



BACKGROUND DOCUMENT

8 – SUMMARY OF SUBMISSIONS

Fair Work Act 2009

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

Aged Care Award 2010

(AM2020/99)

Nurses Award 2020

(AM2021/63)

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

(AM2021/65)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT ASBURY
COMMISSIONER O’NEILL

MELBOURNE, 22 AUGUST 2022

This document has been prepared to facilitate proceedings and does not purport to be a comprehensive discussion of the submissions made; nor does it represent the concluded view of the Commission on any issue.

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ABBREVIATIONS

| | |
|-------------------------------------|--|
| ABS | Australian Bureau of Statistics |
| ABI | Australian Business Industrial |
| <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 Wage rates - PR954938 [2005] AIRC 28</i> |
| ACSA | Aged & Community Services Australia |
| Aged Care Award | <i>Aged Care Award 2010</i> |
| AIN | Assistant in Nursing |
| ANMF | Australian Nursing and Midwifery Foundation |
| AQF | Australian Qualifications Framework |
| Charlesworth Report | Dr 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 | Dr Sara Charlesworth, <i>Supplementary Report of Sara Charlesworth</i> dated 22 October 2021 |
| CCIWA | Chamber of Commerce and Industry of Western Australia |
| Commission | Fair Work Commission |
| Eagar Report | Dr Kathleen Eagar, <i>Report of Dr Kathleen Eagar</i> dated 29 March 2021 |
| Eagar Supplementary Report | Dr Kathleen Eagar, <i>Supplementary Report of Dr Kathleen Eagar</i> dated 20 April 2022 |
| EN | Enrolled Nurse |
| <i>Equal Remuneration Case 2015</i> | <i>Application by United Voice & Australian Education Union [2015] FWCFB 8200</i> |
| FW Act | <i>Fair Work Act 2009 (Cth)</i> |
| HSU | Health Services Union |
| Joint Employers | Aged & Community Services Australia, Leading Age Services Australia, Australian Business Industrial |
| Junor Report | Honorary Associate Professor 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 | Dr 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 |

| | |
|-------------------------------|---|
| Meagher Report | Dr 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 | Dr Gabrielle Meagher, <i>Supplementary report on workforce and work value issues in Australian home care for older people</i> dated 27 October 2021 |
| NES | National Employment Standards |
| Nurses Award | <i>Nurses Award 2020</i> |
| PCW | Personal Care Worker |
| <i>Penalty Rates Decision</i> | <i>4 Yearly Review of Modern Awards – Penalty Rates</i> [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 |
| <i>Pharmacy Decision</i> | <i>Four Yearly Review of Modern Awards – Pharmacy Industry Award 2010</i> [2018] FWCFB 7621 |
| RN | Registered Nurse |
| SCHADS Award | <i>Social, Community, Home Care and Disability Services Award 2010</i> |
| Smith/Lyons Report | Associate Professor Meg Smith and Dr Michael Lyons, <i>Report by Associate Professor Meg Smith and Dr Michael Lyons</i> dated October 2021, as amended 2 May 2022 |
| <i>Teachers Case</i> | <i>Independent Education Union of Australia</i> [2021] FWCFB 2051 |
| Unions | Australian Nursing and Midwifery Foundation, Health Services Union and the United Workers Union |
| UWU | United Workers Union |
| 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</i> |
| WR Act | <i>Workplace Relations Act 1996</i> (Cth) |

1. Introduction

[1] On 5 August 2022, the Commission published Background Document 5 which included:

- The parties' responses to the *provisional views* expressed in a Statement published on 9 June 2022.
- The answers to the questions posed in Background Documents 1 and 2.
- The main points of agreement between the parties.
- The main points of contention between the parties.

[2] Background Document 5 also posed a number of additional questions to the parties. 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:
 - 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.

[3] On 8 August 2022, the Commonwealth filed a [submission](#).

[4] On 17 August 2022, the parties filed submissions in reply to the Commonwealth's submissions. Submissions were received from the following:

- [Health Services Union](#) (HSU)

- [Aged & Community Services Australia \(ACSA\), Leading Age Services Australia \(LASA\) and Australian Business Industrial \(ABI\)](#) (collectively the Joint Employers)

[5] [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.

[6] The UWU [advised](#) that it did not intend to file a submission in reply to the Commonwealth.

[7] 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](#)

[8] Section 2 of this Background Document sets out the answers provided to the questions posed in Background Document 5 and section 3 sets out the parties' submissions in reply to the closing written submissions.

2. Responses to the questions posed in Background Document 5

2.1 Legislative framework

[9] The HSU submits that the specific items in s.157(2A) should be interpreted as follows:

1. The “nature of the work” includes the nature of the job and task requirements imposed on workers, the social context of the work and the status of the work.
2. Assessing “skills and responsibilities” involved in the work includes:
 - (i) Consideration of initial and ongoing required qualifications, professional development and accreditation obligations, surrounding legislative requirements and the complexity of techniques required of workers;
 - (ii) The level of skill required, including with reference to the complexity of the work and mental and physical tasks required to be undertaken; and
 - (iii) The amount of responsibility placed on the employees to undertake tasks;
3. The “conditions under which work is performed” refers to “the environment in which work is done.”¹

[10] The HSU submits that the reference to ‘the social context of the status of the work’ is ‘intended to convey that the social utility or worth of particular kinds of work has been considered to be relevant to the assessment of work value.’²

Question 1 of BD5: *Where does the HSU derive the proposition of the ‘social utility of the work’ from? In particular, which part of the legislative framework supports the proposed construction? How should the ‘social utility of the work’ be measured?*

[11] The HSU maintains a series of cases³ relied on the concept of the ‘social utility or value’ of 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 way⁴ and submits:

‘The HSU’s submission about the social utility of the work in this proceeding is directed to achieve the same end; to ensure that the value of this work which is performed largely out of the public view in residential aged care facilities and homes, which has long been perceived as women’s work and thus “natural” and not skilled, is not overlooked, or undervalued.’⁵

¹ HSU submissions dated 1 April 2021 [38].

² HSU closing submissions dated 22 July 2022 [42].

³ *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, and *Crown Employees (Teachers – Department of Education) Award* [1970] 70 AR (NSW) 345.

⁴ HSU closing submissions in reply dated 19 August 2022 [200].

⁵ *Ibid* [201].

[12] The HSU argues 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, requiring a focus not only on the physical tasks involved in the work but also ‘the full range of skills and the level of responsibility... and the conditions in which the work is performed’ including:

- the cohort of older persons
- 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 of clients and their families
- the increasing burden of responsibility involved in providing care for older Australians following the ‘social reckoning and watershed’ of the Royal Commission.⁶

[13] The HSU submits that the ‘social utility of the work’ isn’t proposed as a standalone measure but rather is a proxy term 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.’⁷

Question 1 for all other parties: The other parties are invited to comment on the HSU’s response to Question 1 of BD5.

2.2 *Main Contentions*

[14] Paragraph [116] of Background Document 1 set out 16 propositions that appeared to be uncontentious.

[15] The HSU accepted that the propositions set out at [116] of Background Document 1 are uncontentious and submitted that 2 further propositions also appear to be uncontentious:

1. 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.
2. 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.⁸

⁶ HSU closing submissions in reply dated 19 August 2022 [202].

⁷ Ibid [203].

⁸ HSU closing submissions dated 22 July 2022 [81].

Question 2 of BD5: Do you agree with the HSU submission that the above additional propositions are uncontentious?

[16] The ANMF accepts that the additional propositions identified by the HSU are uncontentious; but submit that not all uncontentious propositions will carry the same weight. The ANMF submits that the propositions identified by the Full Bench at [116] of Background Document 1 each go to core issues of broad significance to the applications currently before the Commission; whereas the additional propositions identified by the HSU are of less direct relevance and should not be accorded the same weight.⁹

[17] Further, the requirement for greater numbers of staff with a broad range of skills and responsibilities is not limited to clustered domestic and household models of care. Greater numbers of staff with a broad range of skills and responsibilities are required across residential care more broadly, and indeed across aged care.

[18] The UWU agrees with the submission of HSU, that the two additional propositions are uncontentious.¹⁰ In relation to additional proposition 2, UWU refers to the evidence of Karen Roe¹¹, Maria Moffat¹², Ngari Inglis¹³, Susan Morton¹⁴, Teresa Hetherington¹⁵.

[19] The Joint Employers do not agree with the HSU that the two additional propositions are uncontentious. They submit that there is minimal evidence that the clustered and domestic household models are “growing in prevalence”, and that the second proposition fails to take into consideration the effect of indirect supervision and structured proposals used to replace direct supervision.¹⁶

Question 2 for the HSU: What do they say in response to the Joint Employers’ submission? What evidence does the HSU rely on in support of the 2 additional propositions?

[20] In Background Document 1 the CCIWA was asked the following question:

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?

[21] The CCIWA did not make a submission in response to the question posed in Background Document 1.

Question 3 of BD5: 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

⁹ ANMF closing submissions in reply dated 17 August 2022 [5].

¹⁰ UWU closing submissions in reply dated 19 August 2022 [2]-[3].

¹¹ Witness statement of Karen Roe dated 30 September 2021 [20], [33].

¹² Witness statement of Maria Moffat dated 27 October 2021 [25], [27], [30].

¹³ Witness statement of Ngari Inglis dated 19 October 2021 [11], [28], [36].

¹⁴ Witness statement of Susan Morton dated 27 October 2021 [22]-[41].

¹⁵ Witness statement of Teresa Hetherington dated 19 October 2021 [105]-[107].

¹⁶ Joint Employers submissions in reply dated 19 August 2022 [5.4].

by any of the awards subject to these proceedings and as a result may not place weight on their submissions.

[22] The CCIWA did not make a submission in response to the question posed in Background Document 5.

[23] 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.¹⁷

2.3 Summary of closing submissions

[24] Section 5 of Background Document 1 set out a high-level summary of the parties' closing submissions.

[25] Section 3 of the Joint Employers' closing submission provides an overview of the applications.

Question 4 of BD5: *Does the ANMF agree with the Joint Employer's characterisation of their application (at sections 3.12 – 3.19 of the Joint Employer's closing submissions)?*

[26] The ANMF clarifies a number of points raised in the Joint Employer's submission:

- The Joint Employers refer to the creation of a 'new classification structure' in the Nurses Award. The ANMF clarifies that the application seeks to retain the existing Nurses Award classification structure and for it to be incorporated in a new Schedule G applying to employees covered by the Nurses Award engaged in the provision of services for aged persons.¹⁸
- The Joint Employers also refer to the creation of a 'new classification structure' in the Aged Care Award. The ANMF clarifies that the proposed classification structure and associated titles is for a separate personal care stream that nonetheless retains the substance of the existing structure of Levels 1 to 4. Minor changes are proposed to the descriptors at Level 5 to reflect aspects of the work undertaken at that level.¹⁹
- The rates set out in the Joint Employer submissions have not been updated for the Annual Wage Review 2021-22.²⁰ The ANMF also noted that the table provided in the Joint Employer submissions is missing a number of rates.
- The ANMF supports increases sought by the HSU application for other workers (outside the PCW stream) in the Aged Care Award.²¹

¹⁷ HSU submissions dated 19 August 2022, [198].

¹⁸ ANMF closing submissions in reply dated 17 August 2022 [7]-[8].

¹⁹ Ibid [9].

²⁰ Ibid [10].

²¹ Ibid [11].

- The ANMF does not propose the creation of a new category of employee as suggested by the Joint Employers.²²

Question 3 for the Joint Employers: The Joint Employers are invited to respond to the clarification provided by the ANMF.

[27] Section 4 of the Joint Employers’ closing submission purports to summarise the position of the Joint Employers and sets out a number of contentions (at section 4.28). At 4.37 to 4.40 the Joint Employers submit that there ‘appears to be merit in restructuring the classification structure in the Aged Care Award’ and a re-classification structure may benefit from creating 2 streams – a ‘care stream’ (personal care workers and recreational/lifestyle activities officers) and a ‘general services stream’ (administrative, kitchen, laundry, cleaning and maintenance).

Question 5 of BD5: What is being proposed in this aspect of the submission? What, if any, changes to the Aged Care Award classification structure are being proposed by the Joint Employers?

[28] The Joint Employers submit that the first change they envisage is separating out care work of PCWs and Recreational Activities Officers (RAOs) from support activities. It is proposed that the structure of the care stream would follow the scheme described at paragraph 4.39 of their closing submission of 22 July 2022, that is:

‘4.39 For the ‘care stream’, the following should be considered, there should:

- (a) continue to be an entry level;
- (b) continue to be a level for an employee without a formal qualification or experience at this level to promote social inclusion and workforce participation;
- (c) continue to be a level for a Certificate III or equivalent;
- (d) be a level for an employee with a Certificate III (or equivalent) who has acquired three years’ experience in the residential care industry; and
- (e) there should be a level for a Certificate IV or equivalent (this level would obviously include the RAO).’

[29] The Joint Employers submit that ‘the new feature in this is the introduction of a classification between the Certificates III and IV, effectively an ‘experienced Cert III classification’. They submit that if there is a view that rewarding Schedule 4 medications in a residential aged care setting is warranted this is likely better dealt with by an allowance, separate to the classification structure and the same could be the case for employees working in dedicated secure dementia wards or dedicated palliative care facilities.

²² Ibid [12].

[30] The Joint Employers submit that the support stream could follow a similar scheme to classifications in other modern awards dealing with similar activities, but with likely less specialisation.²³

Question 6 of BD5: What, if any, changes to the Nurses Award classification structure are being proposed by the Joint Employers?

[31] The Joint Employers submit that they are not proposing any specific changes to the classification structure of the Nurses Award, but rather noting that “if the Commission is moved to break out aged care nursing into a new Schedule of the Award it must satisfy itself that such an approach is appropriate and that it is appropriate to properly set minimum wages for some but not all nurses”. In respect of this, the Joint Employers draw attention to the comments on service-based classifications in the *Teachers Decision* for consideration.²⁴

[32] In relation to the *SCHADS Award* home care classification structure, the Joint Employers submit that ‘the Commission must be satisfied that the separation of the classification structure based upon the type of clients (i.e. disability home care and aged care home care) is appropriate and justified by the evidence’ noting that ‘[t]he separation of the classifications could create real operational difficulties.’²⁵

Question 7 of BD5: What is being proposed in this aspect of the submission?

[33] In response to this question the Joint Employers submit that a separate payment structure which only applies to aged care home care employees is appropriate given the nature of those who work in the industry. Additionally, they submit that as the HSU is only seeking to increase the rates for those who work in aged care home care, the Commission must be satisfied that separating the rates is appropriate.

[34] The Joint Employers submit that the practical difficulty the separation of rates may cause for some employers is a s.134 consideration, and the Commission may accept this difficulty or ‘form the view that it should not move on home care now but review home care relevant to persons with a disability as well and consider the issue more holistically’.²⁶

[35] At [4.47] of their closing submissions, the Joint Employers contend 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:’

- RN;
- ENs;
- (Cert III) Care Workers; and

²³ Joint Employers closing submissions in reply dated 19 August 2022 [5.5]-[5.10].

²⁴ Ibid [5.12]-[5.13].

²⁵ Ibid [5.14].

²⁶ Ibid [5.15]-[5.18].

- Head Chefs/Cooks.

[36] Sections 8 to 22 of the Joint Employers closing submissions analyses the evidence informing the evaluative judgment under s.157(2A) in respect of the various classifications in the Aged Care Award, the Nurses Award and the SCHADS Award.

Question 8 of BD5: Are the Joint Employers contending that an increase in minimum wages is justified on work value grounds in respect of these classifications of employees? If so, what quantum of increase is proposed in respect of each classification of employees? Do the Joint Employers oppose any increase in respect of any classification not mentioned at [174] above?

[37] The Joint Employers confirm that they contend an increase in minimum wages is justified on work value grounds in respect of these types of employees.

[38] As to the quantum of increase, the Joint Employers submit that, with the exception of RNs, they ‘have not proposed a monetary outcome which appears relatively clear based on past precedent’, but that the C10 framework should provide guidance on this exercise. However, they submit that they do not support a uniform 25% increase in minimum wages for these classifications as claimed.

[39] As to classifications not mentioned above, the Joint Employers submit that they do not consider the evidence supports that an increase is justified on work value grounds, but that ‘these classifications may require some refinement to ensure they at least are properly set against the C10 Framework.’²⁷

[40] At [4.41] of 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 the work value reasons and a consideration of modern awards objective and minimum wages objective.’²⁸

Question 9 of BD5: 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?

[41] The Joint Employers confirm that this is their proposal, and that aligning the minimum rates to the C10 framework is necessary to ‘rectify a material anomaly within the award’ as part of the work value exercise. They add that the case of the RN appears to have a very strong alignment to the ratio in the *Teachers Decision*.²⁹

Question 4 for the Joint Employers: The 3 step process for the determination of properly fixed minimum rates from the ACT Child Care Decision provides that the key classification is fixed by reference to the C10 framework and other rates in the award are set by applying internal

²⁷ Joint Employers closing submissions in reply dated 19 August 2022 [5.21]-[5.25].

²⁸ Joint Employers closing submissions dated 22 July 2022 [4.41].

²⁹ Joint Employers closing submissions in reply dated 19 August 2022 [5.26]-[5.27].

relativities. The Joint Employers contend that the principles in the ACT Child Care Decision ‘are still useful for work value considerations’. Is it proposed that we increase the RN rates by 35 per cent and then adjust the other relevant rates in the Nurses Award by applying the existing internal relativities?

[42] Section 6 of the Joint Employers’ closing submission deals with various issues raised in the expert evidence. A review of that evidence is set out at Annexure J. The Joint Employers contend that the Commission ‘should be cautious with respect to the weight placed’ on the evidence regarding the gender pay gap and undervaluation; sociological theories for undervaluation (including the notion of ‘women’s work’) and the ‘spotlight tool’ and ‘invisible skills’:

‘In summary, 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 in the context of a work value assessment determining how to properly set minimum wages in the awards.’³⁰

Question 10 of BD5: *what is the ANMF and the HSU’s response to the Joint Employers submission about the expert evidence and the weight that should be placed on that evidence?*

[43] The ANMF’s response is set out in Part C.6 of their submission and is summarised in Part 3.2 below.

[44] The UWU agrees with the submissions made by ANMF at part C.6 of its Closing Submissions in Reply, as well as the submission made by the HSU in their Closing Submission in Reply.³¹

[45] The HSU notes its submissions at paragraphs [165]–[175] of its closing submissions in reply and submits that the Joint Employers’ submissions as to the weight to be placed on the expert evidence ‘should be rejected as they are fundamentally misconceived.’³²

[46] Referring to the Joint Employers’ submission that the undervaluation exercise did not involve a comparative analysis of award wages, the HSU submits this ‘misses the point’ as it:

- ‘it ignores the fact that the Award rates are functionally what these workers are paid, which will remain the case due to the recognised low to non-existent bargaining dividend; and
- in any event it presupposes the need for a comparator to assess gender-based undervaluation of work, which is simply wrong.’³³

[47] The HSU further submits that the Joint Employers’ argument appears to ‘distil to a challenge to the proposition that gender-based wage undervaluation exists *at all*’ and argues

³⁰ Joint Employers closing submissions dated 22 July 2022 [6.5].

³¹ UWU closing submissions in reply dated 19 August 2022 [11].

³² HSU closing submissions in reply dated 19 August 2022 [204]–[205].

