

**IN THE FAIR WORK COMMISSION**

**REPLY SUBMISSIONS**

**WORK VALUE CASE - AGED CARE INDUSTRY**

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

**FILED ON BEHALF OF:**

**AGED & COMMUNITY SERVICES AUSTRALIA**

**LEADING AGE SERVICES AUSTRALIA**

**AUSTRALIAN BUSINESS INDUSTRIAL**

**19 AUGUST 2022**

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## 1. BACKGROUND

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1.1 This submission is made on behalf of:

- (a) Aged & Community Services Australia (**ACSA**);
  - (b) Leading Age Services Australia (**LASA**); and
  - (c) Australian Business Industrial (**ABI**),
- (collectively, **the employer interests**).

1.2 On 6 June 2022, the Fair Work Commission (**the Commission**) made orders giving effect to the amended timetable (**the amended directions**).<sup>1</sup> The amended directions included, *inter alia*, the following:

*“1. The parties will file closing written submissions regarding the evidence by 4pm on Friday 22 July 2022.*

*2. The parties will file submissions in reply regarding the evidence by 4pm on Monday 8 August 2022.*

*3. The Commonwealth will file written submissions by 4pm on Monday 8 August 2022.*

*4. The parties will file submissions in reply to the Commonwealth’s written submissions by 4pm on Wednesday 17 August 2022.”*

1.3 The employer interests, Australian Nursing and Midwifery Federation (**ANMF**) and Health Services Union (**HSU**), respectively, filed closing submissions on 22 July 2022. The United Workers Union (**UWU**) filed closing submissions on 25 July 2022, following a request for an extension.

1.4 Pursuant to the amended directions, the employer interests make the following submissions in reply.

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<sup>1</sup> An uncontentious summary of the procedural history appears in Background Document 1.

## 2. REPLY TO SUBMISSIONS FILED BY THE HSU

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- 2.1 The Closing Submissions of the HSU (adopted by the UWU), fail to portray an accurate representation of the industry, the work performed by employees as found in the evidence and make numerous unfounded assertions.
- 2.2 Indeed, the HSU largely seems to ignore any evidence arising out of cross-examination or from the ANMF witnesses that strays from supporting its position; it seems they want the Commission to see the PCW in the absence of the RN, the clinical care manager etc.
- 2.3 In this submission we focus on:
- (a) 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*;
  - (b) the use of "health or medical-related" skills;
  - (c) the relevance of "*social utility or worth of work*" in determining work value;
  - (d) what must now be considered under ss 157(2) and 157(2A) of the *Fair Work Act 2009 (the Act)*;
  - (e) the exclusion of any consideration to the role of the EN and RN; and
  - (f) what weight should be given to the expert and employee evidence.

### The SCHADS Award/Aged Care Award Classifications

#### **SCHADS**

- 2.4 At [4(b)] of the HSU Closing Submissions when discussing the increase sought to the SCHADS Award, the HSU claims:
- "The increase sought 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."*
- 2.5 This assertion is incorrect as the definition of home care sector under clause 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*".
- 2.6 Home care sector employee minimum rates of pay are set out in clause 17. This means that currently home care sector employees, regardless of whether they work with aged

persons or with persons with a disability in their private residences, are entitled to the same minimum rate of pay.

- 2.7 The HSU's application also seeks to insert a new definition into clause 3.1 of the SCHADS Award for a *"home aged care employee"*. This proposed definition is as follows: *"Home aged care employee means a home care employee providing personal care, domestic assistance or home maintenance to an aged person in a private residence"*.
- 2.8 The HSU does not seek to delete the definition of *"home care sector"*. This proposed definition and the creation of a new minimum wage structure at proposed new clause 17A 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.
- 2.9 This may have unintended practical consequences as the evidence suggests that some home care employees work with both aged clients and clients with a disability and aged clients with a disability.

### ***Aged Care***

- 2.10 As part of its Amended Application, the HSU has proposed an amended classification structure of the Aged Care Award. This approach raises concerns.
- 2.11 There is a real concern arising from the proposed levels of the HSU's classification structure, in particular how the proposed structure would apply in practice. This lack of clarity was demonstrated in the evidence arising out of the cross-examination of Lauren Hutchins, HSU Official.<sup>2</sup>
- 2.12 Further, the HSU proposal that those who undertake medication duties be classified at level 5 fails to consider that the administration of medication task will be dependent on the jurisdiction in which the individual PCW is employed in and can create an arbitrary distinction between classifications based on a singular task. It can also be the case that an employee may perform medication duties on one day, but not the next, which creates a practical operational issue. This also overlooks that the qualification for this activity is now within the scope of the Certificate IV or as an elective in the Certificate III.
- 2.13 With regards to creating a new classification for those who perform work in a homemaker model (and can also be a Specialist PCW) some care will be required given the limited use of this model.

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<sup>2</sup> PN647-PN829.

- 2.14 It may well have been the case that something similar to the homemaker model was present in the industry during the days when hostels were prominent. It is clearly the case that some providers have adopted this model, but it would be misconceived to conclude from the evidence that the industry is on a path to adopt this model as the norm.
- 2.15 From the evidence it appears that only Uniting and HammondCare have adopted this approach,<sup>3</sup> and they have not done so across their whole service offering. These organisations have developed a classification for these employees through enterprise bargaining which is fit for purpose and accounts for the specific nuances of how they operate this model.
- 2.16 In this respect, as envisaged by both the ANMF and the employer interests (although the approach between the parties may differ), there appears to be value in restructuring the classification structure of the Aged Care Award to best suit the needs of the industry now and moving forward. We refer to our Closing Submissions at [4.37]-[4.46] in relation to restructuring the wage structure/classification structure.

#### Health or medical-related skills of PCWs

- 2.17 The HSU throughout its Closing Submissions, and for the first time in these proceedings, refers to “*health or medical-related skills*” without providing any further clarification as to what this means and what skills or activities they are actually referring to. Additionally, the evidence does not provide a definition of this term.<sup>4</sup>
- 2.18 The Commission should approach this term with caution as it suggests a gloss that overlooks that the PCW works at all times within their competence (usually Certificate III or IV) and under the supervision of the RN or the EN.
- 2.19 We refer to and rely upon our Closing Submissions at [9] and Annexure A as to the skills and work performed by PCWs.

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<sup>3</sup> For example, see *Uniting Aged Care Enterprise Agreement (ACT) 2017* Schedule B 1.4 which designates a ‘Home Maker’ at a Coordinator level.

<sup>4</sup> See generally Annexure E and Annexure F of the Closing Submissions.

