IN THE FAIR WORK COMMISSION

Applicants: **HEALTH SERVICES UNION OF AUSTRALIA and others**

Matter: **APPLICATION TO VARY THE AGED CARE AWARD 2010 and APPLICATION TO VARY THE SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010**

Matter No: **AM2020/99 and AM2021/65**

HSU List of Authorities

1. *National Wage Case, August 1989* (1989) 30 IR 81
2. *Re Metal Industry Award 1984 – Part I - & Other Awards (No 1)* (1989) 32 IR 262
3. *Re Metal Industry Award 1984 – Part 2 - & Other Awards (No 2)* (1990) 32 IR 267
4. *Australian Nursing Federation re Hospital Employees Etc (Nursing Staff A.C.T.) Award 1980 and ors (Level 1 to 3 Nurses Case)* [1990] AIRC 862
5. *Australian Nursing Federation re Hospital Employees Etc (Nursing Staff A.C.T.) Award 1980 and ors (Level 4 and 5 Nurses Case)* 1991/7 CAR 274 ; (1991) 7 CAR 272
6. *Australian Nursing Federation re Hospital Employees Etc (Nursing Staff A.C.T.) Award 1980 and ors (Enrolled Nurses Case)* 1992/7 CAR 120
7. *Australian Liquor, Hospitality and Miscellaneous Workers Union re Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998 – re Wages rates* PR954938 [2005] AIRC 28
8. *Re Request from the Minister for Employment and Industrial Relations — 28 March 2008* [2009] AIRCFB 345 ; (2009) 181 IR 19
9. *Award Modernisation - Statement - Full Bench [2009] AIRCFB 50 ; (2009) 180 IR 124*
10. *Award Modernisation - Statement - Full Bench [2009] AIRCFB 641 ; (2009) 184 IR 242*

11. *Award Modernisation - Statement - Full Bench [2009] AIRCFB 865 ; (2009) 188 IR 23*
12. *Award Modernisation - Decision - re Stage 4 modern awards* [2009] AIRCFB 945 ; (2009) 190 IR 370
13. *Four Yearly Review of Modern Awards – Pharmacy Industry Award 2010* [2018] FWCFB 7621 ; (2018) 284 IR 121
14. *Re 4 yearly review of modern awards – SCHADS Award* [2019] FWCFB 6067
15. *Independent Education Union of Australia* [2021] FWCFB 2051
16. *Aged Care Award 2010* [2022] FWCFB 200 ; (2022) 319 IR 127
17. *Aged Care Award 2010* [2023] FWCFB 93
18. *Re Annual Wage Review 2022-2023* [2023] FWCFB 3500 ; (2023) 323 IR 332

[AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION]

National Wage Case August 1989

MADDERN P, LUDEKE J, KEOGH DP, PETERSON J, JOHNSON, NOLAN, LAING JJ

7 August 1989

WAGE FIXATION — National Wage principles — Structural efficiency principle — Adjustments — Work value changes — Allowances — Superannuation — Hours of work — Applications for changes in conditions — Anomalies and inequities — Paid rates award — Economic incapacity.

STATEMENT

THE COMMISSION. In the current proceedings, there are two main issues:

- first, the quantum, timing and basis of any wage increase to be made available for effective structural efficiency exercises;
  and
- second, how the approach endorsed in principle by the Commission for ensuring stable relationships between awards and their relevance to industry is best translated into practice.

In addition, other issues concerning the effective implementation and future direction of the principles, raised in the February Review, need to be addressed.

Given the excessive level of imports, a fall-off in the level of export growth, the deterioration in the current account, a serious and continual deterioration in the balance of payments, the level of international debt, high interest rates, and renewed concerns about inflation, there are substantial economic grounds for rejecting any notion of wage increases at the present time.

There are however many interrelated elements involved in the work environment and economic considerations cannot be taken in isolation. Indeed to do so could bring about a perverse situation which may compound rather than reduce the economic difficulties.

Ultimately the test is not the pursuit of what is perfect in the abstract, but what is the best outcome, which is workable and sustainable immediately and over the medium and longer term. Further, there are both economic and non-economic considerations which point to an alternative conclusion. These include:

- the movement in prices and in particular the erosion of the real value of wages;
- the effect on employees of high interest rates;
- the level of capacity utilisation and company profits;
- the tight labour market as reflected in employment and unemployment statistics, labour shortages, and overtime and vacancy data;
- the attitudes of governments and private employers in increasing

management and executive salaries, and overaward payments in current economic circumstances;

- the agreement between the ACTU and the Commonwealth;
- support for that agreement by a number of State governments;
- the attitude of some large employer organisations and their membership covering a substantial number of individual employers in a number of industries;
- the expectations created by the agreement of the ACTU and the Commonwealth, and the support of State governments, the ACT and some major employers for that agreement;
- the current level of industrial disputes;
- the fact that commercial considerations, attitudes to comparative wage justice, the structure of trade union and employer organisations and the structure of awards remain fundamentally unchanged from the periods of earlier wage breakouts; and
- the importance of attaining the objectives of the structural efficiency principle.

In light of all the factors we have referred to we have come to the conclusion that we must reject the submissions of those who argued that there are no grounds to justify wages increases during the year 1989/90.

It is our decision that an adjustment in rates of pay will be allowable for completion of successful exercises under the structural efficiency principle. Such an adjustment will comprise:

(i) a first increase of $10.00 per week for workers at the basic skills/trainee level; $12.50 per week at the semi-skilled worker level; and $15.00 per week or 3%, whichever is the higher, at the tradesman or equivalent level and above;
and

(ii) a second increase of the same order as the first increase, to be paid not less than 6 months after the first increase.

We are of the view that many awards have scope for a less prescriptive approach and, without limiting the opportunities for innovation, we have set out some of the measures which are appropriate for consideration.

Proposals for changes of the nature we have outlined should not be approached in a negative cost-cutting manner and should as far as possible be introduced by agreement.

In its February 1989 Review decision, the Commission stated that minimum rates awards would be reviewed:

> "to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other minimum rates awards".

In these proceedings, the ACTU sought specific endorsement of various classification rates and supplementary payments.

Apart from the relationship between the metal industry tradesperson and the building industry tradesperson, we are not prepared to approve specific wage relativities proposed by the ACTU on behalf of the trade union movement. Nevertheless, we consider it appropriate for relativities to be established for both minimum classification rates and supplementary payments for the key classifications within the ranges set out in the decision.

We determine that the minimum classification rate and supplementary

payment exercise shall be applied in accordance with the following guidelines:

(i) the appropriate adjustments in any award will be applied in not less than four instalments which will become payable at six monthly intervals;

(ii) in appropriate cases longer phasing in arrangements may be approved or awarded and/or parties may agree that part of a supplementary payment should be based on service.

(iii) the first instalment of these adjustments will not be available in any award prior to 1 January 1990 or three months after the variation of the particular award to implement the first stage structural efficiency adjustment, whichever is the later;

(iv) the second and subsequent instalments of these adjustments will not be automatic and applications to vary the relevant awards will be necessary;

(v) consistent with the commitments given by the ACTU in these proceedings, individual unions will be required to accept absorption of these adjustments to the extent of equivalent overaward payments;

(vi) supplementary payments will not be prescribed in the wages clauses of awards but in separate clauses; and

(vii) where the existing minimum classification rate in an award exceeds the minimum rate for that classification assessed in accordance with this decision, the excess amount is to be prescribed in a separate clause: that amount will not be subject to adjustment.

The Commission will conduct a review of the progress of both structural efficiency and minimum rates adjustment exercises in May 1990.

A Full Bench will be constituted in due course for the purpose of hearing further argument about the future of paid rates awards.

We have decided that all special cases should be tested against other relevant principles at the same time as the structural efficiency principle is being applied.

As a consequence of this decision, the existing principles require amendment. Those amended principles are set out in Appendix A to this decision.

Each union will be required to give a no extra claims commitment before the benefits of this decision are available.

The commitment will continue to operate until the principles as amended in this decision are reviewed. Upon application, that Review will commence in September 1990.

We also publish decisions on rates of pay in relation to the Telecom/APTU Award 1986, the Aircraft Industry (Domestic Airlines) Award 1980 and the Aircraft Industry (Qantas Airways Limited) Award 1980.

REASONS FOR DECISION

THE COMMISSION. This *National Wage* case decision is the latest in a series in which the Commission has sought to provide a framework to encourage the parties, through a combination of restraint and sustained effort, to improve efficiency and productivity.

The first decision, that of March 1987 (1987) 17 IR 65, laid down wage fixing principles the key to which was the restructuring and efficiency principle. The proper application of that principle required a positive approach by trade unions, their members and by employer organisations, their members and individual employers. In the event, and although the final result was uneven, many made positive efforts and derived benefits which not only produced immediate efficiency and productivity improvements but also laid the basis for future developments.

In its August 1988 decision (1988) 25 IR 170; Print H4000, the Commission decided not to continue that principle in its then form: some parties had exhausted its usefulness and others were less than successful in applying it. However, in so deciding, the Commission took the view that it was essential that any new wage system should build on the steps already taken to encourage greater productivity and efficiency. It said:

> "Attention must now be directed towards the more fundamental, institutionalised elements that operate to reduce the potential for increased productivity and efficiency."

and

> "to sustain real improvement in productivity and efficiency, we must take steps to ensure that work classifications and functions and the basic work patterns and arrangements in an industry meet the competitive requirements of that industry."

That decision provided the structural efficiency principle as the central element in a new system of wage fixation. The object was to give incentive and scope to the parties to examine and modernise their awards so as to better meet the competitive requirements of industry.

The Commission sat again in February, March and April 1989 to receive detailed reports on individual award reviews and to consider any matters of general principle that might need to be resolved. The February 1989 Review decision (1989) 27 IR 196; Print H8200, should be read in conjunction with the August 1988 decision and this decision.

In the course of the February 1989 Review the Commission made it clear that structural efficiency exercises should canvass a broad agenda. It also endorsed in principle the proposal of the Australian Council of Trade Unions (ACTU) which it had argued would provide "a national framework or blueprint" which would involve restructuring all awards of the Commission to provide "consistent, coherent award structures, based on training and skills acquired, and which bear clear and appropriate work value relationships one to another". However, the Commission did not endorse the particular award relationships proposed by the ACTU. The Commission decided to sit again on 6 June 1989 "to determine whether any wage adjustment should be made having regard to the progress of award restructuring, the tax changes that have been announced, the state of the economy and the extent to which unions are prepared to make the necessary commitments".

In the current proceedings, therefore, there are two main issues:

- first, the quantum, timing and basis of any wage increase to be made available for effective structural efficiency exercises; and
- second, how the approach endorsed in principle by the Commission for ensuring stable relationships between awards and their relevance to industry is best translated into practice.

In addition, other issues concerning the effective implementation and future direction of the principles, raised in the February Review, need to be addressed.

STRUCTURAL ADJUSTMENT CLAIMS

The ACTU claimed increases of $10 per week for workers at the basic skills/trainee entry level; $12.50 per week at the semi-skilled worker level; and $15 per week or 3%, whichever is the higher, at the tradesman level and above. It submitted that such increases should be available on individual award variation, consistent with the structural efficiency principle, in the first half of 1989/90. It sought further increases of the same order to be available in the second half of 1989/90 and paid no less than 6 months and no more than 7 months after the first increases. It also sought the provision of a mechanism whereby higher increases might be achieved on a limited basis to meet special circumstances.

These claims were consistent with an agreement between the ACTU and the Commonwealth, reached on 7 April 1989, and were supported by the Commonwealth in these proceedings. They were also supported by the Governments of Victoria, Tasmania, the ACT and by the Metal Trades Industry Association of Australia (MTIA), the Australian Federation of Construction Contractors, the Master Builders' — Construction and Housing Association Australia Inc, the Plumbing Employers Industrial Secretariat and the Fire Sprinkler Contractors' Association of Australia.

The Confederation of Australian Industry (CAI) opposed the ACTU claims and argued that the maximum increase in award rates "should be in the region of two and a half to 3 per cent, but certainly not exceeding 3 per cent". It submitted that such a figure was in line with the trend rate in productivity growth and was the maximum sustainable increase, consistent with moderating inflation, which would not further damage Australia's international competitiveness. CAI argued further that the increase should be in a percentage form; be established as a maximum for each award; be available in at least two instalments; and should not precede implementation of the results of individual structural efficiency exercises.

The Australian Mines and Metals Association (Inc) (AMMA) and the Governments of NSW and the NT supported the thrust of the CAI submissions in relation to the appropriate amount of wage adjustment. In addition NSW argued that if improvements did not turn out to be as effective as originally claimed the second instalment should be deferred, reduced or negated and further, that if unions fail to co-operate, the first instalment should be rescinded.

The Business Council of Australia (BCA) did not oppose wage increases on the completion of structural efficiency exercises. However, it did not propose a specific order of increase or a maximum increase. It argued rather that negotiations should be on an enterprise basis and that the parties "should themselves determine the magnitude of increases, the nature, strength and directness of linkages between wage rises and performance improvement and the timing of increases". It saw the ultimate objective as being the reduction of the gap between Australian and overseas "wage inflation" and the need, consistent with that objective, for "smaller wage rises or wage rises which flow through more slowly or a combination of both".

The Queensland Government submitted that wage adjustments at this time would not be consistent with economic requirements. However, it accepted that an increase could be approved if the Commission was satisfied that significant progress had been made towards restructuring a particular award and that any initial increase should be commensurate with the assessed value of the resultant productivity increase. Any subsequent increase or increases would depend on the completion of negotiations in satisfaction of the structural efficiency principle.

The Australian Chamber of Commerce also opposed the ACTU claim and submitted that the maximum wage increase allowable in view of the economic situation was 2% for the year 1989/90.

The National Farmers' Federation (NFF) submitted that the economic evidence provided no justification for awarding wage increases during the year 1989/90. As to the period beyond June 1990, it proposed that the Commission should further review the state of the national economy in May 1990. The Australian Wool Selling Brokers Employers Federation supported and endorsed the thrust of the NFF's submission.

STRUCTURAL EFFICIENCY ADJUSTMENT

This case was conducted against an economic background that should concern all Australians. As the Commonwealth put it:

> "On the economic front Australia's external imbalances remain serious and wages policy must continue to play a key part in addressing them. The current account deficit and associated external debt remain pre-eminent economic problems. Growth in demand has been much stronger than expected, resulting in inflationary pressures, a delay in expected improvements to the current account deficit and increases in Australia's external debt. Controlling demand pressures and getting the medium term adjustment process back onto track are central objectives of government policy.
>
> They will require among other things reducing inflationary pressures, improving our international competitiveness, and raising productivity while avoiding a wages explosion and recession. This in turn calls for continuing nominal wage restraint as part of an integrated package of accord policies including concerted action to improve labour market flexibility and productivity on a sustained basis." (Transcript, 161).

This view of the state of the economy has much in common with the conditions discussed by the Commonwealth during the *National Wage* case which led to the decision of 10 March 1987. The Commission then noted:

> "In these proceedings the Commonwealth expressed succinctly the economic predicament Australia faces. It said:
>
> > 'Correction of the imbalances that have developed in Australia's external accounts is necessary. If this is not done, the economy runs the risk of becoming enmeshed in a vicious circle of exchange rate depreciation, mounting inflation and deepening external imbalances.
> >
> > This would result in an erosion in overseas and domestic confidence in the economy's future, seriously undermining private investment, economic activity and employment. The current account deficit would eventually be reduced, but at a cost of a deep recession in the economy.'" (1987) 17 IR at 96.

At that time all parties to the proceedings accepted that Australia's economic performance had to be improved. It was the decision of 10 March 1987 that provided the restructuring and efficiency principle which was designed to accelerate the contribution that parties to awards could make to improve Australia's economic performance.

The period both immediately before and after that decision has seen substantial real wage restraint; an improvement in the relative labour costs and inflation rates as between Australia and its international competitors; reduced industrial disputation; a very substantial rise in employment; high capacity utilisation; a high level of profits; a high level of investment; and rapid growth.

In spite of the improvements in the domestic economy the comments quoted above from the March 1987 *National Wage* case decision seem even more appropriate today than they were then. That this is so is of great concern. There is no doubt that labour market reform and, in particular, award wage restraint have over recent years contributed positively to the rapid growth in many sectors of the economy. That contribution has clearly not been matched in other areas because fundamental imbalances have continued and, in terms of external markets, have worsened.

Micro-economic adjustments and wage reform in particular are medium to longer term options which cannot be expected to provide a substitute for alternative macro-economic policy options. Nevertheless it is also apparent that continued efficiencies and improvements in labour flexibility as well as ongoing wage restraint will remain necessary. The structural efficiency principle will maintain the process started in 1987 but it is clearly not the only answer to Australia's international economic difficulties.

Given the excessive level of imports, a fall-off in the level of export growth, the deterioration in the current account, a serious and continual deterioration in the balance of payments, the level of international debt, high interest rates, and renewed concerns about inflation, there are substantial economic grounds for rejecting any notion of wage increases at the present time.

There are however many interrelated elements involved in the work environment and economic considerations cannot be taken in isolation. Indeed to do so could bring about a perverse situation which may compound rather than reduce the economic difficulties.

Ultimately the test is not the pursuit of what is perfect in the abstract, but what is the best outcome which is workable and sustainable immediately and over the medium and longer term. Further, there are both economic and non-economic considerations which point to an alternative conclusion. These include:

- the movement in prices and in particular the erosion of the real value of wages;
- the effect on employees of high interest rates;
- the level of capacity utilisation and company profits;
- the tight labour market as reflected in employment and unemployment statistics, labour shortages, and overtime and vacancy data;
- the attitudes of governments and private employers in increasing management and executive salaries, and overaward payments in current economic circumstances;
- the agreement between the ACTU and the Commonwealth;

- support for that agreement by a number of State governments;
- the attitude of some large employer organisations and their membership covering a substantial number of individual employers in a number of industries;
- the expectations created by the agreement of the ACTU and the Commonwealth, and the support of State governments, the ACT and some major employers for that agreement;
- the current level of industrial disputes;
- the fact that commercial considerations, attitudes to comparative wage justice, the structure of trade union and employer organisations and the structure of awards remain fundamentally unchanged from the periods of earlier wage breakouts; and
- the importance of attaining the objectives of the structural efficiency principle.

These are factors that we record as matters that must bear on our decision. In varying degrees they were recognised by the parties but, in their essentials, they were summarised by MTIA in describing the basic reasons for its proposed agreement with the Metal Trades Federation of Unions (MTFU). MTIA said:

> "Firstly, the metal and engineering industry has an earnest, indeed it could be said to be, a passionate desire to become internationally competitive. If we do not, the manufacturing industry in this country faces a bleak future.
>
> Secondly, an essential element in the quest for competitiveness is labour market reform. There is unanimity that the operation of our labour market is a substantial hindrance to improved efficiency and productivity.
>
> Thirdly, given the institutional framework we operate in, which includes a powerful and influential trade union movement which has achieved an agreement with the federal government on wage outcomes in 1989/90, and given the explosive pressures on wages caused by labour shortages, cuts in real wages over the last six years and current high interest rates, MTIA accepts the reality that we are not going to achieve the reforms that we so desperately need at a neutral cost in the short term.
>
> Fourthly, given what we have been able to achieve in our agreement on award restructuring, MTIA members, those who have to pay the wage increases, have overwhelmingly endorsed the agreement.
>
> And, fifthly, MTIA disagrees with the view expressed by some organisations that there is no risk of a wages explosion. We see it as a very real probability, a probability we have no desire to test. But we do not have to test it. Here, we have an opportunity to manage the wages outcome and at the same time, commence to implement our program of workplace reform."

MTIA represents employers covered by over 350 federal awards, 82 NSW State awards, 29 Victorian State awards, 72 Queensland State awards and 41 SA State awards.

In light of all the factors we have referred to we have come to the conclusion that we must reject the submissions of those who argued that there are no grounds to justify wages increases during the year 1989/90.

To achieve the goals sought, the structural efficiency principle must

increase flexbility by changing employment conditions, work patterns, employee mobility, education and training. These cannot be achieved without some cost to employers and it is unrealistic to suggest otherwise in the current environment.

We also reject the view of the BCA that no ceiling should be imposed: to accept such a proposal would be to risk economically unsustainable wage increases. Furthermore, we do not accept that the 3% ceiling advocated by CAI is practicable in light of the countervailing factors we have mentioned.

The ACTU and the Commonwealth contended that the increases proposed, properly applied, would not exceed the objective of a 6.5% increase in average weekly earnings in 1989/90. On the other hand, CAI, BCA and NFF, on the basis of differing estimates, contended that the effect would be much higher. The main area of difference between the ACTU and these organisations lay in their individual estimates of the effect of wage increases still flowing through the system. On the basis of the material and analysis put to us, we have concluded that the employer organisations have overestimated those effects.

In all these circumstances we are satisfied that the proposal put by the ACTU and the Commonwealth is capable of being limited to the level of increase in average weekly earnings which is contemplated. We have decided to adopt this proposal for the purposes of the structural efficiency adjustment.

Consequently it is our decision that an adjustment in rates of pay will be allowable for completion of successful exercises under the structural efficiency principle. Such an adjustment will comprise:

(i) a first increase of $10 per week for workers at the basic skills/trainee level; $12.50 per week at the semi-skilled worker level; and $15 per week or 3%, whichever is the higher, at the tradesman or equivalent level and above; and

(ii) a second increase of the same order as the first increase, to be paid not less than 6 months after the first increase.

A number of factors are relevant to the likely labour cost impact of this decision. These include:

- dates of operation of award variations;
- the extent to which translation arrangements from the old to new classification structures and their timing result in actual wage increases;
- the extent to which any increases over and above the structural efficiency adjustment are allowed;
- the extent of wages drift; and
- productivity improvements induced as a consequence of the structural efficiency principle.

Our view on each of these matters is as follows.

We have decided that the first increase should be accessible from the date of this decision. However, the actual date of operation for an award will be the date on which that award is varied following examination by the Commission of the proposals for restructuring and the giving of commitments. The second increase will not be automatic but subject to application.

This is consistent with the submission of the Commonwealth that the taxation and social wage measures being implemented as part of the ACTU/Commonwealth Agreement would "allow a much needed breathing

space for the development of genuine award restructuring initiatives, thereby consolidating the new directions in wage fixing laid down by the Commission". (Transcript, 163.)

We expect that many structural efficiency exercises will involve new classification structures. In those cases the parties to particular awards will need to apply specific procedures governing the translation of workers from the old to the new structure. This in turn demands that the new classification structure levels be clearly defined. In this connection we note that the MTIA/MTFU Agreement provides for a trial of the new classification structure before award changes are made. This is a sensible procedure and we consider that it should be adopted by other award parties, particularly where an award covers a substantial number of individual employers and establishments.

It is our intention that the translation of workers to new classification structures in the various awards should occur with little cost impact apart from that resulting from the structural efficiency adjustment. In this connection the ACTU stated:

> "... any award wage increases in terms of movement from the old to the new classification would be subject to absorption, subject to receipt of the restructuring adjustment as an actual rate increase". (Transcript, 856.)

When the structural efficiency exercise involves reducing the number of award classifications by broadbanding and multi-skilling, it is important that the intent of the broadbanding and multi-skilling be effectively implemented. Hence workers should not be placed in a classification unless they have the training and experience necessary to perform the full range of the functions comprehended by the new classification and are actually required to perform those functions. Consequently the parties should ensure that sufficient time is provided for immediate training needs and, where necessary, on the job experience before finalising the translation of existing employees to the new classification structure. In moving to the new classifications the parties should consider stepped wage increases up to the new classification levels.

Furthermore, we believe that the second instalment of the structural efficiency adjustment should only be available if the Commission is satisfied that the principle has been properly implemented and will continue to be implemented effectively. In this regard, our comments concerning the need for a wider agenda in the special case decisions dealing with the Telecom/APTU Award 1986 (30 IR 78; Print H8350) and the Aircraft Industry (Domestic Airlines) Award 1980 (30 IR 74; Print H8356) should be noted.

The conclusions of this Full Bench in relation to the operation of the other wage fixing principles and special cases should mean that increases from these sources are also limited.

We have particular concern about wages drift which has increased in recent months. While annual growth in award rates remains below 5%, average weekly earnings growth is currently running at just under 7%. The reason for this is not readily discernible but compositional changes in the workforce, the growth in managerial and executive salaries and the granting of overaward payments by employers would all have contributed. Too many employers still persist with their own form of market adjustment of wages based on area rates surveys. Such surveys and the actions that invariably

follow them are a recipe for wage breakouts. They have been instrumental in encouraging employers to participate in a type of area wages ranking system with an in-built and continuing escalation effect which has aptly been described as a spiral of nonsense. This practice is contrary to both the spirit and purpose of the wage fixation principles and encourages workers to break the commitments to those principles made by their unions on their behalf.

Compositional change in the workforce is unremarkable and desirable in a dynamic and growing community. However, over-fast growth in managerial and executive salaries and overaward payments inconsistent with the wage fixation principles inhibit attempts to maintain wage restraint. Simple commonsense, apart from equity, dictates that employers should not attempt to apply two sets of rules within their workforce. The nature of the structural efficiency principle and its potential to induce productivity improvement, its requirement for positive, co-operative effort by both employer and worker and the workers' unions, and the trade union movement's commitment to the wage fixation system demands that employers also scrupulously comply with the principles.

Providing the implementation of the award changes proceed in accordance with this decision, we consider the decision will not adversely affect the economy in the short term and will in time, assist in achieving improved economic performance. The major success in the economy in the past 5 years has been the creation of over a million new jobs. While this is expected to stabilise as a consequence of current policies, no immediate or significant increases in unemployment are anticipated as a direct result of this decision. We anticipate that the results will also be consistent with a reduction in inflation in the medium to longer term.

A final comment must be made on structural efficiency adjustment. Notwithstanding our affirmation in the February 1989 Review decision that there was no limitation imposed on the agenda available for structural efficiency exercises, we are concerned that conditions of employment have not been included in negotiations as a matter of course. Indeed, it was asserted by some employers that in a number of cases, restrictions had been placed on the restructuring agenda.

It will be recalled that in the August 1988 decision the Commission said that

> "The measures to be considered should include but not be limited to:
>
> - establishing skill-related career paths which provide an incentive for workers to continue to participate in skill formation;
> - eliminating impediments to multi-skilling and broadening the range of tasks which a worker may be required to perform;
> - creating appropriate relativities between different categories of workers within the award and at enterprise level; and
> - ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry."

In relation to the last measure in particular we are of the view that many awards have scope for a less prescriptive approach and, without limiting the opportunities for innovation, the following are some of the measures which are appropriate for consideration:

- averaging penalty rates and expressing them as flat amounts;
- compensating overtime with time off;
- flexibility in the arrangement of hours of work, for example:

- wider daily span of ordinary hours
- shift work, including 12 hour shifts
- ordinary hours to be worked on any day of the week
- job sharing;

- introducing greater flexibility in the taking of annual leave by agreement between employer and employee;
- rationalising the taking of annual leave to maximise production;
- reviewing the incidence of, and terms and conditions for, part-time employment and casual employment;
- reducing options for payment of wages other than by electronic funds transfer;
- extending options as to the period for which wages must be paid to include fortnightly and monthly payment;
- changes in manning consistent with improved work methods and the application of new technology and changes in award provisions which restrict the right of employers to manage their own business unless they are seeking from the employees something which is unjust or unreasonable;
- reviewing sick leave provisions with the aim of avoiding misuse; and
- developing appropriate consultative procedures to deal with the day to day matters of concern to employers and workers.

In addition, we consider that the following matters should be placed on the agenda for the better administration of awards:

- updating and/or rationalising the list of award respondents; and
- rationalising the number of awards covering any one employing body.

Proposals for changes of this nature should not be approached in a negative cost-cutting manner and should as far as possible be introduced by agreement.

MINIMUM RATES ADJUSTMENTS

In its February 1989 Review decision, the Commission stated:

> "The fundamental purpose of the structural efficiency principle is to modernise awards in the interests of both employees and employers and in the interests of the Australian community: such modernisation without steps being taken to ensure stability as between those awards and their relevance to industry would, on past experience, seriously reduce the effectiveness of that modernisation." (1989) 27 IR at 201.

The Commission went on to endorse in principle the approach proposed by the ACTU. That meant minimum rates awards would be reviewed:

> "to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other minimum rates awards". (1989) 27 IR at 201.

In these proceedings, the ACTU sought specific endorsement of the following classification rates and supplementary payments:

Classification	Minimum classification rate	Supplementary rate
	$	$
Building industry tradesperson	356.30	50.70
Metal industry tradesperson	356.30	50.70
Metal industry worker, grade 4	341.90	48.80
Metal industry worker, grade 3	320.50	45.80
Metal industry worker, grade 2	302.90	43.10
Metal industry worker, grade 1	285.00	40.60
Storeperson	325.50	46.50
Driver, 3-6 tonnes	325.50	46.50
Filing clerk — 1st year	337.00	28.00
— 2nd year	337.00	38.00
— 3rd year	337.00	48.00
General clerk — 1st year	354.40	30.60
— 2nd year	354.40	40.60
— 3rd year	354.40	50.60

The Commission was informed that these rates and the relationships they bear to each other had been endorsed collectively by the trade union movement after long deliberation; they were also supported by the agreement made by the ACTU and the Commonwealth. It was argued that they would provide a firm base for sustainable relationships across federal awards and thus provide a stable base for wage fixation.

The resolution of the issues in this part of the case was not made any easier by the reluctance of the various employer organisations to fully debate the major issues raised by the February 1989 Review decision. Employers generally took the view that no substantial problem existed, but alternatively, if any problem did exist, there were other ways of dealing with it.

The employers argued that the cost of implementing the decision would be substantial and, indeed, prohibitive given the current economic situation. CAI tendered the results of a survey it had conducted to show that a significant proportion of workers either received no overaward payments or were paid relatively small overawards. CAI argued that this survey showed that ACTU estimates based on broad Australian Bureau of Statistics figures understated the incidence of such workers. MTIA also tendered the results of a survey of 200 members to show a similar result.

We do not intend to analyse those surveys in this decision. Suffice to say that, while they might be open to criticism for their methodology, we acknowledge that the results are consistent with a broad view that there are a substantial number of workers who receive very little or no overaward payments. We also accept that this is a significant element in assessing the possible cost impact of these adjustments which were approved in principle in the Commission's decision in the February 1989 Review.

The employers submitted that proper relationships could not be established between awards until new classification structures and definitions were established. They also argued that the Commission should not adopt what were said to be the unilateral, arbitrary assessments put forward by the

ACTU as to appropriate relativities between the classifications in key awards.

Finally, the employers submitted that, notwithstanding trade union commitment on absorption of these adjustments where applicable, both the nature and practices of industrial relations in industry and past experience meant that the prospect of actual absorption had to be doubtful.

Without firm guidance on appropriate relativities, individual structural efficiency exercises could create situations which would not only continue but possibly worsen the very position that is required to be rectified. For this reason we reject the proposition that the question of relativities should be left completely until the details of structural efficiency exercises are completed.

Subject to what we say later in this decision, we have decided that the minimum classification rate to be established over time for a metal industry tradesperson and a building industry tradesperson should be $356.30 per week with a $50.70 per week supplementary payment. The minimum classification rate of $356.30 per week would reflect the final effect of the structural efficiency adjustment determined by this decision.

Minimum classification rates and supplementary payments for other classifications throughout awards should be set in individual cases in relation to these rates on the basis of relative skill, responsibility and the conditions under which the particular work is normally performed. The Commission will only approve relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards. Before that requirement can be satisfied clear definitions will have to be established.

We are not prepared to approve specific wage relativities proposed by the ACTU on behalf of the trade union movement. Nevertheless, we consider it appropriate for relativities to be established for both minimum classification rates and supplementary payments for the following key classifications within the ranges set out below:

	% of the tradesperson rate
Metal industry worker, grade 4	90-93
Metal industry worker, grade 3	84-88
Metal industry worker, grade 2	78-82
Metal industry worker, grade 1	72-76
Storeman/packer	88-92
Driver, 3-6 tonnes	88-92

In some cases, existing minimum classification rates will already contain an element of overaward payment which should more properly be included as part of the supplementary payment. This will require appropriate adjustment. Similarly, existing minimum classification rates may contain amounts for disabilities and these should be separately expressed.

It will be noted that with the exception of the clerical classifications, we have indicated a range of relativities between the key tradespersons and the other classifications which were the subject of debate. The material available on clerical rates was inadequate to permit the establishment of a similar range of relativities. Furthermore, the ACTU proposed relativities for a number of other classifications in a range of industries, but these too were accompanied by insufficient material to permit any conclusions.

In light of this decision it will no longer be necessary to conduct surveys in relation to overaward payments in individual award areas.

To achieve a proper and lasting reform of awards it is essential that the structural efficiency exercise and the proper fixation of minimum award rates be treated as a package. We are also conscious of the fact that:

(i) the minimum rates adjustment exercise can in itself cause a significant cost impact if the positive co-operation of both workers and employers so necessary to underwrite the exercise is found to be lacking; and

(ii) the minimum rates adjustment exercise could detract from the benefits to be obtained from the structural efficiency principle if priority is not given to that principle.

In making these observations, we are not overlooking the commitments that the ACTU has been authorised to give on behalf of the trade union movement.

However, bearing in mind the statutory injunction of s 90 of the *Industrial Relations Act* 1988 and the importance to the community of success in this endeavour, we determine that the minimum classification rate and supplementary payment exercise shall be applied in accordance with the following guidelines:

(i) the appropriate adjustments in any award will be applied in not less than four instalments which will become payable at six monthly intervals;

(ii) in appropriate cases longer phasing in arrangements may be approved or awarded and/or parties may agree that part of a supplementary payment should be based on service. In this connection the ACTU stated: "It is recognised by the ACTU that in some industries an amount of between $8 to $10 supplementary payment might be appropriately paid after three months service";

(iii) the first instalment of these adjustments will not be available in any award prior to 1 January 1990 or three months after the variation of the particular award to implement the first stage structural efficiency adjustment, whichever is the later;

(iv) the second and subsequent instalments of these adjustments will not be automatic and applications to vary the relevant awards will be necessary;

(v) consistent with the commitments given by the ACTU in these proceedings, individual unions will be required to accept absorption of these adjustments to the extent of equivalent overaward payments;

(vi) supplementary payments will not be prescribed in the wages clauses of awards but in separate clauses; and

(vii) where the existing minimum classification rate in an award exceeds the minimum rate for that classification assessed in accordance with this decision, the excess amount is to be prescribed in a separate clause: that amount will not be subject to adjustment.

The Commission will conduct a review of the progress of both structural efficiency and minimum rates adjustment exercises in May 1990.

On the submissions we heard in this case, there must be concern about the concept of absorption. We emphasise that absorption requires discipline on the part of both employers and unions and, in the May 1990 Review, the

Commission will make detailed inquiry of both employer and union parties in order to check actual practice.

We cannot overemphasise the importance of successfully applying the structural efficiency principle and the minimum rates adjustment process. These exercises provide an opportunity for the parties to display the maturity required to overcome the wage instabilities with which the community is only too familiar. It also provides the opportunity to take an essential step towards institutional reform which is a prerequisite to a more flexible system of wage fixation. As part of that future we envisage that minimum classification rates will not alter their relative position one to another unless warranted on work value grounds. On the other hand it is our expectation that supplementary payments might vary as between industries, industry sectors, individual employers or on a geographic or some other basis.

Finally, the inclusion of, and increase in, supplementary payments which form part of the exercise is designed, inter alia, to assist those "employees covered by minimum rates awards who have suffered from the inequities of the present system due to the level of their award rates and their lack of substantial overaward payments". ((1989) 27 IR at 200; Print H8200, at 5). However, the unions cannot expect to have supplementary payments included in awards to compensate for the lack of overaward payments for some employees and conduct overaward campaigns for others. To this extent the inclusion of supplementary payments in awards is a concomitant of the no extra claims commitment.

As was stated in the February 1989 Review decision, the alternative to the parties not seizing these opportunities and making them work is:

> "the Commission may be left with little choice but to resort to strict prescription of minimum rates only."

PAID RATES AWARDS

For a considerable period of time, the complex issue of paid rates awards and their interaction with minimum rates awards has been an ongoing problem. The complexity has arisen not merely because paid rates awards have been adjusted from time to time on the basis of market movements while, generally speaking, minimum rates awards have not. Although this has changed somewhat with the granting in recent times of supplementary payments there are other problems: for example, the timing of the review of paid rates awards; the market that is relevant to that review; and the appropriate position in that market. Moreover, changes in paid rates award prescriptions invariably have an immediate impact on the market used as the reference point, a market that may and normally includes both other paid rates and minimum rates awards. Again, problems of relativities have arisen where a particular paid rates award has been adjusted and this has affected workers in other areas, and other groups of workers in the same industry, industry sector or employing body.

The issue was discussed, albeit briefly, in the February 1989 Review and in its decision of 25 May 1989 the Commission, while drawing no final conclusions, commented that "On recent experience there are grounds for doubting the wisdom of attempting to maintain paid rates awards in the private sector".

In the current proceedings only brief submissions were put on this subject and these for the most part could be categorised mainly as expressions of

interest by some parties for the retention of paid rates awards rather than a debate as to their efficacy and means of overcoming the problems they create.

In view of this a Full Bench will be constituted in due course for the purpose of hearing further argument about the future of paid rates awards. In those proceedings, parties will be expected to address, inter alia, the following matters:

(i) whether any new paid rates awards should be made;

(ii) whether the parties to existing paid rates awards, both in the private and public sectors, should be required within a given period to apply for cancellation of their existing paid rates awards and their replacement with agreements certified under s 115 of the Act;

(iii) the basis on which rates of pay in paid rates awards or s 115 agreements should be assessed;

(iv) whether paid rates awards or s 115 agreements should only be approved where they cover all workers in an establishment conducted by a single employer; and

(v) whether paid rates awards or s 115 agreements within an industry or industry sector should only be reviewed collectively so as to ensure proper attention is given to internal relativities.

Pending the outcome of the foreshadowed Full Bench proceedings we have determined in relation to paid rates awards that:

- except in special cases, the Commission will not make new paid rates awards;
- it is no longer appropriate to apply the decision in *General Motors-Holden's Limited and Ford Australia Ltd* case, of awarding:

  > "an increase to restore to the rates under the awards the relationship which they had when established vis-à-vis rates actually paid for similar work in industries located near the establishments of these two companies." (1981) 260 CAR 3.

- rates in paid rates awards should not be fixed at a level which would affect the rates for other workers;
- paid rates awards or agreements should contain clear classification definitions;
- statutory declarations will be required from all parties involved to the effect that the integrity of those awards or agreements will be preserved;
- if breached, paid rates awards should be discontinued and appropriate minimum rates should be prescribed;
- no increase at the base rate which is greater than the structural efficiency adjustment will be allowed in a paid rates award; and
- subject to special cases, no special adjustment may be approved which cannot be justified on the basis of the creation of a proper career structure through structural efficiency.

An agreement which adopts paid rates, and in respect of which the parties seek certification under s 115 of the Act, will be subject to the foregoing requirements.

SPECIAL CASES

Both the ACTU and the Commonwealth contended that increases beyond those generally available for structural efficiency may be approved in special cases, provided that the cases are processed through a special case mechanism and provided there is negligible cost or it can be demonstrated that it should be approved on public interest grounds.

It was generally accepted that applications said to fall into the category of special cases must be dealt with at the same time as, and in the context of, the application of the structural efficiency principle.

We have decided that all special cases should be tested against other relevant principles at the same time as the structural efficiency principle is being applied. We consider also that where a special case is claimed, it should be the subject of an application for reference pursuant to s 107 of the Act. It will then be a matter for the President to decide whether it should be dealt with by a Full Bench.

We recognise that there might be some workplaces where the objectives of the structural efficiency principle have already been achieved and there is no scope for further efficiency improvements. We would expect such instances to be rare. However, any such instances may be processed as special cases.

REQUIREMENTS FOR SUCCESS

Having regard to the material before us, in particular the evidence of increases still passing through the system, the amount proposed as a result of these proceedings, and the increase in disposable incomes made available by the recent cuts in income tax, there are additional important requirements if the package is to achieve its aims.

First, to achieve the result expected, wage increases must be carefully phased-in in accordance with this decision.

Second, wages drift will need to return to lower levels. This can be achieved if employers actively support the consistent application of the principles. These principles provide that movements in wages and salaries and improvements in conditions — whether they occur in the public or private sector, whether they be award or overaward, whether they result from consent or arbitration — must fall within the limits established by this decision. We have already alluded to the difficulties created by employers applying differing rules to different people.

Further, it is fundamental to success that the unions make and keep the following commitments:

- commitment to new award structures including the reform of awards into base rates and supplementary payments;
- commitment to acceptance of the broad award framework and the relationships established;
- acceptance of classification change and new job specifications;
- preparedness to undertake training associated with a wider range of duties; and
- absorption of increases arising out of the minimum rates adjustment.

A no extra claims commitment from each union will also be required before the benefits of this decision are available.

We note that the ACTU stated that the unions were prepared to absorb increases other than the structural efficiency adjustment. We are satisfied

that the ACTU accepts that if these commitments are not met, the wages package cannot be sustained and the drive to reform the system will founder.

Further, if any union, or a group or class of its members, refuses to give the necessary commitments or indicates by its conduct that it is not prepared to work within the framework of the principles, then that union or a group or class of its members should not receive any benefits from this package.

There is also a need for consistency in approach on the part of all tribunals, Commonwealth and State. As noted in the February 1989 Review decision:

> "In many instances, employees in the same industry or enterprise may be bound by a mixture of federal and State awards and experience has shown that care must be taken to ensure that appropriate relativities are maintained in decisions of the relevant tribunals." (1989) 27 IR at 205,

and further,

> "In order to guard against industrial disputation and inappropriate wage outcomes, this Commission will utilise the co-operative powers available to it under Pt VII of the Act and will continue to pursue the objective of achieving a consistent approach."

INCENTIVE SCHEMES

In the 1989 Review a number of parties "raised the issue of treatment of profit sharing, performance based systems of pay and payment by results schemes in awards". In that decision the Commission said:

> "Our initial reaction is that such schemes can only operate in minimum rates awards without supplementary payments. However, the issue was not extensively debated in these proceedings and we therefore are not prepared to make a final determination without giving the parties the opportunity of addressing it in more detail." (1989) 27 IR at 203.

Debate in these proceedings again fell short of the detail which is necessary to make a final determination. Nevertheless, we are of the opinion that current payment by result schemes should continue to be part of the award structure and:

- it is essential that workers covered by such a scheme be subject to the protection of prescribed minimum rates plus supplementary payments for the work involved;
- additional payments derived from payment by results schemes should be absorbed into supplementary payments; and
- supplementary payments should not be used for the calculation of payment by results (although the re-expression of an existing base rate in an award as a minimum classification rate and a supplementary payment should not have the effect of prejudicing employees subject to existing incentive schemes).

THE PRINCIPLES

During the proceedings, the relationship between the structural efficiency principle and the other wage fixing principles was debated. In light of that debate, we have decided that:

(i) structural efficiency exercises should incorporate all past work value considerations;

(ii) any extensions of existing awards to include new classifications should form part of the structural efficiency exercises;

(iii) claims based on anomalies and/or inequities will continue to be treated as special cases;
(iv) there is no separate role for the operation of a supplementary payments principle; and
(v) claims for new allowances will be dealt with in accordance with the relevant portion of the allowances principle but, consistent with this decision, existing work-related allowances may be increased by up to 3% at the time of each instalment of the structural efficiency adjustment.

As a consequence of this decision, the existing principles require amendment. Those amended principles are set out in Appendix A to this decision.

NO EXTRA CLAIMS COMMITMENT

As noted earlier, each union will be required to give a no extra claims commitment before the benefits of this decision are available. That commitment shall be inserted into the award concerned in the following terms:

> "It is a term of this award (arising from the decision of the Australian Industrial Relations Commission in the *National Wage* case of 7 August 1989 the terms of which are set out in (1989) 30 IR 81; Print H9100) that the union(s) undertake(s), for the duration of the principles determined by that decision, not to pursue any extra claims, award or overaward, except when consistent with those principles."

The commitment will continue to operate until the principles as amended in this decision are reviewed. Upon application, that Review will commence in September 1990.

APPENDIX A

THE PRINCIPLES

These principles have been developed with the aim of providing, for their period of operation, a clear framework under which all concerned — employers, workers and their unions, governments and tribunals — can co-operate to ensure that labour costs are monitored; that measures to meet the competitive requirements of industry and to provide workers with access to more varied, fulfilling and better paid jobs are positively examined; and that lower paid workers are protected.

The principles provide that movements in wages and salaries and improvements in conditions — whether they occur in the public or private sector, whether they be award or overaward and whether they result from consent or arbitration — must fall within the level allowable in accordance with the *National Wage* case decision of 7 August 1989.

In considering whether wages and salaries or conditions should be awarded or changed for any reason either by consent or arbitration, the Commission will guard against contrived arrangements which would circumvent these principles and their aims.

COMMITMENT

Any claims for improvements in pay and conditions must be processed in accordance with these principles. No adjustments will be approved by the Commission unless a union concerned in an award gives a commitment that

it will not pursue any extra claims, award or overaward, except in compliance with these principles.

When this no extra claims commitment is given, it shall be inserted in the award concerned in the following terms:

> "It is a term of this award (arising from the decision of the Australian Industrial Relations Commission in the *National Wage* Case of 7 August 1989 the terms of which are set out in (1989) 30 IR 81; Print H9100) that the union(s) undertake(s), for the duration of the principles determined by that decision, not to pursue any extra claims, award or overaward, except when consistent with those principles."

WAGE ADJUSTMENTS

1. *Structural Efficiency Adjustment*

   There will be allowable under these principles:

   (i) a first increase of $10.00 per week for workers at the basic skills/trainee level; $12.50 per week at the semi-skilled worker level; and $15.00 per week or 3%, whichever is the higher, at the tradesman or equivalent level and above;

   (ii) a second increase of the same order as in (i) above to be paid not less than 6 months after the first increase;

   (iii) the first increase will be accessible from 7 August 1989 but the actual date of operation for an award will be the date on which that award is varied in accordance with the *National Wage* case decision of 7 August 1989; and

   (iv) the second increase will not be automatic, but subject to application.

2. *Minimum Rates Adjustment*

   Minimum rates adjustments allowable in the *National Wage* case decision of 7 August 1989 shall be in accordance with the following:

   (i) the appropriate adjustments in any award will be applied in not less than 4 instalments which will become payable at 6 monthly intervals;

   (ii) in appropriate cases longer phasing-in arrangements may be approved or awarded and/or parties may agree that part of a supplementary payment should be based on service;

   (iii) the first instalment of these adjustments will not be available in any award prior to 1 January 1990 or 3 months after the variation of the particular award to implement the first stage structural efficiency adjustment, whichever is the later;

   (iv) the second and subsequent instalments of these adjustments will not be automatic and applications to vary the relevant awards will be necessary; and

   (v) acceptance of absorption of these adjustments to the extent of equivalent overaward payments is a prerequisite to their being applied in any award.

3. *Special Cases*

Any claim for increases in wages and salaries or improvements in conditions which exceed the maximum increases allowable under the *National Wage* case decision of 7 August 1989 will be processed as a special case before a Full Bench of the Commission. Such cases should be

considered in accordance with the structural efficiency and other relevant principles.

STRUCTURAL EFFICIENCY

Structural efficiency adjustments allowable under the *National Wage* case decision of 7 August 1989 will be justified in accordance with this principle if the Commission is satisfied that the parties to an award have co-operated positively in a fundamental review of that award and are implementing measures to improve the efficiency of industry and provide workers with access to more varied, fulfilling and better paid jobs. The measures to be considered should include but not be limited to:

- establishing skill-related career paths which provide an incentive for workers to continue to participate in skill formation;
- eliminating impediments to multi-skilling and broadening the range of tasks which a worker may be required to perform;
- creating appropriate relativities between different categories of workers within the award and at enterprise level;
- ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry;
- including properly fixed minimum rates for classifications in awards, related appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments;
- updating and/or rationalising the list of respondents to awards; and
- addressing any cases where award provisions discriminate against sections of the workforce.

Structural efficiency exercises should incorporate all past work value considerations.

WORK VALUE CHANGES

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

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

However, rather than create a new classification it may be more appropriate in the circumstances of a particular case to fix a new rate for an existing classification or to provide for an allowance which is payable in addition to the existing rate for the classification. In such cases the same strict test must be applied.

(b) Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work

is performed by a particular employee and not by increasing the rate for the classification as a whole.

(c) The time from which work value changes should be measured is the last work value adjustment in the award under consideration but in no case earlier than 1 January 1978. Care should be exercised to ensure that changes which were taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this principle.

(d) Where a significant net alteration to work value has been established in accordance with this principle, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work. However, where appropriate, comparisons may also be made with other wages and work requirements within the award or to wage increases for changed work requirements in the same classification in other awards provided the same changes have occurred.

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

(f) The Commission should guard against contrived classifications and over-classification of jobs.

(g) Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any principle, shall not be taken into account in any claim under this principle.

ALLOWANCES

(a) *Existing Allowances*

(i) Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses.

(ii) Existing allowances which relate to work or conditions which have not changed may be adjusted from time to time to reflect national wage increases, except where a flat money amount has been awarded, provided that shift allowances expressed in awards as money amounts may be adjusted for flat money amount national wage increases.

(iii) Existing allowances for which an increase is claimed because of changes in the work or conditions will be determined in accordance with the relevant provisions of the work value changes principle.

(b) *New Allowances*

(i) New allowances to compensate for the reimbursement of expenses incurred may be awarded where appropriate having regard to such expenses.

(ii) No new allowances shall be created unless changes in work have occurred or new work or conditions have arisen: where changes have occurred or new work and conditions have arisen, the question of a new allowance, if any, shall be determined in accordance with the relevant principle.

The relevant principle in this context may be work value changes or first awards and extensions to existing awards principle.

(c) *Service Increments*
  (i) Existing service increments may be adjusted in the manner prescribed in (a)(ii) of this principle.
  (ii) New service increments may only be allowed to compensate for changes in the work and/or conditions and will be determined in accordance with the relevant provisions of the work value changes principle.

SUPERANNUATION

(a) Agreements may be certified or consent awards made providing for employer contributions to approved superannuation schemes for employees covered by such agreements or consent awards provided those agreements or consent awards:
  (i) operate from a date determined or approved by the Commission; and
  (ii) do not involve the equivalent of a wage increase in excess of 3% of ordinary time earnings of employees.
(b) Where, following a claim for employer contributions to approved superannuation schemes for employees, the parties are unable to negotiate an agreement consistent with this principle, and conciliation proceedings before the Commission have also failed to achieve such an agreement, the Commission shall, subject to the provisions of the Act, arbitrate on that claim.
(c) The Commission will not grant retrospective operation for any matters determined in accordance with this principle.
(d) For the purposes of this principle, approved superannuation scheme means a scheme approved in accordance with the Commonwealth Operational Standards for Occupational Superannuation Funds.

STANDARD HOURS

(a) In dealing with claims for a reduction in standard hours to 38 per week, the cost impact of the shorter week should be minimised. Accordingly, the Commission should satisfy itself that as much as possible of the required cost offset is achieved by changes in work practices.
(b) Claims for reduction in standard weekly hours below 38, even with full cost offsets, will not be allowed.
(c) Changes in work practices designed to minimise the cost of introducing shorter hours will not be a consideration for claims under any other principle.

CONDITIONS OF EMPLOYMENT

Except for the flow-on of test case provisions, applications for changes in conditions other than those provided elsewhere in the principles will be considered in the light of their cost implications both directly and through flow-on and must be processed in national wage case proceedings or before a specially constituted Full Bench.

ANOMALIES AND INEQUITIES

(a) *Anomalies*
  (i) In the resolution of anomalies, the overriding concept is that the Commission must be satisfied that any claim under this principle will not be a vehicle for general improvements in pay and

conditions and that the circumstances warranting the improvement are of a special and isolated nature.

(ii) Decisions which are inconsistent with the principles of the Commission applicable at the relevant time should not be followed.

(iii) The doctrines of comparative wage justice and maintenance of relativities should not be relied upon to establish an anomaly because there is nothing rare or special in such situations and because resort to these concepts would destroy the overriding concept of this principle.

(b) *Inequities*

(i) The resolution of inequities existing where employees performing similar work are paid dissimilar rates of pay without good reason, shall be processed through the Anomalies Conference and not otherwise, and shall be subject to all the following conditions:

(1) The work in issue is similar to the other class or classes of work by reference to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is performed.

(2) The classes of work being compared are truly like with like as to all relevant matters and there is no good reason for dissimilar rates of pay.

(3) In addition to similarity of work, there exists some other significant factor which makes the situation inequitable. An historical or geographical nexus between the similar classes of work may not of itself be such a factor.

(4) The rate of pay fixed for the class or classes of work being compared with the work in issue is a reasonable and proper rate of pay for the work and is not vitiated by any reason such as an increase obtained for reasons inconsistent with the principles of the Commission applicable at the relevant time.

(5) Rates of pay in minimum rates awards are not to be compared with those in paid rates awards.

(ii) In dealing with inequities, the following overriding considerations shall apply:

(1) The pay increase sought must be justified on the merits.

(2) There must be no likelihood of flow-on.

(3) The economic cost must be negligible.

(4) The increase must be a once-only matter.

(c) *Procedure*

Any claim made on the grounds of this principle shall be processed as a special case.

PAID RATES AWARDS

(a) Except in special cases, the Commission will not make new paid rates awards.

(b) In the making of a first paid rates award the conditions as provided in the first awards and extensions to existing awards principle must be complied with.

(c) Rates in paid rates awards should not be fixed at a level which would affect the rates for other workers.

(d) In assessing an adjustment in rates of pay in a paid rates award it is

inappropriate to apply the *General Motors-Holden's Limited and Ford Australia Ltd* case approach of:

> "awarding an increase to restore to the rates under the awards the relationship which they had when established vis-à-vis rates actually paid for similar work in industries located near the establishments of these two companies". (1981) 260 CAR 3.

(e) Subject to special cases, no special adjustment will be approved for paid rates awards which cannot be justified on the basis of the creation of a proper career structure through structural efficiency.

(f) In paid rates awards no increase at the base rate which is greater than the structural efficiency adjustment will be approved.

(g) The rates of pay prescribed by a new paid rates award must be expressed in terms of properly fixed minimum classification rates plus supplementary payments.

(h) Paid rates awards should contain clear classification definitions.

(i) Statutory declarations will be required from all parties to paid rates awards to the effect that the integrity of those awards will be preserved.

(j) If a paid rates award fails to maintain itself as a true paid rates award that award should be discontinued and replaced by a minimum rates award.

FIRST AWARDS AND EXTENSIONS TO EXISTING AWARDS

(a) In the making of a first award, the long established principles shall apply ie prima facie the main consideration is the existing rates and conditions.

(b) In the extension of an existing award to new work or to award-free work the rates applicable to such work will be assessed by reference to the value of work already covered by the award.

(c) In awards regulating the employment of workers previously covered by a State award or determination, existing rates and conditions prima facie will be the proper award rates and conditions.

(d) Where a first award is made it shall contain a minimum rate for each classification of employee covered by it. Where the total rate determined for each classification in accordance with (a) and (c) of this principle exceeds the appropriate minimum rate for that classification, the excess amount shall be prescribed as a supplementary payment. For the purposes of this paragraph, the appropriate minimum rate will be assessed by comparison with similar classifications in other minimum rates awards.

ECONOMIC INCAPACITY

Any respondent or group of respondents to an award may apply to reduce and/or postpone the application of any increase in labour costs determined under the principles on the ground of very serious or extreme economic adversity. The merit of such application shall be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested.

[AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION]

Re Metal Industry Award 1984 — Part I — & Other Awards (No 1)

KEOGH DP

20 September 1989

WAGE FIXATION — Wage rates — National Wage Case August 1989 — Structural efficiency principle — Award variations must be of substance and immediate effect — Satisfied awards should be varied for first increase — AMWU proposal adopted in the main — Early implementation of classification not included would pre-empt results of test — Provision for training board not sufficiently argued — Classification structure to be tested — Increase to apply from 20/9/89 — Employers not required to pay relevant increases until 3 weeks from actual date of operation.

[EDITORS NOTE: Later proceedings reported at 267 post.]

KEOGH DP. These matters concern applications by:

- the Amalgamated Metal Workers' Union (AMWU) to vary the Metal Industry Award 1984 — Pt I;
- the Association of Draughting, Supervisory and Technical Employees (ADSTE) to vary the Metal Industry Award 1984 — Pt II — Draughtsmen, Production Planners and Technical Officers and the Metal Industry Award 1984 — Pt V — Foremen and Supervisors; and
- the Federated Engine Drivers' and Firemen's Association of Australasia to vary the Metal Industry (Engine Drivers' and Firemen's) Award 1984,

to give effect to the first structural efficiency adjustment determined by the Commission in the *National Wage* case decision of 7 August 1989 (1989) 20 IR 81.

In that decision, the Commission determined that increases in rates of pay of $10 per week for workers at the basic skills/trainee level, $12.50 per week at the semi-skilled level and $15.00 per week or 3%, whichever is the higher, at the tradesman or equivalent level and above would be accessible as a first adjustment under the structural efficiency principle. Such an adjustment for an award would operate from the date that award was varied "following examination by the Commission of the proposals for restructuring and the giving of commitments". It is also clear from that decision that, to justify the granting of the first structural efficiency adjustment, the award variation has to be one of substance and immediate effect: it cannot merely represent a promise of on-going discussions which may or may not lead to efficiency improvements.

The structural efficiency proposals involved in these proceedings have been the subject of discussions between the parties, and particularly the Metal Trades Industry Association of Australia (MTIA), the Engineering

Employers Association, South Australia (EEASA) and the Metal Trades Federation of Unions (MTFU) for more than two years. Those parties, and the other parties to the awards, have been involved in what is a very complex process of modernising these awards to ensure that they meet the competitive needs of the metal and engineering industry. The applications to vary now pressed by the unions represent the formal implementation of the first stage of that complex process.

The applications to vary provide for:

- removal of interstate differentials in rates of pay;
- broadbanding, to a significant extent, of the existing classifications in the awards as a preliminary step to final broadbanding in a new classification structure comprising 12 to 14 levels;
- minimisation of the cost impact of the initial broadbanding and removal of interstate differentials by:
  - (i) creation of sublevels within a number of the new broadbanded classification levels; and
  - (ii) absorption into existing overaward payments of increases resulting from the broadbanding and the removal of interstate differentials;
- employees to perform "a wider range of duties including work which is incidental or peripheral to their main tasks or functions";
- allowances to be increased by 3% in accordance with the *National Wage* case decision of 7 August 1989;
- commitment by the parties to test a proposed new wage and classification structure; and
- creation of a National Metal and Engineering Training Board.

The proposed new wage classification structure for testing is contained in a document, tendered in the proceedings and marked as Ex H4. It is a comprehensive document prepared jointly by MTIA, EEASA and MTFU and is based upon an in-principle agreement reached between those parties on 13 June 1989 and tendered in the proceedings leading to the *National Wage* case decision of 7 August 1989. The document (Ex H4) details:

- the proposed new classification structure and definitions;
- the phased-in rates for those new classifications based upon the full application of the *National Wage* case decision of 7 August 1989;
- procedures to apply in the testing of the proposed new structure and implementation of the final structure;
- the absorption of increases arising from broadbanding and the application of the minimum rates adjustment determined in the *National Wage* case decision of 7 August 1989; and
- a process for exemptions for employers from the requirement to pay increases arising out of broadbanding or minimum rates adjustment.

The intention is that a final classification structure and definitions be settled by March 1990 and prior to the second structural efficiency principle adjustment and the first minimum rates adjustment. It is also the expressed intention of the unions to address and finalise both the issues of training and the modernisation of the terms of the awards by 1 January 1990.

All other unions respondent to the Metal Industry Award 1984 — Part I, except the Electrical Trades Union of Australia (ETU), supported the

AMWU application to vary in its entirety. The ETU opposed those parts of the application which went to:

(a) a proposed clause under which it would be open to an organisation to seek to implement a new classification structure consistent with that contained in Ex H4 from a date earlier than March 1990; and

(b) the creation of a National Metal and Engineering Training Board.

In relation to the former, the ETU referred to concerns it had with the appropriateness of the classification structure and definitions proposed in Ex H4. Because of these concerns it intended to test its own classification structure. The ETU also argued that an early implementation of a classification structure consistent with that contained in exhibit H4 would pre-empt the results of the testing process to which the parties were committed. In relation to the creation of a National Metal and Engineering Training Board, it submitted without elaboration that such action was outside the jurisdiction of the Commission and would cut across existing training bodies and authorities.

The MTIA and EEASA supported the variation of the awards in the manner sought by the unions. In doing so they argued that the provision for employees to perform a wider range of duties including work which is incidental or peripheral to their main tasks or functions was fundamental to that support. They said of that provision:

> "It provides an immediate opportunity to achieve greater labour flexibility and allows employees to exercise the full potential of their skills and competence uninhibited by artificial demarcation barriers."

and

> "... provides an immediate opportunity to take advantage of the full range of existing skills held by employees."

The Australian Chamber of Manufactures (ACM) and the Metal Industries Association Tasmania (MIAT) did not oppose the variation of the awards to implement the first structural efficiency adjustment. However, they did oppose the form of the variations sought and proposed what they considered to be a simpler form of variation. For example, they proposed that the Metal Industry Award 1984 — Pt I, be varied by removing interstate differentials and by increasing existing classification rates by the appropriate first structural efficiency adjustment; by providing for absorption of increases stemming from the removal of interstate differentials; by providing for employees to perform a wider range of duties including work which is incidental or peripheral (as defined) to their main tasks or functions; by providing for undertakings by the parties to a fundamental modernisation of the award; and by increasing allowances by 3%.

They also submitted documents which set out their views of the manner in which broadbanding of classifications should proceed, the effect of phasing-in of broadbanding and minimum rates adjustments, absorption of those adjustments, exemptions and a procedure for testing proposed classification structures and definitions.

ACM and MIAT opposed, in particular, the insertion into the award of a clause which would commit the parties to test the classification structure and definitions contained in Ex H4 on the grounds that that structure and those definitions were the subject of an in-principle agreement to which ACM and MIAT were not parties. They have developed a different proposed structure and definitions. Because of this, they would propose to test both their

classification structure and also that of the MTIA and MTFU. Similarly, they opposed the insertion of a provision providing for early implementation of a new classification structure consistent with that in exhibit H4 in individual establishments on the basis that this would pre-empt the testing process and its outcome. They also opposed the insertion into the award of a provision which states that the parties are committed, "In accordance with the Agreement between the Metal Trades Federation of Unions", to modernising the terms of the awards. Again, stated simply, they are not parties to that agreement and argue that it should not be forced upon them. Finally, they are opposed to the awards prescribing the creation of a National Metal and Engineering Training Board.

As can be seen from the foregoing, the parties have demonstrated in these proceedings — and notwithstanding a number of private conferences prior to the proceedings — an ability to complicate an already complex process of modernising the awards, even to the point of wanting to test at the one time up to three different classification structures and sets of definitions. This, in part, has been due to the virtual exclusion of ACM and MIAT from discussions until relatively recently. It is imperative that all the direct parties be involved in joint negotiations from now on.

I have considered all the submissions of the parties, including the no extra claims commitments given by all the unions concerned, and I am satisfied that the awards should be varied to implement the first structural efficiency adjustment.

This still leaves the issue of the form those variations should take. I determine that the Metal Industry Award 1984 — Pt I, be varied to:

1 prescribe in the wages clause the broadbanded classifications and the relevant minimum classification rates proposed in the AMWU variation;

2 provide a new clause prescribing the supplementary payments proposed in the AMWU variation;

3 prescribe the absorption of interstate differentials and broadbanding adjustments in the terms of Item 7, as amended in these proceedings, of the AMWU proposed variation;

4 prescribe a new clause, "Structural Efficiency", in the terms of item 8 of the AMWU proposed variation subject to:
   (a) the deletion of subcl (c) of that proposed clause; and
   (b) the addition of a new par (viii) to subcl (b) as follows:
      "(viii) are committed to modernising the terms of the award and to addressing the issues associated with training with a view to finalising these matters by 1 January 1990";

5 increase allowances in the terms set out in the AMWU proposed variation;

6 delete subcl 8(i) of the award; and

7 insert a no extra claims clause in the terms required by the *National Wage* case decision of 7 August 1989.

The Metal Industry Award 1984 — Pt II — Draughtsmen, Production Planners and Technical Officers, the Metal Industry Award 1984 — Pt V — Foremen and Supervisors and the Metal Industry (Engine Drivers' and Firemen's) Award 1984 will be varied in the manner proposed in these

proceedings and as amended in order to maintain consistency with the variation of the Metal Industry Award 1984 — Pt I, detailed above.

It will be noted that I have not included in these variations the provisions for early implementation of a new classification structure as proposed by the AMWU and supported by the other unions, apart from the ETU, and by the MTIA and EEASA. I agree with the ETU and ACM that to do so would risk pre-empting the results of the testing of the new proposed classification structure and definitions. Similarly, the proposed National Metal and Engineering and Training Board has not been made subject of an award provision because I am not satisfied that this issue has been sufficiently argued at this point.

There also remains the issue of what classification structure and definitions should now be tested by the parties. Notwithstanding the fact that Ex H4 is based on an agreement between the MTIA, EEASA and the MTFU, it is my view that all parties to the awards should be committed to testing the proposal set out in that exhibit. It also follows, given the complexity of the issue, that that classification structure and definitions should be the only classification structure and definitions tested. If that testing is carried out properly, it will provide scope for resolving in one way or another the concerns any individual party might have with them.

Finally, the MTIA supported by other employer parties sought a prospective date of effect for the first structural efficiency adjustment variations so as to ensure that adequate guidance on implementation might be given to individual employers. Bearing in mind what was said in the *National Wage* case decision of 7 August 1989 about the date of operation of the adjustment in an award, I am not prepared to determine a prospective date of effect. However, individual employers will need time to properly implement the decision and, therefore, I determine that employers shall not be required to pay employees the relevant increases until a day three weeks from the actual date of operation set in this decision.

The parties are requested to prepare, by 25 September 1989, appropriate draft orders to give effect to the variations determined in this decision. Those variations will operate from the first pay period to commence on or after 20 September 1989 and remain in force for a period of six months.

[AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION]

Re Metal Industry Award 1984 — Part I — & Other Awards (No 2)

KEOGH DP

20 March 1990

WAGE FIXATION — Structural efficiency principle — Demonstration by parties to award that through the variations now proposed, they have implemented the principle properly — Variations presented in proceedings provide means by which the efficiency, productivity and international competitiveness of the industry will be enhanced — Variations to operate from beginning of first pay period to commence on or after 30/3/90.

[EDITORS NOTE: Earlier proceedings reported at 262 ante.]

KEOGH DP. These matters involve an application by The Amalgamated Metal Workers' Union to vary Part I of the Metal Industry Award 1984 in relation to the second structural efficiency adjustment and the first minimum rates adjustment determined by the *National Wage* case decision of August 1989 and similar applications by the Association of Draughting, Supervisory and Technical Employees and The Federated Engine Drivers' and Firemen's Association of Australasia in relation to the Metal Industry Award 1984 (Parts II and V) and the Metal Industry (Engine Drivers' and Firemen's) Award 1984, respectively.

These awards were the subject of a decision of 20 September 1989, see ante 262 in relation to the first structural efficiency adjustment. As a result of that decision, the awards were varied in accordance with the *National Wage* case decision of August 1989. The variations, apart from the structural efficiency adjustments, included:

- removal of interstate differentials;
- broadbanding, to a significant extent, of existing classifications as a preliminary step to final broadbanding in a new classification structure;
- minimisation of the cost impact of the removal of interstate differentials and the initial broadbanding by requiring any resultant increases to be absorbed into existing over-award payments;
- a commitment to a test a proposed new classification structure;
- a commitment to modernise the awards; and
- a obligation on employees to perform "a wider range of duties including work which is incidental or peripheral to their main tasks or functions".

Subsequently, on 15 December 1989, Part I of the Metal Industry Award 1984 was further varied in respect of adult apprenticeships and traineeships (Print J0730). That variation has to be seen as an integral part of the on-going implementation by the parties of the structural efficiency principle.

In their current applications, the unions seek to give effect to an agreement to further vary the award to:

1 Apply the second structural efficiency adjustment.

2 Apply the first minimum rates adjustment in accordance with the *National Wage* case decision of 1989.

3 Insert a new Appendix G in the award which details a 14 — level classification structure, the wage relativity of each level to the base tradesman (C10) level, definitions and indicative tasks. A related award provision provides that this classification structure is to be subject to a transition/implementation period of six months during which all parties are to familiarise themselves with that structure and definitions and implement the structure in each plant. To assist the latter process, the parties at industry level are preparing an implementation manual and, until that is available, the existing structure and definitions will continue to apply. Implementation is to be finalised by the end of the period of six months. During that period, the structure may also be subject to final fine-tuning. Finally, transfer of employees from the old to the new structure will be carried out in accordance with an agreed procedure, including as necessary agreed competency standards and a process for the testing of an employee's claim for reclassification by an independent authority.

4 Re-affirm the requirement that increases deriving from broadbanding and minimum rates adjustment are subject to absorption in existing over-award payments.

5 Re-affirm the parties' commitment to proceed to modernise the awards.

6 Provide, in the contract of employment clause, the right of an employer to direct an employee to perform such duties, and use such tools and equipment, as are within the employee's skill, competence and training. This provision replaces the "wider range of duties ..." requirement inserted in the awards following the Commission's decision of 20 September 1989 and is designed, consistent with the classification structure, to ensure maximum flexibility in the worforce of an enterprise and to eliminate classification demarcation problems.

7 Prescribe a new structural efficiency provision which—

- details the commitment of the parties to co-operate positively to increase the efficiency of their industry;
- requires an employer, his employees and their relevant unions to establish a plant consultative mechanism appropriate to the size, structure and needs of that plant;
- requires the parties through that consultative mechanism to consider measures related to implementation of the new classification structure, the facilitative provisions of the award and training;
- provides a process through which the parties concerned may achieve the implementation of other measures designed to increase flexibility and efficiency at the plant;
- provides that any disputes arising under the provision shall be

dealt with in accordance with the disputes procedure prescribed in the awards.

