[113], Amended witness statement of Stephen Voogt dated 19 May 2022 at [43]; Witness statement of Kristy Youd dated 24 March 2021 at [41]-[42].

⁶⁴² Witness statement of Maree Bernoth dated 29 October 2021 at [45]-[46].

⁶⁴³ Amended witness statement of Pauline Breen dated 9 May 2022 at [23].

⁶⁴⁴ Witness statement of Lyndelle Parke dated 31 March 2021 at [20].

⁶⁴⁵ Consensus Statement at [14]-[15].

Contention 7: Registered Nurses have increased duties and expectations, including more administrative responsibility and managerial duties.

[633] The evidence supports a finding that the role of an RN encompasses increased duties and expectations.

[634] Assoc Prof Junor found that RNs hold direct responsibility for supervising the work of ENs, AINs and PCWs which results in a ‘heavy workload of consultation and authorisation’⁶⁴⁶ and that the introduction of a more complex regulatory environment had created a greater demand for RNs to complete documentation, adding ‘significantly’ to the volume and complexity of their workload.⁶⁴⁷

[635] In a report prepared for the Aged Care Workforce Strategy Taskforce, Korn Ferry Hay Group discussed the significant ‘scope creep’ in aged care nursing roles:

‘The Nursing roles in aged care are loosely defined, with a wide range of fluid responsibilities that can stretch and pull them in different directions – such as people management, operations/shift supervision and documentation – ironically, away from clinical care and expertise which is the core purpose of their role. Further, these roles operate in highly fluid structural arrangements, with multiple informal reporting relationships and responsibilities. Overall, there is a significant scope creep in Nursing roles – they are treated as a ‘jack of all trades’. This creates significant role clarity issues for Nurses leading to ‘burnout’ and ultimately their exit from the aged care industry.’⁶⁴⁸

[636] The expert evidence was supported by the lay witness evidence.

[637] RN Lisa Bayram emphasised that the scope of her role has changed, and the complexity has increased.⁶⁴⁹ Ms Bayram gave evidence of a wide range of administrative and reporting responsibilities she is required to undertake, including those necessary to comply with the Serious Incident Response Scheme (SIRS).⁶⁵⁰

[638] Lay witnesses also gave evidence of the high level of accountability and oversight RNs have in a residential aged care facility. For example, RN Irene McInerney stated:

‘I remain accountable for the care delivered while I am on duty. This means that I need to work with and rely on the nursing team and the carers. This includes identifying at handover and at the start of the shift those residents with particular issues or needs. The carers need to tell RNs anything that is out of the ordinary with any residents. The RNs then need to assess and address issues. Reporting, things as in bruising, an escalation in behavior, skin changes, changes in presentation or condition so the RN can monitor for health changes and make a plan of care. As the RN I monitor resident condition,

⁶⁴⁶ Junor Report Annexure 7 at [34].

⁶⁴⁷ Junor Report Annexure 7 at [51].

⁶⁴⁸ Korn Ferry Hay Group, *Reimagining the Aged Care Workforce* (Report prepared for the Aged Care Workforce Strategy Taskforce, 2018) at [233].

⁶⁴⁹ Witness statement of Lisa Bayram dated 29 October 2021 at [66], [68]–[69].

⁶⁵⁰ Witness statement of Lisa Bayram dated 29 October 2021 at [72].

additionally watching for changes such as confusion or agitation, possible pain management issues, and swallowing issues at meal times. There is need for trust and support for the full team I work with.’⁶⁵¹

[639] Assoc Prof and RN Maree Bernoth emphasised that due to the decrease in the number of RNs in aged care, the workload of the remaining RNs has been intensified:

‘Aged care work is also complex. Unlike most work in acute care, a RN in aged care often will not have back up from other RNs or specialists. There is an absence of peer support, managerial support and specialised services like pathology and allied health. As a result, nurses and carers in aged care need to develop a wide range of skills and broader knowledge. Because of the lack of support, staff working in aged care also have greater responsibility for complex and emotionally demanding situations, including dealing with end of life.’⁶⁵²

[640] Evidence of union officials also supported the proposition that RNs have increased duties and expectations.

[641] Julianne Bryce, Senior Federal Professional Officer ANMF, emphasised that nurses operate in ‘extremely difficult conditions’ with changes in the acuity of residents, reduction in nurse numbers and staffing and skill mix impacting the nursing care required:

‘There is a greatly increased burden of responsibility and accountability for registered nurses relating to both the provision of direct care and supervising and delegating nursing care provided by others.’⁶⁵³

[642] Paul Gilbert, Assistant Secretary of the Victorian Branch of the ANMF, observed that the roles of RNs have undergone a ‘seismic shift’, and have now ‘by and large become the delegator of care, the care planner and regulatory compliance/funding system gurus, while also maintaining professional supervision of work.’⁶⁵⁴

[643] The lay witness evidence also highlighted that RN roles have increased administrative and managerial responsibility.⁶⁵⁵ For example, EN Wendy Knights explained how the role of the RN has changed over her time working in the aged care sector:

‘RNs used to be on the floor much of the time. Now, they are much more in the office. To my observation, that is because the administrative and paperwork load is much greater for RNs than it used to be.

⁶⁵¹ Amended witness statement of Irene McInerney dated 10 May 2022 at [37].

⁶⁵² Witness statement of Maree Bernoth dated 29 October 2021 at [61].

⁶⁵³ Witness statement of Julianne Bryce dated 29 October 2021 at [50].

⁶⁵⁴ Amended witness statement of Paul Gilbert dated 3 May 2022 at [25].

⁶⁵⁵ See Amended witness statement of Virginia Mashford dated 6 May 2022 at [35], [42]; Witness statement of Dianne Power dated 29 October 2022 at [60], [78]; Witness statement of Sally Fox dated 29 March 2021 at [147]; Amended witness statement of Linda Hardman dated 9 May 2022 at [63]; Amended witness statement of Linda Hardman dated 5 September 2022 at [63]; Witness statement of Virginia Ellis dated 28 March 2021 at [76]; Reply witness statement of Alison Curry dated 20 April 2022 at [66]; Witness statement of Donna Kelly dated 31 March 2021; Witness statement of Christine Spangler dated 29 October 2022 at [21], [26].

For example, if a transfer to hospital is required, the RN does the administration side of that. That may involve ringing management, ringing the resident's family, and ringing the resident's doctor, amongst other things. The RN also makes appointments, scans notes, books follow up appointments, arranges changes in medication, and things of this kind. RNs also are involved in producing care plans, reviews, and updates to care plans. I've observed that this work for the RN in Princes Court takes up most of her shift. Though, she is still required on the floor when, for example, ENs or PCWs ask for assistance or evaluation, or if there is a fall.⁶⁵⁶

[644] The employer lay witnesses also gave evidence about the changing nature of the RN role, with a greater focus on administrative and managerial, as opposed to clinical, tasks.⁶⁵⁷

[645] Mark Sewell, CEO and Company Secretary of Warrigal, stated that the role of the RN has 'shifted' and become 'more administrative in nature' with RNs spending more time compiling reports, conducting audits and completing care plans.⁶⁵⁸ Mr Sewell estimated that where previously RNs would have spent half an hour on data entry, they are now spending 1.5 hours per 8-hour shift.⁶⁵⁹

[646] Paul Sadler, CEO of ACSA, gave evidence that RNs have been diverted away from direct care into the completion of ACFI assessments, either on admission or re-assessments, particularly impacting RN workloads.⁶⁶⁰

[647] The Consensus Statement supports the proposition, asserting that expectations of RNs have 'increased markedly':

'RNs are the clinical leaders in residential aged care and have experienced an increase in managerial duties (including co-ordinating and supervising and delegating) and/or administrative responsibilities. Expectations of RNs have increased markedly (along with a shift from residents with lower to higher social and clinical needs). Nurses are required to detect changes in resident health status, identify elder abuse and anticipate medical decision-making. Overall, there are more demands upon nurses due to workforce structures and meeting governance requirements. They develop care plans and oversee their implementation and review.'⁶⁶¹

⁶⁵⁶ Witness statement of Wendy Knights dated 29 October 2021 at [26]–[27].

⁶⁵⁷ See Witness statement of Johannes Brockhaus dated 3 March 2022 at [27]–[28]; Witness statement of Paul Sadler dated 1 March 2022.

⁶⁵⁸ Witness statement of Mark Sewell dated 3 March 2022 at [112].

⁶⁵⁹ Witness statement of Mark Sewell dated 3 March 2022 [41]–[42].

⁶⁶⁰ Witness statement of Paul Sadler dated 1 March 2022 at [41].

⁶⁶¹ Consensus Statement at [15].

Contention 8: PCWs and AINs operate with less direct supervision. PCWs and AINs perform increasingly complex work with greater expectations.

[648] The evidence of 4 of the expert witnesses supports the contention that PCWs and AINs operate with less direct supervision and perform increasingly complex work with greater expectations.

[649] Prof Charlesworth gave evidence that PCWs in residential care are now expected to do more clinical type care, including peg feeding and managing catheters, often with ‘scant supervision’⁶⁶² and that PCWs are required to exercise a high degree of judgment and discretion as to how to care for residents, while balancing the competing needs of other residents.⁶⁶³

[650] Prof Meagher stated that changes in the occupational profile of the direct care workforce has meant that PCWs are taking on tasks previously carried out by nurses, often without supervision.⁶⁶⁴ Prof Meagher points to pain management and palliative care as examples of areas where PCWs now play a major role which requires them to exercise responsibility, judgment and high level assessment skills.

[651] Prof Eagar found that as a result of the reduction in the number of RNs supervising day-to-day activities, many more responsibilities now fall on the shoulders of the rest of the aged care workforce.⁶⁶⁵

[652] Prof Kurrle gave evidence that the level of skill and knowledge required by PCWs has increased since 1997, as PCWs in residential care now perform duties ‘traditionally performed by nurses’ including medication administration, wound dressing, assistance with feeding and performing vital observations.⁶⁶⁶ In cross-examination, Prof Kurrle said that in some situations, PCWs will do work that requires a RN, for example where there is an emergency such as a fall, and there is not an RN in the facility at the time.⁶⁶⁷

[653] In relation to home care workers, Prof Charlesworth found that HCWs usually work alone and that their work involves a significant degree of responsibility and discretion.⁶⁶⁸ Prof Meagher agreed that home care workers ‘largely work alone’ and that this creates particularly demands on the skills, responsibility and judgment that they are required to exercise.⁶⁶⁹ Further, Prof Meagher noted that clients receive fewer visits from a service coordinator and as a result care workers are the ‘face’ of the organisation, with more responsibility and autonomy to manage concerns and make ethical judgments about the care provided to the client.⁶⁷⁰

⁶⁶² Charlesworth Report at [51].

⁶⁶³ Charlesworth Report at [51].

⁶⁶⁴ Meagher Report at 20.

⁶⁶⁵ Eagar Report at 13.

⁶⁶⁶ Kurrle Report at 3.

⁶⁶⁷ Transcript, 3 May 2022, PN3607–3611.

⁶⁶⁸ Charlesworth Report at [73].

⁶⁶⁹ Meagher Supplementary Report at 20–21.

⁶⁷⁰ Meagher Supplementary Report at 25.

[654] Prof Meagher emphasised that due to the growth in the volume and acuity of home care recipients, the skill, responsibility and judgment required by PCWs who work in home care has increased, is more complex and more demanding.⁶⁷¹

[655] PCW/AIN lay witnesses also gave evidence that due to a reduction in nursing staff, their roles and responsibilities have expanded, while their supervision has decreased: RNs do not actively or directly supervise,⁶⁷² but must be sought out,⁶⁷³ or will attend only for a particular purpose such as to check the facility or direct staff to perform a particular task,⁶⁷⁴ or to conduct an assessment, administer medication or do observations.⁶⁷⁵

[656] The lay witness evidence was consistent with a finding that there is little direct supervision of PCWs/AINs.⁶⁷⁶

[657] For example, PCW Sally Fox, gave the following evidence:

‘The RN rostered on shift is technically the supervisor of all ECAs [Extended Care Assistants] on shift, however they don't actively supervise us.

If I need assistance, I have to approach the RN. RNs definitely have significantly more paperwork to complete than they used to, so they do have less time to be on the floor these days.

There is also a Facility Manager (Residential) who is based in an office, but frequently comes down to the floor, however she mostly is liaising with the RNs, not ECAs, and she doesn't actively supervise ECAs either. I am working much more autonomously than when I started.⁶⁷⁷

[658] Veronique Vincent, Home Support Worker, gave evidence of increasing responsibilities of PCWs in home care settings:

‘The tasks we're expected to do have also changed dramatically over time. Whereas in my earlier days as a home care worker the help we provided to clients was more focused in domestic assistance and personal care, these days we are acting as Enrolled Nurses without being Enrolled Nurses.

We handle medications, we tend to wounds, we take blood pressure. Whereas these tasks used to be performed by nurses, now the nurse will only do the initial assessment

⁶⁷¹ Meagher Supplementary Report at 19.

⁶⁷² Witness statement of Sally Fox, dated 29 March 2021 at [145]–[148]; Witness statement of Paul Jones dated 1 April 2021 at [49]; Transcript, 29 April 2022, PN1361–PN1363.

⁶⁷³ Witness statement of Sally Fox dated 29 March 2021 at [145]–[148].

⁶⁷⁴ Witness statement of Antoinette Schmidt dated 30 March 2021 at [112]–[114].

⁶⁷⁵ Witness statement of Donna Kelly dated 31 March 2021 at [28].

⁶⁷⁶ See for example Witness statement of Paul Jones dated 1 April 2021 at [49]; Witness statement of Donna Kelly dated 31 March 2021 at [22], [28].

⁶⁷⁷ Witness statement of Sally Fox dated 29 March 2021 at [145]–[148].

and then create a care chart (in conjunction with a client's doctor) with instructions for the Home Support Workers to manage from that point on.'⁶⁷⁸

[659] Several lay witnesses gave evidence in relation to administering medications. Judeth Clarke said that when she started working as a personal carer, PCWs were not involved in administering medications⁶⁷⁹ but since the early 2000s, many carers are required to complete a medication competency and administer medications.⁶⁸⁰ Paul Jones gave evidence in cross-examination that he frequently administers insulin when an RN is not at the facility, and a second carer with insulin competency will witness it.⁶⁸¹

[660] The employer witnesses also gave evidence that PCWs/AINs work with less direct supervision.

[661] Johannes Brockhaus, CEO of Buckland, stated that RNs are occupied with care planning, conducting reviews, audits and assessments and as a result PCWs are undertaking more of the direct care work that was historically undertaken by RNs.⁶⁸² Similarly, Mark Sewell, CEO of Warrigal, noted that RNs are no longer undertaking as much 'hands on direct care' and as a result PCWs work 'under the general supervision of RNs rather than alongside the RN.'⁶⁸³ In relation to home care, Mr Sewell stated that HCWs usually work alone and do not receive direct or in-person supervision.⁶⁸⁴

[662] The Consensus Statement supports a finding that PCWs/AINs have increased responsibilities and perform work with less direct supervision:

'PCWs are being required to perform duties that were traditionally undertaken by nurses (such as peg feeding and catheter support) after receiving relevant training and/or instruction. Care workers in both residential care and home care are performing increasingly complex work along with the increasing complexity of the needs of residents entering care. There are more expectations of care workers to detect changes in resident or client condition, identify elder abuse and assist with medications and other treatments.'⁶⁸⁵

[663] In relation to home care, the Consensus Statement notes that home care workers work with minimum supervision and, due to the increasing acuity and dependency of recipients of care, exercise more independent decision-making, problem solving and judgment on a broader range of matters.⁶⁸⁶

⁶⁷⁸ Amended witness statement of Veronique Vincent dated 19 May 2022 at [108]–[109].

⁶⁷⁹ Witness statement of Judeth Clarke 29 March 2021 at [18].

⁶⁸⁰ Witness statement of Judeth Clarke 29 March 2021 at [18].

⁶⁸¹ Witness statement of Paul Jones dated 1 April 2021 at [28].

⁶⁸² Witness statement of Johannes Brockhaus dated 3 March 2022 at [28]–[29].

⁶⁸³ Witness statement of Mark Sewell at [114]–[115].

⁶⁸⁴ Witness statement of Mark Sewell at [120]–[121].

⁶⁸⁵ Consensus Statement at [16].

⁶⁸⁶ Consensus Statement at [19].

Contention 9: There has been an increase in regulatory and administrative oversight of the Aged Care Industry.

[664] Chapter 6.4 sets out the system of regulation of the aged care sector and we need not repeat that evidence here.

[665] The expert witnesses gave evidence regarding the impact of the increase in regulatory and administrative oversight in the aged care sector.

[666] Prof Meagher emphasises that there has been ‘considerable change’ in the regulatory environment for residential aged care, and associated with these changes has been the imposition of new standards, policies and procedures creating ‘considerable demands on both the care staff and the administrative staff, to learn and adapt.’⁶⁸⁷

[667] In cross-examination Prof Meagher was asked to expand on this evidence and made the following observations:

‘MR WARD: I take it that aged care facilities have always had to have quality assurance systems?’

PROF MEAGHER: Certainly in the last three decades, yes.

MR WARD: Is what’s changed the nature of the quality assurance system, or is it just that it’s now more policed?’

PROF MEAGHER: I think both – well, certainly the nature of the system has changed sort of in different ways over time. So there’s a kind of learning burden on organisations and the people who have to take carriage of this work. There has also been an increased use of information technology. I mean, some of that could make some things easier to do and some of it means it’s also learning and new skills as well with new systems. But I think there have also been – there are also more standards are being added, as well as changing standards, yes.’⁶⁸⁸

[668] Prof Meagher’s evidence is that this trend extends to home care where ‘prevailing regulatory and community standards have increased expectations of the capacity and quality of home care and support.’⁶⁸⁹

[669] There was considerable lay witness evidence about the impact of changes in the accountabilities of care staff, changes in regulation and residents’ expectations. This included evidence about the Aged Care Quality Standards, Aged Care packages, the SIRS, ACFI accreditation, and a reduced use of chemical and physical restraints.

⁶⁸⁷ Meagher Report at p.24.

⁶⁸⁸ Transcript, 2 May 2022, PN2730–PN2731.

⁶⁸⁹ Meagher Supplementary Report at 20.

[670] Many lay witnesses working in residential facilities and home care settings gave evidence that reporting requirements meant workers were spending more time completing documentation, charting or ‘paperwork’ than in the past.⁶⁹⁰

[671] Employer witnesses also gave evidence of the increased regulatory burden on aged care workers. Mark Sewell, CEO of Warrigal, noted that while the aged care industry has always been very highly regulated, the level of regulation has increased with time.⁶⁹¹ Similarly Johannes Brockhaus, CEO of Buckland, emphasised that the amount of auditing and reporting now required is ‘extensive’ and that many compliance-based duties are now undertaken by RNs.⁶⁹²

[672] The Consensus Statement notes that there has been a change in the regulatory regime of the aged care sector which has meant that nurses and care workers ‘are required to meet increased quality and safety standards and meet increased documentation requirements.’⁶⁹³

Contention 10: More residents and clients in aged care require palliative care.

[673] The expert evidence supports a finding that there has been an increase in aged care residents and clients who require palliative care.

[674] Prof Eagar estimates that in any one year 60,000 aged care residents die and another 60,000 will take their place, resulting in a 1 in 3 turnover and emphasises the impact of these deaths on aged care workers:

‘Those 60,000 deaths will be people who have grieving families and friends. The aged care worker will often be the first point of contact for the family. Aged care workers are frequently required to contact family members to inform them of the death of a resident. Aged care workers are also required to pack up a resident’s belonging[s] after they die and return belongings to the person’s family.

This one in three turnover has broader implications. Aged care workers deal daily with residents who are grieving for their friends who have died while in the same home. At the same time, aged care workers must settle in new residents, deal with anxious families and maintain the usual routine of the home. There is now a level of emotional stress associated with aged care that is significantly higher than in the past when the resident population was less frail.’⁶⁹⁴

⁶⁹⁰ Witness statement of Maree Bernoth dated 29 October 2021 at [36]; Witness statement of Catherine Goh dated 13 October 2021 at [36]; Amended witness statement of Linda Hardman dated 9 May 2022 at [34]; Amended witness statement of Suzanne Hewson dated 6 May 2022 at [25]; Witness statement of Jocelyn Hofman dated 29 October 2021 at [43]; Amended witness statement of Wendy Knights dated 23 May 2022 at [66]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [42]; Witness statement of Susan Morton dated 27 October 2021 at [32]; Witness statement of Josephine Peacock dated 30 March 2021 at [142]; Witness statement of Marea Phillips dated 27 October 2021 at [44]; Witness statement of Helen Platt dated 29 March 2021 at [84]; Witness statement of Christine Spangler dated 29 October 2021 at [26]; Witness statement of Jane Wahl dated 21 April 2022 at [41].

⁶⁹¹ Witness statement of Mark Sewell dated 3 March 2022 at [30].

⁶⁹² Witness statement of Johannes Brockhaus dated 3 March 2022 at [26]–[27].

⁶⁹³ Consensus Statement at [23].

⁶⁹⁴ Eagar Report at 12.

[675] Assoc Prof Junor found that as people are staying at home longer, they are increasingly entering residential aged care at the point of receiving palliative care. As a result, the responsibility for supporting the transition to end of life has increasingly been borne by aged care workers.⁶⁹⁵

[676] Assoc Prof Junor emphasised that aged care workers required ‘significantly increased’ knowledge and technical, social and organisation skills to manage the increase in the numbers of residents with serious co-morbidities or receiving end-of-life care.⁶⁹⁶ She noted that the responsibility of supporting a resident and their family through end-of-life care is a ‘heavy one’ that involves discussions and updating of the care plan, guiding the family, providing reassurance, managing guilt and providing time to think and make decisions.⁶⁹⁷

[677] Similarly, Prof Kurrle noted that the majority of residents die in a residential aged care facility and as a result managing end-of-life care is a ‘particularly specialised area of care and requires a degree of skill and knowledge.’⁶⁹⁸

[678] Prof Meagher noted that the increase in palliative care has also occurred in the home care sector, as people are increasingly remaining at home longer resulting in a ‘significant majority’ of recipients of care dying at home, raising the need for palliative home care.⁶⁹⁹ Prof Meagher found that approximately 1 in 20 recipients die within 3 months of entering home care and more than a third die within 3 years.⁷⁰⁰

[679] Many lay witnesses gave evidence that there is an increasing need to provide palliative care and for the skills required in the provision of end-of-life care.

[680] Assoc Prof and RN Maree Bernoth stated that the need for palliative care by residents has been increasing, with a higher ratio of patients entering aged care facilities at the end of their life, requiring more intensive and specialised care.⁷⁰¹

[681] AIN Alison Curry gave detailed evidence of the role of care staff at end of life, including closely monitoring the resident prior to their passing, comforting family members and other residents, preparing, cleaning and dressing the body, assisting funeral home staff, completing documentation and providing pastoral care to residents and other staff.⁷⁰² Ms Curry emphasised the impact palliative care has on the aged care workers involved:

⁶⁹⁵ Junor Report Annexure 7 at [16].

⁶⁹⁶ Junor Report at [43].

⁶⁹⁷ Junor Report Annexure 7 at [19].

⁶⁹⁸ Kurrle Report at 11.

⁶⁹⁹ Meagher Supplementary Report at 13.

⁷⁰⁰ Meagher Supplementary Report at 3.

⁷⁰¹ Witness statement of Maree Bernoth dated 29 October 2022 at [39].

⁷⁰² Witness statement of Alison Curry dated 30 March 2021 at [53]–[75].

‘All this work will often be conducted in circumstances of extreme emotional labour on the parts of the carer. We form close attachments to our residents. It is truly sad when they pass. This process comes with a heavy psychological burden for carers.’⁷⁰³

[682] Nurse Practitioner Hazel Bucher emphasised the skill involved in providing palliative care:

‘Palliative care takes time, experience and skill. It requires calm unhurried discussions with families and the residents to work through expectations, fears and desires, so death can be peaceful and grief uncomplicated. Both formal learnt and informal skills and experience are required. In my experience there is a significant increase in palliative care provided in RACFs [residential aged care facilities] compared to ten years ago, when more frequent transfer to hospital occurred for palliative care and pain relief.’⁷⁰⁴

[683] Employer lay witnesses Kim Bradshaw, General Manager at Warrigal, and Emma Brown, Special Care Project Manager at Warrigal, both gave evidence during cross-examination that the need for palliative care has intensified, as residents are staying at home longer and entering residential facilities at the point of receiving end-of-life care.⁷⁰⁵

[684] The Royal Commission found that palliative and end-of-life care was a ‘necessary component of aged care services’:

‘The need for skilled provision of palliative and end-of-life care in aged care services is likely to increase with an ageing population that will experience higher rates of chronic illness, including cognitive impairment. The clear delineation of aged care providers’ responsibilities and increased workforce expertise and capability in palliative care is urgent and essential. Older people with complex care needs should also have equitable access to specialist palliative care services.’⁷⁰⁶

Contention 11: Employers in the aged care industry increasingly require that PCWs and AINs hold Certificate III or IV qualifications.

[685] The 2020 Workforce Report provides data on the proportion of care workers who have Certificate III and IV qualifications.

[686] Table 11 below presents the proportion of PCWs in the Residential Aged Care (RAC) and in-home care workforce who have a Certificate III or IV in aged care or a relevant direct care field. This data was submitted by the Commonwealth, citing the National Aged Care Work Census of 2003, 2007, 2012, 2016 and 2020.⁷⁰⁷

⁷⁰³ Witness statement of Alison Curry dated 30 March 2021 at [60].

⁷⁰⁴ Amended witness statement of Hazel Bucher dated 10 May 2022 at [48].

⁷⁰⁵ Transcript, 11 May 2022, PN12805–PN12807; Transcript, 12 May 2022, PN13420–PN13434.

⁷⁰⁶ Royal Commission Final Report Vol 3A, at 117.

⁷⁰⁷ Commonwealth submission dated 8 August 2022 Annexure B, Table B12.

Table 11: Proportion of personal care workers in RAC and in-home care workforce with Certificate III or IV

	2003	2007	2012	2016	2020
	(%)	(%)	(%)	(%)	(%)
RAC					
A relevant Certificate III or higher	n/a	n/a	n/a	n/a	66
Certificate III in aged care	65.0	65.0	65.7	67.4	54.9
Certificate IV in aged care	8.0	13.0	20.0	22.9	11.1
In-home care					
A relevant Certificate III or higher	n/a	n/a	n/a	n/a	HCPP: 63 CHSP: 71
Certificate III in aged care	n/a	48.3	48.1	50.9	n/a
Certificate IV in aged care	n/a	6.2	13.3	12.2	n/a

Source: Commonwealth submission dated 8 August 2022, Annexure B, Table B12.

[687] There was a change in 2020 in how this data was collected. The 2020 data was obtained directly from the providers, while in 2016 the data was self-reported by employees. Further, the data obtained in 2020 included agency/subcontractor roles, while these roles were excluded in the data collected in 2016.⁷⁰⁸ Due to these differences, the Commonwealth has cautioned that care must be taken when comparing data between 2016 and 2020.⁷⁰⁹

[688] For PCWs in residential aged care, around two-thirds had a Certificate III in aged care between 2003 and 2016. However, in 2020, this proportion fell to 54.9 per cent. The proportion that had a Certificate IV in aged care increased from 8 per cent to 22.9 per cent between 2003 and 2016. However, in 2020 this fell to 11.1 per cent. The data in 2020 are significantly different compared to 2016 for both Certificate III and IV, and it is unclear how much of this is due to the change in the data collection methodology.

[689] For HCWs in the in-home care workforce, around half had a Certificate III in aged care between 2007 and 2016. The proportion that had a Certificate IV in aged care increased from 6.2 per cent in 2007 to 12.2 per cent in 2016.

[690] Data obtained in 2020 did not differentiate between PCWs who held a Certificate III or a higher qualification and instead these workers were grouped together. This data was also presented separately for in-home care employees covered by the HCPP and the CHSP. For the HCPP, 63 per cent of employees had a relevant Certificate III or higher, while this proportion was higher for CHSP employees (71 per cent).

⁷⁰⁸ Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) 17, 55.

⁷⁰⁹ Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) 17.

[691] Many lay witnesses gave evidence that their employer requires PCWs,⁷¹⁰ AINs,⁷¹¹ or staff generally,⁷¹² to hold a Certificate III or higher qualification, and many stated that this was a new requirement.⁷¹³ For example, AIN Linda Hardman gave evidence of the changing expectations regarding qualifications over her 20 years in the industry:

‘There is an increased expectation that staff have a minimum of a Certificate III in Aged Care, or are working towards this qualification. This was not in place when I started working in aged care 20 years ago.

This is the sense I get based on the kinds of people that are hired to work at Estia Figtree. 20 years ago, it was common for people to learn on the job. These days, nearly everybody that is hired has a Certificate III, at least.’⁷¹⁴

[692] The employer witnesses confirmed that employers increasingly encourage their employees to obtain Certificate III or IV qualifications.⁷¹⁵

[693] This was echoed by the union official lay witnesses who stated that for employees to secure a job as a PCW in both residential and home care it is usually a requirement that they have, at a minimum, a Certificate III qualification.⁷¹⁶

[694] The Royal Commission Final Report noted that there is currently no minimum mandatory qualification for PCWs⁷¹⁷ and recommended the Aged Care Certificate III as the mandatory minimum qualification.⁷¹⁸

Contention 12: The philosophy or model of aged care has shifted to one that is person-centred and based on choice and control, requiring a focus on the individual needs and preferences

⁷¹⁰ Amended witness statement of Kerrie Boxsell dated 19 May 2022 at [5]; Witness statement of Sally Fox dated 29 March 2021 at [16]; Witness statement of Theresa Heenan dated 20 October 2021 at [107]; Witness statement of Sandra Hufnagel dated 30 March 2021 at [16]; Transcript, 11 May 2022 at PN11597; Witness statement of Sandra O’Donnell dated 25 March 2021 at [17]; Transcript, 11 May 2022 at PN11696; Witness statement of Bridget Payton dated 26 October 2021 at [23]; Transcript, 5 May 2022 at PN6409, Witness statement of Tracy Roberts dated 23 March 2021 at [4]; Witness statement of Lorri Seifert dated 10 June 2021 at [122] [124], Witness statement of Susan Toner dated 28 September 2021 at [2]; Witness statement of Veronique Vincent dated 19 May 2022 at [21].

⁷¹¹ Witness statement of Sherree Clarke dated 29 October 2021 at [44]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [48].

⁷¹² Amended witness statement of Carol Austen dated 20 May 2022 at [8]; Amended witness statement of Susan Digney dated 19 May 2022 at [9]; Witness statement of Kristy Youd dated 24 March 2021 at [25].

⁷¹³ Amended witness statement of Carol Austen dated 20 May 2022 at [8]; Witness statement of Theresa Heenan dated 20 October 2021 at [107]; Witness statement of Sandra Hufnagel dated 30 March 2021 at [16]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [48]; Witness statement of Sandra O’Donnell dated 25 March 2021 at [17]; Witness statement of Lyndelle Park dated 31 March 2021 at [15]; Transcript, 11 May 2022, PN11696; Witness statement of Tracy Roberts dated 23 March 2021 at [4]; Amended witness statement of Veronique Vincent dated 19 May 2022 at [21]; Witness statement of Kristy Youd dated 24 March 2021 at [25].

⁷¹⁴ Amended witness statement of Linda Hardman dated 9 May 2022 at [54]–[55].

⁷¹⁵ Witness statement of Mark Sewell dated 3 March 2022 at [92]; Witness statement of Johannes Brockhaus dated 3 March 2022 at [14]; Witness statement of Anna-Maria Wade dated 23 May 2022 at [46].

⁷¹⁶ See Supplementary witness statement of Christopher Friend dated 29 October 2021 at [57]; Witness statement of David Eden dated 12 October 2021 at [42]; Witness statement of James Eddington dated 5 October 2021 at [67].

⁷¹⁷ Royal Commission Final Report Vol 2 at 215.

⁷¹⁸ Royal Commission Final Report Vol 1 at 261, Recommendation 78.

of each resident or client. This shift has generated a need for additional resources and greater flexibility in staff rostering and requires employees to be responsive and adaptive.

[695] This contention is supported by the expert evidence.

[696] Prof Meagher states that community expectations around the character and quality of aged care have increased in the past decades, with contemporary models of care rejecting the ‘institutionalisation’ of older people in favour of person-centred models of care. Person-centred care is ‘adapted to the needs of each individual older person’ and is ‘grounded in caring relationships in aged care settings’ between residents and their carers, and between carers and the families of residents.⁷¹⁹ Prof Meagher states that the standards introduced in 2019, emphasised choice, control and dignity of older people who receive care. Prof Meagher sets out the Standards as they relate to person-centred care:

- ‘Standard 1 of the ACQS establishes the principles of dignity and choice for older people in relation to their care and supports. In recognising older people’s dignity and autonomy, their identity, culture and diversity are to be respected, as is their privacy.
- Standard 2 positions older people as partners in ongoing assessment and planning that helps ensure they receive the care and support that they need for their health and well-being. Plans must meet the older person’s goals and preferences, and focus on their abilities. Plans should be regularly reviewed and revised as necessary. They should be documented, and documentation should be available to the older person and those who care for them.
- Standard 3 requires organisations to deliver safe and effective personal and clinical care in accordance with the older person’s goals and preferences, to optimise their health and well-being. Significantly, in the context of the poor performance of some residential care providers during the COVID-19 pandemic in 2020, Standard 3 includes requirements related to infection control.
- Standard 4 relates the ideals of person-centred care to supports for daily living, which explicitly include cleaning, laundry, food service, gardening and maintenance. Under this standard, these supports should respond to individual needs, goals and preferences, and promote each older person’s emotional, spiritual and psychological well-being. When older people are less able than before to manage day-to-day activities, providers are expected to take a reablement approach to delay decline.
- Standard 5 requires providers to offer a welcoming, physically and culturally safe and comfortable service environment that promotes older people’s independence, sense of belonging, capacities and enjoyment.
- Standard 6 requires organisations to seek feedback and receive complaints, as relevant, from all stakeholders and use these to inform continuous improvements for older people and the organisation, in open and culturally appropriate ways

⁷¹⁹ Meagher Report at 14.

- Standard 7 requires organisations to have a workforce of sufficient size, that is skilled and qualified to provide safe, respectful and quality care. This includes the requirement that organisations ensure that workers’ interactions with older people are kind, caring, and respectful of each person’s identity, culture and diversity.
- Standard 8 requires providers to have a governing body that is accountable for the delivery of safe and high quality care. Older people must be supported to engage in evaluating services and effective organisational and clinical governance need to be in place.⁷²⁰

[697] Prof Meagher notes the rise of residential aged care facilities arranged in ‘clustered domestic’ or ‘household’ models to enact the person-centred care framed in the Standards. Prof Meagher states that, in the household model, tasks that would be conducted by ancillary staff in traditional facilities are performed by PCWs, such as preparing meals, cleaning and laundry, requiring additional organisational and relational skills of PCWs.⁷²¹

[698] Prof Meagher also notes that the work of ancillary staff in residential care, in addition to PCWs, has also become more demanding in response to the changing community and regulatory expectations about care quality, and that the responsibility for delivering person-centred care is a ‘whole of staff responsibility’.⁷²²

[699] Prof Meagher found that the increased expectations of ‘person-centred care’ extended to home care:

‘As in residential care, responsibility for realising increased expectations falls to home care and support staff, who are required to care for and support older people in ways that respond to their individual needs, goals and preferences, and promote their emotional, spiritual and psychological well-being in all aspects of their work. Again, as in residential care, to provide person-centred and relationship-based care, a task-oriented approach to aged care work is not appropriate. Instead, home care and support staff need to get to know each older person as an individual, and be enabled with the skills, knowledge and work environment necessary to provide care that meets each person’s specific needs.’⁷²³

[700] Prof Eagar⁷²⁴ and Prof Kurrle⁷²⁵ gave corroborating evidence.

[701] The lay witness evidence demonstrates the impact of the transition towards person-centred care on the work and responsibility of aged care workers.⁷²⁶ Witnesses spoke of the difficulty in balancing individual choice with what they consider to be in the best interests of

⁷²⁰ Meagher Report at 15–16.

⁷²¹ Meagher Report at iii.

⁷²² Meagher Report at 23.

⁷²³ Supplementary Meagher Report 20.

⁷²⁴ Eagar Report 3–4.

⁷²⁵ Kurrle Report p.10.

⁷²⁶ See Lay Witness Report at [291].

the person and with establishing efficient routines to ensure the completion of necessary tasks.⁷²⁷

[702] Lay witnesses also gave evidence of the need for additional resources and greater flexibility in providing person-centred care. Wendy Knights, EN in a residential facility, describes the additional flexibility required in adapting to individual preferences:

‘... there is now a lot more consumer choice, especially under the new Aged Care Standards introduced in 2018. For example, some residents want to sleep until 10am or 11am each day. This means their morning medication is actually given at lunchtime. Then their lunchtime medication is given at 5pm.

That makes medications (as well as other care needs like toilets like personal care or meals) more complex. It used to be that you were able to structure your work or establish routines around the kinds of work that you would be doing at particular times. Now, you cannot do that — different work is required for different residents at different times, based on their preferences.

Again, that is a good thing for residents, and I support it. But it is less efficient for aged-care workers, and so involves more work.’⁷²⁸

[703] Alison Curry, AIN in a residential care facility, also gave evidence of the shift to person-centred care disrupting aged care workers’ routines, making work more challenging and time consuming:

‘Before person-centred care was introduced, the structure of our shift was more regimented. We would do our rounds and every resident would shower, get dressed and eat at roughly the same time every day.

The shift to person-centred care has had a major impact on the way we structure our shift. We have increased our quality of care to be more person-centred to accommodate the resident’s choice. Whenever a resident wants to do something, we are expected to be there to provide assistance to them. We are to treat them as if they are effectively in their own home and making their own decisions about when they want to do something. For example, if a resident’s care plan states that they prefer to shower in the morning but on a particular day they say they want to shower after lunch, we then have to change our schedule to make this happen. We have to remember to come back to that resident and find time in our day to make sure they are showered at a different time to when we had set aside time for this task. This means we have to use time management skills and be easily adaptable to residents’ needs and wants. We need to be adaptable, able to prioritise and also manage resident’s expectations. This requires strong interpersonal and communication skills.’⁷²⁹

⁷²⁷ Amended witness statement of Wendy Knights dated 23 May 2022 at [42]–[44], [48]. Witness statement of Linda Hardman, 9 May 2022 at [43]–[45].

⁷²⁸ Amended witness statement of Wendy Knights, 23 May 2022 at [42]–[44].

⁷²⁹ Reply witness statement of Alison Curry, 20 April 2022 [71]–[72].

[704] The employer lay witnesses also emphasised the shift in focus towards person-centred care.⁷³⁰

[705] Emma Brown, Special Care Project Manager at Warrigal stated that the focus on consumer dignity and choice has impacted the work performed by PCWs as it may no longer be as routine:

‘By offering choice this also places the emphasis on the care workers having to have understanding and knowledge of each of their customers to ensure that their choices and preferences are followed. For example, rather than starting from room one and showering the resident then moving onto room two, the personal care worker may need to perform these tasks at different times.’⁷³¹

[706] The philosophy of person-centred care was strongly reflected in the findings and recommendations of the Royal Commission. The Royal Commission recommended that the new system for aged care should be based on the protection and promotion of the rights of the people who require support and care. The rights-based approach to aged care provides older people with agency, choice and control over their care.⁷³² It also recognises that aged care providers and employees have a duty to provide the highest quality care while respecting the dignity and choices of those receiving care.⁷³³

[707] The Consensus Statement also notes that the philosophy of person-centred care is ‘based on choice and control’ and requires a focus on the individual needs of each resident and client.⁷³⁴ In relation to home care, the Consensus Statement states that consumer-directed HCPs mean that home care workers engage in a ‘less structured stream of duties’ and must ‘plan and adapt to different duties and levels of expectations from client to client.’⁷³⁵

Contention 13: Aged care employees have greater engagement with family and next of kin of clients and residents.

[708] The expert evidence supports a finding that aged care employees have greater engagement with family and next of kin.

[709] Prof Charlesworth found that aged care employees ‘are the main conduit for communication with residents’ families’ and may be required to manage disputes between family members about their relative’s care.⁷³⁶ Similarly, Prof Meagher stated that families often look to PCWs ‘as the first line of communication’ regarding the care of their relative, with PCWs required to carefully manage family expectations:

⁷³⁰ See Witness statement of Emma Brown dated 2 March 2022 at [23]–[25]; Amended witness statement of Craig Smith dated 23 May 2022 at [28]–[40].

⁷³¹ Witness statement of Emma Brown dated 2 March 2022 at [24]–[25].

⁷³² Royal Commission, Final Report, Vol 1 at 14.

⁷³³ Royal Commission, Final Report, Vol 1 at 15.

⁷³⁴ Consensus Statement at [9].

⁷³⁵ Consensus Statement at [17].

⁷³⁶ Charlesworth Report at [51]; Supplementary Charlesworth Report at [73].

‘Here, personal care assistants are called upon to exercise careful judgement about the kind and extent of information they provide to families, along with sensitivity and compassion during what can be very difficult times.’⁷³⁷

[710] Prof Meagher also highlighted the expectations placed on aged care workers to engage with family members in delivering the high quality, person-centred care mandated by the Standards. Prof Meagher noted the interactions and collaborations workers are expected to engage in including the expectation that workers will engage sensitively and professionally with families, ‘engaging them in care planning according to the older person’s wishes’, and to make ‘aged care facilities welcoming to families and friends, and to connect older people to their communities’.⁷³⁸

[711] Many lay witnesses gave evidence about having regular interactions with residents’ and community care clients’ families,⁷³⁹ with several giving evidence that family expectations and the level of engagement with families required of care staff have increased.⁷⁴⁰

[712] For example, Nurse Practitioner Hazel Bucher stated that over time interactions with families have become more frequent, with family expectations about feedback and consultation increasing.⁷⁴¹ Similarly, Wendy Knights, an EN in a residential care facility said carers and nurses now interact more with families and this carries an additional documentation burden.

‘I think there is now a lot more interaction between the care staff and the family members of residents. I think several decades ago the input from families was relatively minimal and the requirement to consult families was less. Over the last decade, and especially as care standards have been under question, many families are increasingly active in requesting or advocating for their loved ones. This is great and was sorely needed. However, each interaction has to be responded to and documented. Sometimes there are conflicts between the family expectations and what we see as the care needs of the resident. Also, sometimes family don’t understand the constraints we work under in terms of resources. I think that dealing with these issues requires skills that are relatively new – for both ENs and carers.’⁷⁴²

⁷³⁷ Meagher Report at 30.

⁷³⁸ Meagher Report at 16.