## Social Utility/Social Context

- 2.20 The HSU submit that the *'nature of work'* should give consideration to the social utility or worth of work and refers to three cases<sup>5</sup> which allegedly support this proposition. However, the HSU is misguided in its approach.
- 2.21 The adoption of extraneous effects of the work performed (whether social utility, ethical value or profitability etc) should be approached with caution when considering the minimum value of work. 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?
- 2.22 Approaching the nature of work by what it means for someone extraneous to the work itself could lead the Commission astray in its deliberations as these considerations are detached from the nature of the work itself and the language of the statute.
- 2.23 The HSU relies heavily on decisions from the NSW industrial relations system for this contention. There must be a degree of caution in applying decisions from a jurisdiction that is materially different to that under the Act.
- 2.24 The Commission in this case is setting minimum wages. The Industrial Relations Commission of NSW does not do this but rather sets *"fair and reasonable conditions of employment"* (s 10, *Industrial Relations Act 1996* (NSW)).
- 2.25 The HSU relies on *Re Crown Employees*<sup>6</sup> to suggest there is a warrant for their contention. Without detracting from the above submissions, it is not clear whether this is in fact the case on a proper reading of that decision.
- 2.26 The Industrial Relations Commission of NSW acknowledges that the scientific officers have specialised skills and make a contribution to the common good. However, Bauer J goes onto identify that many specialised fields in the public sector undertake this task and in the (more relevant) paragraph that directly follows the HSU's extract, states:

*"Nevertheless, the above description applies to many specialist fields perhaps in particular to the public sector. The difficult task of the arbitrator is to temper the enthusiastic self-assessment of the officers in their own cause with a little hardening*

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<sup>5</sup> *Re Crown Employees (Scientific Officers, etc – Departments of Agriculture, Mines etc) Award* [1981] AR (NSW) 1091 at 1100; *Crown Librarians, Library Officers and Archivists Award Proceedings* (2002) 111 IR 48 at [21]; *Re Crown Employees (Teachers – Department of Education) Award* [1970] 70 AR (NSW) 345 at 521.

<sup>6</sup> *Crown Librarians, Library Officers and Archivists Award Proceedings* quotes *Re Crown Employees*.

*which has been applied by many similar calls to the unique importance of work being performed by particular groups.”*

2.27 In *Re Crown Teachers* the Industrial Relations Commission of NSW acknowledges that the work performed by Teachers should be valued appropriately, and not on:

*“such an approach originally based on the conception that some work is so vital that those who make it their vocation can be expected partially to live off their dedication, is today completely outdated.”*

2.28 However, the Commission member then goes onto state in the paragraph that directly follows the HSU extract that:

*“The validity of the views I have formed must be judged less on general sentiments such as I have expressed than on the facts established in this case.”*

2.29 As can be seen in these cases, the more relevant aspect of the cases do not in actuality clearly provide a warrant for the HSU’s propositions.

2.30 As such, the HSU has not demonstrated that consideration of the ‘*social utility or worth of work*’ has been a feature of past assessments of work value.

2.31 In any case, the HSU advises the Commission to “*carefully consider the continued relevance of particular aspects of those approaches in light of the current Act*”<sup>7</sup> when taking into consideration previous work value cases which have been determined under differing past statutory regimes, such careful consideration should be given to applying the novel concept social utility.

### **Work Value Considerations**

2.32 The HSU asserts that “*there is no reason in principle why reasons related to the nature of work or the skills and responsibilities involved which might in the past have been categorised as evolutionary should not be now considered ‘work value reasons’*” given that s 157(2A) no longer imposes a requirement to show ‘*significant net addition to work requirements*’.<sup>8</sup>

2.33 The HSU goes onto state that other considerations such as the introduction of a statutory requirement to hold a certificate, the fact that the emphasis on some aspects of the work has changed, keeping abreast of changes and developments in any trade or profession and

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<sup>7</sup> See HSU Closing Submissions, 22 July 2022 [46].

<sup>8</sup> See HSU Closing Submissions, 22 July 2022 [48].



increased workload are now matters which the Commission is required to consider by s 157(2)(a) and s 157(2A).<sup>9</sup>

- 2.34 The approach put forward by the HSU is misconceived.
- 2.35 Assessing the impact of proposed work value reasons is an evaluative task which requires determination as to whether work value reasons warrant a variation.
- 2.36 The HSU has failed to give proper consideration to the evaluative process set out in the *Teachers Decision*<sup>10</sup> which was determined under the current statutory regime.
- 2.37 While the Commission is no longer constrained by the notion of significant change, jumping from not needing significant change to any and all change warranting a re-evaluation of the value of work would seem unsound.
- 2.38 Observing material change in the performance of work may make the deliberative exercise easier.
- 2.39 So, where caution should be exercised is assuming that the Act now stands for the notion that any and all change warrants the re-evaluation of work.
- 2.40 Such an approach would be inconsistent with the notion of “*justification*” which suggests an evaluative exercise. All jobs will change in some way, work substitution, one process being replaced by another, technology replacing manual processes, etc. None of these types of changes (evolution) would ordinarily suggest a change in the value of work.
- 2.41 In any event, the Commission will always be aided by a comparative exercise to the C10 framework. In the context of the Commission not necessarily being required to focus on change in the first place this comparative exercise would seem more relevant than ever.
- 2.42 The employer interests rely upon our Closing Submissions at [7.10]-[7.11], [7.19]-[7.21] and [24].

### Ancillary Staff

- 2.43 The HSU asserts that conclusions that may be drawn from the evidence of direct care staff should apply equally to the indirect care workers (i.e. administrative, laundry, cleaning, kitchen, maintenance and gardeners) and sets out a number of features such which they claim are relevant.<sup>11</sup> The HSU goes on to state that the indirect care workers are “*required*

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<sup>9</sup> See HSU Closing Submissions, 22 July 2022 [49].

<sup>10</sup> *Independent Education Union of Australia* [2021] FWCFB 2051.

<sup>11</sup> See HSU Closing Submissions, 22 July 2022 [83].

*to exercise a significantly broader range of skills than their counterparts in other industries”.*<sup>12</sup>

- 2.44 Outside of the concessions in the employer interests’ Closing Submissions, and with respect to the work performed by these employees, the HSU has failed to establish this contention. These jobs need to be considered in their own right rather than simply having the PCW gloss applied to them.
- 2.45 For illustrative purposes, asking the Commission to draw the same conclusions regarding the work of a PCW and then apply this justification to a gardener is not comparable.

### **Reliance on expert evidence**

- 2.46 The HSU relies largely upon their expert reports in their Closing Submissions. Once again, the HSU fails to give any proper consideration to the totality of the evidence in that it does not address facts and propositions that have arisen out of cross-examination.
- 2.47 We rely upon our Closing Submissions at [6] and Annexure J regarding weight that should be given to the expert evidence.