8 Prescribe a new training provision which—
- details the commitment of the parties to training and skill development;
- requires an employer, following consultation through the consultative mechanism established under 7 above or through a training committee, to develop a plant training programme consistent with certain stated objectives;
- provides that an employee who, by agreement, undertakes additional training in accordance with the plant training programme shall not suffer any loss of pay and shall be reimbursed any standard course fees, cost of textbooks and excess fares;
- provides that the effectiveness of the new provision be monitored by the parties over a period of nine months;
- provides that any disputes arising under the provision shall be dealt with in accordance with the disputes procedure prescribed in the awards.

9 Increase the spread of hours during which actual ordinary hours may be worked from 11½ to 12 hours by changing the current prescription of 6.30 am to 6 pm to 6 am to 6 pm.

10 Insert facilitative provisions designed to enable an employer and his employees to enter into more flexible working arrangements in relation to —
- the taking of meal breaks, including staggering;
- the working of ordinary hours, including twelve hour shifts; and
- the taking of annual leave, including close-downs.

The applications to vary were supported by all other unions concerned (apart from the National Union of Storeworkers, Packers, Rubber and Allied Workers (NUW)) and the Metal Trades Industry Association of Australia, The Australian Chamber of Manufactures, the Engineering Employers Association, South Australia, the Metal Industries Association Tasmania and the South Australian Employers' Federation. The Australian Council of Trade Unions, intervening, also supported the applications. The Confederation of Australian Industry, intervening, noted the thrust of the applications and the support for them by the employers directly concerned. It also noted the traditional role of the Metal Industry Award as a pace-setter and submitted that, given the nature of the structural efficiency principle, it should not be so treated by any parties or tribunals on this occasion.

The NUW opposed the applications in what it described as a qualified sense. It stated that it had not been a full party to the negotiations that had lead to the applications; it had some fundamental problems with the new classification structure proposed, although it did not see this as an impediment to other actions it is taking in the Commission with the objective of achieving a separate warehousing award for its members in the metal industry; and it had fundamental policy objections to the nature of the structural efficiency provision proposed for insertion in the awards and the prescription of any facilitative clauses. It proposed that the Commission defer the applications to vary, insofar as they affected the NUW, for one

week in order to allow it to take the proposed variations to its members for approval or rejection.

In its *National Wage* case decision of August 1989 the Commission stated:

> "Furthermore, we believe that the second instalment of the structural efficiency adjustment should only be available if the Commission is satisfied that the principle has been properly implemented and will continue to be implemented effectively." (1989) 30 IR 81 at 90.

I am satisfied that the parties to these awards have demonstrated, through the variations now proposed to the awards, that they have implemented the principle properly. Moreover, the variations to the awards which they have presented in these proceedings provide the means by which they can, on both an industry and enterprise basis, continue to co-operate positively "to increase the efficiency, productivity and international competitiveness of the metal and engineering industry and to enhance the career opportunities and job security of employees in the industry". Consequently, I shall issue orders varying the awards in the terms of the draft orders tendered in these proceedings. Those variations will operate from the beginning of the first pay period to commence on or after today's date (20 March 1990) and remain in force for a period of twelve months. Individual employers will need time to properly implement this decision and, therefore, I determine that employers shall not be required to pay employees the relevant increases until a day three weeks from the actual date of operation set in this decision.

Australian Industrial Relations Commission

Industrial Relations Commission Decision 904/1990 [1990] AIRC 862; (21 August 1990)

Industrial Relations Commission Decision 904/1990;

Dec 904/90 M Print J4011

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1988
s.113 applications for variation

Australian Nursing Federation

DETERMINATION NO. 195 OF 1970 [NURSING STAFF - RANF](1)
(C Nos 37238 and 50047 of 1989)

DETERMINATION NO. 196 OF 1970 [NURSING STAFF - RANF](2)
(C No. 37240 of 1989)

DETERMINATION NO. 590 OF 1983 [PROFESSIONAL NURSING STAFF - RANF](3)
(C No. 37242 of 1989)

DETERMINATION NO. 407 OF 1969 [SISTERS (INDUSTRIAL)](4)

(C No. 37241 of 1989)

HOSPITAL EMPLOYEES ETC. (NURSING STAFF A.C.T.) AWARD 1980(5)

(ODN C No. 01127 of 1978)
(C No. 37236 of 1989)

NURSES PRIVATE EMPLOYMENT (A.C.T.) AWARD 1972(6)
(ODN C No. 07192 of 1986)
(C No. 37237 of 1989)

NURSES (NORTHERN TERRITORY PUBLIC SERVICE) AWARD 1985(7)
(ODN C No. 01188 of 1985)
(C No. 37243 of 1989)

NURSES (HETTI PERKINS HOME FOR THE AGED - ABORIGINAL HOSTELS LIMITED) AWARD, 1986(8)
(ODN C No. 01899 of 1980)

(C No. 37246 of 1989)

NURSES (TASMANIAN PUBLIC SECTOR) AWARD 1988(9)

(ODN C No. 00606 of 1983)
(C Nos 37248 and 50044 of 1989)

NURSES (GOVERNMENT SUBSIDISED EMPLOYERS) AWARD 1989(10)
(ODN C No. 00606 of 1983)
(C Nos 37233 and 55058 of 1989)

NURSES (ANF - SOUTH AUSTRALIAN PRIVATE SECTOR) AWARD 1989(11)
(ODN C No. 00606 of 1983)

(C Nos 37234 and 55057 of 1989)

TELECOM/ANF AWARD 1989(12)

(ODN C No. 00695 of 1979)
(C No. 37239 of 1989)

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(1)050 CPSAR 851 (2)050 CPSAR 857
(3)085 CPSAR 799
(4)049 CPSAR 1279
(5)Print E5101 [H017]; (1981) 251 CAR 544 (6)Print G0905 [N053] [title change

Print G4567 [N053 V048]]
(7)Print F9547 [N043] (8)Print G2733 [N046]

(9)Print H5432 [N082] (10)Print H8284 [N098]
(11)Print H8558 [N101] (12)Print F8080 [T240]
[title change

Print H9277 [T240 V020]
NURSES (ANF - WESTERN AUSTRALIAN PUBLIC SECTOR) AWARD 1989(13)
(ODN C No. 00606 of 1983)
(C No. 37249 of 1989)

NURSES (NORTHERN TERRITORY) PRIVATE SECTOR AWARD 1989(14)
(ODN C No. 30868 of 1988)

(C Nos 37340 and 37341 of 1989)

ABORIGINAL AND COMMUNITY CONTROLLED HEALTH SERVICES (COMMUNITY HEALTH

NURSING STAFF) AWARD 1988(15)
(ODN C No. 30869 of 1988)

(C Nos 37245 and 50045 of 1989)

NURSES (REGISTERED NURSES - SOUTH AUSTRALIAN PUBLIC HOSPITALS

AND HEALTH AGENCIES) AWARD 1989(16)
(ODN C Nos 00606 and 01076 of 1983)
(C
Nos 37235 and 50046 of 1989)

NGANAMPA HEALTH COUNCIL, (COMMUNITY HEALTH NURSING STAFF) AWARD, 1987(17)

(ODN C No. 00883 of 1984)
(C No. 37244 of 1989)

DOCTORS' NURSES (NORTHERN
TERRITORY) AWARD 1980(18)
(ODN C No. 01037 of 1973)
(C No. 37247 of 1989)

The Hospital Employees Federation of Australia

DETERMINATION NO. 234 OF 1966 [NURSING STAFF -
HEF](19)
(C Nos 35017 and 37519 of 1989)

NURSES (TASMANIAN PUBLIC SECTOR) AWARD 1988

(ODN C No. 00606 of 1983)
(C Nos 37520 and 75010 of 1989)

The State Public Services Federation

NURSES (REGISTERED NURSES - SOUTH AUSTRALIAN PUBLIC HOSPITALS AND

HEALTH AGENCIES) ROPING-IN NO. 1 AWARD 1989(20)

(ODN C No. 30057 of 1989)

(C No. 37539 of 1989)

Conciliation and Arbitration Act 1904
s.59 applications
for variation

Australian Nursing Federation

DETERMINATION NO. 195 OF 1970 [NURSING STAFF - RANF]
(C No. 33945 of 1988)

DETERMINATION NO. 196 OF 1970 [NURSING STAFF - RANF]

(C No. 33956 of 1988)

DETERMINATION NO. 590 OF 1983 [PROFESSIONAL NURSING STAFF - RANF]
(C No. 33957 of 1988)

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(13)Print H8857 [N103] (14)Print J0429 [N111]
(15)Print H7049 [A483] (16)Print H7539 [N092]

(17)Print G9389 [N065] (18)Print G0967 [D015]
(19)046 CPSAR 1009 (20)Print H7953 [N092 V001]

DETERMINATION NO. 407 OF 1969 [SISTERS (INDUSTRIAL)]
(C No. 33958 of 1988)

AUSTRALIAN TELECOMMUNICATIONS COMMISSION OCCUPATIONAL HEALTH NURSING STAFF (SALARIES AND SPECIFIC CONDITIONS OF EMPLOYMENT) AWARD 1979(21)
(ODN C No. 00695 of 1979)
(C No. 33959 of 1988)

HOSPITAL EMPLOYEES ETC. (NURSING STAFF A.C.T.) AWARD 1980
(ODN C No. 01127 of 1978)

(C No. 33961 of 1988)

NURSES PRIVATE EMPLOYMENT (A.C.T.) AWARD 1972

(ODN C No. 07192 of 1986)
(C No. 33962 of 1988)

NURSES (NORTHERN TERRITORY PUBLIC SERVICE) AWARD 1985
(ODN C No. 01188 of 1985)
(C No. 33963 of 1988)

DOCTORS' NURSES (NORTHERN TERRITORY) AWARD 1980
(ODN C No. 01037 of 1973)

(C No. 33964 of 1988)

NURSES (HETTI PERKINS HOME FOR THE AGED - ABORIGINAL HOSTELS LIMITED) AWARD, 1986
(ODN C No. 01899 of 1980)
(C No. 33965 of 1988)

NGANAMPA HEALTH COUNCIL, (COMMUNITY HEALTH NURSING STAFF) AWARD, 1987
(ODN C No. 00883 of 1984)
(C No. 33966 of 1988)

NURSES (ANF - WESTERN AUSTRALIA PUBLIC SECTOR) AWARD 1989
(ODN C No. 00606 of 1983)
(C No. 65188 of 1989)

Nurses
Health and welfare services

JUSTICE COHEN
DEPUTY PRESIDENT HANCOCK
DEPUTY PRESIDENT MARSH

COMMISSIONER CROSS
COMMISSIONER SMITH MELBOURNE, 21 AUGUST 1990

Wage rates - National Wage
August 1989 - special case - decision was one of a series given over the past 12 months for rates for registered nurses in federal

awards - Commission fixed national rates for registered nurses in levels 1, 2 and 3 with salaries for levels 4 and 5 still to be determined - cost impact acknowledged - phasing of increases to occur with a more protracted phasing in Tasmania.

DECISION

This decision is one of a series which we have given over the past 12 months concerning the Special Case before us for rates for registered nurses in federal awards. It is useful to recount some of the history of the matter.

(21)Print F8080 [A208]

When the claims were first lodged in December 1988 only nurses in the Australian Capital Territory, Northern Territory and Commonwealth nurses were involved, essentially the same work force which was the subject of the Full Bench decision concerning salaries of nurses in federal awards issued on 7 May 1987 in matter A.257 (Print C7200). The claims lodged in December 1988 initially were for "professional rates" consistent with rates granted to registered nurses in New South Wales and Victoria which are to be finally phased-in by 30 September 1990. During the course of the proceedings before us public sector nurses in Tasmania, South Australia and Western Australia and private sector nurses in SA came into federal award regulation and were joined in the claims. The ANF amended the claims in October 1989 and what it now seeks are what we have described as nationally consistent structures and rates for registered nurses in all federal awards. Applications for structural efficiency increases pursuant to the national wage decision of 12 August 1989 were lodged for these awards in October and under the direction of the Bench the two sets of claims have been integrated and processed simultaneously.

In decisions handed down on 21 December 1989(22) and 20 January 1990(23) we determined that the ANF had made out a case for moving towards consistency of approach in the fixation of nurses' salaries. We said that we agreed with

the objective of establishing nationally consistent rates and structures for nurses in federal awards, but that this would take time to achieve because of the differences previously existing in rates and conditions as between nurses

in the various States and Territories.

As a first step towards national rates the Bench established a single entry point for registered nurses at level 1 in federal awards in all States and Territories except Tasmania, where an existing 4% differential was maintained. The percentage increase required to achieve the common entry rate was then applied to the existing salaries in each of the awards. We indicated that we were not prepared to alter the internal relativities in the various awards, or to fix final rates, without greater attention being given to salary-related conditions. We said that whilst we believed that nationally consistent rates for nurses would be the best outcome in the long term, the concept of national rates was a fiction if it referred only to salaries. Differences in salary-related conditions, in particular those involving shift penalties, overtime and weekend work were to be addressed in structural efficiency negotiations in the various States and Territories and in relation to DVA hospitals. It was made clear that there would have to be significant progress on rationalisation of these conditions before there could be any further move towards nationally consistent rates. The Bench also indicated that the manner in which rationalisation of conditions was achieved would affect the final salary levels prescribed in these awards.

Commissioners Cross and Smith were delegated to deal with individual structural efficiency applications by way of conciliation and/or arbitration. This has now taken place and first phase structural efficiency increases for nearly all of the nurses covered by these claims have been approved.

The matters were re-listed on 25 June 1990 to "review final rates and relativities together with the timing of any further increases both in relation to the claims for more nationally consistent rates and structural efficiency." It is now our task to assess the structural efficiency results and to consider the new rates claimed for the classification structures in these awards. We have examined the Commissioners' decisions

and are satisfied that the parties
have properly addressed the structural efficiency principle taking into account

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(22)Print J0855 (23)Print J1288

the issues raised in our earlier decisions. It is anticipated that the latest
decision of the Commissioners to be handed down today
will enable the
establishment of a consistent pattern of shift and weekend penalty rates in
these awards.

When the hearing
resumed the ANF submitted that the circumstances
warranting the establishment of national rates are as compelling now as before,

with added ingredients of opportunity. Ms F. Kyle who appeared for the
Federation alluded in particular to the alignment which
has now been
established at the commencement point as between the federal awards and awards
in the two major States of New South
Wales and Victoria. Referring to the
statement of the Full Bench in January as to the necessity for moving to
nationally consistent
conditions, she said the ANF had "taken up the
challenge"; it had not only come forward in the proceedings before
Commissioners
Cross and Smith with proposals for changes to quantum of penalty
rates but it had also addressed issues covering hours specified
for shifts in
order to make sense of the penalty rates. The proposal put to the Commissioners
was for "a take home pay outcome
demonstrably equivalent with nurses in New
South Wales". She said that the ANF was seeking New South Wales conditions
because these
were considered the most appropriate, having been set by the New
South Wales tribunal in 1972 specifically for the hospital industry.

Acknowledging the need for phasing, the ANF proposes the following
timetable for implementation of national rates and structural
efficiency
increases. It seeks an interim increase of at least 3% `towards final national
rates' on the handing down of this decision;
award-by-award second phase
structural efficiency increases to be paid six months after the first increases
received by each group;

and final implementation of national rates by December 1990, recognising that some outstanding second structural efficiency adjustments will not be completed until early in 1991. The ANF expects that within this time frame it will conclude negotiations about grading criteria and final structures for assistant directors and directors of nursing (levels 4 and 5), for which it will also be seeking endorsement.

Subject to this review, the final national rates proposed by the ANF, inclusive of both phases of structural efficiency increases, are as follows:

A.C.T. AND COMMONWEALTH	NORTHERN TERRITORY	SOUTH AUSTRALIA	TASMANIA	WESTERN AUSTRALIA
LEVEL 1	LEVEL 1	LEVEL 1	LEVEL 1	LEVEL 1
23904				
	23904	23904	23904	23904
25065	25065	25065	25065	25065
26338				
	26338	26338	26338	26338
27631	27631	27631	27631	27631
28981				
	28981	28981	28981	28981
30332	30332	30332	30332	30332
31623				
	31623	31623	31623	31623
33034	33034	33034	33034	33034
LEVEL 2	LEVEL 2	LEVEL 2	LEVEL 2	LEVEL 2
34622	34622	34622	34622	34622
35523	35523	35523	35523	35523
36424	36424	36424	36424	36424
37324	37324	37324	37324	37324

A.C.T. AND COMMONWEALTH	NORTHERN TERRITORY	SOUTH AUSTRALIA	TASMANIA	WESTERN AUSTRALIA
LEVEL 3	LEVEL 3A	LEVEL 3	LEVEL 3	

LEVEL 3

38402 38402 38402 38402 40456
39449 39449 39449 39449
41268
40495 40495 40495 40495 42078
41709 41709 41709 41709
42891

LEVEL 3B

42962

LEVEL 4 LEVEL 4 LEVEL 4 LEVEL 4 LEVEL
4

44609 44609 48313 44491 43942
46996 46966 46785
45050
49382 49382 49080 47263
51770 51770 51375
48371
49476

51138

LEVEL 5 LEVEL 5 LEVEL 5 LEVEL 5 LEVEL 5

56883 56883 43411
44491 51138
44563 46786 54071
48313
49080
52063 51375
53767 53711

63427 55897
67539 59079

63450

Notes:

1. Level 1 rates adjusted from 7-year to 8-year scales.
2. DVA nurses' rates to match appropriate
State rates.

These rates have been set, the ANF said, within the framework of

benchmarks for nurses' salaries established by the Victorian and New South Wales tribunals. Apart from the base grade salary in level 1 which is already aligned, it said that there are three other such benchmarks. They are the clinical nurse specialist classification, which sits just above the level 1

scale in New South Wales and Victoria; the nurse unit manager in New South Wales and grades 4A and 4B in the Victorian structure; and the director of nursing in a hospital of more than 700 beds.

The ANF seeks an elongation of the existing level 1 scale in the federal awards by the addition of an eighth salary point. It acknowledges that there are seven incremental points in level 1 in Victoria, whereas the New South Wales scale has eight substantive points and an additional ninth increment for the holder of a degree. The rate it proposes for the top of level 1 in the federal awards is $33,034 p.a., $1,411 p.a. higher than the top of the seven point Victorian scale and $418 p.a. less than the eighth incremental point in New South Wales. This will provide a scale, the ANF said, "which is broadly comparable to the Victorian and New South Wales base scales but bears in mind that there is a difference between Victoria and New South Wales at the top of the base and seeks to resolve that difference".

The proposed level 2 rates commence with the rate for the clinical nurse specialist in New South Wales, a classification which has now also been adopted but is not yet implemented in Victoria. It is a personal classification with a single salary point. The highest salary proposed for the level 2 incremental scale is equivalent to the second salary point for the grade 3B associate charge nurse in Victoria. The intermediate points in the scale are derived from the other rates for classifications 3A and 3B in the Victorian structure. Acknowledging that there is no equivalent of these associate charge nurse positions either in New South Wales or the federal structures, the ANF said that it had looked at the role encompassed by the three classifications in Victoria and the role of the level 2 nurse in federal awards and considered the

functions and responsibilities to be equivalent.

The rates applying to the nurse unit manager in New South Wales and grades 4A and 4B Victorian charge nurses are claimed for level 3 in the federal structure. The same rates apply in the two States for these classifications. The position of nurse unit manager is graded 1, 2 or 3 on the basis of a number of factors which include the size and type of ward or unit. The grade 4A and 4B charge nurse classification is differentiated according to whether the institution is or is not a major teaching hospital. In both Victoria and New South Wales these nurses perform dual administrative and clinical functions.

The proposed rates and scales for levels 4 and 5 are on an interim basis, pending introduction of consistent grading criteria which, as we have said, are the subject of review and negotiation between the parties.

The ANF does not argue for the adoption of these New South Wales and Victorian benchmark salaries in federal awards on the basis of common roles. It sought to establish work value alignment from the evidence of witnesses and by an examination of the duty statements.

The ACTU, which intervened in the proceedings, supported the concept of establishing national rates and conditions of employment which produced identical take-home pay for nurses working similar patterns across Australia.

It submitted that the "most suitable option" was the adoption, at specified benchmark levels, of NSW rates and conditions for a number of reasons, namely: the NSW rates and conditions are actually being received by nurses; NSW rates and conditions have been properly set having regard to more highly qualified health professionals; NSW rates are the only way of guaranteeing truly national rates and conditions in terms of take-home pay throughout Australia; the rates sought are readily understood and as such would not cause disputation or discontent based on actual or perceived inequities; leapfrogging would be prevented; and the current mishmash that has characterised nurses wage fixation would be brought to an end. The ACTU rejected other options as not satisfying

the objective of achieving national rates. It supported appropriate phasing as a means of achieving proper rates and conditions. It further submitted that no existing registered nurse should be financially worse off with the adoption of NSW rates and conditions and that no nurse should receive less than the minimum increase available under the August 1989 National Wage Case principles. The ACTU said that it could not foresee any flow implications arising out of the adoption of the NSW rates. Ms M. Stuart, who represented the ACTU, also appeared for the State Public Services Federation.

The HEF appeared as an applicant in relation to the Hospital Employees etc. (Nursing Staff A.C.T.) Award 1980, the Nurses Private Employment (A.C.T.) Award 1972 and the Nurses (Tasmanian Public Sector) Award 1988. While being supportive of arguments put by the ANF with respect to a final outcome for nurses in terms of salaries and conditions, the HEF sought a different application of that outcome for Tasmanian and ACT nurses, who may lose some benefits as a result of the application of consistent rates of pay and pay-related conditions across the States. In respect of these nurses, the HEF sought the maintenance of current conditions with discounted rates of pay. The discounted rates of pay with current conditions would combine, Ms J. Murray said, to produce an outcome in take-home pay consistent with that of other nurses. The HEF was reluctant to "give up" "properly struck conditions of employment" in exchange for an unknown total outcome. However, the HEF was unable to quantify its submission due to what it considered to be lack of guidance from this Full Bench on the interrelated issues of rates of pay and pay-related conditions. In particular the union did not know what new conditions would be determined by Commissioners Cross and Smith as a result of their proceedings dealing with structural efficiency principle applications.

An important development on the resumption of the hearing on 25 June was a change of attitude on the part of the employing authorities in the States and

Territories to national rates and conditions. While the Commonwealth from the outset has supported nationally consistent rates and pay-related conditions in federal awards for nurses, the States and Territories initially were opposed to the concept. As a consequence of the structural efficiency negotiations which have taken place this year however the issues have been thoroughly debated by the parties and this has led to the employers' acceptance of the principle. Mr G. Simpson, who appeared in the June hearing for the Commonwealth and employers in all of the States and Territories except Tasmania, put forward a common package of rates and conditions for nurses in all federal awards. Tasmania concurred with the package but put separate submissions in relation to costs and phasing.

The employing authorities, Mr Simpson said, saw these proceedings "as a beginning and not a continuation". They meant by that that it was opportune "through the vehicle provided by the structural efficiency principle to take account of various factors both within the nursing industry and outside it, and having done so, to start with a clean slate and build for the future an appropriately established base as from 1990". The employers reject the benchmark salaries proposed by the ANF and the ACTU. They submit that these rates are based on conditions and classification structures which are different from the federal structure. The rates in force in NSW and Victoria, although properly established by the State tribunals, had been fixed, they said, with regard "to a somewhat limited number of factors". In particular, they were fixed in isolation from a consideration of salaries and pay-related conditions in other states. It was submitted that nurses should have their own benchmarks for pay and pay-related conditions and that, with these established, "a new history of the industry should commence".

The general thrust of the employers' submission was that a truly `like with like' comparison cannot be drawn with New South Wales and Victoria for pay fixation purposes in federal awards beyond level 1. There is agreement that the work and responsibilities of registered nurses is like with like across

Australia in federal award structures at this level. There is also agreement for the introduction of an additional point in the incremental scale in level 1, but not for the rate proposed by the ANF for the eighth increment.

While there are differences in the allocation of numbers at levels 2 and 3 in the various States, the evidence still establishes, the employers said, a sufficient degree of like with likeness to justify identical incremental scales and rates of pay at these levels throughout the federal awards. In summary, a broad work value equivalence in the first 3 levels of the nursing profession is accepted in the common structure in the federal awards. The employers emphasized that this work value alignment in the federal structure takes account of the relationships between the various levels of duties. Mr Simpson said: "It is our view that searching for like with likeness begins with examining the various nursing career structures".

The employing authorities specifically rejected the alignment of the clinical nurse specialist position in NSW and Victoria and the associate charge nurse positions in Victoria (grades 3A and 3B) with the level 2 four point incremental scale in the federal structure. It was contended that the clinical nurse specialist is a single personal classification and that the associate charge nurse positions in Victoria have no equivalence in either the NSW or the federal structures. The three positions are not part of an incremental scale either in New South Wales or Victoria; and while the clinical nurse specialist

is a clinical position, grades 3A, 3B in Victoria have substantial administrative content. All in all, no basis exists for the salaries of these three positions to be imposed on an incremental scale for clinical nurses in the federal awards, a scale through which there is automatic advancement.

Similar criticisms were directed to the ANF's proposed rates at level 3, where the three salary bands of the New South Wales nurse unit manager and the salaries applicable to grade 4A and 4B charge nurses in Victoria have been

amalgamated and applied to a four point incremental scale of rates in the federal awards. The positions have been alloted common benchmark salaries in NSW and Victoria where they entail composite clinical and management roles. The employers referred to the different situation applying to the level 3 nurse in the federal structure. At this level, nurses are streamed into a clinical, an administrative or an educational role and remain so streamed through level 4.

The importance of level 3 in the federal awards was emphasized by Mr Simpson, who submitted that it is the level which provides cohesiveness and structural integrity to the federal structure; that it is where career paths are established and the distinctive identity of the federal structure takes form. There is no such streaming into career paths at this level in NSW or Victoria, where the positions encompass dual administrative and clinical functions.

The following rates (inclusive of both structural efficiency adjustments) are put forward by the employers for levels 1, 2 and 3 as part of the package of rates and conditions they propose:

Employers' Joint Proposal

Level 1	Level 2	Level 3
23904	32850	36900
24812	33565	37767
25926	34208	38633
27040	35000	39500
28154		
29268		
30382		
31500		

The new five level, three stream classification structure for nurses was first trialled and introduced in South Australia with the approval of the State Commission in 1986. After an extensive case involving evidence of the

nature of the work at all levels as well as inspections in South Australia, Victoria, New South Wales, the ACT and Northern Territory, a Full Bench of this Commission in a decision handed down on 7 May 1987(24) said that it regarded the new structure "as a satisfactory model for a national structure". The Bench ratified an agreement to introduce the new structure in the Northern Territory and, by an arbitrated decision, introduced it into nursing awards in the ACT. In each State and Territory in which the new structure has been adopted this

(24)Print G7200 has been on a work value basis, approved by the State tribunals in Western Australia and South Australia and by this Commission for the Northern Territory, ACT and Tasmania. The ANF submitted in those proceedings that it had developed the new structure to remove deficiencies in existing structures, particularly in respect of nurses wishing to remain within the clinical areas of nursing.

The positions of charge nurse, supervisory nurse and deputy matron were done away with in the new structure, as was the previous hierarchical nature of authority. A new level (2) was introduced, with a four point incremental scale, for the experienced registered nurse performing clinical duties. At level 3 the structure branches into the three clearly defined streams of clinical nursing, administration and education. Nurses continue in these streams through level 4 and it is only the level 5 director of nursing who necessarily occupies a fully administrative position. We are in agreement with the employing authorities as to the importance of the differences between this and the State structures above level 1. We are also in agreement that the career structure which has been adopted in the federal awards for nurses at levels 2, 3 and 4 has no equivalence in New South Wales or Victoria.

The employers said that it would be a retrograde step to try to establish the work value link proposed by the ANF and the ACTU

with past structures. We agree. We do not accept that it is appropriate to adopt the benchmark rates established in New South Wales and Victoria above level 1 for the federal awards. We are in a position now of setting rates for an industry which has recently come within federal award regulation. These awards have a common classification structure which is designed for and recognises the acquisition of high levels of skill and experience in each of the three streams of clinical nursing, administration and education. The structure is one, moreover, which creates its own cohesive internal relativities.

We do not, however, accept the rates submitted by the employing authorities. We have examined the principles upon which these rates were said to be developed, but in our judgement they are inadequate even in relation to those principles. In considering appropriate rates we have ourselves had regard to the following factors:

. the history of recent wage fixation for nurses by both federal and State tribunals, including those of New South Wales and Victoria;

. the structures of nursing classifications in federal and State awards;

. programs which have been established for implementing consistency of pay-related conditions in federal nursing awards;

. evidence as to work value and the agreement of all of the employing authorities respondent to the federal awards as to work value comparability justifying common incremental scales and common rates at levels 1, 2 and 3 in these awards;

. the submissions of the parties as to cost;

. rates applying to other health professionals. In this respect we refer to the statement of the Full Bench in the National Wage

decision of August 1989 that paid rates awards should not be fixed at a level which would affect the rates for other workers;

. the need to ensure the proper application of the Wage Fixing Principles, in particular the Structural Efficiency Principle which requires that "structural efficiency exercises should incorporate all past work value considerations";

. our own familiarity with standards of remuneration for work requiring different levels of qualifications and skill; and

. the assurance of the ACTU, which proposes rates higher than those which we are granting, that there will be no pressure for flow to other health professionals or other groups within the hospital environment.

We have been persuaded by the employers' submission that a new approach should be adopted. This has necessitated the balancing of a range of competing considerations and the inevitable exercise of a measure of discretion. The rates which we have determined will complete the process of salary adjustment for levels 1, 2 and 3, arising from the Special Case before us. The final rates which will apply (inclusive of both structural efficiency increases) will be as follows:

Level 1	Level 2	Level 3
24,000	33,600	
37,500		
25,200	34,400	38,400
26,400	35,200	
39,300		
27,600	36,000	40,200
28,800		
30,000		
31,200		
32,400		

These rates (which are to be phased in) do not, of course, preclude additional increases consistent with future National Wage Case decisions.

In relation to levels 4 and 5, we are asked by the parties to adopt the rates and structures each proposes on a temporary basis. As we have not adopted the rates proposed by either the ANF or the employers for levels 1 to 3, we decline to apply either of the proposals put to us for levels 4 and 5. We intend to await further submissions about this aspect of the case. If we were to fix any rates, even on an interim basis, this may have the effect of prejudicing the negotiations taking place which are aimed at establishing appropriate relativities based upon proper grading criteria. Further, we note that some of the employing authorities were attracted to the idea of providing a salary band with upper and lower limits rather than providing defined increments within that range, although it was considered that the outcome of the paid rates review should be awaited. Given the influences which may bear upon the fixation of rates at these levels, we may not be opposed to such a concept. In the meantime, it would not be desirable for a situation to develop where any level 4 nurse, even on an interim basis, is in receipt of a salary which is less than the maximum rate for level 3 in the relevant award. Accordingly the orders arising from this decision will contain a provision to ensure that no level 4 nurse shall be paid less than the maximum level 3 salary in that award. We urge the parties to complete their negotiations as quickly as possible so that as a matter of priority we may fix appropriate final rates for levels 4 and 5.

In addressing the question of advancement through the structure, the ANF sought a provision for one year's advancement for level 1 nurses who possess a UG1 degree in nursing or a qualification possession of which entitles a nurse to registration in another branch of nursing or on another nursing register; or a qualification, successful completion of which requires enrolment in a post-registration course of 12 months or more. We support such a principle and will provide accordingly.

We turn to the matter of the cost of the increases which we propose to grant and to the related subject of the manner in which those increases will be phased.

Mr Simpson provided us with data of the percentage increases in rates implicit in the proposals of the ANF and the employers. In either case, the percentage increases which would be received by nurses at different levels and points within incremental scales vary widely. Hence it is difficult to derive from this information a clear impression of the overall costs of the alternative proposals. Ms M. Kaempf tendered estimates of the additions to nursing salary costs in Western Australia. These estimates related to the extra costs to be met by the employers over and above those arising from the increases granted by this Bench in December 1989 and two structural efficiency adjustments of three per cent. They make no allowance for the abolition of qualification allowances, the alteration of salary-related conditions or cost savings caused by structural efficiency measures. The cost of acceding to the ANF proposal would be 6.5 per cent in a full year. For the employers' proposal, the cost would be 2.0 per cent. Estimates of costs in South Australia, tendered by Mr G. Payne, suggested increases of 5.0 per cent (ANF proposal) and 1.3 per cent (employers' proposal). Ms A. Thomas provided information for the ACT from which we calculated that the increases would be 7.2 per cent (ANF) and 2.9 per cent (employers). Mr M. Jarman said that in Tasmania the salary bill, after two structural efficiency increases came into effect, would be a little over $100 million. If the ANF claim were to succeed, the additional cost would be `in the order of $15 million per annum'. For the employers' proposal, the increase would be `in the order of $13 million'. The costs in Tasmania are affected by the salary differential of four per cent which now exists but would disappear under either the ANF or the employers' proposal. We emphasize that the elimination of the differential is supported by the Tasmanian Government.

The cost increases to which the above estimates relate include the costs of raising salaries at levels 4 and 5. We are deferring increases at those levels but assume that some will eventuate. Subject to this qualification we believe that the cost of the increases which we have decided to grant falls between the costs of the ANF and the employer proposals - precisely where, we cannot say. If we assume a cost increase of three per cent - a reasonable, but perhaps conservative, approximation - we find that the combined effect of two movements toward national rates and two structural efficiency increases is to raise nurses' salaries by about 13 per cent on average. The impact on aggregate costs is partially offset by the abolition of qualification allowances; it may be increased or reduced by the standardisation of salary-related conditions to be determined by Commissioners Cross and Smith; and it will be reduced by any favourable effects on productivity of structural efficiency.

The increases in nurses' salaries have, of course, been phased already by the granting of an initial instalment of the movement to national rates in December 1989, with the next increases being deferred, and by the passage of time which is inherent in the process of raising salaries for structural efficiency. All of the employers sought further phasing of the remaining increases leading to national rates. With the exception of the Tasmanian government, none of them attempted to demonstrate any incapacity to pay. Mr Jarman said that the period of phasing-in allowed to Tasmanis should be greater than that provided elsewhere. Tasmania's difficulty was due to the combined budgeting effects of an altered basis of Commonwealth funding of the State which has obtained in recent years and a high burden of debt service commitments.

Our attitude to phasing is influenced by our consciousness of the general imperative of wage restraint in current economic conditions. In recent years, National Wage Case decisions have stressed the importance of interposing intervals between wage increases so as to assist in their absorption by the economy. It would be wrong, in our view, to ignore

this principle in the present case. We are unwilling to delay any further movement toward national rates so as to allow employers first to absorb increases on account of structural efficiency; and there may be some `bunching' of structural efficiency and national rates increases in the latter part of 1990. The remaining national rates increases will, however, occur in two stages. Except in Tasmania, one-half of the increases will take effect in the first pay period after the date of this decision. The balance will take effect in the first pay period to begin on or after 1 April 1991.

We have decided to agree to more protracted phasing in Tasmania, having regard to both the State's budgetry problem and the size of the increases for which funds must be found. The earlier of the two remaining national rates increases will take effect in the first pay period beginning on or after 1 January 1991 and the later increase will occur in the first pay period to begin on or after 1 October 1991.

One-half of the qualification allowances which existed when this case began ceased at the time of the initial national rates increases, granted in December 1989. This was subject to the proviso that no nurse would suffer a reduction of total pay after offsetting the partial loss of the qualification

allowance against the increase in salary. The remaining qualification allowances will be reduced by 50 per cent (i.e. 25 per cent of the amounts originally paid) at the time of the next national rates increase. Payment of qualification allowances will cease when the final movement to national rates comes into effect. The existing proviso as to non-reduction of total pay for loss of qualification allowances will remain.

We now deal with several matters which require separate coonsideration.

Ms Kaempf submitted that the differential between the rates for level 3 in Western Australia and the other federal awards can no longer be sustained. The differential was established by agreement when the structure was first

introduced in Western Australia in anticipation of an expanded role for the level 3 nurse in that State, which the employing authorities submit has not eventuated. We are asked to award rates for these level 3 nurses consistent with those in other States. These rates would be fixed on an initerim basis pending the result of a review of the rates for these positions which is near completion. The ANF opposed any change to the differential at this level in Western Australia, contending that the higher rates were justified by a wider span of control exercised by the clinical nurse specialist in that State.

We are not convinced by anything that has been put to us that Western Australian rates should be higher at this level than those prescribed in the other federal awards and we determine that the rates should be the same for the four incremental steps in level 3 in Western Australia as in the other federal awards. We see no reason to identify the employing authorities operating under the same classification structure.

Another issue involves registered nurses covered by the Nganampa Health Council, (Community Health Nursing Staff) Award, 1987 and the Aboriginal and Community Controlled (Community Health Nursing Staff) Award 1989. In July 1989 the Full Bench received correspondence on behalf of the Pitjantjara Council expressing concern as to the cost implications of the increases sought for these nurses. The difficulties related to funding problems that existed from time to time with the Federal Government, and the existing award levels of salaries and overtime provisions. As no oral submissions were made to the Full Bench on these concerns the matter was referred to Commissioner Cross on 21 December 1989 for investigation and report back to the Full Bench. We have examined these matters in the light of the Commissioner's report and of assurances given by the Commonwealth Government as to funding. We have decided that these health centres wil be covered by the Full Bench decision of 21 December 1989 and there is nothing that causes us to change the date of operation that was set in that decision.

In proceedings before Commissioner Smith in Adelaide on 4 April 1990, agreement was presented in relation to the directors of nursing at the Repatriation General Hospitals at Daw Park, South Australia and Hollywood, Western Australia. The Commissioner concluded, inter alia:

> "The agreements in relation to the director of nursing positions is more difficult. The agreement in both States is for the DVA hospital's director of nursing to be aligned with the particular director of nursing position in the respective States. Parties have submitted that this was the first opportunity to rectify this inequity which existed.
>
> The matter is further complicated by the fact that in Western Australia no such classification exists in the award, and in essence, the parties seek to extend the award to cover this position.
>
> I have considered carefully the principles, particularly the principle relating to structural efficiency, and the increases in rates of pay available under that principle. I have concluded that I should not, as a single member, move to examine any further the merit of this section of the agreement. Issues which may be relevant include proper work value comparisons, and the stated intention of the ANF to review the criteria which is applicable for director of nursing positions.
>
> Accordingly, I decline to approve this aspect of the agreement as I believe it is more properly progressed by way of an application for reference to a Full Bench as a special case."

At that time an application was made pursuant to section 107 of the Industrial Relations Act 1988, consequent upon which the Commissioner directed the parties to prepare an agreed facts document. The President subsequently granted the application and referred the matter to this Full Bench. We have examined the agreement of the parties and have decided, in the context of the review which is about to take place in relation to director of nursing

positions, to approve the agreement. This will provide an appropriate base from which to proceed.

In conclusion we acknowledge that those proceedings have been long and complex. It has been necessary to explore to the fullest the structural efficiency aspects of the case and to integrate them with the claims for national rates. It has also been a complicating factor that some of the awards which the parties have sought to restructure have diverse histories within state jurisdictions.

The Commission has been concerned throughout to establish proper internal relationships and career structures in nurses' federal awards and this has necessitated a gradual approach. National rates have now been fixed for registered nurses in levels 1, 2 and 3, with salaries for levels 4 and 5 still to be determined. Since 1987 the Commission has, through a series of decisions, substantially increased nurses' salaries. All parties have acknowledged the cost impact. There has, however, been consensus on the necessity for and the direction of change and we recognize the thorough and thoughtful approach adopted by the parties. Considerable change has already occurred and the process will continue, given the work program identified in the structural efficiency proceedings before Commissioners Cross and Smith.

The parties should now submit draft orders to give effect to this decision. The orders will be settled by the Registrar with recourse to a member of the Bench. Except in Tasmania the orders will operate from the first pay period on or after today and remain in force until 30 April 1991. The orders affecting Tasmania will operate from the first pay period on or after 1 January 1991 and remain in operation until 31 October 1991.

Appearances:

F. Kyle for the Australian Nursing Federation.

J. Murray for The Hospital Employees Federation of Australia.

M. Stuart for the State Public Services Federation and intervening for
The Australian Council of Trade
Unions.

G. Simpson on behalf of the Minister for Industrial Relations.

G. Payne on behalf of the South Australian Health Commission.

M. Kaempf on behalf of the Minister for Health of Western Australia.

M. Jarman on behalf of the Tasmanian Government.

K.
Law on behalf of Aboriginal Hostels Limited.

A. Thomas for the A.C.T. Community and Health Service.

J. Horan for the Confederation
of ACT Industry and Confederation of West
Australian Industry.

K. Crafter for the South Australian Employers Federation.

Dates
and place of hearing:

1990.
Melbourne:
June 25, 26, 27, 28.

** End of Text **

*** End of Text ***

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1988
s.113 applications for variation

Australian Nursing Federation

DETERMINATION NO. 195 OF 1970[1]
(C Nos 37238 and 50047 of 1989)

DETERMINATION NO. 196 OF 1970[2]
(C No. 37240 of 1989)

DETERMINATION NO. 590 OF 1983[3]
(C No. 37242 of 1989)

DETERMINATION NO. 407 OF 1969[4]
(C No. 37241 of 1989)

HOSPITAL EMPLOYEES ETC. (NURSING STAFF A.C.T.) AWARD 1980[5]
(ODN C No. 01127 of 1978)
(C No. 37236 of 1989)

NURSES PRIVATE EMPLOYMENT (A.C.T.) AWARD 1972[6]
(ODN C Nos. 01836 of 1972 and 07192 of 1986)
(C No. 37237 of 1989)

NURSES (NORTHERN TERRITORY PUBLIC SERVICE) AWARD 1985[7]
(ODN C Nos 01836 of 1972 and 01188 of 1985)
(C No. 37243 of 1989)

NURSES (HETTI PERKINS HOME FOR THE AGED - ABORIGINAL HOSTELS LIMITED) AWARD, 1986[8]
(ODN C No. 01899 of 1980)
(C No. 37246 of 1989)

NURSES (TASMANIAN PUBLIC SECTOR) AWARD 1988[9]
(ODN C No. 00606 of 1983)
(C Nos 37248 and 50044 of 1989)

NURSES (GOVERNMENT SUBSIDISED EMPLOYERS) AWARD 1989[10]
(ODN C No. 00606 of 1983)
(C Nos 37233 and 55058 of 1989)

NURSES (ANF - SOUTH AUSTRALIAN PRIVATE SECTOR) AWARD 1989[11]
(ODN C No. 00606 of 1983)
(C Nos 37234 and 55057 of 1989)

[1] 50 CPSAR 851
[2] 50 CPSAR 857
[3] 85 CPSAR 799
[4] 49 CPSAR 1279
[5] Print E5101 [H017]; (1981) 251 CAR 544
[6] Print G0905 [N053] [title change Print G4567 [N053 V048]]
[7] Print F9547 [N043]
[8] Print G2733 [N046]
[9] Print H5432 [N082]
[10] Print H8284 [N098]
[11] Print H8558 [N101]

TELECOM/ANF AWARD 1989[12]
(ODN C No. 00695 of 1979)
(C No. 37239 of 1989)

NURSES (ANF - WESTERN AUSTRALIAN PUBLIC SECTOR) AWARD 1989[13]
(ODN C No. 00606 of 1983)
(C No. 37249 of 1989)

NURSES (NORTHERN TERRITORY) PRIVATE SECTOR AWARD 1989[14]
(ODN C No. 30868 of 1988)
(C Nos 37340 and 37341 of 1989)

ABORIGINAL AND COMMUNITY CONTROLLED HEALTH SERVICES (COMMUNITY HEALTH NURSING STAFF) AWARD 1988[15]
(ODN C No. 30869 of 1988)
(C Nos 37245 and 50045 of 1989)

NURSES (REGISTERED NURSES - SOUTH AUSTRALIAN PUBLIC HOSPITALS AND HEALTH AGENCIES) AWARD 1989[16]
(ODN C Nos 00606 and 01076 of 1983)
(C Nos 37235 and 50046 of 1989)

NGANAMPA HEALTH COUNCIL, (COMMUNITY HEALTH NURSING STAFF) AWARD, 1987[17]
(ODN C No. 00883 of 1984)
(C No. 37244 of 1989)

DOCTORS' NURSES (NORTHERN TERRITORY) AWARD 1980[18]
(ODN C No. 01037 of 1973)
(C No. 37247 of 1989)

The Hospital Employees Federation of Australia

DETERMINATION NO. 234 OF 1966[19]
(C Nos 35017 and 37519 of 1989)

NURSES (TASMANIAN PUBLIC SECTOR) AWARD 1988
(ODN C No. 00606 of 1983)
(C Nos 37520 and 75010 of 1989)

The State Public Services Federation

NURSES (REGISTERED NURSES - SOUTH AUSTRALIAN PUBLIC HOSPITALS AND HEALTH AGENCIES) ROPING-IN NO. 1 AWARD 1989[20]
(ODN C No. 30057 of 1989)
(C No. 37539 of 1989)

[12] Print F8080 [T240][title change Print H9277 [T240 V020]]
[13] Print H8857 [N103]
[14] Print J0429 [N111]
[15] Print H7049 [A483]
[16] Print H7539 [N092]
[17] Print G9389 [N065]
[18] Print G0967 [D015]
[19] 46 CPSAR 1009
[20] Print H7953 [N092]

Conciliation and Arbitration Act 1904
s.59 applications for variation

Australian Nursing Federation

DETERMINATION NO. 195 OF 1970
(C No. 33945 of 1988)

DETERMINATION NO. 196 OF 1970
(C No. 33956 of 1988)

DETERMINATION NO. 590 OF 1983
(C No. 33957 of 1988)

DETERMINATION NO. 407 OF 1969
(C No. 33958 of 1988)

HOSPITAL EMPLOYEES ETC. (NURSING STAFF A.C.T.) AWARD 1980
(ODN C No. 01127 of 1978)
(C No. 33961 of 1988)

NURSES PRIVATE EMPLOYMENT (A.C.T.) AWARD 1972
(ODN C Nos. 01836 of 1972 and 07192 of 1986)
(C No. 33962 of 1988)

NURSES (NORTHERN TERRITORY PUBLIC SERVICE) AWARD 1985
(ODN C No. 01188 of 1985)
(C No. 33963 of 1988)

DOCTORS' NURSES (NORTHERN TERRITORY) AWARD 1980
(ODN C No. 01037 of 1973)
(C No. 33964 of 1988)

NURSES (HETTI PERKINS HOME FOR THE AGED - ABORIGINAL HOSTELS LIMITED) AWARD, 1986
(ODN C No. 01899 of 1980)
(C No. 33965 of 1988)

NGANAMPA HEALTH COUNCIL, (COMMUNITY HEALTH NURSING STAFF) AWARD, 1987
(ODN C No. 00883 of 1984)
(C No. 33966 of 1988)

NURSES (ANF - WESTERN AUSTRALIA PUBLIC SECTOR) AWARD 1989
(ODN C No. 00606 of 1983)
(C No. 65188 of 1989)

Nurses — Health and welfare services

DEPUTY PRESIDENT HANCOCK
DEPUTY PRESIDENT MARSH
COMMISSIONER SMITH — MELBOURNE, 17 JULY 1991

Wage rates - national wage August 1989 - special case - outstanding claim for final rates for level 4 nurses and level 5 directors determined - parties to negotiate on classification of posts - Commission to arbitrate where agreement cannot be reached - review to occur on completion of this exercise - subsidiary issues determined - responsibility allowance - merits of claim to be considered at a later stage - various dates of operation - awards to be varied.

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DECISION

Introduction

In a decision of 21 August 1990,[21] a Full Bench approved "nationally consistent" salary rates for registered nurses at Levels 1, 2 and 3. It declined to prescribe final rates for nurses at Level 4 (commonly known as Assistant Directors of Nursing - hereinafter ADONs) and Level 5 (Directors of Nursing - DONs). The Bench stated that the prescription of salaries at these levels would await further submissions. In the meantime, there would be award provisions to ensure that no Level 4 nurse received less than the maximum rate for Level 3. A differently-constituted Full Bench on 21 December 1990 decided that Level 4 and Level 5 rates required still further attention from the parties; but it approved interim increases of 3.5 per cent at those levels.[22]

The principal purpose of this decision is to move closer to a final prescription of salaries for Levels 4 and 5.

The decisions of 21 August and 21 December 1990 dealt with all then-existing federal awards for registered nurses. The main sectors of the profession to which they related were:

Western Australia	public sector
South Australia	public and private sectors
Tasmania	public sector
ACT	public and private sectors
Northern Territory	public and private sectors
Repatriation nurses in the above States and Territories	

While the proceedings from which this decision flows were under way, Mr Commissioner Turbet made the first federal award for public sector nurses in Queensland.[23] An application was then made by the Australian Nursing Federation (ANF) to vary the Queensland award (C No. 31002 of 1991). The President referred the application to a Full Bench constituted in the same manner as the Bench which was then sitting. With the agreement of all parties, we decided that the Queensland application would be heard jointly with the other matters already before us.

At the time of the December 1990 decision, the parties had reached a measure of agreement. The Full Bench said:

> "It is agreed that there should be six grades of Director of Nursing and that the existing basis for grading DONs, which at present in some States is on the single criteria of bed numbers, is not appropriate. There is agreement for a formula, yet to be fully developed, which will apply a variety of criteria measuring scope of activities and the environment in which DONs are expected to exercise their responsibilities. This will include the extent of service, complexity of nursing care, staff numbers, budgetary considerations, bed numbers and other relevant factors. It is conceded that the formula requires further development and negotiation.

[21] Print J4011
[22] Print J6124
[23] Print J7768

> Subject to refinement of the grading indicators and other conditions and exceptions to which we will refer, there is in principle agreement for the rates to be applied to these six pay points which would be $45,000, $48,000, $52,000, $56,000, $63,000 and $70,000."

The employers' agreement to the proposed rates was subject to the condition that they represented "all in" salaries. In relation to Level 4, the Commission said that

> ". . . there is less agreement between the parties, both in relation to salaries and grading criteria. The ANF proposes four salary points, $45,500, $48,000, $50,000 and $52,000. The employers do not concede that the position merits this range. They submitted that the position varies little from hospital to hospital or State to State . . . The employers consider that a single salary point of $48,500 is appropriate for level 4 nurses."

Reviewing the material before it about Levels 4 and 5, the Commission said:

> "Accordingly we are not prepared to provide for conditions which include allowances such as on-call and recall. Further, we endorse the approach that there should be no fixed hours and that overtime should not be paid.
>
> On this basis we do not consider that the scope of the rates proposed for Level 5 is inappropriate or inconsistent with the finalisation of national rates for nurses. In relation to Level 4 we are unable to decide on the basis of the submissions whether or not there should be a single salary point or several.
>
> There are in any event a number of factors which prevent our fixing final structures and salaries for Levels 4 and 5 at this time. Whilst a great deal has already been achieved the parties acknowledged that there is still much work to be done in the settlement of grading criteria and transitional arrangements. Until these matters are completed we are unable to assess work value or to ascribe appropriate rates to the various levels of the proposed structures."

The agreement noted last December has, to a significant extent, disintegrated. The ANF, supported by the Health Services Union of Australia (HSUA), contends for a refined version of the formula approach outlined previously. It uses the term "matrix". This is, in effect, a form of job evaluation whereby DON posts would be assessed numerically on the basis of specified criteria - some objective and some subjective. The employers (except those represented by the Queensland Government) now reject the matrix concept, perceiving it as unworkable across the spectrum of health service environments wherein DONs and ADONs work. Their first preference is an approach based on contracts of employment. Only the minimum contract rate ($45000) would be prescribed in the awards (save for special translation provisions for incumbents, to operate for two years). References to Levels 4 and 5 would be deleted from the awards and there would be a generic classification of nursing executive. A less preferred option would involve retention of the two Levels. There would be a common minimum salary ($45000) but also maxima ($52000 at Level 4 and $70000 at Level 5). Other modifications suggested by the employers would omit the translation provisions. The least preferred alternative - one not supported by the Tasmanian Government - would involve the inclusion in schedules to the awards of the six salary rates previously agreed for DONs

together with the translation arrangements; but there would be no prescription of criteria for determining the applicable rates. The Queensland Government supported a "matrix" solution to the problem of classifying DON posts, but proposed a matrix different from the ANF's.

We deal with the issues before us by considering first the prescription of salaries for DONs; next the salaries of ADONs; and, finally, several subsidiary issues which either arise from our basic decisions about salaries or have been specifically raised before us.

It is a fundamental assumption of this decision that the awards in question retain their integrity as paid rate awards. If this assumption proves to be unfounded, what follows will be irrelevant. The contents of minimum rates awards will need to be considered on quite different bases.

Level 5 Salaries

It is convenient to deal at this point with the employers' single-rate proposal as it would apply to DONs. The awards before us are all paid rate awards. By agreeing to the proposal we would, in effect, convert them into hybrid awards. They would be hybrid in two senses:

- whereas for Levels 1-3, the awarded salaries would be paid rates, the salaries for "nursing executives" would be minimum rates; and

- for the "nursing executives" the awards would prescribe minimum salaries and actual conditions.

There may or may not be merit in freeing employers from the constraints of paid rate awards as they apply to the most senior nurses. Methods of achieving this result include the exclusion of those nurses from award coverage and the creation of separate minimum rate awards applicable to them. Neither outcome has been sought in these proceedings.

The alternative of fixing both a maximum and a minimum salary for DONs reduces to some extent the difficulty of reconciling variable salaries with paid rate principles. It is a difficulty, however, that the two rates are so far apart. Scope for variation may exist if the ranges are narrow and there are defined criteria (such as those pertaining to performance appraisal) for differentiation. This, however, is a matter which was not debated before us and our view is very tentative. In the current context, we think it inappropriate to depart from the prescription of specific salary rates which is ordinarily characteristic of paid rate awards.

It is our impression that the employers' proposal for fixing only a minimum rate or a minimum and maximum amount was to a large degree a response to the perceived difficulties of fixing rates within Level 5. As will be apparent, we agree that there are problems, but in our opinion they are not insuperable.

The six rates to which the parties had previously agreed are still supported by the ANF and the HSUA. Although most of the employers would prefer a different approach, they have not asserted that the six amounts would be inappropriate should we decide to prescribe a set of rates for DONs. Indeed, the minimum and maximum rates of $45000 and $70000 correspond to the lowest and highest classification rates which had been agreed; and the least-preferred option put to us by most of the employers adopts the six rates. It is our

opinion that $45000 is a reasonable reflection of the responsibilities of a DON in a small and uncomplex hospital and that $70000 is appropriate for large teaching hospitals wherein the DONs have very heavy responsibilities. The four intermediate rates permit a practical degree of differentiation between hospitals and it is fair that such differentiation of salaries occur. Hence we adopt for Level 5 nurses the six salary levels which the Full Bench in December 1990 described as neither "inappropriate" nor "inconsistent with the finalisation of national rates for nurses".

The problems to which we have alluded pertain to the allocation of specific posts to salary rates in the six-point scale. As we have noted, the ANF proposed a formula. Points would be allotted for characteristics of the posts and for each salary level there would be a range of points. The criteria, in abbreviated terms, would be

- number of employees under the DON;
- hospital or health unit budget;
- daily bed averages;
- level of service (primary, secondary or tertiary);
- responsibility for staff development and education;
- the DON's management role;
- responsibility for quality assurance; and
- responsibility for human resource management.

Several of these criteria are subjective, and the weighting of the various criteria relative to each other also requires judgment. The Queensland Government's matrix is simpler and less subjective, but arguably it excludes relevant criteria. We were told of the results of attempts which had been made to apply the formulae to various posts. We note that the ANF and Queensland Government formulae produce similar rankings of posts; and we think that the overall distribution of posts suggested by the ANF (but excluding additional grades for "on-call" nurses) is reasonable. It would be inappropriate, however, to insert any formula into an award at this stage. Before this could sensibly be done, it would be necessary to identify possible anomalies and to consider the means of resolving disagreements about the formula's application. We have considered whether we should express in principle approval for the use of a formula and direct the parties to negotiate about its terms; but we fear that this would cause unacceptable delays in moving Level 5 nurses to the new salary structure.

We have decided that the parties should negotiate about the classification of posts, the objective being to assign each post to the appropriate level in the six-point scale. In these negotiations, the parties should give their attention to

- the classifications indicated by the ANF's formula;
- the classifications indicated by the Queensland formula; and
- the employers' views about appropriate classifications.

The procedure should be seen as a trial of the formula approach, as well as facilitating the movement of posts to the new salary scale. Where the alternative approaches indicate the same classifications, these may be referred to the Commission for approval and implementation. In other cases, the parties should consider whether some aspect of a formula causes anomalies and ought to be amended. Given the subjectivity of aspects of the formula, the parties may disagree about the evaluation of posts against particular criteria; and they should discuss such differences with a view to reaching similar standards.

The Commission will be available for conciliation and arbitration. It can, perhaps, assist in the resolution of disagreements by classifying posts identified by the parties as benchmarks to which other posts can be related in negotiations.

Effect will be given to classifications by recording them in Schedules to the relevant awards. Commissioner Smith will be available to consider, in groups, posts about which parties have reached agreement and to arbitrate about posts whose salary points are disputed. In dealing with agreed posts, Commissioner Smith will be concerned to ensure that there is no general upward "drift" of salary levels relative to those indicated by the ANF. This does not preclude the possibility that, on closer examination, some posts will be found to warrant higher and others lower salaries than those suggested.

At the completion of this exercise, the Full Bench will reconvene to review it. We shall then hear submissions about the advisability of prescribing in the awards a formula or any other arrangement to be applied when new posts are created and when the attributes of existing posts are changed. We shall be mindful that the prescription of rates for DONs is a part of a much larger process directed toward establishing nationally consistent salaries and conditions for nurses. Parties should bear this in mind in discussing criteria and formulae.

There would be no benefit, in our view, in attempting at this stage to devise definitions of the six Levels for insertion in the awards.

Level 4 Salaries

The employers' proposal envisages a minimum salary for ADONs (as for DONs) of $45000. The ANF and the HSUA, however, ask us to prescribe a minimum of $48000 - higher than for DONs. We readily appreciate that some ADON posts are more demanding than some DON posts; but we think it incongruent that some DONs might receive less than the lowest-paid ADON. In our opinion, the minimum salary for an ADON should be $45000. This is unlikely to lead to an ADON receiving as much as the DON in the same hospital; for a hospital whose DON received only $45000 would probably not have an ADON. To permit a reasonable recognition of the differences between the work of ADONs, we have decided upon a three-level salary structure, namely, $45000, $48500, and $52000. In fixing these salaries, we have taken note of the relation between the pay of Level 3 nurses who will be entitled to certain penalty rates and that of ADONs who, as a result of a decision of Commissioners Cross and Smith,[24] are not so entitled. It would not be inconsistent with our perception of ADONs' work if there were a bunching of posts at the middle salary level. The higher and lower amounts would apply to less usual circumstances.

We expect the parties to negotiate about salary points for ADONs, to refer agreed classifications to the Commission for its consideration and possible approval, and to seek the Commission's help in resolving disagreements. Classifications which are settled will be recorded under Schedules to the Awards. We do not require the parties to make use of any formula, but they may of course do so.

When we reconvene to review the classification of DONs, we shall also wish to hear the parties' views about the exercise of classifying ADONs.

[24] Print J4030

Subsidiary Issues

Avoidance of Salary Reductions

In the great majority of cases, the implementation of this decision will cause salary increases for Level 4 and Level 5 nurses. There may or may not be instances where the salaries arising from the evaluation of posts are less than those currently being paid. In such circumstances, the salaries of incumbents only should be maintained at current levels until future salary adjustments raise the appropriate salary to an amount greater than the current rates. These arrangements should be noted in the proposed schedules to the awards.

All-in Rates

Subject only to exceptions specifically noted in this decision, the salaries for DONs and ADONs are to be regarded as "all-in". They recognise the executive status of nurses at these levels. Overtime penalty rates and allowances do not apply.

Grading Advancement for DONs "on-call"

The ANF and the HSUA propose that DONs who are required to be "on-call" for clinical duties for an average of one period per week or more should be graded at one salary level higher than would otherwise apply. "On-call" responsibilities typically arise in smaller hospitals. An effect of adopting the unions' proposal would be to grade very few DONs at the base level; and some DON posts would be raised from the second to the third level.

This proposal is opposed by the employers, who see it as a breach of the "all-in" principle. We share this opinion. In saying this, we do not exclude the possibility that exceptional on-call responsibilities (including a high incidence of actual call-ins) could be taken into account as one of the factors affecting the grading of particular posts.

The ANF asked us - if we were to reject its preferred option - to approve a savings provision applicable to DONs in country hospitals in Western Australia. These nurses currently receive availability allowances and overtime payments and the ANF wishes to ensure "no loss of income". It proposes "a discrete saving provision calculated on the basis of the previous 12 months overtime payment in respect of each position". Again, the employers oppose this arrangement as a contravention of the "all-in" principle. They point out that it would generate inconsistencies of income levels among DONs with equal gradings.

We sympathise with the ANF's concern to the extent that we would wish to avoid reductions of income for incumbents due to the cessation of on-call allowances and overtime. Hence we are prepared to approve, for Level 5 nurses in the country area of Western Australia, a provision which has the following effect: where, in the 12 months before a post is graded, the DON's basic salary plus overtime and on-call allowance exceeds the prescribed salary for the grade, the DON will receive an allowance equal to the difference. This allowance will be absorbed into subsequent increases in the grade salary. It will apply to incumbents only.

The Award Status of DONs in Western Australia

An issue discussed before us was the application of any salary prescription to DONs in five Western Australian teaching hospitals: the Sir Charles Gairdner Hospital, the Royal Perth Hospital, the Fremantle Hospital, the King Edward Memorial Hospital and the Princess Margaret Hospital. There were, in fact, two areas of disagreement:

- whether the salary provisions of the Nurses' (ANF - Western Australian Public Sector) Award 1989 apply to the DONs in the five hospitals; and

- whether those provisions should so apply.

It is not within our capacity, of course, to make a legally-binding interpretation of the award. We think it doubtful, however, that the salaries of the five DONs are prescribed. The ANF may wish to remove this doubt by applying for an award variation. Questions of merit could then be argued more fully; and if the Commission were persuaded that the five posts should be exempted, it could also consider whether the Award needs to be varied so as to remove any perceived ambiguity.

Tasmanian Rates

Mr M Watson, for the Minister administering the Tasmanian State Service Act, told us that the Tasmanian Government was in the process of altering the management of health services. The movement was "towards a model of regional management of health services". Mr Watson said that "we may have a director of nursing who was responsible for surgery across a region, or responsibility for aged care across a region, or responsible for medical across a region . . ." The Government supported the proposal that there be a minimum rate only for DONs and ADONs. Mr Watson stated:

> "When we have determined roles for nursing positions in the new structures, we will assess the work of each position in work value terms having regard to a number of factors, for example, salaries for health professionals in the same regional management structure, salaries for SES positions . . . salaries for positions within clerical streams including human resource managers' salaries and, if deemed appropriate, salaries paid in other states and territories."

The Tasmanian Government asked us to fix a minimum rate for DONs and ADONs of $43000, whereas other employers subscribing to the concept of a single rate proposed $45000. The only explicit reason for this suggestion was that a salary of $43000 implied a differential of $2800 above the maximum rate for Level 3, which was similar to the differential that existed before the advent of national rates. There may also have been an implication that a minimum rate of $43000 would, by comparison with one of $45000, allow more flexibility in implementing the regional model.

We are unwilling, for reasons previously stated, to fix only a single rate. At the same time, we have no wish to constrain the Tasmanian Government in its choice of method for the delivery of health services. This strengthens our view that the proper course, at this stage, is to allow the Minister's representatives and the unions to negotiate about salary gradings (subject to

the Commission's approval of outcomes) without our giving prior approval to any formula which might or might not suit Tasmanian circumstances. When the proposed review occurs, the applicability to Tasmania of a formula or criteria which may be appropriate to other States can be considered.

Nothing which has been put to us causes us to think that salary rates prescribed for DONs and ADONs in Tasmania should differ from those in other States.

South Australian Private Sector

We were informed of an agreement between employers and the ANF about the Nurses (ANF - South Australian Private Sector) Award 1989. There are at present two grades of Level 4 nurses - the lower two - which would be abolished upon the departure of the incumbents. About five persons are in these grades. The agreement is that the salaries of these grades will be $42500 and $44500. We have no difficulty with this proposal. It will be necessary, of course, for the parties to draft an award provision which clearly distinguishes the grades in question from the normal Level 4 grades set out above.

The Northern Territory

In the Northern Territory, there is a Level 3B, which does not exist elsewhere. An agreement exists that the Level 3B salary should be raised by 3-1/2 per cent. We are prepared to endorse this agreement.

Burrangiri Centre

The employers have asked that the post of DON at the Burrangiri Centre (a crisis centre in the ACT operated by the Salvation Army) be treated as a special case. Currently, the incumbent is employed as a Level 3 nurse and the employer seeks to have this classification retained. The Centre receives government funding.

We express no opinion as to the correct classification of the post; but we agree with the ANF that it ought not to be treated as "special". If it is not aptly described as a DON post, a different term should be used.

Department of Veterans Affairs: RGH Hollywood and RGH Daw Park

Specific reference was made in the proceedings to DON salaries at the Repatriation General Hospitals at Hollywood (Western Australia) and Daw Park (South Australia). The incumbents receive salaries which are "matched" with those of selected DONs in the public systems of the respective States. The DON's salary at Hollywood is matched with one which has been treated - rightly or wrongly - as award free. The salary nexus for the DON at Daw Park, having been agreed by the parties, was approved by the Full Bench in its decision of 21 August 1990.

Some disagreement has emerged about the continuing basis for prescribing the two salaries. In view of the decision which we have already explained about the method of fixing Level 5 salaries, we think it sufficient for us to say that DON salaries at repatriation hospitals other than those in New South Wales and Victoria should henceforth be set in the same way as all other DON salaries which are subject to this decision.

Responsibility Allowances for Nurses at Levels 1-3

The ANF seeks a graduated allowance (related to the size and complexity of the hospital) for Levels 1-3 nurses who assume supervisory responsibilities on evening and night shifts. The allowance would be paid on an hourly basis for the time when the added responsibility applies. It appears that some nurses who currently carry these responsibilities on a permanent basis are classified as Level 4 nurses although their posts would not otherwise be at that Level. The ANF envisages the reclassification of these posts to Level 3 provided that the occupants get responsibility allowances.

The allowances proposed by the ANF are based on a South Australian award provision. The rates in the South Australian award were fixed by consent; but the ANF asks us to adopt them as appropriate.

Ms V Busteed, for the ACT Board of Health, said:

> "As the Commission is well aware by now the 1990 review of the ACT career structure for nurses made many recommendations aimed at achieving a stream-lining of the nursing service in the ACT. One recommendation was that the position of after-hours co-ordinator, previously classified at level 4.1, be reclassified to level 3. It was also recommended that these positions at Royal Canberra Hospital attract a responsibility allowance and that similar positions at Calvary Hospital, when it reached 300 beds, should also receive an allowance.
>
> These positions have already been reclassified to Level 3 in keeping with the review. However, payment of the allowance is dependent on this Bench's decision. The ACT government made a commitment to fully implement all the recommendations of the career structure review and as such supports the ANF application for the introduction of a responsibility allowance payable to those level 3 positions designated as after-hours co-ordinators.
>
> However, the ACT board does not support the granting of such allowances to other than those designated positions. In other words, they don't support the greatly-enhanced proposal that the ANF tabled on Monday. The quantum of the ANF claim in relation to those designated positions of after-hours co-ordinators is also accepted by the ACT Board of Health."

Other employers oppose the ANF claim. They say that the issue should have been dealt with in the totality of the proceedings which led to national rates for Levels 1-3. Indeed, they contend that in Tasmania evening and night supervisors as such are classified at Level 3, implying (presumably) that there would be double-counting if a nurse enjoying the benefit of a higher classification because of an added responsibility were also to receive an allowance to compensate for that responsibility. The employers questioned whether the proposal could be accommodated within the wage-fixing principles prescribed in the 1989 National Wage Case decision.

Ms J Kovacs, for the employers collectively (except in the Queensland public sector), said that the relevant provision should be deleted from the South Australian award "the next time the award is varied". Ms S Kerr, representing the South Australian Health Commission and public sector employers in South Australia, said:

"As the Commission is aware, South Australia is the only state to provide responsibility allowances for registered nurses Levels 1, 2 and 3. We support the common employers' submission that national rates fixed so recently for these levels of registered nurse took into account the full role and responsibilities performed by these level of nurses and it is inappropriate for an additional allowance to be paid.

We would say that if the Commission were not persuaded to provide for a responsibility allowance in the other awards before the Commission today, it would be inappropriate to maintain that provision in the South Australian award and we would seek its removal."

We do not feel able, on the basis of the material before us, to accede to the ANF proposal; but having regard to

- the possibility that some nurses are carrying added responsibilities without fair compensation;
- the position in the ACT; and
- the inconsistency between the South Australian provision and the absence of any allowance elsewhere,

we think that the matter merits further attention before the conclusion of the total case. Accordingly, we shall list this aspect for further hearing at a time convenient to the Bench and the parties.

Operative Dates

Salary increases for Level 4 and Level 5 nurses arising from this decision will take effect in the first pay period after the newly-fixed salaries are recorded in the Schedules. Tasmania is excepted to the extent that increases will not take effect before 1 October 1991. The increase for Level 3B nurses in the Northern Territory will take effect in the first pay period after the relevant order is signed.

Orders

Orders giving effect to this decision will be prepared by the ANF and settled by Deputy President Hancock.