³³ Ibid [206].

that, in the current economic and statutory context, this is an ‘ambitious’ argument to advance and absent support from an expert in the field, should be disregarded.³⁴

Question 11 of BD5: *Noting that the summary of submissions is a high-level summary only, are there any corrections or additions that should be made?*

[48] The UWU confirms that the summary of its submissions is accurate.³⁵

[49] The ANMF notes the high-level nature of the summary and makes the following comments:

- [142] of the summary drawn from Part A.2.3 covers the same material as [154] and [155] drawn from Part G of the ANMF closing submissions. [142] might be combined with [154] and [155]
- The summary, in dealing with Part A, does not refer to the 14 matters summarised in ANMF CS Part A.2.1 of the ANMF closing submissions involving changes to the complexity of aged care work and of changes to the skill, responsibility and conditions of those employees. (Although at [156] the summary refers to the 13 changes listed by ANMF as work value reasons justifying a wage increase in Section I of the closing submissions.)
- The summary in dealing with Part A does not refer to the 5 propositions advanced by ANMF in Part A.2.2 relating to the historical undervaluation of direct care workers’ work. (There is a general reference to this issue at [157] of the summary.)
- Reference to the summary material contained in Parts A.2.1 and A.2.2. of the ANMF’s closing submissions might be included in the summary

[50] The HSU does not have any additions or corrections to the summary of submissions.³⁶

[51] The Joint Employers confirm that the high-level summary of its evidence is correct, but that the summary should not be a replacement for the closing submissions or its submissions regarding the Commonwealth.³⁷

2.4 Main points of agreement between the parties

[52] The ANMF notes that at [159] of the *Pharmacy Decision*, as part of the “historical background”, the Full Bench set out the following 3 step process for the determination of properly fixed minimum rates from the *ACT Child Care Decision*:

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

³⁴ Ibid [207].

³⁵ UWU closing submissions in reply dated 19 August 2022 [12].

³⁶ HSU closing submissions in reply dated 19 August 2022 [208].

³⁷ Joint Employers closing submissions in reply 19 August 2022 [5.28]-[5.29].

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.

[53] The ANMF notes that at [197] of the *Pharmacy Decision* the Full Bench stated:

‘[197] This outcome 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.’

[54] The ANMF further notes that in *Re IEU* [2021] FWCFB 2051 at [653], the Full Bench stated that:

‘[w]e consider that the correct approach is to fix wages in accordance with the principles stated in the ACT Child Care decision. As earlier set out, this requires us to identify a key classification or classifications, align it with the appropriate classifications in the Metal Industry classification structure, and then set other rates for other classifications based on internal relativities that are assessed as appropriate.’

[55] The ANMF submits:

‘It is no longer the correct approach to the Commission’s statutory task under section 157(2)-(2A). In accordance with the propositions from the Pharmacy Decision, which are not contested, “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) 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” (see Background Document 1 at [69]). Those additional requirements include the three step process from the *ACT Child Care decision*.’³⁸

Question 12 of BD5: *To the extent that there is a degree of tension between the Pharmacy Decision and the Teachers Decision in the application of the principles in the ACT Child Care Decision is it common ground that the ACT Child Care Decision was made under a different statutory regime to the Commission’s statutory task under s.157(2A)?*

[56] The ANMF agrees that the *ACT Child Care Decision* was made under a different statutory regime to the Commission’s statutory task under s 157(2A) and maintains the submission made in the ANMF closing submissions dated 22 July 2022 at [79] to [86].³⁹

³⁸ ANMF closing submissions dated 22 July 2022 [86].

³⁹ ANMF closing submissions in reply dated 17 August 2022 [18]-[19].

[57] UWU submits it is clear that the *ACT Child Care Decision* was made under a differing statutory regime.⁴⁰

[58] The Joint Employers agree that the *ACT Child Care Decision* was made under a different statutory regime, however submit that its principles are still useful in work value considerations. They submit that the Commission should be primarily guided by the Teachers Decision, given it is the most recent work value case, and has to an extent superseded the principles and approach taken in the Pharmacy Decision.⁴¹

[59] The HSU agrees that the *ACT Child Care Decision* was made under a different statutory regime and submits that the ‘task for the Commission now is much broader’ and is unfettered by historical approaches to wage fixing.⁴²

[60] The HSU submits that the *Act Child Care Decision* provides a ‘useful guide’ as to the approach to be taken by the Commission however it is ‘not binding’ and its usefulness will ‘vary industry to industry’. The HSU further submits that to the extent that the Joint Employers are submitting that the *Act Child Care Decision* approach must be rigidly applied, this is incorrect.⁴³

Question 13 of BD5: *At [16] of its closing submissions, the HSU suggests that ‘all significant stakeholders agree that some variation to wages is justified by work value reasons and that the view of all major stakeholders is that wages need to be “significantly increased”’. What do the other parties say in response to the HSU’s submission?*

[61] The ANMF concurs with and endorses the HSU submission and submits that based upon the contents of the Consensus Statement, the Commission can safely conclude that “*the view of all major stakeholders is that wages need to be ‘significantly increased’*”.⁴⁴ The ANMF’s further submission as to points of agreement relating to ‘Work value conclusions’ are set out at Part C.1.1 of its submission. The ANMF also refers to its further submissions regarding agreement that may be discerned from the Consensus Statement at Part C.1.5.

[62] The UWU also agrees with the HSU submission.⁴⁵

[63] In respect of the attitude of ‘significant stakeholders’ the HSU submits that the Commission ‘would give little credence to the views of the parties with minimal involvement in the industry’ and notes that it does not consider them to be ‘significant stakeholders’.⁴⁶

⁴⁰ UWU closing submissions in reply dated 19 August 2022 [13].

⁴¹ Joint Employers closing submissions in reply dated 19 August 22 [5.30]-[5.31].

⁴² HSU closing submissions in reply dated 19 August 2022 [209].

⁴³ Ibid [210].

⁴⁴ ANMF closing submissions in reply dated 17 August 2022 [20]-[22].

⁴⁵ UWU closing submissions in reply dated 19 August 2022 [14].

⁴⁶ HSU closing submissions in reply dated 19 August 2022 [211].

[64] The Joint Employers submit that HSU’s submission relies primarily on the views expressed in the Consensus Statement and that the view is of minimal assistance to the evaluative task under s.157(2).

[65] The Joint Employers also refer to paragraphs 3.2-3.4 of their submission regarding the Consensus Statement, where they reject the ANMF’s characterisation of the Consensus Statement as an ‘admission’ barring them from advancing submissions based on the evidence, and that ‘it cannot be concluded that statements in submissions filed by the employer interests should be rejected to the extent that there is inconsistency with the consensus statement.’⁴⁷

[66] The Joint Employers note that an increase in minimum wages is required to be justified by *work value reasons* and that the opinion by the stakeholders’ party to the Consensus Statement provides little assistance in the assessment of these reasons.⁴⁸

Question 14 of BD5: *Do the parties agree with the points of agreement identified at paragraphs [194]–[201] above? Are there any other significant points of agreement that should be identified?*

[67] The ANMF and the UWU agree that:

- the 16 propositions regarding the changing nature of work in the aged care industry set out at paragraph 116 to Background Document 1 are uncontentious.
- the relevant wage rates in the Aged Care Award, Nurses Award and SCAHDS Award have never been properly fixed;
- the Commission does not need to consider “*significant net addition*” or find a fixed datum point; and
- the *ACT Child Care Decision* was made under a different statutory regime to the Commission’s statutory task under s 157(2A).⁴⁹

[68] The HSU agrees with the points of agreement set out at paragraphs [194] to [197] of Background Document 5 and in respect of the paragraphs from [198] to [201] which outline the submissions of the ANMF regarding the *ACT Child Care Decision*, the HSU refers to its response to Question 12 of Background Document 5 outlined above.⁵⁰

[69] The Joint Employers agree with the points of agreement identified at paragraph [194]-[201], however they submit that the agreement they expressed with respect to paragraph 116 of Background Document 1 ‘concerned acceptance that as *generalised statements in the context of an overview document* the propositions were uncontentious’, but were ‘not intended to substitute consideration and analysis of the evidence before the Commission’. They add that

⁴⁷ Joint Employers closing submissions in reply dated 19 August 2022 [3.3].

⁴⁸ Ibid [5.32]-[5.34].

⁴⁹ ANMF closing submissions in reply dated 17 August 2022 [24].

⁵⁰ HSU closing submissions in reply dated 19 August 2022 [212].

that in many respects the propositions taken in isolation oversimplify the matters explored in the evidence and their closing submissions.⁵¹

[70] The Joint Employers make the following observations on contentions 1, 8, 13, and 16 at paragraph 116 of Background Document 1:

- (a) **Contention 1:** As a general proposition, we accept: “*The workload of nurses and personal care employees in aged care has increased, as has the intensity and complexity of the work*”. However, as to the level of “*intensity and complexity*”, we rely upon our submissions at [9.17]-[9.25], [10.4]-[10.6], [19.3]-[19.6] and [20.3]-[20.5] and the review of evidence at Annexure A, E and F. The evidence does not support a conclusion that the level of increase is consistent across all classifications.
- (b) **Contention 8:** As a general proposition, we accept: “*PCWs and AINs perform increasingly complex work with greater expectations*”. However, the evidence before the Commission does not establish this conclusion is available with respect to the work performed by all PCW/AINs. Rather, *some* PCW/AINs that are Certificate III/IV qualified or of equivalent experience and have satisfactorily completed appropriate training perform “quasi-clinical” work, within their level of competency, under the supervision of a RN. In this respect, we rely upon our submissions at [9.5(ss)], [9.17]-[9.25] and [19.3(n)] and the review of evidence at Annexure A, E and F.
- (c) **Contention 13:** As a general proposition, we accept: “Aged care employees have greater engagement with family and next of kin of clients and residents”. However, the frequency and intensity of engagement is not consistent across all aged care employees. Rather, the evidence demonstrates an increased expectation that all aged care employees will engage in small conversation with next of kin and consumers as they go about their day-to-day duties (usually greetings, small talk and generally treat them in a respectful manner). This is not, however, an additional duty added to the daily work of aged care employees.
- (d) **Contention 16:** As a general proposition, we accept: “*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*”. It is also noted that those skills form part of the units of competency available in the Certificate III, see example:
- (i) CHCDIV001 “*Work with diverse people*” (which is a core unit); and
 - (ii) CHCDIV002 “*Promote Aboriginal and/or Torres Strait Islander cultural safety*”.

Aged care employees also receive training with respect to those skills from their employer (see example, Statement of Johannes Brockhaus dated 3 March 2022, Annexure JB-01, which includes a list of the training provided by Buckland addressing each of those issues).⁵²

⁵¹ Joint Employers closing submissions in reply dated 19 August 2022 [5.36].

⁵² Ibid [5.37].

2.5 *Main issues in contention*

[71] The ANMF submits that s.157(2A) exhaustively defines work value reasons being reasons justifying the amount that employees should be paid for doing a particular kind of work'.⁵³

[72] In *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) FCR 368 (the Penalty Rates Review) the Federal Court said:

‘Otherwise, the applicants contend that s 134(1)(a)-(h) is a code so that the FWC, in applying the modern awards objective to the review (as required by s 134(2)(a)), was required to consider all of the s 134(1)(a)-(h) matters and was precluded from considering any other matter. This was said to be supported by the fact that, in contrast to other provisions of the Fair Work Act, s 134(1) does not refer to the FWC being able to consider any other matter it considers relevant.

This submission should be rejected. It fails to recognise that the modern awards objective requires the FWC to perform two different kinds of functions, albeit that the modern awards objective embraces both kinds of function. 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” and in so doing, must take into account the s 134(a)-(h) matters. What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 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 FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters “must be determined by implication from the subject matter, scope and purpose of the” Fair Work Act (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).

This construction of s 134(1) necessarily rejects the applicants’ argument that the words “fair and relevant” qualify the considerations in s 134(1)(a)-(h) and not the minimum safety net of terms and conditions. This submission is untenable. It is apparent that “a fair and relevant minimum safety net of terms and conditions” is itself a composite phrase within which “fair and relevant” are adjectives describing the qualities of the minimum safety net of terms and conditions to which the FWC’s duty relates. 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 Act.’⁵⁴

Question 15 of BD5: *The ANMF’s attention is drawn to the above paragraphs. How does the ANMF reconcile the Penalty Rates Review with its submission that s.157(2A) exhaustively defines ‘work value reasons’?*

⁵³ ANMF closing submissions dated 22 July 2022 [56]; UWU closing submissions in reply dated 19 August 2022 [15].

⁵⁴ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) FCR 368 [47]-[49].

[73] The ANMF does not contend that section 134(1)(a)-(h) of the FW Act is a code so that the Commission would be precluded from considering any other matters in determining whether making the determination is necessary to achieve the modern award objective. The ANMF does, however, contend that section 157(2A) exhaustively defines work value reasons

[74] The ANMF submits that the definition of work value reasons in s.157(2A) adopts different language to the that used in s.134. Section 134(1) requires the Commission to ensure that modern awards, together with the NES provide a fair and relevant minimum safety net of terms and conditions taking into account certain considerations. The ANMF submits that s.157(2A) provides:

‘... that “work value reasons are (not include) reasons justifying the amount that employee should be paid for doing a particular kind of work, being (not including) reasons related to any of the matters prescribed at s 157(2A)(a), (b) and (c). The word “being” is the present participle of the verb “to be”. It makes clear that “work value reasons” is a definition which “means” rather than “includes” reasons related to the matters identified in section 157(2A)(a), (b) and (c). As recognised in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,⁵⁵ the requirement to determine the range of relevant considerations by implication from the subject matter, scope and purpose of the legislation, does not arise where factors enumerated in a definition are exhaustive.’⁵⁶

[75] The ANMF submits that the Penalty Rates Review does not tell against this conclusion. As identified in the Pharmacy Case at [165], the expression “related to” is one of broad import that requires a sufficient connection or association between two subject matters. Accordingly, the category of things that might constitute a “work value reason” is a very large category. Nonetheless, where section 157(2A) is an exhaustive definition, matters that are not “related to” the considerations identified in section 157(2A) will not be “work value reasons”.

[76] The ANMF submits that ‘wages in aged care are not high enough to attract and retain the number of skilled workers needed to deliver safe and quality care’ and says:

‘labour supply constraints that exacerbate staff shortages and inadequate skill mix increase the intensity and work requirements of existing staff. These are matters “related to” the nature of the work, the responsibilities involved and the conditions under which the work is performed.’

Question 16 of BD5: *Is the ANMF suggesting that attraction and retention are considerations relevant to the assessment of ‘work value’ under s.157(2A)? If so, on what authority does the ANMF rely to support that proposition? Alternatively, is it being put that the proposition that the increases sought are ‘necessary to attract and retain the number of skilled workers needed to deliver safe and quality aged care’ is a consideration relevant to the achievement of the modern awards objective?*

[77] The ANMF submits that evidence going to attraction and retention would be relevant to both:

- the identification and assessment of “work value reasons” under section 157(2A); and

⁵⁵ [1986] HCA 40; 162 CLR 24 at 39-40.

⁵⁶ ANMF closing submissions in reply dated 17 August 2022 [27].

- achieving the modern awards objective and minimum wages objective.

[78] In relation to the first point, the ANMF submits that the Commission has evidence from direct care workers about the value of their work arising from workers’ own assessment of the value of the work they are performing. That evidence is consistently 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. The ANMF relies on the terms of ss.157(2) and (2A) in making this submission and is not aware of any case that decides this point.

[79] The ANMF notes that the *Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010*⁵⁷ and other decisions have considered “attraction rates” to have no proper role to play in the fixation of minimum wages. 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.

[80] The ANMF submits that better attraction and retention of staff is also relevant to the promotion social inclusion through workforce participation and the existence of a fair and relevant minimum safety net of terms and conditions in accordance with sections 134(1)(c) and 284(1)(b). It submits that this is consistent with the Commonwealth’s submissions at [9].⁵⁸

[81] The UWU supports the submission of the ANMF at [30]-[37] of its closing submission and submits:

‘Whether or not these factors are relevant to s.157(2A), they are plainly relevant to the consideration of the achievement of the modern award objective, and thus relevant to the overall inquiry. To this end, these factors are relevant to:

- i. The need to promote social inclusion through increased workforce participation (s.134(1)(c));
- ii. The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)).’⁵⁹

⁵⁷ [2020] FWCFB 4961.

⁵⁸ ANMF closing submissions in reply dated 17 August 2022 [36]-[37].

⁵⁹ UWU closing submissions in reply dated 19 August 2022 [17].

[82] Section 7 of Background Document 5 set out a number of points of contention between the parties.

Question 17 of BD5: do the parties agree with the points of contention identified at paragraph [202]–[219] above?

[83] The ANMF addresses the points in contention as follows:

- The position of the Joint Employers in relation to the issue of significant change to the nature of the work of ENs and NPs appears to have evolved somewhat during the course of the hearing. The ANMF submits that the employer parties do not appear to assert that a “*significant net addition*” addition to work requirements is a requirement for varying minimum wages. The ANMF submits further that the Joint Employers do not actively oppose an increase to the award minimum wages for NPs and recognise a number of factors that are work value reasons to be taken into account in relation to ENs.⁶⁰
- It appears that the question of whether s.157(2A) is a code remains in contention.⁶¹
- It appears that the question of whether attraction and retention considerations are relevant to the assessment of work value under s.157(2A) remains in contention.⁶²
- The position of the employer parties as to whether the status of the Consensus Statement is an issue in contention is unclear.⁶³
- The weight to be given to the C10 classification structure is a matter in contention between the parties. The ANMF does not accept that the C10 classification structure is a useful starting point in the proper fixing of minimum rates.⁶⁴

[84] The UWU agrees that the matters identified at [209]–[219] remain points of contention in this proceeding.⁶⁵

[85] In respect of Contention (iii) – the status of the Consensus Statement – the HSU submits that the Consensus Statement:

- ‘as an agreed position, remains binding on ACSA and LASA; and
- can be departed from by ABI, if it wishes but noting that organisation’s lack of standing to speak for anyone in the aged care industry.’⁶⁶

⁶⁰ ANMF closing submissions in reply dated 17 August 2022 [40].

⁶¹ Ibid [41].

⁶² Ibid [42].

⁶³ ANMF closing submissions in reply dated 17 August 2022 [43].

⁶⁴ Ibid [44].

⁶⁵ UWU closing submissions in reply dated 19 August 2022 [19].

⁶⁶ HSU closing submissions in reply dated 19 August 2022 [213].

[86] Regarding the submission by the Joint Employers that ACSA’s CEO was available for cross-examination, the HSU submits that at that point in the proceedings, ACSA ‘had not indicated that it resiled from the Consensus Statement’ and argues that the Joint Employers’ representative was directly asked by the Full Bench whether ACSA and LASA, or only ABI, had departed from the Consensus Statement, and declined to answer. The HSU further submits that it is ‘unclear’ what the Unions could have done to ‘clarify’ ACSA’s position.⁶⁷

[87] The Joint Employers agree that the matters identified at [209]-[219] are points of contention, subject to the amendment that the Joint Employers acknowledge that Enrolled Nurses have experienced a significant change in the nature of their work.⁶⁸

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

2.6 Additional questions for the parties

[88] The HSU and ANMF propose two different structures for Personal Care Workers (PCW) under the Aged Care Award.

[89] 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 classification structure for personal care workers. The proposed new classification structure retains a 5-level personal care worker classification structure as in the current Award:

| Current classification | Proposed Personal Care Worker Classification |
|-------------------------------|---|
| Aged care employee – level 1 | NA |
| Aged care employee – level 2 | Grade 1 – Personal Care Worker (entry up to 6 months) |
| Aged care employee – level 3 | Grade 2 – Personal Care Worker (from 6 months) |
| Aged care employee – level 4 | Grade 3 – Personal Care Worker (qualified) |
| Aged care employee – level 5 | Grade 4 – Senior Personal Care Worker |
| Aged care employee – level 6 | NA |
| Aged care employee – level 7 | Grade 5 – Specialist Personal Care Worker |

[90] The HSU proposed variation continues to include the definition of personal care workers within Schedule B of the Award but proposes deleting the Grade 1 – 5 classification structure and replacing it with the following:

⁶⁷ Ibid [214].
⁶⁸ Joint Employers closing submissions in reply dated 19 August 2022 [5.39].

| Classification | Personal Care Worker Classification |
|------------------------------|---|
| Aged care employee – level 2 | Personal Care Worker (entry up to 6 months) |
| Aged care employee – level 3 | Personal Care Worker (from six months) |
| Aged care employee – level 4 | Personal Care Worker (qualified) |
| Aged care employee – level 5 | Senior Personal Care Worker |
| Aged care employee – level 6 | Specialist Personal Care Worker |
| Aged care employee – level 7 | Personal Care Supervisor |

[91] In essence, the HSU proposed variation creates an additional classification level for personal care workers (Personal Care Supervisor).