### **No consideration given to the role of the RN and to care plans**

- 2.48 The HSU’s submissions are unhelpful in that they seem to disregard the role of the RN or give proper consideration to the function of the “*care plan*”. Avoiding this seems to be used by the HSU to elevate the role of the PCW beyond their defined competence under the supervision of a RN and fails to present the full and proper picture of the various roles and their hierarchy within the industry as clearly set out in the evidence.
- 2.49 The HSU does not give any consideration to the role of the EN or RN in the industry and how this impacts the work value considerations for all aged care staff. By way of example, the HSU does not discuss that residents have a care plan, which is developed and updated by the RN. The care plan dictates the care to be provided to the resident and this was clearly established throughout the evidence in these proceedings. Instead, the HSU only suggests that the care plan is an additional regulatory burden on workers.
- 2.50 Similarly, they do not give any consideration to the role of care plans in home care which set out the services to be provided to each client.

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<sup>12</sup> See HSU Closing Submissions, 22 July 2022 [84].

- 2.51 Whilst the employer interests do consider the work performed by these staff to be vital and valuable, the level of skill, authority and responsibility associated with the work also needs to be viewed in the context of how the service operates as whole.
- 2.52 In this respect, we rely upon our Closing Submissions at [9], [19], [20] and [22] regarding the scope of work performed by these employees.

### Employee Evidence

- 2.53 The HSU relies largely on written statements in their Closing Submissions and does not appear to take on the evidence arising out of cross-examination, unless it expressly supports the singular point they are advancing.
- 2.54 The HSU also selectively refers to situations which have arisen, largely out of their witnesses' written statements, that portray what could reasonably be referred to as the worst possible scenario in aged care.
- 2.55 For example, the HSU refer to the statement of Ms Vincent who details a client who weighed 100 kilograms and died whilst on the toilet and she could do little to assist.<sup>13</sup> Obviously, this is a distressing situation, however this does not mean that this is a common or regular occurrence.
- 2.56 Different personality types may well be better suited to certain work but 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.

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<sup>13</sup> See Closing Submissions of the HSU, 22 July 2022 [344].

### 3. REPLY TO SUBMISSIONS FILED BY THE ANMF

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- 3.1 The ANMF submissions advance a number of propositions that are not contentious. For the purpose of these reply submissions, the employer interests respond to the following contentions advanced by the ANMF:
- (a) the weight to be placed on evidence concerning:
    - (i) the Aged Care Sector Stakeholder Consensus Statement (**Consensus Statement**);<sup>14</sup>
    - (ii) the StewartBrown data;<sup>15</sup>
    - (iii) the “*gender pay gap*”<sup>16</sup> and “*women’s work*”<sup>17</sup> in relation to undervaluation;
    - (iv) the Spotlight Tool, in particular, the identification of “*invisible skills*”;<sup>18</sup> and
    - (v) the “*inherent value*” of the work;<sup>19</sup>
  - (b) the characterisation of the evidence of employer witnesses;<sup>20</sup> and
  - (c) the negative impact of “purpose-built” residential aged care facilities upon safety.<sup>21</sup>

#### Consensus Statement

- 3.2 The ANMF’s characterisation of the Consensus Statement as an “*admission*” that bars the employer interests from advancing submissions based on the evidence should be rejected.<sup>22</sup> The position of employer interests, in this respect, appears at Annexure P [2.1]-[2.9].
- 3.3 The Consensus Statement is not a submission and cannot override findings available from the evidence. 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.

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<sup>14</sup> See Closing Submission of the ANMF dated 22 July 2022 [25]-[26].

<sup>15</sup> See Closing Submission of the ANMF [849]-[855].

<sup>16</sup> See Closing Submission of the ANMF [16(3)], [718], [772]. See also [776]-[786].

<sup>17</sup> See Closing Submission of the ANMF [725]-[726], [774]

<sup>18</sup> See Closing Submission of the ANMF [16(4)-(5)], [17]-[18], [547], [773]. See also [787]-[831]. See also Annexure 1.

<sup>19</sup> See Closing Submission of the ANMF [727]-[738].

<sup>20</sup> See e.g. Closing Submission of the ANMF [127].

<sup>21</sup> See Closing Submission of the ANMF [623].

<sup>22</sup> See Closing Submission of the ANMF [28].

3.4 They also had ample opportunity to test this issue in cross-examination were it important to them and chose not to do so.

### StewartBrown Data

3.5 The ANMF has made number of statements regarding the references in submissions to the data provided by StewartBrown.<sup>23</sup>

3.6 The StewartBrown Aged Care Financial Performance Survey is primarily a benchmarking survey that has existed since 1995, with aged care providers that participate having every reason to provide accurate data to ensure accurate benchmarking.

3.7 Survey data collected and analysed by StewartBrown is extensively relied upon by participants in the aged care sector for both operational benchmarking and the development of public policy.

3.8 We are advised that StewartBrown Survey data was provided to the Royal Commission from 2015 for each quarter and subjected to their data integrity checking. StewartBrown data is referenced extensively in the Final Report of the Royal Commission into Aged Care Quality and Safety. Mr Grant Corderoy who leads StewartBrown's work on this Survey also made a formal statement<sup>24</sup> and appeared as a witness on 14 September 2020 at the hearing of the Royal Commission.<sup>25</sup>

3.9 Mr Corderoy appeared as an expert witness in the Commission consideration as to the ANMF submission for paid pandemic leave to be an inclusion in some modern awards.<sup>26</sup> The StewartBrown Survey was tabled at the hearing and the ANMF cross examined Mr Corderoy but did not dispute the data.<sup>27</sup>

3.10 The ANMF makes reference to Aged Care Financing Authority (**ACFA**) data. Appendix C to Mr Corderoy's Statement to the Royal Commission contains a Peer Review of ACFA's Data Collection and Reporting Activities which StewartBrown was engaged to perform by the Department of Health in 2017.<sup>28</sup>

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<sup>23</sup> See Closing Submission of the ANMF [849]-[855].

<sup>24</sup> Witness Statement of Grant Hilton Corderoy dated 20 April 2020 (Royal Commission into Aged Care Quality and Safety) <[https://agedcare.royalcommission.gov.au/sites/default/files/2020-09/RCD.9999.0320.0001\\_0.pdf](https://agedcare.royalcommission.gov.au/sites/default/files/2020-09/RCD.9999.0320.0001_0.pdf)>.

<sup>25</sup> Transcript of Proceedings - Royal Commission into Aged Care Quality and Safety, Monday 14 September 2020, Day 91 <<https://agedcare.royalcommission.gov.au/sites/default/files/2020-09/transcript-14-September-2020.PDF>>.