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1988
s.113 applications for variation

Australian Nursing Federation

HOSPITAL EMPLOYEES ETC. (NURSING STAFF A.C.T.) AWARD 1980[1]
(ODN C No. 01127 of 1978)
(C Nos 32435 of 1990 and 30763 of 1991)

NURSES PRIVATE EMPLOYMENT (A.C.T.) AWARD 1972[2]
(ODN C No. 01836 of 1972)
(C Nos 32436 of 1990 and 30774 of 1991)

NURSES (NORTHERN TERRITORY PUBLIC SERVICE) AWARD 1985[3]
(ODN C No. 01188 of 1985)
(C No. 30764 of 1991)

NURSES (TASMANIAN PUBLIC SECTOR) AWARD 1988[4]
(ODN C No. 00606 of 1983)
(C No. 30765 of 1991)

NURSES (TASMANIAN PRIVATE SECTOR) AWARD 1990[5]
(ODN C No. 00606 of 1983)
(C No. 30766 of 1991)

NURSING STAFF (REPATRIATION HOSPITALS) AUSTRALIAN NURSING FEDERATION AWARD 1991[6]
(ODN C No. 30171 of 1991)
(C No. 30767 of 1991)

NURSES (SOUTH AUSTRALIAN PUBLIC SECTOR) AWARD 1991[7]
(ODN C No. 31999 of 1990)
(C No. 30768 of 1991)

NURSES (ANF - SOUTH AUSTRALIAN PRIVATE SECTOR) AWARD 1989[8]
(ODN C No. 00606 of 1983)
(C No. 30769 of 1991)

NURSES (NORTHERN TERRITORY) PRIVATE SECTOR AWARD 1989[9]
(ODN C No. 30868 of 1988)
(C No. 30770 of 1991)

DOCTORS' NURSES (NORTHERN TERRITORY) AWARD 1980[10]
(ODN C No. 01037 of 1973)
(C No. 30771 of 1991)

[1]Print E5101 [H017]; (1981) 251 CAR 544
[2]Print G0905 [N053] [title change Print G4567 [N053 V048]]
[3]Print F9547 [N043]
[4]Print H5432 [N082]
[5]Print J7063 [N126]
[6]Print J8096 [N130]
[7]Print J8366 [N133]
[8]Print H8558 [N101]
[9]Print J0429 [N111]
[10]Print G0967 [D015]

Note: Dec 680a/92 Print K4409 correction has been incorporated in this decision.

NURSES (GOVERNMENT SUBSIDISED EMPLOYERS) AWARD 1990[11]
(ODN C No. 00606 of 1983)
(C No. 30772 of 1991)

NURSES (HETTI PERKINS HOME FOR THE AGED - ABORIGINAL HOSTELS LIMITED) AWARD, 1986[12]
(ODN C No. 01899 of 1980)
(C No. 30773 of 1991)

NURSES (QUEENSLAND PUBLIC HOSPITALS) AWARD 1991[13]
(ODN C No. 00606 of 1983)
(C No. 31079 of 1991)

NURSES (SOUTH AUSTRALIAN PUBLIC SECTOR) AWARD 1991[14]
(ODN C No. 31999 of 1990)
(C No. 50089 of 1991)

NURSES (SA MENTAL HEALTH SERVICE) AWARD 1992[15]
(ODN C No. 60176 of 1990)
(C No. 50094 of 1992)

Health Services Union of Australia

NURSES (TASMANIAN PUBLIC SECTOR) AWARD 1988
(ODN C No. 00606 of 1983)
(C No. 30405 of 1991)

NURSES (TASMANIAN PRIVATE SECTOR) AWARD 1990
(ODN C No. 00606 of 1983)
(C No. 30487 of 1991)

DETERMINATION NO. 3 OF 1945 [GENERAL STAFFS: REPATRIATION INSTITUTIONS AND MILITARY HOSPITALS][16]
(C No. 30979 of 1991)

HOSPITAL EMPLOYEES ETC. (NURSING STAFF A.C.T.) AWARD 1980
(ODN C No. 01127 of 1978)
(C No. 30980 of 1991)

NURSES PRIVATE EMPLOYMENT (A.C.T.) AWARD 1972
(ODN C No. 07192 of 1986)
(C No. 30981 of 1991)

Nurses — Health and welfare services

DEPUTY PRESIDENT MARSH
DEPUTY PRESIDENT MACBEAN
COMMISSIONER SMITH — MELBOURNE, 10 JULY 1992

[11] Print J2534 [N098]
[12] Print G2733 [N046]
[13] Print J7768 [N129]
[14] Print J8366 [N133]
[15] Print K2724 [N151]
[16] 025 CPSAR 005

DECISION

Wage rates - national wage August 1989 structural efficiency principle - work value principle - special case - new classification structure for ENs determined - comparability in the work of ENs to attract a common classification structure across all awards - wage relationship between ENs and RN Y1 should be established on work value grounds - parties to confer on developing generic definitions appropriate to the new structure and translations - conditions of employment - pay related conditions of employment established in RN national rates case to apply to EN related classification.

The following federal awards are the subject of section 113 applications lodged by the Australian Nursing Federation (ANF) and the Health Services Union of Australia (HSUA) in relation to enrolled nurses (or their equivalent)(ENs):

- Hospital Employees Etc. (Nursing Staff A.C.T.) Award 1980
- Nurses Private Employment (A.C.T.) Award 1972
- Nurses (Northern Territory Public Service) Award 1985
- Nurses (Tasmanian Public Sector) Award 1988
- Nurses (Tasmanian Private Sector) Award 1990
- Nursing Staff (Repatriation Hospitals) Australian Nursing Federation Award 1991
  (Determination No. 195 of 1970 [Nursing Staff - RANF])
- Nurses (South Australian Public Sector) Award 1991
  (Nurses (Registered Nurses - South Australian Public Hospitals and Health Agencies) Award 1989)
- Nurses (ANF - South Australian Private Sector) Award 1989
- Nurses (Northern Territory) Private Sector Award 1989
- Doctors' Nurses (Northern Territory) Award 1980
- Nurses (Government Subsidised Employers) Award 1989
- Nurses (Hetti Perkins Home For The Aged - Aboriginal Hostels Limited) Award, 1986
- Nurses (Queensland Public Hospitals) Award 1991
- Nurses (South Australian Public Sector) Award 1991
- Determination No. 3 of 1945 [General Staffs: Repatriation Institutions and Military Hospitals]
- Nurses (SA Mental Health Service) Award 1992

As a result of a number of decisions spanning the past few years Federal awards currently cover ENs in the following States and Territories: Australian Capital Territory, Northern Territory, Queensland, South Australia and Tasmania. Employers in each of these States and Territories appeared and employers from the public sector in Western Australia and the private and public sectors in Victoria intervened in the matter.

The applications are made pursuant to the Special Case wage fixing principle with reference to the structural efficiency and the changes in work value principles. The competing applications seek to provide for ENs a classification structure consistent with the objectives of those principles which has the following ingredients:

- provision of a career path for ENs;

- wage levels which reflect relative skills attained and utilised at each classification level;

- properly fixed internal relativities within the EN structure and within the nursing structure;

- provision of overall wage comparability with other health industry workers;

- compatibility with developments and trends in training and educational preparation of ENs which includes the move to competency based training and accreditation and the anticipated shift on a State basis away from hospital based education to TAFE training.

The differences between the unions' applications relate primarily to appropriate wage rates and relativities: in particular the number of levels within the proposed EN structure and the resultant relativities with the RN structure. Each union claims its structure, if adopted, would provide a further step in achieving the objective of properly fixed nationally consistent wage structures for nurses.

Overview of the ANF and HSUA's applications

The ANF's application seeks the adoption of a single level structure with five annual increments reflecting work based experience. The rates of pay attaching to the structure range from $22386 at year 1 level up to $24354 at year 5 level. These rates represent a relativity range of 91-99% of the RN salary range based on a UG 2 (college/university based diploma) qualification for a RN. The claim seeks the determination of final rates based on the same relativity range to the rates which will be implemented on a staged basis across awards to a UG 1 (university based degree) qualified registered nurse. The higher rates for a UG 1 qualified RN have been determined by a Full Bench and will apply when the change from UG 2 diploma to UG 1 degree level qualifications for RNs is effected on a State by State basis. The ANF seeks phasing of the EN rates concurrently with the shift in the base of the RN qualification. The ANF has not provided definitions to underpin the skill based classification structure.

The ANF's revised claim is set out as follows:

	UG 2	UG 1
Y1	$22386	$22386
Y2	22878	23183
Y3	23370	23980
Y4	23860	24776
Y5	24354	25572

For its part the HSUA seeks a two level classification structure with level 1 rates essentially the same as the ANF (but with immediate operation of the UG 1 rates), level 2 is proposed to be a promotional position of two grades. The claim is as follows:

Enrolled nurse	level 1	$22386
		23183
		23980
		24776
		25575
	level 2	26500
		26900

The top increment in level 2 represents 99% of the RN 1 Y3 rate (currently $27060).

The HSUA provides the following definitions for its structure:

"(1) Enrolled Nurse means a person registered as such by the appropriate Nursing Council and who holds a current practising certificate.

(2) ENROLLED NURSE LEVEL 1 : an Enrolled Nurse who provides nursing care to clients/patients according to established procedures and who is not required to exercise advanced skills and knowledge.

(3) ENROLLED NURSE LEVEL 2 : an Enrolled Nurse who in addition to providing nursing care to clients/patients according to established procedures is required to exercise advanced skills and knowledge, and to regularly undertake advanced nursing functions including:

- performing the duties of team leader, or otherwise supervising and/or training other Enrolled Nurses or direct care staff;
- working alone;
- performing duties as the most senior nurse on duty in a ward or unit;
- performing complex nursing tasks;

and/or has completed, and is required in the course of their duty to use an accredited post-basic training course.

(4) An Enrolled Nurse undergoing training for the purpose of obtaining a post-enrolment qualification shall be paid his/her substantive salary for the period of such training; which period shall be counted towards his/her years of experience."[17]

Both applications seek also incremental advancement of 1 year following completion of a TAFE certified course when, as anticipated over the forthcoming years, the state systems transfer from hospital to TAFE based training for ENs.

Level 1 of the HSUA's structure consists of five grades ranging from a beginning enrolled nurse practitioner to a much more experienced nurse in his/her final year. In the HSUA's view the evidence demonstrates that enrolled nurses classified at this level work under close supervision of a registered nurse at entrance level with progressively greater independence and discretion being exercised as the knowledge base and experience is gained.

Level 2 is a promotional level: it is not envisaged that automatic progression will be available, except for an EN holding post-basic certificate and the requirement to use it. Level 2 is defined:

[17] Exhibit M21

". . . as an enrolled nurse who in addition to providing nursing care to patients and clients according to established procedures is required to exercise advanced skills and knowledge and to regularly undertake advanced nursing functions, including performing the duties of team leader or otherwise supervising and/or training other enrolled nurses or direct care staff, working alone, performing duties as the most senior nurse on duty in a ward or unit, performing complex nursing tasks and/or has completed and is required in the course of their duty to use an accredited post-basic training course."[18]

Level 2 is distinguished from level 1 as such:

". . . this second level of work is distinguished from the first level on the basis of a higher work value, which includes greater knowledge and requirements and a direct requirement to use that knowledge, a greater complexity of clinical duties, and higher levels of responsibility."[19]

The following illustrations of work which the HSUA believes meet the definition were provided:

- theatre nurses
- number of staff and staff mix
- on working alone e.g. community based enrolled nurses
- advanced clerical skills

Each of these categories was illustrated by reference to evidence of witnesses who were considered to meet the requirements of Level 2. The HSUA argued that the work was performed on a permanent basis and was not of a character more properly rewarded by way of an allowance for "additional work". This submission was disputed by a number of employers.

Context of applications

Given the nature of the applications it is important to understand the context in which we are asked to assess the applications. This is particularly important because many of the employer submissions centred upon the history of wage fixation in the particular State from which the current award devolved and the emphasis within that history upon work value assessments: hence the requirement to avoid double counting; to identify datum point of change in line with the requirements of the principles, to test whether or not a "significant net addition to work had occurred"; and to consider carefully internal and external wage relativities.

This context is not divorced from the Full Bench decision known colloquially as the "A257" decision[20] which dealt with applications for national rates for both RNs and ENs. As the ANF submitted there was "unfinished business" from that matter which is now capable of being addressed. In its view a return to the objective of national rates can be made on the basis of considering:

- the increased number of ENs now covered by federal awards provide a basis for a national structure;

[18] transcript, p.204
[19] transcript, p.205
[20] Print G7200

- the generation of a new capacity by the adoption of the structural efficiency principle out of which a skill based classification structure for RNs has been determined. This in turn provides the basis for assessing the comparability between RN and EN as the most "proximate classifications in terms of work value and practice that there are in any health settings or as between enrolled nurses and any other group."[21]

The ANF position, adopted by the HSUA, was that the employers got it wrong in relying on State award histories in arguing against the applications - the unique process starting with the "A257" case has a relevance beyond the awards before that bench which extends to the awards before us, enabling us to go further and provide for national rates for ENs on the basis of skill comparabilities with the RN structure.

To more fully understand the framework in which the application is examined a useful background may be found in a Full Bench decision[22] which led to the fixation for final "national" rates for RNs:

"This decision is one of a series which we have given over the past 12 months concerning the Special Case before us for rates for registered nurses in federal awards. It is useful to recount some of the history of the matter.

When the claims were first lodged in December 1988 only nurses in the Australian Capital Territory, Northern Territory and Commonwealth nurses were involved, essentially the same work force which was the subject of the Full Bench decision concerning salaries of nurses in federal awards issued on 7 May 1987 in matter A.257 (Print G7200). The claims lodged in December 1988 initially were for 'professional rates' consistent with rates granted to registered nurses in New South Wales and Victoria which are to be finally phased-in by 30 September 1990. During the course of the proceedings before us public sector nurses in Tasmania, South Australia and Western Australia and private sector nurses in SA came into federal award regulation and were joined in the claims. The ANF amended the claims in October 1989 and what it now seeks are what we have described as nationally consistent structures and rates for registered nurses in all federal awards. Applications for structural efficiency increases pursuant to the national wage decision of 12 August 1989 were lodged for these awards in October and under the direction of the Bench the two sets of claims have been integrated and processed simultaneously.

In decisions handed down on 21 December 1989 (Print J0855) and 20 January 1990 (Print J1288) we determined that the ANF had made out a case for moving towards consistency of approach in the fixation of nurses' salaries. We said that we agreed with the objective of establishing nationally consistent rates and structures for nurses in federal awards, but that this would take time to achieve because of the differences previously existing in rates and conditions as between nurses in the various States and Territories.

[21] transcript, p.359 [22] Print J4011

As a first step towards national rates the Bench established a single entry point for registered nurses at level 1 in federal awards in all States and Territories except Tasmania, where an existing 4% differential was maintained. The percentage increase required to achieve the common entry rate was then applied to the existing salaries in each of the awards. We indicated that we were not prepared to alter the internal relativities in the various awards, or to fix final rates, without greater attention being given to salary-related conditions. We said that whilst we believed that nationally consistent rates for nurses would be the best outcome in the long term, the concept of national rates was a fiction if it referred only to salaries. Differences in salary-related conditions, in particular those involving shift penalties, overtime and weekend work were to be addressed in structural efficiency negotiations in the various States and Territories and in relation to DVA hospitals. It was made clear that there would have to be significant progress on rationalisation of these conditions before there could be any further move towards nationally consistent rates. The Bench also indicated that the manner in which rationalisation of conditions was achieved would affect the final salary levels prescribed in these awards.

Commissioners Cross and Smith were delegated to deal with individual structural efficiency applications by way of conciliation and/or arbitration. This has now take place and first phase structural efficiency increases for nearly all of the nurses covered by these claims have been approved.

The matters were re-listed on 25 June 1990 to 'review final rates and relativities together with the timing of any further increases both in relation to the claims for more nationally consistent rates and structural efficiency.' It is now our task to assess the structural efficiency results and to consider the new rates claimed for the classification structure in these awards. We have examined the Commissioners' decisions and are satisfied that the parties have properly addressed the structural efficiency principle taking into account the issues raised in our earlier decisions. It is anticipated that the latest decision of the Commissioners to be handed down today will enable the establishment of a consistent pattern of shift and weekend penalty rates in these awards."

Subsequent decisions have finalised the rates and classification structures for levels 4 and 5 of registered nurses and salary related conditions have been substantially altered.

We have decided on the basis of the submissions before us that the historical perspective of this matter forms the basis for a special case pursuant to the August 1989 National Wage Case decision.[23] We have considered the requirements of the relevant principles - structural efficiency and changes in work value within the parameters on which the anomaly was found to exist in the history of federal coverage of nurses in "A257". There is a requirement when determining rates and relativities under the work value changes principle that "structural efficiency exercises should incorporate all past work value considerations". As in other special cases we have found it unnecessary to compartmentalise the requirements of each principle.

[23] Print H9100

The fundamental task facing the Commission in this matter is to ensure that the rates fixed for ENs bear a proper relativity having regard to internal and external comparisons. Such a requirement is implicit in the structural efficiency principle and explicit in the changes in work value principle. It is to that end result that we have directed our attention bearing in mind that one of the major grounds in support of the applications is the achievement of a national classification structure for ENs based on skill related comparabilities within the EN structure and with the RN structure. Those applications would be unnecessary if, by historical coincidence, the EN wage fixation in the various jurisdictions from which the federal awards are sourced were consistent in respect to rates and structures. It is because the pattern of award coverage is disparate and inconsistent, reflecting different backgrounds, that the applications are being pursued.

We note that the Full Bench stated in relation to a similar background of diversity in RN rates which the Commission inherited from State jurisdictions:

> "The employers said that it would be a retrograde step to try to establish the work value link proposed by the ANF and the ACTU with past structures. We agree. We do not accept that it is appropriate to adopt the benchmark rates established in New South Wales and Victoria above level 1 for the federal awards. We are in a position now of setting rates for an industry which has recently come within federal award regulation. These awards have a common classification structure which is designed for and recognises the acquisition of high levels of skill and experience in each of the three streams of clinical nursing, administration and education. The structure is one, moreover, which creates its own cohesive internal relativities."[24]

It is the new structure created for RNs with its own cohesive internal relativities which was set within an industry with a growing incidence of federal coverage which contributes to the circumstances in which we are asked to determine rates for ENs.

We turn to our deliberations on the basis of applying the relevant principles to test the veracity of the applications.

The ANF and the HSUA sought to demonstrate a range of propositions from the extensive evidence to support their applications. The applications have been developed on the basis of achieving a "national rates" approach to nurses structures and rates and much of the evidence centred upon the changes in work value which had occurred to substantiate the applications sought.

From the evidence we are asked to conclude:

1. By both the ANF and the HSUA that there has been a significant net addition to the work of ENs to justify the levels sought for ENs employed in all settings and within all States i.e. the evidence sustains the adoption of a national structure.

2. In the view of the HSUA that a second level of nursing can be justified to support a career based structure based on relative skills.

[24] Print J4011

3. By the ANF that the final rate for an EN should not exceed or pierce the commencement rate for a RN.

4. By the HSUA that the EN structure should so pierce the RN structure to the extent sought in its application.

5. By employers, with some exceptions, that the general conclusion to be drawn from the evidence is that there has not been a significant net addition in the value of work of ENs since the last work value assessment. All employers opposed the specific HSUA position in relation to the appropriate comparability between the EN and the RN.

From these the following issues can be discerned which require determination including:

- Whether or not the work value of ENs has changed and if so whether the changes are generally applicable across settings in which ENs work and across the coverage of the awards before us.

- If a single classification structure is determined across awards what is the appropriate number of levels within the EN structure, how many increments should apply, and what if any definitions should attach to the structure.

- Specifically, in applying rates to any structure, we must decide upon the appropriate skill relationship between ENs at various stages of work career e.g. commencement rate of an EN, rate for an experienced EN compared with a beginning practitioner RN.

These issues must be resolved as we stated above within the requirements of the work value and special case principles with obvious regard to salient developments within the structural efficiency exercise.

While the degree of emphasis differed between the parties a number of strands of evidence (often interacting) can be distilled from the evidence led by the HSUA and the ANF which each union argued substantiates the view that the work value of an EN has significantly increased.

Extensive witness evidence was led in Tasmania, South Australia, Queensland, Australian Capital Territory and Northern Territory. A timetable of evidence called is attached to this decision which demonstrates its extensive nature. In very broad terms the changes in work value which the unions sought to draw from the evidence related to:

1. changes in job design and organisation of work: particularly the shift from task allocation to patient or client allocation;

2. changes of a varied nature in the work environment and in nursing practice;

3. changes in patient/client dependency;

4. the increased theatrical and practice knowledge spanning many areas required of an EN whether that knowledge is derived from the TAFE system or is hospital based;

5. the mobility required across a wide range of settings;

6. changes in nursing home areas by the introduction of outcome standards;

7. changing education and planned moves to achieve national competency based accreditation and standards, and

8. the growing access to and incidence of inservice training.

The ANF sought to draw from the evidence a conclusion in relation to the skill relationship between an EN and a RN. This was presented both generally and specifically in relation to a RN beginning practitioner and an experienced EN. Much of the material highlighting the differences and similarities between the two categories of nurses related to the difference in education preparation and knowledge base in regulations and statutes which confine the role of the EN in respect to performing certain medical treatments, in respect to supervision (which also involves regulations) and responsibility. In the ANF's view a distinction can be made between direct and indirect supervision in which a RN will ultimately assume a direct supervisory role or make a decision of a delegation to an EN. Importantly, the ANF was unable to give a commitment that if the EN final wage level exceeded beyond the second year RN level that pressure to realign RN relativities would not occur. The ANF examined the evidence which it said provided a distinction between the "functional or practical performance" of an EN compared with a RN - which in many instances will be similar - and the "less tangible function such as supervisory responsibilities, assessment responsibilities, planning and so forth which are clearly the province of a registered nurse to a greater extent.[25]

In respect of the sensitive relationship between an experienced EN and a beginning TAFE based RN the ANF argued that the commencement skills of a RN were not superior to those of an experienced EN. However in the case of a RN the combination of education preparation and work experience is such that superior relationship changes within 6-12 months of the registered nurse applying the skills.

While the HSUA level 1 scale is identical to the ANF scale the level 2 scale is 99% of the level 1, year 3 rate for the RN - the final relativity extends to 109% of the level 1, year 1 rate for the RN.

The HSUA acknowledged its task in relation to justifying the rates sought, including the contentious area of EN rates penetrating the RN rates means that,

"such overlap can only be justified in salary terms if a true overlap in work values can be shown and we believe this has been done."[26]

The HSUA summarised the evidence in the following way:

"GENERAL PROPOSITIONS ARISING FROM THE EVIDENCE

(1) There is a broad commonality of Enrolled Nurse function across all States and Territories examined in the National Case.

[25] transcript, p.67 [26] transcript, p.215

(2) The range of work value is similar across practice settings, and shifts.

(3) Two levels of Enrolled Nurse work can be identified for salary and grading purposes.

(4) The level at which an Enrolled Nurse is required to operate at is generally determined by the factors outlined in point 3 (Organisation of Work).

(5) There is a 'skills gap' between the level of skill provided by the mandatory EN training courses and what is actually required of ENs in the workplace, and this gap is filled by a variety of means including on the job experience.

(6) For many, Enrolled Nursing is a lifetime career.

(7) The work of Enrolled Nurses has been and continues to be subject to significant change."[27]

By reference to the direct evidence the HSUA sought to demonstrate:

- the overlap of function between the experienced EN and an inexperienced EN;

- that its application was consistent with the outcome for registered nurses;

- that the application does not offend other health industry workers (Exhibit M21) by way of an "impressionistic glimpse" at some of the current rates of pay that exist in the health industry and via examples of the interaction of EN with these employees in selected wards or settings where witnesses worked.

The HSUA argued that while relativities sought were a "very contentious issue" the proposed HSUA levels would not engender opposition from RNs. It rejected also the employer proposition arising out of the evidence that current relativities were working "all right" and that the change in relativities would induce a redistribution of the labour market demand towards the employment of relatively more RNs. This argument is rebutted in its view on the basis of the overall cost of employing a RN who is entitled to a number of increments within that structure. The HSUA also sought to refute the structure proposed by the ANF characterising it as failing to create a genuine career path because the institutional and other factors restricting the transfer from EN status to RN status produces in reality a narrow band of career path "limited by the current reality of the work as it is organised in the industry."[28]

Employer submissions - wage rates

We are asked to assess the applications within the framework of federal award coverage of ENs in Tasmania, Queensland, Australian Capital Territory, South Australia with processes in train in Victoria and Western Australia which may or may not result in federal coverage.

[27] Exhibit M21, pp. 3-4 [28] transcript, p.226

In these proceedings a disparity of views were expressed by the respondent employers. In relation to the wage applications the position is summarised:

Queensland

The Queensland Government provided a detailed history of relevant decisions covering the work of ENs and related classifications since 1971. It opposed any wage increase primarily on the ground that a major decision handed down by the Industrial Conciliation and Arbitration Commission of Queensland in 1987 (Queensland Government Industrial Gazette Vol.CXXV No.44) had determined rates for ENs on work value grounds and that the grounds identified were substantially or totally consistent with the grounds relied upon by the unions in the matter before us. The shift in jurisdiction does not dilute the relevance of the decision made by the State tribunal that work value changes have been reflected in the rates. No measurable change has occurred since. An additional complication is that currently junior rates exist in the award and are utilised in employing ENs.

Australian Capital Territory

Private and public sectors advanced identical propositions - namely that the Full Bench decision in the "A257" case clearly determined relativities for an integrated nursing structure. Subsequent decisions have disturbed the relativities between the RN and the EN - the rectification of that disturbance is a justified basis for salary increases for ENs.

Tasmania

Given the relative progress made in Tasmania in respect to the TAFE based training for nurses including ENs and the identifiable changes in the work value of ENs the Tasmanian public and private sectors considered there was justification in the ANF's proposal (but not in the final proposal based on the UG1 RN level). The Tasmanian Government described the EN as a "vital component in the public health sector" who was "now increasingly viewed as filling the gap created by the emergence of the high tech registered nurse".

South Australia

The South Australian public sector traced the history of wage fixation under State awards since 1964. A decision arising out of a 1990 anomalies case[29] rectified, by consent, an anomaly on the basis that in 1990 the wage relativities fixed in 1976 were correct. An analysis of the evidence relating to South Australian awards led to the conclusion that no expansion in skills had occurred to warrant a finding that a change in the work value of ENs had occurred. The submission stressed the conclusion which should be drawn from the evidence is that the highest EN relativity of 99% of the RN rates is too high and that there should be no overlap of rates based relative on skill of an EN and RN. The public sector supported a maintenance of the SA 1 level, 3 increment structure be modified to incorporate into the structure the qualification allowances currently paid. Consequential realignment of internal relativities should be permitted.

[29] S.A. Industrial Gazette, 5 July 1990

The South Australian private sector presented an overall position which is very similar to that sought by the South Australian public sector. It agreed that neither union had established a change in work value leading to a significant net addition to work requirements and supported the building into the current SA award structure the qualification allowances. In respect to the aged care section the evidence underpinned the conclusion that no change had occurred in the role of the EN. When comparison is made with the role of a RN a number of criteria including the supervisory role, accountability and responsibility, training and knowledge demonstrate that "the evidence that has been led in SA shows that the enrolled nurse cannot and does not work beyond the level of a registered nurse."

Northern Territory

The Northern Territory Public Service (NTPS) Commissioner submitted that the evidence in the Northern Territory, particularly that relating to the move to a holistic approach to nursing and the EN contribution to the preparation of nursing plans has resulted in a change in work value which justifies a wage increase. The NTPS Commissioner opposed, on the basis of legal educational requirements a penetration of RN rates by the EN rates - it is the RN who holds the ultimate supervisory role. The NTPS Commissioner accepted as appropriate adoption of the ANF's "original position" namely the ANF rates based on the UG 2 qualification - not the final rates based on the RN's UG 1 qualification.

The Northern Territory Confederation representing respondents in the private sector generally supported the position put by the Northern Territory Administration.

DVA

The Commonwealth Government argued that the concept of the rates of matching State counterparts should continue in DVA hospitals to "facilitate the transfer of repatriation hospitals to the States". In relation to ENs employed under the Aboriginal Hostels award the Commonwealth submitted that it was appropriate that the rates and conditions should mirror those applying to employees covered by Northern Territory public sector awards.

Victoria

The Victorian public and private sector employers as intervenors before us cautioned against the impact that the granting of the unions' claims could have on unsettling the Victorian structure. As part of a special case involving all classifications in the Health and Allied Services Award No. 1 of 1991 the rates of ENs have been properly fixed in relation to all other hospital workers. In short the Victorian employers argued that no change in work value has occurred in Victoria since the special case and that the factors relied on evidence led in proceedings before us have already been embraced in the Victorian rates.

Western Australia

The Western Australian Government, intervening, indicated that a three level skill based career path has been inserted into the State award as part of the structural efficiency exercise. The classification structure has definitions attached which are still being discussed and refined by the parties.

Conclusions

The work of enrolled nurses was properly fixed as part of the "A257" case which fixed relativities for all classes of work of nurses. Since that decision a number of State tribunals have conducted work value or anomaly/special cases in respect to the nursing structure including ENs. The classification structure of RNs has been fundamentally reviewed as part of a special case conducted in conjunction with structural efficiency exercise. That case determined relativities different from those awarded in the "A257" case for reasons fully set out in relevant decisions. The parties foreshadowed their intention to conduct a review of EN rates following resolution of RN rates. As such the classification structure did not form part of the structural efficiency exercise for ENs but forms part of the special case which we have found to exist.

While some aspects of change in the work of ENs are less pronounced than those pertaining to RNs, nevertheless the factors on which we are asked to adjudicate in this case parallel those the Full Bench considered in the cases of RN decisions. Since the "A257" case a number of important developments have occurred which if not "unique" as the HSUA submitted are certainly special. These developments include:

- a shift of awards covering ENs from State to federal coverage;
- a disparate array of rates and structures for ENs in the various awards;
- an uneven historical pattern of timing of assessment of the value of the EN within the State systems;
- the implementation of structural efficiency principle as a vehicle for award reform on an ongoing and far reaching basis since the value of ENs was reviewed within the State systems;
- the establishment of national rates for RNs;
- training and working relationship between ENs and RNs.

The unions submitted that a "fresh approach" to fixing relativities was required within the context of a special case with reference to the work value and structural efficiency principles.

Against the body of evidence we are asked to conclude that: the work of an EN across awards and settings is comparable i.e. that "EN develop to perform a common body of work across Australia". We are then asked to develop for the "common body" a career based classification structure which properly reflects the attainment and utilisation of skills on the basis of work experience and in service training.

The evidence in this matter is vast. In general it highlights that the work of ENs is of a varied nature both within and across settings and between the beginning and experienced practitioners. It is of sufficient persuasion to lead us to conclude that: there is comparability in the work of ENs to attract a common classification structure across all awards; the increase in skills acquired and utilised as work experience increases with time can form the basis of a career path; a wage relationship between the EN and the RN Y1 should be established on work value grounds in fixing the limits of the classification structure.

In reaching our conclusions we have assessed all the evidence and submissions. In dealing with the relationship between the RN scale and the EN scale particular attention has been given to the competing arguments in relation to supervision, accountability and responsibility of a beginning RN and an experienced EN and our decision balances the body of evidence which revealed different working relationships and different degrees of responsibility within and across a range of settings.

Turning to the classification structure and salary levels we have decided that the awards will be varied to reflect the following:

Y1	$22386
Y2	22878
Y3	23370
Y4	23862
Y5	24354

The range is consistent with the relativity range 91% - 99% of the current registered nurse structure. The rates we have fixed are related to a Y1 RN who holds a UG 2 qualification. This represents the first stage position of the ANF. We have carefully considered the submissions of all the parties in relation to the treatment of EN relativities in the light of the shift of RN educational base from UG 2 to UG 1, the latter being awarded a higher starting point in the RN scale by a Full Bench decision. All employers opposed the automatic movement of the EN relativity to match the UG 1, describing such a move as premature, without foundation and industrially unsound. A number of submissions strongly challenged the unions' claims that the UG 2 classification would not have relevance in the future. Both the ANF and the HSUA argued that the changeover to UG1 was a viable goal to be progressively achieved in the States in the foreseeable future and that such a rate should be the appropriate "enduring" benchmark.

In deciding upon the appropriate outcome we have necessarily considered the skill comparabilities before us. In general that means the comparison between a UG 2 RN and an EN who is hospital based. The Full Bench has stated in relation to UG 1 degree qualified RN:

> "In addressing the question of advancement through the structure, the ANF sought a provision for one year's advancement for level 1 nurses who possess a UG1 degree in nursing or a qualification possession of which entitles a nurse to registration in another branch of nursing or on another nursing register; or a qualification, successful completion of which requires enrolment in a post-registration course of 12 months or more. We support such a principle and will approve accordingly."[30]

The Full Bench attached a monetary evaluation to the UG 1 rate. It has done so by assessing the value of the change in the educational requirement for a RN will have on the overall work value of a RN. It follows therefore that in the absence of a practical assessment of the impact that this change may have on the work value relationship between an EN and the RN there can be no grounds for automatically transferring the EN to the higher relativity. The evidence before us on the relationship of the RN and the EN necessarily relates to what is the current situation. It is that situation which we must assess - not a relationship of the future. It may be the case in the future that,

[30] Print J4011

- a realignment of the relativity is justified between an EN and a RN (UG 2) and, RN (UG 1) in light of the move of RNs to UG 1 status;

- the work value of an EN will vary in light of the education requirement of an EN shifting from hospital to college based.

In evaluating the work of the EN we note the planned developments in the educational area but stress that we have reached our decision on an assessment of the value of work including an assessment of the current educational base for an EN which is hospital based. However there can be no future double counting for increased work value arising out of changed educational qualification of ENs: for example in the form of accelerated entry together with a higher base relativity with the UG 1 qualified RN.

In making observations about the future educational preparation for an EN we further observe that a fundamentally important issue arising out of the evidence relates to the objective of a career path for ENs based on a skilled based classification structure. The attainment of this objective is shared by us and is consistent with the thrust of wage fixing principles based on restructuring since 1989. It forms an important part of the reason why we are prepared to adopt a new structure and definitions for ENs. We wish to make it clear on the basis of the material before us and our knowledge of the RN structure that the objective will be fully met when obstacles inhibiting ENs from advancing through to the RN structure are overcome. Until then we do not believe that opportunities for an integrated career path exist for all aspirants. However while the evidence of Ms Parkes in particular explains the interrelated developments in areas such as training, competency, accreditation, common standards etc, which as the ANF said, "coalesce to give impetus to each other" the ultimate attainment of the objective is beyond the scope of this Commission. It remains however of fundamental importance to enable a genuine career path to be accessible to ENs working in the nursing profession.

The issue of appropriate rates to apply to juniors, students or pupil rates was not agreed between the unions and the relevant employers in Queensland, Australian Capital Territory and Northern Territory where such classifications pertain. We are prepared to adopt existing relativities to the EN year 1 rate pending more detailed submissions. To expedite the finalisation of these issues they will be referred to the panel head who will allocate the matter for further hearing and determination.

We have considered the element of automaticity sought within both structures. We accept on the evidence before us that a defined skill acquisition and utilisation trend line is followed by an EN working within a single or across a variety of settings within parameters of the single level classification structure we have decided upon. However we believe that definitions should attach to a skills based classification structure and the parties are asked to confer on developing generic definitions appropriate to the structure we have determined for ENs which are capable of adequately translating into the structure the existing pattern of award classifications.

The discussions which we have ordered in relation to definitions should embrace translations. Within this framework the issues of accelerated entry and advancement for Tasmanian based ENs; Tasmanian mothercraft nurses; maternity nurses in Queensland; advanced certificate level qualifications should be further discussed between the parties on a skills comparability basis of translation.

The issue of calculating in house training as service will not be subject to blanket award prescription although at least on the face of it some training courses form an important aspect which underpins the incremental pattern provided for in the structure we have determined. We share the employers' concern at the open-endedness of the application and while conceptually there is merit in the proposal, the parameters should be subject to discussions between the parties.

The ANF and the HSUA advocated different positions in relation to pay related conditions of employment. While stressing its argument was advanced in relation to the level of rates sought the ANF nonetheless recognised that the attainment of national rates brings with it on consistency grounds, the requirement for uniform salary related conditions of employment across States and within the nursing structure - a premise challenged by the HSUA. This issue was fully debated and resolved in the RN case. In the relevant decision the Full Bench stated:

> "We are in agreement that national rates must be considered along with conditions. Whilst we believe that nationally consistent rates for nurses, where possible, would be the best outcome in the long term, the concept of national rates is a fiction if it refers to salaries alone. The phasing-out of the differences in salary-related conditions must therefore be addressed in the structural efficiency negotiations in each State and Territory and in the DVA negotiations. It will be necessary for there to be a firm programme for this established prior to the first structural efficiency increase. Significant progress will have to be made on nationalisation before there can be any further move towards nationally consistent rates and prior to any second structural efficiency increases. The manner in which rationalisation of conditions is achieved will, moreover, affect the final salary levels to be prescribed in these awards. If, for example, differences are resolved by levelling-up to the highest conditions now available, there may be little scope for further increases in salaries. We indicated in our previous decision that a member of the Bench will be delegated to deal with individual structural efficiency applications; to consider agreements and if necessary conciliate or arbitrate in relation to these."[31]

All employers in the current matter supported the establishment of pay related conditions which are consistent with that now applying across the RN structure. A range of propositions were advanced in respect to phasing-in arrangements. The employer position was succintly summarised by the Tasmanian Government:

> ". . . to have two groups of staff paid under the same awards and working side by side in the same industry, but receiving disparate salary-related conditions would lead to an atmosphere of disharmony and resentment."[32]

[31] Print J1288

[32] transcript, p.428

We have decided as a matter of principle that the pay related conditions of employment which have been established in the RN national rates case should apply to EN related classifications. However we do not intend to prescribe a standard formula for achieving that objective. We have decided that the parties should address this issue on an award by award basis. This will provide a mechanism to meet the concerns expressed by the HSUA in relation to the proper processes to apply in determining this issue; to allow further consideration of the implementation criteria proposed by the ANF; and, to ensure that the circumstances surrounding each group are taken into account including our view that no loss of income should occur as a result of this decision. If the parties are unable to resolve the issues arising out of this part of our decision Smith C. will sit to hear and determine these matters.

A number of further specific issues relating to a particular award or awards have been raised by the parties. These matters include: $6 shift allowance for supervisors in Tasmania; qualification allowance in Australian Capital Territory and South Australia awards; theatre allowance in DVA awards. A number of these issues were not debated in detail and we have insufficient material relating to their impact to now determine them. Matters where loss of income may be arguable should be dealt with in the same way as salary related conditions of employment. The parties will be given an opportunity to address these issues within the framework of the decision we have reached. While, as a general principle, we believe all historical anomalies related to salary related conditions should be deleted from awards given the advent of a national structure, there may be compelling arguments favouring different treatment. In the first instance the parties should discuss these issues as part of the discussions to be held on both translation arrangements and salary related conditions. If required they are referred to Commissioner Smith to hear and determine.

Commissioner Smith will settle the orders arising out of this decision. The parties will be given an opportunity to address phasing of the increases which will be determined by the Commissioner. Subject to that determination, the salary increases arising out of this decision will operate from the first pay period on or after today's date and will remain in force for twelve months.

A final issue related to the intervention by the private and public sector employers in Victoria who are covered by the State award. Applications to vary that award for ENs are part heard in the Victorian Industrial Relations Commission. We have not given weight to the extracts of evidence which form part of those hearings which were tendered in proceedings before us. If the matters resume in Victoria then it will be a matter for that Commission to give to our decision whatever weight it considers appropriate taking account of all the circumstances of that case. Likewise if coverage of Victorian ENs is shifted to this jurisdiction then any application in relation to EN's rates and structures would be dealt with in accordance with the merit of submissions put at that time.

Appearances:

F. Kyle with M. Beaumont, J. Wilkinson, D. Wasley, Sudano, D. Wasley, J. Carberry, M. Freeman and N. Vidouich for the Australian Nursing Federation.

J. Murray with L. Hiles for the Health Services Union of Australia.

L. Berryman with D. Morgan, N. Swails and K. Heaney for the Minister for Industrial Relations.

L. Dunn with W. Wilkinson for the Minister for Veteran Affairs.

S. Kerr for the South Australian Department of Personnel and Industrial Relations and with A. Thomas for the South Australian Health Commission.

T. O'Shea with V. Busteed and J. Cassie for ACT Board of Health and Chief Minister for the ACT.

J. Frazer with S. Harris, B. Haywood and M. Nelson for Queensland Devetir.

J. Cox with L. Whiteway for Tasmanian Department of Health.

G. Szlawski with M. Prager and G. Clay (intervening) for Health Department of Victoria.

J. Horan for Confederation of A.C.T. Industry.

P. Rocks with G. Shanahan and R. Hosking for NT Public Service Commissioner.

K. Jackson with T. Tsikouris for NT Confederation of Industry and Commerce.

K. Sheridan with D. Wood for SA Employers Federation.

B. Fitzgerald with P. Targett for Tasmanian Confederation of Industries.

I. Henry for State Public Services Federation.

D. Jeffery for The Australian Workers' Union (Queensland Branch).

M. Rahilly with C. Dewan (intervening) for the Victorian Employers' Chamber of Commerce and Industry.

S. Kaempf (intervening) for Western Australian Government.

Dates and places of hearing:

1991.
Melbourne:
June 19;
December 12, 13.

1992.
Melbourne:
March 18, 31;
April 1, 2, 6, 7;
June 1.

Dates and places of hearing - contd

Evidence:

1991.
Darwin:
August 27, 28 (Smith C)
Alice Spring:
August 30 (Smith C)
Adelaide:
September 23-26 (Marsh DP)
Hobart:
October 17 (Marsh DP)
Canberra:
October 22, 23 (Smith C)
Brisbane:
November 12-14 (MacBean DP)
Launceston:
November 27, 28 (Smith C)

ATTACHMENT

LIST OF WITNESSES

DATE	WITNESS	POSITION
		DARWIN
		Smith C.
27.8.91	Eileen Boocock	EN Course Co-ordinator, Alice Springs Hospital
27.8.91	Leonie Sullivan	EN, Royal Darwin Hospital, acute medical ward
27.8.91	Mary Cook	EN, Salvation Army Nursing Home
27.8.91	Sharon Combe	EN, Royal Darwin Hospital Outpatients
28.8.91	Katherine Whitbread	RN, Chan Park Nursing Home
28.8.91	Marlene Herron	EN, Royal Darwin Hospital, Intensive Care Unit & Northern Territory Nurses Board representative
28.8.91	Ronlynn Lindsey	RN, Royal Darwin Hospital, medical ward
		ALICE SPRINGS
		Smith C.
30.8.91	Tanya Hall	EN, Alice Springs Hospital, medical ward
30.8.91	Patricia Possingham	EN, Alice Springs Hospital, paediatrics gastro ward
30.8.91	Judith Hansen	RN, Hetti Perkins [AHL] Home for the Aged
		ADELAIDE
		Marsh D.P.
23.9.91	Kaye Armstrong	Assistant Principal Nurse Educator, Modbury Hospital
23.9.91	Ann Ferguson	EN, Mt Barker District Soldiers' Memorial Hospital Theatre/CSSD
23.9.91	Carol Ebert	EN, North Eastern Community Hospital, Payneham nursing home ward
23.9.91	Angela Roe	EN, Gumeracha District Soldiers' Memorial Hospital

DATE	WITNESS	POSITION
Adelaide - contd		
24.9.91	Elizabeth Terrier	ADON (Management), Royal Adelaide Hospital
24.9.91	Veronica Gower	ADON (Management), Daw Park Repatriation General Hospital
24.9.91	Denise Brewster-Webb	SA RN, Nurse Advisor (Registration) Nurses Board of South Australia
25.9.91	Claire Johansson	DON, St. Andrews Hospital
25.9.91	Ruth Stock	SA RN, Private Consultancy Service
26.9.91	Janice Macklin	SA DON, Adelaide Medical Centre for Women and Children
	HOBART	
	Marsh D.P.	
17.10.91	Denise Oates	RN, Royal Hobart Hospital - orthopaedic acute care
17.10.91	Sandra Krstic	EN, St Johns Park Hospital - geriatric nursing home
17.10.91	Agnes Stanislaus-Large	TAN, Calvary (private) Hospital - acute care
17.10.91	Lynette Batge	TAN, Calvary (private) Hospital theatres
	CANBERRA	
	Smith C.	
22.10.91	Joann Griffiths	RN, Royal Canberra Hospital South
22.10.91	Chris Selkirk	EN, John James Memorial Hospital theatres
22.10.91	Fina Bakker	EN, community nursing
22.10.91	Beverley Wade	EN, Woden Valley Hospital
22.10.91	Jan Seevinck	EN, John James Memorial Hospital
22.10.91	Maureen Schaffer	EN, Woden Valley Hospital theatres
22.10.91	Margaret Lyons	EN, Red Cross Blood Transfusion Service, Canberra

DATE	WITNESS	POSITION
Canberra - contd		
22.10.91	Alison Jenkins	EN, Watson Hostel
22.10.91	Calene Backhouse	EN, Hennessy House
22.10.91	Colleen Fulton	EN, Morling Lodge Nursing Home
23.10.91	Beverley Calver	A/Co-ordinator, EN programme
	BRISBANE	
	MacBean D.P.	
12.11.91	Suzanne Cameron	Chairman, Board of Nursing Studies, Queensland
12.11.91	Debbie Humbley	Nurse Educator & Co-ordinator of EN course at Royal Brisbane Hospital
12.11.91	Dianna Kenrick	DON, Logan Hospital
12.11.91	Mark O'Connor	EN, Rosemount Hospital, acute psychiatric ward
13.11.91	Christine Read	EN, Prince Charles Hospital (nursing home unit)
13.11.91	Rosalie Lewis	DON, Mater Miscricordiae Children's Hospital
13.11.91	Rosemarie Boshammer	EN, Logan Hospital (theatres)
13.11.91	Dorothy McAllister	EN, Bald Hills Hospital, Residential & Respite Care
14.11.91	Ann Noble	EN, Repatriation General Hospital Greenslopes
14.11.91	Alida Mayes	AIN, Royal Children's Hospital, Babies Ward
14.11.91	Margaret Gray	AIN, Royal Womens Hospital
14.11.91	Sylvia Neville	AIN, Royal Children's Hospital outpatients department specialist clinics
14.11.91	Karen Harmon	DON, Boonah Hospital, Queensland

DATE	WITNESS	POSITION
		LAUNCESTON
		Smith C.
27.11.91	Gerard Moore	A/ADON (Staff Development/Education) NW Regional Hospital and member of Nursing Board of Tasmania
27.11.91	Jennifer Stuart	TAN, Queen Victoria Hospital, Gynaecology Surgical Ward
27.11.91	Marie Bentley	DON, Eliza Purton Nursing Home, Ulverstone
27.11.91	Helene Gerke	TAN, James Muir Community Health Centre, Wynyard
28.11.91	John McIntee	TAN, St Vincents Private Hospital
28.11.91	Kay Fenton	TAN, St Lukes Private Hospital
28.11.91	Christine Horton	TAN, Spencer Division, North West Regional Hospital
28.11.91	Barbara Imlach	TAN, North-Eastern Soldiers' Memorial Hospital
		MELBOURNE
		Full Bench
13.12.91	Robyn Parkes	Nurse Advisor, Federal Office - ANF

AustLII

Australian Industrial Relations Commission

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; (13 January 2005)

PR954938

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.113 applications for variation

s.107 reference to Full Bench

Australian Liquor, Hospitality and Miscellaneous Workers Union

CHILD CARE INDUSTRY (AUSTRALIAN CAPITAL TERRITORY) AWARD 1998

(ODN C No. 03697 of 1985)

[AW772250CRA Q2724]

(C2002/5237)

CHILDREN'S SERVICES (VICTORIA) AWARD 1998

(ODN C No. 20079 of 1993)

[AW772675 R0954]

(C2003/4271)

Health and welfare services

VICE PRESIDENT ROSS

SENIOR DEPUTY PRESIDENT MARSH

COMMISSIONER DEEGAN SYDNEY, 13 JANUARY 2005

Wage rates - classification structure - new allowances - award title.

DECISION

INDEX

1. Introduction

[1] This decision deals with two applications (C2002/5237 and C2003/4271) by the Australian Liquor, Hospitality and Miscellaneous Workers Union (now the Liquor, Hospitality and Miscellaneous Union) (the LHMU). The applications seek to vary the *Child Care Industry (Australian Capital Territory) Award 1998* (the *ACT Award*) and the *Children's Services (Victoria) Award 1998* (the *Victorian Award*) in relation to wage rates, classification structure, new allowances and the award titles. The applications were joined, by consent, on 4 December 2003[1]. As a consequence of such joinder the evidence in respect of matter C2002/5237 (the ACT application) has been taken into account in our consideration of matter C2003/4271 (the Victorian application) and vice versa.

2. The Claims and Submissions

2.1 The ACT Award

2.1.1 LHMU Submissions

[2] In the ACT application the LHMU seeks to vary the *ACT Award* to insert a new classification structure and minimum rates of pay. We note that the LHMU has amended its original application. The current classification structure and associated descriptors is set out at Annexure 1. In summary terms it is as follows:

Table 1

Classification	Weekly rate $
Child care worker level 1	474.60
on commencement	484.90
after 1 year in the industry	495.10
after 2 years in the industry	
Child care worker level 2	496.70
on commencement	506.90
after 1 year in the industry	517.20
after 2 years in the industry	
Child care worker level 3	552.00
on commencement	561.20
after 1 year in the industry	571.40
after 2 years in the industry	

Classification	Weekly rate $
Child care worker level 4	602.20
on commencement	610.40
after 1 year in the industry	620.70
after 2 years in the industry	
Child care worker level 5	630.90
on commencement	641.10
after 1 year in the industry	651.40
after 2 years in the industry	
on commencement	697.34
(Graduate Certificate Management)	726.31
after 1 year in the industry	745.28
after 2 years in the industry	
Director level 1	746.80
on commencement	757.00
after 1 year in the industry	767.30
after 2 years in the industry	
on commencement	800.98
(Graduate Certificate Management)	824.82
after 1 year in the industry	848.66
after 2 years in the industry	

Director level 2	796.00
on commencement	804.30
after 1 year in the industry	814.50
after 2 years in the industry	
on commencement	862.30
(Graduate Certificate Management)	891.20
after 1 year in the industry	920.10
after 2 years in the industry	
Director level 3	824.80
on commencement	835.00
after 1 year in the industry	845.30
after 2 years in the industry	
on commencement	893.28
(Graduate Certificate Management)	922.27
after 1 year in the industry	951.26
after 2 years in the industry	
Child care support worker level 1	474.60
on commencement	484.90
after 1 year in the industry	495.10
after 2 years in the industry	
Child care support worker level 2	496.70
on commencement	506.90
after 1 year in the industry	517.20
after 2 years in the industry	

[3] There are four elements to the LHMU's amended claim:

(i) A change in award title.

(ii) The insertion of a new classification structure with properly fixed rates of pay.

(iii) The provision of additional allowances for directors.

(iv) A change in the title of clause 5.1.5.

Award Title

[4] The LHMU seeks to change the current title of the *ACT Award* to the *Children's Services (Australian Capital Territory) Award 2002*. It is submitted that the proposed title of the award:

reflects the increased level of training, community expectations and responsibility of employees in the industry;
is more appropriate in a modern context;
reflects the fact that the award covers a range of workers and facilities including long day care, out of hours care and family day care;
was developed during wide consultation with the children's services industry; and
is consistent with the title of the courses offered by the Canberra Institute of Technology.

New Classification Structure

[5] The LHMU proposes a three stream classification structure: a centre based stream, a school age care stream and a family day care stream. An outline of the proposed classification structure in relation to the centre based stream is set out below.

CC1: Child Care Employees Level 1 and Support workers Level 1

Set at 87.4% of the trade rate. Workers at this level will be new to the children's services industry, without formal qualifications and are being introduced to the working environment of the service.

Employees will only remain at this level for three months.

CC2: Child Care Employee Level 2 and Support Worker Level 2

Set at 92.4% of the trade rate. The next step for CC1 level workers who have completed three months service.

This level would also be the commencement point for employees who have completed an AQF Certificate II, or for those who have enrolled in AQF Certificate III, or for employees who work within the duties contained in Annexure 2 to this document.

CC3: Early Childhood Educator Level 1 and Support Workers Level 3

Set at 100% of the trade rate. The entry point for workers who have completed an AQF Certificate III, or for employees with or without these qualifications, who are expected to undertake higher duties such as being responsible for reporting observations and for the planning and setting of menus.

CC4: Early Childhood Educator Level 2

Set at 115% of the trade rate. Employees move to this level on completion of AQF Certificate III, and AQF Certificate IV or are enrolled in the AQF Diploma, or employees with or without these qualifications who are required to undertake higher duties such as being responsible for programming for an individual child or small group of children.

CC5: Early Childhood Educator Level 3

Set at 130% of the trade rate. Employees move to this level on completion of the AQF Diploma and where employees are required to undertake higher duties such as being responsible for programming for a group.

CC6: Team Leader Level 1

Set at 145% of the trade rate. Employees move to this level on completion of the AQF Diploma and where employees are required to undertake higher duties such as the supervision of employees at levels CC1 to CC4.

CC7: Team Leader Level 2

Set at 150% of the trade rate. Employees would move to this level on completion of the AQF Diploma, and may have other qualifications such as a Graduate Certificate or an Advanced Diploma. Children's services employees at this level would be appointed as a team leader in a room and required to undertake higher duties such as the supervision for employees of level CC5.

CC8: Assistant Director

Set at 160% of the trade rate. Employees at this level are appointed as assistant director, will have at least an AQF Diploma and be required to fill in for the director in her or his absence.

CC9: Director Level 1

Set at 180% of the trade rate. Centre directors are appointed to this position under licensing requirements, and may hold an AQF Diploma, an Advanced Diploma or a recognised Degree.

CC10: Director Level 2

Set at 210% of the trade rate. Centre directors level 2 who are appointed to this position under licensing requirements, and may hold an AQF Diploma, and Advanced Diploma or a recognised Degree, as well as a Graduate Certificate in Management.

[6] The streams in respect of school age care and family day care follow a similar pattern.

[7] The descriptors for each level in the proposed structure, including the list of duties and indicative tasks, are contained in A3 to the LHMU's outline of submissions and at Annexure 2 to this decision.

[8] Four broad lines of argument were advanced in support of this aspect of the LHMU's claim:

The rates of pay were last reviewed by a Full Bench in September 1990[2] (the *1990 Full Bench decision*). At that time a new classification structure was inserted, by consent. The rates of pay for child care workers in the ACT have not had the benefit of an arbitrated decision of the Commission.

The existing classification structure is no longer appropriate to the children's services industry in the ACT, having regard to the extent of the changes to qualifications and the nature of the work since 1991.

The application is consistent with s.88B of the *WR Act* and principle 6, Work Value, of the Commission's Statement of Principles.

The relativities proposed are consistent with those in the *Metal, Engineering and Associated Industries Award, 1998 - Part 1*[3] (the *Metal Industry Award*).

[9] The current and proposed classification structures (below the director level) are contrasted in Table 2 below in terms of their relativity to the base trade rate at each level. A more detailed comparative document is set out in Annexure 3.

Table 2

Current		LHMU Proposal	
Classification level	**% of C10**	**% of C10**	**Proposed level**
CCW1	84.6 - 88.2	87.4	CC1
CCW2	88.5 - 92.2	92.4 - 97.5	CC2
CCW3	98.4 - 101.8	100 - 110	CC3
CCW4	107.3 - 110.6	120 - 125	CC4
CCW5	112.4 - 132.8	130 - 135	CC5
		145 - 150	CC6
		150 - 155	CC7
		160 - 165	CC8

[10] No translation table was provided by the LHMU, hence it is not possible to estimate the level of increase proposed at each level of the current classification structure. Indeed no information about the cost impact of the claim was advanced by the union at all. However, it is possible to estimate the increase at the entry point, at the C10 level and for directors.

[11] A new entrant to the industry is currently classified at child care worker level 1 (CC1). There are three increment points at this level. The LHMU proposes a new entrant level at child care employee level 1 (CC1). An employee would only remain at this level for three months before progressing to level 2. A comparison between the current and proposed rates for a new entrant and after 1 year in the industry is set out below.

Table 3

	Currently	LHMU Proposal	Increase ($/week)
New entrant	474.60	490.50	15.90
After 1 year in the industry	484.90	518.50	33.60

[12] In the current structure the C10 rate is set at one year's service increment in level 3. The LHMU proposes that the C10 level be at the commencement of its proposed level 3. This realignment has the effect of increasing the entry rate at level 3 by $9.20 per week.

[13] The increases at the director level are more significant and we now turn to consider that aspect of the LHMU's claims.

Directors

[14] The application seeks to remove the current structure for centre directors and replace it with a structure which is said to be based on qualifications held, skill and the requirements of the job. The LHMU also proposes to insert allowances for directors, irrespective of level, based on the number of enrolments in the centre.

[15] At present there are three classification levels for directors, each with a number of increments. The level of classification is dependent on the size of the centre being managed. At level 1 the director is a coordinator in charge of a child care centre of no more than 39 places. Level 2 covers a service with between 40 and 59 places and level 3 more than 60 places.

[16] The current and proposed classification structures for directors are contrasted below in terms of the relativity to the base trade rate at each level.

Table 4

Current		LHMU proposal	
Classification level	**% of C10**	**% of C10**	**Proposed level**
Director level 1	133.1 - 151.2	180 - 185	Director level 1
Director level 2	141.8 - 164	210 - 215	Director level 2
Director level 3	147.0 - 169.5		

[17] A person classified at director level 1 in the LHMU's proposed structure is responsible for the overall management and administration of the centre and:

"... is an employee who holds a Degree in Early Childhood or an Advanced Diploma or a Diploma in Children's Services or equivalent..."[4]

[18] In addition to the qualifications required of a level 1 director a person appointed as a level 2 director holds a Graduate Certificate in Childcare Management.

[19] Progression within the two new proposed director's levels appears to be subject to an employee meeting the following criteria:

competency at the existing level
12 months experience at that level and in service training as required
demonstrated ability to acquire the skills which are necessary for advancement to the next pay point.

[20] The LHMU proposes a 30 per cent pay differential (between directors level 1 and 2) based on the completion of a Graduate Certificate in Childcare Management. The differential in the current structure associated with that qualification ranges from 7.25 percent to 13 per cent depending on the classification level and increment point. It is not suggested that the qualification requirement has changed since the current structure was determined. Other than a general reference to increase in work value, no particular justification was advanced for the differential between proposed director levels 1 and 2.

[21] In addition to the proposed two level structure, the LHMU seeks to insert allowances for directors at each level based on the number of licensed places. No allowance would be paid to directors of centres with 39 or less licensed places. Directors of centres with 40 to 59 licensed places would receive an allowance of $98.90 per week. A director of a centre with more than 60 licensed places would receive an allowance of $123.56 per week.

[22] No particular rationale was advanced in support of the quantums proposed. At present the margin paid to a director of a centre of 40 to 59 places is $42.90 (as opposed to $98.90 in the LHMU's proposal). A director of a centre with more than 60 places receives $78 more than a director of a centre with 39 places or less (as opposed to $123.56 in the LHMU's proposal).

[23] The LHMU contends that the evidence shows *"that there had been a large degree of work value change in the work of childcare employees since they were last examined in 1990."* It is submitted that a *"key theme"* emerging from the evidence is summarised in the following extracts from the evidence of Ms Elizabeth Dau, a witness called by the respondents:

"I believe the childcare industry has changed since 1990 in many ways ..."[5]

"And the pressure under which staff work. It is a very stressful job working with young children. It's a very - a critically important job."[6]

"I think if we don't increase the wages, we're going to be in big trouble."[7]

"But people who study - I mean, if they give a year to study then certainly there is increased knowledge and increased skill."[8]

"I have been an advocate for many years for changes to the salary rates for people working with young children."[9]

"... And we know that the quality of care that children receive is absolutely critical in terms of the outcomes for children in later - in later years. We also know now without a doubt that if children come from a background that is less than optimum that if they are in services of a very high quality then the - those disadvantages can be very quickly ameliorated. But we also know that if they go into a centre of less quality that in fact it's a double whammy, if I may use that expression, for those children. So, there's been huge research around the absolutely critical nature of the work that people who work in the child care profession do. And I think it has - and I think we need to recognise that by paying them more appropriately."[10]

[24] The specific work value changes identified are:

the implementation of the Quality Improvement Accreditation System (QIAS);
the QIAS requirement for daily, individual programs specifically defining all aspects of child development;
increased encouragement of workers by employers to undertake structured accredited training in the AQF Certificate III and AQF Diploma, as well as the Graduate Diploma in Management for directors and the expectation that those trained employees will utilise these skills on the job;

management's utilisation of this training of staff for individual and group programming. This programming involves identifying and programming for the special needs of children, programming and planning for a much greater number of children in formal care in any one week, and new requirements in the regulations to stimulate and develop each child's social, physical, emotional and language needs;
increased role of carers with parents and family in providing direct and relevant feedback with respect to the performance of their child during the day, in answering questions with respect to behavioural issues, developmental issues and in assisting with accessing governmental agencies for further support;
increased emphasis placed upon quality, with higher expectations of standards coming from parents, the community and government, reflected in the changes in training and legislation;
the diversity of cultures and family backgrounds of the Australian community;
increased numbers of children with special needs in centres;
requirement of qualified workers to be team leaders and to supervise and train workers with a similar qualification or lesser qualifications, and the development of on the job trainees. These new requirements for supervision, monitoring and mentoring have dramatically increased in centres where the trainees are placed to learn on the job;
new regulations and legislation;
administering medications (in the absence of nurses), and first aid training requirements;
various centre and government policies and procedures implemented as a result of QIAS and government legislation;
other in-service training courses which are undertaken by workers and then implemented on the job;
early intervention, and recent research on brain development;
significant changes to training from the certificate held in l990, including all of the changes to present day;
the increased Government and societal expectations placed on the educative role of children's services, and the recognition of the importance of the early years;
increased work connected with policy writing, record keeping, and more legislation to be aware of, by all employees in services. This is reflected in the requirement for police checks of potential employees, not previously required, as well as in-house training to ensure the ongoing development of staff, and as a result, the greater diversity of programming and responsiveness to children's issues;
mandatory reporting - there is now a new requirement for workers to be responsible or at least aware of suspected child abuse. In the ACT, all children's services workers are mandated to report abuse, which is the same requirement for the director of services in Victoria. All other children's services employees in Victoria are required to be aware of suspected child abuse. This is reflected in the new requirements by centres to the changes in staff practices and the introduction of new procedures which were now required of all staff, contractors, visitors and parents.

[25] Further, the LHMU contends that changes in the pattern of child care utilisation and the resultant increase in part time care has also had a significant impact on the work of child care employees.

[26] The union submits that a new classification structure which recognises qualifications and supervisory or other higher duties is critical, for four reasons:

l. A skills based career path is necessary to overcome massive skill shortages in the industry by properly linking skills acquired with classification outcomes.

2. Employees who undertake further study have an understanding and knowledge of the industry which is utilised on the job.

3. Early Childhood Educators Level 2 will be able to undertake higher duties such as programming for individual children or small groups.

4. The supervisory duties of employees in the industry are largely unrecognised at present. The placement of trainees is widespread and employees are not remunerated appropriately for the higher skills required to supervise, monitor, instruct and assess these trainees.

[27] In addition to work value considerations, it is also argued that the application is in the public interest in that it recognises the *"essential and increasingly important role of development, care and education in children's service facilities"* and *"the importance of the early years as crucial in children's development."*[11] It is submitted that granting the application will address the *"crisis of low pay in childcare"*[12] which was critical to ensuring quality care.

[28] The LHMU seeks an operative date of the first pay period on or after the date of the Commission's decision. In respect of the phasing-in of the increases sought, the LHMU proposes that in the community based sector the increases should be paid over twelve months. No phase-in is proposed in the *"for profit and corporate sector"*, on the basis that the LHMU contends that the increases are affordable and the sector has the capacity to pay the claim.

Title of Clause 5.1.5

[29] Clause 5.1.5 is headed *"Incremental progression"* and is in the following terms:

"5.1.5 Incremental progression

5.1.5(a) Progression from one level to the next within a classification is subject to a child care worker meeting the following criteria:

competency at the existing level;
12 months experience at that level and in-service training as required;
demonstrated ability to acquire the skills which are necessary for advancement to the next pay point level.
5.1.5(a)(i) Where an employee is deemed not to have met the requisite competency at their exiting level at the time of appraisal, his/her incremental progression may be deferred for periods of three months at a time provided that:

the employee is notified in writing as to the reasons for the deferral;
the employee has, in the twelve months leading to the appraisal, been provided with in-service training required to attain a higher pay point;
following any deferral, the employee is provided with the necessary training in order to advance to the next level.
5.1.5(b)(ii) Where an appraisal has been deferred for operational reasons beyond the control of either party, and the appraisal subsequently deems the employee to have met the requirements under this clause, any increase in wage rates will be back paid to the 12 month anniversary date of the previous incremental progression.

5.1.5(b) An employee whose incremental advancement has been refused or deferred may seek to have the decision reviewed by lodging a written request through the dispute resolution procedure in clause 3.1 of this award. If the review is successful, then the incremental advancement will be backdated to the original due date. The review process must be completed within two months of the request for the review being made."

[30] The LHMU proposes to replace the title of the clause with a new title: *"Incremental Progressions"*. The substance of the clause is to remain unchanged.

2.1.2 The ACT Employers

[3l] A joint submission was filed on behalf of the Australian Federation of Child Care Associations; the ACT Children's Services Association; Southside Community Services; Communities @ Work; and the Confederation of ACT Industry (collectively, the ACT Employers).[13]

[32] The ACT Employers oppose the classification structure changes proposed by the LHMU. Two broad arguments are advanced in this regard. First, it is argued that the LHMU's proposed classification structure is unnecessarily complicated and that the creation of different classification structures for the different streams of child care creates further barriers to movement within the industry. For example, the proposed CC6 level does not exist in the School Age Care stream, hence a team leader level l in the Centre based stream would find it difficult to move horizontally across to School Age Care. The complexity of the proposed structure is also said to conflict with the principles set out in the *National Wage Case February 1989 Review* where it was held that:

"... where necessary, the number of classifications in an award should be reduced ... to provide for clearly defined skill levels, broadbanding of functions and multi-skilling."[14]

[33] The second broad argument against the proposed structure is that the LHMU has not provided adequate justification or evidence to warrant the significant changes it proposes to the classification structure. While the ACT Employers acknowledge that since 1990 changes have occurred in the work value of child care workers, they reject the proposition that these changes have been sufficient to justify the classification structure proposed by the union. Indeed it is argued that the changes proposed are so substantial that they have the potential to affect external relativities with other awards. For example it is possible under the LHMU's proposed structure for an employee with AQF Certificate II to achieve a pay outcome equivalent to a person with a three year degree under the *Childcare Industry (Teachers) (Australian Capital Territory) Award 1999*[15].

[34] In this context it is also submitted that the proposed link between classification CC3 and the 100 per cent metal engineering tradesperson rate is an unwarranted departure from the *1990 Full Bench decision*. Contrary to the LHMU's submission, the ACT Employers contend that the 1990 Full Bench matter *was* the subject of arbitration. While there was considerable agreement among the parties on most matters, there was disagreement with respect to wage outcomes and external relativities. The 1990 Full Bench determined that an employee holding a Child Care Certificate (CCC) with one year's experience in the industry was equivalent to an Engineering Tradesperson level 1 for the purpose of fixing an external relativity. All other relativities were set internally by agreement between the parties and adopted by the 1990 Full Bench.

[35] The ACT Employers contend that the Certificate III in Children's Services is not equivalent to the CCC qualification and should not be used as such. The CCC was a two year full time course whereas the Certificate III is a one year introductory course. It is also submitted that:

"... the qualifications the Union is seeking to compare [i.e. the Certificate III in Children's Services and the Engineering Production Certificate] *are vastly different and that commonality in name does not imply that the training required to complete the qualification is equal."*[16]

[36] The ACT Employers submit that the courses in early childhood education have changed little since the 1990 Full Bench proceedings.

[37] In addition to these two broad lines of argument the ACT Employers advanced a number of specific criticisms of the LHMU's proposal, namely:

The titles of otherwise similar classifications appear discriminatory. At the CC3 level an employee can be a *"childhood educator"*, a *"school age care employee"* or a *"playgroup assistant"*. These issues are said to have particular significance within the industry.
An employee may be classified at some levels in the proposed structure simply because they have enrolled in a particular course of study. For example, to be classified at the Early Childhood Educator level 2 it is sufficient if the employee has enrolled in a Diploma. Enrolment in the Diploma requires no prerequisite qualifications or experience.
The descriptor associated with the new classification of assistant director is confusing in that it seems to imply that an employee who is a team leader can drift into the assistant director level merely by undertaking some defined additional responsibilities without being promoted to an actual job.
The director level classifications are problematic. There is insufficient distinction between the two levels. While a director level 2 *`must'* possess a Graduate Certificate in Child Care Management an employee can be appointed to the position without such a qualification, hence any such distinction is irrelevant.

[38] The ACT Employers propose an alternative structure to that proposed by the LHMU. The alternative structure advanced by the ACT Employers also has the support of the following child care providers in the ACT:

Northside Community Services;
Gungahlin Regional Community Service;
Belconnen Community Service.

[39] The alternative structure proposed is set out below.

Child Care Professional Level 1

Commences at 85% of trade rate.

Child Care Professional Level 2

Commences at 92.5% of trade rate.

Child Care Professional Level 3

Commences at 110% of trade rate.

Assistant Director

Commences at 125% of trade rate.

Director Level 1

Commences at 145% of trade rate.

Director Level 2

Commences at 165% of trade rate.

[40] The detail associated with the proposed structure is set out at attachment H to the Employers' written outline of submissions and at Annexure 4 of this decision.

[41] The ACT Employers' structure provides for employees to enter the Certificate Level (Child Care Professional Level 2) with a Certificate III or relevant experience; however, the employee cannot proceed past the barrier at the third increment point unless they have the CCC qualification or equivalent. The ACT Employers' structure broadbands the existing Child Care Worker Levels 2 and 3 with a commencing paypoint of 92.5 per cent of the Tradesperson C10 rate. The top pay point, set at the 100 per cent C10 rate, is reserved for an employee who holds CCC. It is argued that this is consistent with the *1990 Full Bench decision*.