Question 18 of BD5: what is the basis for the difference between the number of classification levels in the HSU and ANMF’s proposed classification structure for personal care workers?

[92] The ANMF submits that its proposed classification structure for personal care workers has the same number of classification levels as the current Aged Care Award (i.e., grades 1–5). Further, each grade would remain aligned with the same classification level of aged care employee as it is under the current Aged Care Award.⁶⁹

[93] The ANMF submits that the HSU will need to satisfy the Commission that an additional classification level (aligned with level 6) is necessary to achieve the modern awards objective and submits that the HSU’s proposed levels 6 and 7 classifications contain qualifications that are not included in the Australian Qualifications Framework and that the classification structure proposed by the ANMF should be preferred.⁷⁰

[94] The HSU notes that the ANMF separately developed its classification structure 6 months following the filing of the HSU application and submits that it is ‘not privy to the reasoning of the ANMF as to why it proposed a different classification structure for personal care workers.’⁷¹

Question 19 of BD5: There are some differences in the classification definitions proposed by each party. How does each party respond to the classification definitions proposed by the other party?

[95] The AMNF notes that its proposal is intended to ensure that personal care workers would retain their current grade under the Aged Care Award and would not be re-aligned with a lower level.⁷² The ANMF submits that the HSU’s proposal:

- moves the requirement for Certificate IV level qualifications from Level 7 to Level 6.⁷³

⁶⁹ ANMF closing submissions in reply dated 17 August 2022 [46].

⁷⁰ Ibid [49].

⁷¹ HSU closing submissions in reply dated 19 August 2022 [215].

⁷² ANMF closing submissions in reply dated 17 August 2022 [50].

⁷³ Ibid [51].

- imposes a further qualification requirement at Level 5 which is unnecessary.⁷⁴
- unnecessarily adds “*the responsibility for leading and/or supervising the work of others*” at level 6 when this is already covered in the Level 7 definition. The AMNF notes that its proposed Level 7 classification has adopted the references to Dementia Care and Palliative Care that were proposed by the HSU.⁷⁵

[96] The UWU

- does not support the removal of personal care workers into a separate classification structure, where the consequence of such a change is to confine an increase in wage rates only to personal care workers, and not to apply such increases to support staff as well; and
- does not support any alteration to classification definitions which would have the effect of reducing the classification of any aged care worker.⁷⁶

[97] The HSU submits that the ‘most significant difference’ between the HSU and ANMF classifications is the proposal by the ANMF to create a separate classification structure for PCWs and it objects to that proposal.⁷⁷

[98] The HSU submits that the ANMF’s proposed classification structure appears to largely align with the HSU’s proposal however, identifies the following significant differences:

- Levels within classification structure
- Personal Care Workers
- Level 5 in the HSU Proposal
- Levels 6 and 7 in the HSU Proposal
- Recreational/Lifestyle Activities Officers

Levels within Classification Structure

[99] The HSU notes that its proposed classification structure contains 7 levels across 3 streams, with 6 levels for PCWs and 4 levels of Recreational/Lifestyle Activities Officers.⁷⁸

[100] The HSU submits that its proposed structure has the same number of classification levels as in the current Aged Care Award however, inserts additional levels within that structure to create opportunities for career progression and increased pay, including the new role of

⁷⁴ Ibid [52].

⁷⁵ Ibid [53].

⁷⁶ UWU closing submissions in reply dated 19 August 2022 [21].

⁷⁷ HSU closing submissions in reply dated 19 August 2022 [216].

⁷⁸ HSU closing submissions in reply dated 19 August 2022 [218].

Specialist Personal Care Worker at Level 6 and Recreational/Lifestyle Activities Officers, who are currently only provided for at Level 3 of the award when they are unqualified.⁷⁹

Personal Care Workers

[101] The HSU notes that the ANMF’s proposed structure for PCWs retains the same number of levels as the current Aged Care Award.

Level 5 in the HSU Proposal

[102] The HSU submits that it has proposed ‘explicit recognition’ that a Senior Personal Care Worker who is required to assist with medication and holds the relevant competency unit will be ‘recognised and paid as a Level 5 employee’ and argues:

‘This makes it clear that when this competency is acquired and used as part of a PCW’s role then they will appropriately remunerated. This is not a requirement in order for a PCW to be classified and paid as a Level 5 as demonstrated by the use of the word “may”.’⁸⁰

[103] The HSU submits that it understands that the ANMF considers the existing Level 5 requirement for “substantial on-the-job training, may require formal qualifications at trade or certificate level and/or relevant skills training or experience” already encompasses a relevant competency unit and the addition of particular units of competency is unnecessary. The HSU argues that its proposed classification structure is in the interests of ensuring a simple, easy to understand modern award system.⁸¹

Levels 6 and 7 in the HSU Proposal

[104] The HSU notes that the ANMF has included the HSU’s proposed role titles of ‘Senior Personal Care Worker’ and ‘Specialist Personal Care Worker’. However, under the ANMF’s proposed structure ‘Specialist Personal Care Worker’ is classified at Grade 5 (equivalent to the current Level 7) compared with the HSU’s proposal which classifies them at Level 6.⁸² The HSU further notes that the ANMF’s proposal does not ‘expressly include’ the HSU’s proposed Level 7 role of ‘Personal Care Supervisor’ and submits that it considers an additional classification level for PCWs (Specialist Personal Care Worker at Level 6) is appropriate and necessary to achieve the modern awards objective.⁸³

[105] The HSU argues that the effect of the ANMF’s proposal is that Specialist Personal Care Workers and supervisory employees who are responsible for supervising them ‘may be employed at the same grade and salary’ and submits:

⁷⁹ Ibid [219].

⁸⁰ Ibid [221].

⁸¹ Ibid [222].

⁸² Ibid [223].

⁸³ Ibid [224]–[225].

‘[t]his provides a flatter classification structure and less opportunity for career progression than that proposed by the HSU. Given that Specialist Personal Care Workers would be on the same level and pay as supervisors this may be a disincentive for workers to seek promotion and impede employers’ ability to attract employees into a supervisory role.’⁸⁴

[106] The HSU submits that if the Commission is minded to follow the ANMF’s proposed structure and place Specialist Personal Care Workers at the equivalent of Level 7, then consideration should be given to an additional Level 8 classification or an annual allowance for people performing supervisory roles.⁸⁵

[107] The HSU notes that the ANMF’s proposed structure retains the HSU’s proposed references to Dementia Care and Palliative Care within the definition ‘Specialist Personal Care Worker’ however, the ANMF has not included a reference to a Household Model specialist. The HSU argues that ‘given the overwhelming evidence filed in relation to the broad and specialised skills of workers employed to provide the Household Model of Care the Commission should ensure that this specialty is recognised within any definition of a Specialist Personal Care Worker.’⁸⁶

[108] The HSU further notes that it’s proposed level 6 classification definition states ‘may require formal qualifications at post-trade or Certificate IV or Diploma level and/or relevant skills training or experience’ and submits that this updates the ‘outdated reference’ in the current Aged Care Award to an ‘Advanced Certificate’. The HSU correspondingly points out that the ANMF’s proposed classification structure for Grade 5 (equivalent to HSU level 7) includes a reference to formal qualifications at a Certificate IV level (compared with the HSU’s inclusion at level 6) and therefore acknowledges that the ANMF’s proposed structure ‘may provide for quicker progression.’⁸⁷

[109] The HSU points out that its proposed Aged Care Employee – Level 7 classification includes a reference to an ‘Advanced Certificate and Associate Diploma’ and submits that this was an error and should be a reference to an ‘Advanced Diploma’.⁸⁸

Recreational/Lifestyle Activities Officers

[110] The HSU considers it is of ‘fundamental importance’ that Recreational/Lifestyle Activities Officers are provided with appropriate career progression through Levels 3 to 6. The HSU notes that it understands that the ANMF supports the HSU’s claim in this regard and that the ANMF’s inclusion of only one level for Recreational/Lifestyle Activities Officers in the ANMF’s proposed structure ‘may be an oversight or drafting issue’.⁸⁹

⁸⁴ Ibid [226].

⁸⁵ Ibid [227].

⁸⁶ Ibid [228].

⁸⁷ Ibid [229]–[230].

⁸⁸ Ibid [231]–[232].

⁸⁹ Ibid [233].

[111] The HSU submits that its proposed classification structures ‘provides for appropriate and easy to understand career and pay progression for these workers.’⁹⁰

Question 20 of BD5: What is the Joint Employers’ position in respect of the ANMF and HSU classification proposals?

[112] The Joint Employers do not consider that the HSU and ANMF’s classification proposals appropriately reflect the work value of employees in the Aged Care Industry.⁹¹

[113] The ANMF seeks, among other things, ‘the amendment of the Nurses Award by inserting a new schedule, applicable to aged care worker only and expiring after four years, which increases rates of pay by 25 per cent.’

Question 21 of BD5: Why is it necessary, in the sense contemplated by s.138, that the schedule expire after 4 years?

[114] The ANMF submits that providing for the expiry of the proposed schedule after 4 years:

‘ ... 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.’⁹²

[115] At [57](4) of its closing submissions, the ANMF appears to be advancing the submission that the funded nature of the aged care sector constitutes a reason related to the ‘nature of the work’ and hence is relevant to the assessment of work value under section 157(2A)(a).

[116] In the SCHADS decision, the Full Bench made observations about the relevance of government funding:

‘The Commission’s statutory function is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net. It is not the Commission’s function to make any determination as to the adequacy (or otherwise) of the funding models operating in the sectors covered by the SCHADS Award. The level of funding provided and any consequent impact on service delivery is a product of the political process; not the arbitral task upon which we are engaged.

...

⁹⁰ Ibid [234].

⁹¹ Joint Employers closing submissions in reply dated 19 August 22 [5.40].

⁹² ANMF closing submissions in reply dated 17 August 2022 [60].

The Commission's statutory function should be applied consistently to all modern award employees, while recognising that the particular circumstances that pertain to particular awards may warrant different outcomes. The fact that a sector receives government funding is not a sound basis for differential treatment. Further, given the gendered nature of employment in many government funded sectors such differential treatment may have significant adverse gender pay equity consequences.⁹³

Question 22 of BD5: *How does the proposition advanced by the ANMF at [57](4) of its closing submissions fit with the observations in the SCHADS decision? On what basis is it put that the funded nature of the sector is relevant to a consideration of work value?*

[117] The ANMF does not press a submission that the funded nature of the sector is related to any of the work value reasons under section 157(2A).⁹⁴ However, the ANMF maintains its submission that it is appropriate to take into account:

- difficulties experience in bargaining by reason of the funded nature of the sector for the purpose of section 134(1)(b); and
- the additional role played by minimum award rates in the industry where employers have limited capacity to pay over award rates because of the funded nature of the sector for the purpose of section 134 generally.⁹⁵

[118] Contention 6 of the Main Contentions states:

‘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).’

[119] The *Aged Care Amendment (Implementing Care Reform) Bill 2022 (Cth)* was introduced to the House of Representatives on 27 July 2022. The Bill proposes an amendment to the *Aged Care Act 1997* which will require approved providers who provide residential care to care recipients in a residential facility or flexible care of a kind specified in the ⁹⁶ Principles to care recipients in a residential facility to ensure at least one registered nurse is one site, and on duty, at all times at the residential facility.⁹⁷

Question 23 of BD5: *What do the parties say about the Aged Care Amendment (Implementing Care Reform) Bill 2022 (Cth). Will it affect the propositions in Contention 6?*

[120] The ANMF submits that the Bill, if enacted would address the important issue of ensuring that there is a minimum of one RN on duty in a facility but that it would not:

⁹³ 4 yearly review of modern awards–Group 4–Social, Community, Home Care and Disability Services Industry Award 2010–Substantive claims [2019] FWCFB 6067 [138] – [143].

⁹⁴ ANMF closing submissions in reply dated 17 August 2022 [62].

⁹⁵ Ibid [63].

⁹⁷ *Aged Care Amendment (Implementing Care Reform) Bill 2022 (Cth)* Schedule 1, s.54-1A(1)–(2).

- address the broader issue of changes to skill mix and the general decline in the proportion of nurses in the aged care workforce.
- require there to be more than one RN in a residential aged care facility at any time.
- increase numbers of ENs in aged care.⁹⁸

[121] The ANMF submits that the Commission will determine whether the variations sought to modern award minimum wages are justified having regard to the evidence of work value reasons before it. That evidence is to the effect that there are now fewer RNs and ENs working in residential aged care facilities. The ANMF relies on submissions previously made as to the consequence of this in relation to work value reasons. Conversely, there is no evidence before the Commission of how the Bill may impact upon work value reasons. Ultimately, the ANMF submits that there is no basis to conclude that the Bill will materially affect the issues identified in proposition 6.⁹⁹

[122] The HSU notes that while the requirement to have a RN on site and on duty at all times will ‘as a matter of common sense’ result in an increase in the number of aged care workers on site, the HSU submits that it will not ‘substantially change the conclusions that flow from Contention 6’ because:

- ‘it is presently not possible to say whether or not this will have a significant impact on the overall proportions, and it is not immediately obvious that it will;
- it is unlikely to significantly alter the work performed by the Registered Nurse on duty, with its focus on administrative and higher-level care work; and
- it will not operate to reverse the trend of direct care workers performing higher-level duties than they might have ten or twenty years ago; instead it will more likely lead (as it is designed to) to a general *increase* in the level of skilled work being performed across the workplace.’¹⁰⁰

[123] The HSU also notes that the Bill has not passed and may still be amended and that some existing facilities already have an RN rostered on duty at any one time, and the Bill will therefore not affect these facilities.¹⁰¹ The HSU finally submits:

‘Fundamentally the Commission ought to determine the matter based on the evidence before it which, (for obvious reasons) does not provide a basis for speculating how the bill might impact the work performed by direct and indirect care workers.’¹⁰²

[124] The Uwu submits that at it is only possible to speculate on the Bill as this stage because:

⁹⁸ ANMF closing submissions in reply dated 17 August 2022 [66].

⁹⁹ Ibid [71]-[72].

¹⁰⁰ HSU closing submissions in reply dated 19 August 2022 [235].

¹⁰¹ Ibid [236].

¹⁰² Ibid [237].

- The Bill requires one RN to be on site and on duty at a facility, but contains a number of exceptions. The application of the exemptions remains unclear (and it could be that a number of aged care providers qualify).
- The Commonwealth Government has foreshadowed that it will introduce subordinate legislation to mandate minimum care time in the near future, and that such subordinate legislation will provide an average of 200 hours minimum care to residents, each day on average.
- It is not clear who the care will be provided by. It seems most likely that these care hours will be filled by PCWs. In such circumstances, the ratio of PCWs to nurses will increase and it seems probable that current tasks assigned to PCWs would remain unchanged, albeit with more PCWs.¹⁰³

[125] The Joint Employers submit, that, in short, the Bill will affect the propositions in Contention 6 as it will require an increase in the number of RNs and numbers of appropriately skilled staff in aged care. They submit that the reforms proposed by the Bill will inevitably, and rightfully, lead to an increase in the number of RNs generally and possibly as a percentage of the total workforce.

[126] The Joint Employers also note that the second schedule of the reform bill, which comes into effect later, may impact the financial viability of home care providers in the aged care industry in limiting what they can charge clients.¹⁰⁴

[127] At [570] of its closing submissions, the ANMF contend that the nature of the work and the conditions under which the work is done ‘have become more challenging and dangerous’.

Question 24 of BD5: What authority is relied on in support of that proposition? Is the ANMF contending that dangerous work warrants a work value increase?

[128] The ANMF notes that there are decisions stating that minimum award wage rates and allowances should not seek to compensate for the risk posed to employees from being required to work in dangerous conditions, and that the focus should be on removing any risk to health and safety so far as is practicable rather than paying employees to put up with it. The ANMF refers to *Vickers Cockatoo Dockyard Pty Limited v FEDFA*¹⁰⁵ (Vickers).

[129] The ANMF submits that there is evidence before the Commission about the increasing dangers faced by direct care workers and the primary relevance of this evidence is not that workers should be paid to ‘put up with it’ but rather that this related to work value reasons. The ANMF submits that the *COVID-19 Care Allowance Case*, recognised the limitations of the principle in Vickers where the danger cannot be removed, and the employees are nonetheless required to perform the work as an essential service.

¹⁰³ UWU closing submissions in reply dated 19 August 2022 [25].

¹⁰⁴ Joint Employers closing submissions in reply dated 19 August 22 [5.43]-[5.50].

¹⁰⁵ [1981] CthArbRp 101, 250 CAR 338.

[130] The ANMF submits that the provision of aged care is a service providing care to vulnerable older people. That service cannot be stopped when a dangerous situation arises. Aged care workers cannot walk away from residents and clients in need of assistance. The ANMF submits further that the evidence leaves little doubt that a high level of skill is required to identify, prevent and de-escalate violence and aggression. There is no reason to ignore this skill in assessing work value.

[131] The ANMF concludes that as the prevalence of dementia and other cognitive impairment increases in aged care, so too will the danger of that work and need for direct care staff to have and exercise additional skills and responsibility for their own health and safety, and that of residents and clients. The nature of the aged care work and conditions under which the work is done have become more dangerous which in various ways relates to work value reasons.¹⁰⁶

3. Summary of submissions in reply to closing written submissions

3.1 HSU

[132] The HSU filed closing submissions in reply on 19 July 2022.

[133] A brief summary of the HSU's closing submissions in reply follows.

The Employer Interests

[134] Paragraphs [1] to [4] set out the HSU's submissions on employer interests in these proceedings.

[135] The HSU maintains that ABI is a registered association of employers entitled to represent, principally, employers in the manufacturing and associated industries (as well as members of the NSW Chamber of Commerce) in NSW.¹⁰⁷

[136] The HSU notes that a significant number of aged care employers have made submissions in the proceedings which 'all uniformly support the HSU's applications.'¹⁰⁸

[137] In relation to the Joint Employers, the HSU submits that ACSA and LASA 'self-evidently have a legitimate interest and presence in the proceedings'¹⁰⁹ however argues that ABI's role is 'less clear' and says:

'Despite the way they have purported to conduct themselves, [ABI] have not been appointed (and cannot assume a role as) counsel assisting the Commission; they are here to, apparently, resist the HSU's applications being granted. To the extent that the position they take departs from that embraced by literally every actual participant in the sector – and the Royal Commission's recommendations – the fact that it is being

¹⁰⁶ ANMF closing submissions in reply dated 17 August 2022 [83].

¹⁰⁷ ABI Rules at rule 6.

¹⁰⁸ HSU closing submissions in reply dated 19 August 2022 [3].

¹⁰⁹ Ibid.

advanced by a body with no actual interest in the industry should be taken into account when considering what, if any, weight to give it.’¹¹⁰

Question 5 for ABI: ABI is invited to respond to the HSU submission as to the weight to be given to its submission.

The position advanced by the Joint Employers

[138] Paragraphs [5] to [20] set out the HSU’s submissions on the position of the Joint Employers.