⁷³⁹ See Witness statement of Eugene Basciuk dated 28 May 2022 at [50]; Witness statement of Catherine Evans dated 26 October 2021 at [53]; Witness statement of Michelle Harden dated 30 March 2021 at [42] [43]; Amended witness statement of Suzanne Hewson dated 6 May 2022 at [28]; Amended witness statement of Hazel Bucher dated 10 May 2022 at [43d]; Reply witness statement of Mark Castieau dated 20 April 2022 at [17] [18]; Reply witness statement of Alison Curry dated 20 April 2022 at [47] [52]; Reply witness statement of Fiona Gauci dated 19 April 2022 at [63] [69]; Reply witness statement of Donna Kelly dated 20 April 2022 at [18] [20]; Amended witness statement of Wendy Knights dated 23 May 2022 at [78]; Witness statement of Pamela Little dated 30 March 2021 at [28e]; Witness statement of Helen Platt dated 29 March 2021 at [37]; Reply witness statement of Antoinette Schmidt dated 20 April 2022 at [28] [29]; Witness statement of Susan Toner dated 28 September 2021 at [30] [31]; Witness statement of Jane Wahl dated 21 April 2022 at [39].

⁷⁴⁰ Amended witness statement of Hazel Bucher dated 10 May 2022 at [43(d)]; Reply witness statement of Mark Castieau dated 20 April 2022 at [17]-[18]; Reply witness statement of Alison Curry dated 20 April 2022 at [47] [48]; Reply witness statement of Fiona Gauci dated 19 April 2022 at [63] [69]; Amended witness statement of Wendy Knights dated 23 May 2022 at [78].

⁷⁴¹ Amended witness statement of Hazel Bucher dated 10 May 2022 at [41].

⁷⁴² Amended witness statement of Wendy Knights dated 23 May 2022 at [78].

[713] Lay witnesses also gave evidence of the emotional toll on care workers from their engagement with residents' families. For example, PCW Donna Kelly provided the following evidence about family interactions involving end of life care:

'The more frail and high needs a resident is the more family engagement that ECAs have with their families and the resident. The families need a lot of support. Their mum or dad is deteriorating and they are upset and scared. We provide end of life care for most residents (as few choose to go to hospital now). This requires ECAs to comfort the resident and their family. I am in tears frequently. After they pass, I tell families that their loved ones are finally at peace. This is one of the hardest things I do. I associate with them as I think about my mum. I really empathise.'⁷⁴³

[714] Witnesses also gave evidence of the difficulty navigating family conflict about the care being given to a relative. For example, AIN Alison Curry gave the following evidence:

'We also have to be aware of family dynamics and what we communicate to each family member. For example, one member of a family has told me they want us to take every intervention possible to assist a resident who is unwell, while another has told me they want us to just make the resident as comfortable as possible. We must try not to get caught up in these conflicting views and deliver the care the resident requires as per their care plan.'⁷⁴⁴

[715] Employer lay witnesses also gave evidence about increased interaction between aged care workers and residents' families. This evidence was somewhat nuanced stating that engagement with families has always been an expectation of care workers, that the content of the engagement is limited and within the scope of their role, while acknowledging that families have become more demanding and the frequency of engagement has increased.⁷⁴⁵

Contention 14: There is an increased emphasis on diet and nutrition for aged care residents.

[716] Prof Meagher found that aged care residents have diverse and specialised food needs, including due to a high prevalence of diabetes, gastrointestinal disorders and cardiovascular disorders that require special diets. Prof Meagher stated that these special diets are accompanied by an emphasis on choice of meals and high-quality mealtime experiences as part of the delivery of 'person-centred care':

'ensuring that older people living in residential aged care are well-nourished requires a holistic approach, which engages food service and care staff along with older people and their families, and which takes into account factors related to food (texture, appearance, nutritional value) and to the social organisation of eating and mealtimes (enabling autonomy and dignity, and including assistance as required).'⁷⁴⁶

⁷⁴³ Reply witness statement of Donna Kelly dated 20 April 2022 at [22].

⁷⁴⁴ Reply witness statement of Alison Curry dated 20 April 2022 at [55].

⁷⁴⁵ Witness statement of Johannes Brockhaus dated 3 March 2022 at [43]–[44]; Witness statement of Emma Brown dated 2 March 2022 at [80]; Witness statement of Paul Sadler dated 1 March 2022 at [90]; Witness statement of Mark Sewell dated 3 March 2022 at [111].

⁷⁴⁶ Meagher Report at 22.

[717] During cross-examination Prof Meagher expanded on her evidence, emphasising that diet and nutrition is both a ‘nutritional activity’ and a ‘psycho-social activity’:

‘[older people] have complex food needs because of their health conditions and various needs in the areas of activities of daily living, and feeding and swallowing and things like that, on the one hand, and on the other hand the importance of meal-times in providing a kind of - the kind of person-centred high-quality care where the daily life has got some moments of pleasure in it and food can be part of that. It's a kind of a psycho-social activity as well as just a nutritional activity.’⁷⁴⁷

[718] The Royal Commission emphasised that diet, nutrition and food are critical to the health and wellbeing of older people:

‘Food must meet the body’s needs to maintain organs and body systems, to repair injury, to fight off or recover from illness or infection and to maximise physical and cognitive capacity. People with higher levels of frailty require greater levels of protein and other nutrients to reduce the rate of decline. Food is also important to provide enjoyment through taste and smell. It stimulates memories.’⁷⁴⁸

[719] The Royal Commission also emphasised that the failure to ensure good nutrition for older people can have significant, and often irreversible, consequences:

‘malnutrition is associated with an increased incidence of falls and fractures and increased time for pressure injuries to heal. Weight loss in older people can increase the risk of infection, impair the body’s ability to repair wounds, decrease muscle mass and affect the ability to sit and to eat, as well as increase the risk of pneumonia. In extreme cases, it can result in multiple organ failure.’⁷⁴⁹

[720] The lay witness evidence also supports a finding that there is an increased emphasis on diet and nutrition.

[721] Donna Cappelluti, Food Services Assistant, gave evidence that more food is being prepared now than in the past as the diet requests of residents have changed:

‘When I first started residents only needed vitamised foods or minced/moist food or soft or normal food. Now, we still have all of those foods plus lactose and gluten free foods, vegan, vegetarian and high protein diets. Essentially very specialised diets.

These changes occurred because the residents are arriving at an older age and living longer. They have more health conditions. Also, SCC provides more client centred care and try to cater for individual resident’s and their family’s needs and requests.’⁷⁵⁰

⁷⁴⁷ Transcript, 2 May 2022, PN2692.

⁷⁴⁸ Royal Commission Final Report Vol 2 at 115.

⁷⁴⁹ Royal Commission Final Report Vol 2 at 115.

⁷⁵⁰ Reply witness statement of Donna Cappelluti dated 21 April 2022 at [12]–[13].

[722] Chef Mark Castieau gave evidence that the number of residents requiring specialised diets is increasing, with approximately 50 per cent of residents at St Vincent’s now requiring modification to their diet.⁷⁵¹

[723] Care Services Employee Paul Jones emphasised the importance of care workers having knowledge of each resident’s nutrition and dietary needs:

‘Some residents who have difficulty swallowing have a modified diet. In order to make sure all residents are able to safety [sic] ingest their food, I am required to be familiar with the dietary needs of each resident, including whether they have allergies, and their ability to swallow different consistencies of food. Whether or not residents are able to eat their food properly and therefore have adequate nutrition is obviously fundamental to their health and wellbeing.

...

Each resident’s feeding and dietary needs are documented in their individualised care plan. However, it is part of my job to monitor each resident for changes in how they are eating, and make sure this is reflected in their care plan. Changes can occur very swiftly in aged care residents. For instance, if a resident’s ability to swallow deteriorates, this will impact on what food they are to be given, and so this needs to be observed and updated.’⁷⁵²

[724] HCWs also gave evidence of the need to focus on a client’s nutrition and diet. For example, in-home support worker Susanne Wagner gave the following evidence:

‘Malnutrition and dehydration is a common problem among [the] elderly, and I need to be aware of signs such as unexplained weight loss reduced appetite, lack of interest in food and drink, feeling tired all the time, feeling weaker, getting ill often and taking a long time to recover, wounds taking a long time to heal, poor concentration, feeling cold most of the time etc... and dehydration: fatigue or lethargy, muscle weakness and cramps, cracked lips, headaches, dizziness, nausea, forgetfulness and confusion, deep rapid breathing or an increased heart rate or low blood pressure.’⁷⁵³

Contention 15: There is expanded use and implementation of technology in the delivery and administration of care.

[725] Prof Charlesworth identified technological and digital capabilities as being one of the types of skills increasingly required in personal care in both residential⁷⁵⁴ and home settings.⁷⁵⁵

[726] In relation to residential care, Prof Meagher noted that increasing use of, and changes in, information technology used in relation to resident care and health status documentation,

⁷⁵¹ Witness statement of Mark Castieau dated 29 March 2021 at [50].

⁷⁵² Witness statement of Paul Jones dated 1 April 2021 at [32], [34].

⁷⁵³ Witness statement of Susanne Wagner dated 28 October 2022 at [64].

⁷⁵⁴ Charlesworth Report at [52].

⁷⁵⁵ Supplementary Charlesworth Report at [71d].

business record keeping, business administration and regulatory compliance activities requires care and administrative staff to learn and adapt.⁷⁵⁶

[727] In relation to home care, Prof Meagher identifies the take-up of digital technologies as a driver of change noting that some aspects and challenges of the digital transformation of care are distinctive to home care because home care and support clients are dispersed in the community and live in private homes, and HCWs are mobile, not stationed in a workplace.⁷⁵⁷ In cross-examination, Prof Meagher stated that while some of the increased use of technology could make some things easier to do, it also means learning new skills and systems.⁷⁵⁸

[728] Prof Kurrle noted that residential care involved a high level of documentation, and that the electronic systems now in use require further training.⁷⁵⁹

[729] The lay witness evidence broadly identified an increase in the use of technology in the delivery of care.⁷⁶⁰ Lay witnesses frequently referred to computerised record keeping systems and mechanical aids such as lifters as examples of new technologies. The evidence as to the impact of the increasing reliance on technology was inconsistent. Lay witnesses varyingly reported:

- the increasing use of technologies assisted them in their work⁷⁶¹
- it had not necessarily made their work easier⁷⁶²
- the new technologies required them to learn new skills⁷⁶³

⁷⁵⁶ Meagher Report at 8, 24.

⁷⁵⁷ Meagher Supplementary Report at 14-15.

⁷⁵⁸ Transcript, 2 May 2022, PN2731.

⁷⁵⁹ Kurrle Report at 5.

⁷⁶⁰ Witness statement of Maree Bernoth dated 29 October 2021 at [56]; Witness statement of Geronima Bowers dated 1 April 2021 at [31]; Witness statement of Sheree Clarke dated 29 October 2021 at [61] [62]; Witness statement of Fiona Gauci dated 29 March 2021 at [47] [48], [57]; Witness statement of Paul Jones dated 1 April 2021 at [42]; Reply witness statement of Donna Kelly dated 20 April 2022 at [31] [33]; Amended statement of Wendy Knights dated 23 May 2022 at [46]; Witness statement of Pamela Little dated 30 March 2021 at [61]; Witness statement of Tracy Roberts dated 23 March 2021 at [148] [149]; Witness statement of Paul Sadler dated 1 March 2022 at [94] [96], Witness statement of Mark Sewell dated 3 March 2022 at [60].

⁷⁶¹ Amended witness statement of Kerrie Boxsell dated 19 May 2022 at [47]–[48]; Witness statement of Judeth Clarke dated 29 March 2021 at [34]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [50]; Witness statement of Paul Sadler dated 1 March 2022 at [95]–[98].

⁷⁶² Witness statement of Judeth Clarke dated 29 March 2021 at [27]; Amended witness statement of Susan Digney dated 19 May 2022 at [5] [53]; Reply witness statement of Virginia Ellis dated 20 April 2022 at [43] [48]; Reply witness statement of Lynette Flegg dated 14 April 2022 at [25]–[33]; Reply witness statement of Fiona Gauci dated 19 April 2022 at [58] [62]; Amended reply witness statement of Jade Gilchrist dated 20 May 2022 at [8]; Reply witness statement of Paul Jones dated 20 April 2022 at [19]–[22]; Reply witness statement of Darren Kent dated 21 April 2022 at [31]; Reply witness statement of Sandra O'Donnell dated 13 April 2022 at [60] [66]; Reply witness statement of Kathy Sweeney dated 14 April 2022 at [50]–[55]; Reply witness statement of Kristy Youd dated 19 April 2022 at [73]–[76].

⁷⁶³ Witness statement of Sheree Clarke dated 29 October 2021 at [61] [62]; Amended reply witness statement of Jade Gilchrist dated 20 May 2022 at [8]; Reply witness statement of Donna Kelly dated 20 April 2022 at [33]; Amended witness statement of Patricia McLean dated 9 May 2022 at [77]; Witness statement of Paul Sadler dated 1 March 2022 at [98]; Reply witness statement of Antoinette Schmidt dated 20 April 2022 at [25]; Witness statement of Mark Sewell dated 3 March 2022 at [86].

- training is now often delivered online, creating difficulty for less computer literate staff,⁷⁶⁴ and
- they are expected to or do assist residents or clients with using technology.⁷⁶⁵

[730] Employer lay witnesses also gave evidence about technological changes that have been introduced.

[731] Paul Sadler, CEO of ACSA, gave evidence that over the last two decades and particularly in the last decade there have been technological changes in the industry:

‘There have been advancements in monitoring equipment, case management systems, medication charts, assistive technology and rostering systems. For example, rosters are now generally given to employees through an app. Through this app, it can also send out an alert to available employees to pick up shifts, put in their leave and communicate the rostering team.

The assistive technology is smarter, designed to relieve the physical nature of the work. It is common practice and has been for some time, and there is an increasing prevalence of assistive technologies in residential aged care facilities.

The case management, monitoring and medication technologies are all designed to make the work more targeted and streamlined.’⁷⁶⁶

Contention 16: Aged care employees are required to meet the cultural, social and linguistic needs of diverse communities including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and members of the LGBTQIA+ community.

[732] Prof Meagher’s evidence is that those living in residential aged care and receiving home care and support come from a diverse range of backgrounds including Aboriginal and Torres Strait Islanders, those from culturally and linguistically diverse backgrounds, those living in rural or remote areas, people who are financially or socially disadvantaged, veterans, those experiencing homelessness, care leavers, parents separated from their children by forced adoption or removal as well as lesbian, gay, bisexual, transgender or intersex people.⁷⁶⁷

[733] Prof Meagher notes that the diversity of aged care residents has been ‘explicitly recognised in the concept of special needs groups in aged care policy’, with the Aged Care Act amended in 2013 to include all special needs groups within the Act itself and to broaden the concept of ‘special needs’ to recognise, for example, gender and sexual expression differences or the specific challenges faced by people who have been in state care and that the Aged Care

⁷⁶⁴ Witness statement of Geronima Bowers dated 1 April 2022 at [31]; Amended witness statement of Pauline Breen dated 9 May 2022 at [21]; Witness statement of Judeth Clarke dated 29 March 2021 at [26]; Reply witness statement of Lynette Flegg dated 14 April 2022 at [31].

⁷⁶⁵ Reply witness statement of Virginia Ellis dated 20 April 2022 at [53]; Reply witness statement of Sally Fox dated 14 April 2021 at [28]; Amended reply witness statement of Jade Gilchrist dated 20 May 2022 at [10]–[13], [16]; Transcript, 11 May 2022, PN11624; Amended witness statement of Wendy Knights, 23 May 2022 at [45]; Witness statement of Pamela Little dated 30 March 2021 at [61].

⁷⁶⁶ Witness statement of Paul Sadler dated 1 March 2022 at [95]–[97].

⁷⁶⁷ Meagher Report at 4; Meagher Supplementary Report at 5.

Quality Standards ‘require that staff have and exercise skills and knowledge about a wide range of social groups so they can meet their individual needs.’⁷⁶⁸

[734] Prof Meagher notes that meeting the needs of these groups requires care workers to recognise and respond to the root causes of these special needs:

‘For example, meeting the needs of Aboriginal and Torres Strait Islander older people requires recognising historical legacies of discrimination and exclusion, as well as sensitive engagement to focus on people’s strengths. Another special needs group is care leavers, which includes the ‘Forgotten Australians’, who are child migrants and non-Indigenous Australian-born children raised in institutions. Research with Forgotten Australians has found that they ‘suffer lifelong health and well-being impacts, have lower educational attainment, lower paid employment, are less likely to own their home, and have difficulty forming relationships’ and that members of this group ‘are unlikely to access care when needed due to high levels of mistrust and fear of reliance on others and authorities’. Other groups are not formally recognised in policy also have special needs related to trauma, such as Holocaust survivors.’⁷⁶⁹

[735] Assoc Prof Junor similarly finds that there are an increasing number of residents and staff from culturally and linguistically diverse backgrounds, which has created extra demands on aged care workers, in the form of both extra effort and responsibility.⁷⁷⁰ Aged care workers are now required to demonstrate a ‘strong focus in work practice of creative solutions to working with a culturally and linguistically diverse resident base and workforce.’⁷⁷¹

[736] Assoc Prof Smith and Dr Lyons gave evidence that many aged care employees communicate with older persons in a language other than English.⁷⁷²

[737] The lay witness evidence pointed to an increase in residents from diverse backgrounds and describes the communication challenges of working with culturally and linguistically diverse residents.⁷⁷³

[738] The Consensus Statement states that aged care ‘caters for the diverse Australian community and needs to meet the cultural, social and linguistic needs of communities such as Aboriginal and Torres Strait Islander people, CALD, LGBTQI+ and other diverse communities.’⁷⁷⁴ The Consensus Statement further notes that the proportion of older people who are from culturally and linguistically diverse backgrounds is increasing, and estimates at as of June 2019 at least 1 in 4 home care consumers and 1 in 5 residential care and home support consumers were culturally and linguistically diverse.⁷⁷⁵

⁷⁶⁸ Meagher Report at 19.

⁷⁶⁹ Meagher Supplementary Report at 15.

⁷⁷⁰ Junor Report Annexure 7 at [32].

⁷⁷¹ Junor Report Annexure 6 at [73].

⁷⁷² Smith/Lyons Report at [138].

⁷⁷³ See Witness statement of Maree Bernoth dated 29 October 2021 at [54], Amended witness statement of Wendy Knights dated 23 May 2022 at [76], Witness statement of Jane Wahl dated 21 April 2022 at [40].

⁷⁷⁴ Consensus Statement at [10].

⁷⁷⁵ Consensus Statement at [11].

Conclusion

[739] As we have mentioned, we consider these contentions to be general in their character and that they would not necessarily apply consistently across classifications or universally in every instance to all employees concerned. That said, we are satisfied there is a sound evidentiary basis for the 16 agreed contentions and we adopt them as findings.

7.3 The Contentious Issues

7.3.1 Gender undervaluation

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

[741] The Smith/Lyons Report contains the most comprehensive analysis of the gender undervaluation in their responses to the following questions:

- Question 3 How is the concept of gender-based undervaluation in Australia addressed in scholarly literature and available research studies, and what is your opinion in relation to whether there is such gender-based undervaluation? At paragraphs 42 – 64 of the Smith/Lyons Report.
- Question 4 If your opinion is that there is such gender-based undervaluation, what are the contributing factors to gender-based undervaluation in Australia? At paragraphs 57 – 64 of the Smith/Lyons Report.
- Question 5 What, if any, have been the barriers and limitations to the proper assessment of work values in female dominated industries and occupations by industrial tribunals in Australia? At paragraphs 65 – 106 of the Smith/Lyons Report.
- Question 6 If your opinion is that there have been barriers and limitations to the proper assessment of work values in female dominated industries and occupations by industrial tribunals in Australia, how have these impacted upon the setting of award minimum rates. At paragraphs 94 – 107 of the Smith/Lyons Report.

[742] Assoc Prof Smith and Dr Lyons define gender undervaluation as ‘work value practices that are impacted by gender and which contribute to a failure to recognise work value in assigned wages.’⁷⁷⁶ A consequence of gender undervaluation is that the skills of the occupation, including the proficiency, complexity, responsibilities and the conditions under which the work is performed are discounted, overlooked and influenced by subjective notions about gender and gender roles. As the Smith/Lyons Report puts it:

‘Skills are devalued or overlooked because of norms, ascribed gender roles, and gendered stereotypes that prevail in the wider social environment. Work becomes “sex typed”

⁷⁷⁶ Smith/Lyons Report at [55].

when a job or occupation is viewed as being socially appropriate for women to perform, often because of the similarity of the work and tasks of the job to the activities women historically undertake in the domestic (unpaid) environment. Consequently, the work is perceived as “women’s work”. Therefore, the work undertaken by women in such jobs or occupations is considered to be less valuable and can be paid less than work undertaken by men that has no obvious similarity to the activities men historically undertake in the domestic (unpaid) environment.’⁷⁷⁷

[743] Assoc Prof Smith and Dr Lyons conclude that there is evidence of gender-based undervaluation of work in Australia which reflects the ‘influence of gender stereotypes, social norms, and historical legacies’ and state:

‘The valuation of work is influenced by social expectations and gendered assumptions about the role of women as workers. In turn these social practices influence institutional and organisational practices. These assumptions are impacted by women’s role as parents and carers and undertaking the majority of primary unpaid caring responsibilities. The disproportionate engagement by women in unpaid labour contributes to the invisibility and the under recognition of skills described as creative, nurturing, facilitating or caring skills in paid labour.’⁷⁷⁸

[744] Assoc Prof Smith and Dr Lyons consider that these social norms have shaped and been shaped by regulation, arguing that Australian industrial tribunals determining pay have reflected and reinforced these norms about women and paid work dating back to the Harvester decision.⁷⁷⁹ The Smith/Lyons Report includes a review of industrial wage setting exercises in Australia, which discusses the ‘barriers and limitations’ to the proper assessment of work value in female dominated industries and occupations.⁷⁸⁰

[745] Assoc Prof Smith and Dr Lyons ultimately find that the main reasons for gender-based undervaluation are:

- social norms and cultural assumptions that impact the assessment of work value⁷⁸¹
- occupational segregation⁷⁸²
- skill level of occupation, work or tasks being discounted or overlooked because of gender⁷⁸³
- weaknesses in job and work valuation methods and their implementation,⁷⁸⁴ and
- social norms, gender stereotypes and historical legacies.⁷⁸⁵

⁷⁷⁷ Smith/Lyons Report at [60].

⁷⁷⁸ Smith/Lyons Report at [56].

⁷⁷⁹ Smith/Lyons Report at [61]; *Ex parte H.V. McKay* (1907) 2 CAR 1.

⁷⁸⁰ Smith/Lyons Report [65]–[107].

⁷⁸¹ Smith/Lyons Report at [59].

⁷⁸² Smith/Lyons Report at [59].

⁷⁸³ Smith/Lyons Report at [60].

⁷⁸⁴ Smith/Lyons Report at [62].

⁷⁸⁵ Smith/Lyons Report at [62].

[746] The link between gender and the undervaluation of care work is further developed in the Junor Report.

[747] Drawing on secondary sources consisting of 116 items listed in a bibliography in Annexure 9 to her Report, Assoc Prof Junor reasons that gender segregation or concentration results in a lack of *visibility* and under-recognition of some skills, as a result of lingering perceptions of care work as an altruistic *vocation* and opines:

‘I consider that a legacy of gendered perceptions of care work skills, based on skill/care, hard/soft, abstract knowledge/body knowledge distinctions has impeded full skill recognition.’⁷⁸⁶

[748] The ‘Secondary Material’ relied on by Assoc Prof Junor consists of:

- Background industry data and reports; occupational change analyses;
- Academic literature on skills, care work, nursing, gender processes, and skill recognition and valuation;
- Practitioner and policy literature, e.g. on aged care, nursing, skill, gender and diversity.

[749] Using academic, policy and practitioner literature, Annexure 9 to the Junor Report presents an analysis that draws links among skill invisibility, skill under-recognition, sources of under-valuation, and the gender bases of each of these processes and practices. As summarised in the Secondary Material in paragraphs 16-38 of Annexure 9, the concept of skill “invisibility” is well-established in the academic and practitioner literature. We discuss this further in Chapter 7.3.2.

[750] In Table A9-1 in the Junor Report (reproduced at Table 12 below), Assoc Prof Junor ‘borrows’ the ‘Five Vs’ concept used by Burchell et al.⁷⁸⁷ in a report to the European Commission Directorate of Justice, linking lack of skill visibility to under-valuation and gender segregation. The model brings together the concepts of gender, care, skill visibility, recognition and valuation and provides a link through from skill invisibility to gender-based under-valuation.⁷⁸⁸

⁷⁸⁶ Junor Report at [48].

⁷⁸⁷ B Burchell, et al, *A New Method to Understand Occupational Segregation in European Labour Markets* (European Commission, Directorate of Justice, 2014) at 30.

⁷⁸⁸ Junor Report Annexure 9 at [56].

Table 12: Gender Segregation: Adapted from Burchell et al., 2014⁷⁸⁹

The five Vs	Relationship to under-valuation	Relationship to segregation
Visibility	Women's skills may not be visible	Care-related skills are intangible; occupations may have limited industrial history of work value investigations
Valuation	Women's skills [are] often not valued	Female-dominated occupations may be based on skill hierarchies developed outside the service sector.
Vocation	Women's skills are often treated as 'natural', deriving from women's "essence" as mothers and carers, and do not require rewards due to the high job satisfaction derived from the work.	Segregation may be explained by vocation; also, segregation allows employers not to reward skills in caring jobs.
Value added	Women are more likely than men to be found in labour intensive occupations; there may be a tension between "quality" and "productivity".	If segregation facilitates low wages, employers have less incentive to raise productivity in ways compatible with service quality and instead seek to keep wages low.
Variance	Jobs that do not comply with a male norm of full-time work may be less valued.	Segregation into non-standard jobs may allow for differences in pay by type of employment contract, rather than by skills, experience etc.

Adapted, with a new and altered column 3, from: Burchell, B., Hardy, V, Rubery, J, and Smith, M (2014) *A New Method to Understand Occupational Segregation in European Labour Markets*. Luxembourg: European Commission, Directorate of Justice: 30.

Source: Junor Report, Annexure 9 Table 9-1

[751] Prof Meagher deals with work value issues in residential aged care in section 7 of the Meagher Report and states:

'Research has shown that jobs involving interacting with other people, which tend to be female-dominated, are generally paid lower wages than comparable jobs, especially where caring or nurturing activities are performed.⁷⁹⁰ In other words, the gendered undervaluation of care work means that care occupations attract a wage penalty.

These studies establish that care work faces a wage penalty, but it is also important to understand why this penalty exists. One reason for the undervaluation of caring

⁷⁸⁹ Junor Report Annexure 9 Table A9-1

⁷⁹⁰ D N Barron, E West 'The financial costs of caring in the British labour market: is there a wage penalty for workers in caring occupations?' (2013) *British Journal of Industrial Relations* 51(1) 104-123; P England, M Budig, N Folbre 'Wages of virtue: The relative pay of care work' (2002) 49(4) *Social Problems* 455-473; B.S Kilbourne, P England, G Farkas, K Beron, D Weir 'Returns to skill, compensating differentials, and gender bias: Effects of occupational characteristics on the wages of white women and men' (1994) 100(3) *American Journal of Sociology* 689-719.

occupations arises is the pervasive cultural association between care work and the traditional roles of women. Because work, such as that in residential aged care, involves care and because the workforce is female-dominated, it is often thought about as an extension of women's traditional roles and dispositions, involving 'body work'⁷⁹¹ and grounded in relationships.

As these female roles are not accorded economic or monetary value in society more broadly, the skills associated with them are also devalued or rendered invisible. Instead of being recognised as skills that some have or have learnt, they are assumed to be natural, feminine capacities – that is, they are associated with *love* rather than with *skill*. These cultural assumptions are grounded in the division of labour in society. Paid care work is associated with, or replaces care tasks that are also offered, unpaid, by women within the family (or by volunteers within religious or voluntary organisations), on the basis of love, altruism or duty rather than money. This means that the tasks and skills are consequently valued and paid less than skills associated with male roles.⁷⁹²

[752] Professor Meagher deals with work value issues in home care and support in section 5 of her Supplementary Report of 27 October 2021.

[753] Prof Meagher provides 2 explanations for the undervaluation of care work:

1. The cultural association of care work with women and the domestic sphere shapes how the work in care occupations (such as aged care) is to be seen, evaluated and remunerated.
2. It is deemed acceptable for certain types of work to be paid less because workers choose to trade off pay and conditions (extrinsic rewards) to perform work because it gives them personal satisfaction (intrinsic rewards).

[754] In respect of the first explanation, Prof Meagher sets out evidence regarding occupational sex-segregation and finds that female-dominated occupations tend to be paid less than male-dominated occupations, with pay rates declining as women increase their share of employment in occupations⁷⁹³ and she applies the concept of occupational sex-segregation to care work, concluding that occupations involving caring or nurturing activities tend to be female-dominated and associated with lower pay than comparable jobs. Prof Meagher analyses a number of international studies that looked at wage rates in care work⁷⁹⁴ and she concludes that the studies demonstrate that 'care work faces a wage penalty' and that one reason for this is the 'pervasive cultural association between care work and the traditional roles of women':

⁷⁹¹ J Twigg, C Wolkowitz, R L Cohen, S Nettleton 'Conceptualising body work in health and social care' (2011) *Sociology of Health & Illness* 33(2) 171-188.

⁷⁹² Meagher Report at 27–28.

⁷⁹³ Meagher Report at 26.

⁷⁹⁴ See England et al, 'Wages of Virtue: The Relative Pay of Care Work' (2002) 49(4) *Social Problems* 455; R E Dwyer, 'The care economy? Gender, economic restructuring, and job polarisation in the US Labor Market' (2013) 78(3) *American Sociological Review* 390; D N Barron, E West, 'The Financial Costs of Caring in the British Labour Market: Is there a Wage Penalty for Workers in Caring Occupations?' (2013) 51(1) *British Journal of Industrial Relations* 104.

‘Because work, such as that in residential aged care, involves care and because the workforce is female-dominated, it is often thought about as an extension of women’s traditional roles and dispositions, involving ‘body work’ and grounded in relationships... As these female roles are not accorded economic or monetary value in society more broadly, the skills associated with them are also devalued or rendered invisible. Instead of being recognised as skills that some have or have learnt, they are assumed to be natural, feminine capacities – that is, they are associated with *love* rather than with *skill*. These cultural assumptions are grounded in the division of labour in society. Paid care work is associated with, or replaces care tasks that are also offered, unpaid, by women within the family (or by volunteers within religious or voluntary organisations), on the basis of love, altruism or duty rather than money. This means that the tasks and skills are consequently valued and paid less than skills associated with male roles.’⁷⁹⁵ [Citations omitted]

[755] Turning to the second explanation, Prof Meagher finds that while there is ‘ample evidence’ that aged care workers derive intrinsic rewards from their work, ‘arguments that justify lower pay for these workers on the basis of a trade-off between pay and the satisfaction derived from caring are not convincing’:

‘The main reason is that they are one-sided: that is, they are applied to women’s caring occupations, but not to men’s jobs. The argument that workers’ altruistic motivations and care work’s intrinsic rewards offset wages could be applied to any job, on the basis that in all occupations and industries are ‘self-selected’ by workers who derive some fulfilment from that field of work. Yet a male engineer who is good at mathematics and enjoys problem-solving is not expected to take low pay because he has this aptitude and likes these aspects of his job.’⁷⁹⁶ [Footnotes omitted]

[756] Prof Meagher also considers arguments that lower pay in care industries is justified because women choose care work because of the organisation of the work, including easy entry and the availability of part-time employment, arrangements which is compatible with unpaid caring responsibilities. Prof Meagher rejects this justification, noting that women’s responsibilities for unpaid care work ‘are also a product of the social division of labour, and are affected at least as much by policy settings as by women’s preferences’⁷⁹⁷ and she further emphasises that motivations and job preferences ‘are shaped by social learning and social experience’ with women accepting poor-quality aspects of care work due to the combined force of economic, family and labour market circumstances.⁷⁹⁸

[757] Prof Charlesworth concludes that ‘there has been an historical as well as an ongoing undervaluation of work performed by PCWs in residential aged care’ and that this ‘undervaluation is profoundly gendered’:

‘The workers who undertake frontline residential aged care work are overwhelmingly female and the nature of work they perform is highly gendered, historically viewed as

⁷⁹⁵ Meagher Report at 28.

⁷⁹⁶ Meagher Report at 29.

⁷⁹⁷ Meagher Report at 29.

⁷⁹⁸ Meagher Report at 29–30.

quintessentially ‘women’s work’ and therefore of little economic value...The gendered norms that underpin the devaluation of care work are premised on an ‘ideology of domesticity’ that positions the care that women do, both in home and as paid work, as natural and therefore unskilled. In particular, it is the link assumed between unpaid care work in the family and paid care work that means aged care work has been significantly undervalued in government funding, in employment protections and in societal, industrial and organisational recognition of the increasingly complex skills required to undertake the work of aged care, including in residential settings.’⁷⁹⁹

[758] Based on the expert evidence we accept the followings propositions:

1. The valuation of work is influenced by social expectations and gendered assumptions about the role of women as workers. In turn these social practices influence institutional and organisational practices.
2. Undervaluation occurs when work value is assessed with gender-biased assumptions. The reasons for gender-based undervaluation in Australia include the continuation of occupational segregation, the weaknesses in job and work valuation methods and their implementation, and social norms, gender stereotypes and historical legacies.⁸⁰⁰
3. Gender-based undervaluation in the employment context occurs when work value is assessed with gender-biased assumptions⁸⁰¹ which means the skill level of occupations, work or tasks is influenced by subjective notions about gender and gender roles in society. Skills of the job occupant are discounted or overlooked because of gender.⁸⁰²
4. Gender-based undervaluation of work in Australia arises from social norms and cultural assumptions that impact the assessment of work value.⁸⁰³ These assumptions are impacted by women’s role as parents and carers and undertaking the majority of primary unpaid caring responsibilities. The disproportionate engagement by women in unpaid labour contributes to the invisibility and the under recognition of skills described as creative, nurturing, facilitating or caring skills in paid labour.⁸⁰⁴

⁷⁹⁹ Charlesworth Report at [43].

⁸⁰⁰ Smith/Lyons Report at [62].

⁸⁰¹ Smith/Lyons Report at [47] citing A-F Bender and F Pigeyre, ‘Job evaluation and gender pay equity: a French example’ (2016) 34(4) *Equality, Diversity and Inclusion: An International Journal* 267 at 268–270. Assoc Prof Smith and Dr Lyons also note at [52]: ‘Peetz (D Peetz, ‘Regulation distance, labour segmentation and gender gaps’ (2015) 39(2) *Cambridge Journal of Economics* 345) examines the impact of stereotypical gender attitudes of skill, and notes they are more subjective than objective. Peetz argues sex-based stereotyping can be a major reason for the undervaluation of jobs and tasks performed primarily by women or work perceived as intrinsically “feminine” in nature. The tasks performed by, and skills applied in, female-dominated occupations – such as care-giving, manual dexterity, human relations skills, and working with children – are often viewed as being of lesser value than the tasks and work performed in male-dominated occupations.’

⁸⁰² Smith/Lyons Report at [60].

⁸⁰³ Smith/Lyons Report at [59].

⁸⁰⁴ Smith/Lyons Report at [56].

5. The barriers and limitations to the proper assessment of work value in female dominated industries and occupations include:
 - changes in the regulatory framework for equal pay and equal remuneration applications and the interpretation of that framework.
 - procedural requirements such as the direction in wage-fixing principles that assessment of work value focus on changes in work value and tribunal interpretation of this requirement.
 - conceptual considerations including the subjective notion of skill and the “invisibility” of skills when assessing work value in female-dominated industries and occupations.⁸⁰⁵
6. The approach taken to the assessment of work value by Australian industrial tribunals and constraints in historical wage fixing principles have been barriers to the proper assessment of work value in female dominated industries and occupations. In particular:
 - (i) The requirement for tribunals to make an adjustment to minimum rates based only on a change in work value has meant that there has been a limited capacity to address what may have been errors and flaws in the setting of minimum rates for work in female dominated industries and occupations. These limitations in the capacity of tribunals to properly value the work arise because any potential errors in the valuation of the work may have predated the last assessment of the work by the tribunals.
 - (ii) Errors in the valuation of work may have arisen from the female characterisation of the work, or the lack of a detailed assessment of the work. The time frame or datum point for the measurement of work value which limit assessment of work value to changes of work value, or changes measured from a specific point in time mitigated against a proper, full-scale assessment of the work free of assumptions based on gender.⁸⁰⁶
 - (iii) The capacity to address the valuation of feminised work has also been limited by the requirement to position that valuation against masculinised benchmarks. Work value comparisons continued to be grounded by a male standard, that being primarily the classification structure of the metal industry awards and to a lesser extent a suite of building and construction awards.⁸⁰⁷

⁸⁰⁵ Smith/Lyons Report at [93].

⁸⁰⁶ Smith/Lyons Report at [90].

⁸⁰⁷ Smith/Lyons Report at [92].

7.3.2 *Invisible Skills – The Junor Report*

[759] In this section we address the proposition, principally advanced by the ANMF, that direct care workers (RNs, ENs and AIN/PCWs) utilise ‘invisible’ skills that have not been recognised in the current modern award minimum rates applicable to their roles. The ANMF submissions in this regard relies heavily on the expert evidence of Assoc Prof Junor.

[760] As mentioned earlier, a central feature of the Junor Report is the application of the Spotlight Tool to the work performed by RNs, ENs and AINS/PCWs working in aged care. The genesis, development and use of the Spotlight Tool is described at [73]–[77] of the Junor Report.

[761] The methodology for generating Spotlight Skill profiles for the RN, EN and AIN/PCW classifications is set out at [82] – [93] of the Junor Report. In brief, the work activity descriptors prepared by the aged care workers were analysed; those workers were interviewed; and the data was coded and analysed for the purpose of expressing the opinions in the Junor Report

[762] Assoc Prof Junor and Hon Prof Hampson independently and separately coded each and every interview transcript and compared findings for validation purposes. Each person independently coded all the material several times, and each cross-checked and validated the other’s work. The final coding was used to produce Spotlight Skill Profiles for the classifications RN, EN and AIN/PCW.

[763] On the basis of the coded data, Assoc Prof Junor produced ‘skill profiles’. The skill profiles were visualised in the form of ‘heatmaps’.⁸⁰⁸ The ‘heatmaps’ show the relative incidence, importance, and contribution to work value of activities utilising each Spotlight skill performed by the aged-care workers.⁸⁰⁹

[764] The skills that are ‘invisible’ are identified in Annexure 8A to the Junor Report. Assoc Prof Junor’s annexures also show collaboration across classifications and clustering of skills,⁸¹⁰ and evidence of increasing responsibility and effort, compared with decreasing conditions of work.⁸¹¹

[765] Annexure 5 provides examples of varying uses of each Spotlight skill predominantly at levels of proficiency described in the Spotlight taxonomy as Problem-solving and Solution-sharing. As shown in Table 13 below, coding of the interview transcripts provided ‘a very high count of instances of the use of all nine Spotlight skills, by interview participants in each classification – RNs, ENs and AINs/PCWS.’⁸¹² [Emphasis added]

⁸⁰⁸ Junor Report at [20].

⁸⁰⁹ Junor Report at [23].

⁸¹⁰ Junor Report at [23], Annexure 6.

⁸¹¹ Junor Report at [23], Annexure 7.

⁸¹² Junor Report at [101].

Table 13: Average incidence of use of Spotlight skills reported per person⁸¹³

Spotlight skill elements	RNs	ENs	AINs/PCWs
A1. Sensing contexts or situations	38.0	29.7	26.0
A2. Monitoring and guiding reactions	37.5	33.0	28.7
A3. Judging impacts	39.5	31.0	27.7
Total A: Contextualising: Building and shaping awareness	115.0	93.7	82.3
B1. Negotiating boundaries	32.0	25.7	27.3
B2. Communicating verbally and non-verbally	38.0	28.0	23.3
B3. Working with diverse people and communities	22.0	22.7	20.7
Total B: Connecting — Interacting and relating	92.0	76.3	71.3
C1. Sequencing and combining activities	33.0	32.0	24.3
C2. Interweaving your activities smoothly with those of others	24.0	30.7	20.3
C3. Maintaining and/or restoring workflow	36.5	31.7	25.3
Total C: Coordinating	93.5	94.3	70.3
Overall incidence	300.5	264.33	224.00
Main skill level	Level 4 (97.5)	Level 4 (75.67)	Level 3 (70.67)

Source: Junor Report, Table MR-2, p.22.

[766] On average, the transcript and workbook of each RN provided 300 countable examples per individual of the use of Spotlight-defined skills. In the case of RNs, the heaviest concentration of Spotlight skill use was in the maintenance of contextual awareness, with awareness of situations and awareness of impacts being of equally high importance. As Assoc Prof Junor observes: ‘[t]his might be expected, given RNs’ role in overseeing work processes on the floor each shift, as well as having overall responsibility for the facility. The dominant skill level was high – that of sharing solutions and expertise (Spotlight Level 4).’⁸¹⁴

[767] In the Spotlight workbooks provided by ENs and in follow-up interviews with ENs working in residential and community settings, an average of 264 examples per person of the use of Spotlight-identified skills was identified. The skills most frequently mentioned by ENs were coordinating skills. As with RNs, the main skill level reflected in the activities described by ENs was again level 4 – expert solution-sharing. Assoc Prof Junor notes ‘[t]his is not surprising, given the complexity of the safety-critical task of completing and following up each

⁸¹³ Junor Report at 22.

⁸¹⁴ Junor Report at [97].

medication round or wound care round in a short timeframe, whilst attending to interruptions and keeping track for record-keeping purposes.⁸¹⁵

[768] Assoc Prof Junor concludes that:

‘The cumulative impact of reading the examples provided by Ens and cited in paragraphs 55 – 81 of Annexure 5, is again one of an occupation whose skills, complexity and job size have been under-recognised.’⁸¹⁶

[769] The workbooks and interview transcripts from AINs/ PCWs provided an average of 224 instances per person of the use of Spotlight skills which Assoc Prof Junor notes ‘indicate an extensive and intensive deployment of all nine skills coded in the Spotlight framework’:

‘The dominant skill level was level 3 (problem-solving). This finding challenges any perception of the work as somehow ‘routine’. The examples cited in Annexure 5, paragraphs 89-122 demonstrate the range of skills required, and the sophistication of their use, in order to sustain safe, well-ordered and person-centred care in time-and-resource-constrained settings. Examples were provided of the skills used to de-escalate aggression, provide reassurance and gain acceptance of activities of daily living. These skills included use of just the right turn of phrase, and choice of the right pace and tone of voice to provide reassurance for each resident each day. They included the use of distracting or cueing.’⁸¹⁷

[770] Examples of the use of the Spotlight skills identified are set out in Tables MR-3 to MR-5 (reproduced below as tables 14 – 16). These table are draw from Annexure 5 and contain selected illustrative examples of activities using each of the 9 skills, indicating the skill level, according to the Spotlight taxonomy. The parenthetical abbreviations in these tables are ‘UC’: ‘under-codified’; ‘UD’: ‘under-defined’; ‘US’ for ‘under-specified’; and ‘H’ for ‘hidden’.