<sup>26</sup> See *Health Sector Awards - Pandemic Leave* [2020] FWCFB 3561 (8 July 2020) [99]-[100].

<sup>27</sup> See Transcript of Proceedings- Health Sector Awards – Pandemic Leave (AM2020/13), 26 June 2020, PN1413-PN1479.

<sup>28</sup> See Witness Statement of Grant Hilton Corderoy dated 20 April 2020 (Royal Commission into Aged Care Quality and Safety), Appendix C - StewartBrown Peer Review of ACFA's Data Collection and Reporting Activities (June 2017) (as available under Freedom of Information).

- 3.11 StewartBrown has subsequently been engaged to provide the data cleansing for the Aged Care Financial Reports and Quarterly Financial Reports.
- 3.12 We disagree with the ANMF's use of *Earnings Before Interest, Taxes, Depreciation, and Amortization (EBITDA)*<sup>29</sup> as a benchmark, given this excludes a number of significant expenditure items. The correct measure of the financial performance and capacity to pay of the sector is *Net Profit Before Tax*.
- 3.13 We do not dispute that it is useful to consider both StewartBrown data and data from the Aged Care Financial Reports that were previously analysed by ACFA together. The greatest difficulty here being that Government data is generally more than a year out of date by the time it is published.
- 3.14 We note that StewartBrown recently undertook an analysis of the data reported by ACFA excluding all non-recurrent items, which demonstrates the growing deficits in residential care, which are expected to grow even further in future years.<sup>30</sup>
- 3.15 We have not provided lengthy evidence on the financial circumstances of the sector, because it has been our view that this is not a key consideration in the determination of work value. It rather 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.
- 3.16 We also note that financial pressures within the industry is not a matter that has been in dispute.<sup>31</sup>

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<sup>29</sup>

<sup>30</sup> See StewartBrown Aged Care Sector Report (31 March 2022) 2, Figure 3: Aggregate Operating Results for Residential Aged Care Sector (\$M) <[https://www.stewartbrown.com.au/images/documents/StewartBrown\\_-\\_Aged\\_Care\\_Financial\\_Performance\\_Survey\\_Sector\\_Report\\_March\\_2022.pdf](https://www.stewartbrown.com.au/images/documents/StewartBrown_-_Aged_Care_Financial_Performance_Survey_Sector_Report_March_2022.pdf)>.

<sup>31</sup> See Consensus Statement 5.

## Gender Pay Gap and “Women’s Work”

### **Gender Pay Gap**

3.17 The position of employer interests, with respect to the gender pay gap, appears at Annexure J [2.1]-[2.41]. We repeat and rely upon those submissions.

3.18 By way of emphasis:

- (a) A work value case exists in a specific framework of modern awards. The Commission is tasked with assessing whether current minimum award rates should be increased based upon work value reasons. It is difficult to discern how statistics, analysis and conclusions reached without specific regard to award rate minima could assist in that exercise. The evidence of Professor Smith and Dr Lyons lacks the requisite precision - *in the context of work value proceedings* - to be of assistance.
- (b) There is no gender pay gap when consideration is limited to minimum award rates.<sup>32</sup> Award minimum rates apply irrespective of gender. Hence, comparisons between aggregate total earnings by gender alone may present an enticing statistic but one that does not assist with assessing existing minimum rates within any modern award.<sup>33</sup>

### **Women’s Work**

3.19 Additionally, as to arguments regarding “women’s work”, we repeat and rely upon the submissions at Annexure J [3.8]-[3.18]. Those contentions, whilst advanced in the context of Professor Meagher and Professor Charlesworth, equally apply to the observations of Professor Smith and Dr Lyons relied upon by the ANMF.

3.20 By way of emphasis:

- (a) It is not contested that the aged care workforce is predominantly female. A factor which may enliven the relevance of gender issues in a work value application.
- (b) Whilst the experts point to literature and international research suggesting a social/cultural perception that “women’s work” is of less economic value, the employer interests suggest *caution* is required. Particularly in circumstances where nursing work has been subject to extensive work value consideration in both state and federal tribunals historically.

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<sup>32</sup> See Closing Submissions of Employer Interests, Annexure J [2.25]-[2.41].

<sup>33</sup> See Closing Submissions of Employer Interests, Annexure J [2.25].

- (c) In order to make out an argument that the *Nurses Award* has been undervalued based on gender, notwithstanding an extensive series of work value cases,<sup>34</sup> the Commission would need to accept that it has historically failed in its assessments.
- (d) This, if accepted, also suggests something troubling. If male dominated and female dominated modern awards are already largely aligned around the C10 framework<sup>35</sup> but “*women’s work*” is however undervalued, it suggests that all women’s work is of greater value than all ‘*men’s work*’ which seems to highlight the problem of transferring concepts of ‘market’ equity into minimum award rates of pay historically based on the *gender neutral ground* of the C10 scheme and the AQF.

### Spotlight Tool and “*Invisible Skills*”

3.21 The position of the employer interests, in this respect, appears at Annexure J [4.1]-[4.19]. We repeat and rely upon those submissions.

3.22 Further, we advance the following submissions in reply:

- (a) The Commission should be cautious to place weight upon the fact that “300 *countable instances of utilisation*” of Spotlight Skills were identified in connection to the work performed by RNs and ENs.<sup>36</sup> 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.<sup>37</sup>
- (b) Additionally, the Commission should be cautious to place weight upon the ANMF alignment of union lay evidence with the Spotlight Tool. There is an irrefutable self-serving aspect to the skills identification tool. It targets three broad categories of skill -- *shaping awareness, interacting and relating, and coordinating* -- which may be identified as existing in all industries.
- (c) This must limit the weight placed upon the mere identification of skills using the Spotlight Tool, particularly when applied as an academic exercise outside of the

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<sup>34</sup> See *Private Hospitals’ & Doctors’ Nurses (ACT) Award 1972* (Print G7200) (1987) 20 IR 420; [1987] AIRC 135 (7 May 1987); *Capital Territory Health Commission and Royal Australian Nursing Federation* (Print E8456) (1982) 269 CAR 66; *Nurses Comparable Worth Case* (1986) 13 IR 108; *Private Hospitals’ & Doctors’ Nurses (ACT) Award 1972* (Print G7200) (1987) 20 IR 420 at 443; [1987] AIRC 135 (7 May 1987); *The Hospital Employees etc (Nursing Staff ACT) Award, 1980* (1992) 7 CAR 120; *Industrial Relations Commission Decision 904/1990* (Print J4011) [1990] AIRC 862 (21 August 1990); *Australian Nursing Federation - Determination Dec 630/91* (A Print J8402); *The Hospital Employees etc (Nursing Staff ACT) Award, 1980* (1992) 7 CAR 120; *Australian Nursing Federation - Re Classification structure* (PR965496) [2005] AIRC 1000; *Appln By Australian Nursing Federation To Vary Nurses Private Sector (ACT)* (PR 965496) (21 November 2005).