[139] The HSU notes that ACSA and LASA were ‘actively involved in negotiating the substance and wording’¹¹¹ of the Consensus Statement and submits:

‘The Commission can be satisfied that assent to the content of the Consensus Statement represents the considered view of the organisations speaking on behalf of their members for the purposes of the present proceedings. No witness put forward by [the Joint Employers] cavilled with any aspect of the statement, or gave any evidence departing from it.’¹¹²

[140] The HSU submits that the Joint Employers’ closing submissions continue to ignore and in some cases ‘actively contradict’ the Consensus Statement and argue that the Joint Employers have not identified any changes since the Consensus Statement was negotiated and neither is there any evidence that ACSA or LASA have ‘ever decided to abandon or renounce their support for the Consensus Statement.’¹¹³

[141] The HSU notes the Joint Employers’ submission that the Unions should have cross examined the CEO of ACSA on this issue and submit that it is not explained why this obligation arose, particularly in the absence of any suggestion that ACSA intended to abandon its support for the Consensus Statement and submit:

‘The Unions – and not to mention the other employer stakeholders – have conducted themselves in the proceedings on the basis of the agreement reached and that the Consensus Statement represented the carefully considered view of the organisations that participated in the process. Parties cannot conduct themselves as though the proceedings are a game; these are serious matters which have significant consequences for hundreds of thousands of employees across Australia in a critical sector. To the extent that ACSA and LASA *are* now attempting to abandon their previous agreement, this is an abuse of process and should not be permitted.’¹¹⁴

¹¹⁰ Ibid [4].

¹¹¹ Ibid [7].

¹¹² Ibid [10].

¹¹³ Ibid [13].

¹¹⁴ Ibid [15].

[142] The HSU submits that absence a clear statement to the contrary with an accompanying explanation, the Commission should proceed on the basis that ACSA and LASA ‘approved and continue to adopt the contents of the Consensus Statement.’¹¹⁵

[143] The HSU accepts that as ABI is not a signatory to the Consensus Statement it is ‘not strictly speaking bound by the agreed position’ however submits that the views of ABI are of ‘no particular significance’ because:

‘It has not been appointed ‘employer body assisting the Commission’ and is not otherwise entitled to act as a roving objector. It is absurd, and contrary to the proper and efficient operation of the Commission’s processes, to allow an unrelated industry body to derail an application that otherwise enjoys consensus support among all relevant stakeholders.’¹¹⁶

[144] The HSU submits that it understands ABI’s position to be:

- ‘to the extent that minimum rates of pay should be increased, this should only occur for RNs, ENs, ‘(Cert III) Care Workers’ and Head Chefs/Cooks; and
- any increase should be ‘*marginal*’ rather than significant, noting that it is not explained what ‘*marginal*’ means.’¹¹⁷

Errors of principle in the Joint Employers’ submissions

[145] Paragraphs [21] to [46] outline what the HSU considers to be ‘errors of principle’ in the Joint Employers’ submissions, namely:

- The application of ‘evolution’ rather than ‘significant change’
- The reasoning and applicability of the *Teachers Case*
- The relevance of gender-based undervaluation
- The significance of the C10 framework

Significant change

[146] The HSU notes that the Joint Employers have acknowledged that an increase in minimum rates for work value reasons no longer needs to identify a ‘significant change’ however, the HSU submits that ‘virtually the entirety of [the Joint Employers’] analysis of the evidence appears reliant on an attempt to categorise changes in the work of employees in aged care or in providing home care services as being ‘*evolutionary*’ rather than ‘*significant*’.’ The HSU argues this approach comprises the continued application of a ‘significant change’ hurdle.¹¹⁸

¹¹⁵ Ibid [16].

¹¹⁶ Ibid [18].

¹¹⁷ Ibid [19].

¹¹⁸ Ibid [23].

[147] Paragraphs [24] and [25] set out a brief history of wage fixing principles prior to the introduction of the Fair Work Act, including the application of a ‘significant net addition to work value requirements.’

[148] The HSU submits that while ‘progressive or evolutionary change’ was not considered appropriate to justify a wage increase under previous wage fixing principle, these have not been imported into the current legislative regime and ‘the parties ostensibly agree, section 157(2) and (2A) require a broad and relatively unconstrained evaluative judgement, unconstrained by historical approaches.’¹¹⁹

[149] The HSU note that the existence of a significant net addition to work value ‘may be relevant’ in assessing whether an increase is justified by work value reasons however, submit that to the extent that the Joint Employers are submitting that changes in work value have been ‘evolutionary’ only, this involves an error of principle.¹²⁰

[150] The HSU argues that, in any event, ‘the seismic changes across the sector have affected these workers, the work they perform and their skills and responsibilities, significantly.’¹²¹

The Teachers Case

[151] Paragraphs [28] to [32] deal with the HSU’s submissions in response to the Joint Employers’ submissions in relation to the *Teachers Case* and particularly the relevance of the C10 scale. The HSU argues that the Joint Employers’ submission that the Full Bench gave ‘primacy to fixing a benchmark classification ... to the C10 framework and then resetting internal relativities’ is an incorrect interpretation of the Full Bench’s reasoning.¹²²

[152] The HSU makes the following observations in respect of the *Teachers Case*:

- The Full Bench found that increases were justified, separate to any question of relativities, on work value reasons and ‘did not determine that increases in rates of pay were justified by, or limited to, a comparison with the C10 scale.’¹²³
- The ‘benchmark’ classification was set at C10(a), the top of the C10 scale, representing the ‘entry level’ classification for teachers, and as a result ‘the classification structure derived thereafter bore no relationship to the scale in the Manufacturing Award.’¹²⁴
- The rejection of the time-based classification structure ‘occurred in the context of a nationally recognised career progression scheme reflecting an established career path’ and should not be taken as being an ‘authority for the proposition that workers

¹¹⁹ Ibid [26].

¹²⁰ Ibid [27].

¹²¹ Ibid.

¹²² Ibid [28].

¹²³ Ibid [29].

¹²⁴ Ibid [30].

in lower-skilled industries, including those with underdeveloped career progression models, should be dead-ended and have no access to progression through experience.’¹²⁵

- The Full Bench did not actually ‘reset’ either internal or external relativities, rather it adopted the compressed actual relativity of 148%. The HSU submits ‘there is a real tension in the employer approach of requiring strict compliance with the C10 relativity scale where it suppresses wages but ignoring compression at above-trade levels.’¹²⁶

[153] The HSU submits that the approach taken by the Full Bench to interpreting ss. 156(3) and (4) in the *Teachers Case* ‘remain instructive’ in relation to ss.157(2) and (2A) however, the HSU maintains that the decision ‘does not support the rigid adherence to external award relativities’ nor dictate that such an approach is appropriate in other proceedings.¹²⁷

Gender based undervaluation

[154] Paragraphs [33] to [39] set out the HSU’s responses to the Joint Employers’ submissions that the expert evidence before the Commission on gender-based undervaluation is of ‘limited utility’ because the expert reports are not based on minimum award rates as follows:

- The HSU notes that both it and the ANMF filed ‘comprehensive expert evidence’ that gender-based undervaluation has placed a role in setting the current minimum rates of pay in the aged care sector and submits that in cross examination the Joint Employers did not successfully challenge this evidence.¹²⁸
- The minimum rates in the Aged Care Award and SCHADS Award are, as a matter of reality, what aged care workers are paid as bargaining ‘either does not occur or delivers pay outcomes which are only marginally above the award.’ The HSU submits this is the reality in a government funded industry and relies on the expert evidence of Dr Charlesworth and Dr Meagher.¹²⁹
- The expert evidence contains a detailed explanation for the drivers of historical undervaluation of work in female-dominated industries including that ‘paid’ care work has been associated with ‘unpaid’ care work traditionally undertaken by women giving rise to the perception that care work is ‘natural and therefore unskilled’. The HSU submits that the Joint Employers arbitrarily assume that the setting of minimum award rates ‘has been entirely immune from these factors.’¹³⁰

[155] The HSU further suggests that the Joint Employers’ submission implies that the HSU’s application ‘offends’ the principle of equal remuneration for work of equal or comparable value

¹²⁵ Ibid.

¹²⁶ Ibid [31].

¹²⁷ Ibid [32].

¹²⁸ Ibid [33].

¹²⁹ Ibid [35] citing Charlesworth Report [40] – [46]; Meagher Report [7.4].

¹³⁰ Ibid [37].

in 134(1)(e) and submits that the proposition being advanced by the Joint Employers appears to be that:

- ‘(a) the HSU’s application if granted will lead to the minimum rate of pay for a C10-equivalent aged care worker being higher than that of, for example, a maintenance fitter;
- (b) the maintenance fitter is more likely to be male; and
- (c) therefore, and because the male maintenance fitter may receive less than the female aged care worker, the award system will not provide remuneration of equal and comparable value.’¹³¹

[156] The HSU submits that this is an ‘ambitious submission’ and reflects ‘perhaps a degree of gender-based bias, that the work of the entry-level mechanical tradesman is *necessarily* equivalent to that of the aged care worker with a Certificate III’ a proposition that is, the HSU argues, ‘inherently unsafe’.¹³²

The significance of the C10 framework

[157] Paragraphs [40] to [46] outline the HSU’s response to what it submits is the Joint Employers’ preoccupation with concerns about external relativities. The HSU notes that where the Joint Employers concede that work value reasons justify an increase, they submit that such an increase should only be ‘marginal’, a position that the HSU argues appears to be based on the presupposition ‘that the Commission in fact cannot, or alternatively should not, depart significantly from these external award relativities.’¹³³

[158] The HSU submits that this position is ‘unsupported by any particular point of principle’ and contends that external award relativities ‘are at best a useful starting point ... one tool which might be used in the process of arriving at fair minimum rates which properly acknowledge work value.’¹³⁴

[159] The HSU maintains that the Joint Employers submit that the rates referable to the C10 framework address not only qualifications but also the environment in which the work is performed and the inherent nature of the work and submit:

‘It is not explained how the asserted alignment between a particular classification in a manufacturing context and work undertaken in the context of an aged care facility or the provision of care to an elderly person in the home takes into account the different between the nature of the work and the environment in which it is performed.’¹³⁵

¹³¹ Ibid [38].

¹³² Ibid [39].

¹³³ Ibid [42].

¹³⁴ Ibid [43].

¹³⁵ Ibid [44].

[160] The HSU further argues that the approach proposed by the Joint Employers ‘would have the effect of entirely negating considerations of changes in work value’ and submit that, to the extent that the minimum rates in the Aged Care and SCAHDS awards have been set with reference to the C10 scale, this has not involved a consideration of the ‘highly specific environment in which the work is performed and the inherent nature of the work.’¹³⁶

Proposed classification structure

[161] Paragraphs [47] to [53] address the Joint Employers’ proposed classification structure, with the HSU making the following observations:

- The proposed delineation between ‘direct care’ and ‘indirect care workers’ does not take into account that all employees in the aged care sector are engaged in care work of some kind and it is ‘incorrect to treat an administrative officer as having an identical job to an administrative officer in a non-aged care setting.’¹³⁷
- The classification structure in the Aged Care Award is ‘of long-standing and derived from the pre-modernisation awards’ and while concerns have been raised about some elements of the current structure, there is ‘no evidence’ that it is ‘problematic because it has classification levels with role descriptions for personal care work and general and administrative and food services work.’¹³⁸
- While there are differences between the type of duties undertaken by employees within the personal care stream and employees in the general and administrative and food service streams, ‘the provision of person-centred care is the responsibility, and the focus, of the whole of the workforce’ and consequently separating the classifications is contradictory to the philosophy informing the aged care sector.¹³⁹
- The work of all workers in residential aged care has been impacted by ‘dramatic changes in the demographics and care needs of residents over the last 20 years.’¹⁴⁰
- It is not uncommon for aged care workers to perform functions across both personal care and administrative and general or food services streams. The HSU relies on the lay witness evidence of Anita Field,¹⁴¹ Fiona Gauci,¹⁴² and Kathy Sweeney¹⁴³ in support of this proposition.¹⁴⁴

¹³⁶ Ibid [46].

¹³⁷ Ibid [48](a).

¹³⁸ Ibid [50].

¹³⁹ Ibid [51].

¹⁴⁰ Ibid [52].

¹⁴¹ Witness statement of Anita Field dated 30 March 2021 [29(b)].

¹⁴² Witness statement of Fiona Gauci dated 29 March 2021 [28]; Transcript, 29 April 2022, [PN2203]–[PN2206].

¹⁴³ Transcript, 5 May 2022, [PN7033].

¹⁴⁴ Ibid [53].

- In relation to the Nurses Award, the proposed abolition of annual increment increases in all circumstances involves a misreading of the *Teachers Case*.¹⁴⁵
- In relation to the SCHADS Award, no evidence has been presented of the ‘operational difficulties’ posited by the Joint Employers and ‘submissions which do little more than speculate as to future problems should, as a general proposition, be ignored.’¹⁴⁶

Joint Employers’ submissions on work value reasons – general observations

[162] Paragraphs [54] to [57] set out the HSU’s general observations on the Joint Employers’ submissions as to work value and the supporting evidence.

[163] The HSU submits that the Joint Employers’ submissions ‘do little more than set out a mechanical (and often incomplete) description of the basal tasks performed by the relevant employees’ and ignore the critical focus of the work and the actual skills it involves.¹⁴⁷ It states:

‘[the] key omission is any recognition of the central feature of aged care work: the presence of aged persons, most commonly with complex physical, mental and emotional needs, who both required care and must be navigated around, often inflicting physical and verbal assaults on the worker.’¹⁴⁸

[164] Paragraphs [58] to [61] set out the HSU’s submissions as to the Joint Employers’ summaries of the lay witness evidence. The HSU submits that it does not agree with the summaries and that they suffer from defects as described earlier in its submission.¹⁴⁹

[165] The HSU contends that the Joint Employers’ submissions go to a disagreement as to what is relevant to the Commission’s consideration and emphasises that work value reasons are not the sole matter in contemplation. The HSU submits that matters such as understaffing, financial pressures of the lay witnesses, the impacts of Covid-19 and rostering practices ‘explain the actual nature of the work, the conditions under which the work is done and inform other matters arising in respect of the modern award and minimum wages objective’.¹⁵⁰

Personal care workers

[166] At [62] to [74] the HSU refers to submissions made by the Joint Employers in relation to Personal Care Workers and submits that while the HSU agrees with the work value changes set out at 9.23 it is an unduly limited view of the nature of the change. It also states that the submission is entirely ‘change focused’ and ‘no analysis of the value of the work has been performed.’¹⁵¹

¹⁴⁵ Ibid [48](b).

¹⁴⁶ Ibid [48](c).

¹⁴⁷ HSU closing submission in reply dated 19 August 2022 [54]–[56].

¹⁴⁸ HSU closing submission in reply dated 19 August 2022 [57].

¹⁴⁹ Ibid [58].

¹⁵⁰ Ibid [60]–[61].

¹⁵¹ Ibid [74].

[167] The HSU states that the Joint Employers' description of the tasks performed by such workers is 'simplistic, and in large part theoretical' and 'ignores the communication, negotiation, interpersonal and empathic skills obviously required to undertake care tasks to assist elderly residents, including in a manner that respects the dignity and individual agency of residents'.¹⁵²

[168] The HSU notes that the Joint Employers' description omits 'the risk, and persistent occurrence of, difficult 'behaviours' from residents'.¹⁵³

[169] The HSU also states that the Joint Employers' submissions 'suggest, at 9.21, that there are factors which mean the work of Personal Care Workers has become easier over time', but the HSU submits that Personal Care Workers are 'required to perform a greater range of tasks, beyond personal care, as part of a move away from institutional an hospital-like settings'.¹⁵⁴ It also submits that the increased use of mechanical mobility aids is more directly attributable to the increased number of residents who are largely or wholly immobile and a corresponding increase in the number of occasions in which residents require assistance with physical movement. It also states that evidence discloses that Personal Care Workers must know how to safely manually assist residents using mechanical aids and that the Joint Employers' submission 'ignores the communication and negotiation skills involved in facilitating the use of technological aids or lifting devices'.¹⁵⁵

Recreational/Lifestyle Officer

[170] At [75] to [78] the HSU refers to submissions made in relation to Recreational/Lifestyle officers. It states that the extent to which the summary of what a RAO might do day today, at 10.4(a)-(u) is misleading to the extent it suggests a controllable or predictable routine.¹⁵⁶

[171] It submits that what it has stated said in respect of increasingly complex skills involved in interacting with residents who have challenging physical and mental needs applies equally to RAOs and indeed all staff and that this is 'ignored almost entirely in [the Joint Employers'] summary'.¹⁵⁷ The HSU also contends that the summary omits 'any real recognition of the work that planning and preparing for activities involves', stating that 'preparatory work is just as, if not more, intensive and demanding than the outcomes it achieves'.¹⁵⁸

[172] The HSU states that the summary at Part 10 of the submissions is 'manifestly inadequate to even capture all the work done, let alone explain it or analyse its worth'.¹⁵⁹

Administrative employees

¹⁵² Ibid [62]–[63].

¹⁵³ Ibid [65].

¹⁵⁴ Ibid [71].

¹⁵⁵ HSU closing submission in reply dated 19 August 2022 [72].

¹⁵⁶ Ibid [75].

¹⁵⁷ Ibid [76].

¹⁵⁸ Ibid [76]–[77].

¹⁵⁹ Ibid [78].

[173] From [79] to [81] the HSU refers to submissions made in relation to Administrative employees and contends that their work is ‘deeply affected by the context in which it is performed, and requires a higher level of skill than their non-aged care counterparts’.¹⁶⁰

[174] The HSU submits that the summary of tasks at 11.3(a)-(h) does not mention ‘consumers’ being the aged care residents themselves and states that this is a ‘critical defect’ in the summary. The HSU submits that administrative officers have ‘direct and persistent contact with residents and their families’.¹⁶¹

[175] The HSU submits that phone conversations with a resident with dementia or a distressed or agitated family member of a resident is ‘somewhat different, and more complex’ than someone calling from a manufacturing facility to speak to a production manager. It also states that the summary ignores the ‘integral role this cohort of workers play in ensuring compliance with the increased regulatory and reporting requirements; and correspondingly the particular effect this has had on the degree of skill and responsibility their work requires’.¹⁶²

Laundry employees

[176] At [82] to [86] the HSU refers to submissions made in relation to Laundry employees. It states that the description of the work of laundry employees at 12.3(a)-(f) ‘involves a misreading of, and fundamentally a failure to engage with, the evidence’ which ‘highlights the unreliability of the summaries at the various annexures’.¹⁶³ Amongst other things, the HSU contends that the proposition at 12.3(d)(iv) that laundry employees are not required to handle soiled or infectious items is wrong’.¹⁶⁴

Cleaning employees

[177] From [87] to [91] the HSU refers to submissions made in relation to cleaning employees. It states that the description of the work performed by cleaning employees at 13.3(a)-(k) ‘gives short shrift to:

- (a) the particularly unpleasant nature of the work, noting the routine exposure to hazardous waste which one might not expect in, for example, an office building; and
- (b) the nature of cleaners’ interaction with residents.’¹⁶⁵

[178] The HSU submits that ‘a move away from institutional models of care makes the work more complex’ and ‘cleaners are required to perform their tasks under time pressure in a manner

¹⁶⁰ Ibid [81].

¹⁶¹ Ibid [79].

¹⁶² Ibid [80].

¹⁶³ Ibid [83].

¹⁶⁴ Ibid [86].