[42] The ACT Employers' structure also broadbands the current Child Care Worker Levels 4 and 5 into one classification level, Child Care Professional Level 3. The proposed classification has a commencement rate set at 110 per cent of the C10 trade rate.

[43] A new classification of assistant director is proposed, with a pay rate set at 125 per cent of the C10 trade rate.

[44] The ACT Employers' structure reduces the number of classifications at the director level from three to two, and has differentiated between the levels on the basis of a sixty-place child care facility or, in the case of family day care, sixty family day carers.

[45] It is contended that the proposed structure seeks to *"reduce and simplify"* the existing structure and to:

largely realign the relativities set by the Full Bench in 1990, while increasing the relativities at the lower end to take account of work change and to provide increased wage outcomes at all levels;
introduce a new level of assistant director; and
provide sufficient incremental structure to create a career path for employees.

[46] It is argued that the proposed structure realigns internal relativities having regard to changes in work value but maintains the integrity of external relativities by ensuring that the C10 100 per cent trade rate remains aligned at the level set by the 1990 Full Bench.

[47] The ACT Employers submit that it is not appropriate to establish the Certificate III as if it were an equivalent qualification to the superseded CCC, i.e. at the C10 100 per cent trade level. It is said that there is now no equivalent qualification to the CCC in the Children's Services qualification stream.

[48] The relativities above child care levels 1 and 2 have to be realigned to the levels determined by the 1990 Full Bench, as they had been eroded as a result of the awarding of flat dollar safety net adjustments. The ACT Employers do not propose to realign the child care levels 1 and 2 (which are up to 4 per cent higher than when set in 1990) for *"social and policy"* reasons.

2.1.3 LHMU Submissions in Reply

[49] In reply, the union contends that the submissions by the ACT Employers in respect of the CCC ignores the fact that this course has not been available since 1990 and that the qualifications and training of workers in the industry have changed significantly since that time.

[50] The LHMU has sought to address some of the specific issues raised by the ACT Employers by revising its proposed structure to include the classifications of team leader 1 and 2 in the School Aged Care stream.

[51] Other criticisms of the proposed structure are rejected, in particular:

Contrary to the ACT Employers' submission, it is argued that the proposed structure is designed to facilitate employment movement between the three streams. It is also argued that the proposal is consistent with the licensing structure for the different services in the ACT.
The criticism of the classification titles are rejected. It is said that the proposed structure is supported by the employees in the industry.
The proposed structure is *not* inconsistent with the February 1989 *National Wage Case decision*. That decision only requires that the number of classifications in an award should be reduced *"where necessary"*. The Commission went on to say that the purpose of such a process was to *"provide for clearly defined skill levels, broadbanding of functions and multi-skilling."*[17] The proposed structure is consistent with that purpose.
The ACT Employers are incorrect when they contend that in the proposed structure employees can be classified on the basis of merely being enrolled in a particular course of study. In this context the union submits that the evidence shows that employees actively use the skills and knowledge learnt in studies and on the job. Further, employers prefer to employ workers who are enrolled in study or who have completed some study because of the wider duties and theoretical knowledge and understanding taught in the courses and consequently utilised on the job. It is contended that the proposed structure is directly comparable with that in the *Metal Industry Award* which includes recognition for enrolment in courses.
The LHMU rejects the employer proposition that it has *"created new relativities to achieve its own purpose."* It is said that each of the relativities proposed has been directly compared with the level of skill, responsibility and qualifications in the *Metal Industry Award*. In this regard it is submitted that the level of skill, responsibility and requirements of the job of Centre Directors are at least equivalent to a degree qualified professional engineer or professional scientist.
The ACT Employers' concerns in relation to the descriptor for team leader and assistant director are unfounded. A team leader cannot *"drift"* into the assistant director position unless they have been appointed to that position.
[52] The LHMU rejects the ACT Employers' alternate classification structure on the basis that it diminishes the current skill based structure, contrary to the requirements of s.88B of the *WR Act*, and fails to take account of work value changes since 1990. It is submitted that the ACT Employers' draft does not provide adequate descriptors such as to indicate that it is a skills based classification structure, and no comparison is provided to the classification levels in the *Metal Industry Award*.

2.2 The Victorian Award

[53] The current classification structure and wage rates in the *Victorian Award* is set out below:

Table 5

Classification/Description	**Rate**
	$
Child Care Worker Level 1:	
Level 1 covers unqualified employees. There are three pay increments at this level.	
Level 1 (a)	474.60
Level 1 (b)	490.00
Level 1 (c)	495.10
Child Care Worker Level 2:	
Level 2 covers employees who have completed:	
TAFE Certificate in Child Care (Assistant) Course	
Certificate III in Children's Services	
Certificate IV in Community Services - Child Care	
Level 2 (a)	496.70
Level 2 (b)	506.90
Level 2 (c)	517.20
Classification/Description	**Rate**
	$
Child Care Worker Level 3:	

Level 3 consists of 4 groups (A-D) covering the following:

Persons who have older qualifications recognised under Regulation 56 (Levels 3.1-3.6)
Persons who hold an Advanced Certificate or Advanced Diploma (including registered Mothercraft Nurses) (Levels 3.4-3.9)
3 year Degree or Diploma in Child Care Studies or equivalent (Levels 3.6-3.9)
Persons with qualifications in A, B or C and undertaking additional responsibilities (Levels 3.7-3.9)
These employees work as the person in charge of a group of children, develop a plan, implement and evaluate a developmental program in conjunction with the Director or Assistant Director. They supervise qualified or unqualified workers caring for more than one group of children.

Classification Level	**Wage Rate**
	$/week
1	556.40
2	565.70
3	573.00
4	580.30
5	587.50
6	591.20
7	602.20
8	610.40
9	620.10
Child Care Worker Level 4:	630.70
Director	

Director - an employee engaged as a Director must hold the appropriate approved qualification and carry out the duties of the Director. Directors' classification levels are divided into the number of licensed places (children) of up to 25, 26-24 and 45 or more.

1. Up to 25 children:	
Level (a)	742.20
Level (b)	756.40
Classification/Description	**Rate**
	$
2. 26 to 44 children:	
Level (a)	771.20
Level (b)	792.70
3. 45 or more children:	
Level (a)	809.90
Level (b)	826.60

[54] Clause 16.4 of the *Victorian Award* deals with progression from one level to the next within a classification. It states:

"16.4.1 *Progression from one level to the next within a classification is subject to a childcare worker meeting the following criteria:*

competency at the existing level;
12 months experience at that level and in-service training as required;
demonstrated ability to acquire the skills which are necessary for advancement to the next pay point level.
Provided that progression between the Groups within Level three is dependent upon the completion of a bridging or upgrading course.

16.4.1(a) *Where an employee is deemed not to have met the requisite competency at their existing level at the time of appraisal, his/her incremental progression may be deferred for periods of three months at a time provided that:*

the employee is notified in writing as to the reasons for the deferral;
the employee has, in the twelve months leading to the appraisal, been provided with in-service training required to attain a higher competency level;
following any deferral, the employee is provided with the necessary training in order to advance to the next level.
16.4.1(b) *Where an appraisal has been deferred for operational reasons beyond the control of either party, and the appraisal subsequently deems the employee to have met the requirements under Clause 16.3 above, any increase in wage rates will be back paid to the 12 month anniversary date of the previous incremental progression.*

16.4.2 *Incremental progression to the next pay point level may be accelerated if:*

an employee has achieved competency at his/her existing level,
has demonstrated an ability to acquire the skills necessary to progress to the next pay point level prior to the completion of 12 months at his/her existing level.
Either the employer or the employee may seek to implement accelerated advancement."

[55] The descriptors associated with each classification level are set out at Annexure 5.

[56] For present purposes the classification of child care worker level 3 is particularly important. An employee classified at this level is involved in the delivery of a children's services programme who is either:

"GROUP (A): Persons who are either qualified (other than qualifications outlined in Groups (B) and (C)) in accordance with the Children's Services Centres Regulations 1998 Regulation number 56. Persons employed in this category shall be employed from level 3.1 to 3.6.

GROUP (B): Persons who hold an Advanced Certificate or Associate Diploma in Child Care Studies including persons with these qualifications who were registered Mothercraft Nurses, persons who hold a Diploma of Community Services Childcare, or a Diploma in Children's Services, are entitled to salary subdivisions set out above for Group (B). Persons employed in this category shall be employed from level 3.4 to 3.9.

GROUP (C): Persons who hold a three year Degree or Diploma in Child Care Studies or equivalent qualification are entitled to salary subdivisions set out above for Group (C). Persons employed in this category shall be employed at level 3.6 to 3.9.

GROUP (D): Persons with the qualifications outlined in (A) or (B) or (C) above, but who undertake additional responsibilities to those outlined in 15.1.3(a), including co-ordination of the activities of more than one group, supervising workers and assisting in administrative functions, are entitled to salary subdivisions set out above for Group (D), provided that they shall maintain their existing wage rate if higher at the time of appointment. Persons employed in this category shall be employed at levels 3.7 to 3.9, provided that where an employee is in receipt of a wage higher than that contained within this award, the higher rate shall apply.

and

***15.1.3(b)** Whose duties will include the following:*

work as the person in charge of a group of children in the age range, 0 to 12 years;
develop, plan, implement, and evaluate in conjunction with the Director or Assistant Director a developmental program;
supervise qualified or unqualified workers caring for the group of children;
liaise with parents;
ensure a safe environment is provided;
ensure that records are maintained and are up to date concerning each child in their care;
develop, implement and evaluate daily routines;
be responsible to the Director or Assistant Director for the assessment of students on placement;
ensure the policies of the Centre or Service are adhered to;
be aware of and comply with all relevant regulations.
***15.1.3(c)** Progression through the relevant salary sub-divisions shall be dependent upon the advancement of skills attained via in-service training in areas such as health and safety, first aid, Regulations and Licensing requirements, knowledge of, and participation in, accreditation."*

2.2.1 LHMU Submissions

[57] In the Victorian matter the LHMU seeks to vary the *Victorian Award* to insert a new classification structure and minimum rates of pay. We note that the LHMU has amended its original application.

[58] The arguments advanced in support of the new classification structure are broadly the same as those put in support of the LHMU's claim in respect of the *ACT Award*. The only significant differences in the arguments advanced relate to the history of the *Victorian Award* and the extent of the changes to child care courses offered in Victoria. The relevant award history is dealt with in the next part of our decision and the changes to training courses are dealt with in section 4.

[59] There are a number of differences between the LHMU's ACT and Victorian applications, specifically:

the titles of employees from CC4 and above;
the number of levels for centre directors;
the insertion of a degree qualification in CC7; and
the insertion of a first aid allowance in the *Victorian Award*.
[60] In all other respects the amended applications are the same.

[61] In respect of the change in classification title, employees at level CC3 and above in the proposed ACT structure are referred to as *"Early Childhood Educators"*. In the proposed *Victorian Award* structure they are called *"Early Years Development Workers"*.

[62] The differences in the structures proposed for centre directors are more significant. In its *Victorian Award* proposal the union seeks four director levels based on the number of licensed places at the centre, as follows:

Table 6

LHMU's Victorian Award Proposal

Classification	Size of Centre	Relativity to C10
CC10 Director level 1	Up to 25	180%
CC11 Director level 2	26-24	185%
CC12 Director level 3	45-60	210%
CC13 Director level 4	61+	215%

[63] The qualification requirements for each of these levels is the same and they are also the same as the qualifications required for appointment to director level 1 in the LHMU's proposed structure for the *ACT Award*. A comparison of the union's proposed classification structures for directors in each award is set out below:

Table 7

Victorian Award			ACT Award*	
Classification Level	Size of Centre	$/week	Size of Centre	$/week
1	1-25	1010.20		
			1-39	1010.20
2	26-44	1038.20		
			40-59	1109.10
3	45-60	1178.50		
			60+	1133.76
4	61+	1206.60		

*Note: The ACT rates are based on a Director Level 1 ($1010.20) receiving allowances based on the size of the centre being managed. Directors of centres with 49 to 50 licensed places receive an additional $98.90 per week and a director of a centre with more than 60 licensed places receives an extra $123.56 per week.

[64] The differences in the classification descriptors for a level 4 director in Victoria and a level 1 director managing a 60 plus place centre in the ACT are insignificant. Yet on the LHMU's proposal the ACT director would receive $72.84 less per week. There was no explanation for this wage differential. It was not suggested that there was any difference in work value such as to warrant this difference in wage rates.

[65] The award wage increases associated with the LHMU's proposal are substantial. At the director level the increases range from $268[18] to $396[19].

[66] The table on the following page gives an indication of the magnitude of the increases proposed.

Table 8

Victorian Award vs LHMU Claim

Victorian Award		LHMU Claim	
Classification	Rate (CCCAV proposal)	Classification	Rate **(increase)**
Child Care Worker level 1(a)	$474.60	Child Care Employee Level 1	$506.60
	($479.56)	Support Worker Level 1	**($32)**
Child Care Worker level 1(b)	$490.00	Child Care Employee Level 2	$527.50
	($500.46)		**($37.50)**
			$538.30
			($43.20)
Child Care Worker level 1(c)	$495.10	Support Worker Level 2	$548.80
			($53.70)
Child Care Worker level 2(a)	$496.70	Child Care Employee Level 3	$561.20
	($506.98)		**($64.50)**
Child Care Worker level 2(b)	$506.90		$582.10
	($522.50)	Support Worker Level 3	**($75.20)**
Child Care Worker level 2(c)	$517.20		$602.90
			($85.70)
		Child Care Employee Level 4	$623.80
			$642.60
Child Care Worker level 3 Subdiv 1	$556.40 ($586.78)	Early Years Development Worker Level 1 (Diploma)	$684.40 **($128)**
Child Care Worker level 3 Subdiv 2	$565.70		
Child Care Worker level 3 Subdiv 3	$573.00		$705.20

	($604.96)		**($132.20)**
		CC6	
Child Care Worker level 3 Subdiv 4	$580.30	Early Years Development Worker Level 2	$746.90 **($166.60)**
Child Care Worker level 3 Subdiv 5	$587.50 ($612.56)		
Child Care Worker level 3 Subdiv 6	$591.20	Diploma and supervision of employees up to CC4 classification or equivalent	$767.80 **($176.60)**
		CC7	
Child Care Worker level 3 Subdiv 7	$602.20 ($617.50)	Early Years Development Worker Level 3	$767.80 **($165.60)**
Child Care Worker level 3 Subdiv 8	$610.40	Diploma and Graduate Certificate or Advanced Diploma and/or Degree and/or supervision of employees of CC5 classification	
Child Care Worker level 3 Subdiv 9	$620.10 ($637.26)		$788.65 **($168.55)**
		CC8	
Child Care Worker level 4	$630.70	Assistant Director	$805.50
			(174.80)
		Diploma and/or Advanced Diploma, Graduate Certificate and/or fills in for Director in his/her absence	$826.40 **($195.70)**

Note:

1. This table is drawn from Attachment A to the Associations' written submissions. It has been updated to reflect the $19 2004 safety net adjustment.

2. The CCCAV proposal has been increased by $19.

3. A comparison of the relativities and classification structure proposed by the LHMU with those contained in the *Metal Industry Award* is set out at Annexure 6.

[67] In its reply submissions the union acknowledges that if granted its application would result in wage increases of between 7 and 28.6 per cent.

[68] The LHMU contends that the increases sought are affordable and in this regard relies on the evidence of Ms Petra Hilsen[20] and Ms Michelle Walker[21]. The union also relies on the cross examination of Mr Martin Kemp and his evidence regarding the improving financial position of his company, ABC Developmental Learning Pty Ltd (ABC),[22] but contended that the Commission should place little or no weight on Mr Kemp's assertion that ABC could not absorb some of the increases which would arise if the union's application were granted. Mr Kemp is a Director of ABC. In this regard the LHMU relies on the evidence about ABC's financial position and its failure to adduce any evidence to support the assertion that it could not absorb some of the increase.

[69] Similarly the LHMU argues that the Commission should not rely on the evidence of Mr Lucian Roncon or Ms Linda Mrocki regarding the cost impact of granting the claims before the Commission. No financial statements were provided to support the assertions made.[23]

First Aid Allowance

[70] In addition to its claim for a new classification structure, the LHMU also seeks the insertion of a first aid allowance in the *Victorian Award*, in the following terms:

"19.5 First Aid Allowance

19.5.1(a) An employee who has been trained to render first-aid and who is the current holder of appropriate first-aid qualifications such as a certificate from St. John Ambulance or a similar body shall be paid an amount of $10.28 per week.

19.5.1(b) If the employer requires an employee to undertake first aid training, then such training shall be in paid time and the cost of course (including course materials) shall be paid by the employer."[24]

[71] The LHMU contends that the evidence establishes that the administration of first aid is a requirement of the job of child care workers and many employers expect their employees to have a first aid certificate.[25] It relies on a decision of Deputy President Maher in *Re: Commonwealth Bank of Australia Officer's Award 1990*[26] in support of its contention that an allowance is appropriate, on work value grounds, in circumstances where there is an expectation that employees will administer first aid as part of their duties.

[72] The LHMU also relies on the fact that the *Children's Services Regulations (Vic) 1998* now provide that centre proprietors are required to ensure that a first aid qualified staff member is on duty at all times. Clause 26 of Part 5 - Staffing, of the Regulations states:

"The proprietor must ensure that at least one staff member on duty whenever children are being cared for or educated by the children's service has first aid training in emergency life support and cardio-pulmonary resuscitation, convulsions, poisoning, respiratory difficulties, management of severe bleeding, injury and basic wound care appropriate for those children."

[73] If the Commission is not inclined to grant the LHMU's primary application then, in the alternative, it seeks a clause in the same terms as appears in the *ACT Award*.

[74] Clause 5.5.2 of the *ACT Award* states:

"5.5.2(a) The employer shall appoint an employee to act as a first aid person and where practicable such employee shall be qualified in first aid. An employee so appointed who has undertaken a first aid course and who is the holder of a current recognised first aid qualification such as a certificate from the St. John's Ambulance or similar body shall be paid an allowance of $6.32 per day. Provided that employees engaged in out-of-school hours care and appointed as First Aid person shall be paid 83 cents per hour additional to his/her ordinary rate of pay.

5.5.2(b) Provided that a first aid person need not be appointed where a qualified nurse is on the premises at all times."

2.2.2 Australian Childcare Centres Association and the Child Care Centres Association of Victoria Submissions

[75] The members of the Australian Childcare Centres Association (ACCA) and the Child Care Centres Association of Victoria (CCCAV) (or collectively, the Associations) are unable to agree that the wage increases which would result from the LHMU's claim being granted are fair, reasonable and sustainable. Even with the benefit of phasing-in, the increases proposed are very significant.

[76] ACCA is a registered organisation of employees under the *WR Act*. CCCAV is a State based employer association.

[77] The eligibility rule of the ACCA entitles it to represent employers in the private long day care sector of the child care industry, and the majority of members of CCCAV are also private sector employees in the long day care sector. Membership of both associations ranges from single owner operator establishments and multi location employers, through to large corporate employers who operate a significant number of centres in Victoria as well as in other States and Territories.

[78] The Associations oppose the LHMU's claims in respect of the *ACT Award* and the *Victorian Award*, though their submissions are primarily directed at the proposed changes to the *Victorian Award*. It is argued that the current wage structure in the *Victorian Award* reflects properly fixed minimum rates consistent with s.88B and the objects of the *WR Act*. The Associations submit that the employment structure in the industry is not so complex as to warrant the detailed classification structure sought by the LHMU.

[79] In particular, the Associations reject the relativities proposed by the LHMU at the Certificate III and Diploma level. In relation to the proposed link between a Child Care Certificate III qualification and the C10 level in the *Metal Industry Award* the Associations submit:

"11.2 ...in the Metals Industry, to undertake a trade, complete that trade and become entitled to the classification level C10, an employee must undergo at least one year's pre-vocational training plus a further 3 years' experience on the job performing the tasks required. The LHMU claim would, in a practical sense, mean that an employee who completes AQF Certificate III, which on average is 12 months or at best 18 months, without any further experience would be entitled to the 100% level.

11.3 The Associations represented in these submissions would submit most strongly that the attainment of a Certificate III in Child Care is not equivalent to the Metals Industry C10 level, and indeed falls below that level when the relative length of experience is factored into the assessment for the establishment of a wage relativity."[27]

[80] The Associations submit that the attainment of a Certificate III in Child Care is not equivalent to the C10 level in the *Metal Industry Award*. The Associations contend that the 100 per cent relativity properly lies at the beginning of the existing *Victorian Award* structure namely child care worker level 3 subdivision 1. This is an employee who has either undertaken and completed a two year Diploma course or has achieved Certificate III and then completed a further twelve months of part time study to attain a Diploma. In determining the appropriate level for both Diploma and Certificate III employees it is contended that the Commission should take into account all factors relevant to the assessment of work value, including knowledge and experience required to perform the role, not simply qualifications alone. A comparative table setting out the wage rates in the *Victorian Award* (as at June 2003) and the respective claims advanced before us is at Annexure 6.

[81] In relation to such considerations the Associations advance three broad points:

1. Much of the evidence relied on by the LHMU relates to the employees' individual experiences and provides little reference to actual changes to the levels of skill, responsibility and requirements of the job. In fact the fundamental nature of the work has not changed.

2. The claim of increased work value and work load as a result of the accreditation requirements is *"significantly overstated"*. Many of the tasks and functions covered under the accreditation guidelines and principles are simply a restatement of requirements that already exist under regulations and/or were being carried out by centres for many years as a matter of course in the provision of quality child care services.

3. The requirements and tasks set out in the *Children's Services Regulations 1998* have been in existence for more than ten years.

[82] The Associations contend that the LHMU has not established that there have been changes in the work of child care workers such as to constitute a significant net addition to work requirements within the meaning of the work value principle. In this context the Associations submit:

The applicant's reliance on claims of shortages of qualified child care workers is misplaced. Attraction and retention arguments do not provide a proper basis for a work value adjustment.
Claims of increased parental or community expectations are not properly in the sphere of the work value principle and should not be regarded as factors which form a basis for assessing changes in work value.
Changes in work as a consequence of the introduction of accreditation have been evolutionary and have resulted in changes in workload, not necessarily work value. The fundamental tasks being performed may still be the same, however the documentation of those tasks is now far more comprehensive. But there is nothing new or novel in such requirements and they are common to a variety of industries and services that have implemented a quality assurance system. Further, quality accreditation is particular to the centre and is not conferred on any individual employee. There is no component of any individual employee's work that can be said to be of increased *"quality"* as a result of a centre achieving accreditation.

[83] In addition to these general submissions the Associations contend that there are a number of particular problems with the classification structure proposed, namely:

The basis for progression through the proposed structure. In some instances advancement is on the basis of an employee merely enrolling in a particular course of study.
The descriptors are confusing.
The practical application of the proposed structure would result in increases which would be far greater than originally contemplated. Employees who hold a Certificate III or a Diploma, and who are in charge of children, will not be classified at the 100 and 130 per cent relativity respectively but are far more likely to be classified at CC4 (120%) and CC6 (145%).

[84] It is also submitted that, if implemented, the cost of the claim would be very significant and would have potential flow on consequences for other awards covering the child care industry. Attached to the witness statement of Mr Kemp[28] is an illustration of the wage cost impact of the LHMU's proposal in relation to two centres operated by ABC. The material attached to his statement suggests that if implemented, the union's claim would increase wage costs by about eighteen per cent.

[85] It is argued that any increase in wage costs will inevitably be passed on by way of increased fees to parents. Increased fees will impact directly on families seeking to access child care services, with the greatest impact on those families that can least afford it.

[86] In addition to their opposition to the LHMU's proposed classification structure the Associations also oppose the claim for a first aid allowance of $10.28 per week. It is argued that this claim fails to recognise that the administration of first aid to children is fundamental to the task of caring for them. It is an inherent requirement of these positions and hence an additional allowance is not justified.

[87] The Associations also propose that there should be an *"exemption"* level of 130 per cent inserted into the *Victorian Award* for directors. It is said that this would apply to directors who are in a realistic salaried position and maintain the award entitlements to all leave and general benefits with the exception of the Hours of work, Overtime and Public holidays clauses. Such a provision would properly recognise those employees who are in a genuine managerial role.

[88] We note that the Associations do not adopt a position of total opposition to the claim. They propose that if the Commission were to make findings based on the evidence, information and submissions presented, then the parties should be directed to participate in a conciliation process with a view to arriving at a final position acceptable to all parties.

[89] The Associations' alternative proposal in Annexure 7 is for the C10 (100%) equivalent to be set as the rate for an employee who holds either a two year Diploma or a Certificate III with two years' experience. The Certificate III employee would gain the first year's experience whilst undertaking the training for the qualification and would then complete a further twelve months of experience on the

job. The Diploma employee could be either an employee who completes the Diploma full time and then enters the industry, or one who firstly undertakes the Certificate III and then completes a further twelve months of study to gain the Diploma. This is the key classification in the *Victorian Award*.

[90] Finally, in relation to the *Victorian Local Authorities matter,*[29] the Associations contend that no reliance should be placed on either the agreed facts and submissions in the case or upon the decision of the 1990 Full Bench. The matter was essentially put to the Commission on a consent basis. The 1990 Full Bench did not, and was not required to, examine the work value of the employees concerned. The Bench simply accepted the position put by the parties that the work value criteria to be applied to child care workers would be the same as that which applied to other employees of Local Authorities.

2.2.3 ACT Employers and the Victorian Private Child Care Association

[91] The ACT Employers and the Victorian Private Child Care Association made a joint submission in respect of the LHMU's proposed amendments to the *Victorian Award*. The submission was in broadly the same terms as that advanced by the ACT Employers in relation to the changes proposed in the *ACT Award*. It is argued that the structure proposed by the LHMU for insertion into the *Victorian Award* contains similar deficiencies to those apparent in their proposed ACT structure, namely:

classification levels are for the most part indistinct and do not provide for clearly defined skill levels;
classification at a particular level merely on the basis of enrolling in a course is inappropriate;
classification on the basis of the classification level of the employee being supervised is not responsive to the work being undertaken;
the application seeks to insert a degree qualification without a definition;
new internal relativities proposed cannot be justified on the evidence presented;
the proposed alignment with the C10 metal engineering tradesperson is incorrect; and
there is no clear evidence that the standards determined by the 1990 Full Bench, as they have been applied in Victoria in 1992, should be departed from.

[92] The ACT Employers and the Victorian Private Child Care Association propose an alternate structure for the *Victorian Award* which is similar to that proposed by the ACT Employers in respect of the *ACT Award*, except for variations arising from differences in licensing requirements.

[93] It is submitted that a consistent outcome should be arrived at to determine the wages of child care workers, recognising not only minimum qualification requirements but also responsibility and the level of work being undertaken.

2.2.4 Kindergarten Parents Victoria

[94] Kindergarten Parents Victoria (KPV) supports a proper review of the current classification structure, having regard to the work value principle and the *WR Act*.

[95] KPV opposes the claim for a first aid allowance as this work is an inherent component of the qualifications of a child care worker's Diploma and a child care worker's employment conditions. Nor does KPV support the title Early Years Development Worker.

[96] It is submitted that any wage increases flowing from the Commission's decision in this matter should be prospective and phased-in in four equal instalments over a twelve month period.

2.2.5 Victorian Children's Services Association

[97] The Victorian Children's Services Association (VCSA) supports a proper work value assessment of the current classification structure.

[98] In respect of the LHMU's claim the VCSA:

supports the inclusion of a support worker classification;
opposes the title "Early Years Development Worker";
agrees that qualified staff should have a term to distinguish them from unqualified staff, but this could be done by simply adding the word *"Qualified"* or *"Diploma"*;
suggests that the proposed Early Years Development Worker Level 3 and Assistant Director should include a provision for a worker who coordinates a small occasional care centre; and
suggests that a monitoring process would be helpful after this matter is concluded.

[99] Any wage increases flowing from the Commission's decision in this matter should be phased-in to allow employers to absorb the increase in centres.

2.2.6 Victorian Employers Chamber of Commerce and Industry (VECCI)

[100] VECCI neither supports nor opposes the LHMU's application.

[101] If the Commission decides to grant an increase then:

it should have a prospective operative date coinciding with the start of the *"school"* year in 2005; and
it should be phased-in.

2.2.7 LHMU Submissions in reply

[102] In response to the Association's submissions with respect to the Certificate III the union contends that the evidence establishes that the qualification is widespread and employees who complete it are required to undertake extra duties and exercise a higher level of skill than employees without the qualification.

[103] In support of its contention that the qualifications of Certificate III and Diploma are widely held in the industry the union relies on the following table extracted from the 2002 Census of Child Care Services.

Table 9

Qualifications Held by Employees in Long Day Care: Vic and ACT 2002

Qualification	**Victoria Private**		**Victoria Community**		**ACT Private**		**ACT Community**	
	No.	%	No.	%	No.	%	No.	%
Child Care 1 Year (Certificate III)	931	17	788	18	55	13	132	21
Child Care 2 years (Diploma)	964	18	1157	26	75	18	117	18

Child Care 3 Years (Adv. Diploma)	477	9	359	8	40	10	51	8
Other relevant	261	5	230	5	23	5	36	6
Undertaking qualifications only	725	13	387	9	70	17	63	10
no qualification but worked for 3 years	623	11	664	15	35	8	86	14
Total staff	5483		4388		420		634	

[104] It is submitted that Table 9 shows that in Victoria over 35 per cent of persons employed in the long day care sector have completed a course of study equivalent to the AQF Certificate III in Children's Services. In the ACT 34 per cent had completed the same qualifications. Over 44 per cent of employees in Victoria have a qualification equivalent to the AQF Diploma, and 36 per cent of employees in the ACT. The union contends that a significant proportion of employees who hold those qualifications have received little or no recognition for them.

[105] The LHMU rejects the criticisms made by the Employers generally in relation to the union's proposed classification structure. Contrary to the Employers' contention, advancement through the proposed structure is *not* based on an employee having merely enrolled in a particular course of study. Advancement from level CC3 and above is based solely on the attainment of qualifications and/or the requirement of the employer for the employee to undertake higher duties. The amended application has removed the capacity for employees who have attained AQF Diploma to progress to CC4. Progression to this level is based on completion of an AQF Certificate IV, and/or for employees who are responsible for programming for an individual child or small group.

[106] The comparative document appended to the Associations' submission includes an alternative pay rate proposal. The LHMU opposes this alternative proposal as no descriptors are provided and there is no appropriate comparison with the *Metal Industry Award* and no explanation as to why the particular relativities were selected.

3. Relevant Award History

[107] The starting point for our consideration of these applications is the *1990 Full Bench decision*.[30] The background to the Full Bench proceedings may be shortly stated.

[108] On 31 August 1988 the *Child Care Industry (Australian Capital Territory) Award 1985*[31] (the *1985 ACT Award*) and the *Child Care Industry (Northern Territory) Award 1986*[32] were considered in the Anomalies Conference. At that time the Australian Council of Trade Unions (the ACTU) and the Federated Miscellaneous Workers Union (the FMWU) raised what were said to be numerous deficiencies in the awards. The President directed Commissioner Laing to investigate and report on the matters that had been discussed at that conference. The Commissioner subsequently conducted an inquiry and published his report on 11 July 1990 at which time the President constituted a Full Bench pursuant to s.108 of the then *Industrial Relations Act 1988* (Cth).

[109] While the proceedings before the 1990 Full Bench were only directly relevant to the two federal awards identified, the ACTU and FMWU took the view that the issues involved were fundamental to the child care industry generally.

[110] The 1990 Full Bench concluded that the awards were inadequate, particularly in relation to salary rates and classification structure. In this regard the 1990 Full Bench stated that it was satisfied that:

existing award rates have not been adequately established in the past;
an inequity exists as a result of child care workers doing similar work but being paid different rates;
there have been significant changes in the child care industry, including the training of child care workers, with commensurate enhancement of their skills and the level of responsibility expected of them; and
this is an industry for which the awards should provide a proper career structure.

[111] In relation to the *1985 ACT Award* the 1990 Full Bench gave effect to an agreement between the ACTU/FMWU and the Canberra Association of Community Based Children's Services (the Canberra Association). The Canberra Association represented the employers of most child care workers in the ACT. The agreement was described in the 1990 Full Bench's decision in the following terms:

"...the agreement generally recognised as appropriate a comparison of the Child Care Worker Level 3 after one year's service with the Engineering Tradesperson Level 1 in the Metal Industry Award. It was not suggested, of course, that these classifications could be "compared" in the conventional sense, but by reference to the training requirements for each classification, a guide was found to the level of competence which must be attained. Both classes of worker must hold a certificate which is awarded after completion of a course provided by a College of Technical and Further Education."[33]

[112] The 1990 Full Bench also gave consideration to the evolving national classification system for TAFE courses and described the child care courses in existence at that time in the following terms:

"A national core curriculum has been developed for courses in child care studies, although there is some variation in the States and Territories in the description of the course. In the ACT, for example, there is a one year course leading to the award of a certificate in child care practices; this trains personnel for employment as child care assistants in children's services and is designed to cover the practical application of care techniques and the development of attitudes, skills and knowledge appropriate for the care and education of young children. A person holding the certificate and having had one year's work experience in child care is accepted for entrance to the course leading to the Associate Diploma of Social Science in Child Care. This is a two year, full-time course, or equivalent in part-time studies."[34]

And at pages 5 to 6:

"The regulations in both Territories require that persons who will occupy the positions contemplated by the classification Child Care Worker Level 3 (after one year's service), shall hold a tertiary qualification awarded after two years full-time study or commensurate part-time study. Equivalent qualifications may be approved. As a result, only those who have completed the course leading to the Associate Diploma, or those who hold the child care certificate, will be eligible for appointment to a position in the classification Child Care Worker Level 3 (after one year's service). Although the child care certificate course is no longer available, the evidence showed that there are many employees who gained the certificate after two years' full-time study or its equivalent. Appointment to Level 3 positions and higher will depend not only on attaining the relevant academic qualification, but also on being required to perform the duties prescribed for a position at the level in the classification structure at annexure A."[35]

[113] The Confederation of ACT Industry (the Confederation) concurred generally with the structure proposed by the ACTU/FMWU and the Canberra Association, but held a different view as to the appropriate base rate. The 1990 Full Bench was not persuaded by the Confederation's submissions in this regard.

[114] On the basis of the agreed 100 per cent relativity between the Child Care Worker Level 3 after one year's service and the Engineering Tradesperson Level 1 (now the C10 level in the *Metal Industry Award*) a nine level classification structure (plus increments) was developed. The holder of a TAFE Advanced Certificate or Associate Diploma in Child Care was set at 110 per cent, with two annual service increments. The Director Level 1 was set at 145 per cent of the tradesperson rate (with Level 2 at 157 per cent and Level 3 at 165 per cent).

[115] A comparison between the previous classification structure and the structure approved by the 1990 Full Bench is set out below:

Table 10

1985 ACT Award	1990 ACT Award	

	Rate		Rate	Relativity to base rate
	$		$	%
Helper	282.70	Child Care Worker Level 1	324.50	80
- after 12 months	285.20	- after 1 year	334.50	
		- after 2 years	344.50	
Assistant	298.40	Child Care Worker Level 2	346.00	85
			356.00	
Child Care Aid	324.10		366.00	
Kitchen Hand	291.40	Child Care Worker Level 3	400.00	98
- after 12 months	293.90		407.00	100
			417.00	
		Child Care Worker Level 4	447.00	110
			457.00	
			467.00	
		Child Care Worker Level 5	477.00	117
		(no increments)		
		Director Level 1	590.00	145
			600.00	
			610.00	
		Director Level 2	640.00	157
			650.00	
			660.00	
		Director Level 3	670.00	165
			680.00	
			690.00	
		Child Care Support Worker Grade 1	324.50	80
			334.50	
			344.50	
		Child Care Support Worker Grade 2	346.00	85
			356.00	
			366.00	

[116] The 1990 Full Bench adopted the agreed classification structure and concluded at page 8:

"...the classification structure in annexure A and the rates of pay set out above are an appropriate outcome of the exercise which the parties have undertaken to review conditions of employment and to provide proper levels of remuneration for the workers in the industry. We approve the classifications and the wage levels."

[117] As we have mentioned, the key classification in the new structure was the Child Care Worker Level 3. After one year's service a worker at this level had a 100 per cent relativity to the base trade level in the *Metal Industry Award*. It is this relativity which is at the heart of the contentions in the proceedings before us. The classification definition of Child Care Worker Level 3, as determined by the 1990 Full Bench, is in the following terms:

"This person would hold a TAFE child care certificate or equivalent qualification which is recognised under the Act authorising the worker to be in charge of children aged two years or more.

Duties will include the following:

work as the person in charge of a group of children in the age range two to twelve years;
develop, plan, implement and evaluate in conjunction with the Director a developmental program;

supervise unqualified workers caring for the group of children;
liaise with parents;
ensure a safe environment is provided;
ensure that records are maintained and are up to date concerning each child in their care;
develop, implement and evaluate daily routines;
be responsible to the Director for the assessment of students on placement;
ensure the centre or service's policies are adhered to.
A Child Care Worker Level 3 shall also include a Field Worker who supervises family day care providers and who does not hold formal qualifications."[36]

[118] In the 1990 proceedings the parties had agreed that a number of matters would be reserved for further negotiation and, if necessary, arbitration. One of these matters concerned the rates of pay applicable to employees holding three and four year qualifications. In 1998 the LHMU made application to the Commission to vary the *ACT Award* to address this matter.

[119] The 1998 application did not seek to alter the rates for child care worker levels 1 to 3. Rather, the LHMU proposed the inclusion of four new salary levels in the classifications of child care worker levels 4 and 5, and in the director levels 1, 2 and 3. The new rates were to apply where an employee holds, and is required to use, advanced qualifications in early childhood education or child care management.

[120] The application was advanced on the basis that the award should be varied to take account of changes which have occurred in the child care industry in the ACT since 1990. It was generally accepted that many employees of child care centres held qualifications which were in excess of, or described differently from, those recognised in classifications in the *ACT Award*. The employers did not oppose the variation sought.

[121] The Independent Education Union of Australia intervened in the proceedings and contended that the Commission should make an in principle decision in relation to the rates that should apply to teachers in child care centres, and direct the parties to confer on the appropriate scale to be included in the award.

[122] Commissioner Deegan determined the application in the following terms:

"It is clear that all parties, including the intervenors, agree that the award should be varied to take account of changes which have occurred in the child care industry in the ACT since 1990. Many employees of child care centres hold qualifications in excess of, or described differently from, those currently recognised in classifications in the award.

The matter of rates of pay for employees with three or four years of relevant training was `leave reserved' at the time the award was made in 1990. In light of this fact I do not accept the argument of the IEU that the Commission is being asked to set a new award safety net in this award.

In setting new rates for employees with qualifications in excess of those already recognised by the award the Commission is continuing the award making process commenced in 1990, and taking account of changes which have occurred in the industry since that time.

I am satisfied it is open to the Commission under the legislation (s.113 and s.89A) and the current Principles to set additional rates for employees who have trained for periods in excess of the two years currently prescribed. I am also satisfied that the rates proposed are appropriate for employees who have completed advanced training/studies in the child care field. I am not convinced, however, that the rates are necessarily appropriate for employees holding recognised teaching qualifications and experience.

The application before the Commission does not alter the rates for child care workers levels 1 to 3. What is proposed is the inclusion of four new salary levels in each of the child care worker 4 and 5 classifications and the Director Levels 1, 2 and 3 classifications. In addition, it is proposed to provide a staggered transition to the new salary levels with an initial increase on 1 September 1998 and a further increase on 1 March 1999."[37]

and at page 15:

"The evidence before me supports the view that the work performed by a teacher employed as such in a child care centre is little different to that of a teacher in a government or independent pre-school. I am unable to conclude, therefore, on the evidence before me that the proposed rates for employees holding three and four year trained qualifications in early childhood education are appropriate for inclusion in the award.

I am prepared to include the new classifications and rates so far as they relate to employees holding advanced qualifications in child care management but refuse the application so far as it relates to persons holding qualifications in early childhood education."

[123] For present purposes it is also relevant to note that in the course of her decision the Commissioner made the following observations:

"The LHMU stressed that the classification structure that was relevant to meeting the needs of child care centres had yet to be determined but that it was essential that the immediate problem, that of appropriate recognition and remuneration for qualifications and skills not currently recognised or remunerated in the award, should be resolved. ...

The LHMU reiterated that the variation was sought on an interim basis. The LHMU had agreed with the employers, in order to obtain employer agreement to the variation, that the classification structure should be reviewed after three months and again after six months."[38]

[124] There is no material before us to suggest that the contemplated review took place.

[125] The rates of pay and classification structure in the *ACT Award*, as varied by Commissioner Deegan's 1998 decision, have subsequently been varied to reflect the 1999, 2000, 2001, 2002, 2003 and 2004 safety net review decisions.[39] The current classification structure and associated definitions is set out at annexure 1.

[126] The *1990 Full Bench decision* was also influential in the determination of the classification structure and wages rates in the *Victorian Award*. In 1992 the Industrial Relations Commission of Victoria (the IRCV) in Full Session reviewed the Victorian rates of pay for child care workers covered by the *Mothercraft Nurses Award* and the *Day Child Care Workers Award*[40]. Essentially the Victorian Branch of the LHMU proposed the insertion of a classification structure which departed from the outcome of the *1990 Full Bench decision*.

[127] The LHMU contended that it was unfair that a person holding a relevant Advanced Certificate or an Associate Diploma from a TAFE institution receives higher wage rates under the *Metal Industry Award* than a person holding a relevant Associate Diploma or Advanced Certificate from a TAFE institution under the two Federal child care awards. It sought to rectify the difference in rates in the Victorian proceedings.

[128] The IRCV rejected the Union's claim, in the following terms:

"... The Commission holds the view that the Victorian child care awards, as far as is practical, must reflect the standards established in the two Federal Awards. If the unions, for whatever reason, are dissatisfied with the outcome of the Federal test case, the onus rests with the unions to seek changes to the Federal awards. ..."[41]

[129] The Victorian Full Bench also concluded at pages 9 to 10:

"In relation to the Day Child Care Workers Award, the award currently provides for `Child Care Worker Untrained' and `Child Care Worker Trained' in a similar manner to the Federal awards. The next level, Children's Services Officer, is defined as a person who holds an Associate Diploma in Arts (Child Care). Progression to this level in the current award therefore requires the completion of the Associate Diploma. The rates of pay for the Children's Services Officer closely match the sum of the wage rates and pre-school allowance of the mothercraft nurse. In fact, historically the Children's Services Officer wage rates have tended to be aligned with the Mothercraft Nurses Award.

...

The Commission, in order to adopt as far as practical the Federal award standards, has concluded that there is a need to group mothercraft nurses in the manner outlined in the unions' claim. Once this is done, it is possible to equate both mothercraft nurses and Children's Services Officers to equivalent levels in the Federal awards, having regard to the work carried out. Persons holding an Associate Diploma or Advanced Certificate and doing the work described in Level IV of the Federal award should, in our view, receive wage rates in line with the Federal award. ...

The test case decision did not establish wage rates for three year trained child care workers. This matter is reserved."[42]

[130] The same classification structure and wage rates were subsequently adopted by the Commission in making the *Children's Services (Victoria) Award 1995*[43]. This award was, in practical terms, a combination of two previous IRCV awards - the *Day Childcare Workers' Award* and the *Mothercraft Nurses Award*.

[131] It is also relevant to note that the *ACT and Victorian Awards* have been reviewed as part of the award simplification process. In that context Item 5l(4) of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (the *WROLA Act*) states:

"If, immediately before the end of the interim period, the award provided for rates of pay that, in the opinion of the Commission:

(a) were not operating as minimum rates of pay; or

(b) were made on the basis that they were not intended to operate as minimum rates;

the Commission may vary the award so that it provides for minimum rates of pay consistent with sections 88A and 88B of the Principal Act and the limitation on the Commission's power in subsection 89A(3) of that Act."

[132] To give effect to this statutory requirement, the Full Bench in the *Paid Rates Review decision* formulated Principles including:[44]

"1. Awards requiring review under item 51(4) will be:

(a) awards containing rates which have not been adjusted in accordance with the minimum rates adjustment principle in the August 1989 National Wage Case decision; and

(b) awards containing rates which have been adjusted in accordance with the minimum rates adjustment principle in the August 1989 National Wage Case decision but which have been varied since the adjustment other than for safety net increases or pursuant to the work value change principle.

2. The rates in the award under review should be examined to ascertain whether they equate to rates in other awards which have been adjusted in accordance with the August 1989 approach with particular reference to the current rates for the relevant classifications in the Metal, Engineering and Associated Industries Award, 1998 - Part 1 [Print Q2527]; where the rates do not equate they will require conversion in accordance with these principles."

[133] In his decision dealing with the review of the *ACT Award* Commissioner Hingley said:

"[4] On the materials and submissions put before me in proceedings of 26 July 1999 and in writing (correspondence received from Australian Liquor, Hospitality and Miscellaneous Workers Union dated 10 March 2000), I am satisfied that the rates contained in this award are minimum rates and not requiring review under Item 51(4).

[5] The parties appearing in this matter have lodged with the Commission by consent a new clause 5.1.5 Incremental Progression, which I approve and will include as part of this process. Accordingly when the award is so varied it will contain no incremental payments as referred to in the Paid Rates decision (p.16) as inappropriate for inclusion."[45]

[134] In relation to the *Victorian Award* the Commissioner determined:

"[4] This award is historically a paid rates award. On 20 July 1999 the Australian Liquor, Hospitality and Miscellaneous Workers Union made application pursuant to s.113 of the Workplace Relations Act (the WR Act) to vary the award in respect of the classification structure and a process for progression within a classification with consequential relationships to junior rates. The application is a consent matter.

[5] I am satisfied on the submissions and material of the parties put before me that the variations sought will provide rates which are properly set minima and consistent with the purpose and intent of Item 51(4) of the WROLA Act and that the award contains no incremental payments as referred to in the Paid Rates Review decision (p.16) as inappropriate for inclusion.

[6] The application is accordingly approved. The variations will operate from the first full pay period commencing on or after 21 July 1999 and shall remain in force for a period of 12 months."[46]

[135] The final decision we wish to mention relates to an application by the Australian Municipal, Administrative, Clerical and Services Union (ASU) for significant increases in rates of pay, the introduction of a new wage structure and additional allowances for child care workers employed under the *Victorian Local Authorities Award 2001*.[47] The Full Bench in that matter also had before it an amended application for orders for equal remuneration pursuant to s.170BC of the *WR Act*.

[136] Following conciliation the parties reached agreement in respect of the applications. The main feature of the agreement was a significant realignment of the relativities of the child care classifications in the award. Child care workers' rates of pay were integrated into the classification and pay structures which apply to local government employees generally. Prior to the agreement being reached, the classification structure and rates of pay of child care workers were separate because they had been transplanted from a previous award of the IRCV into the Federal award.

[137] The effect of the agreement was to insert the child care employees rates into the banded structure at a level which reflects properly fixed internal and external relativities.

[138] The Full Bench granted the application. It concluded:

"[26] No party or intervener suggested that the banded structure in the 2001 award, which applies to many thousands of employees, is not based on proper work value principles. The banded structure was introduced with the making of the 1991 award. The structure was developed as a result of the application of the structural efficiency and minimum rates adjustment principles provided for in the Commission's National Wage Case August 1989 Decision. Some of the history of the proceedings which led to the making of the award is set out in decisions of that time: Re Local Governing Authorities, Employees (Victoria) Award 1984. The structure was approved by the Commission, subject to some modifications, when the 1991 award was simplified in 2001.

[27] We accept the parties' submission that the maintenance of child care classifications separate from the banded structure is anomalous and that the position should be addressed by including child care workers in the structure. To assist in the application of that structure the award prescribes in Appendix A Part A the qualifications and the work value criteria that apply to each band as well as the criteria for advancement to the higher levels within the band. The parties have agreed on the position at which each of the child care worker classifications should be included in the structure and propose that the Appendix be amended accordingly. On the material before us the agreement properly applies the provisions of the Appendix and provides appropriate internal relativities. ...

[28] Finally, the work value criteria which will be applied in the classification of child care workers into the various bands and to the levels within the bands, are the same as the criteria which apply to other employees of local authorities. In that sense child care workers will be in the same position as the other employees in that their place in the structure will depend upon their qualifications and the employer's application of the work value criteria to the work the employees actually perform."[48]

[139] The decision established the following key relativities:

The Certificate III and IV Child Care Worker Level 2, was placed in Band 3 which is 100% at the base rate.
Child Care Worker Level 3 with a 2 year Diploma, was placed in Band 4 which is 111% (compressed relativities to reflect flat rate safety net adjustments).
Child Care Worker Level 3 with a 3 year Degree was placed in Band 5 which is 123% (compressed relativities to reflect flat rate safety net adjustments).

The base director level was placed in Band 6 which is 145 per cent, increasing to 156 per cent for directors of centres with 26 to 44 children. Directors of centres with 45 or more children are also in Band 6 but are paid in the range of 151 to 156 per cent (compressed relativities to reflect flat rate safety net adjustments). Directors with responsibility for more than one centre or directors with responsibilities beyond those of Band 6 were placed in Band 7 with a relativity in the range 161 to 177 per cent.

[140] In the proceedings before us the LHMU agreed with the submission advanced by the Employers that:

"No reliance can be placed upon this decision as the Bench did not, and was not, required to examine the work value of the employees involved."[49]

[141] However, the LHMU submitted that as with the *1990 Full Bench decision "both cases should be used as a `guide' in these two matters"*[50].

4. The Proper Fixation of Minimum Rates

4.1 General

[142] Section 88B(1) provides that the Commission must perform its functions under Part VI of the *WR Act* in a way that furthers the objects of the *WR Act* and in particular the objects of Part VI. One of the objects of Part VI is to ensure that the awards of the Commission act as a safety net of fair minimum wages and conditions of employment. Further, one of the objects of the *WR Act* is to provide the means:

"... to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment".[51] (emphasis added)

[143] Similarly, s.88B(2) provides that in performing its functions under Part VI of the *WR Act* the Commission must ensure that *"a safety net of fair minimum wages and conditions of employment is established and maintained".* Further, s.88B(3)(a) provides that in performing such functions the Commission must have regard to a number of matters, including: *"... the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which the work is performed".* This requirement broadly reflects what have traditionally been regarded as work value considerations.

[144] The applications before us require a determination of whether the wage rates in the relevant awards have been properly fixed. The Commission's traditional approach to the determination of such matters is relevant to our deliberation of these applications.

[145] Classification structures and rates of pay in many awards were subject to a fundamental reassessment as a result of the minimum rates adjustment (MRA) process established by the *August 1989 National Wage Case decision.*[52] That process was designed to facilitate award reform by providing a clear understanding of award relationships one to another.

[146] In the *February 1989 Review decision* the Commission concluded that:

many award classification structures did not meet the needs of industry or employees;
where necessary the number of classifications in an award should be reduced to provide clearly defined skill levels, broadbanding of functions and multi-skilling; and
properly designed and accredited skill training processes were essential to support the structural efficiency principle and its aims.

[147] The Commission emphasised that the successful implementation of these measures would be inhibited by irregularities in award rates of pay. These irregularities had been exacerbated by the attitudes of the parties to awards. As the Commission pointed out:

"The result is there exist in federal awards widespread examples of the prescription of different rates of pay for employees performing the same work but this is only part of the problem. For too long there have existed inequitable relationships among various classifications of employees. That this situation exists can be traced to features of the industrial relations system such as different attitudes adopted in relation to the adjustment of minimum rates and paid rates awards; different attitudes taken to the inclusion of overaward elements in awards, be they minimum rates or paid rates awards; the inclusion of supplementary payments in some awards and not others; and the different attitudes taken to consent arrangements and arbitrated awards.

There is a further dimension to the problem. Employers have introduced and will continue to introduce wage relativities both as between employees employed under the same award and employees covered by other awards in a particular establishment. These relativities can vary from workplace to workplace and may bear no resemblance to the relativities set in the award or awards concerned."[53]

[148] The Commission noted that this situation had inevitably caused feelings of injustice leading to industrial disputation and flow-on settlements. It concluded that the situation had to be corrected otherwise continuing instability within and between awards would seriously reduce the effect of moves to modernise those awards. Consequently it determined that:

"...minimum rates awards will be reviewed to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other minimum rates awards."[54]

[149] The translation of the principle of ensuring stable relationships between awards and their relevance to industry was considered in the *August 1989 National Wage Case decision*. In the course of its decision the Commission elaborated on what had been said in the *February 1989 Review decision* about the requirement to review relationships between classification rates and supplementary payments in minimum rates, stating:

"...we have decided that the minimum classification rate to be established over time for a metal industry tradesperson and a building industry tradesperson should be $356.30 per week with a $50.70 per week supplementary payment. The minimum classification rate of $356.30 per week would reflect the final effect of the structural efficiency adjustment determined by this decision.

Minimum classification rates and supplementary payments for other classifications throughout awards should be set in individual cases in relation to these rates on the basis of relative skill, responsibility and the conditions under which the particular work is normally performed. The Commission will only approve relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards. Before that requirement can be satisfied clear definitions will have to be established."[55]

[150] In the *August 1989 National Wage Case decision* the Commission also stated that following the completion of the MRA process it was envisaged that minimum classification rates would not alter their relative position one to another unless warranted on work value grounds.

[151] Principle 3 of the current Statement of Principles provides that increases under previous National Wage Case decisions, such as minimum rates adjustments, may be awarded in accordance with the relevant principles in those decisions. Further, an award may be varied pursuant to a previous National Wage Case decision without the application being regarded as a claim for wages and/or conditions above the award safety net.

[152] In our view the establishment of properly fixed minimum rates in awards is clearly consistent with the Commission's obligations under the *WR Act*. In particular, s.88B(3)(a) is intended to preserve the structure of stable and equitable relativities between awards established by the MRA process which commenced as a result of the *August 1989 National Wage Case decision*[56].

[153] In the *Paid Rates Review decision*[57] the Commission observed that for an award to contain properly fixed minimum rates the rates of pay must bear an appropriate work value relationship to rates for work covered by a minimum rates award which has completed the MRA process. Further, the Full Bench concluded that without a common basis for the fixation and variation of minimum rates awards it is not possible to maintain stable relativities between such awards.

[154] The continued relevance of the MRA process was confirmed by the *Paid Rates Review* Full Bench, in these terms:

"The MRA principle was designed to establish a consistent pattern of minimum rates in awards covering similar work thereby removing inequities and providing a stable foundation for enterprise bargaining. That objective is as important now, perhaps even more important, than it was in 1989."[58]

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

1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA process with particular reference to the current rates for the relevant classifications in the *Metal Industry Award*. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.

2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.

3. If the existing rates are too low they should be increased so that they are properly fixed minima.

[156] Central to the LHMU's case with respect to the *ACT Award* is the proposition that the *Metal Industry Award* C10 comparator in the *ACT Award* should be set at the Child Care Worker Level 3 on commencement classification (rather than CCW3 after one year, as is presently the case) and that the rate for the AQF Diploma level should be set at 130 per cent of the trade rate. We deal with the merit of this proposition later in our decision. It suffices to note here that the proposition advanced is, in part, misconceived.

[157] The Diploma in Engineering level in the *Metal Industry Award* is at level C5. The wage rate at this level was originally set at 130 per cent of the C10 trade rate. However the relativity between the C5 and C10 levels has been compressed over time as a consequence of the awarding of flat dollar safety net adjustments. The C5 rate is currently $684.40 which is 122 per cent of the C10 rate of $561.20.

[158] The last occasion on which the Commission awarded a percentage adjustment to award rates generally was in the *April 1991 National Wage Case decision*[59]. Since that time there have been eleven adjustments to award rates of pay generally which have been in flat money amounts. Relativities have been compressed further by the tapering of the amount of the increase at the higher levels in 1998, 1999 and 2003. The Commission has remarked on this compression of relativities on a number of occasions[60].

[159] If the LHMU's submission was acceded to then employees classified at the AQF Diploma level in the child care awards would be entitled to $729.60 per week (i.e. 130 per cent of the C10 rate of $561.20), which is $45.20 per week more than an employee at the AQF Diploma level in the *Metal Industry Award*. Clearly such a proposition is unsustainable. It flies in the face of the purpose of the MRA process which was to establish a consistent pattern of minimum rates in awards.

[160] In effect the LHMU seeks to restore the 130 per cent relativity at the AQF Diploma level. As we have noted, this relativity has been eroded as a consequence of flat dollar safety net adjustments. It would be contrary to principle to restore this relativity in the manner proposed by the union. The compression of relativities is not sufficient to justify a work value increase[61] and arguments based on the maintenance of pre-existing relativities are irrelevant to the assessment of work value[62]. As the Commission observed in the *May 2002 Safety Net Review - Wages decision*:

"We wish to make it clear that, as the Commission has pointed out on a number of occasions, changes in relativities brought about by safety net adjustments do not provide a basis for increases or changes in relativities in future safety net reviews. We also endorse the following passage from the Third Safety Net Adjustment and Section 150A Review Decision October 1995 [(1995) 61 IR 236]:

`We reiterate what we said in the September 1994 Review decision; namely, that the Commission will not grant applications to restore pre-existing relativities on the basis that such relativities have been compressed by the granting of flat dollar arbitrated safety net adjustments [Print L5300, p.34]."[63]

[161] How then is it appropriate to determine properly fixed rates for the Certificate III and AQF Diploma level in the child care awards?

[162] If we accept that the rates at the AQF Diploma level should be linked to the C5 level in the *Metal Industry Award,* and that it is appropriate to have a nexus between CCW level 3 on commencement and the C10 level, then a method of determining a properly fixed rate is that which was applied in the *Clerks (Breweries) Consolidated Award, 1985 case*[64]. In that matter the Commission adopted the following approach:

1. The key classification (Grade 2 Administrative Clerk) was aligned with a classification level in a properly fixed minimum rates award (Grade 3 in the *Clerical and Administrative (Victoria) Award*; which is, coincidentally, set at the C10 rate).

2. Having fixed the minimum rate for the key classification the other rates in the award are fixed having regard to established internal award relativities. The existing classification structure was introduced into the *Clerks (Breweries) Consolidated Award 1985*[65] in November 1991. At that time the internal relativities were:

Table 11

Grade	Relativity
	%
1	94
2	100
3	108
4	111
5	115
6	119

[163] The key classification (Grade 2) is the 100 per cent relativity point. The other relativities are determined by dividing the rate of pay at the particular grade by the then rate of pay at grade 2. For example the rate for a grade 1 in November 1991 was $414.80 and grade 2 was $440. Hence the grade 1 relativity is $414.70 divided by $440, or 94 per cent.

[164] Once the internal relativities are established, the properly fixed rates - as at November 1991 - can be determined. In November 1991 the tradespersons rate was $417.20. Using grade 2 as the 100 per cent rate the properly fixed minimum rates are calculated on the basis set out below:

Table 12

November 1991

Grade	Relativities	Minimum rate
	%	$/week
1	94	392.20
2	100	417.20

3	108	450.60
4	111	463.10
5	115	479.80
6	119	496.50

[165] These minimum rates are then increased by adding all of the subsequent safety net adjustments. The resultant rates are the current properly fixed minimum rate.

[166] The safety net adjustments over this period are set out below:

Table 13

Date	**Adjustment**
September 1994[66]:	$24 (three $8 adjustments)
April 1997[67]:	$10
April 1998[68]:	$14 in award rates up to and including $550
	$12 in award rates above $550 up to and including $700
	$10 in award rates above $700
April 1999[69]:	$12 in award rates up to and including $510
	$10 in award rates above $510
May 2000[70]:	$15
May 2001[71]:	$13 in award rates up to and including $490
	$15 in award rates above $490 and up to and including $590
	$17 in award rates above $590
May 2002[72]:	$18
May 2003[73]:	$17 in award rates up to and including $731.80
	$15 in award rates above $731.80
May 2004[74]:	$19

[167] Of course it is not always necessary, or appropriate, to go back to November 1991 as was done in the *Clerks (Breweries) Award case*. It depends on when the key classification was inserted into the relevant award.

[168] In the *ACT Award* the level which has a Diploma in Children's Services or equivalent as a qualification requirement is Child Care Worker Level 4. In its current form this classification was inserted into the *ACT Award* by Commissioner Deegan as a consequence of her decision of 13 August 1998[75]. The first step is to calculate the internal award relativities at that time. For this purpose we have `split' the current award structure into two parts: Certificate III and below; and Diploma and above. Hence there are two 100 per cent relativity points - one at CCW3 on commencement (for AQF3) and the other at CCW4, on commencement (for AQF4). An alternative method would be to set one 100 per cent rate, at the Diploma level. The difficulty with this approach is that the resultant properly fixed rate at the AQF3 level is significantly higher than the C10 rate in the *Metal Industry Award*.

[169] The rate of pay prescribed for the C10 and C5 classifications in the *Metal Industry Award* at this time were $465.20 and $588.40 respectively.[76] Applying the approach in the *Clerks (Breweries) Award decision* the properly fixed minimum rates - as at August 1998 - can be determined based on the internal award relativities at that time.

[170] These minimum rates are then increased by adding all of the subsequent safety net adjustments. The resultant rates are the *current* properly fixed minimum rates, as set out below:

Table 14

Classification	**A** **July 1998 rates** **$**	**B** **Internal Relativities** **%**	**C** **July `98 Properly Fixed Rates** **$**	**D** **Current Properly Fixed Rates** **$**	**E** **Current award rates** **$**	**F** **Increase (Difference between D&E)** **$**	**%**
CCW level 1	380.60	83.1	386.60	480.60	474.60	6.00	1.3
on commencement	390.90	85.3	396.80	490.80	484.90	5.90	1.2
after 1 year	401.10	87.6	407.50	501.50	495.10	6.40	1.3

after 2 years							
CCW level 2	402.70	87.9	408.90	502.90	496.70	6.20	1.2
on commencement	412.90	90.2	419.60	513.60	506.90	6.70	1.3
after 1 year	423.20	92.4	429.80	523.80	517.20	6.60	1.3
after 2 years							
CCW level 3	458.00	100	465.20	561.20	552.00	9.20	1.7
on commencement	465.20	101.6	472.60	568.60	561.20	7.40	1.3
after 1 year	475.40	103.8	482.90	578.90	571.40	7.50	1.3
after 2 years							
CCW level 4	506.20	100	588.40	684.40	602.20	82.20	13.4
on commencement	516.40	102	600.20	696.20	610.40	85.80	14.1
after 1 year	526.70	104	611.90	707.90	620.70	87.20	14.0
after 2 years							
CCW level 5	536.90	106.1	624.29	720.29	630.90	89.39	14.2
on commencement	547.10	108.1	636.10	732.10	641.10	91.00	14.2
after 1 year	557.40	110.1	647.80	743.80	651.40	92.40	14.2
after 2 years							
on commencement (Graduate Cert. Management)	601.34	118.8	699.00	793.00	697.34	95.66	13.7
after 1 year	630.31	124.5	732.60	826.60	726.31	100.29	13.8
after 2 years	649.28	128.3	754.90	848.90	745.28	103.62	13.9
Director level 1	650.80	128.6	756.70	850.70	746.80	103.90	13.9
on commencement	661.31	130.6	768.45	862.45	757.00	105.45	13.9
after 1 year	671.30	132.6	780.20	874.20	767.30	106.90	13.9
after 2 years							
on commencement (Graduate Cert. Management)	706.98	139.7	822.00	916.00	800.98	115.02	14.4
after 1 year	730.82	144.4	849.60	943.60	824.82	118.78	14.4
after 2 years	754.66	149.1	877.30	971.30	848.66	122.64	14.5
Director level 2	702.00	138.7	816.10	910.10	796.00	114.10	14.3

on commencement	741.00	146.4	861.40	955.40	835.00	120.40	14.4
after 1 year	751.30	148.4	873.20	967.20	845.30	121.90	14.4
after 2 years							
on commencement (Graduate Cert. Management)	799.28	157.9	929.10	1023.10	893.28	129.82	14.5
after 1 year	828.27	163.6	962.60	1056.60	922.27	134.33	14.6
after 2 years	857.26	169.4	996.70	1090.70	951.26	139.44	14.7
Child Care support worker level 1							
on commencement	380.60	83.1	386.60	480.60	474.60	6	1.3
after 1 year	390.90	85.3	396.80	490.80	484.90	5.90	1.2
after 2 years	401.10	87.6	407.50	501.50	495.10	6.40	1.3
Child care support worker level 2							
on commencement	402.70	87.9	408.90	502.90	496.70	6.20	1.2
after 1 year	412.90	90.2	419.60	513.60	506.90	6.70	1.3
after 2 years	423.20	92.4	429.80	523.80	517.20	6.60	1.3

[171] Hence if we accept the proposition that the C10 comparator is the Child Care Worker Level 3 on commencement and that the Child Care Worker level 4 (i.e. the AQF Diploma level) should be set at the same rate as level C5 in the *Metal Industry Award*, then the current rates in the *ACT Award* will have to be increased by between 1.2 and 14.7 per cent.

[172] A comparison of the qualifications required at particular classification levels with those in awards which have been adjusted in accordance with the MRA process is one method for establishing properly fixed minimum rates. In that context the Australian Qualifications Framework (the AQF) is relevant. We briefly describe the AQF in the next section of our decision.

4.2 The Australian Qualifications Framework (AQF)

[173] In her evidence Ms Beth Brunskill, the Executive Officer of Training for Health and Community Services Incorporated, provides an overview of the AQF. We accept Ms Brunskill's evidence in this regard and set it out, in summary form, below.

[174] The AQF had its genesis in the March 1992 report of the Employment and Skills Formation Council titled: *`The Australian Vocational Certificate Training System'*. The report endorsed a shift from time based to outcomes based education as reflected in its recommendation that *"each certificate level to be achieved when an individual demonstrates a specified level of competence rather than after a specified level of time"*. The thrust of the report was to replace the then mix of State based certificates, traineeships and apprenticeships with a more coherent national framework based on industry competency standards and the Australian Standards Framework (ASF).

[175] The ASF consisted of eight levels into which the various competency standards could be aligned. The ASF became the AQF on 1 January 1995, using the same eight levels. However at this point levels 7 and 8, while still part of the descriptive framework, became less of a focus for the vocational training sector due to their alignment with the higher education sector.

[176] The table below sets out the current descriptors for levels 1 to 6[77]:

Table 15

Certificate I Pathway qualification	**Certificate II** Workers operate under clear guidance	**Certificate III** Generally seen as entry level to the industry for client or community work	**Certificate IV** First line supervisor or more autonomous worker	**Diploma** Advanced skill worker or manager	**Advanced Diploma** Specialist advanced skill worker or executive manager
Community Services Work Qualifications					
Certificate I in Work Preparation	Certificate II in Community Services (First Point of Contact) Certificate II in Community Services Work	Certificate III in Community Services Work	Certificate IV in Community Services Work Certificate IV in Community Services Advocacy Certificate IV in Community Services (Service Co-ordination) Certificate IV in Community Services (Information, Advice and Referral) Certificate IV in Mental Health Work-(Non-clinical) Certificate IV in Alcohol and Other Drugs Work	Diploma of Community Services Management Diploma of Community Welfare Work Diploma of Community Services (Case Management) Diploma of Community Services (Financial Counselling) Diploma of Alcohol and other Drugs Work	Advanced Diploma of Community Services Management Advanced Diploma of Community Services Work
		Certificate III in Employment Services Certificate III in Disability Work	Certificate IV in Employment Services Certificate IV in Disability Work	Diploma of Employment Services Diploma of Disability Work	Advanced Diploma of Community Services Management Advanced Diploma of Community Services Work

		Certificate III in Youth Work	Certificate IV in Youth Work CHC40702 Certificate IV in Youth Work (Juvenile Justice)	Diploma of Youth Work	Advanced Diploma of Community Services Management Advanced Diploma of Community Services Work
		Certificate III in Social Housing	Certificate IV in Social Housing	Diploma of Social Housing	Advanced Diploma of Community Services Management Advanced Diploma of Community Services Work
			Certificate IV in Marriage Celebrancy		
		Certificate III in Telephone Counselling Skills	Certificate IV in Telephone Counselling Skills		
Community Development / Education					
			Certificate IV in Community Development	Diploma of Community Development Diploma of Community Education	Advanced Diploma of Community Services Management Advanced Diploma of Community Services Work
Residential and Support Work					
	Certificate III in Community Services Support Work	Certificate III in Aged Care Work Certificate III in Home and Community Care Certificate III in Disability Work	Certificate IV in Aged Care Work Certificate IV Services Co-ordination (Ageing and Disability) Certificate IV in Disability Work Certificate IV in Community Services (Lifestyle and Leisure)	Diploma of Community Services Management Diploma of Disability Work Diploma of Community Services Management Diploma of Community Services (lifestyle and Leisure)	Advanced Diploma of Community Services Management Advanced Diploma of Disability Work
Child Protection					
			· Certificate IV in Community Services (Protective Care)	Diploma of Community Services (Protective Intervention) Diploma of Statutory Child Protection	Advanced Diploma of Community Services Management Advanced Diploma of Community Services Work
Children's Services					
		Certificate III in Children's Services	Certificate IV in Out of School Hours Care	Diploma of Children's Services Diploma of Out of School Hours Care	Advanced Diploma of Children's Services Advanced Diploma of Community Services Work

[177] It is important to recognise that the AQF is competency based. Under the AQF structure a *"qualification"* is defined as:

"... formal qualification, issued by a relevant approved body, in recognition that a person has achieved learning outcomes or competencies relevant to identified individual, professional, industry or community needs."

[178] In the *Metal Industry Award* the qualification required for classification at the C10 trade level is a Certificate III in Engineering. This qualification falls within AQF level 3.

[179] In her evidence Ms Brunskill reviewed the various child care qualifications and aligned the Certificate III in Children's Services with the Certificate III in Engineering on the basis that both are AQF level 3 qualifications. In particular Ms Brunskill says:

"... the demands of the various qualification levels are similar in both Industries ... one cannot compare apples with oranges, and try to say for example that the `Care for Children' unit is more or less equivalent to the `Operate Melting Furnaces' unit (both are specialisation units from the Certificate III qualifications in each Industry).