<sup>35</sup> See eg, Closing Submissions of Employer Interests, Annexure J [2.27]-[2.41].

<sup>36</sup> See Closing Submissions of ANMF [795].

<sup>37</sup> See Closing Submissions of Employer Interests, Annexure J [4.7]-[4.9].



modern awards system (i.e. absent a useful comparator, for example, another modern award).

- (d) The Spotlight Tool cannot prove or substantiate the reason for “invisible” skills. It is an “identification” tool limited to skills identification consistent with the taxonomic framework.<sup>38</sup>
- (e) As to the reliance upon secondary material referring to caring work being “gendered” and therefore supporting a finding that ‘caring work’ in aged care is undervalued,<sup>39</sup> we repeat the submissions with respect to “women’s work” at [3.19]-[3.20] above. Further, we emphasise that the secondary material is not based upon an analysis of award minimum rates.

3.23 To illustrate the limitation of the Spotlight Tool analysis when considered outside the modern awards system, we return to the benchmark comparator - the *Manufacturing and Associated Industries and Occupations Award 2020 (Manufacturing Award)*.

3.24 The following table compares the C10 (Certificate III) classification under the *Manufacturing Award* against the Nursing Assistant (Certificate III) classification under the *Nurses Award*.

	<b>Manufacturing Award</b>	<b>Nurses Award</b>
<b>Key Classification</b>	C10 (Recognised Trade Certificate, or Certificate III or equivalent)	Nursing Assistant  Experienced (the holder of a relevant certificate III qualification)
<b>Minimum Rate (weekly)</b>	940.90 <sup>40</sup>	940.90 <sup>41</sup>
<b>Minimum Rate (hourly)</b>	24.76 <sup>42</sup>	24.76 <sup>43</sup>
<b>Classification Definition</b>	<b>(a) Engineering/Manufacturing Tradesperson—Level I<sup>44</sup></b>	<b>A.1 Nursing assistant<sup>45</sup></b>  Nursing assistant means an employee, other than one registered with the Nursing

<sup>38</sup> See Closing Submissions of Employer Interests, Annexure J [4.11]-[4.12].

<sup>39</sup> See Closing Submissions of ANMF [808]-[811].

<sup>40</sup> Manufacturing Award, cl 20.1.

<sup>41</sup> Nurses Award, cl 15.2.

<sup>42</sup> Manufacturing Award, cl 20.1.

<sup>43</sup> Nurses Award, cl 15.2.

<sup>44</sup> Manufacturing Award cl A.4.7.

<sup>45</sup> Nursing Award cl A.1-A.2.

	<b>Manufacturing Award</b>	<b>Nurses Award</b>
	<p>An Engineering/Manufacturing Tradesperson—Level I works above and beyond an employee at the C11 level and to the level of their skills, competence and training:</p> <ul style="list-style-type: none"> <li>● understands and applies quality control techniques;</li> <li>● exercises <u>good interpersonal and communications skills</u>;</li> <li>● exercises keyboard skills at a level higher than the C11 level;</li> <li>● <u>exercises discretion within the scope of this classification level</u>;</li> <li>● <u>performs work under limited supervision either individually or in a team environment</u>;</li> <li>● operates lifting equipment incidental to their work;</li> <li>● <u>performs non-trade tasks incidental to their work</u>;</li> <li>● performs work which while primarily involving the skills of the employee’s trade is <u>incidental or peripheral to the primary task</u> and facilitates the completion of the whole task, provided that such incidental or peripheral work does not require additional formal technical training;</li> <li>● <u>inspects products</u> and/or materials for conformity <u>with established operational standards</u>.</li> </ul>	<p>and Midwifery Board of Australia or its successor or one who is in training for the purpose of such registration, who is under the direct control and supervision of a Registered nurse (RN) nurse and whose employment is solely to assist an RN or Enrolled nurse (EN) in the provision of nursing care to persons.</p> <p><b>A.2 Nursing care</b></p> <p>Nursing care means:</p> <ul style="list-style-type: none"> <li>● giving assistance to a person who, because of disability, is unable to maintain their bodily needs without frequent assistance;</li> <li>● carrying out tasks which are directly related to the maintenance of a person’s bodily needs where that person because of disability is unable to carry out those tasks for themselves; and/or</li> <li>● assisting a registered nurse to carry out the work described in clause A.5.<sup>46</sup></li> <li>● For the purposes of this award nursing care also includes care provided by midwives.</li> </ul>

3.25 The skills highlighted within the C10 level expressly “*recognise*” skills that align to “*Spotlight Skill Levels*”. The below table sets out that alignment, together with reference to examples

<sup>46</sup> Clause A.5 being a reference to the work performed by an RN, set out at clauses A.5.1 - A.5.5.

of equivalent/similar skills identified by the ANMF in Annexure 1 (noting the difference of industry):

<b>Classification Definition - C10 Skills</b>	<b>Spotlight Skill Level</b>
<i>“good interpersonal and communications skills”</i>	Spotlight Skill Level B2 - communicating verbally and non-verbally <sup>47</sup>
<i>“exercises discretion within the scope of this classification level”</i>	Spotlight Skill Level A2 - monitoring and guiding reactions <sup>48</sup>
<i>“performs non-trade tasks incidental to their work”</i>	Spotlight Skill Level B1 - negotiating boundaries <sup>49</sup> Spotlight Skill Level C2 - interweaving your activities smoothly with those of others <sup>50</sup>
<i>“performs work under limited supervision either individually or in a team environment”</i>	Spotlight Skill Level C1 - sequencing and combining activities <sup>51</sup>
<i>“inspects products and/or materials for conformity with established operational standards”</i>	Spotlight Skill B2 - communicating verbally and non-verbally Spotlight Skill C1 - sequencing and combining activities <sup>52</sup>

3.26 The preceding comparative analysis, by reference to the benchmark classification and Spotlight Skill Level, demonstrates the following:

- (a) Spotlight Skills are expressly reflected in the classification definition of the C10 Level under the *Manufacturing Award*. Thereby, according to Professor Junor, they have been plainly *“recognised”* in the wage setting exercise for minimum rates in that award.
- (b) The minimum award rate for a C10 level (Certificate III) in the *Manufacturing Award* (male dominated industry) aligns with the AIN (Certificate III) in the *Nurses Award* (female dominated occupation).
- (c) Therefore, it follows, the minimum award rate for the AIN aligns to a benchmark classification, which included express recognition of *“Spotlight Skills”* as falling

<sup>47</sup> See Closing Submissions of ANMF, Annexure 1, Lilian Grogan, Lyndelle Parke (“interpersonal”).