¹⁶⁵ Ibid [87].

which respects the fact that the facility, and in particular the individual rooms, is the resident's home'.¹⁶⁶

[179] The HSU also submits that it is 'entirely unclear' as to how the observations set out at 13.4 and 13.5 have been reached or their evidentiary basis.¹⁶⁷

Gardening employees

[180] At [92] and [93] the HSU refers to the Joint Employers' submissions in relation to gardening employees. The HSU submits the Joint Employers' submissions correctly identify the following factors:

- (a) the need to take into account resident needs, and in particular the needs of residents with dementia;
- (b) the reality that gardeners in aged care facilities do not work in isolation, but as a key part of their role interact with residents in ways which require specialist training; and
- (c) the particular direct engagement, including leading gardening activities, and the corresponding integration of their work into direct care'¹⁶⁸

[181] However, the HSU also submits that the Joint Employers' submissions contain the same defects as are apparent in their submissions regarding cleaners. It states that '[it] is the presence of a vulnerable cohort whose needs must be central that radically transforms the nature of the work'.¹⁶⁹

Maintenance employees

[182] At [94] to [98] the HSU refers to the Joint Employers' submissions in relation to maintenance employees. It submits that '[the] summary of the work done by maintenance employees, as well as being fixated on broken curtain rods for reasons which remain entirely unclear, similarly understates the additional complexity that the work environment including the presence of residents adds to work of this kind.'

[183] The HSU also submits that '[the] observations of the Joint Employers are identical to those set out for gardening employees and again have no apparent basis in any evidence (as well as being entirely unexplained)', and states that '[it] is the presence of a vulnerable cohort whose acute needs must always be placed at the centre of the activities within the residence that changes the nature of the work.'¹⁷⁰

Chefs/cooks/serverly workers

¹⁶⁶ Ibid [89].

¹⁶⁷ Ibid [91].

¹⁶⁸ HSU closing submission in reply dated 19 August 2022 [92].

¹⁶⁹ Ibid [93].

¹⁷⁰ Ibid [97]–[98].

[184] At [99] to [105] the HSU refers to submissions by the Joint Employers made in relation to chefs/cooks/serverly workers. The HSU submits that the Joint Employers' submission 'relies entirely on the proposition that a significant net addition in work value is required before adjustments will be justified' is 'simply wrong'. It states that '[the] Commission's task is to set fair minimum rates of pay for the work that is actually being performed'.¹⁷¹

[185] It submits that the work of all indirect care staff is made more complex and challenging by the work environment and the reality that it is care work, in addition to the tasks that a serverly worker might perform in a different environment but that in any event it does not accept that there has not been a significant net change in the work value of serverly workers.¹⁷² It states that the Joint Employers' conclusion is unexplained and that the 'significant change in the nature of the work, the regulatory environment and the demographics of residents has affected these workers as much as any other.'

[186] The HSU further submits that some evidence, as described by the HSU at [103] and [104] remains unaddressed by the Joint Employers and that therefore its submission that there are not work value reasons justifying a significant increase for these workers cannot be accepted.¹⁷³

Home care workers

[187] Paragraphs [106] to [163] set out the HSU's submissions in response to the Joint Employers' summary in Annexure G of its closing submission of the tasks performed by home care workers. The HSU submits that while the Joint Employers' summary provides 'a starting point for the consideration of the work' it does not include a description of the clients who 'by their needs, by their frailty, by their behaviours, or by their sheer presence, transform work that might otherwise be regarded as straightforward, into work with a much higher level of complexity, responsibility, and difficulty.'¹⁷⁴

Supervision

[188] The HSU submit that the term 'home' should not mask the reality of the work environment of home care workers and notes:

- (a) the fact that home care workers operate across a range of environments during the course of a day, both welcoming and otherwise, and need to adapt to each of those environments as they move from location to location;
- (b) the risks associated with entering into an enclosed environment with the client and others who reside in the property, including family members of the client; and

¹⁷¹ Ibid [100].

¹⁷² Ibid [101].

¹⁷³ HSU closing submission in reply dated 19 August 2022 [105].

¹⁷⁴ Ibid [107].

- (c) the difficulty involved in operating in a physical environment which, while assessed for hazards, is not under the employer's direct control.¹⁷⁵

[189] The HSU acknowledges that home care workers operate under 'indirect supervision' but submit that the Joint Employers' summary does not recognise the limited role that these supervisors play. At paragraphs [110] to [113] the HSU sets out some of the lay witness evidence it says supports an assertion that supervision is often at the initiative of the home care worker and that the 'mere existence' of a formal structure of supervision is not in and of itself evidence of the actual level or quality of supervision provided to home care workers.

Qualification

[190] Paragraphs [114] to [118] set out the HSU's response to the Joint Employers' assertion that the entirety of the work performed by home care workers is within the competence of the Certificate III qualification. The HSU submits that the lay witness evidence demonstrates that while home care workers perform work within the Certificate III classification, home care workers perform their work in high stakes environments with 'heavy responsibility'¹⁷⁶ and 'it does not follow that the metes and bounds of their work can be adequately captured by referring to the syllabus from that period of formal instruction.'¹⁷⁷

Rostering

[191] Paragraphs [119] to [125] and [129] to [131] set out the HSU's response to the Joint Employers' submission that a home care worker 'will usually have a roster with a regular clientele' that has a set number of appointments, confirmed 1-2 weeks in advance.¹⁷⁸ The HSU submits that the lay witness evidence in fact demonstrates that home care workers work shifts that are unsettled, intrusive on the usual hours of family life, precarious, often of short length, change at short notice and scattered across multiple days.¹⁷⁹

[192] The HSU further submits that roster changes by allocating additional shifts of work to part-time workers 'is a structural feature of the industry' and relies on the evidence of Dr Charlesworth¹⁸⁰ to argue:

'employers commonly require employees to provide their "availability" ... which, coupled with the minimal guaranteed hours, operates to create a casualised workforce available to work on demand. It is inapt in the face of that structural, incentivised underemployment, for [the Joint Employers] to describe "roster changes" in the language of 22.5(f), that: *Changes to the roster may arise if a client cancels an appointment or if another home care employee becomes unavailable.*'¹⁸¹

¹⁷⁵ Ibid [108].

¹⁷⁶ Ibid [117].

¹⁷⁷ Ibid [116].

¹⁷⁸ See Joint Employers closing submissions dated 22 July 2022 [22.5](e).

¹⁷⁹ HSU closing submissions in reply dated 19 August 2022 [120]–[123]; [129]–[130].

¹⁸⁰ Charlesworth Supplementary Report [22].

¹⁸¹ HSU closing submissions in reply dated 19 August 2022 [124].

Assessment

[193] Paragraphs [126] to [128] set out the HSU's response to the Joint Employers' submission that prior to a client being assigned to a home care worker, an initial assessment of the client and client's home will be conducted, along with a risk assessment to identify potential safety risks in the home.¹⁸² The HSU submits that the Joint Employers' submission 'prefers the idealised and abstract description to reality' and argues that the evidence of Ms Vincent suggests that such assessments are not in fact always undertaken.¹⁸³ The HSU contends that, in any event, initial assessment can 'only go so far' with structural modifications dependent upon the availability of the funding and the practicality of modification.¹⁸⁴

The care plan

[194] Paragraphs [132] to [139] set out the HSU's submissions in response to the Joint Employers' submission that the 'care plan sets out 'the scope of the work to be performed and may identify unique features about the client's home.'¹⁸⁵ The HSU submits that 'it does not follow that because a care plan describes the type of service to be provided, that its description of the scope of the work adequately captures the demands of the work that is required, or performed.'¹⁸⁶

[195] The HSU argues that the lay witness evidence demonstrates that home care workers are often required to deviate from the description of a service in the care plan or undertake work that is not contained in the care plan.¹⁸⁷

[196] The HSU further submits that the lay witness evidence demonstrates that often home care workers do not have access to a copy of the care plan or when they do, they are either required to read it on their own time or concurrently while performing their duties.¹⁸⁸

Characterisation of duties

[197] Paragraphs [141] to [149] set out the HSU's submissions in response to the Joint Employers' contention that there are 'four types of appointment: domestic services, personal care, social support and medication prompt.'¹⁸⁹

[198] In relation to domestic services, the HSU submits that this work is 'rendered more complex' by the presence of the client receiving the service, whose personal care needs remain at the centre of the service, as opposed to similar cleaning work performed in office or the hospitality industry.¹⁹⁰

¹⁸² See Joint Employers closing submissions dated 22 July 2022 [22.5](g) and (h).

¹⁸³ HSU closing submissions in reply dated 19 August 2022 [127]–[128].

¹⁸⁴ *Ibid* [129].

¹⁸⁵ See Joint Employers closing submissions dated 22 July 2022 [22.5](k).

¹⁸⁶ HSU closing submissions in reply dated 19 August 2022 [133].

¹⁸⁷ *Ibid* [133]–[136].

¹⁸⁸ *Ibid* [137]–[139].

¹⁸⁹ See Joint Employers closing submissions dated 22 July 2022 [22.5](l).

¹⁹⁰ HSU closing submissions in reply dated 19 August 2022 [141].

[199] The HSU submits that the lay witness evidence demonstrates ‘the toll taken by domestic services’ as what is otherwise simple physical work (i.e. cleaning, washing dishes) is made more complicated by the responsibility of providing care to an individual client,¹⁹¹ and notes the following:

- Domestic care needs to be adopted to the emotional and social needs of clients¹⁹²
- Domestic shifts are physically taxing¹⁹³
- There are additional challenges associated with providing domestic care for people with significant physical and or cognitive deficits.¹⁹⁴

[200] In relation to personal care appointments, the HSU submits that the Joint Employers do not take into account the conditions under which the work is performed, or the skills and responsibilities required to be exercised in performing the work, and in particular note the level of skill and responsibility required in the performance of personal care work derives largely from the frailty and needs of the clients.¹⁹⁵

[201] In relation to social care appointments, the HSU submits that the Joint Employers’ description of these client interactions reduces home care workers to ‘little more than uber drives’. The HSU emphasises the importance of social connection for home care clients that are often isolated, and submit that home care workers take on the responsibility of ensuring a client’s social engagement and well-being and that social support involves far more skill than simply driving a client from A to B.¹⁹⁶

Escalation

[202] Paragraphs [150] to [152] set out the HSU’s submissions in response to the Joint Employers’ submissions regarding the ‘escalation’ responsibilities of home care workers. The HSU submits that the Joint Employers’ description ‘fails to acknowledge the complexity of the judgment that may be required’ in observing and assessing whether a situation requires escalation.¹⁹⁷ The HSU submits that home care workers are required to pay close attention to their clients so they can identify changes that may have significant consequences for their health, which requires:

- ‘knowledge of the factors that impact on the health of older persons, and the signs of ill-health;
- ongoing observation of the client to equip the worker to detect relevant changes;

¹⁹¹ Ibid [143].

¹⁹² Ibid.

¹⁹³ Ibid [144].

¹⁹⁴ Ibid [145].

¹⁹⁵ Ibid [146] – [147].

¹⁹⁶ Ibid [148] – [149].

¹⁹⁷ Ibid [150].

- sufficient judgment to understand whether any signs of changes are explicable by any underlying morbidity or general decline, or are signs of something more serious.’¹⁹⁸

Safety

[203] At paragraph [153], the HSU notes the Joint Employers’ observation that home care providers often adopt systems or protocols for when a worker feels unsafe. The HSU submits that such protocols are necessary as:

‘home care workers work, in most cases alone, and are required to deal with persons, and in locations, where they could come to harm. Even if the incidence of such harm or threat is rare, any assessment of the conditions under which home care workers work must acknowledge the vulnerability of that position, which adds to the burden of the work.’¹⁹⁹

Quasi clinical

[204] Paragraphs [155] to [157] set out the HSU’s submissions in response to the Joint Employers’ description of ‘quasi clinical activities’ performed by home care workers. The Joint Employers submit that the perform of procedures, including blood pressure check, blood glucose check or catheter bag change ‘involves the performance of a procedure at close quarters with a client, in which the procedure must be carried out correctly to ensure that pain and discomfort are minimized and the result is accurate and/or satisfactory.’²⁰⁰The HSU further submits that in performing these tasks, home care workers are also required to reassure the client and instil confidence. The HSU notes that the increasing frailty of clients receiving home care means the need for home care workers to perform this type of work is increasing.²⁰¹

[205] Paragraphs [158] and [159] set out the HSU’s submissions in response to the Joint Employers’ ‘findings’ in relation to the work performed by a Coordinator. The HSU notes that the only Coordinator who gave evidence in the proceedings was Peter Doherty and submits his evidence ‘on the whole’ was unchallenged. The HSU maintains that further findings about the work performed by a coordinator are available:

- What clients need and what they get in terms of package levels are often two different things,²⁰²
- A co-ordinator may be required to field 30 to 40 calls a day;²⁰³
- The task of rostering may be an almost entirely manual process, made more challenging by the shortage of care workers, the inability to attract new workers into the sector, the effects of COVID, the cost of petrol which has meant that some care

¹⁹⁸ Ibid [151].

¹⁹⁹ Ibid [152].

²⁰⁰ Ibid [154].

²⁰¹ Ibid [155].

²⁰² Ibid [159](a) citing Transcript, 5 May 2022, [PN6063].

²⁰³ Ibid [159](b) citing Transcript, 5 May 2022, [PN6293]-[PN6299].

workers haven't been able to afford to fill their tanks in order to come into work, and ever more clients seeking care;²⁰⁴

- In addition to the “direction” and guidance that coordinators provide to care workers, they also provide encouragement and emotional support in what can be stressful and challenging situations.²⁰⁵

[206] Paragraph [160] sets out the HSU's response to the Joint Employers' 'findings' in relation to the work performed by Team Leaders. The HSU notes that the only Team Leader who gave evidence in the proceedings was Lorri Seifert and points out that Ms Seifert was not cross-examined. The HSU sets out 8 propositions it submits is the 'unchallenged evidence' provided by Ms Seifert.²⁰⁶

Differences between residential care PCWs and home care workers

[207] Paragraphs [161] to [163] set out the HSU's submissions in response to the Joint Employers' characterisation of the differences between PCWs in residential care and home care workers. The HSU submits that the Joint Employers' description of the differences between the two does not take into account:

- The uncontrolled and changing nature of the work environment of home care workers; and
- The way in which the time limits associated with home care work imposes a greater level of difficulty in organizing and performing the work in the available time.²⁰⁷

[208] The HSU note the assertion by the Joint Employers that home care work can 'focus' on domestic residential duties,²⁰⁸ and submit that this assertion should not be accepted and is not reflected in the evidence.²⁰⁹ The HSU further submit:

'the characterisation of work as domestic should not conceal the value of that work when performed in the home care setting, involving as it does, responsibilities to perform that work in a manner that ensures the well-being of the clients. The Commission would reject this attempt to minimise the work of home care employees. Home care workers are required to deal with diverse situations with individuals whose needs may change on a daily basis, who are required to exercise a high degree of discretion, judgement and advanced interpersonal, communication and empathetic skills.'²¹⁰

Conclusions regarding the Joint Employers' submissions on the lay witness evidence

²⁰⁴ Ibid [159](c) citing Transcript, 5 May 2022, [PN6270]-[PN6276]; [PN6346]-[PN3648].

²⁰⁵ Ibid [159](d) citing Transcript, 5 May 2022, [PN6319]-[PN6322].

²⁰⁶ See Ibid [160].

²⁰⁷ Ibid [162].

²⁰⁸ See Joint Employers closing submissions dated 22 July 2022 [22.9](c).

²⁰⁹ HSU closing submissions in reply dated 19 August 2022 [163].

²¹⁰ Ibid.

[209] In relation to the Joint Employers' submissions on the lay witness evidence, the HSU submits that the approach adopted by the Joint Employers is 'a mechanical and overly simplistic summary of basic tasks presented largely out of context, coupled with assertions without explanation as to what conclusions should ultimately be drawn' and the HSU argues is 'of no real assistance to the Commission.'²¹¹

[210] The HSU submit that the Joint Employers' approach to the lay witness evidence does not consider:

- the extensive evidence as to the nature of the skills and responsibilities involved in the work
- the context and environment in which the work is performed
- the extent to which the nature of those tasks have been affected by changes to the resident/consumer population
- the regulatory, governance and accountability arrangements which impact upon the workers performance of work and the responsibilities of the workers.²¹²

Conclusions regarding the Joint Employers' submissions on the expert evidence

[211] Paragraphs [165] to [175] set out the HSU's conclusions as to the Joint Employers' submissions on the expert evidence. The HSU submits that the 6 expert witnesses all gave evidence that the current modern award minimum rates do not represent fair remuneration for the work performed.²¹³

[212] The HSU notes that all 6 expert witnesses were cross examined, and submits that the only substantive challenges to their findings appear to be:

1. The proposition that the analysis was based on *actual* rates of pay, not award minima.
2. The concept of gender-based undervaluation of work.²¹⁴

[213] In relation to the first proposition, the HSU submits that the reality of the aged care sector is that most employees are in fact paid the award rate, or close to it as the funded nature of the sector means that there is no 'real scope' for bargaining.²¹⁵

[214] The HSU further submits that the task for the Commission is to set 'fair and relevant' conditions of employment and rates of pay in modern awards and argues:

²¹¹ Ibid [164].

²¹² Ibid [164].

²¹³ Ibid [165].

²¹⁴ Ibid.

²¹⁵ Ibid [166].

‘If a minimum rate does not, as the expert consensus says, reflect proper remuneration for the nature of the work performed on the basis that it is too low, this standard has not been met. As has been explained and appears to be accepted, the task of the Commission is to assess whether there are work value reasons which justify a variation to minimum rates and to value the work performed.’²¹⁶

[215] In relation to the second proposition, the HSU submits that this is a ‘remarkable proposition’ that is not supported by any expert evidence in the proceedings and was not borne out in cross examination. The HSU further notes that the Joint Employers did not lead any expert evidence in the proceedings and submit as a result the second proposition ‘is non-expert opinion from, at best, a lawyer, which has not been put to the actual experts in the field for response.’²¹⁷

[216] The HSU notes that at [3.18] of Annexure J, the Joint Employers ‘suggests 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’ and submit that this is a ‘misunderstanding’ of the phrase ‘women’s work’. The HSU submit that the phrase ‘women’s work’ as it is used in the expert evidence is not conveying that the work is ‘inherently women’s work’ as ‘the idea that any such thing exists is an inherently sexist proposition’ rather ‘the point is that the work has been *perceived* as ‘*women’s work*’ and unfairly attributed less value by society, employers and government (in respect of funding), leading to an inequity.’²¹⁸

[217] The HSU submits that this is not a ‘comparator-based exercise’ and rely on the evidence of Dr Charlesworth that:

‘The concept of gendered undervaluation is precisely there because it's not asking for a male comparator. It's not saying, 'relative to other jobs'. It's looking at the actual skills that are required and involved and on the basis and the knowledge, the judgment, the discretion and on the basis of that saying it's undervalued.’²¹⁹

[218] The HSU further argues that the expert evidence demonstrates that the nature of the work, involving a relationship between the aged care worker and a resident or client, is ‘distinctive and it is difficult, if not impossible, to undertake comparisons with comparable male-dominated industries.’²²⁰ Rather, the HSU submits the task is to:

‘examine the skills and responsibilities actually involved in the work and to ensure that the valuation of the work properly encompasses consideration of all aspects of the work, including skills which have been historically overlooked or undervalued.’²²¹

²¹⁶ Ibid [167].

²¹⁷ Ibid [168].

²¹⁸ Ibid [170] [HSU’s emphasis].

²¹⁹ Transcript, 2 May 2022, [PN2515]-[PN2516].

²²⁰ HSU closing submissions in reply dated 19 August 2022 [172] citing Transcript 2 May 2022, [PN2519]-[PN2521]; Transcript, 2 May 2022, [PN2637].

²²¹ Ibid [173].