The key issue to focus on is the AQF framework. All qualifications and their associated units of competency MUST align to one of the 8 AQF levels. There is no other measuring criteria that should be necessary or entertained. If a party argues that their Industry's Certificate III is higher or better or longer (or whatever!), then it should not be a Certificate III. The process of endorsing Training Packages ensures that qualifications contained therein are set at the right AQF level."[78]

[180] Ms Brunskill was cross examined in relation to this issue[79] but her evidence did not alter. The basis for her comparison was with the AQF level of each qualification rather than the actual number of competencies in each or the period of time taken to complete the course.

4.3 The AQF Certificate III and AQF Diploma levels

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

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

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

[184] The Employers also led evidence and made submissions with respect to the number of hours of training or the number of modules in the Child Care Certificate III and Diploma. But submissions based on this material are misconceived. The AQF is competency based not time based.

[185] The issue is not how long a particular course of study takes to complete, or the number of modules it contains. Rather it is the educational outcome, the number and level of competencies attained, which determines the alignment of the qualification within the AQF.

4.4 Work value changes

[186] Principle 6 of the Statement of Principles sets out the basis upon which changes in work value may justify a change in wage rates. The principle is in the following terms:

"6. WORK VALUE CHANGES

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

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

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

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

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

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

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

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

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

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

(i) Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other principle of this Statement of Principles, will not be taken into account under this Principle."[80]

[187] Wage fixation principles dealing with changes in work value have existed for some time and broadly speaking the current Principle 6 codifies the general principles which have emerged over time. In this context we note that in the proceedings before us the parties generally accepted a statement made by Senior Commissioner Taylor in 1968[81] to the effect that the following factors were relevant to the assessment of work value:

qualifications necessary for the job;
training period required;
attributes required for the performance of the work;
responsibilities for the work, material and equipment and for the safety of the plant and other employees;
conditions under which the work is performed such as heat, cold, dirt, wetness, noise, necessity to wear protective equipment etc;
quality of work attributable to, and required of, the employee;
versatility and adaptability: for example, performing a multiplicity of functions;
skill exercised;
acquired knowledge of plant and process;
supervision over others or necessity to work without supervision; and
importance of the work to the overall operations of the plant.

[188] Paragraph (a) of the current principle sets out the strict test to be satisfied in order to justify an alteration in wage rates based on changes in work value. Such changes may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. The expression *"conditions under which work is performed"* is defined in paragraph (g) of the principle to mean the environment in which the work is done. The principle makes it clear that it is only by satisfying the significant net addition test that wages may be altered on the ground of work value.

[189] The principle makes it clear that changes in work, by themselves, may not lead to an increase in wages. In *State Electricity Commission of Victoria v The Federated Ironworkers' Association of Australia*[82], a Full Bench of the Commission expressed this limitation in the following terms:

"In all categories of work except perhaps the most simple, changes become evident with time. It is in the nature of things that new methods of doing the same thing evolve with time, and that skills which qualify a person for a particular category of work may become fully tested, or in some cases the work may thereby be made easier. However it is essential that such changes are not mistaken for genuine work value change."[83]

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

Rapidly changing technology, dramatic or unanticipated changes which result in a need for new skills and/or increased responsibility may justify a wage increase on work value grounds.[84] But progressive or evolutionary change is insufficient.[85]

An increase in the skills, knowledge or other expertise required to adequately undertake the duties concerned demonstrates an increase in work value.[86]

The mere introduction of a statutory requirement to hold a certificate of competency does not of itself constitute a significant net addition to work requirements. It must be demonstrated that there has been some change in the work itself or in the skills and/or responsibility required.[87] However, where additional training is required to become certified and hence to fulfil a statutory requirement a wage increase may be warranted.[88]

A requirement to exercise care and caution is, of itself, insufficient to warrant a work value increase.[89] But an increase in the level of responsibility required to be exercised may warrant a wage increase on work value grounds.[90] Such a change may be demonstrated by a requirement to work with less supervision.[91]

The requirement to exercise a quality control function may constitute a significant net addition to work requirements when associated with increased accountability.[92]

The fact that the emphasis on some aspects of the work has changed does not in itself constitute a significant net addition to work requirements.[93]

The introduction of a new training program or the necessity to undertake additional training is illustrative of the increased level of skill required due to the change in the nature of the work.[94] But keeping abreast of changes and developments in any trade or profession is part of the requirements of that trade or profession and generally only some basic changes in the educational requirements can be regarded, of itself, as constituting a change in work value.[95]

Increased workload generally goes to the issue of manning levels not work value.[96] But, where an increase in workload leads to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration.[97]

[191] The principle provides, in paragraph (d), that where a significant net addition to work value has been established an assessment will have to be made as to how that addition should be measured in monetary terms. Such an assessment should normally be based on the previous work requirements, the wage previously fixed for the work, and the nature and extent of the change in work. However, it is open to the arbitrator to make comparisons with other wages and work requirements within the award, and in other awards, provided such comparisons are fair, proper and reasonable in all the circumstances. In particular, regard may be had to the wage increases ascribed to comparable changes in work value in other areas.[98] Care must be taken in relation to making a comparison with a provision found in a consent award.[99]

[192] Once an appropriate rate has been assessed for the new or changed work the Commission may, depending on the circumstances of the particular case, create a new classification, fix a new rate for an existing classification, or provide for an allowance to be paid in addition to the existing rate for the classification. Further, the principle provides in paragraph (b) that where the new or changed work is performed only from time to time by persons covered by a particular classification, or where it is performed by only some of the persons covered by the classification, it should be compensated by a special allowance payable only when the new or changed work is being performed by a particular employee and not by increasing the rate for the classification as a whole.

5. The Evidence - Findings

5.1 Introduction

[193] Some 34 witnesses gave evidence during the proceedings, 24 on behalf of the LHMU and 12 on behalf of employer interests.

Union Witnesses - ACT

Ms Beth Caroline Brunskill, Executive Officer of Training for Health and Community Services;[100]
Ms Nina Bukvic, Level 2 employee Pre-school Room, Reid Early Childhood Centre;[101]
Ms Joanne Elizabeth Davies, Introduction to Pre-school Room Leader, Woden Early Childhood Centre;[102]
Ms Barbara Deacon, Coordinator, Spence YWCA Family Day Care Scheme;[103]
Ms Judy Elton, Level 2 Infants Room, Greenway Early Child Care Centre;[104]
Ms Michelle Fernandez, Director, Spence Children's Cottage Association;[105]
Ms Raeline Susan George, Director, Forrest After School Care Facility;[106]
Ms Stephanie Henderson, Assistant Director, Acton Early Childhood Centre;[107]
Ms Diedre Patricia Hobson, Assistant Director, Reid Early Childhood Centre;[108]
Ms Erin Kate Mary Johnston, Level 1 employee, Russell Hill Early Childhood Centre;[109]
Ms Jane Maree Marshall, Resource Coordinator, Central Canberra Family Day Care;[110]
Ms Leslie Ralph, Head of Department - Child Studies Unit, Canberra Institute of Technology;[111]
Ms Molly Rhodin, Manager (previously titled Director) of the Greenway Early Childhood Centre.[112]
Ms Reesha Babetta Stefek, Director, Woden Early Childhood Centre;[113]
Ms Lynda Stubbs, child care organiser, LHMU.[114]
Ms Toni Stedford, Level 4 Child Care Worker, Aranda After School Service.[115]

Employer Witnesses - ACT

Ms Debra Anne Campion, Executive Manager, Communities @ Work Family Day Care Scheme;[116]
Ms Amanda Ruth Colbran, Executive Manager of Early Childhood Services, Communities @ Work;[117]
Ms Leanne Marie Crisp, owner and manager, Precious Moments Childhood Learning and Development Centre;[118]
Ms Elizabeth Audrey Dau, Early Childhood Consultant;[119]
Mr Stephen Larcombe, Chief Executive Officer, Northside Community Services Inc.;[120]
Ms Leonie Ann Maiden, Executive Manager of School Aged Care, Communities @ Work.[121]

Union Witnesses - Victoria

Ms Jennifer Anne Bruinewoud, Children's Services Consultant.[122]
Professor Marilyn Challender Ann Fleer, Professor of Early Childhood Education, Monash University;[123]
Ms Rosemary Clare Forbes, Manager, Department of Child and Family Studies, Swinburne University of Technology;[124]
Ms Petra Hilsen, Manager, East Melbourne Child Care Co-Operative;[125]
Ms Veronica Ann Ilias, Industrial Officer, LHMU;[126]
Ms Diane Patricia Lawson, Chief Executive Officer, Community Services and Health Training Australia Ltd, and National Community Services and Health Training Advisory Body;[127]
Ms Lanie Muir, Temporary Organiser, LHMU and former Level 4 (Assistant Director) child care worker;[128]
Ms Michelle Walker, Director, Jindi Woraback Children's Centre;[129]

Employer Witnesses - Victoria

Ms Roslyn Howey, Workplace Trainer and Assessor with a nationally registered training provider; [130]
Mr Martin Kemp, Director, ABC Developmental Learning Centres Pty Ltd;[131]
Ms Linda Michelle Mrocki, Owner/Licensee/Director of Camberwell Junction Early Learning Centre and Owner/Licensee of Blackburn South Early Learning Centre;[132]
Mrs Susan Jane Peters, Manager, One World for Children and the OWC Training Unit;[133]
Mr Lucian Roncon, President, Child Care Centres Association of Victoria;[134]
Ms Sharon Ann Smith, Manager of five child care centres.[135]

[194] On the basis of the material before us we have made a number of findings which are relevant to the determination of these applications. For convenience our findings have been grouped into six categories:

the children's services sector;
work value considerations;
general
specific
shift in utilisation patterns;
supervision and training of workers;
programming;

children from non-English speaking backgrounds; and
children with special needs, or `at risk' children;
the shift from child minding to child development;
accreditation;
qualifications and training;
recruitment and retention issues.

5.2 The Children's Services Sector

[195] The children's services sector is primarily made up of four types of services: private long day care, community based long day care, family day care and outside school hours care.

[196] Data from the 2002 Census of Child Care Services conducted by the Federal Department of Family and Community Services, released in early 2004 (the 2002 Census)[136], shows that there has been significant growth in the child care industry. There were an estimated 732,100 children attending child care at May 2002, compared to an estimated 577,500 children attending care in 1999 (an increase of 27 per cent).[137]

[197] In all service types the average number of children per service increased markedly between 1999 and 2002 as shown by the table below[138]:

Table 16

Service Type	1996/97 Census	1999 Census	2002 Census
Private Long Day Care			
Services	2,593	2,617	2,178
Children	190,755	193,785	200,815
Average children per service	73.6	74.0	92.2
Community Based Long Day Care			
Services	1,063	1,016	1,253
Children	79,139	76,450	107,317
Average children per service	74.4	75.2	85.6
Family Day Care			
Services	321	313	318
Children	83,471	81,418	93,450
Average children per service	260	260	294
Outside School Hours Care			
Services	1,703	1,828	2,098
Children	93,941	99,902	131,433
Average children per service	54.8	54.7	62.6
Vacation Care			
Services	577	1,080	1,275
Children	28,289	57,521	82,339
Average children per service	49.0	53.3	64.6

[198] The introduction of Child Care Benefit (CCB) from 1 July 2000 was almost certainly a factor in this increase. CCB replaced Childcare Assistance and Childcare Cash Rebate from 1 July 2000. An estimated 501,100 families (this includes an estimate of non-respondent services) were assisted through CCB fee relief at the time of the 2002 Census (compared to 264,000 at the time of the 1997 Census). Ninety-two per cent of all families using long day care centres and family day care schemes received some CCB as fee relief. This was made up of 93 per cent of families using private long day care centres, 90 per cent of families using community based long day care centres and 94 per cent of families using family day care schemes. Maximum CCB was received by 43 per cent of all families using long day care centres and family day care schemes.[139]

[199] Utilisation surveys conducted by the Department of Family and Community Services just prior to and following the introduction of CCB, and also departmental administrative data on CCB customers confirm that since the introduction of CCB the utilisation of child care services has been steadily increasing.[140]

[200] The growth in the private long day care component of the sector has been particularly significant in recent years. It is the dominant means of providing long day care in Victoria.

Table 17[141]

	Victoria			ACT		
	Paid Staff	No. of Children	No. of Services	Paid Staff	No. of Children	No. of Services
Private LDC	5248	36,550	383	412	2,278	26
Community Based LDC	4,152	25,576	301	611	2,993	42

[201] The capacity utilisation of child care services has also increased. In 2002, the average capacity utilisation in long day care centres, as measured by total child hours paid for as a percentage of total capacity, was 88 per cent (89 per cent in private and 86 per cent in community based long day care). This compares to average utilisation in long day care centres of 72 per cent in 1999 (with 71 per cent in private and 75 per cent in community based long day care centres). In 2002, the average utilisation in family day care schemes was 77 per cent, compared to 70 per cent in 1999. In 2002, 28 per cent of private long day care centres indicated they had no vacancies, compared to 9 per cent in 1999. This compares with 22 per cent of community based centres in 2002 and 7 per cent in 1999.[142]

[202] As a consequence of all the changes noted above the number of persons employed in the children's services sector has increased over time. The growth in the number of employees providing child care in Commonwealth funded long day care centres is shown on the following page:

Table 18[143]

	No of Paid Employees		Increase
	1997	2002	%
Private long day care	23,100	30,007	29.9
Community based long day care	13,700	18,005	31.4

[203] Mr Kemp gave evidence during the proceedings.[144] ABC's 2003 Annual Report is also in evidence.[145] At paragraph 8 of his statement Mr Kemp says:

" Information from the Office of the Minister for Family Services indicates that in 2002 the private childcare sector accounted for 72% of all Long Day Care Centre places throughout Australia and this translates to 40% of all formal care, or 760,000 children who access formal care. Formal care includes long day care, family day care, outside school hours care (including vacation care), and occasional care."

[204] ABC operates private long day care centres. It has grown significantly over time. In 1998 it operated 22 centres and by the end of 2003 it operated 187 centres in five states, including 39 centres in Victoria.[146] The 2003 Annual Report records a net profit of $12.07 million (up from $6.86 million in 2002). In his evidence Mr Kemp confirmed media reports that the company was on track to record a full year profit of about $20 million in 2003/2004.[147] The same media report[148] indicated that in February 2004 the company operated 270 centres including 54 centres in Victoria.

[205] On the basis of the foregoing we make the following findings:

1. There has been significant growth in the children's services sector since 1999.

2. Between 1999 and 2002 the average number of children per service has increased markedly in all service types. The capacity utilisation of child care services has also increased, and utilisation patterns of the users of long day care have changed over time. For example, in 1997 in Victoria some 63 per cent of child care attendance hours in private long day care centres were less than 30 hours per week. By 2002 this had increased to 73 per cent.

3. The growth in the private long day care component of the children's services sector has been particularly significant in recent years and it is the dominant means of providing long day care in Victoria.

4. In recent years publicly listed corporate chains have become a significant presence in the long day care component of the sector.

5.3 Work Value Considerations

5.3.1 General

[206] In general terms the witness evidence supports the proposition that the nature of the work of child care workers and the conditions under which that work is performed has changed over time.

[207] A number of witnesses called by the LHMU reported that the work was a lot more stressful than in the past and more is expected of a child care worker now than it was ten years ago.[149]

[208] Witnesses called by the Employers also acknowledged that changes had occurred over time. For example, Ms Maiden said that:

"... there has been a change in the emphasis placed on qualifications by employers in the industry. Over the years people have begun to understand the significance of childcare and this in turn has added value to childcare and to the belief that workers should be `qualified'."[150]

[209] In her statement Ms Dau says that the childcare industry has changed in many ways since 1990, including:

there is a far greater demand for child care;[151]
child care is increasingly in the spotlight and demands for accountability are greater than in the past;[152]
outside school hours care (OSHC) is a much more accepted part of school communities, there are now national standards for OSHC and a requirement for a proportion of staff to be qualified;[153]
the duties and responsibilities of workers within the industry have increased. Quality assurance has increased accountability. There is an increased workload to prepare for the accreditation review and the requisite paperwork has increased;[154]
family involvement and accountability to families has increased since the introduction of accreditation. For many centres this requires additional work;[155]

[210] A number of the witnesses acknowledged that the physical work environment in child care centres had improved over time.[156] But others expressed a contrary view.[157]

[211] In her statement Ms Forbes lists those factors that contribute to the complexity of the role of a child care worker. At paragraph 29 of that statement Ms Forbes says:

"The role includes:

Providing a nurturing environment and interacting with the children in such a way that each individual child's emotional needs are met.
Providing environments and experiences which are appropriately stimulating and engaging and interacting with the children in such a way that each child's cognitive, language, and creative development is stimulated.
Providing experiences and environments that are supportive of children's social development and facilitating the interactions of children in such a way that their social development in a diverse environment is encouraged.
Providing environments and experiences that support the children's physical development. The child care worker needs to assist young children to develop skills - with an understanding of the need for developing competence and confidence in a way that meets the need for independence as well as for safety.
Providing safe and hygienic environments and implementing safe and hygienic practices which support children's health and well-being and which minimize the spread of infections and the risk of accidents in a group environment.
Supporting children's nutritional needs and implementing safe food handling practices.
Supporting the needs of children and families from socially, culturally and linguistically diverse backgrounds, facilitating understanding of that diversity and providing an environment where all children and families feel valued and included.
Supporting the development of children with a range of special needs including supporting the families, liaison with other professionals and accessing specialist resources and services.
Observing babies and children sensitively and accurately and using a developmental analysis of those observations to assist in planning and caring appropriately for each child.
Planning appropriate programs for individual children and groups of children for all areas of their development and well being.

Guiding children's behaviour, and managing situations where a child's behaviour is difficult and challenging.
Communicating appropriately and sensitively with families in a way that is supportive of the child's well-being and development.
Working as part of the team, managing staff, providing leadership, financial management, and supporting workplace relations.
Understanding and participating in the process of meeting quality accreditation requirements.
Complying with relevant legislation and regulations specific to children's services.
Understanding the applications to children's services of Occupational Health and Safety requirements, food handling requirements and privacy legislation requirements.
Operating in an environment that requires an understanding of duty of care, the rights of the child and the implications of legislative and ethical issues surrounding the reporting of suspected child abuse."[158]

[212] Under cross-examination Ms Forbes was asked a series of questions concerning her claim about changes to the work and responsibilities of child care workers over the past decade and responded:

"Mr Moloney: If I put it to you that virtually all of those issues were featured - have been a feature of a trained child care worker's role now and in the past, would you agree with that?

Ms Forbes: Some aspects are, but for example an awareness of children's emotional needs. The fact that many - where children are identified are at risk of harm, sometimes child care centres are used as the place where a child has not been removed from the family, but where a child is being placed and the families are being asked to be supportive of that. And I think elsewhere and in this case I refer to the increased numbers of children who are seen in that category. Again, although it was always the case that you needed to provide stimulative - stimulating and engaging activities, the understanding of the really crucial importance of not just the years three to six but also the years nought to three for the cognitive development of children has involved - resulted in changes in that. In terms of providing the environments and experiences that support the children's physical development, that's become a much harder task as centres have had to cope with the, I suppose we call the insurance madness, where so many - there is so much concern for safety that it's sometimes difficult to give children sufficient physical development experiences. Understanding of the ways that cross-cultural - sorry, cross infection happens and an - there is constant research showing that changes have to keep being made to providing a safe and hygienic environment. Understanding of children's nutritional needs has changed, not just with the Food Handling Act but increased understanding of that. Again the social and cultural diverse and linguistically diverse backgrounds, our understanding of that has increased.

Mr Moloney: It is more the understanding rather than the actual issue?

Ms Forbes: No, I think in some instances it's some of the work they have to do has changed.

Mr Moloney: Well, some of these are very fundamental to the role of a child care worker and a children's services worker. For example providing environments and experiences that support the children's physical development; a safe and hygienic environment, some of those would be fundamental to the nature and work and the nature of the operation of a centre since their doors first opened surely?

Ms Forbes: Indeed and I think I have just explained how I also think that those change. That some of the needs of those changed. That for a whole range of reasons which I have just detailed.

Mr Moloney: You detail over the page at page 8 at paragraphs 31, 32 which you say are additional responsibilities meeting the quality and improvement of the accreditation system. The responsibilities there is it reasonable to say they are more about documentation. A lot more things are documented than what they used to be, but they still were done in the past as they are done now, now it's documented in the quality assurance process?

Ms Forbes: I've been in and out of child care centres for 25 years and in my observation the introduction of the National Quality Accreditation Improvement System has done just that. It has done - it has caused considerable improvements in the way things are done. It's true that some excellent centres did some of the things that they are required to do, by no means all. So there are many things that they are required to do and the very documentation of those requires very considerable skill, a lot of time and as anyone who is involved with child care centres would know, a lot of pressure and stress on staff."[159]

[213] Professor Fleer's evidence was to similar effect. In her statement she says that: *"Over the past 10 years there has been significant instability in the children's services sector."*[160]

[214] Under cross-examination Professor Fleer was asked to elaborate on what she meant by this part of her statement and she replied in the following terms:

"... it's in relation to the fact that the sector has changed significantly over a period of time and I mean, resourcing is part of that; availability of places is part of that; changes in qualifications is part of that. There is a whole range of the quality assurance processes as part of that, there has been a tremendous amount of change for people who work with young children to actually be involved in. They effect them on a day-to-day basis and particularly with funding being reduced in different sectors, at different times and redistributed in different ways. We've seen the outcomes of that which is, you know, parents become suddenly a bit frightened about the costs and then they have a lot more part-time places which puts additional work demands on the staff that work with those children because instead of seeing 40 children they might see 80 children who are part time. It's just a very different - and to plan for 80 different children, to observe 80 different children, to keep records on 80 different children is - so that is - I am referring to the sort of complexity, the way the area has evolved and changed over time and those sort of factors, along with international evidence that parents are demanding much higher levels of placement for their children and they are seeking centres that provide that for their children."[161]

[215] Not all of the evidence accepted that change had occurred. For example, it was Ms Mrocki's evidence that:

changes to Children's Services Regulations have not placed any extra requirements on staff;[162]
training of staff has always been a function of a Director;[163]
food handling guidelines have not placed additional responsibilities on staff whose primary responsibility is the care of children;[164]

[216] In relation to changes in the work of child care workers Ms Mrocki says, at paragraphs 27 to 29 of her statement:

"27. In the time that I have been involved in child care, there have been some significant changes in the way that child care centres operate as well as the way the work is performed. However, the fundamental aspects are still in place and whilst there may be a heightened feeling of responsibility on the part of all staff members, the fundamental nature of the duties have not changed significantly. As the industry has become more professional, so have the staff members and I believe that there have been some changes in the duties with an increased depth of theoretical knowledge that comes with more training. However, I do not believe that there has been a significant increase in the level of skill and responsibilities of the employees, particularly when considering aspects such as programming and observation requirements of the positions, changes in duties and required skill levels.

28. From my own experience in the Industry, I can categorically say that there has been no change to the demands of parent interaction by the staff, job requirements or responsibility. The only visible changes may be that today, unlike some years ago, we now document everything and have clear job descriptions for staff to acknowledge before entering employment. Observations and planning has never changed and these have never changed in the regulations.

29. I do not agree that there has been an increase in the skill levels required of the employees as the only extra that I believe has occurred has been the introduction or awareness of more in-service training and courses being offered by the commercial training providers which has come about with introduction of accreditation. We are constantly bombarded with different groups sending us their course outlines, some of which are useful and others are very costly and of no particular practical value."[165]

[217] In addition to evidence of a general character a number of specific changes were identified and we now turn to deal with those matters.

5.3.2 Specific changes

5.3.2(a) Shift in Utilisation Pattern

[218] The utilisation patterns of the users of long day care have changed over time.

Table 20

Utilisation Patterns LDC Victoria and the ACT[166]

Child Attendance Hours	Victoria				ACT			
hrs/week	Private LDC		Community LDC		Private LDC		Community LDC	
	1997 %	2002 %	1997 %	2002 %	1997 %	2002 %	1997 %	2002 %
<10 hrs	23	26	25	25	13	11	21	17
10-19	23	28	26	31	16	23	23	26
20-29	17	19	19	21	16	21	18	22
30-30	12	11	13	11	15	16	11	15
40-49	15	11	12	9	32	21	18	15
50+	10	5	4	4	9	8	8	5

[219] The table shows that the proportion of child attendance hours of less than 30 hours per week increased between 1997 and 2002. In Victoria in 1997 some 63 per cent of child attendance hours in private long day care centres were less than 30 hours per week. By 2002 this had increased to 73 per cent.

[220] Community based centres show a similar increase, from 70 to 77 per cent.

[221] In the ACT in 1997 some 45 per cent of child attendance hours in private long day care centres were less than 30 hours per week. By 2002 this had increased to 55 per cent. In Community based centres the proportion increased from 62 to 65 per cent over the same period.

[222] The tendency for parents to take up child care places on a part-time basis was reflected in the proceedings before us. For example, the Camberwell Junction Early Learning Centre is licensed for 60 places but there are about 120 children in care in any one week because many of the children are part-time. Similarly, the Spence Children's Cottage Association Long Day Care Centre is licensed for 25 children but there are 67 children who attend the centre in any one week. [167]

[223] This change in utilisation patterns has increased the workload and the value of the work undertaken by child care workers.[168] In her evidence Michelle Fernandez, the Director of the Spence Children's Cottage Centre said: *"Parents expect the same access to information through observation and planning for their child regardless of whether they attend ½ day or for the whole week."*[169]

[224] Similar observations were made by witnesses called by the Employers. Ms Colbran says:

". . .this has impacted on staff requiring to program for a larger number of children. In particular, there is a much higher trend towards part-time care now as opposed to full-week care, and accordingly, as we observe/plan for individual experiences then there has been a significant increase in the programming approaches undertaken by qualified staff."[170]

5.3.2(b) Supervision and training of workers

[225] Since the introduction of the AQF system children's services training packages have incorporated on-the-job training and assessment. This development has increased the work of team leaders and others who supervise employees undertaking further study. Ms Hobson deals with this issue at paragraphs 13 and 14 of her statement:

"13. Currently we have 2 trainees in the centre, and 2 workers studying their diploma. All team leaders and myself are required to supervise these trainees. This involves going through their assessment booklets and marking off that they have met assessment competencies, and ensuring that they are able to undertake the duties listed. There is no paid time off the floor for any of the staff to supervise, monitor, train or answer question for trainees. The team leaders and myself generally undertake this work during lunchtime and out of hours.

14. We explain assignments for the trainees even though they are meant to have an assessor, the criteria for the modules they are undertaking, and lending the resources they require to understand the training. I believe that my centre is active in training and encouraging the training of workers. We are required by the facilitator to provide written assessments of these trainees. We are also required to provide written assessments of students that are studying the Diploma or the Certificate III for CIT."[171]

[226] Ms Hobson was not cross examined in respect of this part of her evidence and we accept it.

5.3.2(c) Programming

[227] In her evidence Ms Crisp acknowledges that there have been changes in the child care industry during the past few years. Ms Crisp points out that a number of these changes *"have had a big impost on employers."*[172] When asked about the changes which have impacted on employees over the past few years, Ms Crisp replied:

"In regards to programming there's a lot more documents that need to be taken, a lot more information that needs to be given with observations, programming, evaluations, mainly for the purpose of accreditation though."[173]

[228] These comments are supported by Ms Stefek, who says:

"When I first started at the centre 13 years ago it was common practice for a program to be displayed that didn't actually relate to any observations or anything like that, it was based on children's interests. Now, we actually base it on written observations. Staff program for each child who attends more than two days a week at our centre and we do that by looking at their skills, their strengths/weaknesses, things like that, their interests and we, from that, gain information, program for that accordingly and children will have often four or five, sometimes more, depending on their needs, programmed activities. So there is a lot of work just based on the program."[174]

[229] In her evidence Ms Mrocki rejects the proposition that this aspect of the work of child care workers has changed to any significant extent at all.[175]

[230] We find that changes in programming and documentation requirements have increased the workload of child care workers and have, to a limited extent, increased their accountability and responsibility.

5.3.2(d) Children from non-English speaking backgrounds

[231] The 2002 Child Care Census shows that children identified as being from culturally diverse backgrounds comprised 13 per cent of users in long day care schemes at May 2002 (compared to 11 per cent in August 1997).

[232] Ms Lawson deals with this issue in her statement, in these terms:

"The most recent census indicated that 3.9 million residents had been born overseas in one of 200 countries, and spoke 111 languages apart from Australian Indigenous languages are currently spoken. The pressure to target and provide culturally appropriate children's services is clear."[176]

[233] We accept that dealing with children from differing cultural backgrounds creates particular challenges for child care workers. For example, Ms Elton referred to children exhibiting different feeding habits depending on their cultural background.[177] Ms Deacon works with children and families from fourteen different cultures, which requires her to have an understanding of wider cultural issues.[178]

[234] In her evidence Ms Walker deals with the changes which have taken place in respect of this issue:

"47. In my experience, centres in the past were not required to have specific programs and deeper understanding of a wide range of cultural issues to reflect the diverse range of cultural backgrounds of the children in the centre. In today's multicultural society, families, government and regulatory bodies require that childcare centre develop programs which involve cultural events i.e.: Christmas, Easter, Mothers Day, Fathers Day, Chinese New Year, Vietnamese New Year. This requires additional planning, resourcing and research by the qualified staff member, and a wider understanding by all employees.

48. In our centre, there are 15 other main languages that are spoken, and when we are planning for an event staff are expected to communicate with the families to inform them of what we are doing. Therefore workers must source the information they provide to be sent out in the languages."[179]

5.3.2(e) Children with special needs or `at risk' children

[235] The evidence suggests that there has been an increase in the number of children with special needs or `at risk' children in childcare centres, and that this has impacted on the work undertaken by childcare employees in all services.

[236] At paragraph 41 of her statement Ms Forbes says:

"Changes have occurred as a result of legislation, research and changing community approaches to child abuse and the reporting of suspected child abuse. Long day care is increasingly where many `at risk' and vulnerable children go (or are sent by social workers and the courts) when families need support and respite. Notifications of child abuse and neglect have increased from 31,707 in Victoria in 1996-1997 to 36,966 in 2000-2001. (An Integrated Strategy for child Protection and Placement Services, page 11, 2002). Many of these increased notifications result in families being referred to child care services as part of the strategy to put in place supports for the families concerned. The children and families often present with many difficulties and challenges."[180]

[237] Other witnesses referred to the additional stress and time taken to care for children with special needs.[181]

[238] However, Ms Howey's evidence was that:

special needs children require a higher standard of reporting but the requirements for such children vary enormously from centre to centre;
special needs children have always been a common feature in children's services and the only real change has been to the level of awareness staff have, rather than any change to skill or responsibility; and
there has never been sufficient funding for special needs children and centres may have to cope with existing resources.

5.4 From Child Minding to Child Development

[239] The evidence supports the proposition that the conceptualisation of children's services has changed over time from the notion of `child minding' or `child care' to one of `early child development, learning, care and education'. A number of broad developments have contributed to this conceptual shift, namely:

neuroscience research on the early years of children's development;
the link between the provision of early childhood programs and subsequent achievement; and
the cost effective nature of early investment in children.

[240] We deal with each of these before turning to the impact of the shift to early child development on the education and work of child care workers.

5.4.1 Neuroscience Research

[241] Recent neuroscience research into brain development provides a new framework for understanding the fundamental influence of the early years of children's development. In her evidence Professor Fleer states that: *"There is now overwhelming evidence of the importance of the first five years of a child's life."*[182] Professor Fleer was not cross examined in respect of this aspect of her evidence and we accept it.

[242] A September 2001 report to the Minister for Family and Community Services by the Commonwealth Child Care Advisory Council titled *`Child Care: Beyond 2001'* (the Beyond 2001 Report) also deals with this issue and notes that the understanding of the brain and children's early years has come a long way from the previous notion of very young children as a `blank slate'. The report states that the current research into the structure and operation of the brain demonstrates three key factors:

Children are born `wired to learn'.
The early `programming' that occurs from before birth has long term impacts.
While the body's central nervous system comes wired to operate in a certain way, an individual brain learns to function as a result of processes which occur over time and which involve the interaction between individual wiring and the environment in which the individual develops.[183]

[243] The Beyond 2001 Report summarises some of the changes in thinking about the brain in a table, which is set out below.

Table 19

Rethinking the brain[184]

Old thinking	**New thinking**
How a brain develops depends on the genes you are born with	How a brain develops hinges on a complex interplay between the genes you are born with and the experiences you have - `use it or lose it'
The experiences you have before age three have a limited impact on later development	Early experiences have a decisive impact on the architecture of the brain and on the nature of adult capacities
A secure relationship with a primary caregiver creates a favourable context for early development and learning	Early interactions don't just create a context: they directly affect the way the brain is `wired'
Brain development is linear: the brain's capacity to learn and change grows steadily from birth to adulthood	Brain development is non-linear: there are prime times for acquiring different kinds of knowledge and skills
A toddler's brain is much less active than the brain of a university student	By the time children reach age three, their brains are twice as active as those of adults. Activity levels drop during adolescence.

[244] The report goes on to observe that the implications of the research into brain development for child care, education and development are profound. In particular it is said that:

"The early brain research supplies a physiological basis for the long-held conviction that the role of carers and the care environment is very important to the growth and learning of children."[185]

5.4.2 Early childhood programs and subsequent achievement

[245] Over the past ten years, the outcomes of longitudinal childhood research in the United States, and more recently Canada, have shown clear links between the provision of early childhood programs and children's subsequent achievement. This proposition is taken further in the Beyond 2001 Report, which contends that the early environment impacts not just on individual opportunities but also has implications for broad social outcomes. It is said that there is a *"long shadow cast by poor attachment on mental health and crime."*[186]

[246] Attached to Professor Fleer's witness statement is a report by her, commissioned by the Department of Education, Training and Youth Affairs, titled: `An Early Childhood Research Agenda: Voices from the Field' (the Fleer Report).[187] In her report Professor Fleer deals with, among other things, the importance of early childhood education.

[247] The Fleer Report notes that the effects of early childhood education on children's subsequent achievement in later schooling and beyond have been well documented through many small-scale studies, large studies and reviews of studies generally - all suggesting that there are positive outcomes for children. For instance, in her literature review, Raban[188] found that early childhood education and care programs are cost-effective, reduce later school year repetitions, have reduced the resourcing needs for special education, have increased school completion rates and have diminished later delinquency[189].

[248] In particular, Raban noted strong evidence for a link between early childhood education and care programs and:

increased secondary school completion[190];
positive socialisation outcomes[191];
increased outcomes for girls[192];
a lack of year repetitions and reduced intervention[193];
more settled behaviours[194];
aspirations for education and employment, motivation and commitment to schooling[195];
the prevention of chronic delinquency[196] or crime/anti-social behaviour[197]; and
increased benefits with longer periods of time in early childhood programs.[198]

[249] The qualifications of staff have been strongly linked to outcomes for children in New Zealand[199] and the United States[200], demonstrating:

"The impact of early childhood training was strongest when there were more staff with three year training, and there were significant relationships between lower levels of training and quality. Centres with more staff with 3 year training had better planned resources and managed programs and children had more positive and responsive interactions[201]*. The general level of staff education also proved a strong predictor of quality (the second strongest predictor of quality on a stepwise regression analysis), so that centres with larger percentages of staff with no school leaving qualifications tended to be of lower quality (beta=-0.30, p=0.0001). Also the percentage of staff with 3 year training was the strongest negative predictor of children wandering and waiting (beta=-0.22, p=-0.006)*[202]*."*

[250] The contents and findings of the Fleer Report were not challenged by the respondents in cross examination. Further, during her oral evidence Professor Fleer elaborated on her research experience and said:

"...in examining the research evidence that exists in terms of the fact that we have young children attending settings such as child care centres and pre-schools where the evidence is mounting which indicates very clearly that children of that age that the outcomes for them later in life and also in their school years is very contingent on the fact that they have a quality early years experience."[203]

[251] Professor Fleer's evidence in this regard was broadly consistent with the evidence of Ms Dau, a witness called by the ACT Employers. Ms Dau referred to a report by Sylva et al titled: `The Effective Provision of Pre-School Education (EPPE) Project: Findings from the Pre-School Period'.[204] The EPPE Project is the first major European longitudinal study of a national sample of young children's development (intellectual and social/behavioural) between the ages of three and seven years. The features of the project's research design are dealt with in the Fleer report at pages 20 to 21. The key findings of the report in respect of the impact of attending a pre-school centre are as follows:

Pre-school experience, compared to none, enhances children's development.
The duration of attendance is important, with an earlier start being related to better intellectual development and improved independence, concentration and sociability.
Full time attendance led to no better gains for children than part time provision.
Disadvantaged children in particular can benefit significantly from good quality pre-school experiences, especially if they attend centres that cater for a mixture of children from different social backgrounds.

[252] The report also found that the quality of pre-school centres is directly related to better intellectual/cognitive and social/behavioural development in children. In that context the authors conclude that:

"The higher the qualification of staff, particularly the manager of the centre, the more progress children made. Having qualified trained teachers working with children in pre school settings (for a substantial proportion of time, and most importantly as the pedagogical leader) had the greatest impact on quality, and was linked specifically with better outcomes in pre reading and social development."[205]

5.4.3 Cost effectiveness

[253] The Fleer report also deals with the cost effectiveness of early childhood education and care. It is said that, in broad terms, money directed towards the birth-to-eight period has been shown to be a cost-effective method of supporting children and young people in achieving their potential. The research evidence supports the view that money directed to the early years will result in long-term outcomes in countries such as the UK, USA, NZ and Canada.[206]

[254] This proposition is supported by the extensive review of the relevant literature by Danziger and Waldfogel[207] who conclude that:

"A consensus has recently emerged, among economists, developmentalists, and others, that investments in early childhood are cost-effective. For example, a recent review found that a variety of early intervention programmes have been successful in improving cognitive development and other outcomes for children."[208]

[255] The research support for long-term social outcomes in the USA through the evaluations of the High/Scope Perry Pre-school program[209] demonstrated a cost-saving ratio of one to six that is an economic return of $6 for each dollar invested in the program. Such findings support the view that spending money on early childhood education is a better investment than paying for remediation later in life, such as treatment programs and support services, for problems that are rooted in poor early development.[210]

[256] The Beyond 2001 Report also dealt with this issue at page 2, in the following terms:

"_ A growing body of research demonstrates the importance of the early years of life to later well being, and the need to value children and childhood as both a family and community responsibility.

Australia cannot afford to ignore this evidence. Research in such diverse areas as neuroendocrinology, crime prevention, mental health and immunology overwhelmingly indicates that government investment in the early years is a cost-effective investment."

5.4.4 Impact on education and work of child care workers

[257] The shift in the conceptualisation of children's services towards early childhood development, learning, care and education has had an impact on the education and work requirements of child care workers.

[258] A number of witnesses with extensive experience as educators made reference to the increase in community expectations of child care workers as a result of an increased focus on early childhood education. Professor Fleer observed that:

"Over the past ten years there has been significant instability in the children's services sector. With changes to funding for childcare, the introduction of quality assurance systems and the increasing demand for childcare places, staff have been under enormous pressure. At the same time, the community has demanded more from staff in terms of providing a quality educational and not just care, environment for their children."[211]

[259] The neuroscience research on the early years of children's development has also led to changes in the training of child care workers. In her evidence Ms Forbes, an early childhood educator since 1975 said:

"An increase in recognition of the importance of the early years to future well being has permeated all aspects of courses. Additional training hours are being devoted to child development competencies, and to ways of fostering children's development of understanding and supporting their conceptual development through a wide range of experiences."[212]

[260] Similarly, in her evidence Professor Fleer said that all tertiary courses held in child care assume that the child care workers will provide an educational environment. According to Professor Fleer *"This has been a significant change to the training and requirement of workers in childcare over the last few years."*[213]

[261] The evidence of the child care educators was largely echoed by those practising in the sector.

[262] For example, in the course of her evidence Ms Henderson, the Assistant Director at the Acton Early Childhood Centre, said:

"With the children the environment's probably changed considerably. We seem to have gone from having just been very care based 10 years ago to running programs that encourage development in all areas for the children. It's also - we've had to increase our knowledge about health and hygiene for the children, safety practices, so all of the environment they're basically spending their days in has changed and become probably a much nicer place to be. And the staff have a better knowledge as well over the last 10 years I think. ... I think with accreditation staff have been required to look at different areas that not everybody in child care was necessarily educated about. ... I think it's more stressful than it used to be and it's a lot more professional than what it used to be."[214]

[263] Other witnesses gave evidence to similar effect.[215]

[264] On the basis of the foregoing we make the following findings:

1. The conceptualisation of children's services has changed over time from the notion of child minding or child care to one of early child development, learning, care and education.

2. Recent neuroscience research into brain development supports the fundamental influence of the early years of children's development.

3. The available research supports the proposition that there are clear links between the provision of early childhood programs and children's subsequent achievement. This has implications not just for individual opportunities but also for broad social outcomes such as mental health and crime.

4. The available research supports the proposition that the provision of quality child care is directly related to better intellectual/cognitive and social/behavioural outcomes in children. The quality of care, and hence outcomes for children, is positively related to the level of the qualifications of the staff working with children.

5. The available research suggests that money directed to the early years of children's development results in positive long term outcomes and is cost effective.

6. The shift in the conceptualisation of children's services towards early childhood development, learning, care and education has increased community expectations of child care workers and has led to changes in their training and development.

5.5 Accreditation

[265] The Federal Government has set up the National Childcare Accreditation Council to administer the quality assurance systems in the child care sector.[216] Quality assurance systems operate in each service type in the children's services sector.

[266] The Quality Improvement and Accreditation System (QIAS), for long day care services was developed in consultation with parents and the child care field and commenced on 1 January 1994. QIAS encourages continuous improvement. QIAS focuses on quality outcomes for children. It involves services undertaking a process of self-study and improvement against 35 principles of good quality care. These principles are incorporated into ten quality areas:

1. Relationships with children

2. Respect for children

3. Partnerships with families

4. Staff interactions

5. Planning and evaluation

6. Learning and development

7. Protective care

8. Health

9. Safety

10. Managing to support quality

[267] Family Day Care Quality Assurance (FDCQA) was developed in consultation with parents and child care professionals and commenced on 1 July 2001. FDCQA encourages continuous quality improvement and is designed to complement state and territory licensing regulations and local government guidelines, which generally provide a minimum standard of operation for family day care schemes.

[268] FDCQA focuses on quality outcomes for children. It involves schemes undertaking a process of self-study and improvement against 32 principles of good quality care. These principles are incorporated into six quality elements:

1. Interactions

2. Physical environment

3. Children's experiences, learning and development

4. Health, hygiene, nutrition, safety and well-being

5. Carers and coordination unit staff

6. Management and administration

[269] Outside School Hours Care Quality Assurance (OSHCQA) was developed in consultation with sector representatives and commenced on 1 July 2003. OSHCQA encourages continuous improvement in the quality of services provided.

[270] OSHCQA is designed to complement state and territory licensing regulations and local government guidelines, which generally provide a minimum standard of operation for outside school hours care schemes.

[271] OSHCQA focuses on quality outcomes for children. It involves schemes undertaking a process of self-study and improvement against 30 principles of good quality care. These principles are incorporated into eight quality areas:

1. Respect for children

2. Staff interactions and relationships with children

3. Partnerships with families and community links

4. Programming and evaluation

5. Play and development

6. Health, nutrition and well-being

7. Protective care and safety

8. Managing to support quality

[272] To be eligible for CCB approval, long day care, family day care and outside school hours care services must register with the National Childcare Accreditation Council (NCAC) and satisfactorily participate in the relevant quality assurance systems. CCB is a payment made to families to assist with the costs of child care. Families using child care provided by approved child care services or registered carers may receive CCB.

[273] There are five steps in QIAS, FDCQA and OSHCQA:

1. Registration

2. Self-study and continuous improvement

3. Validation

4. Moderation

5. Accreditation decision

[274] After the initial completion of the five steps, a service recommences the cycle of the step process for continuous improvement. There are processes for review of an accreditation decision, and for appeal against a decision to withdraw CCB approval.

[275] The stated aim of the quality assurance systems in child care is *"to ensure children in care have positive experiences that foster all aspects of their development."*[217]

[276] Whilst state and territory licensing and regulation procedures in Australia monitor such things as staff/child ratios, group size, staff training and physical space requirements, accreditation procedures examine quality in relation to *"interactions that occur between staff and children, the developmental appropriateness of the curriculum, and the implementation of appropriate health and safety procedures".*[218]

[277] In June 1995 the Federal Government commissioned an evaluation of QIAS which subsequently found: *"... that the system was having substantial perceived benefits for service quality, and that most of the study's participants had a positive attitude towards accreditation".*[219]

[278] Further, a different study surveyed staff in 50 long day care centres across all areas of the Sydney region and found that most:

"... agreed that accreditation ensures high quality care but they found the process difficult, mainly due to lack of time. Work conditions over all had not changed as almost half of the respondents do not have allocated time for written work..."[220]

[279] A number of witnesses who gave evidence about the impact of the introduction of the QIAS reported a significant increase in the paperwork required as a consequence of the introduction of accreditation. Ms Stefek said:

"When I first started at the centre 13 years ago it was common practice for a program to be displayed that didn't actually relate to any observations or anything like that, it was based on children's interests. Now, we actually base it on written observations. Staff program for each child who attends more than two days a week at our centre and we do that by looking at their skills, their strengths/weaknesses, things like that, their interests and we, from that, gain information, program for that accordingly and children will have often four or five, sometimes more, depending on their needs, programmed activities. So there is a lot of work just based on the program. Accreditation has brought a lot of extra work for the child care field. We're formalising things that we haven't needed to formalise before. We have to document it now with accreditation. Everything has to be sourced. So you have to go back. So it's not just how your centre does it, it actually has to be sourced on why you do things like that. So there is a lot more work involved."[221]

[280] While Ms Stefek acknowledged that child care workers were undertaking the same tasks before accreditation, she said that accreditation introduced the need to formalise what they are doing:

"Mr Maloney: There was never a demand for formalisation but you were doing those things before, weren't you?

Ms Stefek: Yes, but it takes so much time to formalise what you do because so much of what we do is innate and so to formalise that takes so much. We have to actually look at every step that we take so - - -

Mr Maloney: So, formalisation relates to, for example, medication, food handling, observations, reporting to parents, putting the program on the wall so that the parents can see it at the beginning and the end of the day etcetera. Those types of things?

Ms Stefek: Yes, at least, yes."[222]

[281] In her statement Ms Walker makes the following observations about the impact of accreditation:

"44. The National Childcare Accreditation Council has also made a number of changes which directly impacts on the daily working of the centre, my role within the centre, and the duties of each staff member. For example, it was previously the practice in our centre as well as all other childcare centres to record the toileting habits of all children. This was usually done by writing on a white board by

the child's name as to how many times they went to the toilet and what was the outcome or if it was an infant how many times the nappy had been changed and the outcome.

45. When the child was collected by the parent this was communicated verbally about the child. However, it is now required that all information be recorded about the child's day be recorded in the child's individual book, and then written on a separate piece of paper for the parents. This information also includes such things as sleeping times and eating habits of the child. This is then archived at the centre and the purpose of this is to prove to the department that we are doing what we say we are doing. This is also used for accreditation. This was not undertaken 10 years ago.

46. Staff are required to have checklists of when toys are cleaned for health and safety regulations, and prevention of cross infection. Once these tasks are completed they are also archived. If there is a suspected case of cross infection, we have to document this and put in place a plan which ensures that it does not repeat. This was not undertaken 10 years ago."[223]

[282] In her evidence Ms Sharrock[224] refers to staff having input into the policies and procedures at the centre at which she is employed as a full time child care worker level 2.

[283] A number of the witnesses called by the Employers tended to regard the introduction of accreditation as simply formalising and documenting tasks which had been done prior to accreditation, though it was acknowledged that accreditation had increased the administrative work required.

[284] In her statement Ms Colbran says:

". . . whilst this has been a change, I believe it has been more about formalising the quality of care provided by the service. It is true however that these changes have led to greater administration because of the extra documentation and evidence needed to validate the accreditation process."[225]

[285] Ms Crisp also deals with the impact of accreditation at paragraphs 5, 6 and 8 of her statement in the following terms:

"5. There have been changes in the child care industry during the past few years, but it is important to point out that these changes have had a big impost on employers. For example, there is now a requirement and expectation from parents, regulators and government to document everything and the time that this takes is increasing. For example in relation to accreditation since 1998 when a new accreditation scheme was introduced and operators were required to bring child care services up to 52 principles. Today, we are required to meet 32 principles which range from interactions with children and staff to other aspects of running a service.

6. It is important to educate and inform staff of any changes to the accreditation requirements. The process involves firstly performing a self assessment, then an assessor comes into the centre and spend two days to perform another assessment and then pending the outcome, accreditation is achieved. For a high quality rating, a review would then be conducted every two and a half years. ...

8. Accreditation means that employees perform more than just simple tasks or child minding, instead today they provide education and care for the physical, social and personal needs and development of children. There is now an expectation that child care employees will have a high level of cognitive and intellectual knowledge and skills. Child care employees must now know about human development, nutrition, occupational health and safety, legal responsibilities, management practices, and group dynamics. Furthermore, a baby sitter or child minder does not have a `duty of care' as a child care educator today does. Today child care employees are responsible for the whole development of children and so must not only be better educated and resourced, but also paid accordingly."[226]

[286] In relation to the impact of accreditation Ms Maiden says:

"Since 1990 accreditation has made an impact on procedural and time management issues. Even though quality assurance has been implemented and child care centres are required to meet a certain standard in line with the centres licencing requirements there has been no actual increase in workload for the staff working directly with the children. These are in fact standards that should be met with or without the accreditation process. Documentation of all evidence has been the major impact as work practice itself should not have had to change."[227]

[287] Ms Mrocki deals with this issue at paragraph 17 of her statement:

"(a) The introduction of Accreditation is linked to the entitlement of parents to Federal Child Care Benefits and has meant some limited changes for staff in the areas of keeping records on children, such as observation and developmental records to assist staff to program accordingly. It has been my experience that these functions and processes have always been performed by Child Care staff members to produce an appropriate developmental program for the children. This approach was a fundamental component of my Diploma studies to enable the students' competencies to be assessed.

(b) There is a significant level of activity required on the part of the Director/Owner for the completion of the self-study report which forms the basis for Accreditation approval. I do not expect my staff to undertake this work and it has not been my experience that staff perform this work in other centres I have been involved with, unless they are in a management position.

(c) It has been my experience that Accreditation approval is not a factor which influences the decision by parents to use my Centres for care of their child. I have never had a parent ask me if my Centres are accredited when they enquire to place their child in our care. I do not actively promote Accreditation approval when talking to new parents, although I will mention it if the occasion arises during a parent interview as the CCB is linked to accreditation.

(d) I have always made it a practice to hold regular staff meetings to discuss a whole range of operational issues including accreditation. The only real change I have observed is that the meetings are sometimes a bit longer when we discuss accreditation requirements. Meetings are generally held on week nights and staff are paid for the time plus I provide them with dinner.

(e) The only real change that I acknowledge is that there is more documentation associated with accreditation, albeit that the observations are still the same except that they are now documented in detail where as previously they were not as well documented."[228]

[288] In her oral evidence Ms Mrocki clarified her statement and said that all of her staff are involved in the QIAS process and in the development of centre policies[229].

[289] Mr Roncon dealt with the impact of accreditation at paragraphs 8 to 10 of his statement:

"8. The introduction of accreditation has led to a significant increase in record-keeping and paperwork. Approximately 80% of these tasks fall to the Directors or Owner/Operators and the remaining 20% is spread between the staff of the Centre.

9. The program planning is driven by the regulations and is designed to be appropriate to the ages and developmental needs of the children.

10. Accreditation has, in my experience, created a higher level of awareness in staff, in that they more thoroughly understand what they are doing and why they are doing it and has led to greater levels of documentation to ensure that there is an absolute transparent system in place for the accreditation checking and quality auditing functions."[230]

[290] Under cross examination Mr Roncon acknowledged that staff have input into QIAS, but said that a significant amount of the work is by management.[231]

[291] In her evidence Ms Peters says:

"The only change that I believe accreditation has brought about is records now are required to be kept for a number of years rather than discarded at the end of the week or month, etc. Archive files are in my experience made for these records for all staff to have easy access to them. Centres have always followed procedures but may not have had these in a written format. Staff just knew that that was how the centre operated. The Accreditation process has ensured that services do need to have all policies and procedures in a written format and that there is consistency in the services provided by centres."
[232]

[292] The evidence of a number of the witnesses called by the Employers was addressed in the evidence of Ms Bruinewoud.[233] In our view Ms Bruinewoud's evidence dealt comprehensively with these issues, in many instances by reference to QIAS documents. We accept Ms Bruinewoud's evidence and prefer it to the evidence of other witnesses.

[293] We also note that a number of the observations made by Ms Bruinewoud were supported by witnesses called by the Employers.

[294] Ms Crisp made a number of comments in her statement about accreditation. These are referred to earlier in this decision.

[295] During cross examination Ms Crisp expanded on the comments made in her statement:

"Ms Crisp: It hasn't really changed. I think accreditation puts a lot more pressure on people because they know that you're working up to ultimately the validator coming into the centre and spending however long in the centre looking at every little thing that you do so in that respect it puts a lot of pressure on what staff are doing. It's no different. They're still providing the care, the education that they've always done but with somebody watching every move you make it puts a lot of stress on to them. ... In regards to the accreditation principles it is stated that child care workers must have a knowledge of nutrition, all child development, occupational health and safety which has previously never been such a huge issue in the industry.

Ms Bellino: So, these are more recent changes?

Ms Crisp: Yes."[234]

[296] Ms Howey, another Employer witness, made the following comments about the impact of accreditation:

"7. The accreditation process has been in place for over 10 years and there are a number of requirements on the Director of the centre. From my own involvement, I am able to say that it has been my experience that staff are more aware of the need for observations and the level of detail that is now required. The observations are more clearly linked to the daily program plan as this is what the accreditation reviewers are looking for when they conduct their auditing process within the centres.

8. I believe that there is a somewhat higher level of awareness on the part of staff members which is reflected in their professional terms of knowledge. The key to these tasks and skills is to be able to write things down appropriately to enable proper observations and assessments to be made."

[297] In her evidence Ms Dau referred to the added responsibilities which have been imposed because of accreditation.[235]

[298] In our view the evidence supports a finding that accreditation has increased the workload of child care workers and has to a limited extent increased their accountability and responsibility for their work.

5.6 Qualifications and Training

5.6.1 General

[299] The proportion of long day care employees holding formal qualifications has increased over time. In the 1996 and 1997 Census about 50 per cent of all long day care employees had formal qualifications. By the 2002 Census this figure had increased to 55 per cent. Of the employees in long day care centres in 2002 who had formal qualifications, 77 per cent held a Child Care Certificate or Diploma/Bachelor of Child Care compared with 71 per cent in 1999. Eighteen per cent (compared to 22 per cent in 1999) held teaching qualifications, 5 per cent (compared to 8 per cent in 1999) held nursing qualifications and 10 per cent (compared to 12 per cent in 1999) had other relevant qualifications. Some staff held more than one qualification.

[300] The 2002 Census of Child Care Services also shows a high level of participation in in-service training. In-service training was undertaken by 70 per cent of all staff and 79 per cent of caregivers in child care related or financial management subjects during the previous twelve months.

[301] Of centre based staff who have undertaken in-service training, 20 per cent undertook training for additional needs children, while most staff (67 per cent) undertook other child care related training courses. Nine per cent undertook management/financial training and 60 per cent other relevant training (eg. First Aid Certificate).

[302] The experience of many of the witnesses in the proceedings attests to a strong commitment to continuing professional development. A number of the witnesses had attended a wide range of continuing education courses to assist them in performing their work.[236]

5.6.2 Course changes

[303] The preponderance of the evidence supports the LHMU's contention that there have been significant changes to the structure and content of child care training courses since 1990.

[304] A number of the LHMU's witnesses gave evidence about this issue.

[305] The evidence of Ms Ralph and Ms Forbes was that a significant number of changes have been made to the training regime of childcare workers, including the number of modules, content changes within the modules, and changes as a result of industry feedback, government policy or community and parental expectations.

[306] Ms Forbes also states, in paragraph 24 of her statement, that *"the responsibilities and expectations of the child care worker have increased quite markedly in the last 10-12 years and have occurred as a result of changes in government, community and parental expectations. Training has also changed in that time in order to meet the increased expectations and responsibilities."*[237]

[307] Further, at paragraphs 30 to 53 of her statement, Ms Forbes documents the specific changes to training, government legislation and community expectations for childcare workers, for example, changes following the introduction of QIAS (paragraphs 31, 32, 34, 35, and 36); Food Handling Legislation (paragraph 37); Health and Safety Requirements (paragraph 38); and Privacy Legislation (paragraph 40).

[308] Ms Forbes' evidence details the significant changes in the training of child care workers to meet the increased demands of the roles. At attachments 4a and 4b to her witness statement, Ms Forbes shows the specific changes, increased hours for theoretical development, the increased complexity of knowledge and skills for an AQF Certificate III in Children's Services, and AQF Certificate V Diploma in Children's Services and an AQF VI Advanced Diploma in Children's Services. This evidence was not contested.

[309] Ms Forbes's evidence included a number of tables setting out the changes in training and qualifications for both the AQF Level III (the Certificate III)[238] and the AQF Level V (the Diploma level)[239]. She noted that the number of on-the-job hours required for the Certificate III had greatly increased since 1995. Ms Forbes also indicated that the Level V qualification had only been in existence since 2000.

[310] Ms Ralph provided an overview of the changes to the courses offered by the Canberra Institute of Technology at the AQF Certificate III and Diploma level[240].

[311] In the course of her evidence Ms Ralph contrasted the old TAFE Child Care Practices Certificate with the courses currently being offered. The former TAFE certificate was a one year course of 15 hours per week in which students were only required to complete the following modules to achieve competency:

Development and Education 1
Applied Practice in Child Care A
Social Studies and Study Skills
First Aid for Community Services
Interpersonal Skills in Child Care
Practicum 1
Development and Education 2
Applied Practice in Child Care B
Health and Safety
Practicum 2

[312] The current Certificate III courses all require the completion of 17 common core modules as well as additional modules depending on the specialisation being undertaken. For example, for the Certificate III in Centre Based Care students are required to do an additional two core modules - "support babies needs" and "support the emotional well being of babies/infants", as well as two additional

elective modules. Students are also required to have a minimum of 100 hours of experience (paid or unpaid) working with young children. The number of contact hours and the length of the two courses is the same but the content delivered has changed over time.[241] The training delivered has evolved to meet the current requirements of working in child care.[242]

[313] Ms Lawson, CEO of Community Services and Health Training Australia Limited (CSHTA), (the national community services and health training body) provided a background document [243] and gave evidence about

her qualifications and experience and the role of CSHTA;
changes between the child care training package released in 1999 and the new qualification;
the Australian Quality Training Framework and the development of training packages;
the characteristics of competencies of the Certificate III in child care and the Diploma level; and
changes to the nature of the work in childcare and the pressures on delivery of the service.

[314] It was Ms Lawson's evidence that there is often confusion about *"parity between and across training packages"* and described the process of development of the package as follows:

"The way that we address that as developers of national competency standards is we use the Australian Qualifications Framework which is a descriptor of the work that is required or the types of accountabilities and responsibilities in job roles from level 1 to level 6 and the last two being 5 and 6 being diploma and advanced diploma. In my background paper I gave two examples because they're most pertinent to children's services although out-of-hours school care does have a certificate 4. Certificate 3, level work, is actually fairly prescribed and defined work but it comes with it a range of expectations around accountability and ability to manage a certain defined range of functions and understanding of complexity of the work and an ability to resolve a range of specific problems. I think it is important for the community services and health sector when we are interpreting those requirements that we also consider that working with human beings is a much more complex requirement on individuals than is actually working with particular pieces of equipment and machinery for example. So when we look at that AQF 3 descriptor for our industry we have to compare those requirements with what it means to actually manage work at that level within our industry, for example the certificate 3 level child care worker. Other industries, such as the metals, ITABs and other groups, will in fact looks at that and measure it in relation to the same sort of descriptors and what that looks like in terms of certificate 3 level work, for example for someone who provides maintenance work in perhaps the - one of the other packages, something like that, if that makes sense."[244]

[315] Ms Lawson also made the following statement about making comparisons between different qualifications:

"... there's two parts to vocational training: one is the part that we're concerned with and that is actually defining the competency standards or the work roles, job functions that people actually do on the job; the other part of the process is actually the training or the delivery, that is how you train someone should they have none of those skills or underpinning knowledge to get to that level of competence. The qualifications we develop or the training package assumes that people will be working at a particular level in a particular job role and we describe and define those competencies according to that job that people do, in this instance the example was cert 3 child care. When you are delivering training - and some people get confused by this - to deliver training you can chop up a competency into three or four learning modules in which you may well be delivering a two-year course and you've actually divided it up into 87 modules of learning but in fact the units of competence that have to be - are required at the end of the process are still the same units of competence. So some people when they're looking at making a comparison between certain qualifications in fact make the mistake of looking at courses and it is up to training providers to decide how they teach materials if they're offering a course."[245]

[316] Under cross examination Ms Lawson stated that twelve to eighteen months was the usual time taken to complete the Certificate III in Child Care although that could vary considerably. She also agreed that on-the-job experience and learning was essential in the child care industry and that the shortage of skilled child care workers could have been contributed to by the rapid growth in the number of centres.

[317] The evidence of Ms Lawson in relation to the new units in children's services training is consistent with Ms Forbes's evidence[246].

[318] Some of the evidence of the Employers' witnesses expressed contrary views to those set out above.

[319] Mrs Smith gave evidence[247] on behalf of the Victorian Private Childcare Association. Mrs Smith oversees the day-to-day management of five child care centres owned and operated by her family. According to her evidence a *"qualified"* childcare worker must hold at least a diploma. A certificate III worker is *"unqualified"* but trained. Certificate III workers may assist in the implementation of a program but it is the qualified worker who is responsible for the taking of observations and programming. It was Mrs Smith's evidence that the only changes to child care in Victoria have been in relation to licensing requirements and the number of qualified staff that must be employed.

[320] According to the evidence of Mrs Smith there is a *"huge discrepancy between the levels of training and skills required and acquired by childcare workers depending on the method of training accessed to achieve their qualification."*[248] Mrs Smith's view is that there has been no substantial change in the work of qualified child care workers since she received her qualification (in 1982). If the claim is granted Mrs Smith expected that employees would upgrade their qualifications or she would simply employ people with higher qualifications.

[321] When questioned about her views on the disparities between various types of training given that the AQF modules have a consistent training package, Mrs Smith agreed that training was becoming more consistent.

[322] Ms Peters, manager of both the One World for Children (OWC) Child Care Centre and the OWC Training Unit, gave evidence[249] of her qualifications and experience in child care and child care training. She noted that the OWC Training Unit provides training to 107 child care centres in Victoria, with about 400 students enrolled. Her evidence covered the course offered by the Unit, the training methods utilised and changes to training over the previous ten years. It was her view that while titles and codes have altered neither the substance of the competencies nor the nature of the training provided had changed. It was her evidence that child care workers have always performed programming, though it might be different in form and structure. The only change brought about by accreditation, according to the evidence of Ms Peters, is a requirement that records be retained for a longer period. Ms Peters also noted that while one employee with a first aid certificate must be rostered on at all times there is no requirement that all staff possess such a certificate.

[323] Under cross examination, Ms Peters reiterated that while competency titles and codes have altered the content had not. She also stated that some items that formed part of a competency may have become competencies in their own right, all the matters covered in training today had been covered at the time she was trained (1990). She did not agree that child development theories have changed over the past ten years but conceded that there may be some new theories.

[324] Ms Howey, a workplace trainer and assessor with a nationally registered training provider, gave evidence derived from her experience in training and assessing child care workers in Certificate III, Certificate IV and diploma level courses. All the training delivered by Ms Howey's organisation is delivered at the workplace with centre managers and qualified staff providing day-to-day supervision. Ms Howey is a former kindergarten teacher and Director/Teacher at a Pre-School.

[325] In summary Ms Howey's evidence, through her statement[250] and cross examination, was:

since accreditation and changes to the training modules workers have a greater awareness of the correct terminology when writing observations and a greater awareness of the need to link observations with programming;
although the prime responsibility for the assessment and documentation of accreditation lies with the centre director all staff are required to be involved in the self-study and to analyse the centre's activities, practices and policies;
although qualified staff are provided with time for planning there is no *mandatory* requirement for a high level of detail in the reports prepared;
trainees don't put additional responsibilities on qualified staff;
experience in the industry is vitally important and the combination of experience and training provides employees with the necessary skills and knowledge to undertake their duties;
there is an identifiable career path - from unqualified through Certificate III to Diploma and Advanced Diploma (although the latter is not a requirement) under the Children's Services Regulations;

there has been a material change in the net work value of employees in children's services in Victoria but this has not *"been so significant as to warrant a fundamental and wholesale review of the wage rates, particularly at Certificate III level"*[251].

[326] However, Ms Colbran who gave evidence for the ACT Employers supported much of the LHMU evidence in relation to changes to training. At paragraph 6 of her witness statement, she states:

"I believe the childcare industry has changed significantly since 1990. One change includes qualifications now available to child care professionals and how more accessible they are for staff who are working and have experience."[252]

[327] In cross examination, Ms Colbran was asked to elaborate on these changes and at PN1380 she states:

"Since that time there have been upgrades in the qualifications so there's been additional modules as each upgrade has occurred. Staff have been required to - well, students have been required to study additional modules."[253]

[328] Further, in her evidence Ms Dau supports much of the evidence of the witnesses called by the LHMU in relation to the changes to training and qualifications. Ms Dau says:

"that certainly there are more modules, more competencies, than there ever were modules, and there are some additional ones that were not part of training previously, and they include things like diversity in all its forms, it includes mandated notification ... But there are, I know, a number of additional subjects or competencies that we expect students to complete."[254]

[329] At paragraph 9 of her statement Ms Maiden states:

"I believe there has been a change in the emphasis placed on qualifications by employers in the industry. Over the years people have begun to understand the significance of childcare and this in turn has added value to childcare and to the belief that workers should be `qualified'."[255]

5.6.3 Costs of undertaking training

[330] Some of the witnesses called by the LHMU referred to the fact that at present there is insufficient financial incentive to undertake further study in child care.[0]

[331] The costs of undertaking further studies in child care are significant. Ms Bukvic estimated that she was paying $400-600 per semester in tuition fees to undertake the Diploma course.[1] Ms Hobson took three years studying at night to complete her Diploma, at a cost of $2,000.[2]

5.6.4 Link between training/qualifications and work value

[332] There is a general preference in the industry for employing qualified staff or staff undertaking further study[3] and the evidence supports a further finding that undertaking training in children's services has a positive impact on work value.

[333] The training undertaken in the Certificate III assists child care workers in the performance of their duties.[4] For example, Ms Johnston said her studies have assisted in a number of ways:

learning basic first aid has given her more confidence to deal with emergencies;[5] and
she would not be able to fill in the Daily Observation Log if she had not undertaken her studies.[6]

[334] Ms Davies has completed a Certificate III and is undertaking a Diploma of Children's Services (Centre Based Care) at the CIT. The studies have helped in the performance of her work:

"13. I believe that undertaking the Certificate III and now the Diploma, was and is, absolutely vital to fulfilling the duties of job that I have been doing. I have learnt a range of skills, and a deeper knowledge of children. If I had not learnt this I would not be able to work in the position that I do. . . .

15. My studies helped me to do this work. I needed to undertake all the training I have, to care and program for the children I see everyday. Without classes such as Understanding Guiding Children's Behaviour I would be lost when dealing with inappropriate behaviours of the children. By undertaking this class, I have learnt different methods to deal with many children, and I am able to implement the strategies straight away at work.

16. Another course I reflect back on every week when I program for my children is, Applied Child Development. This course taught me the developmental milestones children reach and at what ages. By understanding this I can see when the children in my care may not be up to par for their age and I can begin to implement new activities and strategies to help them develop this underdeveloped skill or ability.

17. By completing the Program Philosophy class as part of my Diploma, I am able to, as the room leader, develop my own program for the children in my care and also develop the room's philosophy. I feel that without this course I would not have had the knowledge or the confidence to do these things.

18. The Health & Safety Extension class had help me a lot this year because with the director of my service, I have developed new centre policies, as well as rewritten old and out of date policies.

19. One of the classes in the Diploma course is Children With Additional Needs. I currently have a child in my room that has Downs Syndrome and I am able to use theoretical studies to assist with this child's development. By knowing the characteristics of Downs and knowing where children with Downs are usually underdeveloped I am able to program specifically to meet this child's need. Also by doing this course I was able to know how and what to tell the children in the room about this specific child, I was able to answer their questions and help them to accept this child into their environment. At present the whole room is learning sign language so we are all able to communicate better with this child."[7]

[335] The training undertaken as part of the Diploma also assists workers in performing their functions. For example, Ms Stedford gave evidence that studying for the Diploma has meant that she is *"more able to communicate principles of development and discuss the child's development with parents more effectively and informatively than when I was a level two worker."*[8]

[336] Similarly, Ms Fernandez said:

"4. Studying for the Diploma allowed me to learn a more in-depth understanding of theories of programming. This enabled me to cope with working with a group, understanding the group as a whole and as individuals. I was able to understand the importance of recognising developmental differences and how to cater for them, understanding skill development to help my group work as a team members; and theory based learning and teaching styles. The course allowed me to understand more specialised areas, such as children with special needs, and how to program for them."[9]

[337] A number of centre directors and managers attested to the importance of training and the difference between qualified and unqualified staff. For example, Ms Rhodin, the Manager of the Greenway Early Childhood Centre, said:

"Without formal training it is difficult to do the job as well as a qualified worker. Childcare work requires perception and understanding of a child's development that is very rare in an unqualified worker. . . . The difference in the approach a qualified workers uses means that parents will usually only approach qualified workers to discuss their children's development."[10]

[338] Ms Rhodin specifically identified the following differences:

qualified level 2 workers will complete their daily observations of children in their care without assistance, but unqualified staff require supervision and assistance in order to make their observations more meaningful;
in the way they communicate with children;
qualified workers who have studied at least at Certificate III level require no training as compared to unqualified workers who need more guidance and explanation; and
workers undertaking further study have more enthusiasm to learn and are generally more confident than unqualified workers.