<sup>48</sup> See Closing Submissions of ANMF, Annexure 1, Jocelyn Hofman, Karen Roe (“exercising judgment”).

<sup>49</sup> See Closing Submissions of ANMF, Annexure 1, Sally Fox (“additional skills”).

<sup>50</sup> See Closing Submissions of ANMF, Annexure 1, Irene McInerney.

<sup>51</sup> See Closing Submissions of ANMF, Annexure 1, Linda Hardman (“team skills”).

<sup>52</sup> See Closing Submissions of ANMF, Annexure 1, Wendy Knights (re “Quality Standards” and “Aged Care Standards”).

within the scope of competency of a Certificate III or equivalent; such is clear from an examination of the content of the Certificate III.

3.27 Upon that basis, it is difficult to accept that the minimum award rate in the *Nursing Award* for AIN does not factor in “*interpersonal skills*” (etc), simply by reference to:

- (a) a failure to expressly reference “*Spotlight Skills*”; and
- (b) the fact that nursing is a female dominated occupation.

Especially in circumstances where Spotlight Skills plainly feature in the benchmark classification upon which the key classification in the *Nurses Award* was set.

3.28 Ultimately, the Commission should tread carefully dealing with one academic opinion largely about ways of describing many basic human cognitive traits and behaviours

### The “*inherent value*” of work

3.29 Work does not have any inherent value. Valuing work will always involve some level of comparison rather than operating in an isolated vacuum.<sup>53</sup> 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.

3.30 As to the union lay evidence that refers to opinion as to the altruistic value of the work performed, as set out in Annexures A-G, that evidence should attract little (if any) weight. Such an approach is the same as the notion of social utility advanced by the HSU and discussed above.

3.31 The Commission should not be distracted by such an extraneous notion to the work itself in the context of a “*minimum wage*”.

3.32 Rather than somewhat philosophical notions of social utility or altruistic value the Commission would be better served in its deliberations by grounding itself in the comparative exercise between modern award classifications. We rely upon the illustrative comparative analysis, set out in Annexure J, which supports a conclusion that a great deal of alignment and consistency exists between award minimum rates in comparative roles.<sup>54</sup>

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<sup>53</sup> See Closing Submissions of Employer Interests [7.25].

<sup>54</sup> See Closing Submissions of Employer Interests, Annexure J [2.27]-[2.41].

## Characterisation of Evidence of Employer Witnesses

3.33 The employer interests rely upon their summary of evidence at Annexure H. The summaries provided by the ANMF, in this respect, are highly selective and at times misrepresent the effect of the evidence.

3.34 By way of example, as to personal care work performed in the community (i.e. by home care employees), the ANMF provide the following summary of the employer witnesses' evidence:

*"126. Cheyne Woolsey (CEO of KinCare) identifies one of the biggest challenges faced by home care workers as being the environment and that they do not know what situation they are walking into.*

*127. Sue Cudmore (who has operational control of Alliance Community) expects that personal carers employed by Alliance Community, would be able to know what work can and can't be performed based upon what is a handbook which is very detailed and at times complex and confusing.*

*128. Johannes Brockhaus (Buckland CEO) says that home carers working for Buckland would be provided with the service plan/care plan for a client before going to clients."*

3.35 As set out in Annexure H:

- (a) The evidence of Mr Woolsey sets out the tasks and responsibilities of the Customer Care Manager<sup>55</sup> and Home Care Worker.<sup>56</sup> In identifying the challenges of the work environment, he explains KinCare has *"structured support systems in place to ensure that our carers are equipped with the skills, knowledge and support to be able to perform their role"*.<sup>57</sup> In particular, Mr Woolsey identified several protocols that home care workers are briefed and trained in prior to commencing appointments with KinCare.<sup>58</sup>
- (b) The evidence of Ms Cudmore identifies the responsibilities of the Clinical Care Coordinator,<sup>59</sup> Scheduler,<sup>60</sup> Care Worker<sup>61</sup> and Home Care Case Manager.<sup>62</sup> This includes a summary of the protocols a care worker is trained to follow and implement throughout the course of a shift.<sup>63</sup> The totality of Ms Cudmore's evidence, by

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<sup>55</sup> See Closing Submissions of Employer Interests, Annexure H [5.33(a)-(d)].

<sup>56</sup> See Closing Submissions of Employer Interests, Annexure H [5.34]-[5.35].

<sup>57</sup> See Closing Submissions of Employer Interests, Annexure H [5.14].

<sup>58</sup> See Closing Submissions of Employer Interests, Annexure H [5.35(a)-(g)].

<sup>59</sup> See Closing Submissions of Employer Interests, Annexure H [4.22]-[4.23].

<sup>60</sup> See Closing Submissions of Employer Interests, Annexure H [4.24]-[4.25].

<sup>61</sup> See Closing Submissions of Employer Interests, Annexure H [4.26]-[4.30].

<sup>62</sup> See Closing Submissions of Employer Interests, Annexure H [4.31].

<sup>63</sup> See Closing Submissions of Employer Interests, Annexure H [4.29(a)-(h)].

reference to Annexure SC-05, her statement and oral testimony, reveals the employee handbook to be a comprehensive tool, which supplements ongoing mandatory internal training provided by Alliance Community.<sup>64</sup>

- (c) Mr Brockhaus described the work performed by the home care worker at Buckland.<sup>65</sup> In addition to identifying the timing of when a home care worker accesses the care plan, he identified that home care workers are trained to contact the “*home care manager*” should they have any questions about the care plan. He also confirmed approval is required from the home care manager to make changes to the care plan.<sup>66</sup>

- 3.36 For the sake of brevity, the above exercise will not be repeated with respect to each subject matter addressed in the ANMF closing submissions. However, 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.

### Safety and Purpose-built Facilities

- 3.37 The ANMF submit that:

*“Individual rooms can provide increased privacy for residents but **a decrease in safety for workers who are required to attend to residents alone**, with no visibility to others in the event of an incident”<sup>67</sup>*

- 3.38 Support for the proposition advanced by the ANMF is limited to Ms Chrisfield’s statement at [20].<sup>68</sup> During cross-examination, Ms Chrisfield expanded upon that evidence: “*I don’t think [purpose-built facilities are] more difficult than old facilities but I also don’t think that they take 100 per cent into account the safety needs of the staff*”.<sup>69</sup> She identified one of her primary criticisms, in that respect, is the distance between rooms.<sup>70</sup> She explained more time is spent walking compared to when there were 3-8 residents to a room.<sup>71</sup>

- 3.39 She also accepted the following as accurate descriptions of purpose-built facilities:

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<sup>64</sup> See Closing Submissions of Employer Interests, Annexure H [4.38]-[4.54]; see also [4.33]-[4.37].