⁸¹⁵ Junor Report at [103].

⁸¹⁶ Junor Report at [103].

⁸¹⁷ Junor Report at [104].

Table 14: Selected activities illustrating use of Spotlight skills — Registered Nurses⁸¹⁸

Skill element	1. Orienting	2. Fluently performing	3. Solving new problems	4. Sharing solutions/ Applying expertise	5. Expertly creating a system
A1. Sensing contexts or situations	5.5	7.5	12.5	9.0	3.5
L3 Piece together information from many sources to solve problems, sifting information for key details (UC)					
L4 Exchange rapid situational updates with colleagues, using codes or signals (UD)					
L4 Take stock and make contingency plans for impending critical palliative or pain management needs during weekends/after hours when no doctor available (UC)					
A2. Monitoring and guiding reactions	4.0	8.0	10.5	12.5	2.5
L3 Lead a daily reassessment of residents' preferences and wishes, prioritising them over routines (US, UC)					
L4 Be alert to co-workers' strengths and needs; including stress, emotional fatigue and burnout (US)					
L4 Anticipate family reactions and guide family decision-making. Providing advance warning of end of life (US, UC)					
A3. Judging impacts	3.5	7.5	10.5	14.5	3.5
L3 Make safe decisions in a context of uncertainty and information gaps (H)					
L4 Constantly lead reflection on practice: How did we come to that decision? What do you think the impact will be? 'What did we say to the doctor?' (H, UC, UR)					
L5 Identify flow-on impacts of decisions on the organisation & beyond (UC)					
B1. Negotiating boundaries	3.5	4.0	8.0	12.5	4.0
L4 Consistently advocate for staff and residents in a way that retains goodwill (H, US)					
L4 Constructively provide upward and downward feedback in unequal power situations (H, US)					
L4 Gently manage unrealistic family expectations (US)					
B2. Communicating verbally and non-verbally	5.0	7.0	8.5	14.0	3.5
L4 Use a quietly authoritative and caring communication style that gains trust and cooperation (US)					
L4 Help staff reflect on language use, adapting to resident & family understanding & sensitivities (H, US)					
L5 Help build a consistent, respectful, aesthetic and ethical communication style for the organization ((UD)					
B3. Working with diverse people and communities	4.0	3.0	7.5	7.0	0.5
L3 Anticipate and act to minimise problems created by intercultural and disability barriers (H, US)					
L4 Appropriately incorporate elements of the cultures of staff, residents & families into work practices					
C1. Sequencing and combining activities	5.0	7.0	10.5	8.5	2.0
L3 Simultaneously manage acute-care & high-focus activities involving people, technology, ideas (UC)					
L4 Systematically follow up all non-routine events across the facility several times in a shift (UC)					
C2. Interweaving your activities smoothly with those of others	3.0	4.0	8.0	8.0	1.0
L4 Develop shared system for updating shift status and re-allocating tasks in the course of the shift (US)					
L4 Have in place and be able to activate unobtrusively the shared support networks needed to maintain workflow (US, UC)					
C3. Maintaining and/or restoring workflow	3.5	5.5	10.0	11.5	6.0
L4 Adeptly lead calm response to emergencies such as falls, escalations, fire alarms, infection (US, UC)					
L4 Restore work after an emergency, recognising the importance of emotional repair (UC, US)					
L5 Build & maintain backup systems to ensure against crises or to meet a critical service gap (UC)					

⁸¹⁸ Junor Report at 28.

Table 15: Selected activities illustrating use of Spotlight skills – Enrolled Nurses⁸¹⁹

Incidence of reported activities reflecting Spotlight skills (R= Residential, C= Community)	1. Orienting	2. Fluently performing	3. Solving new problems during normal work	4. Sharing solution/ Applying expertise	5. Expertly creating a system
A1. Sensing contexts or situations	4.0	7.0	9.3	8.0	1.3
L3 Monitor and manage home safety risks to clients and safety risks to self in travel, navigating sites (C) (UD) L4 Devise flip tab guide for carers to use in recognising incipient pressure injuries, preventing falls, etc (R) (UC) L5 In an EN friendship group, exchange information on training programs, new developments, techniques (R)					
A2. Monitoring and guiding reactions	4.0	7.3	9.7	10.0	2.0
L4 Respond to the grief and sadness of residents at loss of independence and possessions (R) (US) L4 Maintain concentration, manage safety, manage own stress in the midst of many interruptions (R) (UC) L4 Manage own and client's responses when managing 'horrendous' effects of neglected wounds (C) (H, US)					
A3. Judging impacts	4.0	5.7	11.0	9.0	1.3
L3 Understand the profound impact on a client of advising transition to residential care (C) (US) L3 In community settings, solve problematic safety risks for client and next service deliverer (C) (UC) L4 Manage adverse impacts on resident 's well being of inappropriate wishes of family who are in denial (R)					
B1. Negotiating boundaries	3.3	4.0	6.3	9.0	3.0
L3 Initiate service acceptance, navigating intense fear and shame, lest 'door slammed in face' (C) (H, US) L4 Prioritise advocacy for residents' rights, dignity and pain relief in interactions with doctors (R) (H) L4 Work with RN & doctor on approaches to resident's pain management, addressing regulatory issues (R) (H)					
B2. Communicating verbally and non-verbally	3.0	6.3	9.3	8.3	1.0
L2 "The power of touch is very important so I make sure that I touch everyone and I ask them how they're going [in the] so limited time to do my job" (R) (UD, UC) L3 Perceive resident's pain level using a scale based on facial expression (R)H L4 Combine professionalism, humour, empathy, projecting confident to establish trust and lighten mood (C) (US)					
B3. Working with diverse people and communities	3.0	4.3	9.7	4.0	1.7
L3 Use key phrases in resident's many mother tongues, establishing a phrase book for staff use (R) (US) L3 Devise effective communication with residents who remember only their mother tongue, e.g. pictorial (C, R) (UD)					
C1. Sequencing and combining activities	4.3	8.7	9.0	8.0	2.0
L3 'So I'm very time conscious. I do all the time sensitive medications first' (R) (UC) L3 Use time management within shift to incorporate extra demands, e.g. regular observations after a fall (R) (UC) L4 Frequently adapt daily schedule to client needs & travel times, multi-tasking during wound treatment to deliver holistic care (C) (UC)					
C2. Interweaving your activities smoothly with those of others	3.3	5.3	8.7	11.7	1.7
L4 Annotate handover sheet with key reminders for later accurate completion before handover (R) (UD) L4 Gauge your own & individual co-workers' strengths & weaknesses when scheduling each shift (R) (US, UC) L4 Compare notes with other client service providers to develop a common approach and avoid mix-ups (C) (UC)					
C3. Maintaining and/or restoring workflow	3.0	6.7	13.3	7.7	1.0
L3 Step in to help carers and RN in managing escalations and accidents, and in restoring order (R) (UC) L4 Finding a home visit emergency, reschedule the day's roster, negotiate with other clients & notify office (C) , UC)					

⁸¹⁹ Junor Report at 29.

Table 16: Selected activities illustrating use of Spotlight skills – AINs/PCWs⁸²⁰

Incidence of reported activities reflecting Spotlight skills	1. Orienting	2. Fluently perform-ing	3. Solving new problems as they arise	4. Sharing solutions , expertise	5. Expertly creating a system
A1. Sensing contexts or situations	3.3	8.7	8.3	4.3	1.3

L3 Piece together resident information – eg past trauma, to better understand present behaviour (H, US)

L4/5 Participate in a Care Support Team to discuss ways of addressing challenges on the floor (H)

A2. Monitoring and guiding reactions	3.7	8.7	11.0	5.0	0.3
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L2 Through a fine-tuned knowledge of each resident’s idiosyncrasies and preferences, support smooth patterns of hygiene, meals and sleeping (US, UC)

L3 Use cues, redirection/distraction in order to overcome residents’ fear and resistance eg in showering, lifting (H, UD)

L4 Be alert to and help manage co-workers’ emotional pressures, strengths and needs (US)

A3. Judging impacts	3.7	7.3	8.0	8.0	0.7
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L3 Quickly pick up early warning signs of an impending disturbance or an approach that’s not working (UD)

L3 Suspend judgment of a resident despite knowledge of unsavoury past history (H, US)

L3 Observe, respond to and report even slight changes in residents, e.g. swallowing difficulties indicating need to change blend consistency (UD)

B1. Negotiating boundaries	5.3	7.0	6.0	7.7	1.3
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L2 ‘Use PR face’ in politely but firmly refusing to be diverted from a safety-critical activity e.g. showering (US)

L3 Advocate for residents to gain safe staff lifting ratios, or obtain comfort equipment, meal improvements etc (H)

B2. Communicating verbally and non-verbally	4.0	6.7	8.7	3.3	0.7
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L2 Adapt voice tone, body language to knowledge of how residents will best respond (UD, US)

L3 Use singing, stories, residents’ loved old TV comedies etc to provide enjoyable interactions and also distractions to gain compliance with showering (UD, US)

B3. Working with diverse people and communities	3.7	3.0	7.3	5.0	1.7
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L3 Use behaviour modelling and informal swap arrangements to protect co-workers from resident racism, while explaining dementia resident inhabit a past world (UD, US)

L3 Ensure residents from the same language groups can interact; use multilingual cues (UD, US)

L4 Facilitate initiatives in which linguistically diverse staff share their culture with residents (UC)

C1. Sequencing and combining activities	5.7	5.3	7.3	5.7	0.3
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L3 Assess urgency and importance of simultaneous calls on attention, any of which could become a crisis (UC)

L3 Use and adapt routines in order to accommodate flexible resident-focused care (UC)

L4 Clearly and briefly flag changes to work patterns (or the need for them) to team members as they arise (UC)

C2. Interweaving your activities smoothly with those of others	4.3	5.3	5.0	5.3	0.3
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L2 Smoothly switch back and forth between individual and paired or team work in managing resident lifts and mobility (UC)

L3 Notice when a colleague needs support and step in to help avert an escalating conflict (UD)

C3. Maintaining and/or restoring workflow	4.3	6.0	9.0	6.0	0.3
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L3 Make time for caring listening and interactions amidst intense work pressures (US, UC)

L4 Unobtrusively activate and participate in team support networks if a critical incident arises (UD, UC)

L4 Provide support for a colleague in a major emergency or first experience managing a resident death (US)

[771] Assoc Prof Junor’s conclusion from the tables extracted above is that:

‘in each classification, RN, EN and AIN/PCW, effective work performance requires the use, in a range of work activities, of a significant number of skills that are not documented in classification descriptions. To varying degrees in the three classifications but in all cases to a degree that was either considerable or significant, the use of these skills required, in addition to fluent performance, the capacity to solve novel problems as they arose, or the independent application of the skill in question at a considerable depth of expertise.’⁸²¹

[772] In sections 3.3. to 3.5,⁸²² Assoc Prof Junor documents by example how the RN, EN and AIN/PWC classifications involve work activities that ‘make intensive and extensive use of *invisible skills* (in the sense that these skills are hidden, under-defined, under-specified, under-codified and therefore under-recognised).’

[773] The ‘heatmaps’ in Annexure 5 Tables A5-1, A5-3 and A5-5 gauge the intensity of deployment of Spotlight framework skills by all 3 classifications. On the basis of this data, Assoc Prof Junor states:

‘Particularly impressive are the accounts, at all three classification levels, of the range of skills used in averting or de-escalating aggression, of thinking into the world of residents disoriented by dementia, particularly those re-living trauma or returning to another cultural and language background; and the skills used to bring a resident and family to a good death. The cumulative impression, on reading Annexure 5, is that residential and community aged care work is founded on the fluent and practised deployment of all nine ‘Spotlight’ skill elements, and their intensive application in problem-solving and collaborative solution-sharing activities requiring a very substantial depth and range of skills. These skills can be brought to light through analysis such as that provided by the Spotlight framework. From the examples amassed in Annexure 5, I consider that there is substantial evidence of intensive depth, and extensive breadth of expertise, in the use by RNs, ENs and AINs of all nine skills in the Spotlight framework.’⁸²³

[774] The Primary Material contains examples of work performed by RNs, ENs and AINS/PCWs, in which they not only use single Spotlight skills but deploy ‘clusters’ of Spotlight skills simultaneously. Annexure 6 provides examples of the clustered use of Spotlight skills. The incidence of activities involving the intensive, extensive or clustered usage of Spotlight skills increases job size, in terms of effort and responsibility, including under demanding conditions.⁸²⁴

[775] Assoc Prof Junor found that the Spotlight skills identified were exercised intensively, extensively, and at a high level of proficiency – predominantly at the level of solution-sharing in the case of RNs and at the level of problem-solving for ENs and AINs/PCWs.⁸²⁵ Particular

⁸²⁰ Junor Report at 30.

⁸²¹ Junor Report at [124].

⁸²² Junor Report at [144]–[186].

⁸²³ Junor Report at [105].

⁸²⁴ Junor Report at [106].

⁸²⁵ Junor Report at [28], [97]–[100].

clustered applications of skills were in relation to the particular challenges of morning, evening, night and community shifts, working with culturally and linguistically diverse residents and colleagues, and in working with dementia, co-morbidities and palliative care.⁸²⁶

[776] Assoc Prof Junor’s overall conclusion in respect of this material is that:

‘there is overwhelming evidence of heavy use of high-level problem-solving and solution-sharing skills, across all nine Spotlight skill content areas.

The effort required to undertake the work is very great and is increasing: Annexure 7 documents the reasons why workloads have increased over the past 16–22 years, and the consequences in terms of the need to maintain a calm, respectful and happy environment for residents while being oneself constantly rushed by the pace of work.

These skills are used under conditions of heavy responsibility for quality of life and death.⁸²⁷

[777] Assoc Prof Junor observes that the ‘Spotlight taxonomy has brought to light, in a systematic way, a significant concentration of skills that are not reflected in the Award.’⁸²⁸ With the exception of ‘communicating’ none of the other Spotlight skills are explicitly referenced in the skill indicators in the relevant classification descriptors.⁸²⁹ Table MR-7 (reproduced as table 17 below) contains a list of skills that are brought to bear by aged care workers but which are not reflected in existing classification descriptions.⁸³⁰

Table 17: Spotlight skills assumed but not identified in the Award classification role/skill descriptions

Registered Nurse

Level	Spotlight skills assumed but not identified
RN1	Level 3/4 (Orienting to Solution-sharing, depending on experience) A1 Sensing contexts/situations; A2 Monitoring/guiding reactions; A3 Judging impacts B1 Managing boundaries; B2 Communicating verbally & non-verbally; C2 Interweaving workflows
RN2	Level 4 (Solution sharing) A2 Monitoring/guiding reactions; A3 Judging impacts; B1 Managing boundaries; B2 Communicating verbally & non-verbally; C2 Interweaving workflows
RN3	Level 4 (Solution sharing) A1 Sensing contexts/situations; A3 Judging impacts; B1 Managing boundaries; B2 Communicating verbally & non-verbally; C2 Interweaving workflows

⁸²⁶ Junor Report at [29], [106]–[108].

⁸²⁷ Junor Report at [98]–[100].

⁸²⁸ Junor Report at [128].

⁸²⁹ Junor Report at [31] and [267].

⁸³⁰ Junor Report at [132].

RN4	Level 4/Level 5 (Solution sharing/Expert system creation) All A Awareness-shaping; B1 Managing boundaries; B2 Communicating verbally & non-verbally; C1 Coordinating own work; C2 Interweaving
RN5	Level 5 (System shaping) All A: Awareness-shaping; B1 Managing boundaries; B2 Communicating verbally & non-verbally; C2 Interweaving

Enrolled Nurse

Level	Spotlight skills not identified
EN ppt1	Level 1/2 (Orienting/Fluently performing) A1 Sensing contexts/situations; A3 Monitoring and guiding reactions; C1 Coordinating own work, C2 Interweaving
EN ppt2	Level 2 (Fluently performing) A1 Contextual awareness; A3 Judging impacts; All C Coordinating
EN ppt3	Level 2/Level 3 (Fluently performing/Problem solving) A2 Guiding reactions; A3 Judging impacts
EN ppt4	Level 3 (Problem solving/Solution sharing) A2 Monitoring/guiding reactions; A3 Judging impacts; B2 Communicating verbally & non-verbally; C1 Coordinating own work
EN ppt5	Level3/Level 4 (Problem solving/Solution sharing; contribution to system shaping) All C: Coordinating; A1 Sensing situations; A3 Judging impacts; B1 Managing boundaries

Assistant in Nursing/Personal Care Worker

Level	Spotlight skills not identified
AIN/PCW Grade 1	Level1/Level 2 (Orienting/fluently performing) A1 Sensing contexts/situations; A3 Judging impacts; B1 Managing boundaries; C1 Coordinating own work
AIN/PCW Grade 2	Level 2 (Fluently performing) A1 Sensing contexts/situations; A3 Judging impacts; B2 Communicating; C1 Coordinating own work; C2 Interweaving;
AIN/PCW Grade 3	L2/L3 Fluently performing/(some) problem-solving A1 Sensing contexts/situations; A3 Judging impacts; B2 Communicating; C1 Coordinating own work; C2 Interweaving
AIN/PCW Grade 4	L3/L4 (Problem-solving/solution sharing) A1 Sensing contexts/situations; A3 Judging impacts; B2 Monitoring/guiding reactions C1 Coordinating own work; C2 Interweaving
AIN/PCW Grade 5	L4 (Solution sharing) A1 Sensing contexts/situations; A2 Monitoring/guiding reactions A3 Judging impacts; B2 Communicating; C1 Coordinating own work C2 Interweaving

[778] Assoc Prof Junor expresses the opinion the Table MR-7 ‘highlights areas where job “size” and hence demands placed on staff will be understated, unless the Spotlight skills

identified in Annexures 5 to 8 as underpinning existing skill descriptors, are taken into account.⁸³¹

[779] Assoc Prof Junor goes on to consider whether this is simply a question of omission, to be remedied by inserting a number of additional skill descriptors or activities into the relevant awards, or whether there is an underlying work value issue which needs to be taken into account.

[780] Assoc Prof Junor’s overall conclusion is that:

‘... [T]he work of RNs, ENs and AINs/PCWs is of very high impact and social value. It requires the substantial depth and range of skills that have been brought to light using the Spotlight framework. I consider that the Primary Material, analysed through the evidence set out in Annexures 5-8, contains evidence of the pervasive, intensive, and extensive use of complex skills that are incompletely visible, as well as evidence of under-recognised and undervalued skill, effort and responsibility.

Sections 3-3 to 3-5 above have documented a significant number and wide range of invisible skills utilised by RNs, ENs and AINs/PCWs. These skills have been classified as invisible for one or more of four reasons. Some are hidden, “behind screens” or “behind the scenes”, because their visible use would be ineffective, undermining the purpose of their use — respect for others’ dignity or diplomacy. Some are under-defined because they are hard to put into words: they aid responses to fleeting but important contexts or refer to non-verbal experiences. Some are under-specified, because the concept of “emotional labour” has become a near-ubiquitous term to cover a range of skilled activities that have not been further analysed, the term “soft” skills is imprecise and carries a value judgment with gender overtones, and the skills in question may be seen as innate personality traits, rather than learned capabilities. Some are under-codified, because of inadequate analysis of work processes, their interactive nature, and the interweaving of action and reflection.

All three classifications of aged care work (RN, EN, AIN/PCW) involve, with some variation based on scope of practice, the *intensive and extensive* utilisation of *invisible skills* at *high Spotlight skill levels*, namely “solving new problems as they arise in the course of work” and “solution-sharing/applying expertise”. There is also evidence of the use of Spotlight skills at system-creating level, constrained by limits resulting from poor skill recognition and restricted career development opportunities.

Annexures 5 and 6 establish that the invisible skills utilised by all three classifications within aged care work (RN, EN, AIN/PCW) *underpin and pervade all aspects of the work* described in the Primary Material. There is strong evidence that aged care work requires the simultaneous deployment of *complex clusters* of skills of awareness, communication and coordination.

⁸³¹ Junor Report at [132].

As a result of the invisibility of the skills documented in Section 3, I conclude that the degree of *skill, responsibility and effort* required in each classification is *under-recognised*.⁸³²

[781] At [191] Assoc Prof Junor expresses the following opinion:

‘I consider that the invisibility of the skills documented in Sections 3.3 to 3.5 above, taken together with the evidence in Annexures 5 to 7, implies that these skills are unrecognised. In general, skills need to have been named and made visible before they can be recognised, whether in qualifications, classification skill descriptors, job analysis data, position descriptions or work value assessments. On the other hand, qualifications, workplace learning records, and recognition of prior learning mechanisms, are forms of skill recognition that can help make skill requirements explicit and allow individuals to claim skills. I consider that the relationship between skill visibility and skill recognition is an interactive one. So from this point in the analysis I shall discuss visibility and recognition in tandem, indicating how each reinforces the other.’

[782] And, at [213] to [215] Assoc Prof Junor states:

‘It is my opinion that the current rates of pay for RNs, ENs and AINs/PCWs, both as set out in the Award and as agreed through enterprise bargaining, are significantly below underlying work value.

I am also of the opinion that current rates do not reflect changes in work value since 2005 or 1997.

I am understanding “work value” to embrace “skill, responsibility, effort and conditions of work”.’

[783] As to the reasons why the current pay rates in aged care do not reflect underlying work value, Assoc Prof Junor’s opinion is as follows:

‘I am of the opinion that the primary reason for the low pay rates of aged care work in Australia is that they are a function of the fact that the work is performed overwhelmingly by females. I refer to this circumstance as “gender segregation”. By this term I mean both “gender concentration” and the following social processes:

- aged care work is part of a feminised care economy (“the labour market is structured on gender lines”) (a)
- care work jobs and skills have, or are seen to have, characteristics such as care-giving that have historically been associated with women (“the job is gendered and its skills are seen as gender-linked”) (b)
- skill recognition and valuation processes are affected by gender (“recognition and valuation have been gender-biased”) (c)

⁸³² Junor Report at [186]–[190].

The steps in my reasoning are as follows:

- Part 6.1 draws a model from the Secondary Material, adapting it to Australian conditions. This “5Vs” model explains how gender segregation or concentration — the predominantly female nature of an occupation — generates the invisibility and under-recognition of some skills (a combination of effects a, b, c in paragraph 246)
- Part 6.2 also draws on the Secondary Material to describe the historical legacy of gendered perceptions of care work, including nursing, as well as an unfortunate “care” versus “skill” dichotomy that misrepresents the nature of the skills of nursing and aged care work (effects a, b in paragraph 246)
- Part 6.3 returns to the Primary Material. It reasons that in this study, the Spotlight tool has accomplished the purpose for which it was designed, of making visible skills that were hitherto invisible on gender grounds. Applied to aged care and nursing jobs, the Spotlight tool has identified a range of skills that were previously hidden, under-defined, under-specified or under-codified, specifically on gender grounds. Establishing that gender was the basis of the invisibility of these skills, and that the result of invisibility was under-recognition and undervaluation, part 6.3 draws the link between gender and undervaluation (effect c in paragraph 246)
- Part 6.4 draws on statements from the Primary Material in which interview participants reported their experience that gender was a factor in the undervaluation of their own work.
- Part 6.5 focuses on the labour market structures and factors that are commonly used as indicators of the likelihood that historical undervaluation processes have been in play, and finds them all present in the case of aged care work (effects a, c in paragraph 246).⁸³³

[784] In concluding her Report, Assoc Prof Junor provided an additional summary of her answers to each of the questions posed in the instructions provided by the ANMF’s solicitors and observes that the ‘present work value assessment is timely’.⁸³⁴

Consideration

[785] As mentioned earlier, the ANMF relies on the Junor Report in support of its contention that direct aged care workers utilise Spotlight skills that are not compensated by the modern award minimum rates of pay applicable to their roles.

[786] The Joint Employers contend that the Commission should be ‘cautious in readily accepting the data and analysis prepared using the Spotlight Tool to support a finding of gender-

⁸³³ Junor Report at [246]–[247].

⁸³⁴ Junor Report at [289].

based undervaluation’.⁸³⁵ The Joint Employers advance 3 broad propositions in support of this contention:

- The application of the Spotlight Tool is an ‘academic exercise’ designed to identify particular skills against a set criteria, by design it is intentionally selective and can be applied to numerous industries to achieve similar results.
- Application of the Spotlight Tool cannot demonstrate all skills identified are ‘invisible’ based on gender reasons.
- The absence of express inclusion of ‘Spotlight Skills’ in the Aged Care and Nurses Awards is not determinative. Both modern awards were substantially based upon pre-reform federal awards, with the work performed by nurses being subject to extensive work value assessment. The extent of the Spotlight Tool’s ‘assistance’, in this respect, is limited to possible phasing and/or re-drafting of classifications.⁸³⁶

[787] We also propose to deal here with the Joint Employers’ characterisation of some aspects of the work of direct aged care employees as attributes, as opposed to skills.

[788] As mentioned in Chapter 5, a number of the criticisms advanced by the Joint Employers in respect of the Junor Report were not put to Assoc Prof Junor in cross-examination. Indeed, the cross-examination of Assoc Prof Junor was limited to the following topics:

- the design and implementation of the Spotlight Tool⁸³⁷
- the meaning of ‘soft skills’⁸³⁸
- the skill sets identified using the Spotlight methodology⁸³⁹
- the 5 ‘levels’ in the Spotlight Tool⁸⁴⁰
- Annexure 4⁸⁴¹, and
- Paragraphs [223], [257], [259] and [275] of the Junor Report.⁸⁴²

[789] Importantly, Assoc Prof Junor was **not** cross-examined in respect of the methodology used and the results obtained from the application of the Spotlight Tool to RNs, ENs and AIN/PCWs. Nor was Assoc Prof Junor cross-examined in respect of Annexures 1, 2, 3, 5, 6, 7, 8 and 9 or in respect of her opinion that the skill, responsibility and effort required in each direct aged care classification is under-recognised.

⁸³⁵ Joint Employer closing submissions dated 22 July 2022 Annexure J at [4.3].

⁸³⁶ Joint Employer closing submissions dated 22 July 2022 Annexure J at [4.3]–[4.4].

⁸³⁷ Transcript, 2 May 2022, PN3114–PN3126.

⁸³⁸ Transcript, 2 May 2022, PN3127–PN3133.

⁸³⁹ Transcript, 2 May 2022, PN3134–PN3148.

⁸⁴⁰ Transcript, 2 May 2022, PN3149–PN3154.

⁸⁴¹ Transcript, 2 May 2022, PN3154–PN3189.

⁸⁴² Transcript, 2 May 2022, PN3190–PN3232.

[790] As mentioned earlier, the Joint Employers do not press the criticisms made in their written submissions in respect of matters that were not put to the expert witnesses nor do they ask that we make findings in respect of those matters.⁸⁴³

[791] We now turn to deal with the 3 propositions advanced by the Joint Employers in support of their contention that we should be ‘cautious’ in respect of the conclusions in the Junor Report.

(i) *A highly selective academic exercise, applicable to all industries*

[792] The Joint Employers emphasise that the ‘Spotlight Tool’ is designed for broad application to identify ‘hidden skills in an array of work processes:

‘the existence of “spotlight skills” is not unique to any one industry. Nor does it promote comprehensive analysis of the skills involved in performance of work. It is an academic exercise used to consider or analyse recognised activities and work processes by re-classifying them using language that targets categories on the taxonomy. The weight placed on this exercise - and upon the quantity of skills identified using the tool – should be limited, given that the exercise is highly selective and self-serving.’⁸⁴⁴ [Emphasis added]

[793] In response to the criticism that Assoc Prof Junor’s application of the Spotlight Tool to direct aged care workers was a ‘self-serving’ ‘academic’ exercise the ANMF submits:

‘the employer parties have somewhat ill temperedly used adjectives in their submission that should not have been used. It was not put to Hon Assoc Prof Junor that her work was of “academic” interest only (JCS Ann J [4.9]). If it had been, she may well have drawn attention to (inter alia) the fact that Employment New Zealand (an instrumentality of the New Zealand Government) uses the tool to accompany an “Equitable Job Evaluation system”—which presumably that nation-state does not do because of the academic interest involved in pointlessly applying a tool to a particular job. She may well have given other explanations as to why it would not be accepted that she was engaged in a purely “academic” exercise. One cannot know, because it was not put.

It was not put to Hon Assoc Prof Junor that her exercise was “self-serving.” It is difficult to know what benign interpretation can be given to those words. It is also difficult to know what kind of motivation the employer parties are ascribing to Hon Assoc Prof Junor in describing her sworn evidence as “self serving.” At least often, that kind of epithet is used in relation to a witness who has an interest in the outcome of the matter, and gives evidence that serves that witness’s interest. It is impossible to see how that could be said about Hon Assoc Prof Junor. It does not really suffice to say that this phrase should not have been used about Hon Assoc Prof Junor; the employer parties should formally withdraw the submission, or at the very least explain how it does not mean what, on its face, it means—and draw attention to where, in fairness, they put it to Hon Assoc Prof Junor for her response.’⁸⁴⁵

⁸⁴³ Joint Employers submission – response to Background Documents 6, 7 and 8 dated 29 August 2022 at [3.19].

⁸⁴⁴ Joint Employers closing submissions dated 22 July 2022 at [4.9].

⁸⁴⁵ ANMF closing submission in reply dated 17 August 2022 at [402]–[403].

[794] The Joint Employers did not respond to this aspect of the ANMF’s submissions; other than to clarify that they did not rely on matters not put in cross-examination.

[795] We agree with the ANMF’s submission. The pejorative characterisation of Assoc Prof Junor’s evidence as ‘self-serving’ is wholly without foundation and, further, the criticism was never put to Assoc Prof Junor.

[796] We do not know what to make of the submission that Assoc Prof Junor’s application of the Spotlight Tool to RNs, ENs and AIN/PCWs was an ‘academic’ exercise. We accept that it was conducted by an academic and, moreover, an academic whose expertise was unchallenged. But, one might say, so what? If the Joint Employer submission is intended to convey that the Junor Report is of no assistance in these proceedings, we deal with that proposition in our conclusion.

[797] As to the criticism that the Spotlight Tool can be used in industries other than aged care, we accept that is so. But that fact does not mean that the tool is of no utility in the aged care sector or that Assoc Prof Junor was wrong to have applied it in the way that she did. Further, we accept that the Spotlight Tool may not identify *all* skills in a work process, but that does not mean that Assoc Prof Junor has incorrectly identified the ‘invisible’ skills identified in the Junor Report. As mentioned earlier, Assoc Prof Junor was not cross examined in respect of the methodology used or the results obtained from the application of the Spotlight Tool to RNs, ENs and AINs/PCWs.

[798] Further, as acknowledged by the ANMF, if it were true that application of the Spotlight Tool to a female-dominated industry like aged care revealed the same quantity and quality of invisible skills as application of the Tool to a male-dominated industry like construction, then that may undermine use of the Spotlight Tool to demonstrate undervaluation of aged care work. But there is simply no basis for assuming that that is (or would be) true. Assoc Prof Junor was simply asked whether one could apply the Spotlight Tool to the construction industry,⁸⁴⁶ importantly she was not asked whether, if one did apply the tool to the construction industry it would reveal the same quantity and quality of invisible skills. Further, as the ANMF submits:

‘It is highly unlikely that, if she were so asked, she would have answered “yes.” That is because the tenor of her report (and those of at least five other experts) was to the effect that it was precisely “women’s work” that was likely to bring to bear skills that were “invisible,” for reasons Hon Assoc Prof Junor identified—see in particular at [191]–[212], and [246]–[261] of the main body of her report, and annexures 8 and 9 to her report (these are considered in detail hereunder).’⁸⁴⁷

(ii) *The Spotlight Tool cannot prove or substantiate the reason for ‘Invisibility’*

[799] The Joint Employers submit that during cross-examination, Assoc Prof Junor accepted that:

⁸⁴⁶ Transcript, 2 May 2022, PN3122.

⁸⁴⁷ ANMF closing submissions in reply dated 17 August 2022 at [400].

- skills identified using the Spotlight Tool may be hidden or unrecognised for a variety of reasons (for example, reasons connected to tact, tactility and tacitness - with gender being included as one of several reasons), and
- the Spotlight Tool cannot provide the reason why a skill is unrecognised. This is because ‘it’s a skill identification tool’.⁸⁴⁸

[800] On this basis the Joint Employers submit that the Spotlight Tool is limited to skills identification:

‘No aspect of the Spotlight Tool refers to gender. Just as it may be applied equally to different industries, it may be applied equally to work performed by men or women. It should be noted that Professor Junor did not address the 30% of men working in the aged care industry or the fact that the same “invisible skills” identified using the Spotlight Tool would apply to men working as RNs, ENs or AINs - noting they are performing the same work.’⁸⁴⁹

[801] Further, the Joint Employers point to what is said to be some inconsistency in Assoc Prof Junor’s evidence regarding the purpose of the Spotlight Tool:

‘When questioned about how the Spotlight Tool connects skills identification to gender, Professor Junor referred to the “original” purpose upon which the Spotlight Tool was developed, namely, “in order to identify skills that were under-recognised on gender grounds”. Despite accepting the final version of the tool -- which she applied for the purposes of her report -- has broad application and the inability of the tool to provide an explanation as to “why” a Spotlight Skill is unrecognised, Professor Junor advocated for the position that “[t]he purpose is to identify skills that have not been identified on gender grounds”. Both answers suggesting that the primary focus of the Spotlight Tool is related to gender.

When the inconsistency of her position was identified, Professor Junor conceded that the Spotlight Tool could equally help identify skills unrecognised for reasons other than gender.

Whilst it is possible that skills identified using the Spotlight Tool are “hidden” due to gender issues, the mere identification of skills cannot establish the reason for a skill not being expressly mentioned in an industrial instrument. As such, the Spotlight Tool and its related analysis does not assist with determining undervaluation based on gender (or other reasons).⁸⁵⁰

[802] At [405] to [414] of the ANMF’s closing submissions in reply, the ANMF convincingly rebuts the suggested inconsistency between the Junor Report and the evidence given by Assoc Prof Junor in cross-examination. We accept the ANMF’s submission in this regard.

⁸⁴⁸ Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.10]–[4.11].

⁸⁴⁹ Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.13].

⁸⁵⁰ Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.14]–[4.16].

[803] Further, as the ANMF correctly observes, it was not suggested to Assoc Prof Junor that there was any inconsistency in her evidence, and that should have been done as a matter of fairness if it was going to be the subject of a submission.⁸⁵¹

[804] We accept that the Spotlight Tool itself just identifies skills that have not been recognised and that the question of *why* they have not been recognised is a separate question. It is, however, a question that Assoc Prof Junor addressed. At [246] of her Report Assoc Prof Junor sets out her expert opinion as to the reasons why the current minimum award rates in the aged care sector do not reflect underlying work value. Assoc Prof Junor was not cross-examined on this aspect of her evidence.

[805] Further, it is apparent that Assoc Prof Junor’s opinion in respect of *why* the invisible skills of direct care workers have not been recognised is based on her specialised knowledge and the Secondary Material, in particular the literature review at Annexure 9.

[806] Starting from [248], Assoc Prof Junor sets out a table in relation to the linkage between gender concentration and undervaluation. This table is set out at Table 12 in this Decision.

[807] At [249], Assoc Prof Junor develops her analysis as follows:

‘The term “vocation” used by Burchell et al. refers to the historical legacy of perceptions of care work as a vocation of care, performed for “love” not “money”— the lingering so-called “virtue script” of service and altruism.⁸⁵² Tendencies to under-recognise and undervalue the work are also partly driven by pressures to “value-add” by containing the costs of necessarily labour intensive care work through wages that do not properly reflect value. As aged care is not a standardised or uniform product, particularly in the context of dementia and palliation, measures of productivity place pressure on both work intensity and wage share, with implications for work value measurement and gender pay outcomes. Further, variance from the male-normed standard full-time employment, justified as “family-friendly”, also helps keep wages low and make bargaining difficult.’⁸⁵³

[808] Assoc Prof Junor was not cross-examined on this and her evidence in this regard is in substantially the same terms as what Assoc Prof Smith says at [60] of the Smith/Lyons Report, upon which Assoc Prof Smith was also not cross-examined. Assoc Prof Junor explains, at [250], further factors leading to skill invisibility in sectors that have historically been (or are) female-dominated as being that the work involved is ‘female’ in some way and as being analogous to unpaid housework and volunteer work, as well as, ‘gender segregation based on role demarcations, informal recruitment, small workplaces, lack of career paths, part-time work and (in the case of AINs/PCWs but not in the case of nurses) lack of formal qualifications.’⁸⁵⁴

⁸⁵¹ ANMF closing submissions in reply dated 17 August 2022 at [404].

⁸⁵² V Adams, J A Nelson ‘The Economics of nursing: Articulating care’ (2009) *Feminist Economics* 15(4) 3–29.

⁸⁵³ Junor Report at [249].

⁸⁵⁴ Junor Report at [250].

[809] Assoc Prof Junor notes that this reflects the historical legacy of ‘care work,’ which includes that:

‘The growth of care work reflects social trends that have contributed to the creation of low-status but skilled service jobs, mostly performed by women who have been recruited on the basis of skills acquired outside the labour market or formal training system. As a result, the skills in question have tended not to be defined as such, but to be “naturalised” to women, perhaps on the basis of earlier gender-specialised education and life and prior work experience.’⁸⁵⁵

[810] This has been, as Assoc Prof Junor explains, the subject of study and theorisation over the last several decades:

‘Thus, definitions of the skills of care-work were still being thrashed out as recently as 10-15 years ago. I think this helps explain the lag in defining, recognising and valuing care skills. I believe that a belated start is now under way to address the issue of recognising and valuing the invisible skills of care.’⁸⁵⁶

[811] Assoc Prof Junor was not cross-examined on any of this.

[812] The summary set out above is developed, in greater detail, in Annexure 8 to the Junor Report. Further, as Assoc Prof Junor makes plain in Annexure 9, her evidence was based on a literature review designed to ‘set out the wider research basis of the typology of invisible skills discussed in the main report and applied in Annexures 5–8 to the work of [RNs], [ENs] and [AINs / PCWs].’⁸⁵⁷

[813] The Joint Employers’ criticism of Assoc Prof Junor’s evidence as to *why* the current award minimum pay rates in the aged care sector do not reflect underlying work value are unpersuasive.

(iii) *Spotlight skills and Award descriptors*

[814] The Joint Employers submit that the absence of the express inclusion of ‘Spotlight Skills’ in the Aged Care Award and the Nurses Award (i.e. using descriptions that expressly incorporate the taxonomy) is not determinative of the question of whether those skills have been factored into the current modern award minimum rates of pay. They submit that the following factors are also relevant when considering the significance of the wording in award classifications:

- ‘(a) both modern awards were substantially based upon pre-reform federal awards, with the work performed by nurses, in particular, being subject to extensive work value assessment;

⁸⁵⁵ Junor Report at [251].

⁸⁵⁶ Junor Report at [252]–[255].

⁸⁵⁷ Junor Report Annexure 9 at [2].

- (b) classifications in modern awards are not drafted as exhaustive position descriptions;
- (c) the Spotlight Tool is a relatively new skills identification tool that primarily assists with the drafting of descriptors.

To the extent the Spotlight Tool is of assistance to the Commission, it should be limited to the re-wording of classifications, if deemed necessary and appropriate.⁸⁵⁸

[815] The Joint Employers also note that Assoc Prof Junor accepts that Spotlight skills may be ‘assumed or implied’ in the relevant award descriptors.⁸⁵⁹

[816] The notion that existing minimum award rates already reflect Spotlight skills is developed by the Joint Employers in their reply submissions where they present a comparison of the benchmark comparator C10 (Certificate III) classification from the Manufacturing Award against the Nursing Assistant (Certificate III) classification found in the Nurses Award.⁸⁶⁰

[817] The Joint Employers highlight several skills in the C10 classification definition that they submit expressly ‘recognise’ (or correlate to) Spotlight skill ‘levels’ defined in the Junor Report.⁸⁶¹ It is submitted that since these skills are recognised, such skills have been taken into account in the wage setting exercise for the Manufacturing Award. Given the Nursing Assistant classification aligns with the C10 level benchmark, the Joint Employers submit it is difficult to accept that the minimum award rate for that classification does not also factor in the relevant ‘interpersonal skills’ simply by virtue of failing to expressly reference them and the fact that nursing is a female-dominated occupation.⁸⁶²

[818] Contrary to the Joint Employers’ submission, there is no reason to think that the Spotlight skills identified by Assoc Prof Junor have been taken into account in skill descriptors and there is a reason to think that they have *not* been. Indeed the purpose of the Spotlight Tool — the efficacy of which was not effectively challenged in cross-examination — is to identify skills that are not generally recognised. As the ANMF puts it:

‘If they are not recognised, they cannot be valued. If they are not valued, then they are not brought to bear in assessing the work value of given work. There is every reason to think, then, that these skills have not been taken into account in previous work value assessments, and the employer parties point to no reason for thinking that they have been taken into account.’⁸⁶³

[819] The fact that Assoc Prof Junor agreed that it was possible that Spotlight skills might be implied in skill descriptors is of little consequence. Just because a thing is possible does not mean it is a fact. The Joint Employers offer no analysis in support of the proposition that,

⁸⁵⁸ Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.18]–[4.19].

⁸⁵⁹ Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.17]; Junor Report at [118]–[119].

⁸⁶⁰ Joint Employers closing submissions in reply dated 19 August 2022 at [3.24].

⁸⁶¹ Joint Employers closing submissions in reply dated 19 August 2022 at [3.25], see table.

⁸⁶² Joint Employers closing submissions in reply dated 19 August 2022 at [3.27].

⁸⁶³ ANMF closing submissions in reply dated 17 August 2022 at [441].

despite that the skill descriptors in the Aged Care Award and the Nurses Award making no reference to Spotlight-type skills, these skills have been implied. Further, as noted earlier, Assoc Prof Junor's evidence in respect of this issue was unchallenged in cross-examination.

[820] Assoc Prof Junor's opinion that the existing classification structures do not encompass the Spotlight skills is supported by other expert evidence. Prof Charlesworth states:

'As in other feminised awards, skill classifications in the Aged Care Award are rudimentary and compressed. They not only fail to provide meaningful progression in terms of pay rates but also lack any relevant description and specification of the skills actually required in PCW jobs, including at different skill levels (Charlesworth & Smith 2018).'⁸⁶⁴

[821] Prof Meagher concluded that the Aged Care Award 'does not recognise the range of skills and responsibilities aged care workers exercise in providing high quality care to older people.'⁸⁶⁵ During cross-examination, the Joint Employers' representative asked Prof Meagher to clarify what she meant by 'does not recognise':

'MR WARD: When you say it doesn't recognise, are you saying there it doesn't explain the skills or are you saying - is that your way of saying they don't get paid for them?

PROFESSOR MEAGHER: It's my way of saying they don't get paid for them. And it's to do with this kind of problem to do with understanding the sorts of things that care workers do are skilled, and they do - they exercise responsibility and judgement even in sort of low level occupations that are sort of not grasped by the industrial instrument ...