[219] The HSU submits that the opinion that care work is undervalued is ‘not a mere assertion’ but supported by the expert evidence that demonstrates that:

‘[p]aid care work has been historically associated with unpaid caring work traditionally performed by women in the home and community. This association has long resulted in the perception that such work is natural and therefore unskilled. The expert evidence indicates that, as a consequence, 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.’²²²

[220] The HSU also notes that the Joint Employers suggest that the analysis on the historical undervaluation of care work does not address the fact that some men work in the aged care industry, and submit that:

‘the complex skills involved in care work, particularly relational, empathic and communication skills, have been undervalued and are perceived to be ‘*women’s work*’ because the workforce is overwhelmingly female and because the work is associated with unpaid labour commonly performed by women. It should not need to be pointed out that those skills are undervalued on gender grounds even though some individuals undertaking care work are men. Equally, the fact that, in theory, skills may be undervalued for reasons other than gender does not engage with the evidence explaining that the skills involved in care work have historically been undervalued for gender reasons.’²²³ [footnotes omitted]

[221] The HSU submits that the Joint Employer’s submissions in relation to the evidence ‘involve significant errors in approach’ and are not support by anyone with expertise in the area and as a result should be disregarded.²²⁴

3.2 ANMF

[222] On 17 July 2022, the ANMF filed its closing submissions in reply.

[223] Part C of its submissions, at paragraphs [84] to [456], sets out the ANMF’s submissions in reply to the Joint Employers’ closing submission.

[224] The following is a brief summary of the ANMF closing submissions in reply.

3.2.1 – Identification of points of agreement

[225] At [85] to [111] the ANMF sets out the matters it submits are agreed between the parties.

3.2.1.1 – Work value conclusions

²²² Ibid [173] citing Charlesworth Report [43]; Meagher Report p.28.

²²³ Ibid [174].

²²⁴ Ibid [175].

[226] The ANMF agrees with the conclusions in respect of work value as set out at [86] to [89] but notes that the ANMF's position is not so confined either in respect of the employees affected by work value change or the extent and scope of that change.²²⁵

3.2.1.2 – Work value considerations

[227] At [91] the ANMF sets out a number of factors that it states arise from the evidence relevant to the Commission's assessment of work value and that are set out in the Joint Employers' closing submission. ANMF agrees that these are established on the evidence and are relevant to the Commission's task of assessing the work value of the RNs, ENs and AINs / PCWs.

[228] The ANMF also submits that it is agreed between ANMF and the Joint Employers that the sixteen propositions listed at [116] of Background Document 1 and repeated at [93] of Background Document 5 are uncontentious.²²⁶

3.2.1.3 – Work value evidence

[229] From [96] to [104] the ANMF refers to factors in the Joint Employer's closing submission concerning the evidence that it states it wishes to expressly endorse as supported by the evidence and relevant to the Commission's task.²²⁷ This includes various submissions in the Joint Employers' closing submission recognising factors with respect to the nature of the work performed by AINs / PCWs, ENs, RNs and submissions in the Joint Employers' closing submission that it states reflects the evidence concerning supervision.²²⁸

[230] The ANMF submits that, whilst relying upon its own concluding submissions, and in particular its approach to the evidence adopted in those submissions with a focus on themes, agrees with the Joint Employers' closing submissions in identifying the matters listed at [102] as relevant to the Commission's task in respect of the skill and responsibility involved. The ANMF states that the range of skills exercised in the delivery of direct care identified by the parties' submissions is reinforced by the evidence of the "interventions" identified in the course of the *National Aged Care Staffing Skills Project Report 2016* and provided at Annexure "RB 2" to the Statement of Robert Bonner.²²⁹

[231] The ANMF also lists various factors identified in the Joint Employers' closing submission under the heading of the 'Conditions under which the work is performed' and submits that these aspects of the work have application to all direct care workers and agrees that these matters are relevant to the Commission's task.²³⁰

3.2.1.4 – Classification Structure

²²⁵ ANMF closing submission in reply dated 17 August 2022 [90].

²²⁶ Ibid [92].

²²⁷ Ibid [96].

²²⁸ Ibid [100].

²²⁹ ANMF closing submission in reply dated 17 August 2022 [103].

²³⁰ Ibid [104].

[232] The ANMF notes that the Joint Employers’ closing submission accepts that there is merit in the restructure of the aged care classification structure into a care stream and a general services stream and submits that this proposal is part of ANMF’s application.²³¹

3.2.1.5 – The Consensus Statement

[233] The ANMF submits that the Commission can rely upon the Consensus Statement as properly representing the position of the stakeholder parties to the statement, including ACSA and LASA, in respect of the ANMF’s application.²³²

3.2.1.6 – Award History and properly fixed rates

[234] The ANMF also contends that the summary of the history of the Aged Care Award and the Nurses Award provided by ANMF and HSU by the Commission in relation to award modernisation in Background Document 2 is uncontentious.²³³

3.2.1.7 – Full Bench Questions

[235] The ANMF further submits that insofar as the position of the employer parties and the ANMF are concerned there is agreement on the answers to questions 2, 5, 7, 8 10, 12, 13 and 14 posed in Background Document 1.²³⁴

3.2.2 – The Metals Framework and “properly set” minimum rates

3.2.2.1 – Relevance of Metals Framework

[236] At [112] to [161] the ANMF makes submissions in relation to the Metals Framework and “properly set” minimum rates.

[237] The ANMF contends that the employer parties’ submissions seek to subvert the Commission’s statutory task and would not be accepted.²³⁵

[238] It submits that whether existing wages were or were not “properly set” or do, or do not align with the Metals Framework does not answer the central statutory question, namely whether work value reasons justify an alteration to award minimum rates and nor does the application of the Metals Framework directly address whether a variation of modern award minimum wages is necessary to achieve the modern awards objective, or minimum wages objective.²³⁶

[239] The ANMF contends that 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

²³¹ Ibid [105].

²³² Ibid [109].

²³³ Ibid [110].

²³⁴ Ibid [111].

²³⁵ ANMF closing submission in reply dated 17 August 2022 [112]–[116].

²³⁶ Ibid [117].

it is not the statutory question. It states that the starting point and end point in any exercise apportioning value to a classification are the identified work value reasons and any application of the Metals Framework should not distract from the Commission’s statutory task.²³⁷

3.2.2.2 – *The significance of “properly setting” minimum rates and the AQF*

[240] The ANMF submits that to the extent that it remains relevant, it takes issue with the statement in the employer parties’ opening submissions and extracted in Annexure M to the Joint Employers’ closing submission to the effect that “[p]rior to varying the minimum rates in the awards, the Commission must form a view as to whether the minimum rates were ever ‘properly set’”. It states that this submission is not supported by the terms of the FW Act and misstates the effect of previous decisions of the Commission.²³⁸

[241] The ANMF refers to the contention in the Joint Employers’ closing submission that the AQF provides a consistent means for aligning qualifications, by reference to the competencies and learning outcomes of each AQF level and states that whilst it may be accepted that the AQF may be used to conduct a comparison between classifications and the Metals Framework, this adds little to the utility of the Metals Framework and is not a satisfactory proxy for work value.²³⁹

[242] The ANMF submits that the AQF alone cannot serve as a satisfactory proxy for determining work value and that 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.²⁴⁰

3.2.2.3 – *ACT Child Care Decision*

[243] The ANMF submits that in Annexure M to the Joint Employers’ closing submission heavy reliance is placed on the *ACT Child Care Decision* as informing the approach by which minimum rates are said to be “properly set”. However, submits that the *ACT Child Care Decision* was made under a different statutory regime and pursuant to wage-fixing principles which no longer exist and is no longer the correct approach to the Commission’s statutory task under section 157(2)–(2A).²⁴¹ It states that even if the three-step process described in the *ACT Child Care Decision* is useful to apply in the context of a particular section 157 application, the way in which those three steps should be applied is exemplified by the Teachers Case [2021] FWCFB 2051.²⁴²

3.2.2.4 – *Key classification*

[244] The ANMF’s primary submission is that it is not necessary or appropriate for the Commission to identify a “key classification” and apply the Metals Framework in order to

²³⁷ Ibid [118].

²³⁸ Ibid [122].

²³⁹ Ibid [125].

²⁴⁰ Ibid [129].

²⁴¹ ANMF closing submission in reply dated 17 August 2022 [132]–[134].

²⁴² Ibid [135].

determine its application to vary the Aged Care Award or the Nurses Award.²⁴³ It states that 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 1.²⁴⁴

[245] It contends that the preferable approach to section 157(2) of the FW Act is to take a work value approach, 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.²⁴⁵

3.2.2.5 – *Intrinsic value of work and the purported utility of the Metals Framework*

[246] The ANMF accepts that supply and demand are not determinative “work value reasons”. Further, “work value reasons” will often require some level of comparison. However, the ANMF states that is not to say work does not have underlying or intrinsic value and neither the AQF nor the Metals Framework are capable of identifying (or valuing) this social utility or worth.²⁴⁶

3.2.2.6 – *Consideration of the relevance of teachers as a comparator to the RN*

[247] In relation to the consideration of the relevance of teachers as a comparator to the RN, the ANMF submits that the Commission should be cautious in drawing conclusions about comparisons between the functions and performance of the two occupations.²⁴⁷ It states that The Teachers Case provides some guidance on the approach to the assessment task to be undertaken by the Commission and is relevant to the establishment of a stable award system but does not provide a basis for a work value comparative exercise as between teachers and RNs.²⁴⁸

3.2.2.7 – *Section 134(e) and the risk of “straying from the C10”*

[248] The ANMF states that it understands the effect of the Joint Employers’ closing submission at [23.19] to be that section 134(e) would not be relevant unless the Commission strayed too far from an application of the Metals Framework.²⁴⁹ The ANMF contends that:

‘This submission highlights the fallacy of giving primacy to the application of the Metals Framework. On one hand, the Metals Framework is an approach adopted under a different statutory regime and pursuant to wage-fixing principles which no longer exist. It finds no expression in the current legislative regime. On the other hand, section

²⁴³ Ibid [145].

²⁴⁴ Ibid [146].

²⁴⁵ Ibid [148].

²⁴⁶ Ibid [151]–[153].

²⁴⁷ Ibid [155].

²⁴⁸ ANMF closing submission in reply dated 17 August 2022 [156].

²⁴⁹ Ibid [160].

134(e) is 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.

Primacy must be given to the Commission's statutory task.²⁵⁰

3.2.3 – Classification structures

[249] The ANMF states that at [4.19] of the Joint Employers' closing submission it is asserted that part of the Commission's deliberations will involve the Commission considering whether the classification structures are themselves appropriate for properly setting minimum rates in a modern award.²⁵¹ More specifically, it states that the employer parties:

- (1) question the benefit of separating out a new schedule to the Nurses Award applicable to aged care workers only;
- (2) oppose the retention of wage increments;
- (3) treat all direct care workers performing home care as being covered by the SCHADS Award; and
- (4) generally agree with amending of the aged care classification structure in the Aged Care Award into a care stream and a general services stream.

[250] In relation to item 4, the ANMF submits that the restructure of the aged care classification structure into a care stream and a general services stream is part of ANMF's application as mentioned above.²⁵²

3.2.3.1 – Nurses Award

[251] The ANMF states that the employer parties submit that in relation to the Nurses Award, the Commission must be satisfied that the separation of the classification structure for aged care within an occupation-based award is appropriate and justified by the evidence. It says that the Joint Employers' closing submission also states that it is questionable whether it is desirable to dissect nurses in aged care from the current Nurses Award classification structure and to properly set the minimum rates for these nurses while not properly setting such rates for nurses outside of aged care and this, it is asserted, does not sit well with the approach taken in the *Teacher's Case*.²⁵³

[252] Th ANMF submits that it would be an inappropriate exercise of power to decline to order an increase in the minimum wage for some employees, only because it is possible to point to other employees who could have been, but were not, the subject of the relevant application and that it is not necessary for all wage undervaluations to be fixed at once, in the one

²⁵⁰ Ibid [160]–[161].

²⁵¹ Ibid [162].

²⁵² Ibid [105].

²⁵³ ANMF closing submission in reply dated 17 August 2022 [165].

application. It states that the current ANMF application is made in a particular context in response to a Royal Commission recommendation in regard to aged care employees in particular.²⁵⁴

[253] Further, the ANMF notes that its application is intended to put a temporal limitation on the situation whereby minimum rates for aged care nurses are adjusted in accordance with s.157(2), whilst rates for other nurses are not.²⁵⁵

3.2.3.2 – *Service/ experience-based increments*

[254] The ANMF states that the employer parties refer to and rely on aspects of the *Teachers Case* to question the appropriateness of service-based increments with annual progression contained in the Nurses Award. The ANMF states that incremental increases should be retained where they properly reflect work values, whether or not those increases are determined by length of service.²⁵⁶ The ANMF also notes that progression through pay points in the Nurses Award does not depend on merely time spent in a role and rather, in accordance with clause 15.7(b), progression through pay points will have regard to:

‘(1) the acquisition and use of skills described in the definitions contained in Schedule A—Classification Definitions; and

(2) knowledge gained through experience in the practice settings over such a period.’²⁵⁷

[255] The ANMF submits that:

‘Whilst the employer parties may question the appropriateness of service or experience based increments under the Nurses Award, no alternate proposal has been put before the Commission and tested in evidence. Absent such an opportunity, the Commission would not depart from the existing classification structure.’²⁵⁸

3.2.3.3 – *Award coverage of Home Care Employees*

[256] In relation to the award coverage of home care employees, the ANMF submits that:

‘Throughout the [Joint Employers’ closing submission], home care employees are treated as covered under the SCHCADS Award. Some home care employees will, of course, be covered by that award. But others will not be. Any “home care worker” who is a nursing assistant within the meaning of Sch A cl A.1–A.2 of the Nurses Award will be covered by that award rather than the SCHCADS Award. And, of course, the [Joint Employers’ closing submission] is not to be understood as suggesting that enrolled or registered nurses, even if providing nursing care in a “home care” setting, are covered by the

²⁵⁴ Ibid [167].

²⁵⁵ Ibid [169].

²⁵⁶ Ibid [173].

²⁵⁷ Ibid [179].

²⁵⁸ ANMF closing submission in reply dated 17 August 2022 [180].

SCHCADS Award rather than the Nurses Award. Any overlap between the Nurses Award and SCHCADS Award is minimal, and would likely be resolved by a proper analysis to determine which award classification is “most appropriate” to the work of the employees and to the “environment” in which the work is normally performed.’²⁵⁹

3.2.4 Matters that are, in fact, relevant to work value reasons

[257] The ANMF contends that proper consideration of staffing levels, funding, attraction and retention, Covid-19, financial pressure, bargaining and the other disputed areas at [211] to [216] are essential to the determination of the current applications.²⁶⁰

3.2.4.1 – Staffing levels

[258] The ANMF submits that staffing shortage issues cannot be divorced from work value reasons and evidence on the issue should be assessed accordingly.²⁶¹ It contends that:

- there is chronic understaffing in the industry which has led to an increase in workload and work intensity across all classifications;
- the Commission should be slow to apply the principle extracted from *the ACT Child Care Decision*. It states that:

‘the central 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. Increased workloads (and other issues caused by inadequate staffing such as working up, work intensity, and providing “rushed care”) may be “related to” each of the work value reasons at section 157(2A). Accordingly, failure to consider such matters would tend to lead into error.’

- the evidence and material before the Commission regarding staffing shortages is “related to” the work value reasons identified at s 157(2A).
- comprehensive evidence of “missed care” resulting from staffing shortages is also detailed in the National Aged Care Staffing and Skills Project Report 2016 at Annexure “RB 1” to the Statement of Robert Bonne and the extent of “missed care” contributes to the intensity of work, the Report provides reliable evidence of the existence of missed care and ,in turn, missed care is related to the work value reasons in s.157(2A).
- the increased workload flowing from staffing shortages has led to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration.

²⁵⁹ Ibid [181].

²⁶⁰ Ibid [182].

²⁶¹ Ibid [186].

3.2.4.2 – Funding, attraction and retention

[259] The ANMF submits that it is uncontroversial that employees in aged care are not competitively paid at a market level and this has, in part, led to a labour supply shortage, and that because of the funded nature of the sector the supply shortage cannot be corrected by market forces.²⁶²

[260] It states that attraction and retention of staff may be related to the work value reasons identified at s.157(2A) and thereby may be considered by the Commission in determining a variation to modern award minimum wages. It submits that better attraction and retention of staff is also relevant to the promotion social inclusion through workforce participation in accordance with s.134(1)(c).²⁶³

[261] In relation to the funded nature of the industry, the ANMF contends that the ANMF and employer parties appear to agree that the funded nature of the industry is relevant to the Commission’s task in determining the present application but that the parties are at odds as to how and why the funded nature of the industry is relevant.²⁶⁴

[262] The ANMF states that its position as to the relevance of the funded nature of the aged care industry is set out in its closing submission at Part G.3, particularly at [848]. The ANMF contends that in maintaining a fair and relevant minimum safety net, it is appropriate to take into account:

- (1) The difficulties faced by the sector in attracting and retaining staff as a consequence of funding arrangements, particularly in respect of the not-for-profit sector and rural and remote facilities;
- (2) Difficulties experienced in bargaining by reason of the funded nature of the sector for the purpose of s.134(1)(b); and
- (3) The additional role played by minimum award rates in the industry where employers have limited capacity to pay over award rates because of the funded nature of the sector for the purpose of s.134 generally.²⁶⁵

[263] The ANMF states that the appropriate approach for the Commission would be to identify what increase to the modern award minimum wages may be justified and necessary having regard to the funded nature of the sector difficulties faced by the sector in attracting and retaining staff as a consequence of funding arrangements; and taking no account of “the affordability issue”.²⁶⁶

3.2.4.3 – COVID-19

²⁶² ANMF closing submission in reply dated 17 August 2022 [187].

²⁶³ Ibid [196].

²⁶⁴ Ibid [197].

²⁶⁵ ANMF closing submission in reply dated 17 August 2022 [198].

²⁶⁶ Ibid [201].

[264] The ANMF notes that the employer parties contended that it is difficult to calibrate the impact of COVID-19 for those working the aged care industry now and into the future and submits that COVID-19 has caused permanent changes in the way infection prevention and control is dealt with in aged care and that difficulty predicting the future course of COVID-19 does not make evidence related to work value reasons irrelevant or diminish the weight that should be attributed to it.²⁶⁷

3.2.4.4 – *Financial pressure*

[265] The ANMF refers to s.134(1)(a) of the FW Act and states that the evidence of ANMF witnesses as to the financial pressures that they face is directly relevant to the ability of direct care workers to purchase the essentials for a “decent standard of living” and to engage in community life.²⁶⁸

3.2.4.5 – *Bargaining*

[266] In relation to bargaining, the ANMF states:

‘The employer parties at JCS [23.11]–[23.15] direct submissions towards “[t]he need to encourage collective bargaining.” The ANMF and employer parties disagree as to the capacity of a change to minimum wages to encourage collective bargaining. The experience of direct care workers with collective bargaining will be relevant to determining that dispute by identifying:

- (1) whether there is a current need to further encourage collective bargaining; and
- (2) what the current challenges to collective bargaining may be.

[267] The ANMF states that evidence of direct care workers about their experience with collective bargaining will be immediately relevant and accordingly relies on Part G.4 of its closing submissions and the evidence identified therein.²⁶⁹

3.2.4.6 – *Other disputed areas*

[268] The ANMF submits that the Joint Employers’ closing submission fails to recognise the interaction between direct care workers and the families of resident of clients has become more frequent, complex, and demanding.²⁷⁰ The ANMF also relies on its submissions with respect to the prevalence and use of technology in aged care and changes to the physical environment and built for of aged care facilities in its closing submission at Part E.11.²⁷¹

²⁶⁷ Ibid [202]–[204].

²⁶⁸ Ibid [206].

²⁶⁹ ANMF closing submission in reply dated 17 August 2022 [210].

²⁷⁰ Ibid [212].

²⁷¹ Ibid [215].