[339] Other witnesses, including those called by the Employers, gave evidence to similar effect.[11]

[340] On the basis of the evidence before us we make the following findings:

1. Child care workers have a strong commitment to continuing professional development.

2. There have been significant changes to the structure and content of the courses offered in children's services since 1990.

3. The current Certificate III in Child Care bears little relationship to the former TAFE Child Care Practices Certificate. A number of new modules have been developed in response to changes in community expectations and the regulatory environment.

4. The Diploma of Child Care replaced the Associate Diploma in 1997. It contains a number of new modules and is competency based.

5. There is a general preference in the industry for employing qualified staff or staff undertaking further study, and the evidence supports a finding that undertaking further training in children's services has a positive impact on work value.

5.7 Recruitment and Retention

[341] We note at the outset that issues of recruitment and retention are not relevant to the proper fixation of minimum rates and do not establish that there has been a significant net addition to the work value of the employees concerned. However, these issues were canvassed in the proceedings before us and have some bearing on the need to establish a proper career path for the children's services sector.

[342] The Beyond 2001 Report noted (at page 14) that child care services around Australia report high staff turnover, difficulty recruiting trained and qualified carers, and low morale. Part of the Australian Government's response to that report was to convene the Child Care Workforce Think Tank, held in Canberra on 8 to 9 April 2003. The Department of Family and Community Services subsequently produced a report on the April 2003 Think Tank.[12] That report concluded that almost all jurisdictions were experiencing shortages of qualified child care workers. Such shortages have the potential to jeopardise the future of quality child care in Australia:

"Several jurisdictions report increases in licensing exemptions to qualifications requirements as evidence of the shortages of qualified staff. This is of concern as it demonstrates that a considerable number of services are not operating in compliance with legislative requirements, that the provision of service quality may not be in accordance with the minimum standard required by legislation, and that the problem of shortages is generally increasing."[13]

[343] The Beyond 2001 Report also noted that in some figures reported to the Commonwealth Child Care Advisory Council, 50 per cent of students graduating from child care studies do not pursue work in this field. The Think Tank Report also dealt with this issue:

"Limited career paths, poor remuneration and conditions that require improvements are anecdotally reported as prominent factors in the decision of students not to pursue a career in early childhood, and act as deterrents for existing staff to make the commitment required to undertake study or upgrade qualifications. Further data on the factors influencing the decision to undertake ongoing training is required to determine relevant action required."[14]

[344] In her evidence in the proceedings before us Ms Ralph, the Head of the Department of Child Studies at Canberra Institute of Technology, made similar observations:

"28. We find many of [our] students are becoming disillusioned with the Child Care profession. These students have demonstrated a strong commitment to children, their development and wellbeing. We are finding the students are investigating other areas/professions that support their interested in children.

29. We are also finding that many of the students are choosing further study rather than working in childcare. Students are enrolling in Early Childhood degree courses. This qualification enables them to work in as government preschool where the conditions and wages are more attractive."[15]

[345] In 2002 the Office of Child Care within the ACT Department of Education, Youth and Family Services commissioned a project to investigate, among other things, the extent to which the supply of qualified staff meets the requirements for children's services in the ACT. A copy of the Childcare Workforce Planning Project Report (the ACT Workforce Planning Report) is attached to Ms Stubbs's statement.[16]

[346] The ACT Workforce Planning Report was undertaken between July and October 2002, with the majority of the data being provided in August, and is based on quantitative and qualitative data, analysed by sector, in consultation with a Steering Group and the ACT Office of Childcare.

[347] A director's questionnaire was sent to every children's service across the sector, that is 227 services. Responses were received as follows:

60 from centre-based children's services (more than 63% of the total number of centre-based children's services);
23 from school aged care (23.5%);
6 from playschools (30%);
5 from independent pre-schools (71.5%); and
5 from family day care (83.3%).

[348] The ACT Workforce Planning Report's findings in respect of recruitment and retention issues in centre based children's services are as follows:

Turnover is high in the sector, particularly for unqualified positions.
Significant numbers of people move around within the sector at qualified level.
Recruiting diploma trained staff from an ever diminishing pool will only get harder if nothing is done to qualify the existing untrained workforce. Equally the exit from the sector of diploma graduates moving on to degrees that lead them to government schools is devastating to the child care sector.
Pre-school room leaders are harder to recruit, due to the high number of part time children attending on a weekly basis.
The lack of a career structure provides little incentive for staff to invest commitment and time to the sector.
The status of child care is extremely poor with low self-esteem amongst child care staff themselves, the community and often the parents they serve.
Poor conditions of employment, low status and the lack of a career structure are resulting in all staff, including degree trained staff, moving away from early years work to the schools sector.
The Department of Education does not appear to give equal value to the early education that takes place in a centre based service compared to that in a pre-school or kindergarten.
Staff believe more training would help them stay in their job, directors did not select this option as a retention tool.
More flexibility in shift patterns may attract more maternity leavers.

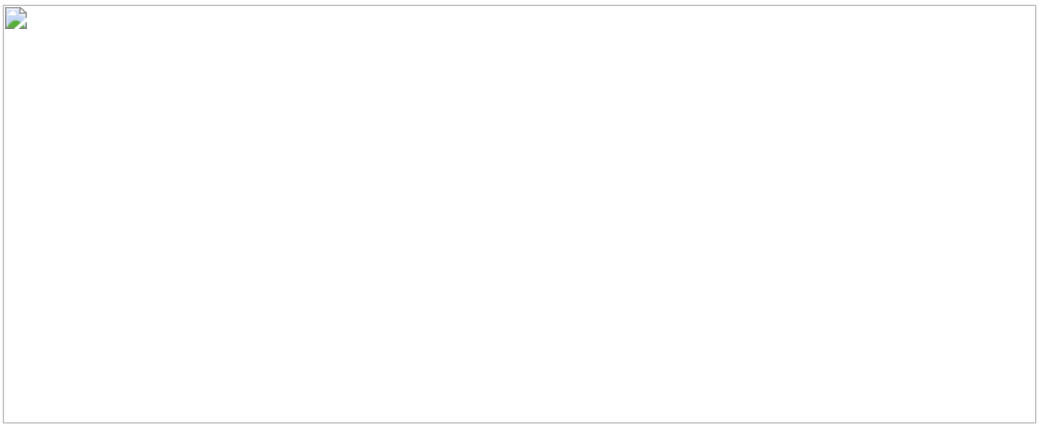
[349] The turnover rate across the centre based workforce was 27.5 per cent. Turnover of qualified staff at child care worker levels 4 and 5 was nearly 30 per cent. In respect of turnover rates within the survey group, the ACT Workforce Planning Report found that turnover was highest among the lower paid positions up to level 3, being more than 40 per cent. In this context the report notes, at page 32:

"The fact, that Certificate III childcare workers are not considered qualified, might affect both the recruitment process, and the enrolment of future students in children's services in the long term. A more progressive career structure might alleviate this problem".

[350] The ACT Workforce Planning Report went on to recommend the development of a recognised career structure to attract a range of potential candidates into the field.[17] The suggested career structure for centre based child care is set out at Appendix 7 to the ACT Workforce Planning Report and is reproduced below.

"There needs to be a recognized career structure in the industry. Recognition for those workers who have been in the field some time should be given once they have completed appropriately recognized `advanced' diploma courses such as the Advanced Diploma in Behaviour Management.

The [chart below] is not suggesting that every room leader has a specialism, or every Diploma graduate chooses a specialism, more that there might be more than one Level 5 and that a Level 5 might not only be in management. Equally there might be two Level 4s but with different gradings to recognise specialisms or responsibility. Workers would have the opportunity to remain working directly with children but be recognised for their specialism. Within this structure there is also room for one of the senior staff to become a mentor for trainees, as recommended in the Childcare Workforce Planning Project."



[351] The evidence in the proceedings before us supports a finding that the child care sector is facing a critical shortage of qualified staff, giving rise to recruitment and retention problems.[18] For example in her evidence Ms Fernandez said:

"We have a difficulty attracting qualified workers to this centre. When I have advertised for qualified positions in the past, I have had no response from qualified workers. We have found that we need to use unqualified workers, as there are very few available who have completed their training. Those staff in the qualified roles not only have to complete their own work, but assist the untrained worker."[19]

[352] Similarly, Ms Hobson said:

"34. We are currently unable to attract the number of qualified workers required under licensing, and as such, we apply to the Department of Children's Services for licensing exemptions. Retention is a major problem because workers do not feel they get enough money for the work they are required to do, and the training they often do and pay for themselves.

35. In the last six months, out of a total of 15 staff at the centre, we have had the following staff turnover:

Pre-School teacher - in December 2002 to pursue another career.
Pre-School teacher - employed a level 4 because we could not attract a teacher, left in May (after only 4 months), position advertised.
Pre-School assistant - left to pursue another career, now replaced.
Pre School Assistant - left to work in after school care, replaced with part time worker.
Toddler leader - left to pursue other work, replaced with contract employee.
Nursery leader - maternity leave - replaced.
Bookkeeper - left for another career.
Director - maternity leave - only one applicant for the position who was unqualified so the centre is now seeking an exemption for this applicant.
36. If this application were successful, I believe that outcome would be a higher retention of staff in the industry. I view childcare as a very important profession and I believe higher wages and better conditions would assist those who want to stay, but cannot afford to on the current wages."[20]

[353] The witnesses called by the Employers also made reference to the problem of recruiting and retaining qualified staff. In her evidence Ms Dau referred to *"the extreme shortage of qualified staff across Australia ... . The shortage is demonstrated in the number of exceptions being given so that services can maintain their licence."*[21] When Ms Dau was asked, during cross examination, to elaborate on this she said:

"There is a huge shortage and there is a great deal of pressure on many staff to become qualified in the quickest possible way in order to meet licensing standards. There's often pressure I think from directors who can't meet those standards to apply for exemptions, and so there are people who are working in those positions a long time before - much earlier than they would have otherwise and before they've internalised a lot of the training. I think there's a great deal of stress in the industry because of that."[22]

[354] Ms Dau was then asked to express a view on why there was such a shortage in qualified staff and replied in the following terms:

"Ms Dau: I can't go past the salary and - the wages and conditions. I can't go past that. And the pressure under which staff work. It is a very stressful job working with young children. It's a very - a critically important job. And I think people - I can use anecdotal evidence, I was talking to some people in a child care centre just recently and one of the staff was leaving and the director was very distressed because this staff member had been very good, and I said to her, `Why are you leaving?', and she said, `I've been offered a senior position, which means I'm not 16 at McDonald's, and I'm going to be earning a lot more money'. And I said, `But you love it here'. She said, `Well, I love the children. I have a passion for children. But I can't afford to. And when they're paying more for me in that sort of situation, then I'm going to go'.

Ms Bellino: So do you think that an increase in the wages would go some way to resolving this issue?

Ms Dau: I think if we don't increase the wages, we're going to be in big trouble."[23]

[355] A number of witnesses expressed the view that low rates of pay and the lack of a career path had contributed to the recruitment and retention problems in the industry. For example:

Ms Hobsen (Exhibit UACT 9 at paragraph 34).
Ms Henderson (Exhibit UACT 10 at paragraph 18).
Ms Stefek (Exhibit UACT 11 at paragraphs 16 to 19).
Professor Fleer (Exhibit UVIC 2 at paragraph 18; transcript at PNs 2299-2310).
Ms Forbes (Exhibit UVIC 6 at paragraph 20).
Ms Walker (Exhibit UVIC 7 at paragraph 34; transcript at PNs 2688 and 2754 to 2757).
Ms Hilsen (Exhibit UVIC 12 at paragraphs 4, 16 and 17; transcript at PNs 3693 to 3704 and 3710).

[356] Ms Hilsen is the spokesperson for the Victorian Children's Services Association (Community Owned Sector), an organisation which facilitates opportunities for coordinators working in community owned children's services to improve their skills and knowledge of best practice and for their professional development. In that capacity Ms Hilsen said:

"...I can confirm that over the last 3 years it has been very difficult to attract qualified staff and it is costing services a lot of money to pay for relief staff. We would be better off paying staff a decent wage and therefore being able to attract staff much faster, than paying money to the agencies to find us relief staff. More must be done by childcare services centres to ensure that the wages are liveable for workers."[24]

[357] Ms Hilsen also said that *"quite a few"* centres on the Children's Services Coordinators' Association were offering a variety of over award wages and conditions - ranging from five to seventeen per cent above the minimum award rates.[25]

[358] It was also the evidence of Ms Hilsen that it was the experience of her Coordinators' Association that it was difficult to attract qualified staff due to the low salaries, and that staff were leaving the industry to work in other areas. Centres paying over award rates seemed to have less difficulty in attracting qualified staff.

[359] Ms Mrocki has not experienced any shortage of child care staff, particularly unqualified staff, and staff turnover has not been due to dissatisfaction with wages or conditions. She acknowledged shortages of staff in particular geographic areas generally due to the rapid expansion of the industry.

[360] In his evidence Mr Roncon says that he had not experienced *"any real problems with recruiting staff"* in the two centres in regional Victoria in which he was, until recently, an owner operator.[26] Further, Mr Roncon said that:

"13. It has not been my experience that staff are leaving the industry or our employ because of dissatisfaction with wages and conditions. At our Centre in Bendigo, we have some 50 staff employed and on average there may be about seven who would move each year. Staff leave for a variety of reasons including lifestyle, marriage, geographical relocation, family reasons, etc. We have in fact had 3 staff who have moved back into our area, having looked for a career change and come back to our employ.

14. We have staff at Bendigo who have been with us since we opened the Centre 6 years ago."[27]

[361] It is clear from a review of Mr Roncon's evidence as a whole that the above remarks relate to his experience as an owner operator of two centres in Regional Victoria. He is not purporting to express a general view on behalf of the members of the CCAV, of which he is President.

[362] Under cross examination Ms Mrocki made it clear that she was only commenting on her own experience, not in relation to child care centres generally.[28]

[363] On the basis of the foregoing we make the following findings:

1. The child care sector is facing a critical shortage of qualified staff and this impacts on the ability of child care services to meet minimum legislative and quality standards.

2. The shortage of qualified staff has the potential to jeopardise the future of quality child care in Australia.

3. Limited career path options and low pay have contributed to the current recruitment and retention problems.

6. Summary of findings

[364] For convenience we have decided to set out the findings made in the previous sections of our decision before setting out our conclusions.

6.1 The proper fixation of rates of pay

1. The rate at the AQF Diploma level in the *ACT* and *Victorian Awards* should be linked to the C5 level in the *Metal Industry Award*.

2. There should be a nexus between the CCW level 3 on commencement classification in the *ACT Award* (and the Certificate level III in the *Victorian Award*) and the C10 level in the *Metal Industry Award*.

6.2 Children's services sector

1. There has been significant growth in the children's services sector since 1999.

2. Between 1999 and 2002 the average number of children per service has increased markedly in all service types. The capacity utilisation of child care services has also increased, and utilisation patterns of the users of long day care have changed over time. For example, in 1997 in Victoria some 63 per cent of child care attendance hours in private long day care centres were less than 30 hours per week. By 2002 this had increased to 73 per cent.

3. The growth in the private long day care component of the children's services sector has been particularly significant in recent years and it is the dominant means of providing long day care in Victoria.

4. In recent years publicly listed corporate chains have become a significant presence in the long day care component of the sector.

6.3 Work value considerations

6.3.1 General

1. The nature of the work of child care workers and the conditions under which that work is performed has changed over time.

6.3.2 Shift in utilisation patterns

1. The utilisation patterns of the users of long day care have changed over time.

2. This change in utilisation patterns has increased the workload of child care workers.

6.3.3 Supervision and training of workers

1. Since the introduction of the AQF system children's services training packages have incorporated on-the-job training and assessment.

2. This development has increased the work of team leaders and others who supervise employees undertaking further study.

6.3.4 Programming

1. Changes in programming and documentation requirements have increased the workload of child care workers and have, to a limited extent, increased their accountability and responsibility.

6.3.5 Children from non-English speaking backgrounds

1. Children from culturally diverse backgrounds comprised 13 per cent of users in long day care schemes as at May 2002 (compared to 11 per cent in August 1997).

2. Dealing with children from differing cultural backgrounds creates particular challenges for child care workers.

6.3.6 Children with special needs or "at risk" children

1. The evidence suggests that there has been an increase in the number of children with special needs or `at risk' children in childcare centres, and that this has impacted on the work undertaken by childcare employees in all services.

6.4 From child minding to child development

1. The conceptualisation of children's services has changed over time from the notion of child minding or child care to one of early child development, learning, care and education.

2. Recent neuroscience research into brain development supports the fundamental influence of the early years of children's development.

3. The available research supports the proposition that there are clear links between the provision of early childhood programs and children's subsequent achievement. This has implications not just for individual opportunities but also for broad social outcomes such as mental health and crime.

4. The available research supports the proposition that the provision of quality child care is directly related to better intellectual/cognitive and social/behavioural outcomes in children. The quality of care, and hence outcomes for children, is positively related to the level of the qualifications of the staff working with children.

5. The available research suggests that money directed to the early years of children's development results in positive long term outcomes and is cost effective.

6. The shift in the conceptualisation of children's services towards early childhood development, learning, care and education has increased community expectations of child care workers and has led to changes in their training and development.

6.5 Accreditation

1. Accreditation has increased the workload of child care workers and has, to a limited extent, increased their accountability and responsibility for their work.

6.6 Qualifications and training

1. Child care workers have a strong commitment to continuing professional development.

2. There have been significant changes to the structure and content of the courses offered in children's services since 1990.

3. The current Certificate III in Child Care bears little relationship to the former TAFE Child Care Practices Certificate. A number of new modules have been developed in response to changes in community expectations and the regulatory environment.

4. The Diploma of Child Care replaced the Associate Diploma in 1997. It contains a number of new modules and is competency based.

5. There is a general preference in the industry for employing qualified staff or staff undertaking further study, and the evidence supports a finding that undertaking further training in children's services has a positive impact on work value.

6.7 Recruitment and retention

1. The child care sector is facing a critical shortage of qualified staff and this impacts on the ability of child care services to meet minimum legislative and quality standards.

2. The shortage of qualified staff has the potential to jeopardise the future of quality child care in Australia.

3. Limited career path options and low pay have contributed to the current recruitment and retention problems.

7. Conclusion

[365] We have reached two broad conclusions in respect of the claims before us. The first relates to work value change. In this regard the time from which work value changes should be measured is the date of operation of the 1990 Full Bench decision. This decision directly effected the classification structure in the *ACT Award* and was clearly instrumental in the determination of the classification structure in the *Victorian Award*.

[366] We are satisfied that the changes in the nature of the work which are detailed in section 5 of this decision constitute a significant net addition to work requirements within the meaning of the work value principle.

[367] The second broad conclusion concerns the proper fixation of rates for the key classification levels in the child care awards. In our view the rate at the AQF Diploma level should be linked to the C5 level in the *Metal Industry Award*. Further, it is appropriate that there be a nexus between the CCW level 3 on commencement classification in the *ACT Award* (and the certificate III level in the *Victorian Award*), and the C10 level in the *Metal Industry Award*.

[368] We accept that aligning these key classifications in the manner proposed will, of itself, result in significant wage increases. This is evident from the analysis at Table 14 on page 45 of our decision. The employers' contend that increases of this magnitude will result in increases in child care fees. In this context it is suggested that such fee increases will put Commonwealth funded child care out of the reach of many families leading to an increase in backyard operators. Such a development is said to be a consideration which weighs against granting the union's claim. Implicit in this proposition is the notion that the provision of appropriately accredited child care is in the public interest. We accept the premise upon which this argument is put. The review of the evidence in section 5 of our decision makes a number of findings relating to the link between quality child care and subsequent development. In particular we have concluded that the available research supports the proposition that the provision of quality child care is directly related to better intellectual/cognitive and social/behavioural outcomes in children. The quality of care, and hence outcomes for children, is positively related to the level of the qualifications of the staff working with children. The available research also suggests that money directed to the early years of children's development results in positive long term outcomes and is cost effective.

[369] But in our view the fact that wage increases will lead to fee increases and hence there will be less access to accredited child care is only one consideration. And, of course the question of where the public interest lies in a particular matter will often depend on balancing interests, including competing interests. The whole of the circumstances in a particular matter must be weighed in order to determine where the public interest lies.[29] Two other general considerations are also relevant.

[370] The first relates to the Commission's statutory obligation to establish and maintain *"fair minimum wages"*[30]. In setting such wage rates the *WR Act* and general principle requires the Commission to have regard to the skill responsibility and the conditions under which the work is performed[31]. The Commission's approach to the proper fixation of minimum rates is dealt with at section 4 of our decision.

[371] A consequence of the employer's contentions is that the minimum award rates applicable to child care workers would be set at a level which is below that applicable to comparable classification levels (in terms of AQF qualification levels) in other awards. Such an outcome is neither fair nor equitable.

[372] Prima facie, employees classified at the same AQF levels should receive the same minimum award rate of pay unless the conditions under which the work is performed warrant a different outcome. Contrary to the employer's submissions the conditions under which the work of child care workers is performed do not warrant a lower rate of pay than that received by employees at the same AQF level in other awards. Indeed if anything the opposite is the case. Child care work is demanding, stressful and intrinsically important to the public interest.

[373] The second general consideration concerns the consequences of not properly fixing the rates of pay for the employees affected by these applications. We have already made findings about the critical shortage of qualified employees in the child care sector and that this impacts on the ability of child care services to meet minimum legislative and quality standards. The shortage of qualified staff has the potential to jeopardise the future of quality child care in Australia. Further, we have found that limited career path options and low pay have contributed to the current recruitment and retention problems.

[374] Failing to properly fix the minimum rates of pay for child care workers will only exacerbate these problems. In this context we note the following observations from the Think Tank Report:

"It is an irony that at the time when we understand more about the early years of a child's development, and the contribution that high quality care can make, we also have a lack of qualified workers to support the provision of care."[32]

[375] The Associations contend that if the Commission were to make findings with respect to the appropriate benchmark rates for the key classification levels then the parties should be directed to participate in a conciliation process with a view to arriving at a final position acceptable to all parties. We think there is merit in this proposal.

[376] The main reason for adopting the course suggested relates to the manifest deficiencies in the case presented by the LHMU. In this regard we note the following:

There has been no attempt by the union to consider, much less apply, the cases and principles which deal with the process of properly determining minimum rates (see section 4 of our decision).
There are unexplained differences between the proposed Victorian and ACT classification structures. As we have noted earlier in our decision the differences in these structures proposed for centre directors are significant. The differences in the classification descriptor for a level 4 director in Victoria and a level 1 director managing a 60 plus place centre in the ACT are insignificant. Yet on the LHMU's proposal the ACT director would receive $72.84 *less* per week. There was no explanation for this wage differential. It was not suggested that there was any difference in work value such as to warrant this difference in wage rates.
Some of the descriptors proposed are confusing as is the basis for progression through the proposed structure. There remains some uncertainty as to whether an employee may advance through the proposed structure as a consequence of merely enrolling in a particular course of study.[33]
There is some substance in the employer's observation that the classification structures proposed simply align classification levels with levels in the *Metal Industry Award* classification structure without adequate explanation.
No attempt was made to address issues concerning transition from the current award to the new classification structure.

[377] However, we do not propose to simply set the key classification points and leave the parties to reach an agreement as to all of the other matters before us. We propose to make a number of other observations to guide the parties' consideration of these matters. In particular:

1. The final classification structures in each of the child care awards should be consistent. At present our preliminary view is that there is no reason why the classification structure in each award should not be identical. Any variation between the two awards must be soundly based by reference to, for example, the regulatory environment or conditions under which the work is performed.

2. We accept the proposal to change the title of the *ACT Award*. The title proposed is appropriate in contemporary circumstances. It is a convenient means of describing the range of employees and facilities covered by the award and is consistent with the descriptors used in training courses and the AQF National Competency Standards.

3. We have not been persuaded that the three stream structure proposed in respect of the *ACT Award* is either necessary or desirable. It seems unnecessarily complex. While it is appropriate that the award covers the various services in the children's services sector we do not think it is necessary to provide three distinct classification streams. There should be a single unified structure

4. The extent of work value change evidenced in these proceedings may warrant increases to the `after 1 year' and `after 2 years' increment points at the CCW level 3 (i.e. the base trade comparator) beyond that which would flow from the application of internal relativities once the key classification levels have been properly set. For instance the `after 1 year' rate could be set at 105 per cent of the base trade rate and the `after 2 years' increment at 110 per cent.

5. To advance up the new structure, more will be required than simply enrolling in a course leading to the attainment of a relevant qualification. However there is merit in providing some incremental progression based on the attainment of a certain number of competencies towards the attainment of a relevant qualification. A reclassification to a higher level may be warranted on partial completion of a course or attaining a certain number of competencies towards an AQF qualification.

6. The new classification structure should provide an appropriate career path for child care workers. In particular there should be classification levels reflecting the additional responsibilities exercised by room or team leaders. In this regard the structure set out at Appendix 7 to the ACT Workforce Planning Report is worthy of some consideration, though it may require more development (see paragraph 350 of our decision).

[378] We have also given consideration to the contrary proposals advanced by various employer associations. It appears that these proposals are based on the restoration of relativities established as a result of the 1990 Full Bench determination. These relativities have been compressed as a consequence of flat dollar safety net adjustments since 1993.

[379] In our view changes in relativities brought about by safety net adjustments do not provide a proper basis for granting wage increases. As the Commission observed in the *May 2002 Safety Net Review - Wages decision*:

"We wish to make it clear that, as the Commission has pointed out on a number of occasions, changes in relativities brought about by safety net adjustments do not provide a basis for increases or changes in relativities in future safety net reviews. We also endorse the following passage from the Third Safety Net Adjustment and Section 150A Review Decision October 1995 [(1995) 61 IR 236]:

"We reiterate what we said in the September 1994 Review decision; namely, that the Commission will not grant applications to restore pre-existing relativities on the basis that such relativities have been compressed by the granting of flat dollar arbitrated safety net adjustments [Print L5300, p.34].""[34]

[380] We also note the Associations proposal for the insertion of a 130 per cent exemption rate for employees classified as Director under the *Victorian Award*. This proposal was not the subject of much debate and a draft award variation was not provided. We think it would be better to finalise the details of the new classification structure first before turning to consider the question of exemption rates. In the event that the Associations wish to press their claim they should advise the Commission and the parties in writing.

7.1 Future Proceedings

[381] We direct the parties to confer in respect of an appropriate classification structure to be inserted into the awards before us, having regard to our findings and conclusions. To facilitate these discussions we make the following additional directions:

1. The applications are referred to Commissioner Simmonds for further conciliation.

2. The Commissioner has advised that the first conference in respect of these matters will be held on Tuesday, 25 January 2005 at 10.15 am in Melbourne (a separate listing notice will be sent out).

3. The Commissioner is requested to prepare a report setting out:

3.1 the extent of any agreement between the parties;

3.2 the areas of disagreement; and

3.3 a comparison of any proposed classification structures.

4. The Commissioner's report will be provided to the Full Bench and the parties by 12 noon on Thursday, 17 March 2005.

5. The parties are to file in the Commission, and serve on the other parties, written submissions setting out the arguments they advance in respect of their preferred classification structure by no later than 2.00 pm on Thursday, 24 March 2005.

6. The Full Bench will sit in Melbourne at 10.00 am on Thursday, 31 March 2005 to hear short oral arguments in support of the written submissions filed.

BY THE COMMISSION:

VICE PRESIDENT

INDEX OF ANNEXURES

1. Current classification structure and associated descriptors in the *ACT Award* (see paragraphs 2 and 125 of this decision).

2. Descriptors for each level in the LHMU's proposed structure for the *ACT Award* (see paragraph 7 of this decision).

3. Comparison of the relativities and classification structure contained in the *Metal Industry Award* with the classification structure proposed by the LHMU for the *ACT Award* (see paragraph 9 of this decision).

4. ACT Employers' proposed structure for the *ACT Award* (see paragraph 40 of this decision).

5. Descriptors associated with each classification level in the *Victorian Award* (see paragraph 55 of this decision).

6. Comparison of the relativities and classification structure contained in the *Metal Industry Award* with the classification structure proposed by the LHMU for the *Victorian Award* (see paragraph 66 of this decision).

7. Comparative table setting out the wage rates in the *Victorian Award* (as at June 2003), the LHMU claim for Victoria and the ACT and the proposal of the Australian Childcare Centres Association and the Child Care Centres Association of Victoria (see paragraphs 80 and 89 of this decision).

ANNEXURE 1

SCHEDULE A - WAGE RATES

[Sched A varied by V001; substituted by V002 V006; PR904636 ppc 22May01]

(a) Adult employees

[Sched A(a) substituted by PR918082 PR932040; PR946752 ppc 23May04]

An adult employee shall be paid according to the classification in which that employee is employed under this award, not less than the following weekly wage:

Classification	**Weekly rate**
	$
Child care worker level 1	474.60
on commencement	484.90
after 1 year in the industry	495.10
after 2 years in the industry	
Child care worker level 2	496.70
on commencement	506.90
after 1 year in the industry	517.20
after 2 years in the industry	
Child care worker level 3	552.00
on commencement	561.20
after 1 year in the industry	571.40
after 2 years in the industry	
Child care worker level 4	602.20
on commencement	610.40
after 1 year in the industry	620.70
after 2 years in the industry	
Child care worker level 5	630.90
on commencement	641.10
after 1 year in the industry	651.40
after 2 years in the industry	
On commencement (Graduate Certificate Management)	697.34
after 1 year in the industry	726.31

after 2 years in the industry	745.28

Director level 1	746.80
on commencement	757.00
after 1 year in the industry	767.30
after 2 years in the industry	
On commencement (Graduate Certificate Management)	800.98
after 1 year in the industry	824.82
after 2 years in the industry	848.66
Director level 2	796.00
on commencement	804.30
after 1 year in the industry	814.50
after 2 years in the industry	
On commencement (Graduate Certificate Management)	862.30
after 1 year in the industry	891.20
after 2 years in the industry	920.10
Director level 3	824.80
on commencement	835.00
after 1 year in the industry	845.30
after 2 years in the industry	
On commencement (Graduate Certificate Management)	893.28
after 1 year in the industry	922.27
after 2 years in the industry	951.26
Child care support worker level 1	474.60
on commencement	484.90
after 1 year in the industry	495.10
after 2 years in the industry	
Child care support worker level 2	496.70
on commencement	506.90
after 1 year in the industry	517.20
after 2 years in the industry	

(b) Arbitrated safety net adjustment

[Sched A(b) substituted by PR918082 PR932040; PR946752 ppc 23May04]

The rates of pay in this award include the arbitrated safety net adjustment payable under the *Safety net review - wages May 2004* decision [Print PR002004]. This arbitrated safety net adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above award payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Australian workplace agreements, award variations to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases made under previous National Wage Case principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments.

(c) Junior employees

Junior employees employed as Child Care Workers Level 1 or Child Care Support Workers Level 1 shall be paid not less than in accordance with the following percentages for each age level:

Under 17 years of age	50%
Under 18 years of age	60%
Under 19 years of age	70%
Under 20 years of age	80%
Under 21 years of age	90%

CLASSIFICATION STRUCTURE

5.1.l(c) CHILD CARE WORKER LEVEL l means an employee who is an unqualified child care worker.

Duties would include some or all of the following:

implement the early childhood program under supervision;
implement daily routines;
ensure the health and safety of the children in care;
give each child individual attention and comfort as required;
work in accordance with the licensing requirements under the Act;
understand and work according to the centre or service's policy
A Child Care Worker Level l shall also include a worker (other than the Co-ordinator) in an Adjunct Care Service.
[Pt 5:5.1.l(d) varied by V00l ppc l3Aug98]

5.1.l(d) CHILD CARE WORKER LEVEL 2 means an employee who has completed a twelve month Level 3 Certificate in Childrens Services conducted by TAFE or a course which is recognised as equivalent under the Act. Alternatively this employee shall possess, in the opinion of the employer, sufficient knowledge and experience to perform the duties at this level.

Duties would include some or all of the following:

any of the duties listed for a Child Care Worker Level l;
assist in the preparation and implementation of programs suited to the needs of individual children and groups;
be responsible for reporting observations of individual children or groups for program planning purposes;
under direction, undertake work with individual children with particular needs.
A Child Care Worker Level 2 shall also include the Co-ordinator of an Adjunct Care Service where the Act does not require the Co-ordinator to hold any qualifications.

[Pt 5:5.1.l(e) varied by V00l ppc l3Aug98]

5.1.l(e) CHILD CARE WORKER LEVEL 3 means an employee who holds a TAFE Child Care Certificate as awarded prior to l990 or equivalent qualification which is recognised under the Act.

Duties would include some or all of the following:

work as the person in charge of a group of children in the age range 2 to l2 years;
develop, plan, implement and evaluate a developmental program under the supervision of the Director or Child Care Worker Level 5;
Co-ordinate and direct the activities of unqualified workers engaged in the implementation of programs and activities in a group setting;
liaise with parents;
ensure a safe environment is provided for the children;
ensure that records are maintained and are up to date concerning each child in their care;
develop, implement and evaluate daily routines;
be responsible to the Director for the assessment of students on placement;
ensure the Centre or Service's policies are adhered to.
[Pt 5:5.1.l(f) varied by V00l ppc l3Aug98]

5.1.l(f) CHILD CARE WORKER LEVEL 4 means an employee who holds either a Diploma in Childrens Services, or an equivalent qualification which is recognised under the Act.

Duties would include some or all of the following:

any of the duties of a Child Care Worker Level 3;
work as the person in charge of a group of children in the age range from birth to l2 years;
take responsibility in consultation with the Director for the preparation, implementation and evaluation of a developmental program for individual children or groups of children in care;
co-ordinate and direct the activities of workers engaged in the implementation and evaluation of developmental programs and activities in a group setting;
contribute, through the Director, to the development of the centre or services policies.
Alternatively this person may hold the same qualifications as set out for a Child Care Worker Level 3 but undertake additional responsibilities such as the co-ordination of the activities of more than one group of children; general supervision of other workers; assisting in centre or service administrative functions.
[Pt 5:5.1.l(g) varied by V00l ppc l3Aug98]

5.1.l(g) CHILD CARE WORKER LEVEL 5 means an employee who holds as a minimum a Diploma in Childrens Services or equivalent or Graduate Certificate in Child Care Centre Management, or an equivalent qualification which is recognised under the Act.

Progression to Level 5 will require the completion of 200 hours in-service training from a recognised body/s prior to appointment to Level 5. Alternatively this employee shall possess, in the opinion of the employer, sufficient knowledge and experience to perform the duties at this level.

Duties would include some or all of the following:

any of the duties of Child Care Worker Level 4;
carrying out the work of an Assistant Director (This position may only be necessary in a centre where there is a Director Level 3.);
supervising qualified and unqualified workers;
planning and co-ordinating in-service training for the centre or service;
planning and implementing special programs such as integrating children with disabilities or children of a non-English speaking background.
A Child Care Worker Level 5 shall also include a person, employed to manage an Out of School Hours service with no more than 39 children, whose responsibility is limited to the planning of the program and supervising staff.

A child care worker level 5 shall also include a Family Day Care Co-ordinator.

A Family Day Care Co-ordinator means an employee who works under general direction to monitor, support and resource a number of child care situations, involving children, family based child care workers and parents.

A person working at this level would hold an Associate Diploma in Child Care or other relevant field of experience. Alternatively this employee shall, in the opinion of the employer, have sufficient knowledge and experience to perform the duties at this level.

Task level

Duties would include some or all of the following:

Visiting assigned family based child care workers on a regular basis.
Supporting, resourcing and monitoring the family based child care worker.
Answering parent/guardian enquiries and interviewing parents requiring child care.
Participating in the selection of family based child care workers including home interviews and home safety checks.
Arranging the placement of children into care.
Maintaining effective communication with parents/guardians of children receiving care.
Liaising with other agencies and community groups as required.
Attending to administrative matters.
Providing training for family based child care workers.

5.1.1(h) DIRECTOR LEVEL 1 means an employee who is a Co-ordinator in charge of a child care centre or service, and who is qualified in accordance with the Act. The Director would be responsible for the overall administration of the centre or service.

Duties would include some or all of the following:

recruit staff in consultation with the management of a centre or service;
keep day to day accounts and handle clerical matters;
ensure that the centre or service adheres to all relevant regulations;
formulate and evaluate annual budgets in liaison with relevant authorities where necessary;
develop, plan and supervise the implementation of educational and/or developmental programs for the children in their centre/service;
ensure that submissions for funding to the relevant authorities are made and monies received;
ensure that Government guidelines on access to centres or services are adhered to;
liaise with management committees or proprietors as appropriate.
A Director Level 1 will be employed to manage a child care centre or service or Out of School Hours service of no more than 39 places.
A Director Level 1 shall also include a Family Day Care Director who is in charge of a family day care scheme of no more than 30 family based child care workers.
A Family Day Care Director means an employee responsible for the overall administration of the Family Day Care Scheme.

Training level or qualifications

A person working at this level would hold an Associate Diploma in Child Care, management or equivalent with child care industry experience. Alternatively this employee shall possess, in the opinion of the employer, sufficient knowledge and experience to perform the duties at this level.

Task level

Employees at this level will have extensive supervisory and management responsibility to perform work assignments guided by policy, precedent, professional standards and managerial expertise. Employees would have the opportunity to participate in and contribute to the development and interpretation of policy.

Duties would include some or all of the following:

Recruiting staff in consultation with the management of the scheme.
Providing general supervision and support for co-ordination unit staff.
Be responsible for the induction and ongoing training of co-ordination unit staff.
Developing, planning and supervising the implementation of induction and in-service training programmes for family based child care workers.
Be responsible for financial and administrative matters.
Undertaking planning including resource use and allocation.
Ensuring that the scheme adheres to all relevant regulations.
Ensuring that the government's guidelines on access to the scheme are adhered to.
Formulating and evaluating annual budgets in liaison with the relevant authorities where necessary.
Liaising with the sponsoring body or management committee.
Liaising with other agencies.
Involvement in policy development.
Developing and implementing procedure in line with existing policy.

5.1.1(i) DIRECTOR LEVEL 2 this employee would have the same duties as a Director Level 1, however they will be employed to manage a child care centre or service or Out of School Hour service with between 40-59 places.

A Director Level 2 shall include a Family Day Care Director who is in charge of a family day care scheme with between 31-60 family based child care workers.

5.1.1(j) DIRECTOR LEVEL 3 This employee would have the same duties as a Director Level 1, however they will be employed to manage a child care centre or service or Out of School Hours service with 60 or more places, or to administer a number of child care services provided by a single sponsor.

A Director Level 3 shall include a Family Day Care Director who is in charge of a family day care scheme with more than 60 family based child care workers.

5.1.1(k) CHILD CARE SUPPORT WORKER GRADE 1 this employee would be an untrained worker employed to perform a range of duties which may include cleaning, kitchen work, handiwork or gardening.

5.1.1(l) CHILD CARE SUPPORT WORKER GRADE 2 this employee will be a worker employed to perform a range of duties of the same nature as a child care support worker level 1. In addition this employee would hold basic qualifications in for example cooking or gardening.

5.1.2 Wage Rates

Employees shall be paid in accordance with the minimum weekly or hourly rates of pay as set out in schedule A of this Award in accordance with their contract of employment and classification level and any additional allowance as set out in Clause 5.5.

5.1.3 Flexibility of work

An employer may direct an employee to carry out such duties as are within the limits of the employee's skills, competence and training consistent with the classification structure of this Award, provided that such duties are not designed to promote de-skilling.

Provided that any direction issued by an employer shall be consistent with the employer's responsibilities to provide a safe and healthy working environment.

5.1.4 Excess rates

Where by mutual agreement between an employer and an employee, rates are paid in excess of those provided by this award, the amount of such excess rates shall not be applied as an offset against any payment due in respect of overtime and/or time worked on any Sunday and/or any holiday.

5.1.5 Progression Through Classification Levels

[Pt 5:5.1.5 inserted by V001 ppc 13Aug98]

Advancement through the first two incremental levels at any classification or qualification level shall be automatic.

Entry into a qualification level within a classification shall be by appointment to that level by the employer.

Any disputes concerning an employee's incremental level shall be dealt with in accordance with the Disputes Settlement Procedure.

Wage rates prescribed for holders of the Graduate Certificate in Child Care Management shall have no application in out of schools hours care, supps services or family day care services.

5.1.5 Incremental progression

[Pt 5:5.1.5 inserted by V001; substituted by V005 ppc 04May00]

5.1.5(a) Progression from one level to the next within a classification is subject to a child care worker meeting the following criteria:

competency at the existing level;
12 months experience at that level and in-service training as required;
demonstrated ability to acquire the skills which are necessary for advancement to the next pay point level.

5.1.5(a)(i) Where an employee is deemed not to have met the requisite competency at their exiting level at the time of appraisal, his/her incremental progression may be deferred for periods of three months at a time provided that:

the employee is notified in writing as to the reasons for the deferral;
the employee has, in the twelve months leading to the appraisal, been provided with in-service training required to attain a higher pay point;
following any deferral, the employee is provided with the necessary training in order to advance to the next level.

5.1.5(b)(ii) Where an appraisal has been deferred for operational reasons beyond the control of either party, and the appraisal subsequently deems the employee to have met the requirements under this clause, any increase in wage rates will be back paid to the 12 month anniversary date of the previous incremental progression.

5.1.5(b) An employee whose incremental advancement has been refused or deferred may seek to have the decision reviewed by lodging a written request through the dispute resolution procedure in clause 3.1 of this award. If the review is successful, then the incremental advancement will be backdated to the original due date. The review process must be completed within two months of the request for the review being made.

ANNEXURE 2

CLASSIFICATION DESCRIPTORS

CENTRE-BASED CARE

Child Care Employee Level 1

A Child Care Employee Level 1 is an employee who has no formal qualifications but is able to perform work within the scope of this level. This employee will work under direct supervision in a team environment, and will receive guidance and direction at all times. An employee at this level shall not be left alone with a group of children at any time.

An employee at this level is being introduced to the working environment and is undertaking the following indicative duties:

Learning the policies, procedures and routines of the centre.
Learning how to establish relationships and interact with the children.
Improving communication and interactive skills with children.
Learning basic skills required to work in this environment with children.
Learning to give each child individual attention and comfort as required.
The employee shall progress to the next level after a period of three months.

Support Worker Level 1

A Support Worker Level 1 is an employee who has no formal qualifications but is able to perform work within the scope of this level. This employee will work under direct supervision in a team environment, and will receive guidance and direction at all times.

An employee at this level is being introduced to the working environment and is undertaking the following indicative duties:

Learning the policies, procedures and routines of the centre.
Engaged in basic duties under the direct supervision or guidance of a higher duty employee. These duties include food preparation, cleaning, or gardening.
The employee shall progress to the next level after a period of three months.

Child Care Employee Level 2

A Child Care Employee Level 2 is an employee who has completed 3 months in the industry, or an AQF Certificate II, or is enrolled in an AQF Certificate III traineeship or equivalent so as to perform the work within the scope of this level.

An employee at this level has limited knowledge and experience in childcare and is expected to take limited responsibility for their own work. A Child Care Employee Level 2 is undertaking the following indicative duties:

Demonstrates a basic operational knowledge of the centre by applying a defined range of skills.
Sets up the inside and outside play area, under supervision or direction, and following the set plan or program for the day.

Prepares and set up for programmed activities and assist the higher duty employee with the implementation of the program.
Assists individual children with physical needs under general direction.
Responsible for the implementation of an activity for a small group of children under the team leader's direction and guidance.
Able to give each child individual attention and comfort as required.

Support Worker Level 2

A Support Worker Level 2 is an employee who has completed 3 months in the industry, or an AQF Certificate II, or is enrolled in an AQF Certificate III traineeship or equivalent so as to perform the work within the scope of this level.

An employee at this level has limited knowledge and experience in childcare and is expected to take limited responsibility for their own work. A Child Care Employee Level 2 is undertaking the following indicative duties:

Demonstrates a basic operational knowledge of the centre by applying a defined range of skills.
Responsible for food preparation, cleaning or gardening in the centre, under guidance of the Director.
May be required to purchase foodstuffs as part of their daily duties.
May be responsible for ordering and stock control.
Demonstrates knowledge of hygienic handling of food and equipment.

Early Childhood Educator Level 1

An Early Childhood Educator Level 1 is an employee who has completed an AQF certificate III traineeship or equivalent, or an experienced employee who is undertaking the following indicative duties to the level of their skills, competence and training:

Reports observations of individual children or groups of children for program planning purposes.
Has a theoretical understanding of the necessary developmental issues required for the effective recording of observations.
Responsible for the implementation of the program of activities and routines under the Team Leader's general direction.
Applies a theoretical knowledge to a range of duties and well-developed skills when interacting with children in the centre.
Supports the training of lower grade employees.
Performs work that requires a range of well-developed skills where some discretion and judgement is exercised.
Demonstrates a thorough operational knowledge of the centre by applying a broad range of skills.
Exercises good interpersonal and communication skills.
Performs work under limited supervision either individually or in a team environment.
Able to undertake work with individual children, under direction.
Responsible for the quality of their own work.

Support Worker Level 3

A Support Worker Level 3 is an employee who has completed an AQF certificate III traineeship or equivalent, or an experienced employee who is undertaking the following indicative duties to the level of their skills, competence and training:

Responsible for food preparation, cleaning or gardening in the centre.
Purchases foodstuffs for the centre.
Responsible for stock control.
Responsible, under the guidance of the Director of the centre, for the planning and setting of menus with respect to special dietary requirements of children in the centre. This would include, but not be limited to, considerations in relation to vegetarian, low fat/cholesterol, lacto-ovo, gluten-free, diabetic, food exclusions for allergies and food intolerance, and food exclusions related to specific medications.
Responsible, under the guidance of the Director of the centre, for the planning and setting of menus with respect to specific cultural requirements of children in the centre.
Responsible for the quality of their own work.

Early Childhood Educator Level 2

An Early Childhood Educator Level 2 is an employee who has completed an AQF certificate IV traineeship or equivalent, ~~or is enrolled in the Diploma in Children's Services or equivalent,~~ or an experienced employee who is undertaking the following indicative duties to the level of their skills, competence and training:

Under the direction of the Team Leader, develops, plans and evaluates the program for an individual child, and eventually as the employee's skills develop, for a small group of children (no more than 5).
Able to identify, analyse and evaluate information from a variety of sources and apply this knowledge practically.
Implements the program of activities and routines under the Team Leader's general direction.
Applies a wide range of theoretical knowledge to duties and well-developed skills when interacting with children in the centre.
Assists in the provision of training to lower grade employees in conjunction with the Team Leader and Director.
Performs work that requires a range of well-developed skills where a high level of discretion and judgment is required.
Demonstrates a thorough operational knowledge of the centre by applying a broad range of skills.
Exercises good interpersonal and communication skills with co-workers, children and parents.
Performs work under limited supervision either individually or in a team environment.
Responsible for the quality of their own work.

Early Childhood Educator Level 3

An Early Childhood Educator level 3 is an employee who has completed a Diploma in Children's Services or equivalent, or an experienced employee who is undertaking the following indicative duties to the level of their skills, competence and training:

Develops, plans, implements and evaluates a developmental program for a group of children as specified in licensing regulations, under the supervision of the Team Leader.
Organises experiences that facilitate and enhance children's development, based on theoretical and practical knowledge.
Responsible for the planning and management of the provision of a healthy and safe environment.
Applies well-developed theoretical knowledge with respect to planning for cultural diversity, gender issues and the centre philosophy.
Ensures that records are maintained and up to date concerning each child in their care.
Able to identify, analyse and evaluate information from a variety of sources and apply this knowledge practically.
Documents, interprets and uses information about children.
Communicates effectively with parents and families in caring for the child.
Demonstrates leadership and appropriate practice for other employees.
Responsible for the quality of their own work.

Team Leader Level 1

A Team Leader Level 1 is an employee who has completed a Diploma in Children's Services or equivalent, and is employed as the person in charge of a group of children in the age range from birth to six years. An employee at this level is undertaking the following indicative duties to the level of their skills, competence and training:

Any of the duties of Early Childhood Educator Level 3.
Develops, plans, implements and evaluates a developmental program for a group of children as specified in licensing regulations, under the supervision of the Director.
Responsible for the co-ordination, direction and supervision of other employees in the centre up to the level of Early Childhood Educator Level 2.
Has knowledge of the regulations and requirements for the centre to meet accreditation.
Plans care routines for individual children and groups of children.

Team Leader Level 2

A Team Leader Level 2 is an employee who has completed an Advanced Diploma or a Diploma in Children's Services or equivalent, and/or a Graduate Certificate in Management or equivalent. An employee at this level is undertaking the following indicative duties to the level of their skills, competence and training:

Any of the duties of Team Leader Level 1
Co-ordinates and directs the activities of qualified workers engaged in the development and evaluation of programs for groups of children.
Responsible to the Director for the assessment of trainees or students on placement.
Responsible in consultation with the Director for the preparation, implementation and evaluation of a developmental program for individual children who have additional needs such as children with disabilities or children for whom English is a second language.
Contributes to the development of the centre policies.
Responsible for the direction and supervision of other employees up to the level of Early Childhood Educator Level 3.

Assistant Director

An Assistant Director is an employee who has completed a Diploma in Children's Services or equivalent and a Graduate Certificate in Management, or has the same duties as a Team Leader with any of the additional responsibilities listed below. An employee at this level is undertaking the following indicative duties to the level of their skills, competence and training:

Any of the duties of a Team Leader Level 1 and/or 2.
Responsible as the person in charge of the centre when the Director is not present.
Assists in centre administrative functions.
Co-ordinates the activities of more than one group of children.
Plans and co-ordinates in-service training for other employees at the centre.

Director Level 1

A Director Level 1 is an employee who holds a Degree in Early Childhood or an Advanced Diploma or a Diploma in Children's Services and/or is appointed as the Director of a centre licensed for up to 39 child care places and with only 39 children enrolled.

The Director is responsible for the overall management and administration of the service.

Where the Director is appointed for a centre licensed for more than 39 child care places the following allowances will apply:

From 40 to 59 licensed places: $98.90 per week

More than 60 licensed places: $123.56 per week

Where the number of children enrolled in a centre is more than 50% above the number of licensed places then the Director shall be paid at the next level of the allowance.

Director Level 2

A Director Level 2 is an employee who holds a Degree in Early Childhood or an Advanced Diploma or a Diploma in Children's Services and a Graduate Certificate in Childcare Management and/or is appointed as the Director of a centre licensed for up to 39 child care places and with only 39 children enrolled.

The Director is responsible for the overall management and administration of the service.

Where the Director is appointed for a centre licensed for more than 39 child care places the following allowances will apply:

From 40 to 59 licensed places: $98.90 per week

More than 60 licensed places: $123.56 per week

Where the number of children enrolled in a centre is more than 50% above the number of licensed places then the Director shall be paid at the next level of the allowance.

SCHOOL AGE CARE

School Age Care Employee Level 1

A School Age Care Employee Level 1 is an employee who has no formal qualifications but is able to perform work within the scope of this level. This employee will work under direct supervision in a team environment, and will receive guidance and direction at all times. An employee at this level shall not be left alone with a group of school age children at any time.

An employee at this level is being introduced to the working environment and is undertaking the following indicative duties:

Learning the policies, procedures and routines of the school age care service.
Learning how to establish relationships and interact with the children.
Improving communication and interactive skills with children.
Learning basic skills required to work in this school age care environment.
Learning to give each child individual attention and comfort as required.
The employee shall progress to the next level after a period of three months.

School Age Care Employee Level 2

A School Age Care Employee Level 2 is an employee who has completed 3 months in the industry, or an AQF Certificate II, or is enrolled in an AQF Certificate III traineeship or equivalent so as to perform the work within the scope of this level.

An employee at this level has limited knowledge and experience in childcare and is expected to take limited responsibility for their own work. An employee at this level is undertaking the following indicative duties:

Demonstrates a basic operational knowledge of the school age care service by applying a defined range of skills.
Sets up the inside and outside play area, under supervision or direction, and following the set plan or program for the day.
Prepares and set up for programmed activities and assist the higher duty employee with the implementation of the program.
Assists individual children with physical needs under general direction.
Responsible for the implementation of an activity for a small group of children under the higher duty employee's direction and guidance.
Able to give each child individual attention and comfort as required.

School Age Care Employee Level 3

A School Age Care Employee Level 3 is an employee who has completed an AQF certificate III traineeship or equivalent, or an experienced employee who is undertaking the following indicative duties to the level of their skills, competence and training:

Reports observations of individual children or groups of children for school age care program planning purposes.
Has a theoretical understanding of the necessary developmental issues required for the effective recording of observations.
Implements the program of activities and routines under the higher duty employee's general direction.
Applies a theoretical knowledge to a range of duties and well-developed skills when interacting with children in the service.
Supports the training of lower grade employees.
Performs work that requires a range of well-developed skills where some discretion and judgement is exercised.
Demonstrates a thorough operational knowledge of the school age care service by applying a broad range of skills.
Exercises good interpersonal and communication skills.
Performs work under limited supervision either individually or in a team environment.
Able to undertake work with individual children, under direction.
Responsible for the quality of their own work.

School Age Care Employee Level 4

A School Age Care Employee Level 4 is an employee who has completed an AQF certificate IV traineeship or equivalent, ~~or is enrolled in the Diploma,~~ or an experienced employee who is undertaking the following indicative duties to the level of their skills, competence and training:

Under the direction of the Director or Assistant Director, develops, plans and evaluates the program for an individual child and eventually as the employee's skills develop for a small group of children (no more than 5).
Able to identify, analyse and evaluate information from a variety of sources and apply this knowledge practically.
Implements the program of activities and routines under the Director's or Assistant Director's general direction.
Applies a wide range of theoretical knowledge to duties and well-developed skills when interacting with school age children.
Responsible for the quality of their own work.
Assists in the provision of training to lower grade employees in conjunction with the Director.
Performs work that requires a range of well-developed skills where a high level of discretion and judgement is required.
Demonstrates a thorough operational knowledge of the school age care service by applying a broad range of skills.
Exercises good interpersonal and communication skills with co-workers, school age children and parents.
Performs work under limited supervision either individually or in a team environment.
Responsible for the quality of their own work.

School Age Care Employee Level 5

A School Age Care Employee Level 5 is an employee who has completed a Diploma in Children's Services or equivalent as recognised under the Act, or an experienced employee who is undertaking the following indicative duties to the level of their skills, competence and training:

Develops, plans, implements and evaluates a program of activities for a group of children as specified in licensing regulations, under the supervision of the Director and in consultation with other employees and children as appropriate.
Organises experiences and activities that facilitate and enhance children's development, based on theoretical and practical knowledge.
Responsible for the planning and management of the provision of a healthy and safe environment.
Applies well-developed theoretical knowledge with respect to planning for cultural diversity, gender issues and the centre philosophy.
Able to identify, analyse and evaluate information from a variety of sources and apply this knowledge practically.
Documents, interprets and uses information about children.
Communicates effectively with parents and families in caring for the child.
Demonstrates leadership and appropriate practice for other employees.
Responsible for the quality of their own work.

Team Leader Level 1

A Team Leader Level 1 is an employee who has completed a Diploma in Children's Services or equivalent, and is employed as the person in charge of a group of children in the age range from five to twelve years. An employee at this level is undertaking the following indicative duties to the level of their skills, competence and training:

Any of the duties of School Age Care Employee Level 5.
Develops, plans, implements and evaluates a developmental program for a group of children as specified in licensing regulations, under the supervision of the Director.
Responsible for the co-ordination, direction and supervision of other employees up to the level of School Age Care Employee Level 4.
Has knowledge of the regulations and requirements for the centre to meet accreditation.

Team Leader Level 2

A Team Leader Level 2 is an employee who has completed an Advanced Diploma or a Diploma in Children's Services or equivalent, and/or a Graduate Certificate in Management or equivalent. An employee at this level is undertaking the following indicative duties to the level of their skills, competence and training:

Any of the duties of Team Leader Level 1
Co-ordinates and directs the activities of qualified workers engaged in the development and evaluation of programs for groups of children.
Responsible to the Director for the assessment of trainees or students on placement.
Responsible in consultation with the Director for the preparation, implementation and evaluation of a developmental program for individual children who have additional needs such as children with disabilities or children for whom English is a second language.
Contributes to the development of the centre policies.
Responsible for the direction and supervision of other employees up to the level of School Age Care Employee Level 5.

Assistant Director

An Assistant Director is an employee who has completed an Advanced Diploma or a Diploma in Children's Services or equivalent and a Graduate Certificate in Management, and/or has the same duties as a Qualified Child Care Employee Level 3 with any of the additional responsibilities listed below. An employee at this level is undertaking the following indicative duties to the level of their skills, competence and training:

Any of the duties of a School Age Care Employee Level 5.
Responsible as the person in charge of the service when the Director is not present.
Assists in service administrative functions.
Co-ordinates the activities of more than one group of children.
Plans and co-ordinates in-service training for other employees at the centre.
Responsible for the direction and supervision of other employees up to the level of School Age Care Employee Level 5.

School Age Care Co-ordinator (Limited Duties)

A School Age Care Co-ordinator is an employee who has completed an Advanced Diploma or a Diploma in Children's Services or equivalent and is appointed as the School Age Care Co-ordinator of a service licensed for up to 39 places. The duties of the School Age Care Co-ordinator are limited to the following:

Develops, plans, implements and evaluates a program of activities under the supervision of the Director and in consultation with other employees and children as appropriate.
Responsible for the direction and supervision of other employees up to the level of Qualified Child Care Employee Level 3.
This employee is **not** responsible for the following:

Recruitment of staff
Replacement of staff and contacting relief staff
Receipting of fees and processing of accounts
Collation of attendance statistics
Attending Management Meetings

Director Level 1

A Director Level 1 is an employee who holds a Degree in Education or an Advanced Diploma or a Diploma in Children's Services or equivalent and/or is appointed as the Director of a school age care service licensed for up to 39 child care places with only 39 children enrolled.

The Director is responsible for the overall management and administration of the service.

Where the Director is appointed for a centre licensed for more than 39 child care places the following allowances will apply:

From 40 to 59 licensed places: $98.90 per week

More than 60 licensed places: $123.56 per week

Where the number of children enrolled in a centre is more than 50% above the number of licensed places then the Director shall be paid at the next level of the allowance.

Director level 2

A Director Level 2 is an employee who holds a Degree in Education or an Advanced Diploma or a Diploma in Children's Services or equivalent and a Graduate Certificate in Childcare Management and/or is appointed as the Director of a school age care service licensed for up to 39 child care places and with only 39 children enrolled.

The Director is responsible for the overall management and administration of the service.

Where the Director is appointed for a centre licensed for more than 39 child care places the following allowances will apply:

From 40 to 59 licensed places: $98.90 per week

More than 60 licensed places: $123.56 per week

Where the number of children enrolled in a centre is more than 50% above the number of licensed places then the Director shall be paid at the next level of the allowance.

FAMILY DAY CARE

Playgroup Assistant Level 1

A Playgroup Assistant Level 1 is an employee who has no formal qualifications but is able to perform work within the scope of this level. This employee will work under direct supervision in a team environment, and will receive guidance and direction at all times. An employee at this level shall not be left alone in the work environment or with a group of children at any time.

An employee at this level is being introduced to the working environment and is undertaking the following indicative duties:

Learning the policies, procedures and routines of the family day care scheme.
Learning how to establish relationships and interact with the Family Based Child Care Workers and children.
Improving communication and interactive skills with Family Based Child Care Workers and children.
Learning basic skills required to work in this environment with Family Based Child Care Workers and children.
Learning to give each child individual attention and comfort as required.
The employee shall progress to the next level after a period of three months.

Playgroup Assistant Level 2

A Playgroup Assistant Level 2 is an employee who has completed 3 months in the industry, or an AQF Certificate II, or is enrolled in an AQF Certificate III traineeship or equivalent so as to perform the work within the scope of this level.

An employee at this level has limited knowledge and experience in family day care and is expected to take limited responsibility for their own work. An employee at this level is undertaking the following indicative duties:

Demonstrates a basic operational knowledge of the family day care scheme by applying a defined range of skills.
Sets up the inside and outside play area, under supervision or direction of the Playgroup Leader.
Prepares and set up for programmed activities and assist the Playgroup Leader with the implementation of the program.
Assists individual children with physical needs under general direction.

Responsible for the transport of Family Based Child Care Workers and the children in their care to and from playgroup as required.
Able to give each child individual attention and comfort as required.

Playgroup Assistant Level 3

An Playgroup Assistant Level 3 is an employee who has completed an AQF certificate III traineeship or equivalent, or an experienced employee who is undertaking the following indicative duties to the level of their skills, competence and training:

Reports observations of individual children or groups of children to the Playgroup Leader for program planning purposes.
Has a theoretical understanding of the necessary developmental issues required for the effective recording of observations.
Responsible for the implementation of the program of activities and routines under the Playgroup Leader's general direction.
Applies a theoretical knowledge to a range of duties and well-developed skills when interacting with Family Based Child Care Workers and children at the playgroup.
Performs work that requires a range of well-developed skills where some discretion and judgement is exercised.
Demonstrates a thorough operational knowledge of the scheme by applying a broad range of skills.
Exercises good interpersonal and communication skills.
Responsible for the transport of Family Based Child Care Workers and the children in their care to and from playgroup as required.
Performs work under limited supervision either individually or in a team environment.
Able to undertake work with individual children, under direction.
Responsible for the transport of Family Based Child Care Workers and the children in their care to and from playgroup as required.
Responsible for the quality of their own work.

Playgroup Assistant Level 4

A Playgroup Assistant Level 4 is an employee who has completed an AQF certificate IV traineeship or equivalent, ~~or is enrolled in the Diploma in Children's Services or equivalent~~, or an experienced employee who is undertaking the following indicative duties to the level of their skills, competence and training:

Under the direction of the Playgroup Leader, develops, plans and evaluates activities for an individual child, and eventually as the employee's skills develop, for a small group of children (no more than 5).
Able to identify, analyse and evaluate information from a variety of sources and apply this knowledge practically.
Implements the program of activities and routines under the Playgroup Leader's general direction.
Applies a wide range of theoretical knowledge to duties and well-developed skills when interacting with of Family Based Child Care Workers and the children in the playgroup.
Assists in the provision of training to lower grade employees in conjunction with the Playgroup Leader and Co-ordinators.
Performs work that requires a range of well-developed skills where a high level of discretion and judgement is required.
Demonstrates a thorough operational knowledge of the scheme by applying a broad range of skills.
Exercises good interpersonal and communication skills with of Family Based Child Care Workers and children.
Performs work under limited supervision either individually or in a team environment.
Responsible for the transport of Family Based Child Care Workers and the children in their care to and from playgroup as required.
Responsible for the quality of their own work.

Playgroup Leader Level 1

A Playgroup Leader Level 1 is an employee who has completed a Diploma or equivalent, or an experienced employee who is undertaking the following indicative duties to the level of their skills, competence and training:

Organises experiences during playgroups that facilitate and enhance children's development, based on theoretical and practical knowledge.
Documents, interprets and uses information about children.
Communicates effectively with Family Based Child Care Workers in caring for children.
Responsible for the planning and management of the provision of a healthy and safe environment.
Applies well-developed theoretical knowledge with respect to planning for cultural diversity, gender issues and the scheme philosophy.
Demonstrates appropriate practice for Family Based Child Care Workers.
Responsible for the co-ordination, direction and supervision of other employees in the scheme up to the level of Playgroup Assistant Level 4.
Responsible for the quality of their own work.

Playgroup Leader Level 2

A Playgroup Leader Level 2 is an employee who has completed a Diploma in Children's Services or equivalent, and undertakes the same duties as a Playgroup Leader Level 1 with the any of the following additional responsibilities:

Any of the duties of Playgroup Leader Level 1
Responsible for the observation, training and development of Family Based Child Care Workers during playgroup.
Demonstrates leadership and direction to Family Based Child Care Workers.
Has knowledge of the regulations and requirements for the scheme to meet accreditation.

Co-ordinator Level 1

A Co-ordinator Level 1 is an employee who has completed a Diploma in Children's Services or equivalent and/or an experienced employee who is undertaking the following indicative duties to the level of their skills, competence and training:

Arranges, administers and monitors a number of Family Day Care placements.
Responsible for the direction, training and supervision of a number of Family Based Child Care Workers
Implements licensing regulations and accreditation requirements for family day care
Recruits and approves the registration of Family Based Child Care Workers in accordance with the scheme's policies and licence regulations.
Documents, interprets and uses information about children.
Assists Family Based Child Care Workers to develop care routines for children in their charge.
Communicates effectively with Family Based Child Care Workers, children, parents and families.
Applies well-developed theoretical knowledge to the care situations with respect to cultural diversity, gender issues and scheme philosophy.
Responsible for the quality of their own work and the work of others.
Ensures that records are maintained and up-to-date concerning each care situation

Co-ordinator Level 2

A Co-ordinator Level 1 is an employee who has completed an Advanced Diploma in Children's Services and/or a Diploma in Children's Services or equivalent and a Graduate Certificate in Childcare Management or equivalent. An employee at this level is undertaking the following indicative duties to the level of their skills, competence and training:

Any of the duties of Co-ordinator Level 1

Responsible to the Director for the assessment of trainees or students on placement in the Family Day Care Co-ordination unit.
Responsible for assisting Family Based Child Care Workers to plan, implement and evaluate a developmental program for individual children who have additional needs such as children with disabilities or children for whom English is a second language.
Contributes to the development of the scheme policies.

Trainee Supervisor

A Trainee Supervisor is an employee who has completed an Advanced Diploma or a Diploma in Children's Services or equivalent, Workplace Assessor/trainer qualifications and/or an experienced employee who is undertaking the following indicative duties to the level of their skills, competence and training:

Provides support and guidance to family based child care workers undertaking the AQF Certificate III Traineeship ~~in Family Day Care~~.
Undertakes supervision visits for the purpose of on-the-job workplace assessment.
Organises training assistance such as additional resources, in-service sessions and study groups as required.
Contributes to the development of the scheme policies.

Assistant Director

Assistant Director means an employee who holds an Advanced Diploma or a Diploma in Children's Services or equivalent and a Graduate Certificate in Management and/or has the same duties as a Co-ordinator with the additional responsibilities listed below. An employee at this level is required by the employer to undertake the following indicative duties to the level of their skills, competence and training:

Any of the duties of Co-ordinator Level 1 or 2
Be responsible as the person in charge of the scheme when the Director is not present.
Assist in scheme administrative functions
Direct the activities of co-ordinators and/or playgroup leaders.
Plan and co-ordinate in-service training for other employees.

Director Level 1

A Director Level 1 is an employee who holds a Degree in Education or an Advanced Diploma or a Diploma in Children's Services or equivalent and/or is appointed as the Director of a Family Day Care Scheme of no more than 30 Family Based Child Care Workers.

The Director is responsible for the overall management and administration of the scheme.

Where the Director is appointed for a scheme of more than 30 Family Based Child Care Workers the following allowances will apply:

From 3l to 60 Family Based Child Care Workers: $98.90 per week

More than 60 Family Based Child Care Workers: $123.56 per week

Director Level 2

A Director Level 2 is an employee who holds a Degree in Education or an Advanced Diploma or a Diploma in Children's Services or equivalent and a Graduate Certificate in Childcare Management and is appointed as the Director of a Family Day Care Scheme of no more than 30 Family Based Child Care Workers.

The Director Level 2 is responsible for the overall management and administration of the scheme.