MR WARD: ...I'm just trying to understand what that means in the context of a classification structure. Is what you're saying that the structure might very well understand the physical task but it's not properly understanding the intensity of what's involved in actually engaging with the resident in any given moment, in any given circumstance, which could be determined by their acuity, it could be determined by their personality or it could be determined by their mood on the day.

PROFESSOR MEAGHER: That's certainly the latter about the sort of interpersonal demands are not recognised...

MR WARD: ...When you use the word responsibility in that paragraph, are you - are you talking about the fact that when as a care worker I'm alone with a resident I hold a responsibility for providing the personal care in that situation? I'm just trying to understand what you mean by responsibility?

PROFESSOR MEAGHER: I do mean that but I guess there are other responsibilities that come up in the day's work. I mean if we're just talking about residential care or also about home care, about sort of decision making and around prioritising tasks and clients and so on. I think they also could be categorised as responsibilities. I think there's just

⁸⁶⁴ Charlesworth Report at [13].

⁸⁶⁵ Meagher Report at v.

a range of things that need to be negotiated in the moment with the person and you need to - you need to take responsibility for what you're doing in that moment and for that person's welfare in the moment. It can be - yes, that are quite significant. Even if people are doing them all day every day I think they're quite significant for the welfare of the person that you're responsible for.’⁸⁶⁶

[822] Assoc Prof Smith and Dr Lyons express the opinion that limitations in the capacity of industrial tribunals to properly value work has meant that there has been a ‘limited capacity to address what may have been errors and flaws in the setting of minimum rates for work in female dominated industries and occupations.’⁸⁶⁷ The Smith/Lyons Report notes that an absence of, or restraint upon, proper work value assessments means that the skills classifications in awards relating to feminised industries are deficient:

‘The classification structures may lack relevant description and information of what is required in jobs, including the detailed specifications of the skills required at different skill levels. These omissions are critical as it means that the work undertaken is not properly described, recognised and valued. Weaknesses in classification structures may also mean that there is no mechanism to recognise additional skills.’⁸⁶⁸

[823] Assoc Prof Smith and Dr Lyons also note that the capacity of industrial tribunals to assess the value of work in feminised industries and occupations has been limited by the requirement to position that valuation against ‘masculinised benchmarks’:

‘This requirement for a comparator has been a feature of equal remuneration proceedings has been noted but the pivotal role of the metal industry tradesperson in wage fixing is also well documented. As an example the award restructuring requirements of wage fixing principles from 1988 was ultimately designed around a set of masculinised classifications and credentials and thus offered a limited capacity to properly describe, delineate and reward work in feminised industries and occupations. Work value comparisons continued to be grounded by a male standard, that being primarily the classification structure of the metal industry awards and to a lesser extent a suite of building and construction awards. This template rested on the relativity of masculinist classifications to the position of metal industry or building industry tradesperson.’⁸⁶⁹

[824] At [111] to [131] of the Smith/Lyons Report Assoc Prof Smith and Dr Lyons conduct an analysis of the classification definitions in the Aged Care Award and identify the following:

‘The classification structure does not contain skill based or task-based descriptions. The “indicative tasks” only lists job positions or job titles. The classification descriptions of Schedule B, and reproduced in Table 4, are generic competency descriptions. These classification descriptions have not been varied since 2009 (except for the minor change to the final dot point of aged care employee level 4 made in 2019) ... We do not think

⁸⁶⁶ Transcript, 2 May 2022, PN2665–PN2668.

⁸⁶⁷ Smith/Lyons Report at [90].

⁸⁶⁸ Smith/Lyons Report at [91].

⁸⁶⁹ Smith/Lyons Report at [92].

the Aged Care Award classification descriptions are useful in assessing or identifying the work value of aged care employees.⁸⁷⁰

[825] The ANMF rejects the Joint Employers' comparison of the descriptors concerning interpersonal and communication skills in the C10 classification, applicable to manufacturing workers, to the kind of skills identified by the Spotlight Tool. In closing oral argument, Mr Hartley for the ANMF put it this way:

'One of the spotlight skills is spotlight skill level A2, "monitoring and guiding reactions", and the employers say, well, that's similar to, quote, "exercises discretion within the scope of this classification level", and we say, not it's not.

Or spotlight skill level B1, negotiating boundaries, and the employers say, well that's similar that it performs non trade tests incidental to their work. We say, no it's not.

...

So the point is this, that the reason why we emphasise that these are skills that have to be taken into account, is that it happens, and the employer submissions are an example of this, but the skills are wrongly discounted. They are characterised in a way that doesn't reflect the true character of the skill.⁸⁷¹

[826] And later:

'The idea that it can be said in some undifferentiated way that the skill of, on the one hand, speaking with your boss in a metal fabrication worksite and the skill of speaking with a person who is in the course of dying and bringing that person to a good death, or dealing with that person's family in the stages of grief or seeking to comfort or re-centre or redirect a person who's lost some or all of their grip on reality and is in immense distress or is scared or is angry or is violent, or someone desperately trying to maintain independence in the context of a diminished capacity for being independent, the idea that there's a comparison between those two skills in terms of their level and their content really only needs to be stated to be rejected.⁸⁷²

[827] The HSU also address this issue:

'Obviously, in our submission to say that the nature of the communication or interpersonal skills that a tradesperson is expected to demonstrate, presumably interacting with colleagues or a supervisor or the like, is very different and not in any sense, comparable with the nature of skills required to provide care to an elderly person with dementia, and bathe that person and deal with difficult behaviours and the like and develop a relationship which allows all of that to occur.⁸⁷³

⁸⁷⁰ Smith/Lyons Report at [131].

⁸⁷¹ Transcript, 24 August 2022, PN15030–PN1533.

⁸⁷² Transcript, 1 September 2022, PN15924.

⁸⁷³ Transcript, 24 August 2022, PN14363.

[828] These submissions highlight that the ability to apply a skill in the context of a particular workplace is inherent to that skill and that the context in which a skill is applied can increase or decrease the weight given to a particular skill in a work value assessment. For the reasons advanced by the ANMF and HSU we find the Joint Employers' submission based on the comparison between the C10 (Certificate III) classification in the Manufacturing Award and the Nursing Assistant (Certificate III) in the Nurses Award entirely unpersuasive.

[829] We accept 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 applicable award rates of pay.

(iv) *Skills or Attributes?*

[830] Among the submissions put by the Joint Employers challenging, or at least qualifying, the expert evidence is that they challenge the ANMF's contention that the Spotlight skills identified by Assoc Prof Junor are assessable skills for the purposes of work value under s.157(2A) that are not recognised in the current minimum rates in the relevant modern awards for RNs, ENs and AINs/PCWs. The Joint Employers submit that these skills are used in all industries,⁸⁷⁴ are not rightly regarded as skills⁸⁷⁵ and the relevant interpersonal skills may be, or are, already recognised in at least one of the relevant minimum rates.⁸⁷⁶

[831] During the course of closing oral argument the Joint Employers' representative clarified that the Joint Employers were 'entirely comfortable' with the proposition that the requirement for direct care employees to exercise empathy and communication skills should be taken into account in assessing the work value of the work performed.⁸⁷⁷ However, there is a degree of tension between that concession and what follows:

'Some of those skills clearly emanate from the Certificate III...four of the modules in the Certificate III were working with diverse people, supporting independence, communicating health or community services and recognise healthy body systems. There's no doubt that some of those competencies to be applied around the caring nature of the work emanate from the Certificate III...

...the other thing that needs to be borne in mind are skills like communication, interpersonal skills and the like, they're not unique to the aged care sector. But they're relevant to a variety of sectors that involve consumers, although we accept that they are clearly relevant to the aged care sector and we think that you need to be a little cautious about where you draw the line on them.

What I mean by that is this... some of those so-called skills appear to us to be examples of simple cognitive activity by adults, and so one needs to be a little bit careful as to where one goes.

⁸⁷⁴ Joint Employers closing submissions in reply dated 19 August 2022 at [3.22] (a)–(b).

⁸⁷⁵ Transcript, 1 September 2022, PN15751–PN15753.

⁸⁷⁶ Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.17]; Joint Employers closing submissions in reply dated 19 August 2022 at [3.25]–[3.27].

⁸⁷⁷ Transcript, 1 September 2022, PN15745–PN15749.

I mean, holding conversations is something that is a capacity that people evolve through childhood, into adolescence and so forth.

Others that were identified, and I'm thinking of empathy, in particular here, we'd ask the Commission to be a little careful. It would appear to us that empathy is a personality disposition, it's a personality trait, and I don't want to get into a debate about whether or not you can learn empathy...

...all we would say to the Commission is, yes, embrace an examination of the caring nature of the work, understand that there are the requirement to exercise skills, such as communication and personal skills, be conscious that some of those come out of the Certificate III (indistinct) program, et cetera, and I think it would be reasonable to say, out of the education that is undertaken by the nursing group, as well.

But just be a little cautious that some of those things seem to be more about the simple cognitive activity of adults, or personality disposition and I'm not able to help the Commission as to how one draws a line in that but I think there has to be some element of care with it.⁸⁷⁸

[832] In short, the Joint Employers concede that regard should be had to 'soft skills' such as empathy or communication skills when assessing work value,⁸⁷⁹ but note that communication skills are not unique to the aged care sector⁸⁸⁰ and that some of these skills 'clearly emanate' from the Certificate III, including modules of 'working with diverse people, supporting independence, communicating health or community services and recognise healthy body systems.'⁸⁸¹

[833] The Joint Employers also characterise empathy as 'a personality disposition' or 'a personality trait'⁸⁸² and urged caution regarding interpersonal and communication skills that seem to be 'more about the simple cognitive activity of adults', such as holding conversations.⁸⁸³

[834] The ANMF addresses the characterisation of interpersonal skills, such as empathy, as 'traits' or 'attributes' in its closing oral submissions, where it described this as 'precisely the misunderstanding addressed by every expert witness' that has led to undervaluation.⁸⁸⁴ Noting that the Joint Employers did not take up the opportunity to cross-examine the expert witnesses on the theoretical underpinnings for the proposition that care skills have been falsely described as attributes, the ANMF refers to the Junor Report where it incorporates into the typology of skill invisibility that described by terms such empathy and emotional intelligence, as 'under-specified' skills:

⁸⁷⁸ Transcript, 1 September 2022, PN15748–PN15755.

⁸⁷⁹ Transcript, 1 September 2022, PN15746.

⁸⁸⁰ Transcript, 1 September 2022, PN15750.

⁸⁸¹ Transcript, 1 September 2022, PN15748.

⁸⁸² Transcript, 1 September 2022, PN15751–PN15753.

⁸⁸³ Transcript, 1 September 2022, PN15755.

⁸⁸⁴ Transcript, 1 September 2022, PN15914–PN15922.

‘Under-specified skills’ — These skills are wrongly defined as “soft”, “natural” or innate personal traits. Concepts such as “emotional intelligence”, “empathy”, “good communication skills”, “people skills”, “resilience”, “sense of humour” and “flexibility” need to be “unpacked”, in order to identify the skills involved. The term “emotional labour” is less precise than the term “skilled emotion management”.⁸⁸⁵

[835] The ANMF also refers to various descriptors of Spotlight skills, taken from table MR-4 of the Junor Report that may be used instead of saying a person has empathy, submitting that each were valuable, legitimate factors in the assessment of work value, and not to be ‘written off’ as personality traits:

‘Responding to the grief and sadness of residents at the loss of independence and possessions; managing one’s own stress in the midst of many interruptions; managing one’s own and a client’s responses when dealing with the horrendous effects of neglected wounds, managing adverse impacts on a resident’s wellbeing of inappropriate wishes of family who are in denial, initiating service acceptance, navigating intense fear and shame, prioritising advocacy for residents’ rights, dignity and pain relief, interactions with doctors, perceiving a resident’s pain level based on facial expression, combining professionalism, humour, empathy, projecting confidence to establish trust and lighten mood.’⁸⁸⁶

[836] A similar point concerning natural ‘aptitude’ was also made in the oral submissions of the HSU:

‘so far as empathy was concerned, it appeared to be suggested that that’s something that people have or they hadn’t. That is, it’s an aptitude issue. I don’t know, that’s quite a philosophical question, perhaps, but leaving that to one side, all jobs have aptitude. Mechanical skills are - some people have a greater aptitude to mechanical skills and, no doubt, some people have a greater aptitude to be a brain surgeon. That doesn’t downplay the significance and importance of the complexities of the skills involved and the way in which they ought be recognised in the pay that - in the setting of appropriate pay.’⁸⁸⁷

[837] In respect of the Joint Employers submission that certain skills identified in the Junor Report seem ‘more about the simple cognitive activity of adults’, the ANMF submits that this misunderstands what Spotlight skills are, being skills that are ‘peculiarly prevalent in feminised work and in particular care work.’⁸⁸⁸

[838] The HSU also address this point in its closing oral submissions, stating that the notion that such skills were merely the ‘cognitive activity of adults’ downplays the types and complexity of skills involved, adding that ‘[p]roviding care to a resident with advanced

⁸⁸⁵ Junor Report at [140].

⁸⁸⁶ Transcript, 1 September 2022, PN15918.

⁸⁸⁷ Transcript, 1 September 2022, PN15861.

⁸⁸⁸ Transcript, 25 August 2022, PN15126.

dementia and endeavouring to bathe and feed and dress that individual is not like striking up a conversation with a stranger at a bus stop about the weather.’⁸⁸⁹

[839] In respect of the Joint Employers submission that certain skills identified in the Junor Report seem ‘more about the simple cognitive activity of adults’, the ANMF submits that this misunderstands what Spotlight skills are, being skills that are ‘peculiarly prevalent in feminised work and in particular care work.’⁸⁹⁰

[840] As Assoc Prof Junor puts it:

‘The Spotlight taxonomy is designed to bring to light work process skills that may otherwise be overlooked, or whose full dimensions have not been understood. I consider that, if the range and level of skills in the Spotlight taxonomy are not fully *identified* and *recognised*, the results will be failure to assign a full and accurate *value* to a job classification.

Under-recognition of the full range of Spotlight skill demands in a job or classification, and/or of the actual level of Spotlight-identified skill at which they are required to be exercised, may also result in, or be linked to, an under-estimation of the effort and/or responsibility required in job performance.’⁸⁹¹

[841] The ANMF also relies on the evidence of an employer lay witness, Mark Sewell, in support of its submissions regarding the correct characterisation of Spotlight skills. Mr Sewell is the CEO and Company Secretary of Warrigal, an aged care provider described as operating 11 residential aged care facilities as well as home care services over several regions in NSW.⁸⁹²

[842] At [93] of his witness statement Mr Sewell gave the following evidence in relation to the Certificate III qualification:

‘What a Certificate III cannot teach is the attitude and maturity required of this role that we are looking for [in] personal carers. From my experience, the required time to be a experienced carer is around 3 years.’⁸⁹³

[843] During the course of cross-examination by the HSU, counsel for the HSU took Mr Sewell to the above paragraph and asked him to clarify whether his view is ‘that there are additional skills and knowledge obtained through experience beyond the baseline knowledge required in a Certificate III? The relevant extract of the transcript follows:

‘MR SEWELL: Certificate III is a terrific training course to give the background and teach technical skills but it requires personal attributes of customer service and resilience and kindness that can't be taught so much but they're attributes and often they develop in people through a long-term commitment to older people and their needs and we estimate

⁸⁸⁹ Transcript, 1 September 2022, PN15860.

⁸⁹⁰ Transcript, 25 August 2022, PN15126.

⁸⁹¹ Junor Report at [71].

⁸⁹² Witness statement of Mark Sewell dated 3 March 2022 at [2], [8].

⁸⁹³ Witness statement of Mark Sewell dated 3 March 2022 at [93].

that about three years people become very, very good at explaining why they do what they do and love what they do and we use them to talk to other people, new incoming staff who are considering a career in aged care.

Mr GIBIAN: Just two aspects of that. One is you referred to matters of perhaps relationship - relational skills, that is, how to relate to the residents, communicate effectively with the residents as matters which are improved over time?

MR SEWELL: Yes.

MR GIBIAN: I understood that correctly?

MR SEWELL: Yes.

MR GIBIAN: I take it you also - that the skills in terms of conducting particular activities, whether it be showering or toileting or the kind of medication processes and the like that care workers are involved in also improve over time in dealing with frail and residents with complex needs?

MR SEWELL: Yes, I think so. Any technical skill would improve over time definitely.⁸⁹⁴

[844] Later in Mr Sewell's cross-examination, counsel for the ANMF asked Mr Sewell to clarify whether the 'personal attributes' he was referring to included the following:

- The ability to piece together resident information, past traumas, for example, to better understand present behaviour
- Developing a fine-tuned knowledge of a resident's idiosyncrasies and preferences to support smooth patterns of hygiene, meals, sleeping
- Being alert to co-workers' emotional pressures, strengths and needs
- Quickly picking up early warning signs of impending disturbances or an approach that isn't working
- Observing, responding to, reporting even very slight changes in residents
- Adapting one's voice, tone, body language to knowledge of how it is that residents would best respond
- Dealing increasingly with residents from different language groups and ensuring that residents either within the same language group or between language groups are able to interact

⁸⁹⁴ Transcript, 12 May 2022, PN12997–PN13000.

- Assessing the urgency and importance of simultaneous pause on the worker’s attention, and
- Smoothly switching back and forth between work that is individualised to one particular resident and then work within a team.

[845] Mr Sewell accepted that each of the above ‘characteristics’ fell within what he had described as ‘personal attributes’.⁸⁹⁵ He further agreed that he could think of ‘many other attributes that care workers and nurses would have which might fall into the category of characteristics or descriptors of the work that they perform which improve over time.’⁸⁹⁶

[846] The ANMF drew our attention to the fact that the characteristics put to Mr Sewell were descriptors of work procedures, taken from Table MR-5 of the Junor Report where they are used to describe the ‘invisible’ skills that are often undervalued on the basis that they are mischaracterised as an ‘attribute’.⁸⁹⁷ The ANMF submitted:

‘Mr Sewell has more familiarity with aged-care work than most or many; Mr Sewell clearly did not intend to deprecate the skills brought to bear by aged-care workers in describing them as “*personal attributes ... that can’t be taught*,” he freely, when he was asked to, accepted descriptions of the kinds of attributes of which he spoke in terms that were clearly descriptors of skills.’⁸⁹⁸

[847] We accept the evidence of Assoc Prof Junor that the Spotlight skills identified in the Junor Report in respect of RNs, ENs and AINs/PCWs working in aged care are correctly characterised as skills (as opposed to personality traits or dispositions) and should be taken into account in the assessment of work value.

[848] Indeed it seems to us the mischaracterisation of the so called ‘soft skills’ as personality traits or ‘the simple cognitive activity of adults is at the heart of the gendered undervaluation of work.

[849] Before expressing our conclusions in respect of Assoc Prof Junor’s evidence more generally we note the ANMF’s contention that the skills identified in the Junor Report are supported by the lay witness evidence.

[850] In Annexure 1 to its closing submissions, the ANMF engages in its own ‘hidden skills analysis’ of the employee lay witness evidence.

[851] Annexure 1 sets out both written and oral evidence given by the employee lay witnesses about the nature of their work and compares this to the Spotlight descriptors in order to identify tasks performed by aged care workers that involve the application of Spotlight skills. Annexure 1 contains tables, separated by each employee lay witness, in which extracts of their evidence

⁸⁹⁵ Transcript, 12 May 2022, PN13100–PN13110.

⁸⁹⁶ Transcript, 12 May 2022, PN13109.

⁸⁹⁷ ANMF closing submissions dated 22 July 2022 at [829]; Transcript, 25 August 2022, PN1522.

⁸⁹⁸ ANMF closing submissions dated 22 July 2022 at [830].

are set out against the hidden skill elements from the Junor Report. For example, the evidence of AIN Linda Hardman is presented as follows:

LINDA HARDMAN AIN, Estia Health facility in Figtree. Statement of 29 October 2021, tab 263 at page 13265		
A2. Monitoring and guiding reactions	52	Dementia and mental health issues also leads to wandering. Some residents wander into other residents' rooms, which can lead to conflict. Even if it does not, we spend time finding wandering residents and persuading them go back to their own room or in any event leave another resident's room. Sometimes we use strategies such as making a cup of tea, or finding an activity for the resident to undertake. At times I just have to make time to have a chat with the resident to reassure them or orientate them in time and place. This takes time, but it can prevent a resident becoming aggressive or intrusive into other residents' rooms.
A3. Judging impacts	22(a)	... AINs have and exercise the following skills in carrying out their work: ... Observational skills. You have to know your residents very well, so that you know when they are off or something is up. I may not know all of the medical terminology, but by careful observation you can get a sense of when things are wrong and alert the ENs or RNs.
	22(b)	... AINs have and exercise the following skills in carrying out their work: ... Recognising behaviours. Often, before a resident has problematic behaviours associated with mental illness or dementia, you can notice triggers or little changes in behaviour. It is important to recognise these sorts of things and report them to the RN.
	38	There is so much as an AIN that I need to be aware of when caring for a resident. For example, if I am showering someone I need see if there any change in their condition, they could be grimacing and therefore in pain. When residents are meant to [be] eating, I need to see if they are eating. I need to make sure they're drinking water.
	51	With my experience, I am pretty good at recognising the kinds of triggers that will lead to behaviours, aggression, or abuse. But, despite all of my training and experience sometimes I do not see the warning signs. Sometimes, you just have to leave a resident's room because you can see that the resident is about to get aggressive. I always make sure the resident is safe before I leave. I then re-approach several times. I use strategies such as changing staff, to see if that makes a difference.
B3. Working with diverse people and communities	24	The diversity of residents has changed over time. There is an increase in residents from various cultural backgrounds. It can make it more difficult to communicate with the residents and rely on non-verbal cues and try to learn some of their language to understand their needs.
C1. Sequencing and combining activities	23	I also think that our ability to be adaptable and diplomatic has increased over the years I've worked in aged care. I think AINs have excellent time management and team skills because there are so many tasks that need to be finished in a shift.
C2. Interweaving your activities smoothly with those of others	36	Re documentation: There are a limited number of computer terminals. That means that you are competing with other workers for use of the terminal and you have to try to fit in when there is a chance to use it. If something happens when you're trying to complete your paperwork, which it often does (whether it is attending to a buzzer, assisting a resident with toileting, or something else), often someone else is using the terminal when you return, and even if not you have to log in again, and remember where you were up to.
C3. Maintaining and/or restoring workflow	74	For me to provide proper care means that I spend an extra five or ten minutes with residents. Sometimes they cry, and need a bit of TLC. That has to be done, but then it is harder to fit in all the other work.

[852] The ANMF submits that the analysis demonstrates that when the lay witnesses are describing their work, they frequently describe it in ways that fall within the categorisation of Spotlight skills, and thus supports a conclusion that Assoc Prof Junor’s categorisation of skills draws out the kinds of skills utilised by aged care workers:

‘If [no Spotlight skills] had been identified, that might have called into question the validity of Hon Assoc Prof Junor’s analysis of the primary material that she analysed. But the reverse is true: the evidence of the lay witnesses in this proceeding provides ample further examples of each of the spotlight skills being brought to bear, in each classification (RN, EN, AIN / PCW) and within each skill element (A1–A3, B1–B3, C1–C3). This, then, provides further support for the proposition that aged-care workers do, in fact, bring to bear the skills identified by Hon Assoc Prof Junor in the Junor Report.’⁸⁹⁹

[853] We accept that the ANMF’s analysis of the lay witness evidence broadly corroborates the results of the application of the Spotlight Tool in the Junor Report. That said, we also acknowledge that there are limitations in the lay witness evidence, as discussed previously in Chapter 5.4.

[854] For the reasons given we reject the Joint Employers’ critique of Assoc Prof Junor’s evidence. We also reject the Joint Employers’ characterisation of certain Spotlight skills as personality traits or dispositions. In doing so we note that such characterisation has led to the undervaluation of these skills. Further, we reiterate that the application of a skill in the context of a particular workplace, is an integral and essential aspect of assessing the value of that skill.

[855] We acknowledge that *some*, but clearly not all, of the Spotlight skills identified by Assoc Prof Junor may be comprehended within the relevant Certificate III syllabus. But, as we have said, we reject the Joint Employers’ characterisation of the Spotlight skills as personality traits or dispositions; for the reasons articulated by Mr Hartley in the ANMF’s closing oral submissions.

[856] Assoc Prof Junor’s evidence was 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 force of Assoc Prof Junor’s evidence was undiminished during cross-examination which, as we have mentioned, was somewhat perfunctory.

[857] The Junor Report supports the ANMF’s contention that RNs, ENs and AINs/PCWs in the aged care sector exercise Spotlight skills which are not compensated by the modern award minimum rates of pay applicable to their roles.

[858] We turn now to the issue of the gender pay gap.

⁸⁹⁹ ANMF closing submissions dated 22 July 2022 at [825].

7.3.3 Gender Pay Gap

[859] The gender pay gap was the subject of considerable debate in both written and oral submissions, in particular the relevance of the gender pay gap to the consideration of work value under s.157(2A).

[860] The gender pay gap refers to the difference between average wages earned by men and women. It may be expressed as a ratio which converts average female earnings into a proportion of average male earnings on either a weekly or an hourly basis.

[861] The drivers of the gender pay gap are complex and are influenced by numerous interrelated factors. The Smith/Lyons Report suggests the following are key drivers of the gender pay gap:

- occupational segregation
- differences in the types of jobs held by men and women and the method of setting pay for those jobs
- structures and workplace practices which restrict the employment prospects of workers with family responsibilities, and
- the historical undervaluation of female work and ‘feminised’ occupations.

[862] The ANMF acknowledged that it is not necessary that the Commission form a view as to why the minimum rates in the Awards have not been properly fixed, however submits that it may ‘assist the Commission’ to understand why the rates in the Awards ‘dramatically undervalue the relevant work.’⁹⁰⁰ It is submitted that the relevance of the gender pay gap to this task is that the ‘persistent existence’ of the gap enables the Commission to conclude that work has been undervalued in female-dominated industries, such as aged care.⁹⁰¹ The ANMF relied on the Smith/Lyons Report in support of this proposition.

[863] During the course of oral hearing, counsel for the ANMF was asked to clarify the relevance of the gender pay gap to our statutory task under s.157(2A) and submitted:

‘I think at a very high level and the way we put the submission ... is as follows. We ask your Honours to award a 25 per cent pay increase. And your Honours might look at the evidence about work value and say, we're happy that this evidence provides all the explanatory force we need to satisfy us that there is a 25 per cent higher value on this work than what the wages currently reflect.

Or the Commission might say, it's higher than the current wages but it may not be 25 per cent. Why is it that the ANMF says that the work has been so drastically undervalued if it isn't only the changes in work value? And our answer to that is, the other mechanism

⁹⁰⁰ ANMF closing submissions in reply dated 17 August 2022 at [327].

⁹⁰¹ ANMF closing submissions in reply dated 17 August 2022 at [329].

by which explanatory force is provided is that the wages [are] a manifestation of, or a contributor to, the gender pay gap.’⁹⁰²

[864] Counsel for the ANMF later conceded that the extent to which the Commission needs to consider the gender pay gap in these proceedings may be ‘limited’⁹⁰³ and submitted its relevance is that it ‘gives the Commission comfort by reference to real world data that feminised work is undervalued.’⁹⁰⁴

[865] It is uncontroversial that a gender pay gap exists in Australia. We accept the logic of the proposition in the expert evidence that gender undervaluation of work is a driver of the gender pay gap. We also accept as a general proposition that if all work was properly valued there would likely be a reduction in the gender pay gap.

[866] However, these proceedings are not a general inquiry into the drivers of the gender pay gap. As we have outlined above, it is not necessary, for the purposes of these proceedings, that we determine why the minimum rates in the relevant Awards before us have not been properly fixed. Our task is to determine the actual value of the work in aged care and whether a variation of the current rates in the relevant awards is justified by ‘work value reasons’ being reasons related to any of the s.157(2A)(a)-(c) criteria. That task requires that we take into account *all* the skills exercised by aged care workers, which may include an assessment of skills that have previously not been considered or properly valued.

⁹⁰² Transcript, 24 August 2022, PN15046–PN15047.

⁹⁰³ Transcript, 25 August 2022, PN15132.

⁹⁰⁴ Transcript, 25 August 2022, PN15134.

8. Consideration

8.1 The Context

8.1.1 *The parties' position*

[867] It is common ground between the parties that in order to vary modern award minimum wages we must be satisfied that the variation is 'justified by work value reasons'; 'necessary to achieve the modern awards objective'; 'necessary to achieve the minimum wages objective', and that we must take into account the rate of the national minimum wage as currently set in a national minimum wage order.

[868] At the heart of these proceedings is the Applicants' contention that the variations they seek to modern award minimum wages are 'justified by work value reasons'. While there is a significant amount of agreement between the parties, the Joint Employers and the Unions disagree on the extent of changes to work in the aged care sector, in particular the classes of workers affected by those changes.

[869] The HSU application argues for a 25 per cent increase for *all* workers covered by the Aged Care Award, including general, administrative, maintenance and food services workers. The HSU submits that the 'provision of care is the central role and purpose of *all* workers covered by the Award, regardless of stream.'⁹⁰⁵

[870] The Joint Employers submit that in assessing the change in the value of work performed by aged care employees, a distinction is to be drawn between aged care employees in direct care roles and work performed by general and administrative employees.⁹⁰⁶ In particular, they submit that the work of administration, maintenance, gardening, laundry and cleaning employees in aged care has not changed significantly in the past 2 decades. The Joint Employers argue that while there has been a shift for *all* aged care employees, to integrate consumer focused thinking into their work,⁹⁰⁷ this has not resulted in a change to the work performed.⁹⁰⁸

[871] Further, while the Joint Employers oppose an increase in minimum award wages for general and administrative employees, on the basis that an increase is *not* justified by work value reasons, the position taken in respect of 'direct care' workers is more nuanced. While reluctant to support a particular level of increase for 'direct care' workers, the Joint Employers accept that the current modern award minimum rates do not properly value the work performed by such employees.

[872] Despite the obvious differences between the parties' positions, it is also apparent that there is extensive common ground.

⁹⁰⁵ HSU submissions dated 1 April 2021 at [49].

⁹⁰⁶ Joint Employers submissions dated 4 March 2022 at [19.35].

⁹⁰⁷ Joint Employers submissions dated 4 March 2022 at [19.18].

⁹⁰⁸ Joint Employers submissions dated 4 March 2022 at [19.19].

[873] These proceedings have been characterised by the evolving positions of the parties in respect of the issues in contention. We do not propose to go through each and every shift in their respective positions, but rather seek to capture where they have ended up.

[874] The Joint Employers' position crystallised in their final written submissions, as supplemented in closing oral argument. In their closing submissions, the Joint Employers submitted that 'based on the evidence given during the hearing, the work undertaken by the following classes of employee in residential aged care has significantly changed over the past two decades warranting consideration for work value reasons':

- RNs
- ENs
- Certificate (III) Care Workers, and
- Head Chefs/Cooks.⁹⁰⁹

[875] In Background Paper 5, the Joint Employers were asked to clarify whether their submission was to the effect that they were supporting an increase to minimum wages on work value grounds in respect of the above classifications of employees and, if so, what quantum of increase was proposed. The Joint Employers' response is set out in their closing submissions in reply, in which they confirm that they contend that an increase in minimum wages is justified on work value grounds in respect of RNs, ENs, Certificate III Care Workers and Head Chefs/Cooks in residential aged care.⁹¹⁰

[876] As to the quantum of such an increase, the Joint Employers noted that 'while [their] submission may seem less than helpful', with the exception of RNs, they 'have not proposed a monetary outcome' but submit that the C10 framework should provide guidance on this exercise.⁹¹¹ Contrary to the Unions' claim, the Joint Employers do not support a uniform 25 per cent increase in minimum wages for these classifications.⁹¹² No further clarification in relation to the quantum of any increase was provided during the course of closing oral argument.⁹¹³

[877] As to RNs, the Joint Employers contend that there has been a 'material change' in the work performed and that the 'shift in emphasis with respect to administrative/management duties' and the 'increase in accountability' are clear work value reasons to be taken into account. In their closing submissions, the Joint Employers submit:

'In any exercise apportioning value to a classification, clearly, the C10 Framework will be an effective starting point (and for some an end point). However, whether any marginal departure is then warranted will be determined by the Commission based upon its satisfaction that the variation is justified by work value reasons and a consideration of modern awards objective and minimum wages objective.'⁹¹⁴

⁹⁰⁹ Joint Employers closing submissions dated 22 July 2022 at [4.47].

⁹¹⁰ Joint Employers closing submissions in reply dated 19 August 2022 at [5.20]

⁹¹¹ Joint Employers closing submissions in reply dated 19 August 2022 at [5.21]–[5.22].

⁹¹² Joint Employers closing submissions in reply dated 19 August 2022 at [5.23].

⁹¹³ Transcript, 1 September 2022, PN15556–PN15557.

⁹¹⁴ Joint Employers closing submissions dated 22 July 2022 at [4.48].

[878] Further, at [19.7] of their closing submissions, the Joint Employers compare the approach taken by the Commission in the *Teachers Decision* in respect of degree qualified teachers with the assessment of the work value of degree qualified RNs.

[879] In Background Document 5, the Joint Employers were asked the following question:

‘A comparison with the C10 framework suggests if the Joint Employer submission is accepted, that the minimum rates for RNs should be increased by 35 per cent, is that what is being proposed by the Joint Employers?’

[880] In their closing submissions in reply, the Joint Employers confirmed that their submission is that the minimum rates for RNs ‘should be aligned to the C10 framework’ in order to ‘rectify a material anomaly with the award’:

‘Being a degree-qualified classification, the minimum rates for RNs are currently not consistent with the minimum rates of other degree-qualified classifications within the modern award system. As such, this alignment should be rectified as part of the work value exercise.’⁹¹⁵

[881] In closing oral argument, the representative for the Joint Employers clarified that it is ‘not just a reflection of the C10 framework’ that leads to a wage rise of 35 per cent for RNs and submitted:

‘It’s also the fact that when one compares the role and nature of the work performed by the registered nurse by comparison to the teacher in the Teachers decision, we actually in our submissions indicate that we saw very clear parallels between those two occupations, and so we thought there was a broader reason to support that other than just the mechanics of the framework.’⁹¹⁶

[882] In respect of ENs the Joint Employers note that the evidence reveals ‘an increase in the level of support that ENs provide to PCWs and the increased supervisory role they play’:⁹¹⁷

‘The EN is more frequently placed as the conduit between the PCW and RN and will make some decisions about when issues about nursing care should be escalated to the RN. This is a change that represents clear ‘work value reason’ to be taken into account by the Commission in its deliberative exercise.’⁹¹⁸

[883] In relation to PCWs/AINs the Joint Employers submit the evidence gives rise to the following ‘work value reasons’:

- (a) the change in the nature of the work in providing personal care to consumers with predominantly high care needs;
- (b) the change in the nature of the work providing personal care to consumers with complex needs (for example, advanced dementia and palliative care); and

⁹¹⁵ Joint Employers closing submissions in reply dated 19 August 2022 at [5.26].

⁹¹⁶ Transcript, 1 September 2022, PN15561.

⁹¹⁷ Joint Employers closing submissions dated 22 July 2022 at [20.4].

⁹¹⁸ Joint Employers closing submissions dated 22 July 2022 at [20.5].

- (c) assisting the RN with some ‘clinical’ activities (for example, Schedule 4 medication if trained, catheter care, blood glucose level monitoring, etc) (this appears to be recognised as an “experienced” AIN in the Nurses Award, however, the parallel in the Aged Care Award is less clear).⁹¹⁹

[884] In relation to (a), the Joint Employers argue that ‘it is clear’ that the majority of aged care recipients have higher care needs, which has universally ‘increased the overall intensity of the work’ for PCWs and AINs. In respect of (b) and (c), the Joint Employers submit that these considerations will impact some members of the workforce more than others, particularly those employees who work exclusively in dementia or palliative care units.⁹²⁰

[885] The Joint Employers also note that the majority of PCWs/AINs who gave evidence in the proceedings had a Certificate III qualification but observe that ‘there are still a large number of PCWs without a Certificate III who qualify as equivalent based on their depth and length of experience in the industry.’⁹²¹ In final oral submissions, the representative for the Joint Employers clarified that they were ‘entirely comfortable’ with the proposition that ‘there is a person who doesn’t hold a Certificate III formally but has been assessed as being equivalent based on experience.’⁹²²

[886] The Joint Employers’ concessions regarding the classes of employees set out above are confined to the performance of that work in a residential aged care setting. The Joint Employers submit there are ‘important subtleties’ that distinguish PCWs/AINs who work in home care from those in residential care, including:

- ‘(a) working alone versus working as part of a team;
- (b) the nature of indirect supervision; and
- (c) the work can focus on domestic residential duties, as opposed to solely personal care per se.’⁹²³

[887] In closing oral argument, the representative for the Joint Employers emphasised that PCWs/AINs in home care and residential care have some ‘fairly distinct features that differentiate them’:

‘The process of supervision is different. The requirement for one group, the home care worker, to, for want of a way of putting it, sort of phone home for assistance and guidance versus the residential person simply finding a colleague or the registered nurse at the facility. That actually does create a different work process and the things associated with it.’⁹²⁴

[888] However, the Joint Employers’ representative conceded that these distinctions ultimately ‘might not matter’ and submitted:

⁹¹⁹ Joint Employers closing submissions dated 22 July 2022 at [9.23].

⁹²⁰ Joint Employers closing submissions dated 22 July 2022 at [9.24]–[9.25].

⁹²¹ Joint Employers closing submissions dated 22 July 2022 at [9.8].

⁹²² Transcript, 1 September 2022, PN15670.

⁹²³ Joint Employers closing submissions dated 22 July 2022 at [22.9].

⁹²⁴ Transcript, 1 September 2022, PN15689.

‘At the end of the day, why we say that might not mean very much is the Bench might sort of weigh all of that up and come to the view that, well, okay, one's got a slightly different supervision, one's doing a slightly different array of activities, but on balance, they're still certificate III care workers, on balance they're still discharging the general competencies that a certificate III provides, and in that sense, on balance, the Commission might form the view that while there are some differences, on balance you arrive at the same conclusion. All we're simply saying is it would be wrong to say they are the same job. They're not. They're not.’⁹²⁵

[889] In relation to RNs and ENs in home care, the Joint Employers submit that the evidence indicates that there are some distinctions between residential and home care work.⁹²⁶ In respect of RNs, the Joint Employers submit that where in residential care the RN performs a ‘quasi managerial administrative role’, this does not appear to be the case in home care where the RN performs the ‘traditional role’ of providing clinical care. Similar observations were made⁹²⁷ in respect of ENs.⁹²⁸ The Joint Employers then conclude:

‘we don't believe the evidence supports the view that the EN and RN, in home care, is on all fours with what's occurring in the residential setting, although there will be many similarities, in terms of dealing with people with higher acuity, et cetera. We do accept, without any reservation, that the registered nurse, in all settings, is executing their competence within their scope of practice, as registered, and we accept that, in all settings, the enrolled nurse is exercising their competence within their scope of practice as well.’⁹²⁹

8.1.2 *The evidentiary findings*

[890] There is considerable common ground between the parties in respect of the relevant factual matrix. Some 16 broad contentions are agreed between the parties. In Chapter 7 we conclude that there is a sound evidentiary basis for the 16 agreed contentions and we adopt them as findings. These evidentiary findings are as follows:

1. The workload of nurses and personal care employees in aged care has increased, as has the intensity and complexity of the work.
2. The acuity of residents and clients in aged care has increased. People are living longer and entering aged care later as they are choosing to stay at home for longer and receive in-home care. Residents and clients enter aged care with increased frailty, co-morbidities and acute care needs.
3. There is an increase in the number and complexity of medications prescribed and administered.

⁹²⁵ Transcript, 1 September 2022, PN15697.

⁹²⁶ Transcript, 1 September 2022, PN15702.

⁹²⁷ Transcript, 1 September 2022, PN15701.

⁹²⁸ Transcript, 1 September 2022, PN15703–PN15705.

⁹²⁹ Transcript, 1 September 2022, PN15706.

4. The proportion of residents and clients in aged care with dementia and dementia-associated conditions has increased.
5. Home care is increasing as a proportion of aged care services.
6. Since 2003, there has been a decrease in the number of Registered Nurses (RN) and Enrolled Nurses (EN) as a proportion of the total aged care workforce. Conversely, there has been an increase in the proportion of Personal Care Workers (PCW) and Assistants in Nursing (AIN).
7. Registered Nurses have increased duties and expectations, including more administrative responsibility and managerial duties.
8. PCWs and AINs operate with less direct supervision. PCWs and AINs perform increasingly complex work with greater expectations.
9. There has been an increase in regulatory and administrative oversight of the Aged Care Industry.
10. More residents and clients in aged care require palliative care.
11. Employers in the aged care industry increasingly require that PCWs and AINs hold Certificate III or IV qualifications.
12. The philosophy or model of aged care has shifted to one that is person-centred and based on choice and control, requiring a focus on the individual needs and preferences of each resident or client. This shift has generated a need for additional resources and greater flexibility in staff rostering and requires employees to be responsive and adaptive.
13. Aged care employees have greater engagement with family and next of kin of clients and residents.
14. There is an increased emphasis on diet and nutrition for aged care residents.
15. There is expanded use and implementation of technology in the delivery and administration of care.
16. Aged care employees are required to meet the cultural, social and linguistic needs of diverse communities including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and members of the LGBTQIA+ community.

[891] As we have mentioned, we consider these contentions to be general in their character and that they would not necessarily apply consistently across classifications or universally in every instance to all employees concerned.

[892] The Consensus Statement is also relevant to our assessment of whether an increase in modern award minimum wages is justified by work value reasons and, as mentioned in Chapter 7, we propose to take it into account. It represents the views of a number of stakeholders in the aged care sector and was developed in contemplation of these proceedings. The assertions in the Consensus Statement are also broadly consistent with the findings we have made in respect of the 16 agreed contentions. The Consensus Statement is set out at Attachment C.

[893] In Chapter 7 we address the proposition, principally advanced by the ANMF, that RNs, ENs and AIN/PCWs utilise ‘invisible’ skills that have not been recognised in the current modern award minimum rates applicable to their roles. The ANMF submissions in this regard rely heavily on the expert evidence of Assoc Prof Junor.

[894] The Joint Employers concede that regard should be had to ‘soft skills’ such as empathy and communication when assessing work value,⁹³⁰ but submit that communication skills are not unique to the aged care sector⁹³¹ and that some of these skills ‘clearly emanate’ from the Certificate III, including modules of ‘working with diverse people, supporting independence, communicating health or community services and recognise healthy body systems.’⁹³²

[895] We acknowledge that *some*, but clearly not all, of the Spotlight skills identified by Assoc Prof Junor may be comprehended within the relevant Certificate III syllabus.