3.2.5 – Approach to the “summaries” of evidence in JCS Ann E–F, as well as some miscellaneous matters of lay evidence

[269] In relation to evidence summaries, other than those in relation to Annexure J (expert evidence) which the ANMF deals with in Part C.6, the ANMF’s principal submission is that the Commission would prefer the analysis set out in Parts D–E of the ANMF’s closing submissions.²⁷²

[270] The ANMF also addresses 6 particular points arising from the Joint Employers’ closing submission evidence summaries as follows²⁷³:

‘First, the [Joint Employers’ closing submission] evidence summaries understate the significance of evidence from union officials, many of whom give evidence directly relevant to work value reasons.

Second, in a few (minor) aspects, the [Joint Employers’ closing submission] evidence summaries are factually wrong (in regard to qualifications, experience, and other “biographical” information, or incomplete (in regard to role descriptions).

Third, submissions are directed to the aspects of the [Joint Employers’ closing submission] evidence summaries which address the weight to be given to particular aspects of witnesses’ evidence.

Fourth, as to [Joint Employers’ closing submission] [4.28(e)], the submission that, “the qualifications required to perform a lot of the work in aged care have not materially changed,” requires qualification.

Fifth, contra what is submitted at [Joint Employers’ closing submission] [9.5(h)], the evidence does not support a proposition that AINs / PCWs have a “routine” which they follow, nor that there is meaningfully a “cadence” of the working day.

Sixth, contra [Joint Employers’ closing submission] [20.4], only at a level of generality that is so high as to be unhelpful (i.e., nurses are still doing nursing work) could it be said that ENs are “still performing the same role that has existed for the past two decades.”’

3.2.5.1 – Relevance and significance of evidence of union officials

[271] The ANMF submits that the summaries of the evidence of the union officials dramatically underrepresent the importance of that evidence.²⁷⁴ At [231] to [237] the ANMF draws attention to relevant parts of its closing submissions in relation to the relevance of various evidence.

3.2.5.2 – Qualifications, experience, and role descriptions

²⁷² Ibid [218].

²⁷³ Ibid [221]–[227].

²⁷⁴ ANMF closing submission in reply dated 17 August 2022 [228].

[272] The ANMF submits that there are a few minor corrections to make to the few annexures so far as they contain ‘biographical’ information and role descriptions and sets these out at [239] to [244].

3.2.5.3 – Submissions about the employer parties’ “weight” submissions for ANMF witnesses

[273] From [245] to [309] the ANMF makes submissions in relation to the sections in each of the Joint Employers’ closing submission summaries of evidence (for ANMF witnesses) dealing with the ‘weight’ to be given to particular parts of witnesses’ evidence.

3.2.5.4 – Joint Employers’ closing submissions [4.28(e)]—qualifications

[274] The ANMF refers to [4.28(e)] of the Joint Employers’ closing submission:

“The qualifications required to perform a lot of work in aged care have not materially changed except to say that there is now an increased preference for ‘care employees’ to obtain a Certificate III (noting that some AINs require a Certificate III).”

[275] The ANMF submits that the Commission would have regard, as well, to the fact that the content of the Cert III has itself changed, and continues to change over time.²⁷⁵

3.2.5.5 – “Routine” and the cadence of the day

[276] The ANMF states that at [9.5(h)] of the Joint Employers’ closing submission the employer parties submit that a PCW will have a ‘routine’ that they follow which follows the usual cadence of a domestic day and the employers contend that a PCW providing palliative care will “undertake their usual routine, however this may involve greater frequency of activity as well additional assistance to comfort the consumer”. The ANMF states that no reference is made to PCW’s undertaking their usual routine in these circumstances in the evidence relied upon for this proposition (or elsewhere).²⁷⁶ It states that:

‘The submission that an AIN / PCW has a “routine” that they follow would be rejected, so far as it goes beyond the uncontroversial (but not particularly salient) point that people tend to sleep at night, be up during the day, etc., and that work—changing and unpredictable as it is—will of course reflect these sorts of considerations. For the same reasons the employer submission that the provision of care by RNs is built around routine (JCS 19.3(g)) would be rejected.’²⁷⁷

3.2.5.6 – ENs not the same role [20.4]

[277] In relation to the employer parties’ submission that ‘[i]n many respects ENs are still performing the same role that has existed for the past two decades, providing nursing care under the supervision of a RN, which comprises a combination of personal care together with nursing care which includes a clinical care element consistent with their competency and experience

²⁷⁵ Ibid [310]–[311].

²⁷⁶ ANMF closing submission in reply dated 17 August 2022 [312].

²⁷⁷ Ibid [317].

level’, the ANMF submits that it is wrong to suggest that the work of ENs has not changed in two decades, or has only changed in the way identified in the Joint Employers’ closing submission at [20.5]. The ANMF states that it otherwise relies on its principal closing submissions, and in particular Part E.²⁷⁸

3.2.6 – Expert Evidence

[278] The ANMF states that the Joint Employers’ closing submissions contain criticisms of the experts that were not put to the experts in cross-examination.²⁷⁹ The ANMF submits that consideration of fairness (i.e., *Browne v Dunn* (1984) 6 R 67) require the Commission to avoid findings not put to witnesses for comment.²⁸⁰ However, the ANMF submits that the failure to meet the standard expressed in *Browne v Dunn* does not matter, because the employer parties’ criticisms are answered by reading the expert’s report.²⁸¹ Nonetheless, the ANMF address a ‘few criticisms that really should not have been put in submissions.’²⁸²

Question 6 for the Joint Employers: What do you say in reply to the *Browne v Dunn* point advanced by the ANMF?

3.2.6.1 – Joint Employers’ closing submissions Annexure J Part 2–Gender pay gap and minimum rates

[279] The ANMF submits that the Joint Employers’ closing submission misunderstands the Smith/Lyons report and the use ANMF makes of it.²⁸³ The ANMF submit that it has advanced two propositions as to why the current award rates dramatically undervalue the relevant work to assist the Commission in reaching a conclusion on the question of whether the rates have been properly fixed.²⁸⁴ The ANMF relies on the finds of the Smith/Lyons Report together with the Junor Report to support its second proposition that ‘the work is undervalued because the industry is a female-dominated industry in which stereotypically “women’s work” is done.’²⁸⁵

Joint Employers’ closing submissions Annexure J Part 2(a) – “The evidence does not concern minimum rates in awards”

[280] The ANMF submits that Annexure J Part 2(a) – “The evidence does not concern minimum rates in awards” contains four sub-headings and that they have addressed each sub-heading under corresponding sub-headings (outlined below).²⁸⁶

“The gender pay gap”

²⁷⁸ Ibid [317]–[320].

²⁷⁹ Ibid [321].

²⁸⁰ Ibid [321].

²⁸¹ Ibid [322].

²⁸² Ibid [322].

²⁸³ Ibid [323].

²⁸⁴ Ibid [327].

²⁸⁵ Ibid [329]–[331].

²⁸⁶ Ibid [332].

[281] The ANMF rejects the Joint Employers’ closing submission, in so far, that they assert that (a) the ANMF is concerned with award rates, (b) the Smith/Lyons Report draws its conclusions about the gender pay gap based on actual earnings rather than award earnings and (c) therefore, the Smith/Lyons report has nothing useful to say in this application.²⁸⁷ The ANMF submits that the Smith/Lyons report addresses whether there is a gender pay gap in general and it is irrelevant whether this is measured by reference to actual earnings or earnings at the award minimum.²⁸⁸

[282] The ANMF submits that [2.7(a)] in Annexure J of the Joint Employers’ closing submission mischaracterises the report and cross-examination. The ANMF submits that the Assoc Prof Smith’s evidence that she was not comparing award rates of pay is not a concession but an accurate description of the content of her report.²⁸⁹

“Gendered undervaluation”

[283] The ANMF rejects the criticisms of Assoc Prof Smith in JCS Annexure J [2.12].²⁹⁰ The ANMF submits that although Assoc Prof Smith prefers the institutional approach to measuring gender pay gap ‘she spends a great deal of time outlining how even on a “standard economics” approach, a GPG gap is still presented (see Smith/Lyons Report at [18]-[33], in particular [18]-[24]).’²⁹¹ Further, the ANMF submits that ‘Smith/Lyons Report also contains the opinion, that if the institutional/sociological approach is adopted as a lens, still there is a GPG (see at [34]-[41]).’²⁹²

[284] The ANMF submits the evidence of the experts is uncontradicted and unchallenged by the employer interests and therefore, the only conclusion it could reach is that:

- (1) ‘there is a GPG; and
- (2) there is no basis for thinking that the aged-care industry is somehow immune from what is otherwise an economy-wide phenomenon;
- (3) in fact, there is a basis for thinking that the GPG is particularly pronounced in aged care, given the explanatory force that “*occupational segregation*” has on the existence of a GPG.’²⁹³

“Gender bias in tribunal decisions”

[285] The ANMF submits that it is an inevitable conclusion that the history of wage setting in this country has involved gender based discrimination and that ‘the question is whether, at any

²⁸⁷ Ibid [333].

²⁸⁸ Ibid [334].

²⁸⁹ Ibid [335]-[337].

²⁹⁰ Ibid [342].

²⁹¹ Ibid [340].

²⁹² Ibid [341].

²⁹³ Ibid [345].

point, the undeniable gender-based discrimination has ever been reversed.²⁹⁴ The ANMF submits Smith/Lyons analysis from [81]-[93] to ‘explain why there is reason to think that gender-based discrimination ... has not been reversed’ and emphasises ““conceptual including the subjective notion of skill and the “invisibility” of skills when assessing work value in female-dominated industries and occupations”” as a barrier and limitation.²⁹⁵

[286] The ANMF submits:²⁹⁶

The submission (JCS Ann J [2.20]), then, that little weight should be placed on the Smith/Lyon’s Report’s analysis of the relevance of gender in the industrial wage-setting framework would be rejected. On the contrary, the report advances a persuasive rationale for the conclusion that historical gender-based undervaluation has not been rectified as a result of the application of industrial wage-setting mechanisms.

Low’ rates

[287] The ANMF submits that the rates are low and that this is ‘one of the more uncontroversial facts in this proceeding.’²⁹⁷

[288] The ANMF submit that the propositions that the Smith/Lyon report as being a “connect the dots” exercise or that the authors’ analysis was directed to achieve a particular outcome rather than reflecting the authors’ genuine opinions in Ann J [2.23] of the Joint Employers’ closing submission is without basis and have not been put to Assoc Pro Smith or Dr Lyons.²⁹⁸

Conclusion

[289] The ANMF rejects the Joint Employers’ closing submissions at [2.24] of Annexure J. The ANMF submits that ‘the Smith/Lyons Report amply serves the purpose for which it was produced.’²⁹⁹

Joint Employers’ closing submissions Annexure J Part 2(b) – “No evidence of a gender pay gap within the modern award framework”

[290] The ANMF states that it is obvious that the awards do not set male and female rates however, they submit:

‘given a history of gender-based undervaluation of stereotypically “female” work, the absence of express reference to gender could not safely lead to a conclusion that all historical gender-based differences in wages had been addressed. Given the presence of a GPG (no matter how many things one controls for and no matter which approach to measurement one would adopt), it would be a surprising conclusion that, somehow, the

²⁹⁴ Ibid [347]–[348].

²⁹⁵ Ibid [349].

²⁹⁶ Ibid [353].

²⁹⁷ Ibid [354].

²⁹⁸ Ibid [355].

²⁹⁹ Ibid [357].

aged-care industry was unique (or unusual) in having managed to eliminate historical gender-based undervaluation of “female” work.’³⁰⁰

[291] The ANMF submits that the point the Joint Employers’ closing submission is making in [2.28]-[2.39] is unclear and that it is unsurprising that “care work” carries similar wages across a few awards.³⁰¹ The ANMF submits that this part says ‘nothing about whether, across those awards, those consistent wages for “care work” are too high, too low, or about right.’³⁰² Further, the ANMF submits that ‘one cannot demonstrate the absence of a gender pay gap in the aged-care industry by drawing comparisons between similar or identical work, as covered by different awards. An equally available conclusion from the same premise is that the work in the other industry is similarly undervalued (which might be shown were ever an application to be brought in relation to that other award).’³⁰³

[292] The ANMF submits that the Commission should reject the submission that there is no gender pay gap at [2.41] in Annexure J of the Joint Employers’ closing submission.³⁰⁴

3.2.6.2 – Joint Employers’ closing submissions Annexure J Part 3–Sociological theories for undervaluation”

[293] The ANMF submits that:

‘There is a short answer to the entirety of [the Joint Employers’ closing submission at] Annexure J [3.1]-[3.22]. In those paragraphs, the [Joint Employers’ closing submission] criticises the application of sociological approaches to conclude that there is a GPG. The short answer was that given at [339]-[341] above: Assoc Prof Smith also outlined literature which applied a “*standard economic*” approach to analysis of whether a GPG exists, and stated that that approach does show a GPG. She was not challenged on that conclusion in cross-examination.’³⁰⁵

[294] The ANMF submits that no cross-examination and no contrary evidence ‘completely undermines the [Joint Employers’ closing submission’s] attempt to avoid a finding of a GPG by characterising all of the experts as adopting a sociological approach.’³⁰⁶ It states that in any event, even if Assoc Prof Smith had only adopted a sociological approach, the criticisms made of that approach are unfounded.³⁰⁷

3.2.6.3 – Joint Employers’ closing submissions Annexure J Part 4—“The Spotlight Tool and ‘Invisible Skills’”

³⁰⁰ Ibid [359].

³⁰¹ Ibid [363].

³⁰² Ibid [363].

³⁰³ Ibid [367].

³⁰⁴ Ibid [368].

³⁰⁵ ANMF closing submission in reply dated 17 August 2022 [369].

³⁰⁶ Ibid [370].

³⁰⁷ Ibid [371].

[295] At [394] to [442] the ANMF sets out its response to the following 3 propositions made in the Joint Employers’ closing submission:

Proposition 1: “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.”

Proposition 2: “application of the Spotlight Tool cannot demonstrate all skills identified are ‘invisible’ based on gender reasons.”

Proposition 3:” the absence of express inclusion of “Spotlight Skills” in the Aged Care Award and Nurses Award is not determinative.”

[296] In relation to proposition 1, the ANMF contends that the fact that a tool is selective, and can be applied in more than one context, does not go any way to demonstrating that, when the tool is applied in a particular context (i.e., the aged care industry), it is somehow less useful.

[297] In relation to proposition 2, the ANMF contends that the demonstration that the skills involved here are likely to be “invisible” for gender reasons is not in the part of the Junor Report that applies the Spotlight Tool; it is elsewhere in the Junor Report, and in the Smith Report.

[298] In relation to proposition 3, the ANMF contends that ‘[it] is not determinative, and the ANMF does not rely on it as such’. It states that [t]he efficacy of the Spotlight Tool does not rest, in any degree (let alone in substantial degree), upon this point.

3.2.6.4 – Joint Employers’ closing submissions Annexure J Part 5—“The Smith Report”

[299] The ANMF states that it presses its analysis of the Smith/Lyons Report and repeats [346] to [353] of its closing submission in reply in relation to the contention in the Joint Employers’ closing submission that the identification of barriers to the proper recognition of work value in female-dominated industries does not ‘sustain a conclusion that the minimum rates in modern awards were infected by gender bias’.³⁰⁸

3.2.7 – Miscellaneous reply matters

[300] At [446] to [449] the ANMF sets out what it submits to be minor errata in the Joint Employers’ closing submission.

[301] At [450] and [451] the ANMF refers to palliative care and states that the Joint Employers’ closing submission seems to assume that the evidence supports the propositions that all aged care employees are exposed to palliative residents and residents with dementia and that some aged-care employees engaged in specialist wings or wards will have greater exposure than those. It states that

‘It does not seem, therefore, that the [Joint Employers’ closing submission] advances a proposition that, for example, every aged-care facility has such specialist wings, so that non-specialist workers will be insulated from dementia and palliation. If that proposition is put, then

³⁰⁸ ANMF closing submission in reply dated 17 August 2022 [443]–[444].

the ANMF would rely on what it submitted at [114]–[128] of its reply submissions dated 22 April 2022, in support of the following conclusion:

“... palliative care is part of the experience of all aged care employees, or at least that it is a commonplace. The Commission could not proceed on the basis that “specialist providers” assume responsibility for all such work. Rather, the increased prevalence of palliative patients and end-of-life care is a feature of aged-care work generally.”

[302] The ANMF refers to nurse practitioners at [452] to [455] and submits that were the Commission to be satisfied that a particular wage increase were appropriate for RNs, it would be satisfied that the same wage increase is appropriate for NPs.

[303] In relation to ‘clinical care’, the ANMF states that it continues to rely on the submissions at [82] to [88] of its 22 April 2022 reply submissions in support of the proposition that:

‘[...] it is not possible, nor is it necessary, and it would introduce conceptual confusion, to seek to identify which parts of the work done by which members of a “care team” are clinical. The proper analysis of the work done in aged care by RNs, ENs, and AINs/PCWs, would focus on the nursing care provided by a care team, or nursing team, and identifying changes in the roles of each member of that nursing team.’³⁰⁹

3.3 *UWU*

[304] On 19 August 2022, the UWU filed its closing submissions in reply.

[305] The UWU supports the submissions of the HSU and does not make further submissions in reply.³¹⁰

3.4 *The Joint Employers*

[306] The Employer interests in these proceedings are represented by ACSA, LASA and ABI (collectively the Joint Employers). On 19 August 2022, the Joint Employers filed their closing submissions in reply.

[307] The Joint Employers’ submission is structured as follows:

Section 2 sets out their submissions in reply to the HSU.

Section 3 sets out their submissions in reply to the ANMF

Section 4 sets out their submissions in reply to the documents published by the Commission

[308] The following is a brief summary of the Joint Employers’ submissions in reply.

3.4.1 *Reply to the submissions filed by the HSU*

³⁰⁹ Ibid [456].

³¹⁰ UWU closing submissions in reply dated 19 August 2022 [3]–[4].

[309] Section 2 sets out the Joint Employers’ submissions in reply to the HSU.

[310] The Joint Employers submit that HSU’s closing submissions ‘fail to portray an accurate representation of the industry, the work performed by employees as found in the evidence and make numerous unfounded assertions’³¹¹ and maintain that the HSU largely ignores evidence arising in cross-examination or from the ANMF witnesses that ‘strays from supporting its position.’³¹²

[311] The Joint Employers’ submissions in reply to the HSU focus on the following:

- (i) the HSU’s contentions in relation to home care sector employees under the SCHADS Award and proposed amendment to the classification structure of the *Aged Care Award*;
- (ii) the use of “health or medical-related” skills;
- (iii) the relevance of “*social utility or worth of work*” in determining work value;
- (iv) what must now be considered under ss 157(2) and 157(2A) of the *Fair Work Act 2009*;
- (v) the exclusion of any consideration to the role of the EN and RN; and
- (vi) what weight should be given to the expert and employee evidence.

The SCHADS Award/Aged Care Award Classifications

[312] Paragraphs [2.4] to [2.9] set out the Joint Employers’ submissions regarding the HSU’s proposed classification structure under the SCHADS Awards.

[313] The Joint Employers note the HSU’s submission that the proposed increased in minimum rates in the SCHADS Award would ‘have the effect of bringing the rates of pay for those employees approximately in line with workers providing home care services in the home to persons with a disability.’³¹³

[314] The Joint Employers maintain that the HSU’s submission is incorrect and submit that the definition of ‘home care sector’ at 3.1 of the SCHADS Award defines the sector as meaning ‘the provision of personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence.’³¹⁴ The Joint Employers further note that the minimum rates of pay are set out in clause 17 of the SCHADS award and submit that therefore

³¹¹ Joint Employers closing submissions in reply dated 19 August 2022 [2.1].

³¹² Ibid [2.2].

³¹³ See HSU closing submissions dated 22 July 2022 [4](b).