Where the Director Level 2is appointed for a scheme of more than 30 Family Based Child Care Workers the following allowances will apply:

From 3l to 60 Family Based Child Care Workers: $98.90 per week

More than 60 Family Based Child Care Workers: $123.56 per week

ANNEXURE 3

Table 2: Proposed Children's Services Classification Structure ("A2") and

Comparison with Metal, Engineering and Associated Industries Award 1998 ("A9") relativities

Wage Group	Classification title	Minimum training requirement	Wage relativity to C10 after full minimum rate and broadbanding adjustments	CLASSIFICATION LEVEL	Classification Title	Minimu Requ
C 14	Engineering/Production Employee - level 1	Up to 38 hours induction training	78%	N/A	N/A	N/A
C 13	Engineering/Production Employee - level II	In-house training	82%	N/A	N/A	N/A
C 12	Engineering/Production Employee - level III	Engineering Production Certificate I or equivalent	87.4%	CC1	Childcare Employee Level 1 Support Worker Level 1	Up to 3 mo in the indus
C11	Engineering/Production Employee - level IV	Engineering Production Certificate II or equivalent	92.4%	CC2	Childcare Employee Level 2 Support Worker Level 2	After 3 mo Certificate I in AQF Cer Or equivale

C10	Engineering Tradesperson - Level 1 Production Systems Employee	Trade Certificate or Engineering Production Certificate III or equivalent.	100%	CC3	Early Childhood Educator Level 1 Support Worker Level 3	AQF Certif higher dutie Or equivale
C 9	Engineering Technician - level 1 Engineering Tradesperson - level II	3 appropriate modules in addition to C10 or 3 modules towards National Diploma or National Advanced Diploma or equivalent.	105%	CC3	Early Childhood Educator Level 1 Support Worker Level 3	CC3 after 1 with satisfa evaluation.
C 8	Engineering Technician - level II Engineering Tradesperson - Special Class level 1	Higher Engineering Tradesperson or 3 appropriate modules in addition to C9 or 6 modules towards National Diploma or National Advanced Diploma or equivalent.	110%	CC3	Early Childhood Educator Level 1 Support Worker Level 3	CC3 after 2 industry an satisfactory
C 7	Engineering technician - level III Engineering tradesperson - special class level II	AQF Level 4 National Certificate 9 modules towards National Diploma or National Advanced Diploma 3 appropriate modules in addition to C8 or equivalent	115%	N/A	N/A	N/A
C 6	Engineering technician - level IV Advanced engineering tradesperson - level 1	12 modules towards National Diploma or National Advanced Diploma or equivalent	125%	CC4	Early Childhood Educator Level 2	AQF Cert I Cert IV and AQF Diplo responsible programmi individual c group. Or equivale
C 5	Engineering technician - level V Advanced engineering tradesperson - level II	AQF 5 - National Diploma Or 15 modules towards National Advanced Diploma or equivalent	130%	CC5	Early Childhood Educator Level 3	AQF Natio and/or Resp programmi Or equivale
C 4	Engineering associate - level 1	22 Modules towards National Advanced Diploma or equivalent	135%	CC5	Early Childhood Educator Level 3	CC5 after 1
C 3	Engineering associate - level II	Associate diploma or formal equivalent	145%	CC6	Team Leader level 1	AQF Diplo supervision up to CC4 l
C 2(a)	Leading technical officer Principal engineering supervisor/trainer/co-coordinator	7 modules in addition to National Advanced Diploma AQF 6 National Advanced Diploma - with 15 modules minimum in supervision/training Or equivalent	150%	CC7	Team Leader level 2	AQF Diplo Graduate C Advanced I supervision of CC5 clas Or equivale
C2(b)	Principal technical officer	15 modules in addition to national Advanced Diploma or equivalent	160%	CC8	Assistant Director	Appointed Licensing R Degree and Diploma an Or equivale
C1	Professional engineer	Degree	180% - 210%	CC9	Director Level 1	Appointed Licensing R

	Professional scientist					Degree and Diploma an Or equivale
		Degree		CC10	Director Level 2	Appointed Licensing R Degree and Diploma an plus Gradua Or equivale

ANNEXURE 4

ACT EMPLOYERS'

PROPOSED CHILD CARE STRUCTURE

Classification	**Proposed Award Rate**	**Metals**
Child Care Level 1 (Unqualified) **Minimum Qualifications**: Nil Trainee Support Worker Base Child Care Worker _ Under supervision, implement an early childhood program.	**$460.87** Unqualified level **$474.43** Unqualified level after one year **$487.98** Unqualified with 2 years experience.	85% 87.5% 90%
Child Care Level 2 (Certificate) **Minimum Qualifications**: AQF Cert. III in Children's Services and one year's experience or equivalent or sufficient knowledge or experience to perform the duties. Experienced Child Care Worker SAC Worker FDC Playgroup Assistant _ Report observations for individual children or a group of children _ Assist to develop, plan, implem. and evaluate a developmental program _ Undertake work with individual children with particular needs _ Supervise unqualified staff _ Stand in for room leader when necessary.	**$501.54** **$515.09** After 1 year's experience **$528.65** CERT. III employee cannot advance beyond this point **$542.20** Employee must hold old CCC qualification or equivalent as a minimum.	92.5% 95% 97.5% 100%
Child Care Level 3 (Qualified) **Minimum Qualification**: AQF Diploma in Children's Services or equivalent or sufficient knowledge or experience to perform the duties, if licensing permits. Team Leader in charge of a room SAC Program Leader FDC Playgroup Leader FDC Coordinator Responsible for the development, planning, implementation and evaluation of a developmental program. Responsible for the direction, training and supervision of a number of family based child carers.	**$596.42** Old Associate Diploma with 1 year exp. or Diploma with no exp. **$609.98** After one year's experience. **$623.53** **$637.09** **$650.64** **$677.75** Assistant Director level. Assist in the Management of a child care centre or SAC Program or Family Day Care Program.	110% 112.5% 115% 117.5% 120% 125%
Director Level 1 **Minimum Qualification**: Diploma in Children's Services and two years experience or equivalent or sufficient knowledge or experience to perform the duties.	**$786.19** **$799.75** **$813.13**	145% 147.5% 150%

Responsible for a child care Centre or SAC Program with up to 60 children in care, or, a Family Day Care Scheme with up to 60 family based child carers.		
Director Level 2	**$894.63**	165%
Minimum Qualification: Diploma in Children's Services and two years experience or equivalent or sufficient knowledge or experience to perform the duties.	**$909.63**	167%
Responsible for childcare centre or SAC Program with more than 60 children in care, or, a Family Day Care Scheme with more than 60 family based child carers.		

ANNEXURE 5

15.1 Definitions

15.1.1 Child Care Worker Level 1

15.1.1(a) Child Care Worker Level 1(a):

This is an unqualified employee involved in the delivery of a children's services programme, whose duties would include some or all of the following:

implement an early childhood programme under direct supervision;
assist in the implementation of daily routines;
ensure the health and safety of each child;
give each child individual attention and comfort as required;
work in accordance with the licensing requirements under the Act;
understand Centre policy and work accordingly at all times.

15.1.1(b) Childcare Worker Level 1(b)

implement an early childhood programme under routine supervision;
implement daily routines;
ensure the health and safety of each child, through the provision of in-service training as required;
develop increased understanding of the individual needs of each child as required;
give each child individual attention and comfort as required;
have an understanding of, and work in accordance with, licensing requirements under the Act;
understand Centre policy and work accordingly at all times.

15.1.1(c) Childcare Worker Level 1(c)

implement an early childhood programme;
understand and proactively implement daily routines;
have a developed knowledge of the health and safety of each child;
attend in-service training as required on issues such as first aid;
understand the individual needs of each child, and provide care accordingly;
give each child individual attentions and comfort as required;
have a detailed understanding of, and act in accordance with, the licensing requirements under the Act;
understand Centre policy and work accordingly at all times.

15.1.2 Child Care Worker Level 2

This is an employee involved in the delivery of a children's services programme, who has completed one of the following:

the TAFE Certificate in Child Care (Assistant) Course;
Certificate III in Children's Services;
Certificate IV in Community Services - Childcare (traineeship);
or possesses in the opinion of the employer sufficient knowledge and experience to perform the duties at this level;

or has completed a Traineeship pursuant to clause 36 - Traineeship approval guidelines of this award.

15.1.2(a) Childcare Worker Level 2(a)

Whose duties, in addition to those duties performed by a Child Care Worker Level I, would include some or all of the following:

assist in the preparation and implementation of programmes suited to the needs of individual children and groups;
responsibility for reporting observations of individual children or groups for programme planning purposes;
undertake work with individual children with particular needs under direct supervision.

15.1.2(b) Childcare Worker Level 2(b)

assist in the preparation and implementation of programmes suited to the needs of individual children and groups based on the general observation of each child;
reporting observations of individual children or groups for programme planning purposes;
foster children's cognitive development through in-service training;
facilitate play;
undertake work with individual children with particular needs under routine supervision.

15.1.2(c) Childcare Worker Level 2(c)

provide direct assistance in the preparation and implementation of programmes suited to the needs of individual children and groups;
responsibility for reporting observations of individual children or groups for programme planning purposes;
undertake work with individual children;
support the emotional and psychological development of children through in-service training as required;
support the social and language development of children.

15.1.3 Child Care Worker Level 3

15.1.3(a) This is an employee involved in the delivery of a children's services programme, who is either:

GROUP (A):	Persons who are either qualified (other than qualifications outlined in Groups (B) and (C)) in accordance with the Children's Services Centres Regulations 1998 Regulation number 56. Persons employed in this category shall be employed from level 3.1 to 3.6.
GROUP (B):	Persons who hold an Advanced Certificate or Associate Diploma in Child Care Studies including persons with these qualifications who were registered Mothercraft Nurses, persons who hold a Diploma of Community Services Childcare, or a Diploma in Children's Services, are entitled to salary subdivisions set out above for Group (B). Persons employed in this category shall be employed from level 3.4 to 3.9.
GROUP (C):	Persons who hold a three year Degree or Diploma in Child Care Studies or equivalent qualification are entitled to salary subdivisions set out above for Group (C). Persons employed in this category shall be employed at level 3.6 to 3.9.
GROUP (D):	Persons with the qualifications outlined in (A) or (B) or (C) above, but who undertake additional responsibilities to those outlined in 15.1.3(a), including co-ordination of the activities of more than one group, supervising workers and assisting in administrative functions, are entitled to salary subdivisions set out above for Group (D), provided that they shall maintain their existing wage rate if higher at the time of appointment. Persons employed in this category shall be employed at level 3.7 to 3.9, provided that where an employee is in receipt of a wage higher than that contained within this award, the higher rate shall apply.

and

15.1.3(b) Whose duties will include the following:

work as the person in charge of a group of children in the age range, 0 to 12 years;
develop, plan, implement, and evaluate in conjunction with the Director or Assistant Director a developmental program;
supervise qualified or unqualified workers caring for the group of children;
liaise with parents;
ensure a safe environment is provided;
_nsure that records are maintained and are up to date concerning each child in their care;
develop, implement and evaluate daily routines;
be responsible to the Director or Assistant Director for the assessment of students on placement;
ensure the policies of the Centre or Service are adhered to;
be aware of and comply with all relevant regulations.
15.1.3(c) Progression through the relevant salary sub-divisions shall be dependent upon the advancement of skills attained via in-service training in areas such as health and safety, first aid, Regulations and Licensing requirements, knowledge of, and participation in, accreditation.

15.1.4 Child Care Worker Level 4

15.1.4(a) This is a qualified employee who is qualified in accordance with the Children's Services Centres Regulations 1998;

and

15.1.4(b) in addition to the duties of a Child Care Worker Level 3, performs the duties of a Child Care Worker Level 4, which would include the following:

carrying out the work of an Assistant director;
supervising qualified and unqualified workers;
planning and coordinating in-service training for the centre or service;
planning and implementing special programmes such as integrating children with disabilities or children of a non-English speaking background;
assist the Director in the performance of any duty of a Director;
assumes the responsibilities and duties of the Director, in the Director's absence, where such absence does not exceed two complete consecutive working days.

15.1.5 Director

15.1.5(a) This is an employee who is a person entrusted with the control or superintendence of a day child care centre notwithstanding that he or she may be accountable to another person who does not devote his or her whole time to the management of the centre.

15.1.5(b) Provided that a person appointed to the position of Director of a day child care centre shall be either:

15.1.5(b)(i) A person holding the Diploma in Arts (Child Care Studies);

15.1.5(b)(ii) A person holding the Associate Diploma in Arts (Child Care); or

15.1.5(b)(iii) A person holding the Associate Diploma of Social Science (Child Care Studies)

15.1.5(b)(iv) A person possessing such experience, or holding such qualifications deemed by the employer to be appropriate to the position;

and

15.1.5(c) Whose duties would include the following:

recruit staff in consultation with the management of a centre;
day to day accounts and handle clerical matters;
ensure that the centre or services adheres to all relevant regulations;
formulate and evaluate annual budgets with relevant authorities;
supervise the implementation of educational and/or developmental programmes for young children;
ensure that submissions for funding to the relevant authorities are made and monies received;
ensure that Government guidelines on access to centres or services are adhered to;
liaise with management committees or proprietors as appropriate.

ANNEXURE 6

Table 2: Proposed Children's Services (Victoria) Award 1998 Classification Structure ("VIC2") and

Comparison with Metal, Engineering and Associated Industries Award 1998 ("A9") relativities

Wage Group	Classification title	Minimum training requirement	Wage relativity to C10 after full minimum rate and broadbanding adjustments	Classification Title	Minimum Training Requirement
C14	Engineering/Production Employee - level 1	Up to 38 hours induction training	78%	N/A	N/A
C13	Engineering/Production Employee - level II	In-house training	82%	N/A	N/A
C12	Engineering/Production Employee - level III	Engineering Production Certificate I or equivalent	87.4%	Childcare Employee Level 1 Support Worker Level 1	Up to 3 month experience in the industry
C11	Engineering/Production Employee - level IV	Engineering Production Certificate II or equivalent	92.4%	Childcare Employee Level 2 Support Worker Level 2	After 3 months or AQF Certificate II or enrolled in AQF Cert III Or equivalent
C10	Engineering Tradesperson - Level 1 Production Systems Employee	Trade Certificate or Engineering Production Certificate III or equivalent.	100%	Childcare Employee Level 3 Support Worker Level 3	AQF Certificate III and/or higher duties. Or equivalent
C9	Engineering Technician - level 1 Engineering Tradesperson - level II	3 appropriate modules in addition to C10 or 3 modules towards National Diploma or National Advanced Diploma or equivalent.	105%	Childcare Employee Level 3 Support Worker Level 3	CC3 after 12 months and with satisfactory evaluation.
C8	Engineering Technician - level II Engineering Tradesperson - Special Class level 1	Higher Engineering Tradesperson or 3 appropriate modules in addition to C9 or 6 modules towards National Diploma or National Advanced Diploma or equivalent.	110%	Childcare Employee Level 3 Support Worker Level 3	CC3 after 2 years in the industry and with satisfactory evaluation.
C7	Engineering technician - level III Engineering tradesperson - special class level II	AQF Level 4 National Certificate 9 modules towards National Diploma or National Advanced Diploma 3 appropriate modules in addition to C8 or equivalent	115%	N/A	N/A
C6	Engineering technician - level IV Advanced engineering tradesperson - level 1	12 modules towards National Diploma or National Advanced Diploma or equivalent	125%	Childcare Employee Level 4	AQF Cert III and or AQF Cert IV and/or Enrolled in AQF Diploma and/or responsible for programming for individual child or small group. Or equivalent
C5	Engineering technician - level V Advanced engineering tradesperson - level II	AQF 5 - National Diploma Or 15 modules towards National Advanced Diploma or equivalent	130%	Early Years Development Worker Level 1	AQF National Diploma and/or Responsible for programming for a group. Or equivalent.
C4	Engineering associate - level 1	22 Modules towards National Advanced Diploma or equivalent	135%	Early Years Development Worker Level 1	CC5 after 12 months.
C3	Engineering associate - level II	Associate diploma or formal equivalent	145%	Early Years Development Worker Level 2	AQF Diploma and supervision of employees up to CC4 level.

C 2(a)	Leading technical officer Principal engineering supervisor/trainer/co-coordinator	7 modules in addition to National Advanced Diploma AQF 6 National Advanced Diploma - with 15 modules minimum in supervision/training Or equivalent	150%	Early Years Development Worker Level 3	AQF Diploma and Graduate Certificate or Advanced Diploma and/or supervision of employees of CC5 classification. Or equivalent.
C2(b)	Principal technical officer	15 modules in addition to national Advanced Diploma or equivalent	160%	Assistant Director	Appointed under Licensing Requirements. Degree and/or Advanced Diploma and/or Diploma. Or equivalent.
C1	Professional engineer Professional scientist	Degree	180% - 210%	Director Level 1 (Up to 25 Places) Director Level (26 - 44 Places)	Appointed under Licensing Requirements Degree and/or Advanced Diploma and/or Diploma Or equivalent
		Degree		Director Level 3 (45 - 60 Places) Director Level 4 (61 + Places)	Appointed under Licensing Requirements Degree and/or Advanced Diploma and/or Diploma plus Graduate Certificate Or equivalent

ANNEXURE 7

Victorian Children's Services (Victoria) Award 1998		**ALHMWU claim**		**% Relativity**		**ACT Child Care Claim**		
Classification	**Rate**[1] ***(CCCAV)***	**Classification**	**Rate**	**LHMU Claim**	**1990** **ACT/NT**	**Classification**	**Rate**	**% $**
Child Care Worker Level 1 (a)	$455.60 ***($460.56)***	Childcare Employee Level 1 Support Worker Level 1	$489.65 ***$34.05*** ***7.5%***	87.4	80.0	Childcare Employee Level 1 Support Worker Level 1	$470.10	82 Entry Lev
Child Care Worker Level 1 (b)	$471.00 ***($481.46)***	Childcare Employee Level 2 Support Worker Level 2	$508.80 ***$37.80*** ***8.03%***	92.4 94.0 97.0	- - -	Child Care Worker Level 2 Support Worker Level 1	$491.50 $504.35 $514.75	86 480.00
Child Care Worker Level 1 (c)	$476.10		$517.37 ***$41.27*** ***8.67%*** $529.98 ***$53.88*** ***11.32%***					
Child Care Worker Level 2 (a) (b) (c)	$477.70 ***($487.98)*** $487.90 ***($503.50)*** $498.20	Childcare Employee Level 3 Support Worker Level 3	$542.20 ***$64.50*** ***13.5%*** $563.26 ***$75.36***	100.0 105.0 110.0	85.0 - -	Early Childhood Educator Level 1 Support Worker Level 3	$525.20 $549.05 $566.90	**CERT III** 87 485.00 92 505.00

			15.45% $584.10 ***$85.90*** ***17.24%***					
		Child Care Employee Level 4	$625.20 ***$127.00*** ***25.49%*** $646.70 ***$148.50*** ***29.8%***	120.0 125.0	- 98.0	Early Childhood Educator Level 2	$608.65 $627.50	
Child Care Worker Level 3 subdiv. 1	$537.40 ***($567.78)***	Early Years Development Worker Level 1 (Diploma)	$667.56 ***$130.16*** ***24.22%*** $688.42 ***$141.72*** ***25.9%*** ***$134.42*** ***24.26%***	130.0 135.0	100.0 110.0	Early Childhood Educator Level 3	$648.40 $671.20	**DIPLOMA** 100 542.00 108 570.00 111 585.00
Child Care Worker Level 3 subdiv. 2	$546.70							
Child Care Worker Level 3 subdiv. 3	$554.00 ***($585.96)***							
Child Care Worker Level 3 subdiv. 4	$561.30	Early Years Development Worker Level 2 (advanced Diploma) Degree	$709.30 ***$148.00*** ***26.37%*** $730.15 ***$161.65*** ***28.44%*** $751.00 ***$178.80*** ***31.25%***	140.0 145.0 150.0	117.0 - -	Team Leader Level 1	$710.90 $733.80	**DEGREE** 114 595.00 116 600.00 120 623.60
Child Care Worker Level 3 subdiv. 5	$568.50 ***($593.56)***							
Child Care Worker Level 3 subdiv. 6	$572.20							
Child Care Worker Level 3 subdiv. 7	$583.20 ***($598.50)***	Early Years Development Worker Level 3 (equivalent to subdivisions 6-9) (Degree)	$771.85 ***$188.65*** ***32.35%*** ***$180.45*** ***30.51%*** ***$170.75*** ***28.41%***	155.0	-	Team Leader Level 2	$733.80 $754.66	
Child Care Worker Level 3 subdiv. 8	$591.40							
Child Care Worker Level 3 subdiv. 9	$601.10 ***($618.26)***							
Child Care Worker Level 4	$611.70	Assistant Director	$792.70 ***$181.00*** ***29.6%*** $813.90	160.0 165.0	- -	Assistant Director	$771.50 $796.38	122.5 633.00

			$202.20 ***33.06%***					
Director Up to 25 children Level (a)	$723.20	Director Level 1 - Up to 25 Places	$876.15 ***$138.75*** ***18.82%***	180.0	145.0	Director Level 1	$855.00 $879.80	
Level (b)	$737.40							150 748.80
26 to 44 children Level (a)	$752.20	Director Level 2 - 26-44 Places	$897.00 ***$123.30*** ***15.9%***	185.0	157.0			+30% (Exem 155 767.66 160 788.52
Level (b)	$773.70							
45 or more children Level (a)	$790.90	Director Level 3 - 45-60 Places	$1001.30 ***$193.70*** ***24.0%***	210.0	165.0	Director Level 2	$980.10 $1005.00	
Level (b)	$807.60	Director Level 4 - 61+ Places	$1022.18 ***$214.58*** ***26.6%***	215.0	-			

Appearances:

S. Bellino with *L. Stubbs* and *V. Ilias* for the Australian Liquor, Hospitality and Miscellaneous Workers Union (now the Liquor, Hospitality and Miscellaneous Union).

K. Wilson (of counsel) and *C. Gamack* for Communities at Work.

D. Morphett (of counsel) for the Australian Federation of Childcare Associations, the Confederation of ACT Industry, the ACT Children's Services Association, Southside Community Services, Communities at Work Incorporated and the Victorian Private Child Care Association.

A. Allars for the Confederation of A.C.T. Industry.

L. Moloney and *N. Taylor* (of counsel) for the Australian Childcare Centres Association and the Child Care Centres Association of Victoria.

R. Waite for the Victorian Children's Services Association.

D. Ploenges and *D. Amesbury* for the Kindergarten Parents of Victoria.

Hearing details:

Before Commissioner Deegan:

2002.

Canberra:

19 November.

2003.

Canberra:

26 February.

29 April.

6 August.

By video link between Canberra, Sydney and Brisbane:

2 September.

Before Vice President Ross, Senior Deputy President Marsh and Commissioner Deegan:

2003.

Melbourne:

28 August.

4 December.

Canberra:

18 and 19 December.

Before Vice President Ross, Senior Deputy President Marsh (in absentia) and Commissioner Deegan (in absentia):

2004.

By video link between Melbourne, Sydney and Canberra:

5 February.

Before Vice President Ross, Senior Deputy President Marsh and Commissioner Deegan:

2004.

Melbourne:

11 and 12 May.

By video link between Sydney, Melbourne and Canberra:

24 June.

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1 Rates effective 10 June 2003

1 Transcript, 4 December 2003 at PN49.

2 Print J4316, 14 September 1990 per Ludeke J, Marsh DP and Laing C.

3 AW789529 Print Q0444.

4 LHMU5 (LHMU's written submissions in the ACT) at Attachment A3 (The definition cited relates to centre-based care, we note that there are slight differences in respect of the other streams).

5 Exhibit EACT2 (witness statement of Ms Dau) at paragraph 12.

6 Transcript, 18 December 2003 at PN1522.

7 Transcript, 18 December 2003 at PN1523.

8 Transcript, 18 December 2003 at PN1531.

9 Exhibit EACT2 at paragraph 29.

10 Transcript, 18 December 2003 at PN1551.

11 Exhibit LHMU9 (LHMU's closing submissions) at paragraph 146 and 147.

12 Exhibit LHMU9 at paragraph 145.

13 Exhibit JE1.

14 (1989) 27 IR 196 at 199.

15 AW777456CRA Print S1825, 14 December 1999 per Deegan C.

16 ACT Employer submissions, Exhibit JE1 at paragraph 47.

17 (1989) 27 IR 196 at 199.

18 A director managing a centre of up to 25 children is entitled to $742.20 per week under the award (see AW772675 PR948625). If the LHMU's claim was granted the new minimum award rate would be $1010.20 (see Table 7 in this decision). A difference of $268 per week.

19 A director managing a centre with over 60 licensed places is currently entitled to $809.90 (see AW772675 PR948625). The new minimum award rate under the LHMU's proposal is $1206.60 (see Table 7 in this decision). A difference of $396 per week.

20 Especially Exhibit UVIC12 (Ms Hilsen's witness statement) at paragraphs 10-15 and 18.

21 See transcript, 11 May 2004 at PN 2750.

22 Transcript, 12 May 2004 at PNs 3077, 3079, 3085-3086.

23 When questioned about whether she had brought any financial records to support her assertions Ms Mrocki said: *"No, I didn't bring them because they are not your business"*, transcript, 12 May 2004 at PNs 3387-3388. Mr Roncon described the sale of his two centres to Peppercorn as profitable, transcript, 12 May 2004 at PNs 3314-3316.

24 Exhibit LHMU6 (LHMU's written submissions in Victoria) at Attachment Vic 2.

25 In this context the LHMU refers to the evidence of Ms Walker at paragraphs 35-39 of Exhibit UVIC7 (her witness statement) and in transcript, 11 May 2004 at PNs 2696-2707; Ms Muir at paragraph 27 of Exhibit UVIC8 (her witness statement); Ms Hobson at paragraph 37 of Exhibit UACT9 (her witness statement) and Ms Johnston at paragraph 7 of Exhibit UACT15 (her witness statement).

26 Print L1448, 28 January 1994 per Maher DP.

27 Exhibit L2 (the Associations' final written submissions) at paragraphs 11.2 and 11.3.

28 Exhibit EVIC 4.

29 PR933309, 23 June 2003 per Giudice J, Marsh SDP and Smith C.

30 Print J4316, 14 September 1990 per Ludeke J, Marsh DP, and Laing C.

31 C0173CRA Print G0220.

32 C0148CRN Print K8095.

33 Print J4316 at p.4.

34 Print J4316 at p.5.

35 Print J4316 at pp 5 and 6.

36 Print J4316 at p.11.

37 Print Q4851, 13 August 1998 per Deegan C at p.13.

38 Print Q4851 at pp 2 and 5.

39 See AW772250 Prints R5726, R5976, S6470, PR904636, PR905599, PR918082, PR932040 and PR946752.

40 See IRCV D92/0260, 18 June 1992.

41 IRCV D92/0260 at p.7.

42 IRCV D92/0260 at pp 9-10.

43 C0772 Print P1906.

44 Print Q7661, *Paid Rates Review decision*, 20 October 1998 per Giudice J, Marsh SDP, MacBean SDP, Smith C and Larkin C at Schedule A.

45 Print S4572, 4 May 2000 per Hingley C.

46 Print R8709, 2 September 1999 per Hingley C.

47 AW811556 PR910776.

48 PR933309.

49 LHMU8 (LHMU's written submissions in Victoria) at paragraph 35.

50 LHMU8.

51 Section 3(d)(ii) of the *Workplace Relations Act 1996*.

52 Print H9100, (1989) 30 IR 81.

53 Print H8200, 25 May 1989 per Maddern J at p.6.

54 Print H8200 at p.7.

55 Print H9100 at p.12

56 See Print Q7661 at p.16.

57 Print Q7661.

58 Print Q7661 at pp 15-16.

59 Print J7400, 16 April 1991 per Maddern J, Keogh DP, Hancock DP, Connell C and Oldmeadow C.

60 For example in the *May 2000 Safety Net Review - Wages decision*, Print PR002002 at paragraph 157.

61 *Transport Workers Union of Australia v Qantas Airways Ltd*, Print G6238, 7 January 1987 per Leary C.

62 *Re PKIU Work Value case*, Print G9406, 1 October 1987 per Maddern P, Munro J and Leary C.

63 PR002002 at paragraph 157.

64 Print R9120, 14 September 1999 per Ross VP.

65 C0024, Print F9905.

66 *September 1994 Safety Net Adjustments and Review decision*, Print L5300.

67 *April 1997 Safety Net Review - Wages decision*, Print P1997.

68 *April 1998 Safety Net Review - Wages decision*, Print Q1998.

69 *April 1999 Safety Net Review - Wages decision*, Print R1999.

70 *May 2000 Safety Net Review - Wages decision*, Print S5000.

71 *May 2001 Safety Net Review - Wages decision*, PR002001.

72 *May 2002 Safety Net Review - Wages decision*, PR002002.

73 *May 2003 Safety Net Review - Wages decision*, PR002003.

74 *May 2004 Safety Net Review - Wages decision*, PR002004.

75 See Print Q4851.

76 See Mis 283/98 N Print Q1020, 19 May 1998 per Munro J.

77 Exhibit UACT 19c (attachment 4 to Exhibit UACT 19, witness statement of Ms Brunskill).

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104 Exhibit UACT7; Transcript, 18 December 2003 at PNs 232-381.

105 Exhibit UACT17; Transcript, 18 December 2003 at PNs 1224-1315.

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108 Exhibit UACT9; Transcript, 18 December 2003 at PNs 449-585.

109 Exhibit UACT15; Transcript, 18 December 2003 at PNs 1111-1162.

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115 Exhibit UACT5.

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136 2002 Census of Child Care Services (available at www.facs.gov.au/childcare/census2002 as at 11 January 2005).

137 2002 Census at p.5.

138 2002 Census at p.8.

139 2002 Census at pp 8-9 and p.15.

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141 2002 Census, derived from Table 3 on p.21.

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144 Exhibit EVIC 4; Transcript, 12 May 2004 at PNs 3026-3267.

145 Exhibit UVIC 10.

146 Exhibit UVIC 10 at p.6.

147 Transcript, 12 May 2004 at PNs 3191-3912.

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149 See the evidence of Ms Elton in transcript, 18 December 2003 at PNs 302 and 306.

150 Exhibit EACT3 at paragraph 9.

151 Exhibit EACT2 at paragraph 12a.

152 Exhibit EACT2 at paragraph 12b.

153 Exhibit EACT2 at paragraphs 13 and 14.

154 Exhibit EACT2 at paragraphs 15 and 16.

155 Exhibit EACT2 at paragraph 17.

156 See the evidence of Ms Elton in transcript, 18 December 2003 at PN 305; and Ms Stefek in transcript, 18 December 2003 at PNs 798-799.

157 See Ms Henderson in transcript, 18 December 2003 at PNs 644-646.

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159 Transcript, 11 May 2004 at PNs 2572 - 2575.

160 Exhibit UVIC2 at paragraph 17.

161 Transcript, 11 May 2004 at PN 2327.

162 Exhibit EVIC7 at paragraph 20.

163 Exhibit EVIC7 at paragraph 21.

164 Exhibit EVIC7 at paragraph 23.

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166 Source: Tables 4.2.3 and 5A.2.3 from the 1996/1997 Census of Child Care Services and Tables 34 and 35 from the 2002 Census.

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169 Exhibit UACT17 at paragraph 9.

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2 Exhibit UACT9 at paragraph 7.

3 See Exhibit UACT2 (witness statement of Ms Hynes) at paragraph 8; and the evidence of Ms Maiden, transcript, 18 December 2003 at PN 1622.

4 See Exhibit UACT3 (witness statement of Ms Sharrock) at paragraph 6; and Exhibit UACT7 (witness statement of Ms Elton) at paragraph 13.

5 Exhibit UACT15 at paragraphs 6-7.

6 Exhibit UACT15 at paragraph 11.

7 Exhibit UACT12 at paragraphs 13 and 15-19.

8 Exhibit UACT5 at paragraph 11.

9 Exhibit UACT17 at paragraph 4. Also see Exhibit UACT13 (witness statement of Ms Bukvic) at paragraphs 10-14 and 17; and Exhibit UACT9 (witness statement of Ms Hobson) at paragraph 8.

10 Exhibit UACT4 at paragraphs 11 and 12.

11 See Exhibit UACT8 (Ms George) at paragraphs 22-24; Exhibit UACT11 (Ms Stefek) at paragraph 24; Exhibit UACT16 (Ms Marshall) at paragraphs 11, 12 and 17; Exhibit UACT17 (Ms Fernandez) at paragraphs 14-17; Exhibit UACT14 (Ms Stubbs) at paragraph 34; Exhibit UACT18 (Ms Deacon) at paragraph 40; Exhibit EACT2 (Ms Dau) at paragraphs 24 and 25; evidence of Ms Maiden in transcript, 18 December 2003 at PN 1622; and evidence of Ms Crisp in transcript, 19 December 2003 at PN 1723.

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13 Exhibit UVIC14 (the Think Tank Report) at p. 19.

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19 Exhibit UACT17 at paragraph 22.

20 Exhibit UACT9 at paragraphs 34-36.

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23 Transcript, 18 December 2003 at PNs 1522-1523. Also see Ms Maiden's evidence, Exhibit EACT 3 at paragraph 18, and transcript, 18 December 2003 at PN1657.

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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Re Request from the Minister for Employment and Industrial Relations — 28 March 2008

Award Modernisation (AM 2008/5, 7 and 13-24)

[2009] AIRCFB 345

Giudice J, President, Watson Vice President, Watson, Harrison and Acton

SDPP, Smith C

3 April 2009

Awards — Award modernisation — Variation of certain standard clauses to reflect variations to Minister's request — Transitional provisions in modern awards to be dealt with separately — Publication of modern awards to apply to stage 2 industries and occupations — Publication of amendments to two of priority modern awards — Publication supported wage system schedule for employees with a disability, school-based apprentices schedule, as well as further exposure draft of national training wage schedule — Consideration of whether redundancy provisions applicable in a particular industry constitute an industry-specific redundancy scheme — Consideration of whether there should be separate modern awards, or separate provision, for indigenous organisations to be dealt with separately.

Pursuant to s 576C of the *Workplace Relations Act 1996* (Cth) the Minister made an award modernisation request on 28 March 2008. The Minister varied the request on 16 June and 18 December 2008. Following an initial statement and consultation, the Full Bench dealing with award modernisation published a decision in which, inter alia, it determined the industries and occupation to be the subject of the priority modern awards, and set an indicative timetable for the award modernisation process ((2008) 175 IR 120).

The Full Bench subsequently determined the industries and occupations to be dealt with in each of stages 2, 3 and 4 of the award modernisation process, and published a more detailed timetable to apply to each of those stages ((2008) 177 IR 5).

The Full Bench subsequently published exposure drafts of the priority modern awards, expressed certain views on the coverage provisions to be included in modern awards, and adopted proposed model award clauses dealing with a range of matters ((2008) 177 IR 8). Subsequently, on 19 December 2008, the Full Bench published 17 modern awards to apply in the priority industries and occupation ((2008) 177 IR 364).

On 23 January 2009 the Full Bench published a statement dealing with the modern awards to apply to the stage 2 industries and occupations, accompanied by exposure drafts of the proposed awards ((2009) 180 IR 124). That statement also dealt with a number of issues of general importance to award modernisation.

This decision deals with the modern awards to apply in the stage 2 industries and occupations, as well as the issues of general importance dealt with in a preliminary manner in the statement of 23 January 2009.

Held: (1) There were three areas where the 18 December 2008 amendment to the Minister's request potentially affected modern awards, namely, award coverage, award flexibility clauses and annual leave. The Full Bench varied the standard award coverage clause and the model award flexibility clause in order to comply with the Minister's request as varied. It was determined that there was no need to vary any annual leave clause within the modern awards already made to take account of the variation to the Minister's request.

(2) The Full Bench noted that the Parliament clearly intended to permit the Commission to include transitional provisions in modern awards to cushion the impact of changes in wages and other conditions. It decided to program a separate proceeding to deal with transitional provisions for the priority and stage 2 awards and any matters of principle relating to transitional provisions, and a timetable for consultation on those matters was set. A further process for dealing with transitional provisions in stage 3 and 4 awards will be announced later in the year.

(3) The Full Bench published the supported wage system schedule to be included in most modern awards (attachment B to the decision). This schedule should not apply to certain awards where there were safety considerations or due to the nature of the work covered by the award, and the schedule would not be included, for example, in the on-site building and construction award or in most awards in the health and welfare services group.

(4) The Full Bench published the school-based apprentices schedule to be included in every award in which an apprenticeship was possible (attachment C to the decision).

(5) The Full Bench published a further exposure draft of the national training wage schedule to be included in modern awards (attachment D to the decision), and announced that it would consider submissions on the further draft in stage 4 of the award modernisation process.

(6) The Full Bench published 27 modern awards to apply in the stage 2 industries and occupations.

(7) It was noted that progress on rationalisation of allowances had not been rapid, and that there were national industries such as manufacturing and building and construction which still had far too many detailed allowance provisions. Further rationalisation of these allowances will have to await the foreshadowed award reviews.

(8) Properly fixed minimum rates should be shown separately in modern awards. Minimum classification rates should be shown separately from all-purpose allowances, rather than adopting an approach of rolled-up wage rates.

(9) The Full Bench was not prepared, as a matter of principle, to determine whether or to what extent exemption clauses should be included in modern awards. The Full Bench decided whether to include exemption provisions in particular modern awards by examination of the exemption provisions in the pre-reform awards and Notional Agreements Preserving State Awards (NAPSAs) which the modern award would replace.

(10) In relation to the modern awards published in each of the industry groupings within stage 2, the Full Bench noted and set out reasoning for some of the more significant changes made from the exposure drafts of the awards.

(11) In the context of the *Pastoral Award 2010* the Full Bench rejected a submission that it was not prohibited from prescribing ordinary hours in excess of 38 hours per week. The Commission was bound not to exclude the National Employment Standards (NES), which provided that maximum standard hours of work for full-time employees are 38 per week.

(12) In the context of the *Building, Engineering and Civil Construction Industry General On-site Award 2010*, the Full Bench considered whether the current building industry redundancy scheme constituted an *industry specific redundancy scheme* as referred to in the Minister's request, for the purpose of including that scheme in the modern award to apply in place of the redundancy entitlement included within the NES. The redundancy scheme in the building industry could be properly described as an industry specific redundancy scheme. An industry specific redundancy scheme was also included in the *Mobile Crane Hiring Award 2010*.

(13) The Full Bench also published a varied Clerks Modern Award, and a varied Manufacturing Modern Award, being variations to two of the priority modern awards already published. In relation to the latter modern award, the coverage clause was varied to include additional manufacturing sectors and to expressly exclude certain manufacturing sectors covered by other modern awards.

(14) The Full Bench noted a submission seeking a separate comprehensive modern award for indigenous community health organisations, and that there had been previous requests to make specific provision for indigenous organisations. The Full Bench appointed another Commissioner to investigate the merits of such requests, with the Full Bench to give further consideration to the issue during stage 4 of the award modernisation process.

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Employment and Workplace Relations — Award Modernisation, Re Minister for (2008) 177 IR 5.

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Cur adv vult

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The Commission

List of Main Abbreviations

In this decision the following abbreviations are used:

ACCI	The Australian Chamber of Commerce and Industry
ACG Association	The Australian Cotton Ginning Association
Act	*Workplace Relations Act 1996*
ACTU	Australian Council of Trade Unions
AiGroup	Australian Industry Group and the Engineering Employers Association, South Australia
ANF	Australian Nursing Federation
ASU	Australian Municipal, Administrative, Clerical and Services Union
AWU	Australian Workers' Union, The

BECC Modern Award	*Building, Engineering and Civil Construction Industry General On-site Award 2010*
Building and Construction Award	*National Building and Construction Industry Award 2000*
CCC Award 2003	*Contract Call Centre Industry Award 2003*
CCC Modern Award	*Contract Call Centres Award 2010*
CCNT	Chamber of Commerce Northern Territory
CEPU	Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia
CFMEU	Construction, Forestry, Mining and Energy Union
CICA	Crane Industry Council of Australia
CIT Modern Award	*Transport (Cash in Transit) Award 2010*
Clerks Modern Award	*Clerks—Private Sector Award 2010*
Electrical Contracting Award	*National Electrical, Electronic and Communications Contracting Industry Award 1998*
Engine Drivers' (ACT) Award	*Engine Drivers' and Firemen's (ACT) Award 2000*
Federal Waste Award	*Transport Workers' (Refuse, Recycling and Waste Management) Award 2001*
Furnishing Award	*Furnishing Industry National Award 2003*
General Retail Modern Award	*General Retail Industry Award 2010*
Graphic Arts Award	*Graphic Arts Award 2000*
joint amendments	Master Plumbers' and Mechanical Services Association of Australia, National Fire Industry Association and CEPU joint submissions of 19 March 2009.
Manufacturing Modern Award	*Manufacturing and Associated Industries and Occupations Award 2010*
MBA	Master Builders Australia
Metal and Engineering On-site Award	*National Metal and Engineering On-site Construction Industry Award 2002*
Minister	Minister for Employment and Workplace Relations
Mixed Industries Award	*Transport Workers (Mixed Industries) Award 2002*
Mobile Crane Hiring Award	*Mobile Crane Hiring Award 2002*
NACCHO	Aboriginal & Torres Strait Islanders Community Controlled Health Organisations
NAPSA	Notional Agreements Preserving State Awards
NECA	National Electrical and Communications Association
NES	National Employment Standards
NFF	National Farmers Federation
NSW NAPSA	*Transport Industry (State) Award* NSW
Pastoral Industry Award	*Pastoral Industry Award 1998*
RT&D Modern Award	*Road Transport and Distribution Award 2010*

RT Long Distance Modern Award	*Road Transport (Long Distance Operations) Award 2010*
TCR Case	*Termination, Change and Redundancy Case*
TWU	Transport Workers' Union
TWU Award 1998	*Transport Workers Award 1998*

Introduction

1 This decision deals with a number of matters in the award modernisation process. It should be read in conjunction with earlier statements and decisions. The Commission's statement of 23 January 2009 is particularly relevant.[1] In that statement the Commission drew attention to a number of issues of general importance to award modernisation and published exposure drafts of a number of awards for Stage 2. Since that time the Commission has had the benefit of a large number of written and oral submissions on the issues of general importance and on the Stage 2 exposure drafts. This decision sets out the Commission's conclusions. We have decided to make a further 27 modern awards which we publish with this decision. We also publish the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Modern Award)[2] and the *Clerks—Private Sector Award 2010* (Clerks Modern Award)[3] as varied by this decision. Variations in relation to those two awards are published separately.

2 This decision is divided into the following sections:

- general issues
- Stage 2 modern awards
- other matters

General Issues

3 In this section of the decision we deal with a number of matters of general importance in the award modernisation process:

- amendments to the award modernisation request
- transitional provisions
- other variations to modern awards
- supported wage system, school-based apprentices and national training wage provisions

Amendments to the award modernisation request

4 The award modernisation process is governed by the provisions in Pt 10A of the *Workplace Relations Act 1996* (Cth) (the Act) and a request made by the Minister for Employment and Workplace Relations (the Minister) pursuant to s 576C(4) of the Act. The Minister's request was made on 28 March 2008 and subsequently amended on 16 June and 18 December 2008.[4] We shall refer to the request as amended as the consolidated request. The priority modern awards were made by the Commission on 19 December 2008. Because of the timing

1 *Re Request from Minister for Employment and Workplace Relations ([2009] AIRCFB 50)* [2009] AIRCFB 50; (2009) 180 IR 124.

2 MA000010.

3 MA000002.

4 *Re Request from Minister for Employment and Workplace Relations—28 March 2008 ([2008] AIRCFB 1000)* (2008) 177 IR 364.

there was no opportunity to take the amendment to the request made on 18 December 2008 into account before publishing the priority modern awards. In its statement of 23 January 2009 the Commission sought views on how the amendment might affect the terms of modern awards. It appears that there are three main areas in which the 18 December amendment might have effect. Those areas are: coverage, award flexibility and annual leave. We deal first with coverage.

5 As a result of the 18 December amendment cl.2(e) of the consolidated request now requires that "a modern award should be expressed so as not to bind an employer who is bound by an enterprise award or a Notional Agreement Preserving a State Award (NAPSA) derived from a state enterprise award." Each of the modern awards made so far contains the following sentence in the coverage clause:

> The award does not cover an employer bound by an enterprise award with respect to any employee who is covered by the enterprise award.

6 It appears to us that the most direct way to ensure compliance with cl.2(e) is to amend the sentence in the coverage clause so that it reads:

> The award does not cover an employer bound by an enterprise award or an enterprise NAPSA with respect to any employee who is covered by the enterprise award or NAPSA.

7 The Australian Council of Trade Unions (ACTU) proposed that we should postpone action on this issue. It suggested that at the present time NAPSAs derived from State enterprise awards, like other NAPSAs, will cease to operate on 31 December 2009. Since modern awards do not commence to operate until 1 January 2010, a provision in the terms we have set out would only operate if the legislature extends the operation of NAPSAs beyond 31 December this year. While this is true, it seems to us that the terms of the request limit the Commission's discretion in the matter. We should ensure, to the extent we can, that we comply with the request. We have included the amended provision in each of the Stage 2 modern awards. We have also included a definition of enterprise NAPSA in the definition clause. We decide later on the process for varying the modern awards which were made on 19 December 2008.

8 We deal next with award flexibility. The Commission published a model flexibility clause in its decision of 20 June 2008.[5] The Commission changed the model clause in some respects in its decision of 19 December 2008. None of those changes was responsive to the 18 December amendment to the consolidated request. Clause 11AA of the consolidated request, which was included by the 18 December amendment, deals with the Commission's obligation in relation to a flexibility term in a modern award. It reads:

> 11AA The Commission must ensure that the flexibility term:
>
> - identifies the terms of the modern award that may be varied by an individual flexibility arrangement;
> - requires that the employee and the employer genuinely agree to an individual flexibility arrangement;
> - requires the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall;

5 *Re Request from Minister for Employment and Industrial Relations — 28 March 2008* (2008) 175 IR 120.

- sets out how any flexibility arrangement may be terminated;
- requires the employer to ensure that any individual flexibility arrangement be in writing and signed:
  (a) in all cases — by the employee and the employer;
  (b) if the employee is under 18 — by the parent or guardian of the employee;
- requires the employer to ensure that a copy of the individual flexibility arrangement be given to the employee; and
- prohibits an individual flexibility arrangement agreed to by an employer and employee from requiring the approval or consent of another person, other than the consent of a parent or guardian where an employee is under 18.

9 It seems that there are only two requirements in cl.11AA which are not already accommodated in the model flexibility clause. The first is the requirement that any individual flexibility arrangement must result in the employee being better off overall. The second is the requirement that the flexibility clause prohibit an individual flexibility arrangement from requiring the approval or consent of a non-party, except in relation to minors. We deal with the better off overall requirement first.

10 The model award flexibility provision published by the Commission in its decision of 20 June 2008 was based on a test of no-disadvantage to the employee.[6] The relevant terms of the model clause are sub-clauses 3, 4 and 5(d). They read:

> 3. The agreement between the employer and the individual employee must:
> (a) be confined to a variation in the application of one or more of the terms listed in clause x.1; and
> (b) not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment.
> 4. For the purposes of clause 3(b) the agreement will be taken not to disadvantage the individual employee in relation to the individual employee's terms and conditions of employment if:
> (a) the agreement does not result, on balance, in a reduction in the overall terms and conditions of employment of the individual employee under this award and any applicable agreement made under the Act, as those instruments applied as at the date the agreement commences to operate; and
> (b) the agreement does not result in a reduction in the terms and conditions of employment of the individual employee under any other relevant laws of the Commonwealth or any relevant laws of a State or Territory.
> 5. The agreement between the employer and the individual employee must also:
> …
> (d) detail how the agreement does not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment; and
> …

11 To the extent that the model clause is based on the no-disadvantage test it is now inconsistent with the consolidated request and must be altered. Reference

6 175 IR 120 at [177]-[181] and [187].

to "no-disadvantage" in sub-clauses 3(b) and 5(d) will be replaced with references to "better off overall." The terms of sub-clause 4 deal with the application of the no-disadvantage test and will be deleted.

12 We deal now with the requirement that the flexibility clause prohibit an individual flexibility arrangement from requiring the approval or consent of a non-party, other than the consent of a parent or guardian where the employee is under 18. We think this requirement is best met by including a standard clause to that effect.

13 Some parties suggested that other changes should be made to the model flexibility clause to meet the new requirements of the consolidated request. For example the Australian Chamber of Commerce and Industry (ACCI) suggested that we should prescribe criteria by which it might be concluded that an agreement would result in an employee being better off overall. ACCI proposed the following:

> 7.4 For the purposes of clause 7.3(b) the agreement will be taken to result in the employee being better off overall in relation to his or her individual terms and conditions of employment if:
>
> (a) the agreement assists in meeting, reflects or responds to an employee request;
>
> (b) the agreement is mutually agreed to result in the employee being better off overall in relation to the individual employee's terms and conditions of employment;
>
> (c) the agreement does not result, on balance, in a reduction in the overall terms and conditions of employment of the individual employee under this award and any applicable agreement made under the Act, as those instruments applied as at the date the agreement commences to operate; and
>
> (d) the agreement does not result in a reduction in the terms and conditions of employment of the individual employee under any other relevant laws of the Commonwealth or any relevant laws of a State or Territory.

14 Proposed sub-clause (a) seems to accord a preference to an arrangement which relates to an employee request over an arrangement which relates to an employer request. Proposed sub-clause (b) introduces an element of subjectivity and it is inconsistent with proposed sub-clauses (c) and (d) which seem to be a reversion to the no-disadvantage test. We do not think that the proposal overall is consistent with the requirements of the consolidated request. Furthermore it is desirable to permit the model clause to operate for some time before contemplating any refinement of the better off overall criterion.

15 The model clause as amended reads:

> X. Award flexibility
>
> X.1 Notwithstanding any other provision of this award, an employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:
>
> (a) arrangements for when work is performed;
>
> (b) overtime rates;
>
> (c) penalty rates;
>
> (d) allowances; and

(e) leave loading.

X.2 The employer and the individual employee must have genuinely made the agreement without coercion or duress.

X.3 The agreement between the employer and the individual employee must:

(a) be confined to a variation in the application of one or more of the terms listed in clause X.1; and

(b) result in the employee being better off overall than the employee would have been if no individual flexibility agreement had been agreed to.

X.4 The agreement between the employer and the individual employee must also:

(a) be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;

(b) state each term of this award that the employer and the individual employee have agreed to vary;

(c) detail how the application of each term has been varied by agreement between the employer and the individual employee;

(d) detail how the agreement results in the individual employee being better off overall in relation to the individual employee's terms and conditions of employment; and

(e) state the date the agreement commences to operate.

X.5 The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.

X.6 Except as provided in X.4(a), the agreement must not require the approval or consent of a person other than the employer and the individual employee.

X.7 An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal.

X.8 The agreement may be terminated:

(a) by the employer or the individual employee giving four weeks' notice of termination, in writing, to the other party and the agreement ceasing to operate at the end of the notice period; or

(b) at any time, by written agreement between the employer and the individual employee.

X.9 The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.

16 We turn now to the annual leave issue. The National Employment Standards (NES) deal, among other things, with the manner in which annual leave is to be taken. They provide that leave is to be taken at a time which is agreed between the employer and the employee. Despite that provision, the consolidated request allows the Commission to make a modern award which, in some circumstances, permits an employer to compel an employee to take annual leave. The relevant provision is in cl.33 of the consolidated request. We set out the provision as it stands following the 18 December 2008 amendment:

33 The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be

> inconsistent with the NES. The Commission may include provisions dealing with these issues in a modern award. The NES allows, but does not require, modern awards to include terms that:
>
> …
>
> • require employees, or allow employees to be required, to take paid annual leave, but only if the requirement is reasonable;
>
> • …

17 Although the structure of the provision has altered, it is the last few words of the provision, "but only if the requirement is reasonable," which require attention. Some of the priority modern awards made on 19 December 2008 permit an employer to require an employee to take annual leave in specified circumstances. The circumstances are mainly of two kinds. The first kind deals with annual close down. The second kind deals with excessive accumulations of annual leave. A number of the exposure drafts for the Stage 2 modern awards also contain such provisions.

18 It was not suggested that any provision, either in the modern awards already made or in the exposure drafts, allowed an unreasonable requirement to take leave or should be altered as a result of the 18 December 2008 amendment. In particular it was not suggested that any of the provisions should be altered to include a general requirement for reasonableness in relation to the exercise of the rights given to employers. In the circumstances we have decided not to alter any of the existing modern award provisions and we have included similar provisions in a number of the Stage 2 modern awards.

Transitional provisions

19 In its 23 January 2009 statement the Commission sought proposals and submissions as to the manner in which transitional issues should be dealt with.[7] Most modern awards will contain terms which involve changes in minimum terms and conditions for many employees. That is because modern awards will replace a number, in some cases many, pre-reform awards and NAPSAs and establish a uniform safety net for employees and employers formerly covered by those pre-reform awards and NAPSAs. The effect of s 576T is that while modern awards must not include terms and conditions of employment that are determined by reference to State or Territory boundaries, a modern award may include such terms for an initial period of five years. It is no doubt the legislature's intention to permit the Commission to include transitional provisions in modern awards to cushion the impact of changes in wages and other conditions. In the case of employees such provisions might deal with any reductions in their terms and conditions. In the case of employers the focus might be on increases in costs.

20 The Act deals specifically with issues relating to the terms and conditions in modern awards which are determined by reference to State boundaries. The relevant statutory provision is s 576T of the Act. The section reads:

> 576T Terms that contain State-based differences
>
> (1) A modern award must not include terms and conditions of employment that:

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7 *Re Request from Minister for Employment and Workplace Relations ([2009] AIRCFB 50)* [2009] AIRCFB 50; (2009) 180 IR 124.

(a) are determined by reference to State or Territory boundaries; or

(b) do not have effect in each State and Territory.

(2) Despite subsection (1), a modern award may include terms and conditions of employment of the kind referred to in subsection (1) for a period of up to 5 years starting on the day on which the modern award commences.

(3) If, at the end of the period of 5 years starting on the day on which a modern award commences, the modern award includes terms and conditions of employment of the kind referred to in subsection (1), those terms and conditions of employment cease to have effect at the end of that period.

21 In its 19 December 2008 decision, the Commission included some transitional provisions in the priority modern awards but indicated that, in general, transitional provisions were better considered later.[8] The decision contains the following passage:

> [106] We have received many submissions and suggestions concerning the way in which modern awards should deal with the multitude of transitional issues which may arise in the establishment of a safety net based predominately on modern awards and the NES. Transitional provisions must be developed, that, in a practical way, take account of the intention of the consolidated request that modern awards not disadvantage employees or increase costs for employers. In the case of some conditions of employment we have decided to include a specific transitional provision in the priority awards. These conditions are redundancy pay, accident pay and district allowances in Western Australia and the Northern Territory. There are also a small number of transitional provisions of limited application. In general, however, we are convinced that, as many contended, transitional provisions are best dealt with after the terms of the priority awards have been published, if it is practical to do so. There are a number of reasons. The first and obvious reason is that it is difficult to know what the effect of the award will be until those affected have had an opportunity to consider the impact in detail. The second reason is that in many cases the effect of the award upon employees and employers is not uniform and depends upon the terms of the NAPSA or pre-reform award which applied previously. More debate will be needed as to how the differing situations of employers and employees are to be viewed and dealt with. In some cases an aggregate or overall approach may be the appropriate one. Finally, it follows that the representatives of employers and employees will be in a better position to assess the overall effect of the awards, taking potential gains and losses into account and will be in a position to give practical assistance to the Commission.
>
> [107] There is an additional consideration. It is desirable that transitional provisions, including supersession provisions, take account of the legislative scheme in which they will operate. For that reason it is our intention not to deal with transitional provisions until the legislation, including the foreshadowed transitional legislation, has been passed by the Parliament. At that time we shall be in a position to assess the overall economic impact and to give consideration to how transitional provisions are to be finalised for the remaining stages of the modernisation process. On current indications we would expect to address these matters towards the middle of 2009.

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8 *Re Request from Minister for Employment and Workplace Relations—28 March 2008 ([2008] AIRCFB 1000)* (2008) 177 IR 364.

22 As already indicated, in its 23 January 2009 statement the Commission sought views on how transitional provisions should be dealt with. Most parties which addressed the issue, and many did, suggested a process in which transitional provisions were addressed after the terms of the Stage 2 modern awards are known. There was some disagreement as to the precise timing.

23 As foreshadowed, we have decided to programme a separate proceeding to deal with transitional provisions. We are aware of the difficulties faced by parties, particularly parties with interests in a number of modern awards, in meeting the deadlines in the award modernisation program. We have sought to develop a process for dealing with transitional provisions which takes those deadlines into account. Nevertheless it is not practical to delay consideration of transitional provisions until much later in the year. For that reason we shall deal initially with transitional provisions for the modern awards made in the priority stage and in Stage 2. This will also provide an opportunity to address some matters of principle. Although consideration of transitional provisions for Stages 3 and 4 will be delayed until later in the year, with the benefit of a decision in relation to the earlier stages that consideration should be less complex than otherwise.

24 We shall provide for transitional issues relating to the priority and Stage 2 modern awards to be dealt with in a consultation process over the period from 29 May to 18 July. The consultations will be conducted mainly in writing, by email and on the internet. Parties' proposals and submissions must be filed by 29 May 2009. There will be an opportunity for parties to comment on each others' proposals and submissions. Any party wishing to take advantage of this opportunity must file any additional or reply submissions by 26 June 2009. The Commission will sit in the week of 13 July to hear any supplementary oral submissions. By providing two opportunities for written submissions the amount of time required in the week of 13 July will be minimised. While the main focus of this proceeding will be the transitional provisions to be included in the priority and Stage 2 awards, submissions relating to issues of general principle or other transitional matters will be welcome. A process for dealing with any transitional provisions to be included in Stage 3 and 4 awards will be announced later in the year.

25 There are two important matters of principle which deserve emphasis. First, we remain of the view, expressed by the Commission in its 19 December 2008 decision, that transitional provisions are better considered after the terms of modern awards are known. There are some cases in which it may be possible to deal with transitional provisions at the same time as the award is being made but these cases will be rare and likely to be limited to particular conditions. As the Commission indicated in its 19 December 2008 decision we shall also consider the overall economic impact of the move to modern awards. The actual cost impact will also be relevant. Secondly, we are concerned that there is a potential for transitional provisions in some awards to be overly-complicated. This is a danger in particular where the modern award is to replace a range of disparate conditions in pre-reform awards and NAPSAs. If transitional provisions are too complicated they will not serve the award modernisation objective and their implementation might be compromised. An approach is required which deals with the net effect of changes in conditions or perhaps which focuses on the main changes.

Other variations to modern awards

26 It is well recognised that modern awards are likely to require other variations before 1 January 2010. Changes will almost certainly be required to recognise changes in legislation. For example, some awards include references to specific provisions of the NES. Those references will have to be replaced with references to sections of the Fair Work Bill 2009. Wage rates may require updating. In some cases supported wage system, adult apprenticeship and national training wage provisions will need to be added to awards. These variations might be seen as a cleaning-up exercise. In large part they will be directed to the implementation of changes which are necessary because of legislation or changes which have already been decided upon in principle. They could be described as residual variations.

27 With the exception of transitional provisions, which we have dealt with separately, we have decided to defer consideration of residual variations until the final quarter of 2009. By that time most of the issues of principle will have been decided and most of the standard provisions will be settled. By leaving the residual variations until late in the process we also hope to minimise the number of occasions on which a particular modern award will require variation before the commencement date of 1 January 2010.

Supported wage system, school-based apprentices and national training wage provisions

28 With our 23 January 2009 statement we published three draft schedules. The draft schedules deal with the supported wage system for employees with a disability, school-based apprentices and the national training wage. We indicated in the statement that we wished to finalise our consideration of these provisions as part of Stage 2. We received numerous helpful proposals and submissions. We shall deal first with the supported wage system.

29 Apart from some relatively minor matters there was general agreement to the terms of the supported wage system draft schedule. The only issue worthy of comment relates to the parties' reluctance to take on the responsibility of notifying unions which are not party to an assessment of the fact that an assessment has been made and of their right to object. We shall provide for the notification to be the responsibility of the Industrial Registrar. In due course we would expect the reference to be amended to the General Manager of Fair Work Australia.

30 Some submissions suggested that the schedule should not be included in some awards because conditions in the industry covered by the award are not conducive to the employment of persons with a disability. This was the position taken by the Construction, Forestry, Mining and Energy Union (CFMEU) in relation to the construction industry. While the schedule should be included in most awards, we accept that there should be some limits based on safety considerations and the nature of the work the award covers. The schedule will not be included in a number of the Stage 2 awards, such as the main on-site building and construction award or in most of the awards in the health and welfare services group.

31 We deal next with the draft schedule for school-based apprentices. There was general agreement with the terms of the draft. The ACTU suggested that the operation of the schedule should be limited to the trades provided for in the modern award concerned. We agree in general with that approach. To put the matter beyond doubt we shall include a provision limiting the schedule to trades

covered by the award. The ACTU also pointed out that the schedule should specifically recognise the possibility of a three year apprenticeship. We shall include an appropriate clause. The schedule should be included in every award in which an apprenticeship is possible. It is desirable that other provisions in the body of the award should be deleted. This will ensure consistency of approach and make review and variation simpler.

32 We note that in the Queensland jurisdiction school-based apprentices can be paid a loading of 20% in place of award leave entitlements. The Queensland Department of Education, Training and the Arts proposed that a similar clause be included in the schedule. While we are not opposed to the suggestion it did not receive much support from other interested parties. We would be prepared to consider including such a provision when next the schedule is reviewed.

33 Many parties provided detailed submissions on the draft schedule for the national training wage. However, others indicated they needed more time to properly consider the draft. In the circumstances, we have decided to publish a further draft schedule. The further draft removes definitions which are not used in the schedule and simplifies others. It also recognises that there are full-time and part-time traineeships and, within those types, school-based and certain Australian Qualifications Framework Certificate Level IV traineeships. In addition it modernises provisions dealing with training and employment conditions in respect of traineeships. The further draft schedule provides that where its terms and conditions conflict with other terms and conditions in the award to which it is a schedule and which also deal with traineeships, the other terms and conditions prevail.

34 We shall consider submissions on the further draft schedule in Stage 4 of the award modernisation process. This should give parties sufficient time to consider the range of issues involved, including amendments needed to Appendix 1 which allocates certain traineeships to wage levels, whether default wage rates should be set for traineeships not included in Appendix 1, whether the schedule should automatically apply to training packages which replace those in Appendix 1 and how competency based training should be dealt with.

35 Parties making submissions on the national training wage draft schedule in Stage 4 should detail the specific amendments they consider need to be made and the reasons for such amendments.

Stage 2 Industries/Occupations

36 In this section of the decision we deal with the modern awards to be made in Stage 2. The industries and occupations to be dealt with in Stage 2 were identified in the Commission's statement of 3 September 2008.[9] Pre-drafting consultations were held towards the end of 2008 and a number of exposure drafts were published on 23 January this year. We now publish 27 Stage 2 modern awards. Before dealing with the awards on a more detailed basis it is appropriate to make some general observations.

37 The award modernisation process is to be carried out according to ss 576A(2) and 576B(2) of the Act. Section 576A(2) is as follows:

> (2) Modern awards:
>
> (a) must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and

9 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2008) 177 IR 5.

(b) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and

(c) must be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work; and

(d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and

(e) must result in a certain, stable and sustainable modern award system for Australia.

38 These characteristics of modern awards are to be achieved in the context of the further guidance provided by s 576B(2). That section requires the Commission to have regard to a number of specified factors in performing award modernisation functions. We shall not repeat those factors here. The Commission is also required to observe the objects in ss.1 and 2 of the consolidated request. Section 1 of the consolidated request repeats the terms of s 576A(2). Section 2 is as follows:

2. The creation of modern awards is not intended to:

(a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;

(b) result in high-income employees being covered by modern awards;

(c) disadvantage employees;

(d) increase costs for employers;

(e) result in the modification of enterprise awards or Notional Agreements Preserving State Awards (NAPSAs) that are derived from state enterprise awards. This does not preclude the creation of a modern award for an industry or occupation in which enterprise awards or NAPSAs that are derived from state enterprise awards operate. However a modern award should be expressed so as not to bind an employer who is bound by an enterprise award or a NAPSA derived from a state enterprise award in respect of an employee to whom the enterprise award or NAPSA applies.

39 This section deals with questions of award coverage of employees, disadvantage to employees, increased costs for employers and the exclusion of enterprise awards and NAPSAs from the process. Each of these matters has been treated as of central importance. We have avoided repetitive references to them, however, in dealing with individual modern awards. While issues relating to disadvantage for employees and increased employer cost have been dealt with in formulating the terms of the modern awards themselves, they will also be addressed in considering transitional provisions.

40 In the 23 January 2009 statement we referred to the large number of allowances in some industries and raised the possibility of rationalising them. Progress on this issue has not been rapid. While we have not included many

allowances which are either obsolete or for one reason or another inappropriate for inclusion in a safety net award, there are large national industries such as manufacturing and building and construction which still have far too many detailed allowance provisions. Despite our urging little has been achieved by consent in those industries. Regrettably further rationalisation will have to await the foreshadowed award reviews.

41 We refer also to piecework provisions generally. The terms of the NES require that modern awards should specify the base rate of pay and the full rate of pay which are to apply to pieceworkers. The base rate of pay is relevant to annual leave, personal/carer's leave, community service leave and redundancy pay. The full rate of pay is relevant to notice of termination and that part of the parental leave provisions which deals with transfer to a safe job. Since casual employees do not have any entitlement to annual leave under the NES, the issue only arises in relation to weekly employees who are pieceworkers and who therefore have a fixed number of hours of work per week. Debate on the question was extremely limited. We have decided to apply the definitions of base rate of pay and full rate of pay in the NES to pieceworkers as if they were not pieceworkers. Should this approach give rise to problems the matter can be reviewed in due course at the appropriate time.

42 Questions also arose concerning the types of exclusions which should be specified in modern awards. In many awards, for example, it was suggested that we should include a specific exclusion for local Government bodies. Suggestions were also made that we should exclude some operations conducted by State Governments. We do not consider it appropriate, as a general rule, to incorporate in awards exclusions which simply restate or define the statutory or Constitutional boundaries of the Commission's jurisdiction. We see no benefit in attempting to define the limits of the jurisdiction in relation to Government or quasi-Government bodies or corporations generally. To the contrary, we see dangers in that approach. There are differences as between the States. In Victoria, for example, there is a referral of power to the Commonwealth. Again, various Commonwealth statutory corporations may be in a different position to State Government corporations. The situation in the Territories differs from the situation in the States. There are always exceptions, of course, but we have decided that as a general rule modern awards should not exclude State, Territory or local Government corporations of any kind. The coverage of the award will be left to the operation of the legislation and the Constitution. In this way the full extent of the power granted to the Commission by the Parliament will be utilised.

43 Some parties, particularly in the building, metal and civil construction group of industries, proposed the inclusion in modern awards of rolled-up wage rates i.e. rates comprised of minimum wages and all-purpose allowances, such as industry allowances. In our statement of 23 January 2009[10] we decided against such an approach in relation to the draft *Electrical, Electronic and Communications Contracting Award 2010* despite the submissions of the National Electrical and Communications Association (NECA) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). It remains our view that minimum classification rates should be shown separately from all-purpose

10 *Re Request from Minister for Employment and Workplace Relations ([2009] AIRCFB 50)* [2009] AIRCFB 50; (2009) 180 IR 124 at [45].

allowances in modern awards. The combination of minimum classification rates and industry allowances would confuse minimum award payments of two different types, prescribed for different purposes. It is essential that properly fixed minimum classification rates are retained and shown separately in modern awards, in order to maintain consistent properly fixed minimum classification rates. The development and maintenance of properly fixed minimum rates have been important underpinning elements of the Commission's awards since August 1988.[11] A stable system of minimum wage relativities has developed throughout much of the award system over the last twenty years. A departure from those relativities would have the potential to destabilise minimum wage fixation and generate unsustainable claims. Because of that potential we are not prepared, given the limited debate that has occurred so far, to move away from the principle that minimum wages should be kept separate from allowances.

44 In a number of clerical and administrative awards questions arose concerning exemption rates. By exemption rates we mean the specification of a rate of pay above which an employee is not entitled to specified award provisions. Such provisions would typically include overtime but in many cases might include a range of other award entitlements as well. Some parties, the ACTU and the Australian Municipal, Administrative, Clerical and Services Union (ASU) in particular, expressed great concern about the inclusion of exemption provisions in modern awards and suggested that the Commission should, at least, severely limit their application.

45 The ACTU raised an issue of principle. It submitted that "neither the Act (nor the Fair Work Bill), the proposed NES nor the Request contemplate the inclusion of an exemption clause in modern awards that denies a class of employees, otherwise covered by the award, access to specific conditions contained in the award." It supported this submission by reference to statutory provisions for annualised salaries and for the exemption of high income earners from the modern award system. This submission was directed at the exemption provision in the Clerks Modern Award, which is not currently before us in that respect, and the exemption provisions in two of the Stage 2 exposure drafts.

46 Exemption provisions are not uncommon in some areas of federal and State award regulation, although the number of award entitlements they exclude varies. There are exemption provisions in a number of the priority modern awards. The detailed provisions of the Act and the consolidated request do not expressly prohibit exemption provisions. To the extent that the ACTU, supported by the ASU, has asked us to decide a question of principle we have concluded that we have neither the material nor the breadth of argument to do so at this stage. It is desirable, however, that we indicate the approach we have adopted.

47 In considering whether to include exemption provisions in modern awards, and where relevant the terms of the exemption, a number of matters have been considered. Those matters include the extent to which exemption provisions appear in pre-reform awards and NAPSAs which the modern award will replace, the level of the exemption rate in those instruments and the award entitlements which the various exemption provisions exclude. We have been conscious of the need to provide a safety net which as far as practical recognises existing arrangements. The provisions we have decided upon in each of the

11 *National Wage Case February 1988* (1988) 22 IR 461.

modern awards reflect our examination and assessment of a diverse range of award provisions in all of the relevant pre-reform awards and NAPSAs including those without exemption clauses. It should be clear that in this decision the Commission is not deciding any questions of principle relating to exemption provisions. Such questions must wait for another time.

48 Turning to another matter, the ACTU submitted that the Commission has so far taken a view of its power to supplement the terms of the NES which is too restrictive. It referred in particular to passages in the 19 December 2008 decision relating to concurrent parental leave, community service leave and public holidays. We adhere to those views. We think that we should give proper weight to the Parliament's decision to regulate minimum standards in relation to the matters covered by the NES. It cannot have been Parliament's intention that the Commission could make general provision for higher standards. We accept, however, that there may be room for argument about what constitutes supplementation in a particular case.

49 From time to time we refer in this decision to rates of pay in pre-reform awards and NAPSAs. Technically these references should be to Australian Pay and Classifications Scales and should be so regarded. We have adopted the language generally used by parties for simplicity and ease of reference.

Agriculture group

50 We have decided to make six modern awards to apply in what has been broadly identified as the agriculture group for the purposes of the award modernisation process. The awards are:

Pastoral Award 2010
Horticulture Award 2010
Cotton Ginning Award 2010
Nursery Award 2010
Silviculture Award 2010
Wool Storage, Sampling and Testing Award 2010

51 We have made a number of variations to the provisions of the exposure drafts. We shall deal with some of the more significant changes. It will be noted that we have dealt with piecework in a variety of contexts.

52 We have dealt with the effect of the NES upon pieceworkers' pay for leave and other purposes in the way discussed more generally above.

53 Our overall approach to coverage of the pastoral and horticultural awards is that they should be confined to agricultural production within the "farm gate." Other questions of coverage also arose. It will be seen that we have excluded aquaculture and viticulture for wine production from coverage pending further consideration of those industries in the following stages of the award modernisation process as indicated in our 23 January 2009 statement.[12]

Pastoral Award 2010

54 Following the submissions of the parties filed in response to the exposure draft and the consultations on 26 and 27 February 2009, we have been persuaded to vary the terms of the exposure draft significantly. The ordinary hours of work and overtime provisions of the *Pastoral Award 2010*, with the exception of those applying to pig breeding and raising, will now reflect the

12 180 IR 124 at [23].

existing provisions of the *Pastoral Industry Award 1998* (Pastoral Industry Award).[13] We have also altered the classifications, classification structure and pay scales to more closely align the pay levels for different classifications of work with the pay levels in the Pastoral Industry Award. However, we have retained the extensive classification descriptors for various industry settings.

55 A number of other changes have been made to the terms of the exposure draft. These include the deletion of the casual conversion provision and an alteration to the superannuation provision to better reflect the pattern of existing regulation and an amendment to the public holidays provision to allow the NES substitution arrangements to operate. There are some other technical or consequential changes.