<sup>65</sup> See Closing Submissions of Employer Interests, Annexure H [3.75].

<sup>66</sup> See Closing Submissions of Employer Interests, Annexure H [3.76]. See also [3.13], [3.20]-[3.22], [3.30]-[3.32].

<sup>67</sup> See Closing Submissions of ANMF [623] (emphasis added).

<sup>68</sup> See Closing Submissions of ANMF [609], citing Statement of Kathryn Chrisfield dated 29 October 2021.

<sup>69</sup> Transcript, 3 May 2022, PN3783.

<sup>70</sup> Transcript, 3 May 2022, PN3791.

<sup>71</sup> Transcript, 3 May 2022, PN3792-PN3793.

- (a) modern facilities have purpose designed beds that can move up and down, the bedhead can come up, the legs can come up;<sup>72</sup>
  - (b) rooms in modern facilities are made of a size that allows wheelchairs to be easily move around in the room;<sup>73</sup>
  - (c) subject to the facility, showering areas are purpose designed so that people can actually be comfortably sat on a chair or a wheelchair actually in the shower (she noted this is “not always” the case for modern facilities);<sup>74</sup>
  - (d) those modern designs, referred to in (a)-(c) above, are in part for the resident but also to make it easier for the care worker to move around;<sup>75</sup>
- 3.40 Additionally, as to lifting equipment, Ms Chrisfield accepted that most residential aged care facilities have procedures requiring two-person lifts.<sup>76</sup>
- 3.41 The evidence does not sustain a conclusion that purpose-built renovations have had a negative impact on safety of consumers or employees. Rather, as set out in Annexure H, purpose-built residential aged care facilities are safer for both the consumers and the employees.<sup>77</sup> That conclusion is also supported by reference to Ms Chrisfield’s evidence in cross-examination.

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<sup>72</sup> Transcript, 3 May 2022, PN3785.

<sup>73</sup> Transcript, 3 May 2022, PN3786.

<sup>74</sup> Transcript, 3 May 2022, PN3787-PN3789.

<sup>75</sup> Transcript, 3 May 2022, PN3790.

<sup>76</sup> Transcript, 3 May 2022, PN3795.

<sup>77</sup> See Closing Submissions of Employer Interests, Annexure H [2.17]-[2.18]; see also [6.26]-[6.30].

#### **4. REPLY TO DOCUMENTS PUBLISHED BY THE COMMISSION**

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- 4.1 For completeness, the employer interests confirm their position with respect to documents published by the Commission:
- (a) On 20 June 2022, the Full Bench published Background Document 3—Witness Overview. The employer interests have no further comments in relation to that document, save for noting reliance on the evidence review that appears at Annexures A-H of the Closing Submissions filed on 22 July 2022.
  - (b) On 20 June 2022, Commissioner O’Neill published Report to the Full Bench. That report provides an overview of the Union lay evidence called in the proceedings. The employer interests have no further comments in relation to that document, save for noting reliance on the evidence review that appears at Annexures A-H of the Closing Submissions filed on 22 July 2022.
  - (c) On 20 June 2022, the Full Bench published Background Document 4—Royal Commission into Aged Care Quality and Safety. The employer interests have no further comments in relation to that document.
- 4.2 As to matters raised in Background Documents 1 and 2, these were addressed in Closing Submissions and Annexure P.



## 5. RESPONSE TO QUESTIONS IN BACKGROUND DOCUMENT 5

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- 5.1 On 5 August 2022, the Full Bench published Background Document 5, which included 24 questions for the consideration of the parties.
- 5.2 The answers to those questions directed to the employer interests appear below

### **Question 2 for all other parties: do you agree with the HSU submission that the above additional propositions are uncontentious?**

- 5.3 The HSU submit that the following additional propositions are 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.”*

- 5.4 In response to the above additional propositions, the employer interests do not agree that they are uncontentious for the following reasons:

- (a) there is minimal evidence that the clustered and domestic household models are “growing in prevalence”. Whilst some providers have adopted this model, there is not enough evidence to establish that this trend will go beyond these providers or that each operation requires the same broad range of skills and responsibilities; and
- (b) the second proposition fails to take into consideration the effect of indirect supervision and structured protocols used to replace direct supervision.

### **Question 5 for the Joint Employers: 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?**

- 5.5 In relation to the *Aged Care Award* classification structure, we advanced the following submissions:

*“4.37 There appears to be merit in restructuring the classification structure in the Aged Care Award.*

*4.38 In this respect, a new classification structure may benefit from creating two streams. One being a ‘care stream’ (PCWs and Recreational/Lifestyle Activities*

*Officers (RAOs)) and, the second, a general services stream (i.e. those that work in administration, the kitchen, the laundry, cleaning and maintenance).*

*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).*

*4.40 For the general services stream, there should be a classification structure which broadly reflects of the C10 scheme with an entry level (C14/13), an unqualified level (C12), a Certificate III qualification or equivalent level (C10) and a Certificate IV or equivalent qualification level (likely most relevant to administration roles) (C7)."*

- 5.6 The first change we envisage is separating out care work of PCWs and RAOs from support activities.
- 5.7 The structure of the care stream would follow the scheme above. The new feature in this is the introduction of a classification between the Cert III and the Cert IV; effectively an experienced Cert III classification.
- 5.8 If there is a view that rewarding Schedule 4 medications in a residential aged care setting is warranted this would likely be better dealt with by way of an allowance separate to the structure.
- 5.9 The same could be the case for employees working in dedicated secure dementia wards or dedicated palliative care facilities.
- 5.10 The support stream should follow a similar scheme to classifications in other modern awards (except with, likely, less specialisation) dealing with similar activities and the broad scheme of this is set out above.

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

- 5.11 In relation to the *Nurses Award* classification structure, we submitted that:
- (a) *“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”*; and, further,
  - (b) *“the Commission must also consider that the award operates with service based increments with annual progression internally through the pay-points of the levels, and some where there are no pay point descriptors within the level”*.
- 5.12 The employer interests are not proposing any specific change to the structure, 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.
- 5.13 The employer interests also draw the Commission’s attention to the *Teachers Decision* in regard to their comments on service-based classifications to ensure that it considers that in its broader deliberations.

**Question 7 for the Joint Employers: What is being proposed in this aspect of the submission?**

- 5.14 In relation to the *SCHADS Award* classification structure, we submitted 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”*.
- 5.15 The employer interests are stating 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.
- 5.16 Additionally, as the HSU is only seeking to increase the rates in the separate rate structure for those who work in aged care in home care, the Commission must be satisfied that the separation of the rates is appropriate.
- 5.17 The employer interests have simply pointed out the practical difficulty that this may cause some employers which is a s 134 consideration.