³¹⁴ Joint Employers closing submissions in reply dated 19 August 2022 [2.4]-[2.5].

home care sector employees (regardless of whether they work with aged persons or persons with disability in their private residences) are entitled to the same minimum rate of pay.³¹⁵

[315] The Joint Employers note that the HSU proposes to introduce a new definition of ‘home aged care employee’ and introduce a new minimum wage structure for these employees and submit that the proposal ‘means that home care employees working with persons with a disability in their private residences could be paid less than employees working with aged persons in their private residence.’³¹⁶ The Joint Employers argue this may have ‘unintended practical consequences’ as some home care employees work with both aged care and disability clients, or aged clients with a disability.³¹⁷

Question 7 for the HSU: What does the HSU put in reply to the Joint Employers’ submission that home care employees receive the same minimum rate of pay?

[316] Paragraphs [2.10] to [2.16] set out the Joint Employers’ submissions in response to the HSU’s proposed amendments to the classification structure in the Aged Care Award. The Joint Employers contends that there is a real concern as to how ‘the proposed structure would apply in practice’ and submit:

- The HSU proposal that aged care workers who perform medication duties be classified at level 5 does not take into account that the administration of medication is dependent on the jurisdiction the aged care worker is employed in and ‘can create an arbitrary distinction between classifications based on a singular task’. Additionally, it may be the case that an employee will not perform medication duties every day thereby creating a ‘practical operational issue’, noting that the qualification for performing medication duties is now within the scope of the Certificate IV or as an elective in the Certificate III.³¹⁸
- ‘Some care’ should be given to the creation of a new classification for employees who perform work in a homemaker model (and can also be a Specialist PCW) given the limited use of this model.³¹⁹

[317] However, the Joint Employers submit that ‘there appears to be value in restricting the classification structure of the Aged Care Award to best suit the needs of the industry now and moving forward’ and refer to their closing submissions at [4.37]–[4.46] in this regard.³²⁰

Health or medical-related skills of PCWs

[318] Paragraphs [2.17] to [2.19] set out the Joint Employers’ submissions in response to the HSU’s reference to ‘health or medical related skills’.

³¹⁵ Ibid [2.6].

³¹⁶ Ibid [2.7]–[2.8].

³¹⁷ Ibid [2.9].

³¹⁸ Ibid [2.12].

³¹⁹ Ibid [2.13]–[2.15].

³²⁰ Ibid [2.16].

[319] The Joint Employers submit that the term ‘health or medical related skills’ is used by the HSU without any clarification as to what it means and what skills or activities are being referred to.³²¹ The Joint Employers contend that the Commission should approach this term ‘with caution’ as it ignores the fact that PCWs work, at all times, within their competence and under the supervision of an RN or EN.³²² The Joint Employers refer to and rely upon their closing submissions at [9] and Annexure A in regards to the work performed by PCWs.

Social Utility/Social Context

[320] Paragraphs [2.20] to [2.31] set out the Joint Employers’ response to the HSU’s submissions regarding the ‘social utility’ of the work.

[321] The Joint Employers submit that considering the ‘extraneous effects’ of the work, such as social utility, ethical value or profitability, should be ‘approached with caution’ when determining the minimum value of the work and argue:

The HSU are asking the Commission to stray from the language in the statute which could have unintended consequences; if positive utility is to now be relevant to valuing work so will negative utility. Should the Commission discount the value of wages for employees involved in socially less desirable activities?³²³

[322] The Joint Employers further submit that considering the nature of work by what it means for someone extraneous to the work itself may ‘lead the Commission astray’ as these considerations are detached from the nature of the work itself and the language of the statute.³²⁴

[323] In relation to the HSU’s reliance on decisions from the NSW industrial relations system, the Joint Employers submit that these decisions should be applied with ‘a degree of caution’ as the NSW Industrial Relations Commission operates in a ‘materially different’ statutory context.³²⁵

[324] The Joint Employers note the decisions in *Re Crown Employees*³²⁶ and *Re Crown Teachers*³²⁷ and submit that a proper reading of these cases does not ‘in actuality clearly provide a warrant for the HSU’s propositions’ and as a result the HSU has failed to demonstrate the consideration of the ‘social utility or worth of work’ has been a feature of past work value assessments and the Commission should apply ‘care consideration’ before adopting such a novel concept.³²⁸

Work Value Considerations

³²¹ Ibid [2.17].

³²² Ibid [2.18].

³²³ Ibid [2.21].

³²⁴ Ibid [2.22].

³²⁵ Ibid [2.23] – [2.24].

³²⁶ *Re Crown Employees (Scientific Officers etc – Departments of Agriculture, Mines etc) Award* [1981] AR (NSW) 1091.

³²⁷ *Re Crown Employees (Teachers – Department of Education) Award* [1970] 70 AR (NSW) 345.

³²⁸ Joint Employers closing submissions in reply dated 19 August 2022 [2.29] – [2.31].

[325] Paragraphs [2.32]–[2.42] set out the Joint Employers’ submissions in response to the HSU’s characterisation of the work value considerations under s.157(2A).

[326] The Joint Employers note the HSU’s submission that as s.157(2A) no longer imposes a requirement to demonstrate a ‘significant net addition to work requirements’ there is no reason why ‘evolutionary’ changes in work should not now be considered work value reasons.³²⁹ The Joint employers submit that this approach is ‘misconceived’ and argue that the HSU has failed to give proper consideration to the evaluative process set out in the *Teachers Case*.

[327] The Joint Employers acknowledge that the Commission is no longer constrained by the requirement for ‘significant change’ however, submit that ‘jumping from not needing significant change to any and all change warranting a re-evaluation of the value of work would seem unsound.’³³⁰ The Joint Employers further submit that ‘caution’ should be applied to the notion that the FW Act allows a consideration of ‘any and all change’, and that, in any event, such an approach would be inconsistent with the notion of ‘justification’ which implies an evaluative exercise and argue:

‘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.’³³¹

[328] The Joint Employers maintain that in any event the Commission ‘will always be aided’ by a comparison with the C10 framework and rely on their closing submissions at [7.10] – [7.11] and [7.19] – [7.21].³³²

Ancillary staff

[329] Paragraphs [2.43] to [2.45] set out the Joint Employers’ submissions in relation to the work value of ‘indirect care workers’. The Joint Employers submit that outside the concessions made in their closing submissions, the HSU has failed to establish the the conclusion to be drawn from the evidence of direct care staff should be applied equally to administrative, laundry, cleaning, kitchen, maintenance and gardening workers and argue that these roles ‘need to be considered in their own right.’³³³

Reliance on expert evidence

[330] Paragraphs [2.46] and [2.47] address the HSU’s reliance on the expert evidence. The Joint Employers submit that the HSU ‘fails to give any proper consideration to the totality of the evidence’ as it does not address the evidence arising out of cross examination, and refers to and relies on its closing submissions at [6] and Annexure J regarding the weight to be given to the expert evidence.³³⁴

³²⁹ See HSU closing submissions dated 22 July 2022 [46] – [48].

³³⁰ Joint Employers closing submissions in reply dated 19 August 2022 [2.37].

³³¹ Ibid [2.39]–[2.40].

³³² Ibid [2.41]–[2.42].

³³³ Ibid [2.43]–[2.44].

³³⁴ Ibid [2.46]–[2.47].

Consideration given to the role of the RN and to care plans

[331] Paragraphs [2.48] to [2.52] sets out the Joint Employers' submissions regarding the HSU's consideration of the role of RNs and care plans in determining the work value of PCWs.

[332] The Joint Employers submit that HSU appears to disregard the role of the RN and EN and fails to give proper consideration to the development and implementation of the care plan and as a consequence elevates the role of the PCW 'beyond their defined competence under the supervision of a RN' and does not present a complete picture of the roles and hierarchy within the aged care sector.³³⁵

[333] The Joint Employers acknowledge that the work performed by PCWs is 'vital and valuable' however submits that the level of skill, authority and responsibility should be 'viewed in the context of how the service operates as a whole.'³³⁶ The Joint Employers rely on their closing submissions at [9], [19], [20] and [22] in this regard.³³⁷

Employee evidence

[334] Paragraphs [2.53] to [2.56] set out the Joint Employers' submissions regarding the HSU's consideration of the lay witness evidence.

[335] The Joint Employers submit that HSU relies largely on the written statements of the lay witnesses and does not consider the evidence arising out of cross-examination.³³⁸

[336] Further, the Joint Employers argue that the HSU 'selectively refers' to the lay witness evidence that portrays the worst-case scenario and submit that this evidence should not be taken to mean that these situations are a 'common or regular occurrence.'³³⁹ The Joint Employers note that different personality types may be better suited to certain work however submit:

'this has never been a feature of evaluating the value of work as the drivers are individualistic rather than collective to certain work. No doubt some of the employees in the aged care industry are temperamentally suited to it, no doubt some are less so. Such an occurrence is likely to be the case in all occupations.'³⁴⁰

3.4.2 Reply to the submissions filed by the ANMF

[337] Section 3 sets out the Joint Employers' submissions in reply to the ANMF's closing submissions. The Joint Employers respond to the following points advanced by the ANMF:

- (i) The Aged Care Sector Stakeholder Consensus Statement

³³⁵ Ibid [2.48].

³³⁶ Ibid [2.51].

³³⁷ Ibid [2.52].

³³⁸ Ibid [2.53].

³³⁹ Ibid [2.54]–[2.55].

³⁴⁰ Ibid [2.56].

- (ii) The StewartBrown data
- (iii) The ‘gender pay gap’ and ‘women’s work’ in relation to undervaluation
- (iv) The Spotlight Tool, and the definition of ‘invisible skills’
- (v) The ‘inherent value’ of the work

Consensus Statement

[338] Paragraphs [3.2] to [3.4] set out the Joint Employers’ submissions regarding the Consensus Statement. The Joint Employers note the ANMF’s characterisation of the Consensus Statement as an ‘admission’ and submit that the Consensus Statement is not a submission and ‘cannot override findings available from the evidence’ and emphasise:

‘It cannot be concluded that statements in submissions filed by the employer interests should be rejected to the extent that there is inconsistency with the consensus statement. Employer interests at all times have filed submissions and evidence at the instruction of ACSA, LASA and ABI. There is no proper basis for the ANMF to suggest otherwise.’³⁴¹

[339] The Joint Employers further note that the ANMF had ‘ample opportunity’ to address the issue in cross examination and did not do so.³⁴²

StewartBrown Data

[340] Paragraphs [3.5] to [3.16] set out the Joint Employers’ submissions regarding the ANMF’s characterisation of the StewartBrown data.

[341] At [3.6]–[3.12] the Joint Employers make submissions regarding the relevance of the StewartBrown data and its frequent use in the aged care sector, including the Final Report of the Royal Commission.

[342] The Joint Employers disagree with the ANMF’s use of *Earnings Before Interest, Taxes, Depreciation and Amortization* data as a benchmark and submit that the ‘correct measure of the financial performance and capacity to pay of the sector is *Net Profit Before Tax*.’³⁴³

[343] The Joint Employers maintain that the financial pressures in the aged care industry are not in dispute,³⁴⁴ and submit evidence regarding the financial circumstances of the sector is not a ‘key consideration’ in the determination of work value rather it ‘becomes significant in the context of the consideration of timetable through which an increase might be applied. We intend to provide further information on matters pertaining to financial performance at that time, making reference to the most up to date data.’³⁴⁵

Gender Pay Gap

³⁴¹ Ibid [3.3].

³⁴² Ibid [3.4].

³⁴³ Ibid [3.12].

³⁴⁴ Ibid [3.16].

³⁴⁵ Ibid [3.15].

[344] Paragraphs [3.17] and [3.18] set out the Joint Employers’ submissions in reply in respect of the gender pay gap. The Joint Employers repeat and rely on their closing submissions at Annexure J [2.1]–[2.41] and emphasise:

- The Commission is required to assess whether current minimum award rates should be increased based upon work value reasons and statistics, analysis and conclusions that do not have regard to award minimum rates do not assist in this exercise. The expert evidence of Professor Smith and Dr Lyons therefore ‘lacks the requisite precision’ to be of assistance.³⁴⁶
- There is no gender pay gap when consideration is limited to minimum award rates as award minimum rates apply irrespective of gender. Consequently, comparisons between aggregate total earnings by gender alone does not assist with assessing existing minimum rates within any modern award.³⁴⁷

Women’s Work

[345] Paragraphs [3.19] and [3.20] set out the Joint Employers’ submissions in reply regarding ‘women’s work’. The Joint Employers repeat and rely on their closing submissions at Annexure J [3.8]–[3.18] and submit that the contentions advanced in respect of the evidence of Dr Meagher and Dr Charlesworth equally apply to the evidence of Professor Smith and Dr Lyons. The Joint Employers emphasise:

- It is not contested that the aged care sector is predominately female.³⁴⁸
- Literature and international research suggesting a social/cultural perception that ‘women’s work’ is of less economic value should be applied with caution, particularly in circumstances where nursing work has historically been subject to extensive work value considerations in both state and federal tribunals.³⁴⁹
- Consequently, in order to establish the rates in the Nurses Award have been undervalued based on gender, the Commission would need to accept that it has historically failed in its assessments.³⁵⁰
- Accepting that male dominated and female dominated modern awards are already largely aligned around the C10 framework, if “women’s work” is undervalued it implies that all ‘women’s work’ is of greater value than all ‘men’s work’, highlighting the problem of transferring concepts of ‘market’ equity into minimum award rates of pay that have historically been based on the ‘gender neutral’ ground of the C10 scheme and the AQF.³⁵¹

³⁴⁶ Ibid [3.18](a).

³⁴⁷ Ibid [3.18](b).

³⁴⁸ Ibid [3.20](a).

³⁴⁹ Ibid [3.20](b).

³⁵⁰ Ibid [3.20](c).

³⁵¹ Ibid [3.21](d).

Spotlight Tool and “Invisible Skills”

[346] Paragraphs [3.21] to [3.28] set out the Joint Employers’ submissions in reply in relation to the Spotlight Tool and ‘invisible skills’. The Joint Employers repeat and rely on their closing submissions at Annexure J [4.1] – [4.19] and advance the following further submissions in reply:

- The Commission should apply caution in placing weight on the assertion that 300 countable instances of utilisation of Spotlight Skills were identified in relation to Rns and ENs as ‘the Spotlight Tool is not limited to female dominated industries and can be applied equally to male dominated industries to identify so called “hidden skills” using the taxonomic framework.’³⁵²
- The Commission should apply caution in placing weight on the ANMF’s alignment of the lay witness evidence with the Spotlight Tool as the tool targets 3 broad categories of skills which ‘may be identified as existing in all industries.’³⁵³ This should ‘limit the weight placed upon the mere identification skills using the Spotlight Tool particularly when applied as an academic exercise outside of the modern awards system.’³⁵⁴ reason
- The Spotlight Tool cannot ‘prove or substantiate’ the explanation for the existence of ‘invisible’ skills it is simply an ‘identification’ tool that is limited to identifying skills consistent with the taxonomic framework.³⁵⁵
- In relation to the reliance placed on secondary material regarding caring work undervalued on gender grounds, the Joint Employers repeat and rely on their closing submissions in reply at [3.19] – [3.20] and emphasise that the secondary material is not based on an analysis of award minimum rates.³⁵⁶

[347] Paragraphs [3.23]–[3.26] set out what the Joint Employers submit is the ‘limitation’ of the Spotlight Tool when considered outside the modern award system, by reference to the C10 rates in the Manufacturing Award.

[348] At [3.24] the Joint Employers compare the C10 (Certificate III) classification under the Manufacturing Award against the Nursing Assistant (Certificate III) classification under the Nurses Award.³⁵⁷ The Joint Employers submit that the comparison demonstrates that:³⁵⁸

- The Spotlight skills are expressly reflected in the classification definition of the C10 Level under the Manufacturing Award.

³⁵² Ibid [3.22](a).

³⁵³ Ibid [3.22](b).

³⁵⁴ Ibid [3.22](c).

³⁵⁵ Ibid [3.22](d).

³⁵⁶ Ibid [3.22](e).

³⁵⁷ Ibid [3.24].

³⁵⁸ Ibid [3.26].

- The minimum award rate for a C10 Level (Certificate III) in the Manufacturing Award (male dominated industry) aligns with the AIN (Certificate III) in Nurses Award (female dominated industry).
- The minimum award rate for the AIN aligns to a benchmark classification, which includes the express recognition of spotlight skills.

[349] The Joint Employers consequently submit that ‘it is difficult to accept’ that the minimum rates for an AIN under the Nurses Award does not factor in skills such as interpersonal skills, simply by a failure to expressly reference ‘Spotlight skills’ and the fact that nursing is a female dominated occupation. The Joint Employers argue this is particularly the case where ‘Spotlight Skills plainly feature in the benchmark classification upon which the key classification in the *Nurses Award* was set’³⁵⁹ and submit that the Commission should ‘tread carefully’ when considering one academic opinion that describes ‘many basic human cognitive traits and behaviours.’³⁶⁰

The “inherent value” of work

[350] Paragraphs [3.29] to [3.32] set out the Joint Employers’ submissions regarding the ‘inherent value’ of work in aged care.

[351] The Joint Employers submit that ‘work does not have inherent value’ and that ‘its value, outside of a regulated industrial system is driven by supply and demand and the bargaining power of the parties to the employment relationship.’³⁶¹

[352] The Joint Employers note the lay witness evidence that refers to the ‘altruistic value’ of the work and submit that this evidence should ‘attract little (if any) weight.’³⁶² The Joint Employers argue that rather than being distracted by ‘philosophical notions of social utility or altruistic value’ the Commission should ground itself in the comparative exercise between modern award classifications, and rely on its comparative analysis set out at Annexure J of its closing submissions.³⁶³

Characterisation of Evidence of Employer Witnesses

[353] Paragraphs [3.33] to [3.36] set out the Joint Employers’ submissions in reply regarding the characterisation of the employer witnesses’ evidence. The Joint Employers rely upon their summary of evidence at Annexure H of their closing submissions and submit that ‘to the extent regard is given to the ANMF summary of the employer evidence, it should be understood as a highly selective summary and not representative of all relevant employer evidence on the subject matter being addressed.’³⁶⁴

³⁵⁹ Ibid [3.27].

³⁶⁰ Ibid [3.28].

³⁶¹ Ibid [3.29].

³⁶² Ibid [3.30].

³⁶³ Ibid [3.32].

³⁶⁴ Ibid [3.33]-[3.36].

Safety and Purpose-built Facilities

[354] Paragraphs [3.37] – [3.41] set out the Joint Employers’ submissions in response to the ANMF’s submission that ‘individual rooms can provide increased privacy for residents but decrease safety for workers’³⁶⁵ The Joint Employer note the support for the ANMF’s submission is limited to the evidence of Ms Chrisfield and submit that ‘the evidence does not sustain a conclusion that purpose-built renovations have had a negative impact on safety of consumers or employees’. The Joint Employers rely on their closing submissions at Annexure H and submit that purpose-built residential aged care facilities are in fact ‘safer for both the consumers and the employees.’³⁶⁶

3.4.3 Reply to the documents published by the Commission

[355] Section 4 sets out the Joint Employers’ submissions in reply to Background Documents 3 and 4 and the Report to the Full Bench – Lay Witness Evidence.

[356] The Joint Employers make no further comments in relation to the documents published by the Commission, except for noting with respect to Background Document 3 and the Lay Witness Report the evidence review that appears at Annexures A – H of the Joint Employers’ closing submissions.³⁶⁷

Question 8 for all parties: Are there any corrections or additions that should be made in respect of the summary of submissions in reply to closing written submissions?

³⁶⁵ See ANMF closing submissions dated 22 July 2022 [623].

³⁶⁶ Joint Employers closing submissions in reply dated 19 August 2022 [3.41].

³⁶⁷ Ibid [4.1].