[896] As set out in Chapter 7.3.2, we accept the evidence of Assoc Prof Junor that the Spotlight skills identified in the Junor Report in respect of RNs, ENs and AINs/PCWs working in aged care are correctly characterised as skills (as opposed to personality traits or dispositions) and should be brought to account in the assessment of work value. Further, we have found Assoc Prof Junor’s evidence to be 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)).

[897] In order to vary modern award minimum wages we must be satisfied, among other things, that the variation is justified by ‘work value reasons’.

[898] The expression ‘work value reasons’ is defined in s.157(2A) which provides:

(2A) *work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) the nature of the work;
- (b) the level of skill or responsibility involved in doing the work;
- (c) the conditions under which the work is done.

⁹³⁰ Transcript, 1 September 2022, PN15746.

⁹³¹ Transcript, 1 September 2022, PN15750.

⁹³² Transcript, 1 September 2022, PN15748.

[899] We are satisfied in respect of direct care workers in the aged care sector that the evidence establishes existing minimum wage rates do not properly compensate employees for the value of the work performed.

[900] The evidence in respect of support and administrative employees is not as clear or compelling and varies as between classification.

[901] We would also observe that unlike the position in respect of RNs, ENs and AINs/PCWs, no ‘Spotlight skills’ analysis was undertaken in respect of the support and administrative employees employed in the aged care sector.

8.1.3 Complexity and unresolved issues

[902] These proceedings have raised a number of complex issues for determination relating to the appropriate classification structures in the relevant Awards such as:

- the appropriate classification and minimum rates of pay for Personal Care Workers (PCWs) and Nursing Assistants (AINs), noting the differing rates of pay in the Aged Care and the Nurses Awards and noting the Joint Employers’ suggestion that rewarding administering Schedule 4 medications in a residential facility and working in dedicated dementia and/or palliative care facilities may be dealt with by way of an allowance rather than the classification structure⁹³³
- the appropriateness of separating out the PCWs from other employees in the Aged Care Award and creating a new PCW classification stream
- the appropriateness of inserting in the Aged Care Award the nursing classifications from the Nurses Award
- the application of the C10 framework to the relevant Awards, especially in relation to the fixation of wage rates for RNs
- the application of appropriate internal relativities within each Award, and
- in relation to the SCHADS Award, the impact on disability support workers of the increase sought for aged care workers covered by the SCHADS Award.

[903] In our view these issues require close examination and we would benefit from further submissions and, potentially, further evidence, from the parties.

[904] Further, as mentioned earlier, 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 phasing of wage increases. The Government has committed to ensuring the outcome of these proceedings is funded, but the extent of that funding is unknown at present.

⁹³³ Joint Employers submission in reply dated 17 August 2022 at [5.8]–[5.9].

[905] In its submission of 8 August 2022, the Commonwealth addressed this issue in the following terms:

‘The Commonwealth will provide funding to support any increases to award wages made by the Commission in this matter and that will help deliver a higher standard of care for older Australians. The Commonwealth would also welcome an opportunity to work with the Commission and the parties regarding the timing of implementation of any increases, taking into account the different funding mechanisms that support the payment of aged care workers’ wages ...

With regard to fairness for employers, the Commonwealth submits that the particular contemporary context of Government funding for the aged care sector means employers are unlikely to experience significant detrimental impacts as a result of increases to modern award minimum wages in the sector. Such wage increases could therefore not be considered to be unfair to aged care employers ...

The cost to business of increasing aged care sector wages would likely be substantial, depending on the quantum and phasing of wage increases.

However, as the primary funder of aged care services, the Government has committed to ensuring that the outcome of the aged care work value case is funded. The Commonwealth submits that the Commission can therefore proceed on the basis that the impact on business of significant increases to award minimum rates in the case will not be material.⁹³⁴

[906] In reply to the Commonwealth’s submission, the Joint Employers submitted ‘it is encouraging’ that the Commonwealth is prepared to fund any increase to award minimum wages, but ‘it is unclear whether this support will extend to the on-costs associated with any increase to minimum award rates’, and argue there will be increased costs associated with:

- superannuation
- payroll tax
- workers’ compensation
- allowances and entitlements which are based on a percentage of the standard rate and may be subject to an increase, and
- any possible new entitlements arising out of this matter.⁹³⁵

[907] The Joint Employers contend that the above factors are relevant to the consideration under s.134(1)(f) of the modern awards objective and invited the Commonwealth to ‘provide its position regarding whether its support extends to funding the associated on-costs of any minimum rate increase.’⁹³⁶

⁹³⁴ Commonwealth submissions dated 8 August 2022 at [5], [165], [200]–[201].

⁹³⁵ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 at [3.13]–[3.14].

⁹³⁶ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 at [3.15].

[908] Background Document 7 summarised the Commonwealth’s submissions and the reply submissions of the other parties in relation to the modern awards objective, and posed the following question:

‘Does the Commonwealth’s funding support extend to the associated on-costs of any increase in minimum wage rates?’⁹³⁷

[909] The Commonwealth responded to this question as follows:

‘The Commonwealth reiterates it will provide funding to support any increases to award wages made by the Commission in this matter.

The government is considering the most appropriate approach to funding to ensure any wage increases are appropriately supported, which would be the subject of a future decision of government. As such, the Commonwealth is not in a position at the present time to state with certainty the precise quantum or the extent of the funding it will provide to:

- support the wage increases; and
- fund associated on-costs.

Despite what is in [the paragraph] above, the Commonwealth affirms its commitment to provide funding to support any increases to award wages made by the Commission. It is further anticipated that the Commonwealth’s funding response will necessarily take into account associated on-costs.

The Commonwealth would welcome an opportunity to work with the Commission and the parties regarding the timing of implementation of any increases.

The Commonwealth submits that the details of its funding response is a matter which the Commission should take into account at the stage of determining commencement date, implementation and any phasing in arrangements.⁹³⁸ [Emphasis added]

[910] It is also apparent from counsel’s oral submissions that it is envisaged the Commonwealth would make a decision about the extent of the funding support it will provide *after* we have determined, in a preliminary or final sense, the extent of any increase to modern award minimum wages.⁹³⁹

[911] The extent to which the Commonwealth funds any outcome from these proceedings is plainly relevant to our consideration of the impact of any increase in employment costs on the employers in the aged care sector. But, as discussed in the *SCHADS 4 Yearly Review*

⁹³⁷ Background Document 7 at 38.

⁹³⁸ Commonwealth submission – response to questions from the Full Bench dated 29 August 2022 at [13]–[17].

⁹³⁹ Transcript, 1 September 2022, PN15802.

Substantive Claims decision (the *SCHADS 2019 Decision*)⁹⁴⁰, the modern awards objective requires that we take into account the s.134(1) considerations. The obligation to take the s.134(1) considerations into account means that *each of these matters*, insofar as they are relevant, must be treated as a matter of significance in the decision-making process. And, as mentioned in Chapter 3, no particular primacy is attached to any of the s.134 considerations.

[912] In the *SCHADS 2019 Decision*, the Ai Group opposed the Union’s claims on the basis that if the Award were varied as sought by the Unions, employers would face substantial additional costs for which there was no funding and no scope to recover from those who need and access their services.⁹⁴¹

[913] The Ai Group’s submission in respect of this issue is encapsulated in this extract from its written submission:

‘The operation of the NDIS and the constraints it places on employers covered by the Award should, in our respectful submission, form the cornerstone of the Commission’s consideration of the impact of the Unions claims on employers. Such a consideration necessarily leads to the inevitable conclusion that employers cannot and should not be saddled with the additional employee entitlements sought by the Unions in these proceedings.’⁹⁴² [Emphasis added]

[914] The Full Bench rejected the proposition advanced by the Ai Group on the basis that it sought to elevate one set of considerations – the impact on business and employment costs – above all others, and went on to state:

‘We accept that the impact of granting the claims on business and on employment costs is a relevant consideration and weighs against making the variations proposed by the Unions. But we reject the notion that the constraints placed on employers by the NDIS funding arrangements should be given determinative weight.

In the context of the provision of social services where employers are largely dependent on government funding, or, in the case of the NDIS, a fixed price, we are cognisant of the fact that significant unfunded employment cost increases may result in a reduction in services to vulnerable members of the community – a point made by the NDS. But such outcomes are a consequence of current funding arrangements, which are a matter for Government. Further, as we have mentioned earlier ... the evidence as to the impact of the recent budgetary increase to the NDIS is somewhat unsatisfactory. Nor was there much consideration given to the extent to which the impact of an increase in casual overtime work and work on weekends and public holidays may be ameliorated by the utilisation of part-time and full time employees.’⁹⁴³

[915] It follows from the foregoing that the extent to which the Commonwealth provides funding to support increased employment costs which arise from any variation determination

⁹⁴⁰ [2019] FWCFB 6067.

⁹⁴¹ Ai Group written submission of 8 April 2019 at [162].

⁹⁴² Ai Group written submission of 8 April 2019 at [163].

⁹⁴³ *SCHADS 2019 Decision* at [136]–[137].

in these proceedings is plainly relevant to our assessment of whether such a variation is necessary to achieve the modern awards objective. The extent of Commonwealth funding directly affects the economic impact of any variation determination on the aged care sector employers and 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):

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

[916] During the course of closing oral argument, counsel for the Commonwealth stated that 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 taken by the Australian Government after the Commission has come to a concluded or preliminary view about the Applications. Counsel was not in a position to comment upon whether the funding provided would cover *all* of the employment costs flowing from any variation determination made in these proceedings.⁹⁴⁴

[917] In the next section we consider what is the appropriate way forward in light of the extent of agreement between the parties, the evidentiary findings and the range of complex issues that arise for determination.

8.2 The Way Forward – An Interim Decision

[918] During the course of closing oral argument, a number of parties, and the Commission, canvassed a range of options regarding the process for determining the Applications, including dealing with the Application in stages and determining an initial interim increase for some or all relevant award classifications. In response to a submission by counsel for the HSU (which flagged the Commission’s possible consideration of some interim outcomes), the presiding Member said:

‘there would be a range of options, as you indicated, some form of interim increase position. I think, plainly, the classification structure issue has a degree of complexity about it and the benefit of some form of interim increase to some or all of the classifications, where that lands, would be - that would also involve determination of - there is still some issue between you about s.157 and how that operates.’⁹⁴⁵

[919] Section 589(2) provides that the Commission may make an ‘interim decision’ in relation to ‘a matter’ before it, either on its own initiative or on application. The word ‘decision’ in this context is to be given a broad meaning and an interim decision may be made by order.⁹⁴⁶ An interim decision must be in writing.

[920] The ‘matter’ before us consists of the Applications which seek to vary 3 awards by, among other things, increasing modern award minimum wages. A determination varying

⁹⁴⁴ Transcript, 1 September 2022, PN15426–PN15436.

⁹⁴⁵ Transcript, 1 September 2022, PN15865.

⁹⁴⁶ See FW Act ss.598(1) and (4) and *Maugham Thiem Auto Sales Ltd v Cooper* [2013] FCAFC 145 at [26] (Katzmann J, with whom Greenwood and Besanko JJ agreed)

modern award minimum wages, including such a determination made pursuant to an interim decision, must be an order under s.157(2) and the requirements of that section must be satisfied.⁹⁴⁷

[921] In short, we can issue an interim decision (and variation determination) provided we have reached the required state of satisfaction as to the matters the FW Act requires. Of course, the wide scope given to the Commission in determining the relief it will give does not absolve it from an obligation to act judicially and afford interested parties procedural fairness.⁹⁴⁸ In our view that obligation has been satisfied in this case, as evidenced by the options canvassed during the course of closing oral argument.

[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 minimum wages for direct care workers while that process takes place.

[923] In these circumstances, we have decided to address and dispose of the Applications in 3 stages. This decision constitutes the first stage in the process. In this decision we have determined the relevant legal principles and the conceptual issues that have been canvassed by the parties in relation to the Applications and we have decided that an interim increase in the modern award minimum wages applicable to direct care workers is justified by work value reasons.

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

[925] Stage 3 will include a more detailed consideration of the classification definitions and structures in the relevant Awards. Interested parties may wish to make further submissions and

⁹⁴⁷ *Ms Virginia Wills v Grant, Marley and The Government of New South Wales, Sydney Trains and Another* [2020] FWCFB 4514.

⁹⁴⁸ *Re Australian Bank Employees Unions Ex parte Citicorp Australia Ltd* [1989] HCA 41; (1989) 167 CLR 513 at 519; *Re Australian railways Union; Ex parte Public Transport Corporation* [1993] HCA 28; (1993) 117 ALR 17 at [23].

call additional evidence in relation to one or more of these matters in this stage of the proceedings. We would then issue a further decision finalising the classification definitions and structures in the relevant Awards.

[926] Stage 3 would also determine wage adjustments that are justified on work value grounds for employees not dealt with in Stage 1, and determine any further wage adjustments that are justified on work value grounds for direct care workers granted initial wage increases in Stages 1 and 2 (in the context of our decision on classification definitions and structures).

[927] Staging our decision in this way:

- ensures that the parties are informed of our decision in respect of how ss.157(2) and (2A) of the FW Act apply to the Applications, before we determine the framing of various classification definitions in the relevant Awards and the Awards' broader classification structures
- avoids unduly delaying any increase to minimum wages, pending finalisation of classification definitions and structures in the relevant Awards, and
- enables us to more quickly consider how to phase-in any initial minimum wage adjustments.

[928] We now turn to the form of the interim variation.

8.3 The Interim Decision

8.3.1 Coverage and quantum

(i) Coverage

[929] As we have mentioned, 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 that an increase in minimum wages for these classifications is justified by work value reasons.

[930] We note that the Joint Employers' agreement is confined to work in a residential aged care setting, and they submit that there are features that distinguish residential and home care. We accept that the 2 sectors have different features but, as acknowledged by the Joint Employers, 'at the end of the day ... that might not mean very much ... the Bench might ... weigh all that up and come to the view that ... on balance, while there are some differences ... to arrive at the same conclusion.'⁹⁴⁹

[931] We are satisfied in respect of direct care workers in the residential and in-home aged care sector that the evidence establishes existing minimum wage rates do not properly compensate employees for the value of the work performed. Accordingly, we do not propose

⁹⁴⁹ Transcript, 1 September 2022, PN15697.

to distinguish between residential aged care and home care in terms of the application of an interim increase.⁹⁵⁰

[932] There are 3 further points in relation to the coverage of the interim wage increase.

[933] First, in respect of PCW/HCWs we do not propose to confine the interim increase to Certificate III PCW/HCWs. We are satisfied that the appropriate course is to apply the interim increase to each level of PCW/HCWs (ie at and below the Certificate III level). We are satisfied that the extent of the changes in the work of the employees in the lower classifications is such as to warrant an increase of at least the magnitude we propose to grant as an interim increase. Adopting such an approach also maintains internal relativities, at least until the classification structure is determined in Stage 3 of the proceedings. We deal with this issue in more detail later in this chapter.

[934] We are also satisfied that the interim increase should apply to each of the relevant classifications in the Nurses Award, including Nurse Practitioners, in a separate ‘Aged Care’ Schedule. We note that the Joint Employers observed that the role of the Nurse Practitioner is ‘very niche’. The Joint Employers also submitted that while the cross-examination provided ‘additional insight’ into the role, the evidence does not have the same ‘clarity’ as that pertaining to the RNs.⁹⁵¹ But, in relation to the evidence that was available, the Joint Employers clarified that a Nurse Practitioner’s scope of practice and competence sits somewhere above a RN and below a general practitioner, and noted that ‘it’s clear that some of their activities are unashamedly of a much higher order than those undertaken by the registered nurse.’⁹⁵² We agree and are satisfied that an interim increase is warranted for these employees.

[935] Second, 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. Absent an agreement between the parties, any increase applicable to these employees will be determined in Stage 3, together with whether an increase is to be provided to other administrative/support aged care workers and the extent of such increase.

[936] Third, the extent of agreement about whether work value considerations justify an increase in the minimum wages of Recreational Activities Officers/Lifestyle Officers (RAOs) requires further clarification. Whilst they are not expressly identified as direct care workers (RNs, ENs and Cert III PCWs), they are identified by the Joint Employers as ‘care workers’ who along with PCWs, should be in a separate ‘care’ stream from ‘general services’ employees in the classification structure in the Aged Care Award⁹⁵³. Further, the Joint Employers acknowledge that an RAO ‘works within the broader environment of the aged care setting and

⁹⁵⁰ See generally Meagher Supplementary Report.

⁹⁵¹ Joint Employers closing submissions dated 22 July 2022 at [21.4].

⁹⁵² Transcript, 1 September 2022, PN15675.

⁹⁵³ Joint Employers closing submissions dated 22 July 2022 at [4.38].

as such interacts with consumers who have high care needs as the PCW does’ which ‘has increased the degree of difficulty and intensity of work for RAOs’.⁹⁵⁴

[937] We do not propose to provide an interim increase in respect of RAOs (that are not classified as PCWs), 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. Absent an agreement between the parties any increase applicable to these employees will be determined in Stage 3, together with whether an increase is to be provided to other administrative/support employees and the extent of any such increase.

(ii) *Quantum*

[938] As to the quantum of the increase, we are also conscious that we are, at this stage, determining an *interim* increase for certain classifications only (ie direct care workers). As an interim increase, we must be satisfied that the quantum sits comfortably below the level of increase we may determine on a final basis.

[939] As we concluded in Chapter 3, when dealing with applications to vary modern award minimum wages it is appropriate and relevant to have regard to relativities within and between awards. We agree with the Commonwealth that aligning rates of pay in one modern award with classifications in other modern awards with similar qualification requirements will support a system of fairness, certainty and stability. The C10 Metals Framework Alignment Approach and the AQF are useful tools in this regard. That said, we acknowledge that such an approach has limitations, in particular:

- alignment with external relativities is not determinative of work value
- while qualifications provide an indicator of the level of skill involved in particular work, factors other than qualifications have a bearing on the level of skill involved in doing the work, and
- alignment with external relativities is not a substitute for the Commission’s statutory task of determining whether a variation of the relevant modern award rates of pay are justified by ‘work value reasons’ (being reasons related to the nature of the employees’ work, the level of skill and responsibility involved and the conditions under which the work is done).

[940] In respect of the application of the C10 Metals Framework Alignment Approach, the *ACT Child Care Decision* set out a 3 step process for the determination of properly fixed minimum rates:

1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA process with particular reference to the current rates for the relevant classifications in the *Metal Industry Award*. In this regard the relationship between the

⁹⁵⁴ Joint Employers closing submissions dated 22 July 2022 at [10.5]–[10.6].

key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.

2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.

3. If the existing rates are too low they should be increased so that they are properly fixed minima.⁹⁵⁵

[941] In Annexure O of their closing submissions, the Joint Employers set out their assessment of the application of the C10 Metals Framework Alignment Approach to the 3 Awards which are the subject of the Applications.

[942] The Joint Employers identify what they characterise as a ‘significant anomaly’ when the existing rates in the Nurses Award are compared to the C10 Metals Framework, in that the minimum rates in the Nurses Award do not correspond to the minimum qualifications of the position when compared to the AQF and the C10 Metals Framework.⁹⁵⁶

[943] At [7.5] of their closing submissions, the Joint Employers identify the extent of the non-alignment of the RN classification to the Metals Framework, including that:

- the minimum rates for ENs currently align at 102 per cent relativity, which sits between C10 and C9, despite the fact that an EN is required to obtain a Diploma of Nursing, which is the qualification requirement at the C5 rate in the Metals Framework
- the minimum rates for a RN currently align just below a C8, but the standard qualification for a RN is an accredited tertiary degree—which is an AQF Level 7 qualification that aligns with C1 in the Metals Framework, and
- the minimum rates for a Nurse Practitioner currently align with a C2(b) with a qualification requirement of an Advanced Diploma, yet the qualification for Nurse Practitioner is a post-graduate degree.

[944] The weekly rate for an RN at Level 1, pay point 1 under the Nurses Award is currently \$1,025.20. The Joint Employers accept that the role of RN corresponds to AQF Level 7 and aligns with level C1 in the Metals Framework. Both levels—RN Level 1 in the Nurses Award and C1(a) in the Manufacturing Award—have a degree as a minimum qualification. If existing relativities were then to be retained (as contemplated by step 2 from the *ACT Child Care Decision*), the ANMF submitted that the result would be the following (based on the rates of pay applicable as at 21 April 2022:

⁹⁵⁵ *ACT Child Care Decision* at [155].

⁹⁵⁶ Joint Employers closing submissions dated 22 July 2022 Annexure O at [3.10].

Table 18: Alignment of existing Nurses Award classification structure with the Metals Framework rate C1(a)⁹⁵⁷

	Existing rate	Existing relativity against RN L1 G1	New rates	Relativity after alignment
<u>Nurse Practitioner</u>				
1st year	\$ 1,508.60	154%	\$ 2049.12	154%
<u>Registered Nurse</u>				
RN Level 5 Grade 1	\$ 1,509.90	154%	\$ 2050.88	154%
RN Level 4 Grade 1	\$ 1,496.30	153%	\$ 2,032.41	153%
RN Level 3 Pay point 1	\$ 1,311.00	134%	\$ 1,780.72	134%
RN Level 2 Pay point 1	\$ 1,209.10	123%	\$ 1,642.31	123%
RN Level 1 Pay point 1	\$ 980.10	100%	\$ 1,331.26	100%
<u>Enrolled Nurse</u>				
EN pay point 1	\$ 916.20	93%	\$ 1,244.47	93%
Student EN, >21 yrs	\$ 821.40	84%	\$ 1,115.70	84%
<u>Nursing Assistant</u>				
Experienced	\$ 899.50	92%	\$ 1,221.78	92%
3rd year	\$ 871.50	89%	\$ 1,183.75	89%
2nd year	\$ 857.20	87%	\$ 1,164.33	87%
1st year	\$ 843.40	86%	\$ 1,145.58	86%

[945] The application of the C10 Metals Framework Alignment Approach in accordance with the 3 step process set out in *ACT Child Care Decision* would result in a 35 per cent pay increase across all levels.

[946] Despite the Joint Employers' support for a 35 per cent pay increase, at least at the RN level, the ANMF position is markedly ambivalent to such an outcome. In reply to the Joint Employers' proposal (including the posited 35 per cent increase), the ANMF submits:

‘That is not the case that the ANMF is advancing. Rather, its submission is that the preferable approach to section 157(2) of the FW Act is to take a work value approach,

⁹⁵⁷ ANMF submissions dated 21 April 2022 at [58]. We note that this table does not include all of the relevant rates in the Nurses Award.

and look at changes in work and historical undervaluation as justifying increases in wages, rather than by selecting a pay level (be it RN level 1 grade 1 or any other level), adjusting it to fit a qualifications framework, and then mechanically adjusting all other rates.⁹⁵⁸

[947] Later the ANMF submitted:

‘In truth, the Metals Framework is a blunt instrument. Any use of it in this proceeding would be heavily reliant on the third step described in the *ACT Child Care Decision* ...

The ANMF's primary submissions is that it is not necessary or appropriate for the Commission to identify a “*key classification*” and apply the Metals Framework in order to determine its application to vary the Aged Care Award or the Nurses Award.

If that submission is not accepted and the Commission considers that it is necessary to start by fixing a “*key classification*” to the comparable classification in the Manufacturing Award, then the ANMF's submission is that the key classification for the Nurses Award is, in fact, RN Level 1 Pay point 1. Nursing care is provided under the Nurses Award under the supervision of Registered Nurses. And, it would not make sense to view a Nursing Assistant, who is not a nurse, and whose employment is “*solely to assist an RN or [EN] in the provision of nursing care to persons,*” as being the key classification in a Nurses Award.⁹⁵⁹

[948] It was only during the course of closing oral argument that counsel for the ANMF appeared to warm somewhat to the idea of a 35 per cent increase:

‘The Commission can and should increase minimum rates for registered nurses in aged care by 35 per cent, if, having a regard to the evidence, the Commission determines that a 35 per cent increase for registered nurses is justified and is necessary to achieve modern awards objective. However, the ANMF is not asking the Commission to apply a 35 per cent increase based upon an application of the minimum framework in a way that is divorced from work value reasons.⁹⁶⁰

[949] In essence the ANMF submits that if we think a 35 per cent increase in the minimum rates for RNs in aged care is justified by work value reasons and is necessary to achieve the modern awards objective then we should vary the Nurses Award accordingly. A difficulty with this proposition is that it is inconsistent with the case put by the ANMF.

[950] Earlier in the course of closing oral argument counsel for the ANMF submitted:

‘The position of the ANMF is that both changes to the work by direct care workers and the historical undervaluation of this work justifies an increase in the minimum wages for direct care work workers in aged care and an increase in the amount of 25 per cent ...

⁹⁵⁸ ANMF submissions dated 21 April 2022 at [59].

⁹⁵⁹ ANMF closing submissions in reply dated 17 August 2022 at [131], [145]–[146].

⁹⁶⁰ Transcript, 24 August 2022, PN14840.

The ANMF seeks a 25 per cent increase in wages because, in our submissions, such an increase is justified by the work value reasons and necessary to achieve the modern awards objective and the minimum wages objective. That 25 per cent is not put as an ambit claim, it is put on the basis that that is in fact what the work is worth.⁹⁶¹ [Emphasis added]

[951] So the ANMF is contending that the value of the work of an RN in aged care is 25 per cent above the current minimum rates, but, invites us – without any elaboration or argument – to grant a 35 per cent increase if we think that meets the relevant statutory tests. To that we would simply say that it’s the ANMF’s application and while we are not bound by the relief sought we do not think it appropriate, in these proceedings, to contemplate an increase beyond that in the union’s claim; and certainly not without providing all interested parties with an opportunity to be heard.

[952] We would also note that the last sentence in the above quote appears to proceed on a false premise. The qualifications required for a particular role will usually be relevant to the task of assessing the level of skill exercised by an employee. And, ‘work value reasons’ justifying the amount that employees should be paid for doing a particular kind of work are ‘reasons related to’, among other things: ‘the level of skill ... involved in doing the work’ (s.157(2A)(a)). We also accept, as is evident from our discussion of ‘invisible skills’ in Chapter 7.3.2 that the relevant qualification is, plainly, not exhaustive of the level of skill exercised in doing a particular kind of work.

[953] The Commonwealth was somewhat more fulsome in its response to the Joint Employers’ proposal, submitting:

‘The Joint Employers observed that the minimum rates in the Nurses Award do not correspond to the minimum qualifications of the positions when compared against the AQF and note that the Nurses Award was one of the awards identified by the President for review. They also submitted that the classification of Registered Nurse should align with C1.

Consistent with the above, the Commonwealth submits that a comparison to rates in the Metal Industry classification structure with equivalent qualification levels may be of some assistance when the Commission is dealing an application under s 157 of the FW Act to vary modern award minimum wages on work value grounds but is not a complete answer. In addition to the level of skill involved in doing the work, s 157 requires the Commission consider whether there are work value reasons related to the nature of the work, the level of responsibility involved in doing the work and the conditions under which the work is done.

It would be open to [the] Commission to align modern award wages rates for employees with equivalent AQF qualification levels in the absence of any countervailing work value reasons. However, there may be reasons justifying different wage rates for employees, despite their having attained equivalent AQF qualifications. For example, employees may have different levels of responsibility, perform work of a different

⁹⁶¹ Transcript, 24 August 2022, PN14644–PN14645.

nature or under different conditions. There may also be factors other than qualification that have a bearing on the level of skill involved in doing the work.⁹⁶²

[954] We accept that in determining this matter we are not confined to the terms sought in the Applications and may determine the claims other than in the terms sought by the ANMF but that if we were to contemplate such a course, we would be obliged to provide interested parties procedural fairness.

[955] We agree with the Joint Employers' assessment that the comparison between the C10 Metals Framework and the Nurses Award discloses an anomaly. The realignment of the classification rates in the Nurses Award would also be consistent with the approach taken in the *Teachers Decision*. In our *provisional* view, there is considerable merit in such an approach. But that is not what we propose to do in this decision.

[956] The realignment of the rates for nurses in the aged care sector would have implications for nurses employed in other sectors and for the employers in those sectors. Given the position taken by the ANMF in these proceedings and the fact that other parties likely to have an interest in the matter are entitled to be heard on the matter, we have not taken this particular issue any further in these proceedings. As we mention later in this chapter, it is open to the ANMF to simply make an application to vary the Nurses Award.

[957] However, having regard to the evidence canvassed earlier in this chapter we are satisfied that an interim increase of 15 per cent for nurses working in aged care in each of the relevant classifications is plainly justified by work value reasons, as required by s.157(2).

[958] In respect of the Aged Care Award, the Joint Employers submit that 'Aged Care Level 4' is the key classification level. PCW grade 3 (with a minimum qualification requirement of a Certificate III) sits within this level. The minimum rate for an Aged Care Level 4 employee is \$940.90 per week, which is aligned with the current minimum rate for a C10 level under the Manufacturing Award (as does the minimum qualification of Certificate III).

[959] In respect of the SCHADS Award, the Joint Employers submit that Home Care Employee level 3 is the key classification. That classification requires the employee to either be the holder of a relevant Certificate III qualification or to have knowledge and skills gained through on-the-job training commensurate with the requirements of the work at that level. The minimum rate for that classification is also \$940.90, which is consistent with the minimum rate for a C10 level under the Manufacturing Award.

[960] It follows that in terms of step 1 in the 3-step process set out in the *ACT Child Care Decision*, the key classifications in the Aged Care and SCHADS Awards are properly aligned with the C10 Metals Framework, insofar as the requisite qualifications are concerned. But, of course, that is not the end of the story. It is notable that the Joint Employer submissions quote the 3 steps from the *ACT Child Care Decision*, but essentially ignore the third step in that process. Insofar as the Joint Employers are to be taken to suggest that it would be enough for the Commission to simply align existing rates with the C10 Metals Framework, we reject that proposition. Plainly, it is necessary for the Commission to consider whether there have been

⁹⁶² Commonwealth submissions dated 8 August 2022 at [150]–[152].

changes in work value, or a historic undervaluation of the work, which constitute work value reasons which justify an increase in minimum rates.

[961] Step 3 calls for a consideration of whether the existing rates for these classifications are too low based on the value of the work performed by these employees. Having regard to the evidence canvassed earlier in this chapter, we are satisfied that an interim increase of 15 per cent at the Aged Care Level 4 for PCW grade 3 is plainly justified by work value reasons, as required by s.157(2). We are likewise satisfied that an interim increase of 15 per cent at the Home care employee level 3 in the SCHADS Award is justified by work value reasons for the purposes of s.157(2).

[962] We now turn to the rates *below* Aged Care Level 4 (in respect of the lower level PCW classifications) and Home care employee level 3. As mentioned earlier we are satisfied that the appropriate course is to apply the interim increase to each level of PCW (ie at and below the Certificate III level).

[963] During the course of oral submissions, counsel for the HSU pointed out that a strict application of the C10 framework to the lower levels of PCWs in the Aged Care Award (that is those below a Certificate III) would appear to result in a reduction in the current minimum rates in the Award.⁹⁶³

[964] In closing oral argument, the representative for the Joint Employers clarified that the Joint Employers are *not* contending that the wage rates of any employee should be reduced and submitted:

‘MR WARD: If the Commission formed the view that it was appropriate, by way of example only, that you grant a 4 per cent increase to the Certificate III classification, there would obviously be a consideration then as to what should happen with the classifications below.

It might ordinarily follow that you want to maintain the current internal relativities, unless there's some particular reason why they might cause you some anxiety and, in that case then, the classification below would obviously have an increase as well commensurate to maintain the relativity. That's certainly one approach that would be available to the Commission and, in that sense, it wouldn't go down.

I don't think there's enough evidence before the Commission - in fact, I don't think there's any evidence before the Commission - of any employee who operates currently in the classification below the Certificate III or equivalent classification ...

... Our presumption in this case was largely the one I put, which was we had assumed that you most likely would grant an increase of some magnitude to the Certificate III classification and then there would be some obvious movement of the classification below commensurate with that. We have made that assumption. There's not enough

⁹⁶³ Transcript, 24 August 2022, PN14472.

evidence before the Commission to independently form a view as to the value of the work for that classification.⁹⁶⁴

[965] The process set out in the *ACT Child Care Decision* clearly envisages the proper fixation of a key classification followed by the adjustment of other rates by applying established internal relativities. We think that is a sensible and appropriate approach to adopt in the circumstances of this case. Further, our evidentiary findings clearly establish a significant increase in the work value of all employees engaged in direct care work. In relation to direct care employees classified below Aged Care Level 4, the following findings are particularly relevant:

- the complexity of the work has increased
- the acuity of residents in aged care has increase; they enter aged care with increased frailty, co-morbidities and acute care needs
- the proportion of residents and clients in aged care with dementia and dementia associated conditions has increased
- more residents and clients in aged care require palliative care
- employees have greater engagement with family and next of kin of clients and residents
- the model of aged care has shifted to person-centred care; requiring employees to be responsive and adaptive, and
- aged care employees are required to meet the cultural, social and linguistic needs of diverse communities;

[966] We are satisfied that an interim increase of 15 per cent for direct care classifications below Aged Care Level 4 are plainly justified by work value reasons, as required by s.157(2). We do not wish to be taken to be suggesting that the existing internal relativities are immutable; simply that we propose to maintain them at present. 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. Accordingly, we are also satisfied that an interim increase of 15 per cent for direct aged care classifications below Home care employee level 3 is justified by work value reasons.

[967] Having regard to all of the matters canvassed earlier in this chapter, we are satisfied that the variation of the minimum wages of the direct care aged care classifications in the Aged Care and SCHADS Awards to provide for an interim increase of 15 per cent is plainly justified by work value reasons. Section 157(2)(a) is so satisfied.

[968] We wish to make it clear that this does not conclude our consideration of the Unions' claim for a 25 per cent increase for other employees, namely administrative and support aged care employees. Nor are we suggesting that the 15 per cent interim increase necessarily exhausts

⁹⁶⁴ Transcript, 1 September 2022, PN15543–PN15546, PN15553.

the extent of the increase justified by work value reasons in respect of direct care workers. Whether any further increase is justified will be the subject of submissions in Stage 3 of these proceedings.

[969] We also point out that in determining the quantum of the interim increase we have *not* taken into account *all* of the material before us.

[970] As noted in the Lay Witness Evidence Report, the lay witnesses gave a great deal of detailed evidence regarding the impact of the COVID-19 pandemic. Many witnesses also gave evidence regarding staffing levels; in particular, the challenges associated with understaffing.⁹⁶⁵

[971] The Joint Employers address the issue of whether the COVID-19 pandemic and staffing shortages within the aged care sector are the proper subject of work value assessment in Section 5 of their closing submissions.⁹⁶⁶ The Joint Employers there acknowledge the change in the work demanded by the pandemic, but argue, citing *Decision - Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010*⁹⁶⁷ that this change does not alter level of skill or responsibility exercised by employees. They also submit it is not clear whether the changes to work resulting from the pandemic are temporary or not.⁹⁶⁸

[972] In respect of staffing shortages, the Joint Employers submit that while it is an open question whether this issue is relevant to work value assessment, staffing shortages affecting the aged care sector are a matter for industry and government to respond to, and not the Commission through a work value case.⁹⁶⁹ We address the relevance of increased workload and work intensification in Chapter 3.

[973] We have not taken the impact of the COVID-19 pandemic or the issues arising from understaffing into account in arriving at the interim increase we have determined to be justified by work value reasons. These matters can be the subject of further submissions in the next stage of the proceedings; in particular, we invite submissions on the extent to which the changes to work resulting from the pandemic have become permanent.

8.3.2 *Timing and implementation*

[974] Given the funding arrangements in the aged care sector, the Joint Employers and the Commonwealth sought an opportunity to make further submissions regarding the timing of the implementation of any minimum wages increases arising from these proceedings. As the Commonwealth put it:

‘The Commonwealth would also welcome an opportunity to work with the Commission and the parties regarding the timing of implementation of any increases, taking into

⁹⁶⁵ Lay Witness Evidence Report at [3].

⁹⁶⁶ Joint Employers closing submissions dated 22 July 2022 at Section 5.

⁹⁶⁷ [2020] FWCFB 4961.

⁹⁶⁸ Joint Employers closing submissions dated 22 July 2022 at [5.17].

⁹⁶⁹ Joint Employer closing submissions dated 22 July 2022 at [5.23].

account the different funding mechanisms that support the payment of aged care workers' wages.⁹⁷⁰

[975] We think the course proposed is a reasonable one and is comprehended within the staged approach discussed in Chapter 8.2. We deal with the next steps in this process in Chapter 9.

[976] To assist the parties in their submissions regarding the implementation of the interim increase, this section of our decision sets out the relevant legislative provisions and the approach taken to the phasing-in of Commission decisions in other cases.

[977] Section 166 of the FW Act sets out when a determination under Part 2-3 setting, varying or revoking modern award minimum wages comes into operation⁹⁷¹ and creates a default rule that a determination under Part 2-3 comes into operation on 1 July in the next financial year after it is made (or on the day it is made if made on 1 July), unless the Commission is satisfied that it is appropriate to specify another day in the determination as the day on which it comes into operation. The Commission may also specify that changes take effect in stages, if it is satisfied that it is appropriate to do so.

[978] The Explanatory Memorandum for the *Fair Work Bill 2008* (Cth) states:

‘Clause 166 – When variation determinations setting, varying or revoking modern award minimum wages come into operation

631. Clause 166 provides for when determinations setting, varying or revoking modern award minimum wages come into operation. (These rules apply to determinations made under this Part. Wage variations flowing from annual wage reviews commence in accordance with rules in Part 2-6.)

632. A determination affecting modern award minimum wages will generally come into operation on 1 July in the next financial year, or on the day it is made if made on 1 July (clause 166(1)). This is consistent with the commencement of wage variations from annual wage reviews, and is designed to ensure certainty and predictability for employers and employees (see clause 286).

633. However, if FWA is satisfied that it is appropriate to do so it may specify another day on which the determination comes into operation (clause 166(2)).

634. This day will almost always be on or after the day that the determination is made. FWA may only vary an award retrospectively in very limited circumstances, where:

- the determination relates to a variation to remove an ambiguity or uncertainty, or to correct an error; and
- FWA is satisfied that there are exceptional circumstances that justify doing so (subclause 166(3)).

⁹⁷⁰ Commonwealth submissions dated 8 August 2022 at [5].

⁹⁷¹ Section 165 deals with when variation determinations (other than those setting, varying or revoking modern award minimum wages) come into operation, and s.167 sets out special rules relating to retrospective variations of awards.

635. FWA may provide that changes to modern award minimum wages take effect in stages if it is satisfied that it is appropriate to do so (subclause 166(4)).

636. A determination setting, varying or revoking modern award minimum wages will generally take effect in relation to a particular employee at the start of the employee's next full pay period on or after the day that the determination comes into operation. However, where a determination is to take effect in stages, it will not take effect in relation to a particular employee until the start of the employee's next full pay period on or after the day that the change to modern award minimum wages is specified to take effect (subclause 166(5)).'

[979] There is limited *express* consideration of s.166 in Commission decisions. Two recent examples which have considered s.166 are the decisions of *Australian Workers' Union*⁹⁷² (to vary minimum wages in the *Horticulture Award 2020*) and *Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch (130N-NSW)*.⁹⁷³

[980] In *Australian Workers' Union*,⁹⁷⁴ the Full Bench was considering the operation of s.166 in the context of when the variation determination should come into effect—rather than the appropriateness of transitional or staged increases—but the decision does provide some commentary on the statutory requirements in s.166 and the types of considerations that may be relevant to considering the appropriateness of commencement arrangements, as follows:

'[152] The NFF and the Ai Group are correct in their views that s.166 will apply to the determination, on the basis of our earlier conclusion that the Application seeks to set modern award minimum wages for pieceworkers.

[153] Pursuant to s.166(1)(a) (and assuming the determination is made before 1 July 2022), the determination will come into operation on 1 July 2022 unless we specify another day of operation. Subsection 166(2) provides that we must not specify another day unless "satisfied it is appropriate to do so".

[154] To the extent that s.166(1)(a) can be said to create "a presumption" that the variation determination arising from these proceedings takes effect from 1 July 2022 it is not a difficult presumption to displace. We need only be satisfied it is "appropriate" to specify a different day of operation.

[155] A number of Full Bench decisions have considered the implementation arrangements in respect of variations to modern awards.

[156] The *Penalty Rates (Transitional Arrangements) Decision* dealt with the implementation of the Commission's decision to reduce Sunday and public holiday penalty rates in certain Hospitality and Retail sector awards. In particular, the Full Bench

⁹⁷² [2022] FWCFB 4.

⁹⁷³ [2021] FWCFB 6021.

⁹⁷⁴ [2022] FWCFB 4.

concluded that “any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective.” These observations have been adopted by subsequent Full Benches, including in relation to variations which advantaged the employees covered by the relevant modern award.

[157] In relation to the s.134 considerations, the Penalty Rates Full Bench stated that the setting of transitional arrangements required a particular focus on:

- “relative living standards and the needs of the low paid (s.134(1)(a));
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)); and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s.134(1)(g)).”

[158] Further, as the proposed variation sets modern award minimum wages for pieceworkers, it enlivens ss.157(2) and 284 of the Act...

[160] The matters in s.284(1)(d) and (e) are not relevant in the present context. As to s.284(1)(a), in the November 2021 Decision we concluded that “no probative evidence has been advanced to suggest, much less demonstrate, that the introduction of a minimum wage floor in clause 15.2 would have any appreciable impact on the performance and competitiveness of the national economy”. It follows that this consideration has no bearing on the determination of the operative date of the variation. The matters in s.284(1)(b) and (c) are in the same terms as s.134(1)(c) and (a) respectively.

[161] The Penalty Rates Full Bench also said:

“We must also perform our functions and exercise our powers in a manner which is ‘fair and just’ (as required by s.577(a)) and must take into account the objects of the Act and ‘equity, good conscience and the merits of the matter’ (s.578).

...

Finally, fairness is a relevant consideration, given that the modern awards objective speaks of a ‘fair and relevant minimum safety net’. Fairness in this context is to be assessed from the perspective of both the employee and employers covered by the modern award in question.”

[162] We apply the above observations to our consideration of the operative date of the variation we propose to make.

[163] As to the s.134 considerations, the following conclusions from the November 2021 Decision are particularly relevant:

- “Relative living standards and the needs of the low paid” weighs in favour of inserting a minimum wage floor from an early operative date. There is widespread underpayment of pieceworkers in the horticulture industry and, further, a significant proportion of pieceworkers earn less than the National Minimum Wage. The proposed variation will assist in rectifying this situation.
- The “need to encourage collective bargaining” and “the promotion of social inclusion through increased workforce participation” weigh against varying the Horticulture Award to insert a minimum wage floor . It follows that these considerations favour a later operative date.
- The insertion of a minimum wage floor and consequential time recording provisions in the piecework clause in the Horticulture Award are likely to have a negative impact on business, by increasing employment costs and regulatory burden for those businesses that engage pieceworkers. These considerations favour a later operate date.
- The introduction of a minimum wage floor will increase compliance by providing an easily calculated minimum payment. The proposed variation is simple and easy to understand. These considerations weigh in favour of the insertion of a minimum wage floor, although not strongly so, and similarly lend some support to an earlier operative date.