5.18 The Commission may simply accept that this difficulty might materialise for employers who provide both services or it might 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.

**Question 8 for the Joint Employers: 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?**

***Are the Joint Employers contending that an increase in minimum wages is justified on work value grounds in respect of these classifications of employees?***

5.19 At [4.47] of closing submissions, we submit 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”*:

- (a) RNs;
- (b) ENs;
- (c) (Certificate III) Care Workers; and
- (d) Head Chefs/Cooks.

5.20 The employer interests contend that an increase in minimum wages is justified on work value grounds in respect of these types of employees.

***If so, what quantum of increase is proposed in respect of each classification of employees?***

5.21 While this submission may be seen as less helpful, with the exception of the RN, the employer interests have not proposed a monetary outcome which appears relatively clear based on past precedent.

5.22 The C10 Framework should provide some guidance as to how this exercise should be commenced.

5.23 That being said, the employer interests do not support a uniform 25% increase in respect to these classifications as claimed.

***Do the Joint Employers oppose any increase in respect of any classification not mentioned at [174] above?***

- 5.24 As to the balance of classifications (i.e. those not mentioned above), the employer interests do not consider the evidence before the Commission supports a conclusion that an increase in minimum wages is justified on work value grounds.
- 5.25 These classifications may require some refinement to ensure they at least are properly set against the C10 Framework.

**Question 9 for the Joint Employers: 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?**

- 5.26 Yes. The minimum rates for RNs should be aligned to the C10 framework. This is necessary to rectify a material anomaly within the award. Being a degree-qualified classification, the minimum rates for RNs are currently not consistent with the minimum rates of other degree-qualified classifications within the modern award system. As such, this alignment should be rectified as part of the work value exercise.
- 5.27 The case of the RN does appear to have very strong alignment to the ratio in the Teachers Decision.

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

- 5.28 With regard to the high-level overview of the employer interests' evidence is correct.
- 5.29 This summary should not be a replacement for the closing submissions, and with regard to the Commonwealth, its submissions.

**Question 12 for all parties: 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)?**

- 5.30 Yes, the ACT Child Care Decision was determined under a different statutory regime. However, the principles in the ACT Child Care Decision are still useful for work value considerations.

5.31 The employer interests consider that the Commission should be primarily guided by the approach set out in the *Teachers Decision*, given that the *Teachers Decision* is the most recent Work Value case. To an extent, the *Teachers Decision*, has superseded the principles and approach taken in *Pharmacy Decision* (however these principles may also be instructive in the exercise of discretion).

**Question 13 for all parties: 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?**

5.32 The submission advanced by the HSU relies primarily upon the views expressed in the Consensus Statement. In that respect, we repeat our submissions at [3.2]-[3.4] above.

5.33 It is also submitted that the view is of minimal assistance to the evaluative task under s 157(2). The factors required to justify an increase to minimum rates are “*work value reasons*”.

5.34 The opinion by the stakeholders’ party to the Consensus Statement, should provide little assistance in the Commission’s assessment of the *nature of the work, the level of skill or responsibility involved in doing the work, or the conditions under which the work is done*.

**Question 14 for all parties: 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?**

5.35 The employer interests agree that the points of agreement between the parties, subject to the below.

5.36 The agreement expressed by the employer interests with respect to paragraph [116]<sup>78</sup> in Background Document 1, concerned acceptance that as *generalised statements in the context of an overview document* the propositions were uncontentious. However, the contentions are not intended to be a substitute for consideration and analysis of the evidence before the Commission. Noting, in many respects, the propositions taken in isolation represent an oversimplification of matters explored in the evidence and addressed more fully in the employer interests closing submissions.

5.37 As such, with respect to the propositions at [116], the following observations are made:

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<sup>78</sup> See ACSA, LASA and ABI Closing Submissions, Annexure P at [3.32].

- (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).

5.38 Those observations are supported by Closing Submissions and the review of the evidence at Annexure A-H.

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

5.39 The employer interests agreed that the issues identified at [202]-[219] are points of contention between the parties, subject to one amendment. The employer interests acknowledge that Enrolled Nurses have experienced a significant change to the nature of the work.

**Question 20 for the Joint Employers: What is the Joint Employers' position in respect of the ANMF and HSU classification proposals?**

5.40 As discussed above, the employer interests do not consider that the HSU and ANMF classification proposals appropriately reflect the work value of employees in the Aged Care Industry.

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

5.41 In Background Document 1 at [116], the following proposition was identified as uncontentious:

*"6. Since 2003, there has been a decrease in the number of Registered Nurses (RN) and Enrolled Nurses (EN) as a proportion of the total aged care workforce. Conversely, there has been an increase in the proportion of Personal Care Workers (PCW) and Assistants in Nursing (AIN)."*

5.42 In Background Document 5 at [228], the Commission observe:

*"[228] 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 Quality of Care Principles to care recipients in a residential facility to ensure at least one registered nurse is on site, and on duty, at all times at the residential facility."*

5.43 In short, the answer is yes. The reform bill will have an impact on contention 6 as it will require an increase in the number of RNs and numbers of other appropriately skilled staff in aged care.



- 5.44 The amendment to the *Aged Care Act 1997* will require that providers have at least one RN on site and on duty at each residential facility the provider operates 24 hours a day, 7 days a week.
- 5.45 The reform also increases the minimum number of care minutes per resident per day to 215 minutes (including 44 RN care minutes) from October 2024.
- 5.46 This will inevitably, and rightfully, lead to an increase in the number of RNs generally and possibly to an increase of RNs as a proportion of the total workforce.
- 5.47 By way of example, in circumstances when a RN has previously been rostered as being 'on call' during a night shift and only attended site as needed, they will now be required to be on site working.
- 5.48 The impact on providers will be felt differently across the jurisdictions due to the individual State/Territories' existing Public Health Acts and poisons and therapeutic goods (or similar) legislation.
- 5.49 Using NSW as an example, the relevant legislation prescribes that a RN is rostered 24/7 in some but not all residential aged care settings. PCWs with appropriate training (i.e. a unit of competency and internal training and assessment) can assist with medication rounds (save for Schedule 8 and PRN medications) in some residential aged care settings (prescribed by the legislation). Practically speaking, a RN has, in some services, has never been rostered 24/7, rather they've worked on an "on call" basis, especially overnight.
- 5.50 We also note that the second schedule of the reform bill, which comes into effect later, will limit what home care providers can charge clients which has the possibility of impacting the future financial viability of this part of the aged care sector.

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