[164] We now turn to the AWU’s submission that delaying the operative date until 1 July 2022 may lead to an influx prior to this date of applications for approval of enterprise agreements that “seek to ‘lock-in’ piecework rates through enterprise agreements on the basis of a point-in-time BOOT assessment.”

[165] We agree with the NFF’s characterisation of the submission advanced by the AWU; it is speculative. Further, it is not clear what capacity employers would actually have to “lock-in” piece rates through enterprise agreements before the determination comes into operation. For example, this may not be feasible in operations where employers find a need to change piece rates frequently. Also, it may be difficult to establish that any fixed piece rates satisfy the BOOT against the Award as it is, when under the approach in Hu (No 2) the minimum amount of the piece rate could vary depending upon factors such as crop and environmental conditions and the characteristics of the workforce available to the employer at a particular time.

[166] The capacity for an enterprise agreement to exclude the effect of the amendments to the Horticulture Award, may also be limited by s.206 of the Act. As discussed in section 3.7 of this decision, s.206 is to the effect that the base rate of pay under such an enterprise agreement could not be less than the base rate of pay under the Award as it is from time to time. In particular, the base rate of pay under the agreement could not be less than the ‘minimum wage floor’ for piecework under draft cl.15.2(f).

[167] Other contextual issues also bear on the operative date issue. One such matter is our previous finding that the “totality of evidence presents a picture of significant

underpayment of pieceworkers in the horticulture industry when compared to the minimum award hourly rate”:

“A significant proportion of pieceworkers, and WHM’s in particular, earn less per hour than the NMW (\$20.33 per hour; which is also the minimum hourly rate for a level 1 employee in the Horticulture Award) and a substantial proportion earn less than the ‘target rate’ for the ‘average competent pieceworker’ prescribed in clause 15.2.”

[168] Such a consideration weighs in favour of an early operative date. We have taken into account the matters set out above and the specific issues identified in the submissions. Ultimately a balance needs to be struck between the interests of employers and the interests of employees.

[169] Finally, we accept that employers will require a reasonable time to adjust to the imposition of a minimum wage floor for pieceworkers. Payroll systems, recruitment practices and supervision arrangements may need to be changed to adapt to the new award requirements. These considerations weigh in favour of a later operative date.

[170] In our view an operative date of 28 April 2022 is “appropriate”, within the meaning of s.166(2). Such an operative date is about 3 months from the date of this decision and almost 6 months from the November 2021 Decision. We have taken into account the ss.134 and 284 considerations to the extent they are relevant, and are satisfied that a 28 April 2022 operative date is fair, when assessed from the perspective of both the employers and employees covered by the Horticulture Award.

[171] A variation determination will be published shortly.’ [Footnotes omitted]

[981] In *Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch (130N-NSW)*,⁹⁷⁵ the Full Bench held that it was appropriate to set 1 January 2022 as the operative date and that there should be no phasing-in of wage increases:

‘[19] We consider that the variation to the EST Award to give effect to the April decision should have an operative date of 1 January 2022, and that there should be no phasing-in of the increases. In reaching this conclusion, we have taken into account the following matters:

- (1) Employers covered by the EST Award, including the early childhood sector employers who will principally be affected, have been on notice since the date of the April decision (19 April 2021) as to the wage increases which will be made to the minimum wage rates in the EST Award. This will mean that, by 1 January 2022, they will have had over 8 months to make the necessary adjustments to accommodate the impact (if any) of the increases.

⁹⁷⁵ [2021] FWCFB 6021.

(2) The increases to minimum rates which will be made are, while not insignificant, not of such a quantum or scope as to require a phasing-in period. For employers currently paying only minimum award rates, the increases involved range from approximately 3.3% to 13.6%, depending on the level at which the employee is currently graded. Further, in respect of the early childhood sector, the EST Award will likely only be applicable to a small minority of the employer's workforce.

(3) The funding changes identified in CCSA's submissions, and its analysis of the impact on the charged cost of early childhood education and care, support the conclusion that an operative date of 1 January 2022 without phasing-in is appropriate.

(4) Considerable weight must be placed on the adherence of the ACA/ABI to the consent position, albeit that those organisations would undoubtedly have preferred a later operative date. The ACA was the principal employer participant in the main proceedings, and adduced extensive evidence from a wide range of businesses in the for-profit early childhood sector in response to the original claims advanced by the IEU, including detailed evidence concerning the affordability (or otherwise) of those claims. In that context, we have confidence that the ACA/ABI is representative of a wide range of employers in that sector and that its assessment that an operative date of 1 January 2022 is viable may be relied upon.

(5) By contrast, the AFEI called no evidence from any employer in the sector in the main proceedings, nor has it adduced any evidence from any employer in the post-April decision phase of the proceedings in support of its position concerning operative date and phasing-in. In that context, its submissions concerning affordability cannot be weighed as rising above the level of mere assertion. The same may be said in relation to the position of the CER, which did not participate in any meaningful way in the main proceedings.

(6) 1 January 2022 appears to us to be the most convenient operative date since it will allow employers to set their charges for the 2022 calendar year on the basis that the wage increases have become payable.

[20] Section 166(1) of the FW Act establishes a default position that, relevantly, determinations that set or vary modern award minimum wages outside of the annual wage review are to come into operation on 1 July in the next financial year after the determination is made. However, s 166(2) empowers the Commission to specify another day in the determination as the operative date "*... if it is satisfied that it is appropriate to do so*". In this case, we consider that it is appropriate to set 1 January 2022 as the operative date having regard to the six matters stated above.

[21] We see no reason to give an earlier operative date in respect of the Educational Leader's allowance, as submitted by the Arraballes.' [Emphasis added]

[982] In summary, s.166 creates a default rule or presumption that a determination varying modern award minimum wages comes into operation on 1 July in the next financial year after it is made. To displace the presumptive operative date the Commission need only be satisfied that it is ‘appropriate’ to specify a different operative date.

[983] 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 the objectives of the FW Act and ‘equity, good conscience and the merits of the matter’ (s.578).

[984] 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’. Fairness in this context is to be assessed from the perspective of both the employees and employers affected by the variation determination.

[985] A number of Commission decisions have considered the principles to be applied when phasing-in variations to modern awards.

[986] In the context of a *reduction* in penalty rates, the Penalty Rates Full Bench summarised the matters which were relevant to the determination of the transitional arrangements to implement the *Penalty Rates decision*, as follows:

‘[141] The relevant considerations may be conveniently grouped into three broad categories:

- the statutory framework;
- the Penalty Rates decision; and
- fairness.

[142] Before turning to each of these matters we would observe at the outset that the range of relevant considerations – and the tension between some of the matters we must take into account – means that the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgment, rather than a formulaic or mechanistic approach involving the quantification of the weight accorded to each particular consideration.

[143] As to the statutory framework, any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective. Further, as to the s.134 considerations (set out in s.134(1)(a)–(h)), the setting of transitional arrangements will require a particular focus on:

- relative living standards and the needs of the low paid (s.134(1)(a));
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(1)(f)); and

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

[144] We must also perform our functions and exercise our powers in a manner which is “fair and just” (as required by s.577(a)) and must take into account the objects of the Act and “equity, good conscience and the merits of the matter” (s.578).

[145] As to the second category, the evidence and our findings and conclusions in the *Penalty Rates decision* are relevant.

[146] The finding that the relative disutility of Sunday work (as opposed to Saturday work) is “much less than in times past” informed our conclusion that the existing Sunday penalty rates in the *Hospitality, Fast Food, Retail and Pharmacy Awards* do not provide a fair and relevant safety net. That finding, that the existing Sunday penalty rates in the *Hospitality, Fast Food, Retail and Pharmacy Awards* do not achieve the modern awards objective (because they do not provide a fair and relevant safety net), is a consideration which plainly supports the timely implementation of the reduction in Sunday penalty rates in these awards.

[147] A number of the submissions advanced by employer organisations in these proceedings contend that a shorter transition period will result in positive employment effects materialising earlier. While this may be so, it needs to be borne in mind that the views expressed in the *Penalty Rates decision* about the potential for positive employment effects consequent upon a reduction in Sunday penalty rates, were somewhat muted and cautious. As such, the force of the various employer submissions which rely on positive employment effects to support a shorter transition period are somewhat diminished. We note however that the various employer submissions also rely on other effective effects resulting from the reduction in Sunday penalty rates ... These positive effects favour a shorter transition period.

[148] Finally, fairness is a relevant consideration, given that the modern awards objective speaks of a “fair and relevant minimum safety net”. Fairness in this context is to be assessed from the perspective of both the employees and employers covered by the modern award in question. While the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, it is not appropriate to “totally subjugate” the interests of the employers to those of the employees.

[149] In assessing the fairness of transitional arrangements it is relevant to consider the extent of the reduction in penalty rates and the number of employees affected. In this regard we note that the reductions in Sunday penalty rates are more significant in the *Retail and Pharmacy Awards* than in the *Hospitality and Fast Food Awards*. This is a factor which favours a longer transition period in respect of the *Retail and Pharmacy Awards*.

[150] As to the number of employees affected by the penalty rate reductions, one of the questions on notice put to all parties in the present proceedings was in the following terms:

‘Each party is asked to provide an estimate of the number of employees affected by the penalty rate reductions determined in the [*Penalty Rates decision*], by award, and the basis of that assessment.’

[151] The revised background document published on 26 May 2017 summarises the submissions filed in response to the above question, it is not necessary to repeat that material

here. Suffice to say that there was a significant variation in the estimates provided, depending on the range of assumptions adopted.

[152] For example, in respect of the *Retail Award* the Retail Employers submit that ‘between 79,833 and 108,831 employees will be affected by the penalty rate reductions under the *Retail Award*. ABI’s estimate is between 71,62 and 164,002 employees. Whereas the SDA contends that the 412,171 persons employed in the ANZSIC industry classification ‘Retail Trade’ (which includes employees covered by the *Retail*, *Fast Food* and *Pharmacy Awards*), whose pay is determined by award only, are affected by the penalty rate reductions ‘irrespective of whether or not they presently perform any hours of work on a Sunday’.

[153] The available data does not allow us to determine the number of employees affected by the penalty rate reductions with any precision. Nor is it necessary that we do so. It suffices to observe that the number will be significant, in respect of each of the awards before us, both in terms of absolute numbers and as a proportion of the employees covered by the relevant awards.

[154] We make the same observation about the monetary impact of the penalty rate reductions on particular employees. The extent of the impact on an individual employee will depend on a number of factors, including:

- whether the employee is paid in accordance with the relevant award or is covered by an enterprise agreement or over award arrangement;
- the frequency with which they work on Sundays and public holidays;
- the number of hours they work on Sundays and public holidays;
- their classification level and employment status (full-time, part-time or casual); and
- the applicable award.

[155] A range of potential adverse impacts were advanced in the proceedings. As a general proposition, the union submissions advance examples which tended to overstate the impact, while the employer submissions understate it. For our part, we accept that the reductions in penalty rates we have determined will have an adverse impact on the award-reliant employees who work at these times and are likely to reduce their earnings and have a negative impact on their relative living standards and on their capacity to meet their needs.⁹⁷⁶ [References omitted]

[987] In *4 yearly review of modern awards – Award stage – Group 4 – Aged Care Award 2010 – Substantive claims*,⁹⁷⁷ a Full Bench of the Commission considered submissions in response to its provisional view to phase in pay increases for casual employees working on weekends and public holidays:

‘[33] In the *Penalty Rates – Transitional Arrangements decision* the Full Bench made the following observation about the determination of transitional arrangements:

⁹⁷⁶ *Penalty Rates – Transitional Arrangements decision* [2017] FWCFB 3001 (5 June 2017, Justice Ross, President, Catanzariti VP, Asbury DP, Hampton C, Lee C). This extract was cited with approval in *Application to vary the General Retail Industry Award 2010* [2020] FWCFB 3427 (1 July 2020, Justice Ross, President, Catanzariti VP and Asbury DP) at [7].

⁹⁷⁷ [2019] FWCFB 7094.

‘the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgment, rather than a formulaic or mechanistic approach involving the quantification of the weight accorded to each particular consideration.’

[34] The Full Bench went on to observe that the following matters were relevant to its determination of transitional arrangements in relation to the *reduction* of penalty rates.

(i) The statutory framework: any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective. The Full Bench also noted that it must perform its functions and exercise its powers in a manner which is “fair and just” (as required by s.577(a)) and must take into account the objects of the Act and “equity, good conscience and the merits of the matter” (s.578).

(ii) Fairness is a relevant consideration, given that the modern awards objective speaks of a “*fair* and relevant minimum safety net”. Fairness in this context is to be assessed from the perspective of both the employees *and* employers covered by the modern award in question. The Full Bench said “while the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, it is not appropriate to ‘totally subjugate’ the interests of the employers to those of the employees”.

[35] We adopt the above observations and propose to apply them to the matter before us. In the *August 2019 Decision* we expressed the *provisional* view that the increase in the weekend and public holiday penalty rates for casuals should be phased in as follows:

	Saturday	Sunday	Public holidays
	(% of ordinary rate, inclusive of casual loading)		
1 December 2019	160	185	260
1 July 2020	175	200	275

[36] As mentioned in the *August 2019 Decision* we accept that these variations will increase employment costs and to the extent that fulltime or part-time permanent employees are substituted for casuals, the variations may reduce flexibility. We also acknowledge that many employers covered by the Aged Care Award are not-for-profit organisations who rely on funding from a range of sources to provide their services. An increase in employment costs *within* a budget cycle may place such organisations under financial pressure.

[37] The assertion by ABI that “many businesses will not be able to sustain the increase in monetary costs” for the time period from 1 December 2019 to 30 June 2020 as they are often required to adhere to “very tight budgets for each financial year”, was uncontested.

[38] Against these considerations is the fact that the low utilisation of casual employees in the sector (likely to be less than 10 per cent) suggests that the cost impact of the variations is not likely to be substantial, at least not in an aggregate sense. We accept, as put by ABI, that employers who utilise casual employees in greater numbers will be impacted more significantly.

[39] The fact that most of the classifications covered by the Aged Care Award are “low paid” within the meaning of s.134(1)(a) is a consideration in favour of *not* deferring or phasing-in these variations.

[40] Further, in the *August 2019 Decision* we accepted that the existing rates for casuals working on Saturdays, Sundays and public holidays are not fair and proportionate to the disability experienced by casual employees working at these times. This too is a consideration which tells against the deferral or phasing in of the variations.

[41] In our view, an appropriate fair and just balance between these considerations is to provide that the increases in weekend and public holiday rates for casuals will commence operation, in full, from 1 July 2020.’ [References omitted; Emphasis added]

[988] A similar approach was taken by the Full Bench in the *4 yearly review of modern awards—Group 4—Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claim*.⁹⁷⁸

[989] In the *4 Yearly Review of the General Retail Industry Award 2010*, the Commission determined to increase the penalty rates under the for casual employees working on Saturdays and Monday to Friday evenings.⁹⁷⁹ The Full Bench concluded that there was a need for appropriate transitional arrangements as follows:

‘7 Transitional Arrangements

[264] In the *Penalty Rates – Transitional Arrangements decision* the Full Bench confirmed the views expressed in the *Penalty Rates Decision*—that there is a need for appropriate transitional arrangements to mitigate hardship—and was satisfied that it had the power to make appropriate transitional arrangements. The Full Bench also observed that “the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgement, rather than a formulaic or mechanistic approach involving the qualification of the weight accorded to each particular consideration”.

...

[267] We propose to adopt and apply the observations in the *Transitional Arrangements decision* regarding the matters which are relevant to our determination of the transitional arrangements in the matters before us, with one modification. Instead of the matter at (ii) in [265] above, we will have regard to the evidence, findings and conclusions in this decision.

...

[280] In its reply submission of 6 September 2018 the SDA opposes the phasing schedule proposed by the Retail Employers, submitting that:

⁹⁷⁸ [2019] FWCFB 7096.

⁹⁷⁹ *4 yearly review of modern awards – General Retail Industry Award 2010 – award specific penalty rates claims* [2018] FWCFB 5897 at [263].

“The SDA opposes any proposal to delay corrective increases until July 2019 and beyond. This is inappropriate. This simply affords yet another 9 months and more of anomalous financial advantage (at the expense of a workforce already identified as low paid) which the employers have profited from. Critically, in the after 6pm Saturday period, no penalty would continue to be the accepted norm.
...

Further having this increase linked to a 1st July timetable would mean that employers would face both a possible National Wage Increase and the Casual increase at the same time. If this casual increase is so demanding then it seems illogical to compound the potential change in wages.”

[281] Contrary to the SDA’s submission, there is a need for appropriate transitional arrangements in respect of these increases in order to ameliorate any adverse impact upon employers. The arguments advanced by the SDA in support of immediate implementation are unconvincing. While we accept—based on Professor Borland’s evidence—that the aggregate impact on labour costs of the increases will be “relatively small”, they are not properly characterised as “marginal”. Further, the quantum of the increase (an *additional* 25 per cent on week day evenings and on Saturdays before 7.00am and after 6pm for casual employees) is not a more significant quantum than the decrease in Sunday penalty rates for casuals arising from the *Penalty Rates Decision*, it too was 25 per cent.

[282] Nor does the fact of the SDA’s March 2015 application warrant the immediate implementation of the increases. Even if it is accepted that employers were put on notice as to the possibility of an increase one might ask, so what? Until such a possibility becomes a reality it is highly unlikely that any proactive steps would be taken by employers to ameliorate the effect of such increases. Indeed if accepted the same argument could be applied to the reduction in Sunday penalty rates for shiftworkers as the ARA filed submissions and a draft determination in respect of that issue in February 2015.

[283] We do think there is merit in the points raised in the SDA’s reply submission, in particular:

- a phase in period of almost 5 years is simply too long;
- the existing anomaly in respect of the Saturday penalty rates for casuals should be addressed as quickly as practicable (though we think the SDA overstates the extent of the anomaly, see [233] to [243] above); and
- contrary to the Retail Employers’ proposal, the operative date of the phased increases should not be 1 July. The timetable proposed by the Retail employers would mean that employers may face an Annual Wage Review increase and an increase in casuals’ penalty rates simultaneously. As the SDA submits “it seems illogical to compound the potential change in wages”.

[284] In respect of the adjustment to the Saturday rate for casuals and the extension of the evening work Monday to Friday penalty we have decided that the transitional arrangements below are necessary to ensure that the Retail Award achieves the modern awards objective:

Saturday work – casuals

1 November 2018 A casual employee must be paid an *additional* 15 per cent for *all* work performed on a Saturday

1 October 2019 A casual employee must be paid an *additional* 20 per cent for *all* work performed on a Saturday

1 March 2020 A casual employee must be paid an *additional* 25 per cent for *all* work performed on a Saturday

Evening work: Monday to Friday

1 November 2018 An additional 5 per cent will be paid to casuals for hours worked after 6pm

1 October 2019 An additional 10 per cent will be paid to casuals for hours worked after 6pm

1 March 2020 An additional 15 per cent will be paid to casuals for hours worked after 6pm.

1 October 2020 An additional 20 per cent will be paid to casual for hours worked after 6pm

1 March 2021 An additional 25 per cent will be paid to casuals for hours worked after 6pm

[285] Variation determinations will be published shortly.’ [References omitted; Emphasis added]

[990] It is apparent that the observations by the Full Bench in the *Penalty Rates – Transitional Arrangements decision* have been applied in a number of subsequent Full Bench decisions. In the next stage of these proceedings the parties will be invited to comment on the appropriateness of those principles and their application in this matter.

8.3.3 Other matters

[991] As mentioned in Annexure A, the ANMF application seeks the creation of a new schedule to the Nurses Award for aged care employees to enable an increase in minimum wages in respect of those employees. The ANMF has foreshadowed an application to vary the Nurses Award more generally on the basis that increases in nurses’ minimum wages are justified by work value reasons. It is in this context that the ANMF seek a temporal limitation in respect of the proposed aged care schedule, as the ANMF submits:

‘The ANMF have applied for new Schedule to the Nurses Award to apply for a period of 4 years from the date of commencement. This is specifically intended to put a temporal

limitation on the situation ... whereby minimum rates for aged care nurses are properly set, whilst rates for other nurses are not.⁹⁸⁰

[992] In short, the ANMF proposes that the increased rates in the schedule operate for 4 years and at the end of that period they cease to operate.

[993] In Background Document 5 we posed the following question to the ANMF: Why is it necessary, in the sense contemplated by s.138, that the schedule expire after 4 years?

[994] The ANMF responded as follows:

‘The ANMF seeks a new Schedule to the Nurses Award for employees otherwise covered by the award, where those employees are engaged in the provision of services for aged persons. Clause G.1.1 of the new schedule would provide that the schedule will apply until a date, 4 years after commencement. The expiry of the proposed schedule after 4 years is not a matter beyond the minimum terms and conditions that would properly be the product of enterprise bargaining, and enterprise agreements.

It has also been recognised that what is “*necessary*” to achieve the modern awards objective in a particular case is a value judgment, taking into account the section 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.⁹⁸¹

It is submitted that variations to the Nurses Award sought by the ANMF are necessary to provide a fair and relevant minimum safety net of terms and conditions and achieve the modern awards objective. The creation of a new Schedule applying to persons engaged in the provision of services for aged persons might give rise to some additional complexity.

The clause providing for the expiry of the proposed schedule after 4 years is a clause which contributes to ensuring a fair and relevant minimum safety net of terms and conditions, having regard to the need to ensure a simple, easy to understand, stable modern award system for Australia. That is, increases to the wages payable to aged-care workers but not other nurses is, in the ANMF’s submission, appropriate as a medium-term solution. The longer-term solution will follow a subsequent application in regard to award wages of non-aged care workers covered by the Nurses Award. Inclusion of the 4-year period minimises any adverse impact on the simplicity of the modern award system for the purpose of section 134(1)(g) by placing a temporal limitation on the operation of the new Schedule.⁹⁸²

⁹⁸⁰ ANMF submissions in reply dated 21 April 2022 at [71].

⁹⁸¹ See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* [2012] FCA 480; (2012) 205 FCR 227; and *4 yearly review of modern awards - plain language re-drafting - standard clauses* [2018] FWCFB 4177 at [12].

⁹⁸² ANMF closing submissions in reply dated 17 August 2022 at [57]–[60], also see section C.3.1 of that submission.

[995] This issue was also the subject of an extended exchange between the Commission and counsel for the ANMF during closing oral argument.⁹⁸³ The essence of the argument put in support of the proposed 4 year term is that ‘it puts a proposed temporal limitation on a situation which is less than ideal, whereby some of the workers covered by the Nurses Award have had their rates assessed under s.157 and some have not ... [and] the intent and purpose of the 4 year sunset clause was in part directed to objective 134(g) under the modern awards objective’.⁹⁸⁴

[996] For our part we have no in-principle objection to the idea that any increases in nurses’ minimum wages arising from these proceedings be contained in an ‘Aged Care Schedule’ to the Nurses Award. The objectionable aspect of the ANMF’s proposal is that such a schedule cease to operate after 4 years. We see no warrant for such a temporal limitation, and we are not satisfied that it is necessary to ensure that the Nurses Award achieves the modern awards objective.

[997] The arguments advanced by the ANMF in support of a self-executing temporal limit are wholly unpersuasive. Contrary to the ANMF’s submission, a temporal limitation would not promote ‘a stable ... modern award system’ (s.134(1)(g)). Nor is it clear to us how we can, on the one hand, vary modern award minimum wages on the basis that an increase is justified by work value reasons and then 4 years later effectively reduce those wages by the same amount without any consideration of work value.

[998] We acknowledge that it is, as the ANMF put it, ‘less than ideal’ that some workers covered by the Nurses Award, ie those working in aged care, will have had their wages properly assessed under s.157, and others will not be in that position. But that situation can be remedied by the ANMF simply making an application to vary the Nurses Award.

[999] The proposed temporal limitation is devoid of merit and we reject it.

[1000] We now turn to consider the modern awards objective and the minimum wages objective.

8.4 The Modern Awards Objective

[1001] In giving effect to the modern awards objective, the Commission performs an evaluative function taking into account the s.134(1) considerations and assessing the adequacy of the safety net by reference to the statutory criteria of fairness and relevance.

[1002] Some observations about the modern awards objective are made in Chapter 3 and in Background Documents 1 and 5. In addition, Background Document 7 summarises the parties’ submissions on the modern awards objective and the various s.134(1) considerations. These submissions were also the subject of further elaboration during the course of closing oral argument. We have taken these submissions into account but need not repeat all of them here.

⁹⁸³ Transcript, 24 August 2022, PN14739–PN14771.

⁹⁸⁴ Transcript, 24 August 2022, PN14760 and PN14767.

[1003] As mentioned in Chapter 3, we accept that a fair and relevant safety net is one which provides minimum wage rates at a level which bears a proper relationship to the value of the work performed by the workers in receipt of those wages.

[1004] We have determined that the minimum modern award rates applicable to NPs, RNs, ENs, AINS/PCWs and Home Care Employees significantly undervalue the work performed by these employees; it follows that increasing these rates, commensurate with the value of the work performed, is necessary to achieve a fair and relevant safety net.

[1005] Fairness, in the context of providing a ‘fair and relevant safety net’, is to be assessed from the perspective of *both* the employees *and* employers covered by the modern award in question.

[1006] At present, we are unable to reach a concluded view on whether the proposed interim variation determination is necessary to achieve the modern awards objective. 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.

[1007] In these circumstances, we propose to express some *provisional* views in respect of the other s.134(1) considerations. Parties will be provided an opportunity to comment on those provisional views in Stage 2 of the proceedings and to make submissions in respect of the impact on employers once the extent of Commonwealth funding support is known.

Provisional views

[1008] We note at the outset that we are not persuaded that s.134(1)(d), (da) and (g) are relevant to the interim increase we propose to award.

[1009] We express the following *provisional* views in respect of the remaining s.134(1) considerations.

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

[1010] The Unions and the Commonwealth submit that relative living standards and the needs of the low paid weigh in favour of increasing the modern award minimum wages for aged care workers.

[1011] The Joint Employers acknowledge that it is self-evident that any employee who is considered low paid will benefit from an increase in pay, but submit that this does not justify doing so in an ‘unfettered manner’.⁹⁸⁵

[1012] As set out in Chapter 6, most of the award classifications which are the subject of the interim increase are ‘low paid’ within the meaning of s.134(1)(a). The evidence before us also

⁹⁸⁵ Joint Employers closing submissions dated 22 July 2022 at [23.9].

demonstrates that many of these workers face challenges in meeting financial obligations due to their low rates of pay.⁹⁸⁶ This consideration 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.

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

[1013] Section 134(1)(b) requires that the Commission takes into account ‘the need to encourage collective bargaining’.

[1014] The ANMF relies on the lay witness evidence of Kevin Crank,⁹⁸⁷ Paul Gilbert,⁹⁸⁸ Paul Bonner⁹⁸⁹, Christopher Friend⁹⁹⁰ and Sue Cudmore⁹⁹¹ as evidence of the difficulties associated with bargaining for higher wages in the aged care sector,⁹⁹² and submits that the common themes emerging from the lay witness evidence include:

- that employers claimed during bargaining to be constrained by an absence of funding⁹⁹³
- the difficulty organising aged-care workforces or in actually negotiating (*e.g.*, due to perceived power imbalance, reticence of workers from a culturally and linguistically diverse background to make waves),⁹⁹⁴ and
- the actual or perceived unwillingness of aged care workers to take industrial action.⁹⁹⁵

[1015] The ANMF submits that increasing the minimum rates of pay for aged care workers would encourage collective bargaining, because:

⁹⁸⁶ See Witness statement of Sheree Clarke dated 29 October 2021 at [14]-[16]; Amended witness statement of Carol Austen dated 20 May March 2022 at [39]; Witness statement of Charlene Glass dated 29 March 2021 at [92]; Witness statement of Sandra O’Donnell dated 25 March 2021 at [107]-[112]; Witness statement of Tracey Roberts dated 23 March 2021 at [162]-[166]; Amended witness statement of Michael Purdon dated 19 May 2022 at [87]-[92]; Witness statement of Suzanne Wagner dated 28 October 2021 at [160]-[161], Witness statement of Julie Kupke dated 28 October 2021 at [127]-[128], Witness statement of Catherine Evans dated 26 October 2021 at [104]-[105]. Also see Australian Aged Care Collaboration, *Cost Of Living Pressure Pushing Aged Care Workers To The Brink Of Poverty Line, Fuelling Workforce Shortage: New Analysis* 22 March 2022; HSU closing submissions dated 22 July 2022 at [400].

⁹⁸⁷ Witness statement of Kevin Crank dated 29 October 2021 at [11]-[21].

⁹⁸⁸ Witness statement of Paul Gilbert dated 29 October 2021 at [36]-[51].

⁹⁸⁹ Witness statement of Robert Bonner dated 29 October 2021 at [36]-[38].

⁹⁹⁰ Transcript, 26 April 2022, PN928.

⁹⁹¹ Transcript, 12 May 2022, PN13559-PN13565.

⁹⁹² ANMF closing submissions dated 22 July 2022 at [857].

⁹⁹³ Witness statement of Christine Spangler dated 29 October 2021 at [42]; Witness statement of Kevin Crank dated 29 October 2021 at [14].

⁹⁹⁴ Witness statement of Jocelyn Hofman dated 29 October 2021 at [47]-[49]; see also witness statement of Linda Hardman dated 20 October 2021 at [82]; Witness statement of Wendy Knights dated 29 October 2021 at [98]-[99]; Witness statement of Dianne Power dated 29 October 2021 at [100]-[103]; Witness statement of Patricia McLean dated 29 October 2021 at [125].

⁹⁹⁵ Amended witness statement of Linda Hardman dated 9 May 2022 [82]; Amended witness statement of Wendy Knights, dated 23 May 2022, [98]-[99]; see also the XXN of Christopher Friend, Transcript, 26 April 2022, PN923-PN928, and the XXN of James Eddington, Transcript, 3 May 2022, PN3513-PN3514.

- it would increase the incentive or necessity to negotiate enterprise-specific trade-offs and productivity benefits, and
- it removes any disincentive to continue collective bargaining for employees who have negotiated rates at or higher than the correct work value of the work they perform, by removing the gap between these rates and the award minima.⁹⁹⁶

[1016] Similarly, the HSU submits there are ‘significant and widespread difficulties associated with collective bargaining in the aged care sector’ and relies on the expert evidence of Prof Charlesworth that:

‘A particular constraint with enterprise bargaining relevant to residential aged care is that options to address low remuneration in aged care, both in awards and enterprise bargaining, are entirely dependent on federal government commitment and action. The federal government is effectively almost the sole purchaser and lead employer in an aged care supply chain of contracted out residential aged care services.’⁹⁹⁷

[1017] The HSU also relies on Prof Charlesworth’s opinion that the challenges facing bargaining in residential care are ‘amplified’ in home care.⁹⁹⁸ The HSU submits that Prof Charlesworth’s evidence ‘aligns with the experience of the HSU’ and relies on the evidence of Mr Friend, including his evidence that the ‘primary obstacle’ to achieving higher pay through bargaining in the aged care sector is that ‘employers indicate they do not have the necessary funding to increase pay rates above the Award.’⁹⁹⁹

[1018] The HSU submits that while, in other industries, the need to encourage enterprise bargaining might be regarded as warranting a limitation on increases to wages, there is ‘neither purpose nor justice’ in adopting that approach in respect of these awards as ‘[e]nterprise bargaining has simply not provided an effective mechanism for addressing low pay and poor conditions for aged care or home care workers.’¹⁰⁰⁰

[1019] The HSU submits that, in any event, the variations sought would to some extent encourage employers to engage in collective bargaining by:

- increasing the relevance of the minimum rates applicable to the work performed
- encouraging industrial parties to bargain for particular arrangements in workplaces to improve productivity and properly utilise a skilled workforce, and
- increasing the competitiveness of enterprises that currently engage in enterprise bargaining.¹⁰⁰¹

⁹⁹⁶ ANMF Form F46 Application to vary a modern award (AM2021/63) dated 17 May 2021 at [27].

⁹⁹⁷ HSU closing submissions dated 22 July 2022 at [405] citing Charlesworth Report at [39].

⁹⁹⁸ HSU closing submissions dated 22 July 2022 at [406] citing Charlesworth Supplementary Report at [48], [58].

⁹⁹⁹ HSU closing submissions dated 22 July 2022 at [407] citing amended witness statement of Christopher Friend dated 20 May 2022 at [22].

¹⁰⁰⁰ HSU closing submissions dated 22 July 2022 at [409].

¹⁰⁰¹ HSU closing submissions dated 22 July 2022 at [411].

[1020] The HSU relies on Mr Friend’s evidence to contend that increasing award minimum rates of pay may enable employers and employees to focus collective bargaining on issues other than pay, including innovative classification structures, greater support for training and development and career pathways.¹⁰⁰²

[1021] The Joint Employers reject the proposition that increasing minimum wages will create incentives for employers to engage in collective bargaining and submit:

‘On any logical basis, increasing minimum award rates in a price constrained sector must reduce the likelihood, or create a disincentive of collective bargaining, not increase it.’¹⁰⁰³

[1022] The Joint Employers submit that the evidence demonstrates that a ‘significant proportion’ of aged care workers are covered by enterprise agreements and that it therefore follows ‘as a matter of logic’ that raising the minimum award rates will ‘diminish the capacity of employers to bargain for further wage increases above those higher minimum rates.’¹⁰⁰⁴

[1023] The Joint Employers submit that increasing minimum rates in the aged care sector under the current Government funding model ‘will do more than dampen bargaining, it will likely lead to its end’.¹⁰⁰⁵

[1024] The Commonwealth submits that ‘collective bargaining in the aged care sector is already widespread’ and notes that while modelling from DoHAC indicates that the majority of aged care workers are covered by enterprise agreements, in most cases they have a ‘low bargaining premium’.¹⁰⁰⁶

[1025] The Commonwealth notes the observation from Prof Charlesworth that low remuneration in the aged care sector, both in modern awards and enterprise bargaining, is ‘entirely dependent on Commonwealth Government commitment and action’. The Commonwealth also notes the Unions’ evidence that increasing modern award minimum wages would create incentives for employers to engage in collective bargaining and provide industrial parties with a realistic basis from which to engage in collective bargaining.¹⁰⁰⁷

[1026] The Commonwealth submits that it is ‘very difficult to anticipate what effect increases to modern award minimum wages in the aged care sector would have on collective bargaining’ and that, at best, it anticipates that if the increases sought were granted it would have a ‘neutral effect’ on bargaining.¹⁰⁰⁸

¹⁰⁰² HSU closing submissions dated 22 July 2022 at [412] citing amended witness statement of Christopher Friend dated 20 May 2022 at [18].

¹⁰⁰³ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 at [3.4].

¹⁰⁰⁴ Joint Employers submissions dated 22 July 2022 at [23.11]–[23.12].

¹⁰⁰⁵ Joint Employers closing submissions dated 22 July 2022 at [23.15].

¹⁰⁰⁶ Commonwealth submissions dated 8 August 2022 at [170].

¹⁰⁰⁷ Commonwealth submissions dated 8 August 2022 at [171]–[172] citing Charlesworth Report at [39]; UWU submissions dated 29 October 2021 at 12.

¹⁰⁰⁸ Commonwealth submissions dated 8 August 2022 at [167].

[1027] During the course of closing oral argument, counsel for the Commonwealth submitted that an increase in minimum award rates of pay ‘may encourage collective bargaining ... on terms and conditions outside of wages. But given the state of the evidence I can’t take it any further than that.’¹⁰⁰⁹

[1028] In a number of annual wage reviews, the Expert Panel has pointed to the ‘complexity of factors which may contribute to decision making about whether or not to bargain’ and that complexity has led the Expert Panel to conclude that it is ‘unable to predict the precise impact [of its decisions] on collective bargaining with any confidence.’¹⁰¹⁰ We agree with those observations and with the Commonwealth’s submission that it is very difficult to predict the effect increasing minimum wages will have on collective bargaining in the aged care sector.

[1029] The proposition that increasing minimum wages may encourage collective bargaining on matters other than pay seems to us 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.

[1030] We are not persuaded that varying the relevant awards to increase minimum wages will *encourage* collective bargaining. It follows that this consideration weighs against the variation of the relevant Awards to give effect to the interim increase determined to be justified by work value reasons.

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

[1031] Obtaining employment is the focus of s.134(1)(c)¹⁰¹¹ and ‘social inclusion may also be promoted by assisting employees to *remain in employment*.’¹⁰¹² Further, in the Annual Wage Review 2015–2016 decision, the Expert Panel observed that ‘social inclusion’ requires more than simply having a job. The Expert Panel endorsed the proposition that a job with inadequate pay can create social exclusion if the income level limits the employee’s capacity to engage in social, cultural, economic and political life.¹⁰¹³

[1032] The Unions contend that increasing minimum award wages would promote social inclusion through increased workforce participation by contributing to the attraction and retention of employees.

[1033] The Commonwealth submits that increasing modern award minimum wages in the aged care sector ‘could significantly improve workforce participation and social inclusion’ as higher wages make jobs ‘more attractive’ and would encourage those currently unemployed, underemployed or not in the labour force to join the workforce.¹⁰¹⁴

¹⁰⁰⁹ Transcript, 1 September 2022 at PN15503.

¹⁰¹⁰ [2016] FWCFB 3500 at [540].

¹⁰¹¹ *Penalty Rates Decision* at [179].

¹⁰¹² *4 yearly review of modern awards - Family and domestic violence leave* [2018] FWCFB 1691 at [282].

¹⁰¹³ *Annual Wage Review 2015–2016* [2016] FWCFB 3500 at [467].

¹⁰¹⁴ Commonwealth submissions dated 8 August 2022 at [175].

[1034] The Commonwealth notes that areas of high unemployment are often areas of social exclusion and submits that encouraging employees from this pool to join the aged care industry will promote social inclusion by ‘improving participation, increasing their income and enhancing their opportunities, in meaningful aged care work.’¹⁰¹⁵

[1035] The Commonwealth submits jobs in the aged care sector are accessible to those who are unemployed or not in the labour force, and points to the following:

- Many positions available in the aged care sector require only entry level or relatively low skill levels (Certificate II or III).¹⁰¹⁶
- Approximately 51.5 per cent of residential care services industry workers have a skill level commensurate with a Certificate II or III qualification, while a further 9.5 per cent have a skill level commensurate with having completed secondary education.¹⁰¹⁷
- In February 2022, 294,500 people who were not employed said that caring for an ill or elderly person affected their workforce participation.¹⁰¹⁸ Many jobs in the aged care sector offer ‘significant flexibility’— almost 80 per cent of current aged care workers work part-time— offering opportunities for those with caring responsibilities.

[1036] The Commonwealth further submits that higher wages in the aged care sector may assist in addressing rural and regional unemployment rates. The Commonwealth maintains that regional unemployment rates tend to be higher than those in capital cities — in May 2020 the unemployment rate in state capital city areas averaged 3.7 per cent compared with 4.1 per cent across the rest of the states.¹⁰¹⁹ The Commonwealth submits that encouraging the unemployed to take up higher paid jobs in the aged care sector may reduce the disparity between regional and capital city unemployment rates, thereby improving social inclusion in rural and regional areas.¹⁰²⁰

[1037] In their reply submissions to the Commonwealth, the Joint Employers concede that ‘the notion of attraction and retention may be a relevant consideration to the modern awards objective’.¹⁰²¹

[1038] As noted by the Commonwealth, the aged care sector is facing ‘a projected shortfall in workers’ and DoHAC modelling estimates the aged care workforce will have to expand by an average of 6.6 per cent each year over the next 5 years to support quality of care and growing

¹⁰¹⁵ Commonwealth submissions dated 8 August 2022 at [176].

¹⁰¹⁶ Commonwealth submissions dated 8 August 2022 at [179].

¹⁰¹⁷ Commonwealth submissions dated 8 August 2022 at [179] citing ABS, *Characteristics of Employment, Australia, August 2021* (Catalogue No 6333.0, 14 Dec 2021).

¹⁰¹⁸ Commonwealth submissions dated 8 August 2022 at [180] citing ABS, *Participation, Job Search and Mobility, Australia* (Catalogue No 6226.0, 25 June 2022).

¹⁰¹⁹ Commonwealth submissions dated 8 August 2022 at [181] citing ABS, *Labour Force, Australia, Detailed May 2022* (Catalogue No 6291.0, 23 June 2022).

¹⁰²⁰ Commonwealth submissions dated 8 August 2022 at [181].

¹⁰²¹ Joint Employers submissions in reply submissions to the Commonwealth dated 17 August 2022 at [6.5].

demand.¹⁰²² The Commonwealth submits that in 2020, the ACWC estimated that there were 22,000 vacancies in direct care roles across the aged care sector.¹⁰²³

[1039] In our view, increasing minimum wages will assist in attracting and retaining employees in the aged care sector, thereby promoting social inclusion through increased workforce participation.

[1040] This consideration 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.

s.134(1)(e): the principle of equal remuneration for work of equal or comparable value

[1041] The Commonwealth submits that the principle of equal remuneration for work of equal or comparable value is of particular relevance to these proceedings given the high proportion of women working in the aged care sector compared with other sectors of the economy.¹⁰²⁴

[1042] Citing the *Equal Remuneration Decision 2015*,¹⁰²⁵ the Commonwealth observes that ‘there is no reason why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s 157’,¹⁰²⁶ and that in dealing with a s.157 application, the Commission does not need to identify a male comparator.¹⁰²⁷

[1043] The Commonwealth submits that ss.134(1)(e) and 284(1)(d) enable the Commission to take into account gender-related issues and whether or not a determination to vary an award would contribute to closing the gender pay gap.¹⁰²⁸

[1044] The Commonwealth submits that the evidence supports a finding that the current award rates significantly undervalue the work performed by aged care workers, for reasons related to gender.¹⁰²⁹ Increasing minimum award wages in care classifications in the Awards would contribute to narrowing the gender pay gap by increasing the relative earnings of a female-dominated sector.¹⁰³⁰

[1045] Accordingly, the Commonwealth is of the view that s.134(1)(e) weighs in favour of increasing the award rates for aged care workers.¹⁰³¹

¹⁰²² Commonwealth submissions dated 8 August 2022 at [178], see Tables B2, B4, B8 and B11 of Annexure B.

¹⁰²³ Commonwealth submissions dated 8 August 2022 at [178], see Tables B2, B4, B8 and B11 of Annexure B.

¹⁰²⁴ Commonwealth submissions dated 8 August 2022 at [187].

¹⁰²⁵ [2015] FWCFB 8200.

¹⁰²⁶ Commonwealth submissions dated 8 August 2022 at [188].

¹⁰²⁷ Commonwealth submissions dated 8 August 2022 at [189].

¹⁰²⁸ Commonwealth submissions dated 8 August 2022 at [190]–[191].

¹⁰²⁹ Commonwealth submissions dated 8 August 2022 at [190] and [195]–[196]; see also Transcript, 1 September 2022, PN15419.

¹⁰³⁰ Commonwealth submissions dated 8 August 2022 at [192].

¹⁰³¹ Commonwealth submissions dated 8 August 2022 at [199].

[1046] The Unions also contend that s.134(1)(e) weighs in favour of an increase in minimum award wages. For example, the ANMF submits that a correction of the historical undervaluation of the work values of aged care employees would promote the principle of equal remuneration for work of equal or comparable value.¹⁰³² The ANMF describes this as ‘one of many, non-exhaustive, matters that the Commission will take into account in determining whether the proposed award variation is necessary to provide a fair and relevant minimum safety net of terms and conditions.’¹⁰³³

[1047] The Joint Employers submit that ss.134(1)(e) and 284(1)(d) ‘are of minimal relevance save to say that the Commission should it stray too far from the C10 scheme could provoke a question of whether this principle is being met.’¹⁰³⁴

[1048] As discussed earlier, we accept that the aged care workforce is predominantly female and the expert evidence is that, as a general proposition, work in feminised industries including care work has historically been undervalued and the reason for that undervaluation is likely to be gender-based. We also accept the logic of the proposition in the expert evidence that gender-based undervaluation of work is a driver of the gender pay gap and if all work was properly valued there would likely be a reduction in the gender pay gap. While it has not been necessary for the purposes of these proceedings for us to determine why the relevant minimum rates in the Awards have not been properly fixed we accept that varying the relevant awards to give effect to the interim increase we propose would be likely to have a beneficial effect on the gender pay gap and promote pay equity. The more contentious issue concerns the proper construction and application of ss.134(1)(e) and 284(1)(d).

[1049] The notion of ‘equal remuneration for work of equal or comparable value’ appears in 3 parts of the FW Act: the modern awards objective (s.134(1)(e)); the minimum wages objective (s.284(1)(d)), and the equal remuneration provisions found in Part 2–7. The objects of the FW Act and other parts of the FW Act make no specific mention of pay equity or the gender-based undervaluation of work.

[1050] Consistent with authority, the definition of ‘equal remuneration for work of equal or comparable value’ 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’. For example, the Expert Panel’s approach to ss.134(1)(e) and 284(1)(d) is set out in the *Annual Wage Review 2017–18* as follows:

‘[33] The modern awards objective and the minimum wages objective both provide that in a Review we must take into account ‘the principle of equal remuneration for work of equal or comparable value’ (s.134(1)(e) and s.284(1)(d)). The Dictionary section of the Act ... directs attention to s.302(2) for the definition of the expression ‘equal remuneration for work of equal or comparable value.’ Section 302(2) is in Part 2-7 ‘Equal Remuneration’ and defines this expression to mean ‘equal remuneration for men and women workers for work of equal or comparable value.’ It seems highly unlikely that Parliament intended this expression to mean something different in ss 134 and 284.

¹⁰³² ANMF submissions dated 29 October 2021 at [200(4)]; ANMF closing submissions dated 22 July 2022 at [832(4)].

¹⁰³³ ANMF closing submissions in reply dated 17 August 2022 at [160].

¹⁰³⁴ Joint Employers closing submissions dated 22 July 2022 at [23.19] and [24.5].

Hence, the appropriate approach to the construction of ss 134(1)(e) and 284(1)(d) is to read the definition into the substantive provision. Accordingly, the relevant consideration is to be read as follows:

“the principle of equal remuneration for men and women workers for work of equal or comparable value.”¹⁰³⁵

[34] In the *Equal Remuneration Decision 2015* the Full Bench concluded that the expression ‘work of equal or comparable value’ in s.302(1) refers to equality or comparability in ‘work value.’ We agree and, further, the same meaning should be attributed to this expression in ss 134(1)(e) and 284(1)(d). 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.’

[35] The application of the principle of equal remuneration for work of equal or comparable value is such that it is likely to be of only limited relevance in the context of a Review. Indeed it would only be likely to arise if it were contended that particular modern award minimum wage rates were inconsistent with the principle of equal remuneration for work of equal or comparable value; or, if the form of a proposed increase enlivened the principle. We agree with the observations of a number of parties that Review proceedings are of limited utility in addressing any systemic gender undervaluation of work. It seems to us that proceedings under Part 2-7 and applications to vary modern award minimum wages for ‘work value reasons’ pursuant to ss 156(3) and 157(2) provide more appropriate mechanisms for addressing such issues.

[36] But the broader issue of gender pay equity, and in particular the gender pay gap, is relevant to the Review. This is so because it is an element of the requirement to establish a safety net that is ‘fair.’ It may also arise for consideration in respect of s.284(1)(b) (‘promoting social inclusion through workforce participation’), because it may have effects on female participation in the workforce.

[37] The gender pay gap refers to the difference between the average wages earned by men and women. It may be expressed as a ratio which converts average female earnings into a proportion of average male earnings on either a weekly or an hourly basis. The *Statistical Report—Annual Wage Review 2017–18* (Statistical report) sets out three measures of the gender pay gap, ranging from 11.0 per cent to 15.3 per cent (see Table 4.1).

¹⁰³⁵ See also *Penalty Rates Decision* at [207].

[38] As noted in the *Annual Wage Review 2015–16* decision (2015–16 Review decision), the causes of the gender pay gap are complex and influenced by factors such as: differences in the types of jobs performed by men and women; discretionary payments; workplace structures and practices; and the historical undervaluation of female work and female-dominated occupations. We accept that moderate increases in the NMW and modern award minimum wages would be likely to have a relatively small, but nonetheless beneficial, effect on the gender pay gap.¹⁰³⁶ [Emphasis added; Footnotes omitted]

[1051] This approach was endorsed in the *Annual Wage Review 2021–22*.¹⁰³⁷

[1052] 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 s.134(1)(e) and 284(1)(d) is not a relevant consideration.

[1053] We observe that 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.

[1054] Reading the FW Act harmoniously requires that the relevant consideration in ss.134(1)(e) and 284(1)(d) be read as ‘the principle of equal remuneration for men and women workers for work of equal or comparable value’. The question is then what that means, in applying the modern awards and minimum wages objectives.

[1055] First, it can be observed that ‘equal remuneration for work of equal or comparable value’ in ss.134(1)(e) and 284(1)(d) 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 terms of meeting a particular statutory standard or test.¹⁰³⁸

[1056] Second, the principle is one of the several broad social and economic considerations in ss.134(1) and 284(1). The modern awards objective, including s.134(1)(e), is applied on a case-by-case basis in circumstances where the Commission proposes to vary a modern award. As the Full Court of the Federal Court observed in *National Retail Association v Fair Work Commission*:

‘It is apparent from the terms of s.134(1) that the factors listed in (a)-(h) are broad considerations which the FWC must take into account in considering whether a modern award meets the objective set by s.134(1), that is to say, whether it provides a fair and relevant minimum safety net of terms and conditions. The listed factors do not, in

¹⁰³⁶ *Annual Wage Review 2017–18* [2017] FWCFB 3500 at [33]–[38].

¹⁰³⁷ [2022] FWCFB 3500.

¹⁰³⁸ Compared to s.302, which does not rely on the expression of any such ‘principle’. In s.302, ‘equal remuneration for men and women workers for work of equal or comparable value’ is used in the context of the statutory precondition for the exercise of the Commission’s discretion to make an equal remuneration order.

themselves, however, pose any questions or set any standard against which a modern award could be evaluated. Many of them are broad social objectives.'

[1057] If the principle in ss.134(1)(e) and 284(1)(d) were to be confined to the circumstance suggested in the *Teachers Decision*, it would seem to have very little work to do. Those sections 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.

[1058] In the context of the equal remuneration provisions in Part 2–7, the Commission has observed that these are remedial or beneficial provisions¹⁰³⁹ and that the:

'general purpose of the provisions is to remedy gender wage inequality and promote pay equity. It follows that in exercising its discretion [under s.302(1)] it would be open for the Commission to take into account the reasons for any difference in remuneration between different gendered employees performing work of equal or comparable value.¹⁰⁴⁰ [Emphasis added]

[1059] Noting the above, 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.

[1060] 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.

[1061] However, we note this construction would seem to run counter to the weight of Commission decisions that touch upon the relevance of the principle in ss.134(1)(e) and 284(1)(d).

[1062] We also observe that pay equity concerns arise for our consideration under ss.134(1) and 284(1), in deciding whether an award variation is necessary to achieve 'a fair and relevant minimum safety net of terms and conditions' and 'a safety net of fair minimum wages'. As has been held in annual wage review decisions:

'the broader issue of gender pay equity, and in particular the gender pay gap, is relevant to the Review. This is so because it is an element of the requirement to establish a safety net that is 'fair.' It may also arise for consideration in respect of s.284(1)(b) ('promoting

¹⁰³⁹ *Equal Remuneration Decision 2015* [2015] FWCFB 8200 at [177].

¹⁰⁴⁰ *Equal Remuneration Decision 2015* [2015] FWCFB 8200 at [17] of the Summary following [367]. See also [178], [183], [210] and [212].

social inclusion through workforce participation’), because it may have effects on female participation in the workforce.’¹⁰⁴¹

[1063] In view of the above matters, we propose to invite further submissions from the parties on the proper construction of ss.134(1)(e) and 284(1)(d) and their relevance to the proposed interim increase.

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

[1064] Section 134(1)(f) is expressed in very broad terms and requires the Commission to take into account the likely impact of any exercise of modern award powers ‘on business, including’ (but not confined to) the specific matters mentioned, that is; ‘productivity, employment costs and the regulatory burden’.

[1065] Productivity’ is not defined in the FW Act but given the context in which the word appears, it is apparent that it is used to signify an economic concept. The conventional economic meaning of productivity is the number of units of output per unit of input. It is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated.

[1066] The Joint Employers submit that 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.¹⁰⁴²

[1067] As we have mentioned, the extent of Commonwealth funding to support the increase in minimum wages arising from these proceedings is unknown at present. It follows that we are unable to reach a concluded view on our consideration of s.134(1)(f) at this time.

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.

[1068] The requirement to take into account the likely impact of any exercise of modern award powers on ‘the sustainability, performance and competitiveness of the national economy’

¹⁰⁴¹ *Annual Wage Review 2017–18* [2017] FWCFB 3500 at [36].

¹⁰⁴² Joint Employers closing submissions dated 22 July 2022 at [23.20].

focuses on the aggregate (as opposed to sectorial) impact of an exercise of modern award powers.

[1069] The UWU contends that the aged care sector is critical to the sustainability and performance of the national economy and that increasing minimum wages will assist in attracting and retaining workers in the sector.¹⁰⁴³ On this basis, it is put that s.134(1)(h) weighs in favour of varying the relevant Awards to increase minimum wages.

[1070] The Commonwealth submits that the considerations in s.134(1)(h) ‘do not militate against award minimum wage rises in this matter.’¹⁰⁴⁴

[1071] The Commonwealth submits that a 25 per cent increase in award minimum wages ‘would not be material, due to the relatively small size of the aged care sector relative to the economy as a whole’ and notes that modelling by Treasury estimates that such a wage rise would increase economy-wide wages by less than one per cent. The Commonwealth notes that ‘in the current economic environment of above-target inflation and persistent global price shocks, there would be risks to inflation expectations if similar wage rises are demanded in associated industries’.¹⁰⁴⁵ Further, given the small size of the aged care sector, the effect on GDP is expected to be modest.¹⁰⁴⁶

[1072] We are not persuaded that varying the relevant Awards to give effect to the interim increase we have determined to be justified by work value reasons will have any material effect on the national economy. This consideration is neutral in the present context.

8.5 The Minimum Wages Objective

[1073] The minimum wages objective is considered in Chapter 3.

[1074] As noted by the Expert Panel in the *2019-20 Annual Wage Review decision*,¹⁰⁴⁷ 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. Both the minimum wages objective and the modern awards objective require the Commission to take into account:

- promoting social inclusion through increased workforce participation¹⁰⁴⁸
- relative living standards and the needs of the low paid¹⁰⁴⁹
- the principle of equal remuneration for work of equal or comparable value,¹⁰⁵⁰ and

¹⁰⁴³ UWU closing submissions in reply dated 19 August 2022 at [18](d).

¹⁰⁴⁴ Commonwealth submissions dated 8 August 2022 at [205].

¹⁰⁴⁵ Commonwealth submissions dated 8 August 2022 at [208].

¹⁰⁴⁶ Commonwealth submissions dated 8 August 2022 at [209].

¹⁰⁴⁷ [2020] FWCFB 3500 at [205].

¹⁰⁴⁸ FW Act s.284(1)(b) and s.134(1)(c).

¹⁰⁴⁹ FW Act s.284(1)(c) and s.134(1)(a).

¹⁰⁵⁰ FW Act s.284(1)(d) and s.134(1)(e).

- various economic considerations.¹⁰⁵¹

[1075] Similarly to the modern awards objective, the Commission’s task in s.284 involves an ‘evaluative exercise’ which is informed by the considerations in ss.284(1)(a)–(e).¹⁰⁵² No particular primacy attaches to any of the s.284(1) considerations, and a degree of tension exists between some of these considerations.¹⁰⁵³

[1076] A safety net of ‘fair minimum wages’ includes the perspective of employers and employees, and the Commission is required to take into account all of the relevant statutory considerations,¹⁰⁵⁴ but those expressly listed in s.284(1) do not necessarily exhaust the matters which the Commission might properly consider to be relevant.¹⁰⁵⁵

[1077] It is common ground that the consideration in s.284(1)(e) is not relevant in the context of the Applications.¹⁰⁵⁶

[1078] We express the following *provisional* views in respect of the remaining s.284(1) considerations.

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

[1079] Similarly to s.134(1)(h), this consideration 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 a variation.

[1080] We adopt the same *provisional* view as that adopted in respect of s.134(1)(h). This consideration is neutral in the present context.

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

[1081] This consideration is in the same terms as s.134(1)(c) and we express the same *provisional* view.

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

[1082] This consideration is in the same terms as s.134(1)(a) and we express the same *provisional* view.

¹⁰⁵¹ FW Act s.284(1)(a) and ss.134(1)(d), (f) and (h).

¹⁰⁵² *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [208]; *Re IEU* [2021] FWCFB 2051 at [221], citing *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [14].

¹⁰⁵³ *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [210].

¹⁰⁵⁴ *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [208]; *Re IEU* [2021] FWCFB 2051 at [221], citing *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [17].

¹⁰⁵⁵ *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [209]; *Re IEU* [2021] FWCFB 2051 at [221], citing *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [14].

¹⁰⁵⁶ HSU closing submissions dated 22 July 2022 at [64]; Joint Employers closing submissions dated 22 July 2022 Annexure P at [3.28]; ANMF closing submissions dated 22 July 2022 at [70].

s.284(1)(d): the principle of equal remuneration for work of equal or comparable value

[1083] This consideration is in the same terms as s.134(1)(e) and we propose to invite further submissions on the proper construction and the relevance of the principle, having regard to the discussion about s.134(1)(e) above.

9. Next Steps

[1084] We may vary modern award minimum wages if we are satisfied that the variation is ‘justified by work value reasons’, ‘necessary to achieve the modern awards objective’ and ‘necessary to achieve the minimum wages objective’, and we take into account the rate of the national minimum wage as currently set in a national minimum wage order.

[1085] In Chapter 8 we conclude that the variation of the minimum wages of the direct aged care classifications in the 3 Awards to provide an interim increase of 15 per cent is plainly justified by work value reasons and that s.157(2)(a) is so satisfied.

[1086] At present, we are unable to reach a concluded view on whether making the proposed interim variation determination in these proceedings is necessary to achieve the modern awards objective. 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(1)(f)). 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.

[1087] In addition, the proceedings have raised a number of complex issues for determination which require close examination. We would benefit from further submissions and, potentially, further evidence, from the parties, in respect of some of them.

[1088] These considerations led us to determine the Applications in 3 stages.

Stage 1

[1089] In this decision we have determined the relevant legal principles and the conceptual issues that have been canvassed by the parties in relation to the Applications. We have also decided that an interim increase of 15 per cent in the modern award minimum wages applicable to direct care workers in the 3 Awards is justified by work value reasons. This decision constitutes the first stage in the process.

Stage 2

[1090] Stage 2 will commence shortly. To assist the parties in their submissions regarding the implementation of the interim increase, Chapter 8 sets out the relevant legislative provisions and the approach taken to the phasing-in of Commission decisions in other cases.

[1091] In Stage 2 the parties will have the opportunity to make submissions and adduce evidence in relation to:

1. The timing and phasing-in of the interim increase in the modern award minimum wages applicable to direct care aged care employees, including the appropriateness and application of the principles canvassed at [974] [974]–[990][990] above.
2. Whether making the interim increases to the modern award minimum wages applicable to direct care aged care employees in these proceedings is necessary to

achieve the modern awards objective; and our *provisional* views in respect of the s.134(1) considerations (at [1001] [1001]–[1072] [1072] above).

3. Whether the interim increases in the modern award minimum wages applicable to direct care employees are necessary to achieve the minimum wages objective and our *provisional* views in respect of the s.284(1) considerations (at [1073] [1073]–[1083] [1083] above).

[1092] Stage 2 will conclude our consideration of the interim increase in modern award minimum wages applicable to direct care employees.

[1093] As noted in Chapter 8, the Joint Employers submit an increase in minimum wages for Head Chefs/Cooks is justified by work value reasons. We have not provided 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 consideration in Stage 2 to determining an interim increase for these employees. Absent an agreement between the parties, any increase applicable to these employees will be determined in Stage 3 (together with whether an increase is to be provided to other administrative/support aged care employees and the extent of such an increase).

[1094] Similarly, we do not propose to provide an interim increase in respect of RAOs (that are not classified as PCWs) at this time. The parties are directed to confer in respect of this issue and if they are able to agree on the quantum of an interim increase, we will give consideration in Stage 2 to determining an interim increase for these employees.

Stage 3

[1095] As we point out in Chapter 8, our determination of an interim increase in the modern award minimum wages applicable to direct care workers does not conclude our consideration of the Unions' claim for a 25 per cent increase for other employees, namely administrative and support aged care employees. Nor does the 15 per cent interim increase necessarily exhaust the extent of the increase justified by work value reasons in respect of direct care workers.

[1096] In Chapter 8, we also point out that in determining the quantum of the interim increase we have *not* taken into account *all* of the material before us. In particular, we have not taken into account the impact of the COVID-19 pandemic or the issues arising from understaffing. These matters can be the subject of further submissions in the next stage of the proceedings; in particular we invite submissions on the extent to which the changes to work resulting from the pandemic have become permanent.

[1097] Stage 3 will also involve a detailed consideration of the classification definitions and structures in the Awards, including the issues outlined in Chapter 8 and the issues raised by the Commonwealth in its submissions of 8 August 2022 at [210] – [229]. Interested parties may wish to make further submissions and call additional evidence in relation to one or more of these matters in this stage of the proceedings. We will then issue a further decision finalising the classification definitions and structures in the Awards.

[1098] Stage 3 will also determine wage adjustments that are justified on work value grounds for employees not dealt with in Stage 1 and determine any further wage adjustments that are justified on work value grounds for direct care workers granted initial wage increases in Stages 1 and 2 (in the context of our decision on classification definitions and structures).

[1099] A Mention will be listed for **9:30am on Tuesday 22 November 2022** for the purpose of issuing directions in respect of Stage 2 of these proceedings.

PRESIDENT

Appearances:

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

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

Mr B Redford, Mr S Oski, Ms C Barry, Ms N Dabarera and Ms L Harrison on behalf of the United Workers Union

Mr Nigel Ward, Ms Jordan Lombardelli and Ms Alana Rafter on behalf of Aged & Community Services Australia, Leading Aged Services Australia and Australian Business Industrial.

Mr Sharif and Ms Bulut on behalf of the Commonwealth

Hearing details:

Melbourne (via Microsoft teams)

2022.

26 April.

29 April.

2 – 6 May.

9 – 12 May.

24 May.

2 June.

[2022] FWCFB 200

6 June.

Melbourne

2022.

24 – 25 August.

Sydney

2022.

1 September.

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ATTACHMENT A – PROCEDURAL HISTORY, APPLICATIONS & SUBMISSIONS

[1] Three applications to vary modern awards in the aged care sector are before the Full Bench:

1. [AM2020/99](#) – an application by the Health Services Union (HSU) and a number of individuals to vary the minimum wages and classifications in the *Aged Care Award 2010* (Aged Care Award).
2. [AM2021/63](#) – an application by the Australian Nursing and Midwifery Federation (ANMF) to vary the Aged Care Award and the *Nurses Award 2010*, now the *Nurses Award 2020* (Nurses Award).¹⁰⁵⁷
3. [AM2021/65](#) – an application by the HSU to vary the *Social, Community, Home Care and Disability Services Award 2010* (SCHADS Award) (the Applications).

[2] On 12 November 2020, a number of individuals made an [application](#) to vary the minimum wages and classifications in the Aged Care Award. An [amended application](#) was made on 17 November 2020 adding the HSU as an applicant (AM2020/99). The application seeks to vary the Aged Care Award by:

- (a) Increasing wages for *all* classification levels in the Aged Care Award by 25 per cent by replacing subclause 14.1 of the Award with the following:¹⁰⁵⁸

14.1 Minimum wages – Aged Care Employee	
Classification	Per week
	\$
Aged care employee – level 1	861.40 1076.80
Aged care employee – level 2	895.50 1119.40
Aged care employee – level 3	929.90 1162.40
Aged care employee – level 4	940.90 1176.10
Aged care employee – level 5	972.80 1216.00
Aged care employee – level 6	1025.20 \$1281.50
Aged care employee – level 7	1043.60 \$1304.50

- (b) Varying the classification structure in Schedule B to provide for an additional pay level for Personal Care Workers (PCW) who have undertaken specialised training in a specific area of care and who use those skills, clarifying progression from Aged Care Employee Level 1 to Level 3, clarifying the role descriptions within the personal care stream, referring to the administration of medication as a task for a Senior Personal Care Worker and providing for a new role description for qualified and senior

¹⁰⁵⁷ The *Nurses Award 2010* was varied and renamed the *Nurses Award 2020* on 9 September 2021 ([2021] FWCFB 4504).

¹⁰⁵⁸ An updated version of the HSU's proposed clause 14.1 was included in its closing submissions dated 22 July 2022 to reflect the *Annual Wage Review 2020-21* and the *Annual Wage Review 2021-22*.

Recreational/Lifestyle Officers. The proposed replacement Scheduled B is outlined at **Annexure B**.

- [3] A mention in respect of Application AM2020/99 was held on 23 November 2022.
- [4] On 24 November 2022, a Statement and Directions were issued requiring the HSU to file an outline of its evidentiary case and proposed draft directions by 14 December 2020.
- [5] A further mention was held on 18 December 2020, following which the Commission issued the following directions:
1. The Applicants and other union parties to file evidence and submissions by 4pm on Thursday 1 April 2021.
 2. Employers and Employer Associations to file evidence and submissions by 4pm on Monday 16 August 2021.
 3. The matter will be listed for Mention at 9:30am on Monday 23 August 2021. The purpose of the Mention is to discuss witness scheduling and which witnesses will be called for cross-examination.
 4. The Applicants and other union parties to file evidence and submissions in reply by 4pm on Monday 18 October 2021.
 5. Submissions to be filed in both Word and PDF formats to amod@fwc.gov.au.
 6. The parties are granted liberty to apply to vary the above directions.
- [6] On 14 December 2020, the HSU filed an [outline of evidence](#).
- [7] On 13 January 2021, the Commission notified parties that 10 to 26 October 2021 had been provisionally reserved for hearings of the evidence.
- [8] On 1 March 2021, the final report of the Royal Commission into Aged Care Quality and Safety was tabled in Parliament.
- [9] On 16 March 2021, the ANMF [wrote](#) to the Commission foreshadowing that it would be making an application to vary the minimum wages and classifications in the Nurses Award. The ANMF also sought to vary the directions issued on 18 December 2020.
- [10] On 18 March 2021, the Commission issued a Statement and listed the matter for a Directions Hearing on 26 March 2021. The ANMF was directed to file the variation sought to the directions by 24 March 2021.
- [11] On 24 March 2021, the UWU wrote to the Commission foreshadowing the filing of an application to vary the SCHADS Award and supporting the ANMF's proposed amendment to the directions issued on 18 December 2020.

[12] At a [directions hearing](#) on 26 March 2021, the President indicated that he was not minded to amend the Directions until the proposed variation applications and directions had been filed by the ANMF and UWU.

[13] On the 1 April 2021, submissions were received from the following parties:

- [HSU](#)
- [ANMF](#)
- [UWU \(collectively the Unions\)](#)

[14] Evidence was filed by the HSU and UWU on 1, 23 and 26 April 2021.

[15] On 17 May 2021, the ANMF made an [application](#) to vary the Aged Care Award and the Nurses Award (AM2021/63) by:

1. inserting a new Aged Care Employees Schedule into the Nurses Award, which would increase rates of pay by 25 per cent and expire after 4 years; and
2. creating a new classification structure for PCWs in the Aged Care Award (and consequentially removing them from the main ‘aged care employee’ classification structure in Schedule B) and increasing PCW rates of pay by 25 per cent.

[16] The ANMF’s proposed Aged Care Employees Schedule in the Nurses Award would create a new set of minimum rates for employees who are engaged in the provision of:

- (a) Services for aged persons in a hostel, nursing home, aged care independent living units, aged care services apartments, garden settlement, retirement village or any other residential accommodation facility; and or
- (b) Services for an aged person in a private residence.¹⁰⁵⁹

[17] The proposed schedule applies an increased minimum wage for employees working in the aged care industry in the following classifications:

- Nursing assistant
- Enrolled nurses (including student enrolled nurse) (EN)
- Registered nurses (RN) (levels 1-5); and
- Nurse practitioner.¹⁰⁶⁰

[18] The ANMF’s application seeks a 25 per cent wage increase for all employees covered by the Nurses Award who provide services for aged persons. The ANMF’s initial application was dated 17 May 2021 and there have been 2 developments since that application was made:

¹⁰⁵⁹ ANMF Application (AM2021/63) dated 17 May 2021 Annexure 1 at [1].

¹⁰⁶⁰ The proposed schedule does not include the classification Occupational health nurse as set out at cl.A.6 of the Nurses Award.

1. The ANMF’s initial application included a proposal to insert a new Aged Care Employees Schedule into the Nurses Award which reflected the structure of clause 14 of the *Nurses Award 2010*. The *Nurses Award 2020* came into operation on 9 September 2021. Clause 15 of the *Nurses Award 2020* differs from clause 14 in the 2010 award in two significant respects: it contains a minimum hourly rate for each classification and minimum entry rates for employees with a 4-year degree or a Masters degree.
2. The minimum wages in the Nurses Award and the Aged Care Award have increased as a result of the *Annual Wage Review 2020-21* and the *Annual Wage Review 2021-22*.

[19] In its closing submissions,¹⁰⁶¹ the ANMF amended its proposed schedule to the Nurses Award to reflect the developments since its initial application as follows:

Nurses Award 2020
Proposed Schedule G
(note Schedule F under the Nurses Award 2020 is now Part-day Public holidays)

Classification	Minimum weekly rate (Full-time employee)	Minimum hourly rate
	\$	\$

G.1 General

G.1.1 The provisions of this schedule apply until [insert date 4 years after commencement].

G.1.2 The provisions of this schedule are to be applied to employees in the classifications listed in Schedule B, engaged in the provision of:

- (a) Services for aged persons in a hostel, nursing home, aged care independent living units, aged care serviced apartments garden settlement, retirement village or any other residential accommodation facility; and/or
- (b) Services for an aged person in a private residence.

G.2 Nursing assistant

1 st year	1104.30	29.06
2 nd year	1121.50	29.51
3 rd year and thereafter	1139.50	29.99

¹⁰⁶¹ ANMF closing submissions dated 22 July 2022 Annexure 2.

Experienced (the holder of a relevant certificate III qualification)	1176.10	30.95
G.3 Enrolled Nurses		
(a) Student enrolled nurse		
Less than 21 years of age	1025.90	27.00
21 years of age and over	1076.80	28.34
(b) Enrolled nurses		
Pay point 1	1197.90	31.52
Pay point 2	1213.80	31.94
Pay point 3	1229.90	32.36
Pay point 4	1247.60	32.83
Pay point 5	1260.10	33.16
G.4 Registered Nurses		
Minimum entry rate for a:		
4-year degree ¹	1338.10	35.21
Masters degree ¹	1384.30	36.43
¹ Progression from these entry rates will be to level 1 – Registered nurse pay point 4 and 5 respectively		
Registered nurse – level 1		
Pay point 1	1281.50	33.72
Pay point 2	1307.80	34.41
Pay point 3	1339.90	35.26
Pay point 4	1375.50	36.20
Pay point 5	1417.80	37.31
Pay point 6	1458.80	38.39
Pay point 7	1501.00	39.50
Pay point 8 and thereafter	1540.00	40.53
Registered nurse – level 2		
Pay point 1	1580.90	41.60
Pay point 2	1606.00	42.26
Pay point 3	1633.90	43.00
Pay point 4 and thereafter	1660.60	43.70
Registered nurse – level 3		
Pay point 1	1714.10	45.11
Pay point 2	1745.60	45.94
Pay point 3	1775.80	46.73
Pay point 4 and thereafter	1807.60	47.57

Registered nurse – level 4		
Grade 1	1956.40	51.48
Grade 2	2096.60	55.17
Grade 3	2218.90	58.39
Registered nurse – level 5		
Grade 1	1974.30	51.95
Grade 2	2079.00	54.71
Grade 3	2218.90	58.39
Grade 4	2357.30	62.03
Grade 5	2599.90	68.42
Grade 6	2844.60	74.86
G.5 Nurse practitioner		
1 st year	1972.50	51.91
2 nd year	2031.10	53.45

[20] The ANMF proposes to vary the Aged Care Award by deleting ‘personal care worker’ from the definitions of aged care employee levels 2, 3, 4, 5 and 7 in Schedule B and inserting a new separate classification structure for PCWs.¹⁰⁶² The application also seeks to insert clause 14.1A, which increases the minimum wages of PCWs by 25 per cent as follows:¹⁰⁶³

14.1A Minimum wages – Personal Care Workers	
Classification	Rate of pay
	\$
Grade 1 – Personal Care Worker (entry up to 6 months)	1119.40
Grade 2 – Personal Care Worker (from 6 months) & Recreational/Lifestyle activities officer (unqualified)	1162.40
Grade 3 – Personal Care Worker (qualified)	1176.10
Grade 4 – Senior Personal Care Worker	1216.00
Grade 5 – Specialist Personal Care Worker	1304.50

[21] On 31 May 2021, the HSU made an [application](#) to vary the SCHADS Award (AM2021/65) by:

(1) Inserting the following new definition into clause 3.1:

Home aged care employee means a home care employee providing personal care, domestic assistance or home maintenance to an aged person in a private residence; and

¹⁰⁶² The ANMF’s proposed Schedule B is set out at Annexure C.

¹⁰⁶³ An updated version of the ANMF’s proposed clause 14A was included in its closing submissions dated 22 July 2022 to reflect the *Annual Wage Review 2020-21* and the *Annual Wage Review 2021-22*.

- (2) Inserting a new clause 17A – Minimum weekly ages for home aged care employees to provide a 25 per cent increase in wages for home aged care employees at all classification levels as follows:¹⁰⁶⁴

17A.1 Home aged care employee Level 1

	Per week
	\$
Pay point 1	1089.50

17A.2 Home aged care employee Level 2

	Per week
	\$
Pay point 1	1152.40
Pay point 2	1160.30

17A.3 Home aged care employee Level 3

	Per week
	\$
Pay point 1 (certificate III)	1176.10
Pay point 2	1212.40

17A.4 Home aged care employee Level 4

	Per week
	\$
Pay point 1 (certificate IV)	1283.10

¹⁰⁶⁴ An updated version of the HSU's proposed clause 17A was included in its closing submissions dated 22 July 2022 to reflect the *Annual Wage Review 2020-21* and the *Annual Wage Review 2021-22*.

Pay point 2	1308.80
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17A.5 Home aged care employee Level 5

	Per week
	\$
Pay point 1 (degree or diploma)	1375.80
Pay point 2	1430.00

(3) To make such further or other amendments to the SCHADS Award as appear appropriate to the Commission in light of the evidence in the proceeding.

[22] In essence, together, the Applications seek a 25 per cent rise to the minimum wage for all aged care employees covered by the Aged Care, Nurses and SCHADS awards. The ANMF supports the wage increases sought in the HSU applications for PCWs consistent with its own application.¹⁰⁶⁵ While the ANMF application does not seek a wage increase for employees other than nurses and PCWs, it supports the wage increases sought by the HSU for other employees affected by those applications.¹⁰⁶⁶

[23] The HSU and ANMF differ on their approach to Schedule B in the Aged Care Award.

[24] The ANMF submits that the work performed by Assistants in Nursing (AIN) and PCWs differs qualitatively from the work done by general and administrative services and food services workers and as a result their rates of pay should be treated separately.¹⁰⁶⁷ It relies on 2 propositions:

1. If the Commission is satisfied that there should be an increase in award rates for AINs and PCWs, but is *not* so satisfied in relation to general and administrative services worker and food services workers, then a separate classification structure for AINs/PCWs is an ‘obvious drafting technique or structure to give effect to those conclusions.’¹⁰⁶⁸
2. Even if the Commission *is* satisfied that there should be an increase in award rates for general and administrative services workers and food services workers, a separate classification structure is appropriate because AINs/PCWs work as part of the ‘nursing team’ and engage in care work that is not analogous to the work performed by other aged care employees, such as gardeners.¹⁰⁶⁹ The

¹⁰⁶⁵ ANMF submissions dated 29 October 2021 at [5].

¹⁰⁶⁶ ANMF submissions dated 29 October 2021 at [5].

¹⁰⁶⁷ ANMF submissions dated 29 October 2021 at [205].

¹⁰⁶⁸ ANMF submissions dated 29 October 2021 at [209].

¹⁰⁶⁹ ANMF submissions dated 29 October 2021 at [210].

current classification, which places varieties of workers who perform very different work into a single classification ‘carries with it the risk of stultification of development of particular terms and conditions ... which take account of those qualitative differences between work.’¹⁰⁷⁰

[25] On 1 June 2021, the UWU [wrote](#) to the Commission confirming that, in the circumstances, it would not be making a separate application to vary the SCHADS Award.

[26] On 22 June 2021, the ANMF and the HSU made separate applications to set aside the Directions of 18 December 2020 in respect of matter AM2020/99 and proposed new Directions for the handling of matters AM2020/99, AM2021/63 and AM2021/65.¹⁰⁷¹

[27] On 24 June 2021, a [conference](#) in respect of the applications was held before Commissioner O’Neill.

[28] On 1 July 2021, a [Statement and Directions](#) were issued confirming that the Applications (AM2020/99, AM2021/63 and AM2021/65) would be dealt with jointly by one Full Bench and any evidence given in the matters would be admissible in relation to all of them. The following Directions were issued:

1. AM2020/99, AM2021/63 and AM2021/65 will be dealt with jointly by one Full Bench and any evidence given in the matters will be admissible in relation to all of them.
2. The directions dated 18 December 2020 in relation to application in AM2020/99 are set aside.
3. The Australian Government is to confer with the Applicants in relation to the requests for information and data in Schedule 1.
4. The Australian Government is to file its response to the request for information and data, specifying what information and data it can provide and by when, by **4pm on 16 July 2021**.
5. The Australian Government is to file the information and data then available by **23 July 2021**, and any additional information and data as soon as it is available.
6. The Applicants will file any agreed position involving union parties, employers, employer associations and/or the Australian Government in relation to the matters by 4pm on **Friday 20 August 2021**.
7. The Applicants and other union parties will file evidence and submissions by 4pm on **Friday 8 October 2021**. This includes any updated submission or evidence already filed in matter AM2020/99 in accordance with the directions dated 18 December 2020.

¹⁰⁷⁰ ANMF submissions dated 29 October 2021 at [211].

¹⁰⁷¹ ANMF submission dated 22 June 2021; HSU submission dated 22 June 2021.

8. Employers and employer organisations will file evidence and submissions by 4pm on **Friday 18 February 2022**.

9. The Applicants and other union parties will file evidence and submissions in reply by 4pm on **Thursday 14 April 2022**.

10. The matters will be listed for Mention at 9.30am on **Tuesday 19 April 2022**. The purpose of the Mention is to discuss witness scheduling and which witnesses will be called for cross-examination.

11. The matters will be listed for the hearing of evidence from **26 April to 11 May 2022** (inclusive), with 12 and 13 May reserved.

12. The parties will file closing written submissions regarding the evidence by 4pm on **3 June 2022**.

13. The parties will file submissions in reply regarding the evidence by 4pm on **24 June 2022**.

14. The matters will be listed for oral hearing on **6 and 7 July 2022**.

15. Submissions to be filed in both word and PDF formats to amod@fwc.gov.au.

16. The parties are granted liberty to apply to vary the above directions.

[29] Schedule 1 to the Directions contained requests from the ANMF and the HSU for information and data from the Australian Government. The Directions provided:

4. The Australian Government is to file its response to the request for information and data, specifying what information and data it can provide and by when, by 4pm on **16 July 2021**.

5. The Australian Government is to file the information and data then available by **23 July 2021**, and any additional information and data as soon as it is available.

[30] On 16 July 2021, the Australian Government filed a [submission](#) in response to Direction 4, setting out the information it could provide and the timeframe for providing it. On 23 July 2021, the Australian Government provided a further [submission](#) in response to Direction 5 that contained the information and data requested. This submission was accompanied by an [information and data spreadsheet](#).

[31] On 30 July 2021, the ANMF applied to vary the directions regarding the filing of an agreed position, noting its intention to engage in discussions being facilitated by the Aged Care Workforce Industry Council (ACWIC) about increasing wages in the aged care sector.

[32] On 2 August 2021, the Full Bench issued a Statement varying the Directions as sought by the ANMF, noting that the ANMF application was not opposed by any party. The deadline

for the Applicants to file any agreed position was extended from 20 August 2021 to 19 November 2021.

[33] On 31 August 2021, the Australian Government provided a [submission](#) in response to questions 1-3 of the HSU's schedule of requested information.

[34] On 15 September 2021, the HSU [responded](#) to the Australian Government's submissions and requested clarification and additional information. The Australian Government provided a [response](#) on 24 September 2021.

[35] On 5 October 2021, the HSU informed the Commission that it was not able to file 2 supplementary reports by the deadline and sought an extension of time to file the reports and its outline of submissions. The Commission extended the deadline for the Applicants and other union parties to file submissions from 8 October 2021 to 29 October 2021.

[36] On 29 October 2021, further submissions and witness statements were filed by the [UWU](#), [ANMF](#) and [HSU](#).

[37] On 12 November 2021, the ANMF lodged an application to vary the Directions regarding the filing of any agreed position, noting that parties to the discussions being facilitated by the ACWIC had agreed that further time was required to complete the discussions.¹⁰⁷²

[38] On 15 November 2021, the Commission asked parties to advise if the application was opposed and noted that otherwise, the application would be granted. No comments were received.

[39] On 18 November 2021, as requested by the ANMF, the Commission extended the deadline for Applicants to file any agreed position from 19 November 2021 to 17 December 2021.

[40] On 17 December 2021, a [Consensus Statement](#) was received from the following stakeholders in the aged care sector:

- ACSA
- Aged Care Industry Association (ACIA)
- Aged Care Reform Network
- ANMF
- Carers Australia
- Council on the Ageing (COTA)
- Federation of Ethnic Communities' Councils of Australia (FECCA)
- HSU
- LASA
- National Seniors Australia

¹⁰⁷² ANMF Form F48 dated 12 November 2021.

- Older Persons Advocacy Network (OPAN)
- UWU

[41] The Consensus Statement emerged from meetings convened by the Aged Care Workforce Industrial Council (ACWIC) of stakeholders from the aged care sector to consider the HSU and ANMF's applications. The Consensus Statement 'reflects the matters over which the parties have reached agreement but does not represent the entirety of the views of each of the stakeholders.'¹⁰⁷³

[42] The stakeholders agree that wages in the aged care sector need to be 'significantly increased' because the work of aged care workers has been historically undervalued and has not been properly assessed.¹⁰⁷⁴

[43] On 22 December 2021, ACSA, LASA and ABI applied to vary the directions regarding the filing of submissions and evidence by employers and employer organisations, noting the impacts of a shift in government policy and the emergence of the Omicron variant in the COVID-19 pandemic. It requested an extension from 18 February 2022 until 11 March 2022.¹⁰⁷⁵

[44] The ANMF opposed the application. It made an alternative proposal to extend the due date for submissions by employers and employer organisations until 4 March 2022 and to extend the due date for submissions in reply by Applicants and other union parties until 21 April 2022.¹⁰⁷⁶ The HSU and UWU supported the ANMF's position.¹⁰⁷⁷ ACSA, LASA and ABI did not oppose the ANMF's proposal. On 4 January 2022, the Commission varied the Directions in the terms proposed by the ANMF.

[45] The employer interests in these proceedings are being represented by ACSA, LASA and Australian Business Industrial (ABI) (collectively the Joint Employers). On 4 March 2022, the Joint Employers made the following submissions:

- [Submission](#)
- [Witness statements and evidence](#)
- [Reference Material Document](#)

[46] The Joint Employers submit that although some decisions allude to the C10 framework, the classification structures in the awards were not based on a pre-reform award classification structure that was expressly mapped to the C10 framework and therefore that 'it does not appear that the minimum rates in [the Aged Care, Nurses and SCHADS awards] were properly set as part of the award modernisation process.'¹⁰⁷⁸ Further, the Joint Employers submit that the

¹⁰⁷³ Consensus Statement dated 17 December 2021 at 1.

¹⁰⁷⁴ Consensus Statement dated 17 December 2021 at 2.

¹⁰⁷⁵ Joint Employers correspondence dated 22 December 2021.

¹⁰⁷⁶ ANMF correspondence dated 23 December 2021.

¹⁰⁷⁷ HSU correspondence dated 23 December 2021; UWU correspondence dated 23 December 2021.

¹⁰⁷⁸ Joint Employers submissions dated 4 March 2022 at [3.10].

concept of properly set rates should not be divided from work value assessment. The Joint Employers submit any increase to minimum rates in the Aged Care Award, Nurses Award and SCHADS Award should be preceded by a consideration of the C10 framework and work value principles. The Joint Employers do not support an arbitrary increase of 25%.¹⁰⁷⁹

[47] The Chamber of Commerce and Industry of Western Australia (CCIWA) also made a [submission](#). CCIWA opposes the HSU and ANMF applications.

[48] Submissions were also received from the following aged care providers:

- [Uniting NSW, ACT](#)
- [Uniting Care Australia](#)
- [IRT Group](#)
- [Evergreen Life Care](#)
- [Tandara Lodge Community Care](#)
- [BaptistCare NSW & ACT](#)
- [MercyCare](#)

[49] The following state governments made submissions:

- [Queensland Government](#)
- [Victorian Government](#)

[50] A [submission](#) from an individual aged care worker was also received.

[51] On 21 April 2022, submissions in reply were received from the following parties:

- [HSU](#)
- [ANMF](#)
- [UWU](#)

[52] In total, the Unions relied on 6 expert witness reports and statements and 89 lay witness statements. The Unions lay witness evidence falls into 2 broad categories:

- 17 union officials
- 72 employee lay witnesses

[53] The Joint Employers relied on the statements of 9 lay witnesses.

[54] On 6 April 2022, a [Statement](#) directed the parties to file any objections to the evidence contained in the witness statements by Thursday 21 April 2022. The parties' responses noted

¹⁰⁷⁹ Joint Employers submissions dated 4 March 2022 at [3.20]; Joint Employers closing submissions dated 22 July 2022 Annexure P at [3.2].

that they considered that parts of the material upon which other parties proposed to rely were objectionable (including on the grounds of relevance and hearsay), but they did not propose to take any formal objection to that material.¹⁰⁸⁰ Each of the parties reserved their right to address such matters in their closing submissions in terms of the weight, if any, to be given to parts of the witness statements. The Commission proceeded on that basis.

[55] A [Mention](#) was held on 22 April 2022. The Commission proposed that in order to facilitate the efficient use of Commission resources, the Unions' employee lay witness evidence would be heard by a single member of the Full Bench, Commissioner O'Neill. Commissioner O'Neill would then prepare a report in respect of the evidence for the Full Bench, and the parties would have the opportunity to comment on the report before it was finalised. The remaining witnesses (the union officials, experts and employer lay witnesses) would be heard by the Full Bench. The parties did not object to the course proposed. The Full Bench determined these arrangements in a [Statement](#) published on 24 April 2022.

[56] On 28 April 2022, the ANMF [wrote to the Commission](#) proposing that, for abundant caution, the President formalise the position determined by the Full Bench by way of a written direction, under section 616(3D)(b), section 582(2) and/or section 590. The correspondence reflected a joint position of the HSU, UWU and the Joint Employers. The President issued a [Direction](#) in the proposed terms on 29 April 2022.

[57] On 3 May 2022, a Mention was held to discuss amendments to the existing directions. The Directions were amended as follows:

- The due date for closing written submissions was extended from 3 June 2022 to 8 July 2022
- The due data for submissions in reply regarding the evidence was extended from 24 June 2022 to 25 July 2022
- Oral hearings were rescheduled from 6 and 7 July 2022 to 2 and 3 August 2022

[58] In a [Statement](#) issued on 12 May 2022, the Commission advised that it would prepare the following material and provide it to the parties on 7 June 2022:

- A draft agreed issues document (including the approach to work value cases). The document will also seek to identify the disputed matters.
- A document summarising the major contentions of the parties.
- A background paper on the relevant award(s) history.
- A background document on the residential and home aged care sector.

¹⁰⁸⁰ Joint Employers submission – objections to evidence dated 21 April 2022; UWU submission – hearing plan and evidence dated 21 April 2022; HSU submissions – hearing plan and objections to evidence dated 22 April 2022; ANMF submissions in reply dated 21 April 2022.

[59] On 20 May 2022, the HSU [wrote](#) to the Commission to request that the statements of five lay witnesses be accepted as evidence despite the witnesses not being available for cross-examination.

[60] On 24 May 2022, a [Hearing](#) was held before the Full Bench to determine the HSU's request. The Full Bench issued the following decision in respect of the HSU's request:

'The decision we've arrived at is we do not propose to accept the statements of the five witnesses who are not available for cross-examination. We will permit the HSU to withdraw the statement of Adrienne White. We will allow the HSU to file one further witness statement from a maintenance staff employee and that statement should be filed by no later than 4 pm on 30 May. That witness should be available for cross-examination on the morning of 2 June. Commissioner O'Neill will liaise with the parties in respect of that matter.'¹⁰⁸¹

[61] Hearings of evidence were held from 26 April to 2 June 2022. Transcripts of those hearings may be found [here](#). 12 of the lay witnesses were not required for cross-examination.¹⁰⁸²

[62] The Unions [also proposed](#) that the Commission conduct site visits at a number of aged care facilities. Site visits were undertaken by Deputy President Asbury in Sydney on 27 April 2022 and by Commissioner O'Neill on 28 April 2022.

[63] On 2 June 2022, the Commonwealth [wrote](#) to the Commission to advise that it wished to be heard in the proceedings and anticipated that it would require additional time in order to file its submissions.

[64] On 3 June 2022, a draft lay witness evidence report was circulated to the parties and the Commonwealth for comment.

[65] At a [Mention](#) on Monday 6 June 2022, the Directions were varied as follows:¹⁰⁸³

1. The parties will file closing written submissions regarding the evidence by **4pm on Friday 22 July 2022**.
2. The parties will file submissions in reply regarding the evidence by **4pm on Monday 8 August 2022**.
3. The Commonwealth will file written submissions by **4pm on Monday 8 August 2022**.
4. The parties will file submissions in reply to the Commonwealth's written submissions by **4pm on Wednesday 17 August 2022**.

¹⁰⁸¹ Transcript, 24 May 2022, PN13990.

¹⁰⁸² Leigh Svendsen, Kevin Crank, Kristen Wischer, Melissa Coad, Lorri Seifert, Sally Fox, Tracy Roberts, Hazel Bucher, Maree Bernoth, Pauline Breen, Susan Toner and Cheyenne Woolsey.

¹⁰⁸³ [2022] FWCFB 89.

5. The matter will be listed for oral hearing on:

- a. **24 and 25 August 2022** for submissions by the Applicants and the Commonwealth to be held **in person** in at the Commission's Melbourne office.
- b. **1 September 2022** (with 2 September reserved) for submissions by ABI, ACSA and LASA and reply submissions to be held **in person** at the Commission's Sydney office.

[66] On 8 June 2022, the Commonwealth, ANMF and the Joint Employers provided feedback on the draft lay witness report. Pursuant to an extension granted by the Commission, the HSU provided feedback on the draft law witness report on 10 June 2022.

[67] On 9 June 2022, the Commission published the following documents:¹⁰⁸⁴

- [Background Document 1 – The Applications](#) setting out, amongst other things, a summary of the applications, the procedural history, the legislative framework relevant to the applications and the main contentions of the principal parties.
- [Background Document 2 – Award Histories](#) setting out the history of wages and classifications in the Aged Care Award, the Nurses Award and the SCHADS Award.
- [Amended Digital Hearing Book](#) combining and indexing all material filed up to 7 June 2022, including amended witness statements.
- [Research Reference List](#) setting out all of the research materials and data sources referred to in the parties' submissions and a list of cases referred to by the parties in their submissions.

[68] Background Document 1 and Background Document 2 posed a series of questions to parties with an interest in the proceedings. The answers to those questions were to be filed with the submissions due on Friday 22 July 2022.

[69] On 20 June 2022,¹⁰⁸⁵ the Commission published the [Report to the Full Bench – Lay Witness Evidence](#) (Lay witness evidence report) which provides an overview of the evidence of lay witnesses called by the union parties, including:

- A summary of the lay witnesses who gave evidence (including charts);
- An overview of each witness's evidence;
- An overview of the witnesses' evidence about the duties of various roles in the aged care industry; and
- Illustrative examples of the witness evidence grouped by theme.

¹⁰⁸⁴ [2022] FWCFB 94.

¹⁰⁸⁵ [2022] FWCFB 102.

[70] The Commission also published the following additional Background Documents:¹⁰⁸⁶

- [Background Document 3 – Witness Overview](#) which contains a brief overview of each of the witness’ statements (including employers, union officials and expert witnesses); the relevant page number of each witness statement in version 2 of the Digital Hearing Book, links to the final witness statements and transcript reference; and specific paragraphs of the witnesses’ statements that they were taken to in cross-examination as well as links to any other documents referenced in the course of giving oral evidence.
- [Background Document 4 – The Royal Commission](#) sets out links and extracts from the submissions, witness evidence and the Research Reference List that are relevant to the findings and recommendations of the Royal Commission reports.

[71] On 22 July 2022, the parties filed closing written submissions regarding the evidence and answers to the questions posed in Background Documents 1 and 2. Submissions were received from:

- HSU dated [22 July 2022](#) and [2 August 2022](#)
- ANMF dated [22 July 2022](#)
- UWU dated [25 July 2022](#)
- ACSA, LASA and ABI dated [22 July 2022](#) and [27 July 2022](#)

[72] On 5 August 2022, the Commission published [Background Document 5](#) which summarises the closing written submissions received and the answers to the questions posed in Background Documents 1 and 2. Background Document 5 posed a number of additional questions to the parties.

[73] In view of the range of issues canvassed in the parties’ closing written submissions and the questions posed in Background Document 5, the [Directions](#) were amended as follows:

1. The Commonwealth will file written submissions by **4pm on Monday 8 August 2022.**
2. The parties will file submissions in reply to the Commonwealth’s written submissions by **4pm on Wednesday 17 August 2022.**
3. By no later than **4pm on Friday 19 August 2022**, parties will file:
 - a. Submissions in reply to the closing submissions filed on 22 July 2022
 - b. Responses to the questions posed in Background Document 5.
4. The matter will be listed for oral hearing on:

¹⁰⁸⁶ [2022] FWCFB 102.

- a. **24 and 25 August 2022** for submission by the Applicants and the Commonwealth to be held in person at the Commission's Melbourne office.
 - b. **1 September 2022** (with 2 September reserved) for submissions by ABI, ACSA and LASA and reply submissions to be held in person at the Commission's Sydney office.
5. Submissions to be filed in both word and PDF formats to amod@fwc.gov.au.
 6. Liberty to apply.

[74] On 8 August 2022, the Commonwealth filed a [submission](#).

[75] On 17 August 2022, submissions in reply to the Commonwealth's submission were filed by:

- [Health Services Union \(HSU\)](#)
- [Aged & Community Services Australia \(ACSA\), Leading Age Services Australia \(LASA\) and Australian Business Industrial \(ABI\)](#) (collectively the Joint Employers)

[76] [The Australian Nursing and Midwifery Federation \(ANMF\)](#) filed both its submissions in reply to the Commonwealth, closing submissions in reply and responses to the questions posed in Background Document 5, on 17 August 2022.

[77] The UWU [advised](#) that it did not intend to file a submission in reply to the Commonwealth.

[78] On 19 August 2022, parties filed submissions in reply to the closing submissions and responses to the questions posed in Background Document 5. Submissions were received from the following:

- [HSU](#)
- [UWU](#)
- [Joint Employers](#)

[79] On 22 August 2022, the Commission published 3 further Background Documents:

- [Background Document 6](#) summarises the Commonwealth's submissions and the parties' submissions in reply to the Commonwealth.
- [Background Document 7](#) sets out the parties' submissions in relation to the modern awards objective.
- [Background Document 8](#) summarises the closing submissions in reply and the answers to the questions posed in Background Document 5.

[80] Background Documents 6, 7 and 8 posed a number of additional questions for the parties. The Applicants were invited to respond to these questions at the oral hearing on **24 and 25 August 2022**. The Commonwealth and the Joint Employers were to respond to the additional questions, in writing, by no later than **4pm on Monday 29 August 2022**.

[81] A Full Bench Hearing was held in Melbourne on 24 and 25 August 2022 for submissions by the Unions.¹⁰⁸⁷ During the Hearing, the Full Bench posed a number of questions. The parties provided the following written responses:

- [ANMF – response to question 8 in Background Document 8 and AIN/PCW rates comparison](#) dated 25 August 2022
- [ANMF – evidence of workers having left aged care for work value reasons](#) dated 25 August 2022
- [HSU – response to question on supervision](#) dated 26 August 2022
- [ANMF – removing aged care workers from the Nurses Award 2020](#) dated 30 August 2022

[82] On 29 August 2022, the [Joint Employers](#) and the [Commonwealth](#) provided their responses to the questions posed in Background Documents 6, 7 and 8.

[83] On 30 August 2022, the Commission published [Background Document 9](#) setting out the updated procedural history.

[84] A Full Bench Hearing was held in Sydney on 1 September 2022 for submissions by the Joint Employers, the Commonwealth and reply submissions.¹⁰⁸⁸

[85] Parties were invited to provide any corrections or additions to Background Document 9 at the hearing on 1 September 2022. The following additional written submissions were received:

- [UWU – amendment to Background Document 9](#) dated 31 August 2022
- [HSU – additions to Background Document 9](#) dated 1 September 2022

¹⁰⁸⁷ Transcript, 24 August 2022; Transcript, 25 August 2022.

¹⁰⁸⁸ Transcript, 1 September 2022.

ATTACHMENT B – WITNESSES

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
Health Services Union					
HSU 1	26 April 2022	HSU	Witness statement of Gerard Hayes	DHB11231	PN519 XN: PN533–PN578 RXN: PN580–589
HSU 2	26 April 2022	HSU	Amended witness statement of Lauren Hutchins	DHB11476	PN598 XN: PN618–841 RXN: PN844–857
HSU 3	26 April 2022	HSU	Reply witness statement of Lauren Hutchins	DHB11581	PN598 XN: PN618–841 RXN: PN844–857
HSU 4	26 April 2022	HSU	Amended witness statement of Christopher Friend	DHB11773	PN873 XN: PN883–PN946
HSU 5	26 April 2022	HSU	Supplementary witness statement of Christopher Friend	DHB1802	PN873 XN: PN883–PN946
HSU 6	29 April 2022	HSU	Witness statement of Mark Castieau	DHB14750	PN974 XN: PN992–1178 RXN: PN1180–12111
HSU 7	29 April 2022	HSU	Reply witness statement of Mark Castieau	DHB14813	PN974 XN: PN992–1178 RXN: PN1180–12111
HSU 8	29 April 2022	HSU	Witness statement of Paul Jones	DHB13019	PN1244 XN: PN1256–1371 RXN: PN1374–1391
HSU 9	29 April 2022	HSU	Reply witness statement of Paul Jones	DHB15030	PN1244 XN: PN1256–1371 RXN: PN1374–1391

HSU 10	29 April 2022	HSU	Witness statement of Virginia Ellis	DHB14231	PN1405 XN: PN1421–1704 RXN: PN1709–1740
HSU 11	29 April 2022	HSU	Reply witness statement of Virginia Ellis	DHB14266	PN1405 XN: PN1421–1704 RXN: PN1709–1740
HSU 12	29 April 2022	HSU	Witness statement of Donna Kelly	DHB14567	PN1749 XN: PN1768–1851
HSU 13	29 April 2022	HSU	Reply witness statement of Donna Kelly	DHB14578	PN1749 XN: PN1768–1851
HSU 14	29 April 2022	HSU	Witness statement of Jade Gilchrist	DHB14722	PN1886 XN: PN1897–1955 RXN: PN1957–1963
HSU 15	29 April 2022	HSU	Amended reply witness statement of Jade Gilchrist	DHB14728	PN1886 XN: PN1897–1955 RXN: PN1957–1963
HSU 16	29 April 2022	HSU	Amended witness statement of Kerrie Boxsell	DHB15046	PN1969 XN: PN1987–2114 RXN: PN2117–2121
HSU 17	29 April 2022	HSU	Reply witness statement of Kerrie Boxsell	DHB15060	PN1969 XN: PN1987–2114 RXN: PN2117–2121
HSU 18	29 April 2022	HSU	Witness statement of Fiona Gauci	DHB14657	PN2139 XN: PN2153–2270
HSU 19	29 April 2022	HSU	Reply witness statement of Fiona Gauci	DHB14667	PN2139 XN: PN2153–2270
HSU 20	29 April 2022	HSU	Witness statement of Pamela Little	DHB14537	PN2284 XN: PN2297–2342
HSU 21	29 April 2022	HSU	Reply witness statement of Pamela Little	DHB14555	PN2284 XN: PN2297–2342

HSU 22	29 April 2022	HSU	Amended witness statement of Carol Austen	DHB14336	PN2349 XN: PN2363–2445
HSU 23	29 April 2022	HSU	Amended reply witness statement of Carol Austen	DHB14345	PN2349 XN: PN2363–2445
HSU 24	2 May 2022	HSU	Witness statement and report of Dr Sara Charlesworth	DHB7159	PN2472 XN: PN2486–2566 RXN: PN2577–2586
HSU 25	2 May 2022	HSU	Supplementary witness statement and report of Dr Sara Charlesworth	DHB7230	PN2472 XN: PN2486–2566 RXN: PN2577–2586
HSU 26	2 May 2022	HSU	Witness statement and report of Dr Gabrielle Meagher	DHB7295	PN2594 XN: PN2616–2735 RXN: PN2737–2757
HSU 27	2 May 2022	HSU	Amended supplementary witness statement and report of Dr Gabrielle Meagher	DHB7457	PN2594 XN: PN2616–2735 RXN: PN2737–2757
HSU 28	2 May 2022	HSU	Witness statement of Marion Jennings	DHB11880	PN2777 XN: PN2796–2897 RXN: PN2899–2904
HSU 29	2 May 2022	HSU	Reply witness statement of Marion Jennings	DHB11904	PN2777 XN: PN2796–2897 RXN: PN2899–2904
HSU 30	2 May 2022	HSU	Witness statement of Lindy Twyford	DHB11835	PN2913 XN: PN2925–2997 RXN: PN2998–3006
HSU 31	2 May 2022	HSU	Reply witness statement of Lindy Twyford	DHB11868	PN2913 XN: PN2925–2997

					RXN: PN2998–3006 PN3020 XN: PN3032–3061
HSU 32	2 May 2022	HSU	Witness statement of David Eden	DHB11731	PN3491 XN: PN3503–3552 RXN: PN3554–3556
HSU 33	3 May 2022	HSU	Witness statement of James Eddington	DHB11909	PN3567 XN: PN3582–3684 RXN: PN3686–3709
HSU 34	3 May 2022	HSU	Witness statement and report of Professor Susan Kurrle	DHB7926	PN4087 XN: PN4102–4301
HSU 35	3 May 2022	HSU	Witness statement of Lyn Cowan	DHB14817	PN4087 XN: PN4102–4301
HSU 36	3 May 2022	HSU	Reply witness statement of Lyn Cowan	DHB14956	PN4316 XN: PN4340–4431 RXN: PN4435–4443
HSU 37	3 May 2022	HSU	Witness statement of Alison Curry	DHB14367	PN4316 XN: PN4340–4431 RXN: PN4435–4443
HSU 38	3 May 2022	HSU	Reply witness statement of Alison Curry	DHB14388	PN4456 XN: PN4480–4605
HSU 39	3 May 2022	HSU	Amended witness statement of Susan Digney	DHB15143	PN4643 XN: PN4658–4722 RXN: PN4725–4733
HSU 40	4 May 2022	HSU	Witness statement of Josephine Peacock	DHB14734	PN4744 XN: PN4753–4841 RXN: PN4843–4853
HSU 41	4 May 2022	HSU	Witness statement of Helen Platt	DHB14307	PN4859 XN: PN4875–4916
HSU 42	4 May 2022	HSU	Witness statement of Michelle Harden	DHB14992	

					RXN: PN4919–4922 PN4859
HSU 43	4 May 2022	HSU	Reply witness statement of Michelle Harden	DHB15015	XN: PN4875–4916 RXN: PN4919–4922
HSU 44	4 May 2022	HSU	Witness statement of Antoinette Schmidt	DHB14411	PN4937 XN: PN4963–5114 RXN: PN5117–5128
HSU 45	4 May 2022	HSU	Reply witness statement of Antoinette Schmidt	DHB14531	PN4937 XN: PN4963–5114 RXN: PN5117–5128
HSU 46	4 May 2022	HSU	Witness statement of Camilla Sedgman	DHB15-66	PN5146 XN: PN5159–5234
HSU 47	4 May 2022	HSU	Amended witness statement of Sanu Ghimire	DHB14295	PN5256 XN: PN5274–5334 RXN: PN5337–5341
HSU 48	4 May 2022	HSU	Witness statement of Kristy Youd	DHB14679	PN5350 XN: PN5366–5424 RXN: PN5426–5432
HSU 49	4 May 2022	HSU	Reply witness statement of Kristy Youd	DHB14688	PN5350 XN: PN5366–5424 RXN: PN5426–5432
HSU 50	4 May 2022	HSU	Julie Kupke	DHB15611	PN5445 XN: PN5457–5526
HSU 51	4 May 2022	HSU	Amended witness statement of Jennifer Wood	DHB15084	PN5540 XN: PN5554–5824 RXN: PN5627–5634
HSU 52	4 May 2022	HSU	Amended witness statement of Veronique Vincent	DHB15662	PN5646 XN: PN5667–5736 RXN: PN5739–5751

HSU 53	5 May 2022	HSU	Witness statement of Lynette Flegg	DHB14964	PN5765 XN: PN5778–5974 RXN: PN5976–5994
HSU 54	5 May 2022	HSU	Reply witness statement of Lynette Flegg	DHB14987	PN5765 XN: PN5778–5974 RXN: PN5976–5994
HSU 55	5 May 2022	HSU	Witness statement of Peter Doherty	DHB15122	PN6012 XN: PN6038 – 6098; PN6258–6343 RXN: PN6346–6349
HSU 56	5 May 2022	HSU	Witness statement of Catherine Evans	DHB15545	PN6106 XN: PN6116–6237 RXN: PN6240–6250
HSU 57	5 May 2022	HSU	Reply witness statement of Catherine Evans	DHB15573	PN6106 XN: PN6116–6237 RXN: PN6240–6250
HSU 58	5 May 2022	HSU	Witness statement of Bridget Payton	DHB15636	PN6371 XN: PN6386–6460 RXN: PN6463–6471
HSU 59	5 May 2022	HSU	Reply witness statement of Bridget Payton	DHB15657	PN6371 XN: PN6386–6460 RXN: PN6463–6471
HSU 60	5 May 2022	HSU	Witness statement of Sandra O’Donnell	DHB14349	PN6481 XN: PN6504–6881 RXN: PN6684–6887
HSU 61	5 May 2022	HSU	Reply witness statement of Sandra O’Donnell	DHB14359	PN6481 XN: PN6504–6881 RXN: PN6684–6887
HSU 62	5 May 2022	HSU	Witness statement of Charlene Glass	DHB14316	PN6699

					XN: PN6715–6880
HSU 63	5 May 2022	HSU	Reply witness statement of Charlene Glass	DHB14326	PN6699 XN: PN6715–6880
HSU 64	5 May 2022	HSU	Witness statement of Marea Phillips	DHB15341	PN6912 PN6927–6987
HSU 65	5 May 2022	HSU	Witness statement of Kathleen Sweeney	DHB14704	PN7002 XN: PN6504–6681 RXN: PN6884–6887
HSU 66	5 May 2022	HSU	Reply witness statement of Kathleen Sweeney	DHB14712	PN7002 XN: PN6504–6681 RXN: PN6884–6887
HSU 67	6 May 2022	HSU	Witness statement of Darren Kent	DHB14583	PN7312 XN: PN7332–7516 RXN: PN7518–7530
HSU 68	6 May 2022	HSU	Reply witness statement of Darren Kent	DHB14648	PN7312 XN: PN7332–7516 RXN: PN7518–7530
HSU 69	6 May 2022	HSU	Amended witness statement of Michael Purdon	DHB15415	PN7539 XN: PN7561–7612 RXN: PN7613–7627
HSU 70	6 May 2022	HSU	Witness statement of Anita Field	DHB15037	PN7636 XN: PN7651–7838 RXN: PN7841–7844
HSU 71	6 May 2022	HSU	Witness statement of Theresa Heenan	DHB15578	PN7866 XN: PN7877–8019
HSU 72	6 May 2022	HSU	Reply witness statement of Theresa Heenan	DHB15606	PN7866 XN: PN7877–8019
HSU 73	9 May 2022	HSU	Witness statement and report of Professor Kathleen Eagar	DHB7457	PN8723 XN: PN8736–8929 RXN: PN8931–8949

HSU 74	9 May 2022	HSU	Supplementary witness statement and report of Professor Kathleen Eagar	DHB7548	PN8723 XN: PN8736–8929 RXN: PN8931–8949
HSU 75	9 May 2022	HSU	Witness statement of Kevin Mills	DHB14698	PN10083 XN: PN10097–10194 RXN: PN10196–10207
HSU 76	10 May 2022	HSU	Witness statement of Susanne Wagner	DHB15428	PN10219 XN: PN10233–10333 RXN: PN10334–10375
HSU 77	2 June 2022	HSU	Witness statement of Eugene Basciuk	DHB15693	PN14000 XN: PN14015–14192 RXN: PN14196–14204
HSU 78	22 April 2021	HSU	Witness statement of Leigh Svendsen	DHB7990	-
HSU 79	6 October 2021	HSU	Witness statement of Lorri Seifert	DHB15203	-
HSU 80	29 March 2021	HSU	Witness statement of Sally Fox	DHB15227	-
HSU 81	28 October 2021	HSU	Supplementary witness statement of Sally Fox	DHB15245	-
HSU 82	23 March 2021	HSU	Witness statement of Tracy Roberts	DHB14278	-
HSU 83	31 March 2022	HSU	Reply witness statement of Tracy Roberts	DHB14294	-
Australian Nursing and Midwifery Federation					
ANMF 1	2 May 2022	ANMF	Amended witness statement and report of Associate Professor Anne Junor	DHB7656	PN3087 XN: PN3111–3232 RXN: PN3235–3241
ANMF 2	2 May 2022	ANMF	Amended witness statement and report of Associate Professor Smith and Dr Lyons	DHB7553	PN3250 XN: PN3267–3334
ANMF 3	2 May 2022	ANMF	Amended witness statement of Annie Butler	DHB11942	PN3348 XN: PN3373–3444 RXN: PN3447–3451

ANMF 4	3 May 2022	ANMF	Witness statement of Julianne Bryce	DHB13853	PN3717 XN: PN3727–3749
ANMF 5	3 May 2022	ANMF	Amended witness statement of Kathryn Chrisfield	DHB13442	PN3761 XN: PN3780–3838 RXN: PN3841–3847
ANMF 6	3 May 2022	ANMF	Amended witness statement of Andrew Venosta	DHB13830	PN3855 XN: PN3874–3964
ANMF 7	3 May 2022	ANMF	Amended witness statement of Paul Gilbert	DHB13478	PN3975 XN: PN4007–4051
ANMF 8	6 May 2022	ANMF	Witness statement of Lisa Bayram	DHB15929	PN8031 XN: PN8059–8243 RXN: PN8248–8256
ANMF 9	6 May 2022	ANMF	Amended witness statement of Suzanne Hewson	DHB16120	PN8267 XN: PN8285–8322 RXN: PN8324–8330
ANMF 10	6 May 2022	ANMF	Amended witness statement of Virginia Mashford	DHB16128	PN8348 XN: PN8403–8464
ANMF 11	6 May 2022	ANMF	Amended witness statement of Rose Nasemena	DHB16057	PN8479 XN: PN8509–8595 RXN: PN8598–8602
ANMF 12	6 May 2022	ANMF	Witness statement of Christine Spangler	DHB15712	PN8620 XN: PN8634–8694 RXN: PN8697–8703
ANMF 13	9 May 2022	ANMF	Witness statement of Robert Bonner	DHB13500	PN8959 XN: PN8979–9043
ANMF 14	9 May 2022	ANMF	Amended witness statement of Wendy Knights	DHB16141	PN9116 XN: PN9133–9259
ANMF 15	9 May 2022	ANMF	Amended witness statement of Stephen Voogt	DHB16094	PN9272 XN: PN9288–9373

					RXN: PN9376–9378
ANMF 16	9 May 2022	ANMF	Witness statement of Dianne Power	DHB15805	PN9397 XN: PN9411–9556 RXN: PN9559–9567
ANMF 17	9 May 2022	ANMF	Witness statement of Jocelyn Hofman	DHB15854	PN9584 XN: PN9607
ANMF 18	9 May 2022	ANMF	Amended witness statement of Patricia McLean	DHB16006	PN9665 XN: PN9694–9764
ANMF 19	9 May 2022	ANMF	Amended witness statement of Linda Hardman	DHB15968	PN9780 XN: PN9797–9873 RXN: PN9875–9880
ANMF 20	9 May 2022	ANMF	Witness statement of Sherree Clarke	DHB16068	PN9899 XN: PN9917–10054 RXN: PN10057–10065
ANMF 21	10 May 2022	ANMF	Witness statement of Irene McInerney	DHB15842	PN10976 XN: PN11000–11096 RXN: PN11099–11105
ANMF 22	29 October 2021	ANMF	Witness statement of Kevin Crank	DHB13456	-
ANMF 23	14 September 2021	ANMF	Witness statement of Kristen Wischer	DHB12031	-
ANMF 24	9 May 2022	ANMF	Amended further witness statement of Kristen Wischer	DHB13355	-
ANMF 25	10 May 2022	ANMF	Amended witness statement of Hazel Bucher	DHB15820	-
ANMF 26	29 October 2021	ANMF	Witness statement of Maree Bernoth	DHB15979	-
ANMF 27	9 May 2022	ANMF	Amended witness statement of Pauline Breen	DHB16050	-
United Workers Union					

UWU 1	10 May 2022	UWU	Amended witness statement of Paula Wheatley	DHB16236	PN10386 XN: PN10400–10457
UWU 2	10 May 2022	UWU	Witness statement of Ngari Inglis	DHB16227	PN10475 XN: 10485–10527
UWU 3	10 May 2022	UWU	Witness statement of Teresa Hetherington	DHB16260	PN10544 XN: PN10552–10620
UWU 4	10 May 2022	UWU	Witness statement of Catherine Goh	DHB16186	PN10638 XN: PN10648–10736
UWU 5	10 May 2022	UWU	Witness statement of Susan Morton	DHB16242	PN10768 XN: PN10778–10855
UWU 6	10 May 2022	UWU	Witness statement of Maria Moffat	DHB16222	PN10882 XN: PN10892–10961
UWU 7	10 May 2022	UWU	Witness statement of Jane Wahl	DHB16277	PN11130 XN: PN11141–11224
UWU 8	10 May 2022	UWU	Witness statement of Lillian Grogan	DHB16217	PN11237 XN: PN11248–11330
UWU 9	11 May 2022	UWU	Witness statement of Karen Roe	DHB16211	PN11371 XN: PN11395–11505
UWU 10	11 May 2022	UWU	Witness statement of Ross Heyen	DHB16183	PN11517 XN: PN11527–11573
UWU 11	11 May 2022	UWU	Witness statement of Sandra Hufnagel	DHB16169	PN11586 XN: PN11595–11663
UWU 12	11 May 2022	UWU	Witness statement of Lyndelle Parke	DHB16178	PN11681 XN: PN11691–11791
UWU 13	11 May 2022	UWU	Witness statement of Geronima Bowers	DHB16190	PN11803 XN: PN11811–11961
UWU 14	11 May 2022	UWU	Witness statement of Judeth Clarke	DHB16068	PN11970 XN: PN11982–12074
UWU 15	11 May 2022	UWU	Witness statement of Donna Cappeluti	DHB16271	PN12086 XN: PN12096–12178
UWU 16	7 October 2021	UWU	Witness statement of Melissa Coad	DHB13861	-

UWU 17	28 September 2021	UWU	Witness statement of Susan Toner	DHB16248	-
Joint Employers					
JE 1	11 May 2022	Joint Employers	Witness statement of Paul Sadler	DHB16283	PN12202 XN: PN12211–12439 RXN: PN12442–12453
JE 2	11 May 2022	Joint Employers	Amended witness statement of Anna-Maria Wade	DHB17896	PN12470 XN: PN12543–12568 RXN: PN12570–12573
JE 3	12 May 2022	Joint Employers	Witness statement of Mark Sewell	DHB17297	PN12855 XN: PN12885–13129 RXN: PN13132–13139
JE 4	12 May 2022	Joint Employers	Witness statement of Kim Bradshaw	DHB17640	PN12953 XN: PN12604–12827 RXN: PN12830–12834
JE 5	12 May 2022	Joint Employers	Amended witness statement of Craig Smith	DHB16823	PN13147 XN: PN13162–13299 RXN: PN13302–13312
JE 6	12 May 2022	Joint Employers	Witness statement of Emma Brown	DHB16683	PN13319 XN: PN13328 – 13488 RXN: 13492 – 13503
JE 7	12 May 2022	Joint Employers	Witness statement of Sue Cudmore	DHB17769	PN13513 XN: PN13525–13743 RXN: PN13747–13749
JE 8	12 May 2022	Joint Employers	Witness statement of Johannes Brockhaus	DHB17530	PN13755 XN: PN13765 -
JE 9	12 May 2022	Joint Employers	Witness statement of Cheyne Woolsey	DHB18415	PN13901

ATTACHMENT C – THE CONSENSUS STATEMENT

This Statement has been prepared by stakeholders from the aged care sector. The Aged Care Workforce Industry Council is not party to this Statement. The Council engaged an independent facilitator to support the stakeholders to develop this Statement.

Introduction

Throughout the period September to December 2021 the Aged Care Workforce Industry Council (ACWIC) convened meetings of stakeholders from the aged care sector to consider the applications made by the Health Services Union (HSU) and the Australian Nursing and Midwifery Federation (ANMF) to the Fair Work Commission (FWC) to increase the wage rates of aged care sector workers by 25% (the applications).

ACWIC convened these meetings in response to the recommendations of the Royal Commission into Aged Care, Quality and Safety. Recommendation 76 (2) (e) recommended that:

(2) By 30 June 2022, the Aged Care Workforce Industry Council Limited should:

...

(e) lead the Australian Government and the aged care sector to a consensus to support applications to the Fair Work Commission to improve wages based on work value and/or equal remuneration, which may include redefining job classifications and job grades in the relevant awards. (Emphasis added)

Participants at the meetings came from stakeholder organisations that represent the aged care workforce, aged care providers, and consumers – older Australians and their families. The Federal Government via the Department of Health was invited to attend and participate but declined.

Arising from these meetings and pursuant to the Recommendation, this Statement has been prepared by stakeholders from the aged care sector. This Statement reflects the matters over which the parties have reached agreement but does not represent the entirety of the views of each of the stakeholders.

The organisations supporting the Statement are listed in Attachment A.

The parties to the work value case will participate in discussions to attempt to reach a Statement of Agreed Facts in relation to the applications in early 2022.

STATEMENT

Value of the work

The stakeholders agree that wages in the aged care sector need to be significantly increased because the work of aged care workers has been historically undervalued for a range of reasons¹⁰⁸⁹ and has not been properly assessed by the Fair Work Commission or any other industrial tribunal.

Minimum wages in awards need to be set according to the value of the work done by workers in aged care, recognising increases in the complexity of the nature of the work and skills and responsibility involved in doing the work and changes to the conditions under which work is done.

The stakeholders believe that in properly valuing the work of aged care workers and setting minimum wages in awards, the Fair Work Commission should take into account the following:

1. Australians are living longer. The proportion of Australians over the age of 65 is set to increase from 15 per cent to 23 per cent by 2066¹⁰⁹⁰. With advanced age often comes increased frailty which is associated with increased morbidity, declining function and a concurrent need for supports. As a result, aged care consumers are entering aged care with more frailty, co-morbidities and acute care needs. Thus, the acuity of recipients of aged care services has increased and this trend is expected to continue.
2. The proportion of people with dementia and dementia-associated conditions receiving aged care services has increased.
3. With an increase in the ageing population, the need for embedded and effective palliative care is now more prevalent than historically was the case.
4. Aged care services are provided to consumers in residential aged care facilities (residential care), clients' own homes (home care) and in clustered domestic and household models of care. Home care is increasing as a proportion of aged care services.
5. Clustered domestic and household models of care are growing in prevalence. These models of care require greater numbers of staff with a broad range of capabilities.
6. The academic discipline of gerontology has evolved considerably in the last 20 years and informs options for the provision of care.
7. In each of the settings, consumers are increasingly requiring and receiving care to meet more complex needs including acute and sub-acute care. The need for socio-emotional skills in addition to clinical and care skills is more apparent.

¹⁰⁸⁹ For example, see the *Royal Commission into Aged Care Quality and Safety*, Final Report, Summary and Recommendations, page 41.

¹⁰⁹⁰ <https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/demographics-of-older-australians/australia-s-changing-age-and-gender-profile>.

8. There is an increase in the number and complexity of medications prescribed and administered.¹⁰⁹¹
9. The expectations of aged care consumers and their families, and the community, about the provision of aged care services has risen over time.¹⁰⁹² The philosophy of care is person-centred based on choice and control, and this requires a focus on the individual needs of each resident and client.
10. Aged care caters for the diverse Australian community and needs to meet the cultural, social and linguistic needs of communities such as Aboriginal and Torres Strait Islander people, CALD, LGBTQI+ and other diverse communities.
11. Older people of CALD backgrounds are an increasingly significant proportion of the population, making up approximately a third of people aged 65 and over. Cultural diversity among older people seeking care is changing and increasing. As of June 2019, at least 1 in 4 home care consumers were CALD older people and 1 in 5 among residential care and home support consumers.
12. Communication with consumers and their families requires skills in interpersonal communication and cross-cultural awareness.
13. The work demand of aged care workers is changeable and work is done to rigorous time and performance standards.
14. Changes in staffing levels, skills mix and, consequently, workloads, have a significant impact on the changing nature of the work and therefore work value.
15. Since 2003, there has been a decrease in the number of nurses, both Registered Nurses (RNs) and Enrolled Nurses (ENs), as a proportion of the total workforce employed in aged care.¹⁰⁹³ RNs are the clinical leaders in residential aged care and have experienced an increase in managerial duties (including co-ordinating and supervising and delegating) and/or administrative responsibilities. Expectations of RNs have increased markedly (along with a shift from residents with lower to higher social and clinical needs). Nurses are required to detect changes in resident health status, identify elder abuse and anticipate medical decision-making. Overall, there are more demands upon nurses due to workforce structures and meeting governance requirements. They develop care plans and oversee their implementation and review.
16. Again since 2003, there has been an increase in the proportion of PCWs and AINs (care workers) in aged care with less direct supervision. PCWs are being required to

¹⁰⁹¹ ANMF 110 Trends in Medication Use 2016-2021 (fwc.gov.au) at 2 and 8, Reiersen F. Trends in Medication Use 2016-2021 September 2021 and <https://onlinelibrary.wiley.com/doi/full/10.1111/imj.14871> M. C. Inacio, C. Lang, S. C. E. Bray, R. Visvanathan, C. Whitehead, E. C. Griffith, K. Evans, M. Corlis, S. Wesselingh. Health status and healthcare trends of individuals accessing Australian aged care programmes over a decade: the Registry of Senior Australians historical cohort. 2 May 2020.

¹⁰⁹² <https://agedcare.royalcommission.gov.au/sites/default/files/2020-09/research-paper-11-aged-care-reform-projecting-future-impacts.pdf>.

¹⁰⁹³ The 2016 Aged Care Workforce census and survey report undertaken by the National Institute of Labour Studies (NILS) research team shows in 2003 RNs were 21.4% of the direct care workforce; this decreased to 16.8% in 2007, and to 14.7% in 2012, and that it increased to 14.9% in 2016. The latest census and survey, the *2020 Aged Care Workforce Census Report*, indicates RNs make up 15.6% of direct care workers.

perform duties that were traditionally undertaken by nurses (such as peg feeding and catheter support) after receiving relevant training and/or instruction. Care workers in both residential care and home care are performing increasingly complex work along with the increasing complexity of the needs of residents entering care. There are more expectations of care workers to detect changes in resident or client condition, identify elder abuse and assist with medications and other treatments.

17. Consumer-directed Home Care Packages have resulted in a less structured stream of duties for home care workers, who must now perform a broader range of duties. Home care workers must plan and adapt to different duties and levels of expectations from client to client. The proportion of home care packages at levels 3 and 4 have increased.
18. Funding for Home Care Packages going directly to clients means that providers have less discretion about how to allocate funding among perceived areas of need.
19. Home care workers work with minimal supervision, and the increase in acuity and dependency of recipients of aged care services means that these workers are exercising more independent decision-making, problem solving and judgment on a broader range of matters.
20. Labour turnover and the use of lower hours, part-time, casual and agency staff in home and residential care results in longer-serving and permanent staff having more responsibility for continuity of care. These staff then need to mentor new starters and irregularly employed employees as well. Casual and agency staff face the added pressure of dealing with changing settings and consumers.
21. Care work requires workers to engage with a range of people, many of whom are vulnerable people. The work consistently requires significant degrees of discretion and judgement to be exercised, and strong interpersonal and communication skills. The changes in, and changes sought to, the qualifications and training of direct care workers reflect changing care needs.

For example:

- (a) The addition of a reference to the care of older people to the Registered Nurses Accreditation Standards 2019
- (b) The skills considered necessary to be added to current training for the Certificate III in Care Support, as follows:
 - (i) Person-centred behaviour supports
 - (ii) Providing loss and grief supports
 - (iii) End of life and palliative care
 - (iv) Dementia care
 - (v) Management of anxiety and adjustment to change
 - (vi) Supporting relationships with carers and families
 - (vii) Falls-prevention strategy

- (viii) Assisting with monitoring and modification of meals
 - (ix) Working with people with mental health issues
 - (x) Providing or assisting with oral hygiene and recognising and responding to oral health issues
 - (xi) Effective care for members of diverse population groups including aboriginal and Torres Strait Islander people
 - (xii) Use of information technology
22. The changes in the characteristics of aged care consumers (increased acuity, frailty and incidence of dementia) mean the conditions under which work is done are more challenging for employees providing indirect care support services (such as food services, cleaning or general/administrative work). These workers are an important part of the aged care team. Their work necessitates higher levels of skill when compared to similar workers in other sectors, or to aged care in the past.
23. There has been a change in the regulatory regime applying to aged care. Changes to the Aged Care Funding Instrument (ACFI) requirements and a new funding instrument is soon to be introduced. There have also been changes to regulations concerning the use of physical and chemical restraint and to incident reporting arrangements. These changes mean nurses and care workers are required to meet increased quality and safety standards and meet increased documentation requirements.

Attraction and retention of workers

Wages in aged care need to be competitive to attract and retain the number of skilled workers needed to deliver safe and quality care.

Minimum award wages of nurses are significantly lower than in the acute health sector, making aged care a less attractive choice for nurses. Minimum award wages of PCWs are significantly lower than for disability support workers

Providers of both aged care and disability support would benefit from alignment of wage levels to support the mobility and the aggregate supply of staff in both sectors.

Similar challenges are faced in the attraction and retention of support staff, who are an integral part of aged care functional teams.

Funding

A decision of the Fair Work Commission to increase minimum wages in the aged care sector must be fully funded by the Federal Government and linked to transparency and accountability measures as to how funding is used.

Attachment A

Aged & Community Services Australia (ACSA)
Aged Care Industry Association (ACIA)
Aged Care Reform Network
Australian Nursing and Midwifery Federation (ANMF)
Carers Australia
Council on the Ageing (COTA)

Federation of Ethnic Communities' Councils of Australia (FECCA)
Health Services Union (HSU)
Leading Age Services Australia (LASA)
National Seniors Australia
Older Persons Advocacy Network (OPAN)
United Workers Union (UWU)