56 We have also made some changes to the coverage of the award from that contained in the exposure draft. These changes are designed to more clearly define the coverage of the *Pastoral Award 2010* and the *Horticulture Award 2010*. We now deal with questions related to standard hours of work for shearing classifications.

57 A submission was received from the Western Australian Shearing Contractors Association Inc. and the Western Australian Farmers Industrial Association contending, among other things, that the Commission is not obliged to include a 38 hour week in all awards and that there is no legislative prohibition on awards prescribing ordinary hours of work in excess of 38. This submission was made primarily in relation to shearers and crutchers but was said to be equally relevant to other classifications such as shed hands, pressers and cooks. We think this submission is misconceived. Maximum hours of work are not fixed by the Commission but by the NES. Section 12(1) of the NES provides that maximum standard hours of work for full time employees are 38 per week. In making modern awards the Commission is bound by cl.30 of the consolidated request not to exclude the NES or any of their provisions. While cl.33 of the consolidated request permits averaging of hours of work over a specified period there is no other indication in the consolidated request or in the Act permitting the Commission to provide for standard, or "ordinary" hours, in excess of 38. It is therefore the Commission's duty to ensure that modern award provisions dealing with the pay and other conditions of casual employees, such as shearers, are consistent with the standard hours requirement.

58 For these reasons the relevant award provisions will be based on a 38 hour week. As to the method of implementation, we have decided not to adopt the Australian Workers' Union's (AWU) suggestion.[14] Instead, we have increased the relevant piecework rates to reflect a reduction of ordinary hours from 40 to 38 with respect to shearing, crutching, wool pressing and related classifications broadly along the lines suggested by the National Farmers Federation (NFF).

59 To avoid any doubt we emphasise the fact that any necessary transitional provisions relating to hours of work and other matters will be considered in the proceeding to deal with transitional provisions which we have provided for earlier in this decision. This may be particularly relevant for employers in Western Australia.

Horticulture Award 2010

60 We have revised the ordinary hours and overtime provisions of the exposure

13 AP792378CRV.

14 at [29].

draft. The provisions in the *Horticulture Award 2010* are generally in line with the relevant provisions of the *Horticultural Industry (AWU) Award 2000*,[15] as it applies to what are referred to as the Schedule A respondents to that award. We have also included more extensive provisions for pieceworkers and included piecework provisions we consider are consistent with the requirements of the consolidated request. A number of other provisions have been altered to make the interaction with the NES clearer.

Cotton Ginning Award 2010

61 The Australian Cotton Ginning Association (ACG Association) pointed out in response to the exposure draft that the majority of cotton gins are situated in New South Wales and that the ordinary hours provisions of the *Cotton Ginneries, Cotton Oil and Other Seed Oil Manufacturing employees Award — State 2003 (Qld)*,[16] which provide for a three shift roster system, are complex and rarely used. Accordingly, we have deleted those provisions from the draft and based the ordinary hours, overtime, and shift work provisions in the *Cotton Ginning Award 2010* on those in the *Cotton Ginning &C. Employees (State) Award (NSW)*.[17]

62 We have deleted the prohibition on casuals being employed beyond 16 weeks or the season and some related clauses, on the basis that a prohibition of that kind is not appropriate in a modern award. We have, however, included a provision for casual conversion in the form which is found in a number of modern awards. We have also deleted that part of the superannuation clause which deals with contributions during absence from work on the basis that it is not a feature of the State award applying in New South Wales.

63 We have adopted, with some modification, the classification descriptors proposed by the ACG Association to create a new classification structure. We have also included the pay levels and rates proposed by the ACG Association.

Nursery Award 2010

64 We have made some modifications to the coverage provisions in the exposure draft and to the related definition of associated nursery products in order to reduce the possibility of overlap with the retail industry. To that end we have also provided for an exclusion in relation to the operation of the *General Retail Industry Award 2010 (General Retail Modern Award)*.[18] An adjustment to the entry level pay rates has also been made. In addition two provisions which were in the exposure draft have not been included because they are not features of the existing award and NAPSA coverage. The most significant of those is the casual conversion clause. The other related to hours for part-time employees.

Silviculture Award 2010

65 There were few changes suggested to the exposure draft. We have revised the pieceworkers provision and the resulting clause differs in some respects from

15 AP784867CRV.
16 AN140086.
17 AN120160.
18 MA000004.

the piecework provisions of the only industrial instrument specifically regulating the industry of silviculture, the *Silviculture and Afforestation Award (Tas)*.[19]

Wool Storage, Sampling and Testing Award 2010

66 We published an exposure draft of an award entitled the *Skin, Hide and Wool Stores Award 2010*. We have altered the title in the final modern award. It is now called the *Wool Storage, Sampling and Testing Award 2010*. Some alterations have been made to the coverage, definitions and classifications. Most of these changes have been made in response to a submission made by the Australian Wool Testing Authority. The pieceworkers provision has been amended slightly to make the operation of the NES in relation to pieceworkers clearer.

Building, metal and civil construction group

67 We have decided to make five modern awards in the building, metal and civil construction group of industries and occupations. They are:

Building, Engineering and Civil Construction Industry General On-site Award 2010
Electrical, Electronic and Communications Contracting Industry Award 2010
Plumbing and Fire Sprinklers Contracting Award 2010
Joinery and Building Trades Award 2010
Mobile Crane Hiring Industry Award 2010

Building, Engineering and Civil Construction Industry General On-site Award 2010

68 Notwithstanding the continued pursuit, by some interested parties in the post-exposure draft consultations, of separate modern awards for the general building and construction, engineering construction and civil construction sectors, we have decided to proceed with a single award covering each of the sectors in respect of on-site work. We have renamed the award the *Building, Engineering and Civil Construction Industry General On-site Award 2010* (BECC Modern Award). In our view, the award terms and conditions currently applying and the nature of the work favour a single modern award, albeit with some limited differential conditions between the sectors.

69 The final award incorporates some alterations in the definitions clause, including minor changes to adult apprentice and air-conditioning work definitions. We have also added a definition of continuous service, reflecting the award definition in the *National Building and Construction Industry Award 2000* (Building and Construction Award),[20] to apply in respect of redundancy arrangements and the living away from home-distant work provision. We have removed foreperson/supervisor and general foreperson/supervisor from the definitions clause, placing that definition with special conditions for foremen and supervisors in the metal and engineering construction sector within Part 7

19 AN170096.

20 AP790741CRV.

— Industry Specific Provisions. These special provisions reflect Appendix B of the *National Metal and Engineering On-site Construction Industry Award 2002* (Metal and Engineering On-site Award).[21]

70 The coverage clause has been amended in a number of respects. An exclusion has been included in respect of the *Quarrying Award 2010*. We have included "maintenance, in respect to buildings" to the definition of general building and construction but confined to maintenance undertaken by employees of employers covered by the award. We have also added an exclusion to the definition of metal and engineering construction in respect of incidental metal trades work performed by an employee of an employer not engaged substantially in metal and engineering construction. This is consistent with the exclusion in cl.6.3.1 of the *Metal and Engineering On-site Award*. The coverage clause may be further amended to take account of other modern awards resulting from Stages 3 and 4.

71 We have retained, at this stage, within both the coverage clause and the classification structure appendix, references to the pre-mixed concrete, asphalt and bitumen industries, pending consideration of those industries in Stage 3. These references can be reviewed and if necessary altered or deleted in light of the outcome of that consideration.

72 We have altered the means by which access to the award can be provided by an employer. This is reflected in a change to the standard clause dealing with access to the award and the NES. The change recognises the peculiar physical environment of on-site construction.

73 We have added a dispute resolution procedure training leave provision, on the basis that it is a prevailing industry standard.[22]

74 We have deleted the reference to notice under the NES which appeared in cl.11.2 of the exposure draft from the award because the NES expressly exclude building and construction industry daily hire employees from them.

75 We have decided to include the current industry award redundancy provisions in the modern award as an industry-specific redundancy scheme.

76 Section 141 of the Fair Work Bill 2009 permits the inclusion of such a scheme in a modern award. The consolidated request deals with industry specific redundancy schemes in the following way:

> Termination and Redundancy
>
> 36. The NES excludes employees from redundancy entitlements where their award contains an "industry specific redundancy scheme". An "industry specific redundancy scheme" in a modern award will operate in place of the NES entitlement in these circumstances.
> 37. An "industry specific redundancy scheme" is one identified as such in a modern award.
> 38. The Commission may include an "industry specific redundancy scheme" in a modern award.
> 39. In determining whether particular redundancy arrangements constitute an "industry specific redundancy scheme", the Commission may have regard to the following factors:

21 AP816828CRV.

22 *Re Request from Minister for Employment and Workplace Relations—28 March 2008 ([2008] AIRCFB 1000)* (2008) 177 IR 364 at [46].

- when considered in totality, whether the scheme is no less beneficial to employees in that industry than the redundancy provisions of the NES; and
- whether the scheme is an established feature of the relevant industry.

77 We are satisfied that the redundancy scheme in the building industry award redundancy provisions is an established feature of the building and construction industry. Having regard to the arbitral history and general application of the current redundancy prescriptions within awards in the building and construction industry the scheme is properly described as an industry specific redundancy scheme.

78 The redundancy benefits in the NES had their origin in the *Termination, Change and Redundancy Case*, (*TCR Case*)[23] modified in the *Redundancy Case 2004*.[24] However, award provisions for redundancy in the building and construction industry took a different path, reflecting the particular circumstances of employment in that industry. That arbitral history commenced with a decision in 1989 of a Full Bench,[25] which applied the TCR Case with modifications to suit the employment terms and conditions applying in the industry. Special provision was included for the accrual of redundancy benefits because of the high labour mobility in the industry. Before an order could be issued, however, some employer parties to the relevant awards obtained an order nisi for prohibition in the High Court. The Full Bench orders, and the High Court proceedings, were overtaken by a 1990 decision[26] which determined what was to become the final form of the redundancy provisions for the building and construction industry. That decision was based on an in-principle agreement between organisations respondent to the awards. Two appeals against this decision were dismissed.[27]

79 In June 1998, another Full Bench of the Commission considered the redundancy scheme within building and construction industry awards, inserting the provisions in the *Building and Construction Industry (Northern Territory) Award 1996*,[28] against the opposition of employers. The Full Bench stated:

> We are satisfied that the variation of the Award in the terms set out in Exhibit B13 would bring that award into conformity with comparable federal awards that apply generally in the building and construction industry throughout Australia. Those provisions, and …the corresponding State awards, reflect the outcome of a relatively tortuous process of arbitration and negotiation. That process resulted in the development of what was described by several Full Benches as "one general statement of benefits to apply to redundancy in the building and construction industry…"

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23 *Amalgamated Metals, Foundry and Shipwrights Union v Broken Hill Pty Co Ltd, Whyalla (Termination, Change and Redundancy Case)* (1984) 8 IR 34.

24 *Redundancy Case* (2004) 129 IR 155.

25 *Building Industry Inquiry Case*, Print H7465, 22 March 1989.

26 *Stuart Bros Pty Ltd v Building Workers Industrial Union of Australia* (unreported, AIRC, J4870, Palmer C, 10 October 1990).

27 *National Building and Construction Industry Award 1990 (2)* (unreported, AIRC, Keogh SDP, Watson DP and Smith C, Print K4831, 1 October 1992) and *National Building and Construction Industry Award 1990 (2)* (unreported, AIRC, Keogh DP, Watson DP and Smith C, Print K2799, 5 May 1992).

28 AP812941CRN.

> We are satisfied that it is appropriate, and consistent with the merits of the case, that the award should be varied to reflect what we accept to be effectively a national minimum award or safety net standard condition applicable to the building and construction industry.[29]

80 Whilst, as noted in our 23 January 2009 statement, the current award prescription does not reflect the standard for larger employers arising from the *Redundancy Case 2004* decision,[30] when regard is had to the slightly more beneficial scale of benefits in earlier years, the broader application of the benefit and the pattern of limited periods of continuous service within the industry to which the building and construction redundancy provisions were directed we are also satisfied that when considered in totality, the scheme is no less beneficial to employees in the industry than the redundancy provisions of the NES. In relation to the pattern of service in the industry, we have relied on to the data supplied by Incolink, BERT and CoINVEST contained in the CFMEU submission of 11 March 2009.

81 The Master Builders Australia (MBA) and some other employer bodies contended that the building industry arrangements cannot constitute an industry specific redundancy scheme. It was pointed out that the application of the scheme extends beyond redundancy as defined by the NES. Some suggested that the definition of redundancy in the current award provisions should be modified to reflect the NES. We do not accept these submissions. There are several reasons. First, in determining whether a particular scheme is an "industry specific redundancy scheme" the Commission can have regard to the factors mentioned in the passage we have set out above. Having regard to those factors, we are satisfied that they apply to the scheme. Secondly the definition of redundancy in the NES does not apply to an industry specific scheme. Clause 64, which is in Subdivision C—Limits on scope of this Division - of the NES, provides that Subdivision B does not apply to an employee covered by a modern award which includes an industry-specific redundancy scheme. While Subdivision B sets out the circumstances in which the NES entitlement to redundancy pay arises and to the amount of the entitlement that sub-division does not apply to an industry-specific redundancy scheme. It follows that an industry-specific redundancy scheme can deviate from the NES redundancy prescription in relation to both the circumstances in which the benefits arise and the amount of the benefits. Thirdly, the ability to include an industry-specific redundancy scheme in a modern award implies that the scheme as a whole can be included. A modified scheme might not meet the criterion, found in the consolidated request, that the scheme be a feature of the industry. Finally, the building industry scheme clearly falls within the definition of industry specific redundancy scheme in s.12 of the Fair Work Bill 2009, the relevant part of s.12 reads:

> *industry-specific redundancy scheme* means redundancy or termination payment arrangements in a modern award that are described in the award as an industry-specific redundancy scheme.

82 The modern award has clarified provisions permitting some other payments to be offset against payments required under the industry specific redundancy

29 *Oakajee Constructors Mid West Iron and Steel Project Certified Agreement 1997* (unreported, AIRC (FB), Print Q1465, 4 June 1998).

30 PR062004, 8 June 2004.

scheme. Payments made to an employee from a redundancy pay fund, where such payments are made, or contributions on behalf of an employee to such a fund where no payments are made upon termination can be offset.

83 We have added additional content to the apprentices clause, drawing on current award prescription and applied the payments arrangements from the Metal and Engineering On-site Award in respect of adult apprentices. We have, however, added a provision to make it clear that notice of termination and redundancy provisions do not apply to apprentices, subject to the apprenticeship period being counted as service in the event that the employment is continued at the completion of an apprenticeship or resumed within six months of completion.

84 We have not included the trainee provisions for civil traineeship and the more general traineeship provision in cl.39 of the Building and Construction Award. The application of the National Training Wage Schedule will be applied with any necessary modification to maintain the current award provisions in respect of wages and additional payments for trainees.

85 We have not included the supported wage system schedule in the award. There is no supported wage provision in current awards and no party has sought to alter that position.

86 The rate for Level 8 in the minimum rates clause has been corrected and a note has been added to the clause, drawing attention to the applicability of specified allowances, with a reference to the clause setting out the method for calculating hourly rates. That provision has been amended to refer to the title of relevant allowances to assist users of the award.

87 The piece rate provision in the exposure draft has been amended to specify the base and full rates of pay for an employee working under a piece rate agreement for the purposes of the NES.

88 We have deleted cl.20.6 from the exposure draft. That provision was based on rates payable under the *Building and Construction Award* but applied only to forepersons in Tasmania and bridge and wharf carpenters in New South Wales. Transitional arrangements may be required in respect to these State based payments. Otherwise, we have retained the allowances provisions in the exposure draft. They reflect current award provisions. We have referred above to our preference for a rationalisation of such allowances, as expressed at [20] and [21] of our statement of 23 January 2009. Notwithstanding, efforts by the MBA to address this issue, most recently in its eleventh submission (dated March 2009), we have not received sufficient material and input from interested parties to allow us to attempt to rationalise allowances at this stage. Such an exercise should, however, be given some priority in any future review of the modern award.

89 We have amended the exposure draft provisions dealing with the fares and travel patterns allowance, inclement weather and annual leave to reflect the additional current terms of the *Building and Construction Award*.

90 We have not included the administrative process for programming rostered days off for any particular year in the modern award. The relevant clause deals with the scheduling of rostered days off.

91 The Queensland CEPU referred to a number of provisions in the Queensland NAPSA[31] which have not been incorporated into the exposure draft. Such matters will be addressed in the context of transitional provisions.

Electrical, Electronic and Communications Contracting Industry Award 2010

92 The Australian Industry Group (AiGroup) raised concerns about the possible overlap of the *Electrical, Electronic and Communications Contracting Industry Award 2010* with the *Manufacturing Modern Award*. We think the distinction between contractors and employers in the manufacturing sector is reasonably clear. Nonetheless, we have included in cl.4.2 of the modern award an additional exclusion derived from the electrical contracting NAPSA in New South Wales. The exclusion reads:

> employers operating a business, the primary purpose of which is the manufacture and/or vending of plant and equipment in respect of those parts or divisions of the business which predominantly engage in the manufacture and/or vending of plant and equipment or the installation, assembly, refurbishment and maintenance of that plant and equipment or their employees engaged in that part or division.[32]

93 We have also altered the coverage clause to make it clear that manufacturing or vendors of plant or equipment in high or low tension power stations are not included. This corrects an inadvertent alteration to the meaning of that exclusion in the exposure draft.

94 In our 23 January 2009 statement we explained the modifications we had made to the wage rates proposed jointly by the CEPU and NECA in the pre-exposure draft consultations.[33] The modifications were principally directed to separating the minimum classification rate and all-purpose allowances from the rolled-up rate proposed and deducting the special payments on the basis that they constituted the residual amounts arising from the conversion of paid rates to minimum rates in June 1998. We invited the CEPU and NECA to address us on the appropriateness of the level of the minimum classification rates and the level of and rationale for the inclusion in a safety net award of the various allowances in the total weekly rates they proposed by reference to State NAPSA rates.[34]

95 In a joint submission dated 6 March 2009, the CEPU and the NECA pointed out that the minimum safety rates in the exposure draft were low when compared with the *National Electrical, Electronic and Communications Contracting Industry Award 1998* (Electrical Contracting Award)[35] and NAPSAs in each State. They contended that such an outcome was inconsistent with s.2(c) of the consolidated request. That paragraph states that the creation of modern awards is not intended to disadvantage employees. They proposed that the differential between the current Federal award and NAPSA all-purpose rate and that arising from the exposure draft minimum classification rate and all-purpose allowances should be remedied by increasing the industry allowance

31 *Building Construction Industry Award — State 2003 (Qld)*, AN140043.

32 *Electrical, Electronic and Communications Contracting Industry (State) Award (NSW)*, AN120191.

33 [2009] AIRCFB 50; (2009) 180 IR 124 at [46]-[48].

34 *Re Request from Minister for Employment and Workplace Relations ([2009] AIRCFB 50)* [2009] AIRCFB 50; (2009) 180 IR 124 at [49].

35 AP791396CRV.

from $23.60 to $80.00 or 3.7% and 12.55% respectively of the standard rate. They justify that proposition on the basis of incorporation of additional factors, separately accounted for in some NAPSAs.

96 We have given careful consideration to this proposition but cannot accede to it. The increase in the industry allowance proposed by the CEPU and NECA appears to offset at lower classification levels and exceed at higher classification levels the special payment we decided not to include in the exposure draft for the reasons given in our 23 January 2009 statement and referred to above. The CEPU and NECA proposal seeks to restore the payments. We remain of the view that a residual payment arising from the conversion of the Electrical Contacting Award from a paid rates award to a minimum rates award should have been absorbed into minimum wage increases and is not a legitimate element of properly fixed rates and allowances within a modern minimum rates award. Notwithstanding our invitation to the CEPU and the NECA to explain the basis of NAPSA rates no explanation was provided. We cannot be confident that the NAPSA rates do not have a similar foundation.

97 In addition, on the information before us, we are not satisfied that an increase in the industry allowance to the level proposed by the CEPU and the NECA is justified by the additional factors they seek to incorporate within it. The level of the allowance proposed by the CEPU and NECA would increase the weekly all-purpose rates (inclusive of all-purpose allowances) at the higher classifications in the *Electrical Contracting Award* and all NAPSAs other than the New South Wales NAPSA. Such an outcome could not be justified by reference to s.2(c) of the consolidated request, particularly when regard is had to s.2(d).

98 We understand that the rates proposed in the exposure draft, and maintained in the modern award, may lead to disadvantage for some employees. Any disadvantage can be addressed in the transitional provisions proceeding.

99 We have not included the additional factors proposed by the CEPU and NECA as matters to which the industry allowance is directed in the modern award published. If there is a basis for their inclusion and for an appropriate increase in the industry allowance, an application can be made to vary the modern award at some future time.

100 An issue arose concerning adult apprentices. The Queensland CEPU and Electrical Contractors' Association proposed that adult apprenticeship provisions reflective of those in the Queensland NAPSA should be adopted. The CEPU support that course. The NECA oppose it. We have included provisions in the modern award but they will operate only in Queensland. The provisions will cease operation on 31 December 2014. This transitional arrangement will accommodate current arrangements in Queensland, and what we understand to be the current practice in other States, whereby trades assistants are invited to undertake an adult apprenticeship by employers and normally retain their trades assistant rate until the normal apprentice rate overtakes that rate. While the transitional arrangement is operating the parties should attempt to reach agreement on appropriate adult apprenticeship provisions to be included in the award.

Plumbing and Fire Sprinklers Award 2010

101 The *Plumbing and Fire Sprinklers Award 2010* is both an industry and occupational award. It will operate as an occupational award in industries where

modern awards do not contain relevant classifications. Rather than refer to specific awards, we have excluded from coverage employers bound by a modern industry award that contains plumbing and fire sprinkler fitting classifications. This is consistent with the approach taken in the *Clerks Modern Award*.

102 We have decided that the current award arrangements for redundancy constitute an industry specific redundancy scheme and have included them in the modern award. They are very similar to the building and construction industry arrangements which we have already dealt with. Our reasons for including them in the award are similar to the reasons given above in relation to the BECC Modern Award.

103 At the request of the major parties, we have identified allowances referred to in other major clauses in order by title as well as clause number to assist users of the award. We have amended the provisions in respect of protective clothing and equipment and lost or damaged tools. This accommodates current arrangements for plumbers and sprinkler pipe fitters by giving employers the option of providing such equipment or reimbursing employees for the expenses associated with their provision. The special allowance, in cl.21.1(v) has been reformulated as a dollar amount, and will not be varied. This reflects the current award provision.

104 Allowances for confined space, swing scaffold, wet work, dirty work and ladder work, which operate only in South Australia, have not been included in the award and will be further considered in the context of transitional arrangements, as will a number of other State-specific provisions identified in the joint amendments of 19 March 2009, filed by the Master Plumbers' and Mechanical Services Association of Australia, National Fire Industry Association and CEPU (joint amendments).

105 We have adopted a number of changes to the exposure draft proposed in the joint amendments:

- the addition of a definition of a sprinkler fitter's assistant;
- the limitation of daily hire to plumbing and mechanical service classifications, consistent with current award provisions;
- some minor amendment to the types of employment provision in the exposure draft;
- the provision of separate adult apprenticeship provisions for plumbing and sprinkler fitter apprentices;
- changes to the daily hire employees lost time loading allowance provision, which provides greater clarity for users of the award;
- the general rationalisation of allowances, including the fares and travelling time provision; and
- rationalisation of the hours provision.

106 We think that the rationalisation of the allowance provisions, the fares and travelling time provision and the hours provision suggested in the joint amendments provide a better structure. We have also added a number of differential conditions as between plumbing and mechanical employees and sprinkler fitting employees identified in the joint amendments, most notably in the penalty rates and overtime provisions.

107 We have not acceded to the proposal in the joint amendments to alter the

casual loading in the exposure draft from 25% to 20%. We see no reason not to implement the level which will apply generally to casual employment. We have deleted the whole of cl.17.4 — employment as an adult apprentice.

108 The centre for employment identified in the fares and travelling time provision has been amended to reflect the national operation of the modern award. We have retained the 50 kilometres radius in light of current award provisions.

109 We have amended the exposure draft provisions dealing with inclement weather and annual leave to reflect the additional current terms of the *Plumbing Trades (Southern States) Construction Award 1999*.[36]

110 We have added a provision for annual close down to the annual leave clause, again a current award provision.

111 The two highest minimum rates have been altered to achieve consistency with minimum rates at the same skill level in the *Manufacturing Modern Award* and the BECC Modern Award.

Joinery and Building Trades Award 2010

112 The *Joinery and Building Trades Award 2010* is both an industry and an occupational award. The industries covered by the award are joinery work, shopfitting, prefabricated building, stonemasonry and glazing contracting work. The occupations covered by the award are a carver, letter cutter, carpenter, joiner, signwriter, painter, stonemason and plasterer. An employer employing an employee in those occupations will be covered by the award unless the employer is covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This provision in the coverage clause is designed to overcome the overlap the exposure draft had with other modern awards and has necessitated amendments to or deletion of some of the definitions in the exposure draft. The award specifically excludes those covered by the BECC Modern Award. Pre-cast concrete manufacturing and associated occupations have not been included in the award pending the consideration of the cement and concrete products industry in Stage 3.

113 The terms and conditions in the award largely reflect those in the *National Joinery and Building Trades Products Award 2002*.[37] However, the casual conversion clause reflects that in other modern awards. The apprentice provisions have been simplified and adult apprentice wage rates consistent with those in other modern awards have been included. The apprentice provisions recognise there are both 3 and 4 year apprenticeships covered by the award. Where practical allowances have been simplified. The adjustment of allowances reflects industry practice.

Mobile Crane Hiring Award 2010

114 We have published a separate award for the mobile crane hiring industry — the *Mobile Crane Hiring Award 2010*. We accept there is a need for a separate award for the industry reflecting the existence of a distinct industry servicing a range of other industries. The modern award is based on the drafts submitted by

36 AP792355CRV.

37 AP817265CRV.

the AiGroup/CICA and the CFMEU, which were broadly consistent in their content and largely reflect the terms and conditions of the current *Mobile Crane Hiring Award 2002* (Mobile Crane Hiring Award).[38]

115 We have utilised the dispute resolution clause which appears in modern awards generally in place of the clause from the Mobile Crane Hiring Award, and we have inserted the casual conversion provision generally included in modern awards, instead of the current restrictive provision which prohibits a casual engagement extending beyond four weeks.

116 We have included the redundancy provision of the industry Mobile Crane Hiring Award as a specific redundancy scheme, replacing the redundancy entitlements under the NES. The redundancy scheme incorporated in the current award is an established feature of the industry and is no less beneficial to employees in the industry than the redundancy provisions of the NES, when considered in its totality. We have placed the definition of continuous service proposed by the CFMEU within the industry specific redundancy scheme to which it relates.

117 Both the CFMEU and AiGroup/CICA have proposed a new qualification based classification structure in place of the 22 different classifications, encompassing mobile cranes (with differential rates in New South Wales), operators and mobile elevated work platforms within the current structure. The new structures proposed seek to align the classification structure with current licensing requirements and incorporate equipment changes. We have decided to incorporate a new structure, directed to these ends, in the modern award.

118 The CFMEU and AiGroup/CICA propose slightly different structures in relation to the groupings of employee functions and minimum rates. In relation to the groupings the major differences arise in respect of the level at which slew crane operators are placed and the splitting by the AiGroup/CICA of the rigger function into three levels based on the licenses required. We have adopted the position of the AiGroup/CICA in both respects. Their proposal in relation to slew crane operators better reflects the current award groupings and minimum wage levels. The recognition of licence requirements for riggers results in a more rational structure.

119 With respect to minimum wage rates both the CFMEU and AiGroup/CICA identify a key rate, although not at the same classification level, and calculate other minimum rates as percentages of the key rate. The result, in both cases, is to apply old relativities associated with the incorporation of skill-based classification structures into awards in the late 1980s. This approach removes the effect of flat dollar and/or differential percentage safety net adjustments of minimum wage rates since that time. AiGroup/CICA proposes a minimum rate which incorporates an industry allowance, whereas the CFMEU proposes a separate minimum classification rate, augmented by a separate industry allowance.

120 We have applied our general approach of separately identifying minimum classification rates and industry allowances. We have established the first classification (MCE1) at 100% of the tradesperson rate having regard to the current rates in the Mobile Crane Hiring Award, which include an industry allowance, and the fact that the dogger and mobile crane operator are classified at that level in the building industry award.

38 AP816842.

121 We have not adopted the approach of applying percentage relativities to a key rate, as proposed by both the CFMEU and AiGroup/CICA. Instead, we have included in the new classification structure minimum rates which reflect those in the Manufacturing Modern Award, at each equivalent classification level, by reference to the percentage relativities to the key classification rate, proposed by the CFMEU and/or the AiGroup/CICA. In doing so, we have had regard to the current rates in the Mobile Crane Hiring Award.

122 Having established a set of minimum classification rates, we have then derived a separate industry allowance which is the difference between the minimum rate for the new MCE1 level and the rate in the Mobile Crane Hiring Award for the classifications of dogger, mobile elevated platform less than 17 metres and the operator of a mobile crane of less than 20 tonnes, which currently incorporate an industry allowance. The difference, 5.7% of the standard weekly rate, is the industry allowance. The industry allowance will apply at all levels.

123 The new classification structure results in minimum classification rates and an industry allowance which, in aggregate, are below those proposed by the CFMEU and the AiGroup/CICA and below those in the Mobile Crane Hiring Award at the higher classification levels. It may be necessary to address any potential impact on employees through transitional provisions, depending on the practical effect of the new rates.

124 We have not included a definition of crane crew. The definition related to a classification, operating only in Victoria, in the Mobile Crane Hiring Award. Given the new qualifications based classification structure and the single State operation of the old classification, we have not included such a classification in the modern award, and the definition is therefore unnecessary.

125 We have not included a number of allowances applying in only one State. Where we have included a State-based allowance, it will not operate beyond 31 December 2014.

126 We have included a payment of wages provision which simplifies the current overly prescriptive provision, although not to the full extent suggested by the AiGroup/CICA.

Cleaning Services

127 We have decided to make an award called the *Cleaning Services Award 2010*. For the most part it is in the same terms as the exposure draft published on 23 January this year, although there are a number of changes which should be mentioned.

128 The coverage clause has been amended. An exclusion has been added to make it clear that trolley collection, which is covered by the General Retail Modern Award is not covered by the award. The definition of event cleaning has been varied to make it clear that the award does not cover repair and maintenance services

129 Some allowances included in the exposure draft have not been included in the modern award because they are not appropriate or are State-based. As we have indicated elsewhere State-based allowances are not appropriate for a safety net award applying on a national basis. Where State-based allowances in pre-reform awards and NAPSAs still have application they can be the subject of discussion in the proceeding to deal with transitional provisions.

130 Provisions relating to overtime worked on weekends and public holidays have been included as well as provision for time off instead of payment of overtime.

131 The annual leave clause has been amended to provide that "ordinary pay" in relation to payment of annual leave does not apply to the calculation of leave loading. Consistent with the provision that leave loading should be 17½% or where shift or penalty rates are greater than 17½% these will apply, the draft has been varied to clarify that the 17½% is calculated on the ordinary hourly rate. These amendments have been made to bring the award into line with prevailing standards in the industry.

132 Other variations to the clause clarify that shift workers, as defined, accrue an additional five days annual leave, rather than six, and that leave loading is only paid on termination of employment on completed years of service.

Financial services group

133 We publish the *Banking, Finance and Insurance Award 2010*. The exposure draft published in January 2009 attracted comment from various parties. Some parties reiterated their opposition to their coverage under a broad industry award and, in the alternative, submitted that changes were necessary to properly cater for the needs and achieve the objects of award modernisation. Other parties commented on particular terms of the exposure draft.

134 The ASU requested that the health insurance industry be split from the coverage of the award. The Agribusiness Employers Federation submitted that the agribusiness industry should be separate. We have decided not to accede to these requests. In our view the industry is capable of being covered by a single set of safety net provisions and making a single modern award best achieves the objects of award modernisation.

135 The health insurance industry is not sufficiently different to other parts of the banking, finance and insurance industry to warrant separate regulation. The agribusiness industry has many aspects in common with parts of the finance sector and no other industry is a more logical fit. The reach of the current award appears broad but it is not clear that it is confined to the limits of the union party's eligibility rules. Further, many provisions of the award are unclear and would need to be reconsidered in the light of the need for a fair safety net. In our view applying the finance sector safety net to all award covered employees in the agribusiness industry is a sound and fair approach. We accept that changes to the content of the modern award are appropriate.

136 As far as the content of the modern award is concerned, employers and unions sought changes to the exposure draft. We have acceded to many of these requests and made other changes. We shall briefly deal with the important changes.

137 Some alterations have been made to the coverage clause. We have added superannuation and agribusiness to the definition of the banking, finance and insurance industry to ensure that the coverage of the award is comprehensive for the financial services sector. Section 576V(3) of the Act requires a modern award to be expressed not to bind an employer who is bound by an enterprise award in respect of an employee to whom an enterprise award applies. Some employers submitted that the coverage clause should exclude all employees of employers covered by enterprise awards. Such a provision would be inconsistent with s 576V(3) and there is in any event no sound basis for expanding the exclusion. We have not included accountancy practices as these

will be considered in Stage 4. We have decided to make a contract call centre award, which we deal with below. Accordingly contract call centres covered by that award are excluded from coverage. The industry of the employer will therefore determine which of the two awards applies.

138 There are also some alterations in the provisions dealing with pay, allowances and related conditions. The casual provisions will clarify the application of the loading and reflect the usual approach in modern awards. An adjustment has been made to the Level 6 annual salary to reflect the level of the weekly rate. The exemption provision in the exposure draft has been amended to more closely reflect the provision in the *Insurance Industry Award 1998*.[39] There is provision for the first aid allowance to be paid pro rata to part-time employees. Employers will be permitted to make deductions from salary with respect to the private use portion where vehicle running expenses are fully met by the employer. The standard superannuation provision has also been included.

139 Special provisions have been included dealing with hours of work and penalties for employees in call centres. These provisions mirror the provisions in the *Contract Call Centres Award 2010* (CCC Modern Award). We accept the need for flexibilities in this type of work whether work is performed under this award or the CCC Modern Award. Other alterations to the hours of work clauses include the deletion of some unnecessary detail, inserting rest break provisions in line with the *Clerical and Administrative Employees (Health Insurance Industry) Award 2001*[40] and amending the shift work provisions to reflect more closely those currently applying in the insurance industry.

140 There have also been some changes to the classification definitions to make the references to managerial employees clearer and to cover a broader range of employees in the agribusiness industry. We have not expanded or contracted the number of salary levels in response to requests by unions and employers respectively. We do not think that it is necessary to broaden the exemption in the consolidated request in relation to employers covered by enterprise awards or enterprise NAPSAs.

141 The award we make as a result of these changes has comprehensive application in a large and important industry. It is concise and easy to apply. In our view the award reduces the regulatory burden on business and provides a fair and flexible safety net for employees in the industry.

Graphic arts group

142 We publish a *Graphic Arts, Printing and Publishing Award 2010*. We have made only minor alterations to the coverage provision in the exposure draft. Some concerns were expressed about the potential for overlap between this award and other awards in relation to publishing and despatching. We have made a minor alteration to make it clear that the award only applies to despatching which is incidental to the industries or parts of industries covered by the award. Otherwise we do not think any greater clarification is warranted. We have not made any changes to the draft relating to coverage of web design, design generally, or metropolitan newspapers or plastics manufacturing. The provisions largely reflect the coverage of awards to be subsumed into the modern award.

143 As a result of the consultations we have decided to include in the award the

39 AP784988CRV.

40 AP809224.

substance of the facilitative provisions in the *Graphic Arts — General — Award 2000* (Graphic Arts Award)[41] with appropriate changes. Alterations were sought in the leading hands allowances, public holiday provisions and the junior artist and designer rates. We have altered the junior rates to bring them into line with those in the Graphic Arts Award. We have not included the restrictions on the employment of casual employees which are in the Graphic Arts Award, but we have maintained the provision for casual conversion to weekly employment after six months which was in the exposure draft.

144 A number of other minor changes have been made to the exposure draft to better reflect the existing award regulation to correct drafting errors, or both.

Health and welfare services (excluding social and community services)

145 We now publish four modern awards. They are the:

Nurses Award 2010
Aged Care Industry Award 2010
Health Professionals and Support Services Award 2010
Medical Practitioners Award 2010

146 Each of the awards has been altered since the release of the exposure drafts. We have not adopted the proposal by the Health Services Union to create one award. This approach would have constituted a significant departure from the existing pattern of regulation. It would also have involved important work value considerations and posed a number of relativity issues.

147 There were a number of key factors which the parties raised which require comment in this decision. One matter which was raised in all but the *Medical Practitioners Award 2010* related to the use of part-time employees. There are a number of common features for the use of part-time employees. To begin, they must have reasonably predictable hours of duty. Underlying provisions vary but generally there is a requirement to provide certainty when employing part-timers. We have included a relevant provision. The next issue is in relation to changes to working hours of part-timers. There are of course notice periods for roster changes contained in the underlying awards but these seem not to be used in relation to part-timers. Instead, part-time hours appear to be changed regularly on a daily basis where the employee consents. Many employers saw this as a necessary flexibility. The private hospital industry employer associations estimated that, on average, part-timers would work an extra six hours per week. The impact of this consent is that the employee does not receive overtime for working in excess of the rostered hours when requested but is paid at the ordinary time rate.

148 We have some reservations about the nature of the consent in circumstances where a supervisor directly requests a change in hours on a day where the part-timer had otherwise planned to cease work at a particular time. Existing provisions require that any amendment to the roster be in writing and we have retained this provision. We also have no doubt that many part-time employees would welcome the opportunity to earn additional income. However, there may also be part-timers who would be concerned to ensure that their employment is not jeopardised by declining a direct request from a supervisor to work additional non-rostered hours at ordinary rates. From the submissions of the employers this is a major cost saving and used widely.

41 AP782505CR.

149 Whilst all the relevant underlying awards have different provisions there is a general opportunity for part-time employees to consent to working additional hours at ordinary rates within an average of less than a 38 hour week. We have sought to provide some common provisions which retain cost savings for employers in the knowledge that any change requires written consent. There was never any suggestion that asking part-timers to work additional hours did not relate to unforseen circumstances on the day.

150 Some concern was raised in relation to the basis upon which a casual employee should be paid overtime. Two examples were given. The first is the separate calculation of overtime on the ordinary rate and the calculation of the casual loading also on the ordinary rate. The second is the cumulative approach. The ordinary rate plus the casual loading forms the rate for the purpose of the overtime calculation. We believe that the correct approach is to separate the calculations and then add the results together, as illustrated by the first example, rather than compounding the effect of the loadings.

151 Another important matter related to annual leave for nurses. There was universal agreement that the history of annual leave for nurses is both complex and diverse. In the exposure draft we tentatively reached the conclusion that the provision of five weeks leave for all nurses was a reasonable balance between the existing award entitlements. This meant that there were some who may be entitled to an increase but clearly there were nurses whose annual leave would decrease. This quantum was raised as a cost increase in some areas however concern was expressed at the level of penalty rate for public holidays worked by nurses. The exposure draft contained a penalty of 250% for working on a public holiday. It was argued that there was a trade-off between extra leave and payment for a public holiday being reduced to 200%. The Australian Nursing Federation (ANF) submitted that no such trade-off existed. Whilst it appears true that no express trade-off is evident, nonetheless, where the greater annual leave amount is available there generally exists lower payments for public holidays. We have altered the exposure draft by reducing the payment of public holidays to 200%.

152 In the *Nurses Award 2010* there is also a classification for nursing assistant. We were asked both to delete this classification and to make it more relevant. There were concerns about an overlap between this classification and the personal care worker. We have decided to retain the classification in the *Nurses Award 2010* and make it directly relevant to the work of nurses. In addition, we have adopted the suggestion of the ANF to provide an additional salary point at the Certificate III level.

153 We have also provided an exclusion, at this stage, for nurses in secondary and primary schools. Our views are not fixed in this regard but we believe it preferable to hear from the participants in the consultations on education before a final decision is made on the employment of nurses in a school environment.

154 Particular submissions were made on the span of hours for various private practices which reflected the underlying awards and the needs of the sectors. Whilst some rationalisation has taken place we have sought to maintain a specific spread in these areas.

155 A number of submissions were made going to general flexibilities which should be expressly contained in the awards. Some of these requests do not currently apply in underlying awards. Where some of these can be

accommodated in accordance with the flexibility clause we have not included them as we believe that it is better to use that clause with its attendant protections.

156 The Department of Human Services in the State of Victoria invited us to conclude that relevant modern awards would apply to Victorian public hospitals as they do not represent and are not a part of the Victorian government. It was also suggested that, if such a finding were made, we should conclude that some matters in the awards were beyond the constitutional power of the Commonwealth. As we explained earlier in this decision, we see no benefit in attempting to define the limits of the Commission's jurisdiction in relation to Government or quasi-Government bodies or corporations generally. To that we add the observation that coverage of particular entities may depend upon the nature of the legislative provisions operating on 1 January 2010 and thereafter.

157 The National Aboriginal Community Controlled Health Organisation (NACCHO) submitted that the aboriginal and Torres Strait islander controlled health services deliver primary health care services and are operated by local aboriginal communities with elected boards of management. It argued that the services need separate regulation and it opposed the "mainstreaming" of staff through the award modernisation process which may have the affect of divorcing staff from the existing governance structures. It raised current award provisions dealing with self-determination and ceremonial leave. We have included ceremonial leave provisions in the relevant awards. We deal with the question of separate award coverage at the end of this decision.

Information and communications technology group

158 We publish four modern awards. They are the:

Business Equipment Award 2010
Contract Call Centres Award 2010
Market and Social Research Award 2010
Telecommunications Services Award 2010

159 We also publish a varied Clerks Modern Award.

160 These industries are of relatively recent origin and their growth is important to the Australian economy. We published two exposure draft awards covering market and social research operations and telecommunications services and proposed amendments to the Clerks Modern Award to cover call centre operations. A number of parties representing both employers and employees requested that additional awards be made covering the business equipment industry and the contract call centre industry. We have decided to accede to these requests.

161 It appears that there is an industry of selling and/or leasing business equipment of various types including computers, photocopiers and printers. Businesses involved in such activities are also involved in the installation and servicing of that equipment. It is not in the nature of a manufacturing, retail or electrical contracting business. The AiGroup proposed an award which effectively amalgamated three awards currently covering the servicing, clerical and sales activities of employers in the business equipment industry. The result is a comprehensive modern award covering all award-covered employees in this industry which largely reflects the terms of existing awards. In the modern award we have replicated the exemption provisions in the existing awards. The modern award makes minor changes in the draft submitted by AiGroup. The

changes we have made provide greater clarity, reduce some of the prescription and conform to other modern awards. Nevertheless we are concerned at the length and complexity of the award. There is scope to revise it further in future award modernisation exercises.

162 Parties to the existing *Contract Call Centre Industry Award 2003* (CCC Award 2003) supported the making of a separate award for contract call centres in preference to establishing call centre flexibilities within the Clerks Modern Award. In our view there should not be disparate safety net provisions for call centres. Flexibilities which reflect the needs of the industry while enhancing competitiveness and employment growth prospects should be generally available. We will make a CCC Modern Award based on the CCC Award 2003 — amended to reflect the Commission's standard approach to certain modern award provisions. We will also make amendments to the Clerks Modern Award to reflect appropriate call centre flexibilities.

163 Minor changes have been made to exposure drafts of the telecommunications services and market and social research awards to reflect certain non-contentious matters raised by the parties.

Manufacturing group

164 The coverage clause of the Manufacturing Modern Award, one of the priority modern awards, has been varied to include all or a significant part of the brush and broom making, chemical, clay and ceramics, furnishing, glass, gypsum and plasterboard manufacturing, insulation materials manufacturing, paint manufacturing, rope, cordage and thread and saddlery, leather and canvas industries. Electrical contractors and glazing contractors have been excluded from the coverage of the award as they are covered by other awards. The production of polypropylene/polyethylene has also been excluded from the coverage of the award pending consideration of the oil and gas industry in Stage 3. The coverage clause of the Manufacturing Modern Award may require further variation once the coverage of other modern awards, in particular that to cover the timber industry, is known.

165 The terms and conditions in the award are substantially the same as those in the award at the conclusion of the priority stage, reflecting prevailing industry standards. However, small employer redundancy provisions have been inserted for those who perform work within the manufacturing and associated industries and occupations which immediately prior to 1 January 2010 would have been covered by the *Engine Drivers' and Firemen's (ACT) Award 2000* (Engine Drivers' (ACT) Award)[42] or was in clauses 6.1 to 6.6 of the *Furnishing Industry National Award 2003* (Furnishing Award). [43] They reflect the small employer redundancy provisions of these two awards. The Engine Drivers' (ACT) Award is a common rule award. The provision concerning the Engine Drivers' (ACT) Award is transitional given its application solely in the Australian Capital Territory. To provide a consistent approach to the application of the small employer redundancy provisions in modern awards, that concerning the Furnishing Award is not limited to the current respondents to the award. A number of allowances which are significant in the industries added to the award have also been included.

166 The classification structure of the Manufacturing Modern Award remains

42 AP805250CRA.

43 AP825280CAV.

unaltered. Issues concerning how the many employees now covered by the award will be classified in the Manufacturing Modern Award will need to be addressed prior to 1 January 2010.

Private transport industry (road, non passenger)

167 We have decided to make three industry awards. They are the *Road Transport and Distribution Award 2010* (RT&D Modern Award), the *Road Transport (Long Distance Operations) Award 2010* (RT Long Distance Modern Award) and the *Transport (Cash in Transit) Award 2010* (CIT Modern Award).

168 We have previously published exposure drafts of each of the awards we now propose to make. We should make a number of comments about issues raised by the parties concerning the exposure drafts and variations of substance that have been made to the drafts. We refer first to be RT&D Modern Award. In our statement of 23 January 2009 [44] we said that the definition of the industry should be closely considered by the parties and submissions made as to whether the description was sufficient to encompass the various sectors of the industry that were being incorporated into the award. No party submitted that any additional paragraphs needed to be added to the definition and accordingly it retains paragraphs (a) to (i) however we have made some variations to make it clear that the award relates to the transport of goods etc by road. We have also adopted the definition of a distribution facility as proposed by the Transport Workers' Union (TWU) so it is clear that they are facilities which are operated by an employer as part of its road transport business.

169 We have retained the reference in paragraph (a) of the definition of the road transport and distribution industry to the transport of goods etc where that work is ancillary to the principal business, undertaking or industry of the employer. In our January 2009 statement we raised this aspect of the award's coverage and, for the purposes of encouraging submissions about it, we put cl.4.3, as it then was, in the exposure draft. We also noted that this issue had not arisen before in the award modernisation process in any significant way.[45] As it transpired few parties made submissions about this matter. AiGroup submitted that it was appropriate that the award have a majority clause in terms similar to that in the *Transport Workers (Mixed Industries) Award 2002*[46] (Mixed Industries Award). We should comment on how that award, and the majority clause in it, operates. The incidence of award clause is in terms similar to paragraph (a) of the definition of the road transport and distribution industry in the RT&D Modern Award. However the Mixed Industries Award provides that it only binds an employer respondent to that award. Modern awards are not to have the equivalent of named respondent employers. The Mixed Industries Award makes it clear that it only applies where the employee of a respondent employer is required to perform work in one of the classifications in the award. In this respect we note that the classification structure is very similar to the RT&D Modern Award which in turn has been based on the pre-reform *Transport Workers Award 1998* (TWU Award 1998).[47] Clause 9 of the Mixed Industries Award provides that if employees are in a minority of employees in a

44 [2009] AIRCFB 50; (2009) 180 IR 124.

45 *Re Request from Minister for Employment and Workplace Relations ([2009] AIRCFB 50)* at [101].

46 AP813166.

47 AP799474CNV.

respondent employer's enterprise and the majority of the employer's employees are covered by another award then certain identified provisions would apply and the balance of provisions could be those applying in an award covering the majority of the employer's employees. The identified provisions included the rates of pay, and in this respect, we note that those rates were the same as in the TWU Award 1998.

170 Based on the observations we have made above we have not been persuaded to put a majority clause in the RT&D Modern Award. The manner in which the clause in the Mixed Industries Award operated cannot easily be accommodated in the modern award regime. We also note in this respect, the submission that in the absence of named employers, the manner in which a majority and a minority of relevant employees may be identified and the time when that assessment should occur was likely to give rise to some doubts about award coverage.

171 We also gave consideration to a number of other matters. Even though the RT&D Modern Award is an industry award it is clear that the practical effect of the various existing private transport awards it encompasses is that they operate by reference to a structure of types, models and classes of vehicle and, it follows, to the driver of those vehicles thereby having occupational coverage. We note that there are very few transport classifications in the modern awards made to date and it is likely that any transport functions of any significance are carried out by dedicated transport operators. If the transport of goods etc as defined in the RT&D Modern Award is ancillary to an employer's business but it is carried out by an employee in one of the classifications in the award it should be covered by the award. In this respect we are not persuaded that an employer will loose the ability to have those drivers, who may be a small number only of its workforce, work hours which the employer's business requirements dictate. The RT&D Modern Award contains numerous facilitative provisions which relate to matters like hours of work, shifts and spread of hours. The award also contains the standard award flexibility clause. We will monitor the practical implications of our decision to not put a majority clause in the RT&D Modern Award, and, at an appropriate time, the parties may wish to address us further about it.

172 We turn next to the classification structure. We have retained the classification structure which was in the exposure draft which, as we have earlier observed, was based on the TWU Award 1998. Similar classifications or a subset of them were also in many of the other pre-reform transport awards. In our statement of 23 January 2009 we asked the parties to confer in relation to a proposed variation to the classification structure introduced by the TWU late in the consultation process. We also asked the parties to give consideration to grouping a number of the grades together. In the Full Bench post-exposure draft consultations we were informed that no agreement about either of these matters could be reached. In those circumstances, and as foreshadowed by us, we have decided to retain the long-standing existing classification structure.

173 We indicated in January 2009 that the issue of appropriate rates had been considered by us when publishing the rates in the exposure draft. In the Full Bench post exposure draft consultations the TWU made further submissions again urging us to adopt the higher rates contained in the *Transport Industry (State) Award (NSW)*[48] (the NSW NAPSA) We have considered all of those

48 AN120594.

submissions and also the decisions of the Industrial Relations Commission of New South Wales referred to by the TWU and other parties. It seems clear to us that the wage increases granted in those decisions were considered as special cases. An attempt to flow on the first of them to the TWU Award 1998 (it was then known as the 1993 award) was not granted by this Commission.[49] Accepting the TWU submission that even if we were to discount the amounts granted in the special cases the NSW NAPSA rates would still be in excess of those operating federally that does not persuade us that a case is made out to adopt those rates in the RT&D Modern Award. It is also relevant to here note that it was not suggested by any party in the context of the simplification of the TWU Award 1998 that the rates should be those in the NSW NAPSA.

174 The Act makes it clear that wage rates in a modern award must be minimum rates and can be included only to the extent that they provide a fair minimum safety net.[50]

175 In performing award modernisation functions we are also obliged to have regard to a number of factors including the rates of pay in Australian Pay and Classification Scales and transitional awards.[51] The TWU would have us adopt the rates in the NSW NAPSA in preference to all other non-New South Wales NAPSA and transitional rates in pre-reform transport awards. As we have previously indicated the rates that are reflected in the modern award are those applying in the vast majority of the pre-reform awards and NAPSA's applying in various states other than New South Wales. Many of those NAPSA's reflect a regime whereby the predominant Federal awards were varied and thereafter the rates flowed to the state common rule awards.

176 We acknowledge the fact that the rates in the *Transport Workers (Oil Distribution) Award 2001*[52] and the *Transport Workers (L.P. Gas Industry) Award 2005*[53] are higher than rates in the other pre-reform transport awards. We have considered the history of adjustment of the rates in those awards. It appears that each award had, in the past, operated as a paid rates award and it is not apparent that when the awards were simplified the rates were converted to minimum rates. In any event the majority of rates in other pre-reform transport awards and NAPSAs weigh heavily in favour of them being reflected in the rates in the RT&D Modern Award. We need say little about the TWU suggestion that we introduce an 11% industry allowance in the oil distribution and LP gas sectors. The union did not raise this proposal in submissions filed in accordance with the published timetable. When it was raised late in the consultation process little was said to justify it. Such an allowance would normally apply to all employees in the sector and for all purposes and before we would consider the introduction of such an allowance employers would need to first be alerted to the fact it was being sought and then an opportunity, on the days set aside for Full Bench consultations, to make submissions about it. We have decided that no such provision should be in the RT&D Modern Award. The rates for these two sectors can be considered further in the context of transitional provisions.

177 We next turn to the hours clause in the RT&D Modern Award and in

49 P0926, 15 May 1997.

50 ss 576A(2)(b), 576J(1) and 576L of the *Workplace Relations Act 1996* and s 576C(1) of the consolidated request.

51 s 576B(2)(h).

52 AP813252CAV.

53 AP841105CAV.

particular cl.23 which provides for ordinary hours of work for oil distribution workers. The exposure draft clause reflected the existing regime of hours being 35 per week or 70 per fortnight. We are aware that these hours have operated within these sectors of the transport industry for many decades. We considered whether, in the context of this modern award, the ordinary hours for this sector of the industry should be less than those for the remaining sectors. In this respect we acknowledge the submissions of the Oil Industry Industrial Committee as to why two different hours clauses may not be appropriate. On balance however we have decided it is appropriate to retain the two minimum ordinary hours clauses. As a consequence of doing so we have inserted into the facilitative provisions and the provisions of cl.23 additional flexibilities contained in existing awards. We should indicate that it is not our intention that these minimum hours of work should extend any further than they have traditionally applied. It may be that, at an appropriate time, consideration needs to be given to variations to the award to ensure these constraints are reflected in it.

178 The TWU submitted there was no need for the various flexibility or facilitative clauses in the award and suggested that the award need only contain the standard award flexibility clause. We have decided to maintain the existing flexibilities contained within various pre-reform awards as well as the award flexibility clause. We have decided that the making of this modern award should not reduce the range of existing flexibilities currently in relevant awards. Also in this context we refer to comments made in earlier statements that it is not intended that the existing facilitative provisions, particularly those requiring majority agreement, should reduce the operation of individual flexibility found elsewhere in the award and more recently in the award flexibility clause.[54]

179 We have amended the shiftwork clause to reflect the provisions of the corresponding clause in the TWU Award 1998. We have also made a number of changes to the work on public holidays clause to reflect the penalty rates in a large number of pre-reform transport awards.

180 We now turn to the RT Long Distance Modern Award. Few comments need be made about this award. It is largely in the terms of the exposure draft.

181 The TWU submissions about this award both before and after the exposure draft were that long distance driving should not be paid by reference to cents per kilometre driven and that there was no justification for a separate modern award applying to long-distance operations; they should be contained in the RT&D Modern Award. The union made no submissions about the provisions contained in the exposure draft. Each of the employers maintained that a separate award should be made and the cents per kilometre method of remuneration, as well as other methods of remuneration that had always been in the award, should continue. We have not been persuaded to incorporate long-distance operations into the RT&D Modern Award. The long distance sector of this industry has been regulated federally for many years under a separate award and we accept the submission of the employers that it should continue to do so. As indicated in the Commission's 23 January 2009 statement, in the event there are some legislative provisions that impact on the method of remuneration contained in this award we shall revisit those provisions.

182 Finally we refer to the CIT Modern Award. The TWU made no submissions

54 [2008] AIRCFB 100 at [35]-[39].

in relation to the exposure draft and the employer submissions were limited and made only by Linfox Armaguard Pty Ltd and Chubb Australasia Pty Ltd. There were few significant issues raised and we have taken into account the various drafting changes suggested by them. We should indicate that there seemed to be some suggestion that the percentage by which allowances will be varied will vary by reference to each of the classifications in the award. That is not the case. There will be one reference point for the purposes of variations to allowances for responsibilities and skills and that is to the rate for the armoured vehicle operator.

183 We have deleted the allowance that related to a contract for work for the Reserve Bank of Australia. We have also reinserted into the part-time employment clause a provision concerning the offering of additional hours of work and payment for those hours.

Quarrying industry

184 We publish the *Quarrying Award 2010*. In large measure the award is based on the agreement of the major parties. Little alteration has been made in the coverage provision in the exposure draft. Consistent with our general approach, which we have set out above, we have not included a specific exclusion for quarries operated by local councils.

185 The AWU asked us to include the provision for voluntary conversion of casuals to weekly employees contained in the federal award applying to quarrying in Victoria. There was no employer objection to that course. Instead of the long and detailed provisions in that award, however, we have included a casual conversion provision in the terms found in the Modern Manufacturing Award. The AWU also sought a provision to supplement the NES redundancy pay arrangements for small business. For the reasons given in the Commission's 21 December 2008 decision we have not granted that request.

186 We have included a new classification structure based on competencies acquired and exercised rather than on function groups. We have deleted the provision for additional payments for employees trained and accredited in more than two function groups, since progression through the structure will be based on competencies rather than function groups. Minor alterations have been made in the format of the minimum wages clause in the exposure draft but, consistent with our approach generally, we have not combined the industry allowance with the minimum wages. Each remains a separate element of remuneration. Some alterations have been made in tool and clothing allowance provisions. New provisions have been included, based on terms in the award applying in Victoria, relating to the reimbursement for the cost of obtaining an articulated vehicle licence, and transport home after overtime and shiftwork.

187 We have not altered the spread of ordinary hours in the exposure draft, which is the same as that in the Victorian and New South Wales awards applying to quarrying. Nor have we altered the night shift penalties which are in line with prevailing federal standards in industry generally. By contrast, the night shift penalties applying to quarrying in the various States vary and it is not practical to reduce them to a standard provision. We have made some change to the provisions dealing with rostered days off. We have also deleted the provisions relating to the working of reasonable overtime which appeared in the exposure draft. On reflection we have decided that they add nothing to, and indeed may be inconsistent with, the terms of the NES.

Sanitary and garbage disposal services

188 We publish the *Waste Management Award 2010*. In our 23 January 2009 statement we drew attention to the significant differences between rates in the *Transport Workers' (Refuse, Recycling and Waste Management) Award 2001 (Federal Waste Award)*,[55] which applies in all States except New South Wales and in the Northern Territory, and the rates in the NAPSAs applying in New South Wales. The minimum wages in the exposure draft were based on the minimum rates in the Federal Waste Award. The TWU submitted that the rates in the New South Wales NAPSA were appropriate for inclusion in the modern award and also submitted that those rates could be integrated with the federal rates to produce a compromise set of minimum wages if need be.

189 As we have already indicated in dealing with the private transport industry (road, non-passenger) group of industries, with very few exceptions, federal road transport driver rates are properly fixed minimum rates. The rates in the Federal Waste Award mirror the structure in the key federal road transport awards. We have not been persuaded to depart from those rates. We accept that transitional provisions may be necessary in New South Wales. Any proposals for transitional provisions should be advanced in the proceeding to deal with such provisions that we have provided for above. Proposals should take any other relevant changes in award regulation into account. We note that the junior rate provisions in the modern award will reflect those in the Federal Waste Award.

190 Some alterations have been made to the classification structure as it appeared in the exposure draft. The new structure, which is primarily based on the Federal Waste Award, will provide for coverage of employees at waste management facilities and is agreed between the main parties.

191 A number of other provisions in the exposure draft have been deleted and replaced with the equivalent provisions from the Federal Waste Award. That award covers the bulk of the private waste management industry nationally. These provisions primarily deal with highest function, hours of work, shift work, overtime and public holidays. While a number of these clauses will be more onerous for employers previously covered by the New South Wales NAPSAs, such changes should be balanced against the reduction in minimum award wages in New South Wales and taken into account in considering what transitional provisions might be necessary.

Other Matters

192 We received a submission from some employers in the fast food industry in which they sought an exemption from some of the terms of the *Fast Food Industry Award 2010*.[56] That award is one of the priority modern awards made on 21 December 2008. In particular exemption was sought from some of the management classifications in the award. Historically retail awards, including the *National Fast Food Retail Award 2000*,[57] have contained managerial classifications. We see no case for varying the modern award in the manner sought.

193 In dealing with the modern awards in the health and welfare services group we referred to a submission by NACCHO seeking a separate, comprehensive

55 AP812785CNV.

56 MA000003.

57 AP806313CRV.

modern award for aboriginal and Torres Strait islander community controlled health organisations. This is not the first occasion on which we have been asked to make specific provision for indigenous organisations. In the Commission's 19 December 2008 decision the following passage appears:

> [108] The Chamber of Commerce of the Northern Territory (CCNT) submitted that the award modernisation program should take account of the special needs of indigenous organisations in remote areas. The CCNT submission indicated that such organisations operate a variety of businesses which reflect a range of local factors such as geography, climate, community needs, tourism, industry needs and national security. The view was expressed that the patterns of work in these organisations are unlikely to be catered for in modern awards. We think this submission raises some potentially important issues for the award modernisation process. We shall make provision for the matter to be further considered concurrently with Stage 4 when the terms of modern awards generally applying to indigenous organisations will be clearer and there will be an opportunity to properly consider the impact and decide upon the necessary modifications.

194 We shall appoint Commissioner Raffaelli to investigate the matters raised by the CCNT and NACCHO and any other similar matters. The Commissioner will visit the Northern Territory for this purpose at a time to be advised. The Commission will give further consideration to the issues in Stage 4, as already indicated. A possible outcome is that one or more separate awards may be made for indigenous organisations or services.

Conclusion

195 We express our appreciation to all of those who have made contributions to the consultation process and to the staff of the Australian Industrial Registry for their research and their administrative support to the Full Bench.

Attachment A to Full Bench decision of 3 April 2009

Stage 2 modern awards

Aged Care Award 2010
Banking, Finance and Insurance Award 2010
Building and Construction General On-site Award 2010
Business Equipment Award 2010
Cleaning Services Award 2010
Contract Call Centres Award 2010
Cotton Ginning Award 2010
Electrical, Electronic and Communications Contracting Award 2010
Graphic Arts, Printing and Publishing Award 2010
Health Professionals and Support Services Award 2010
Horticulture Award 2010
Joinery and Building Trades Award 2010
Market and Social Research Award 2010
Medical Practitioners Award 2010
Mobile Crane Hiring Award 2010
Nursery Award 2010
Nurses Award 2010
Pastoral Award 2010

Plumbing and Fire Sprinklers Award 2010
Quarrying Award 2010
Road Transport and Distribution Award 2010
Road Transport (Long Distance Operations) Award 2010
Silviculture Award 2010
Telecommunications Services Award 2010
Transport (Cash in Transit) Award 2010
Waste Management Award 2010
Wool Storage, Sampling and Testing Award 2010

The following modern awards have been amended:

Clerks—Private Sector Award 2010 — call centre provisions

Manufacturing and Associated Industries and Occupations Award 2010 — coverage clause and small employer redundancy in the furnishing industry

Attachment B to Full Bench decision of 3 April 2009

Supported Wage System Schedule

1. This schedule defines the conditions which will apply to employees who because of the effects of a disability are eligible for a supported wage under the terms of this award.
2. In this schedule:

approved assessor means a person accredited by the management unit established by the Commonwealth under the supported wage system to perform assessments of an individual's productive capacity within the supported wage system

assessment instrument means the tool provided for under the supported wage system that records the assessment of the productive capacity of the person to be employed under the supported wage system

disability support pension means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the *Social Security Act 1991*, as amended from time to time, or any successor to that scheme

relevant minimum wage means the minimum wage prescribed in this award for the class of work for which an employee is engaged

supported wage system means the Commonwealth Government system to promote employment for people who cannot work at full award wages because of a disability, as documented in the Supported Wage System Handbook. The Handbook is available from the following website: www.jobaccess.gov.au

SWS wage assessment agreement means the document in the form required by the Department of Education, Employment and Workplace Relations that records the employee's productive capacity and agreed wage rate

3. **Eligibility criteria**

3.1 Employees covered by this schedule will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a disability support pension.

3.2 This schedule does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers compensation legislation or any provision of this award relating to the rehabilitation of employees who are injured in the course of their employment.

4. **Supported wage rates**

4.1 Employees to whom this schedule applies will be paid the applicable percentage of the relevant minimum wage

according to the following schedule:

Assessed capacity (clause 5)	Relevant minimum wage
%	%
10	10
20	20
30	30
40	40
50	50
60	60
70	70
80	80
90	90

4.2 Provided that the minimum amount payable must be not less than $69 per week.

4.3 Where an employee's assessed capacity is 10%, they must receive a high degree of assistance and support.

5. **Assessment of capacity**

5.1 For the purpose of establishing the percentage of the relevant minimum wage, the productive capacity of the employee will be assessed in accordance with the Supported Wage System by an approved assessor, having consulted the employer and employee and, if the employee so desires, a union which the employee is eligible to join.

5.2 All assessments made under this schedule must be documented in an SWS wage assessment agreement, and retained by the employer as a time and wages record in accordance with the Act.

6 **Lodgement of SWS wage assessment agreement**

6.1 All SWS wage assessment agreements under the conditions

of this schedule, including the appropriate percentage of the relevant minimum wage to be paid to the employee, must be lodged by the employer with the Commission.

6.2 All SWS wage assessment agreements must be agreed and signed by the employee and employer parties to the assessment. Where a union which has an interest in the award is not a party to the assessment, the assessment will be referred by the Industrial Registrar to the union by certified mail and the agreement will take effect unless an objection is notified to the Commission within 10 working days.

7. **Review of assessment**The assessment of the applicable percentage should be subject to annual or more frequent review on the basis of a reasonable request for such a review. The process of review must be in accordance with the procedures for assessing capacity under the supported wage system.

8. **Other terms and conditions of employment**Where an assessment has been made, the applicable percentage will apply to the relevant minimum wage only. Employees covered by the provisions of this schedule will be entitled to the same terms and conditions of employment as other workers covered by this award on a pro rata basis.

9. **Workplace adjustment**An employer wishing to employ a person under the provisions of this schedule must take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other workers in the area.

10. **Trial period**

10.1 In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this schedule for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding four weeks) may be needed.

10.2 During that trial period the assessment of capacity will be undertaken and the percentage of the relevant minimum wage for a continuing employment relationship will be determined.

10.3 The minimum amount payable to the employee during the trial period must be no less than $69 per week.

10.4 Work trials should include induction or training as appropriate to the job being trialled.

10.5 Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment will be entered into based on the outcome of assessment under clause 5.

Attachment C to Full Bench decision of 3 April 2009

School-based Apprentices Schedule

1. This schedule applies to school-based apprentices. A school-based apprentice is a person who is undertaking an apprenticeship in accordance with this schedule while also undertaking a course of secondary education.
2. A school-based apprenticeship may be undertaken in the trades covered by this award under a training agreement or contract of training for an apprentice declared or recognised by the relevant State or Territory authority.
3. The relevant minimum wages for full-time junior and adult apprentices provided for in this award, calculated hourly, will apply to school-based apprentices for total hours worked including time deemed to be spent in off-the-job training.
4. For the purposes of clause 3, where an apprentice is a full-time school student, the time spent in off-the-job training for which the apprentice must be paid is 25% of the actual hours worked each week on-the-job. The wages paid for training time may be averaged over the semester or year.
5. A school-based apprentice must be allowed, over the duration of the apprenticeship, the same amount of time to attend off-the-job training as an equivalent full-time apprentice.
6. For the purposes of this schedule, off-the-job training is structured training delivered by a Registered Training Organisation separate from normal work duties or general supervised practice undertaken on the job.
7. The duration of the apprenticeship must be as specified in the training agreement or contract for each apprentice but must not exceed six years.
8. School-based apprentices progress through the relevant wage scale at the rate of 12 months progression for each two years of employment as an apprentice.
9. The apprentice wage scales are based on a standard full-time apprenticeship of four years (unless the apprenticeship is of three years duration). The rate of progression reflects the average rate of skill acquisition expected from the typical combination of work and training for a school-based apprentice undertaking the applicable apprenticeship.
10. If an apprentice converts from school-based to full-time, all time spent as a full-time apprentice will count for the purposes of progression through the relevant wage scale in addition to the progression achieved as a school-based apprentice.
11. School-based apprentices are entitled pro rata to all of the other conditions in this award.

Attachment D to Full Bench decision of 3 April 2009

National Training Wage Draft Schedule

1. **Title**

This is the *National Training Wage Schedule*.

2. **Definitions**

In this schedule:

adult trainee is a trainee who would qualify for the highest minimum wage in Wage Level A, B or C if covered by that wage level.

Australian Qualifications Framework (AQF) is a national framework for qualifications in post-compulsory education and training.

approved training means the training specified in the training contract.

out of school refers only to periods out of school beyond Year 10 as at the first of January in each year and is deemed to:

(a) include any period of schooling beyond Year 10 which was not part of or did not contribute to a completed year of schooling;

(b) include any period during which a trainee repeats in whole or part a year of schooling beyond Year 10; and

(c) not include any period during a calendar year in which a year of schooling is completed.

relevant State or Territory training authority means the bodies in the relevant State or Territory which exercise approval powers in relation to traineeships and register training contracts under the relevant State or Territory vocational education and training legislation.

relevant State or Territory vocational education and training legislation means the following or any successor legislation:

Western Australia: *Vocational Education and Training Act 1996*

Northern Territory: *Northern Territory Employment and Training Act*

Victoria: *Education and Training Reform Act 2006*

New South Wales: *Apprenticeship and Traineeship Act 2001*

Australian Capital Territory: *Training and Tertiary Education Act 2003*

Queensland: *Vocational Education, Training and Employment Act 2000*

South Australia: *Training and Skills Development Act 2008*

Tasmania: *Vocational Education and Training Act 1994*.

trainee is an employee undertaking a traineeship.

traineeship means a system of training which has been approved by the relevant State or Territory training authority, or which meets the requirements of a training package developed by the relevant Industry Skills Council and endorsed by the National Quality Council, and which leads to an AQF certificate level qualification.

training contract means an agreement for a traineeship made between an employer and an employee which is registered with the relevant State or Territory training authority.

training package means the competency standards and associated assessment guidelines for an AQF certificate level qualification which have been endorsed for an industry or enterprise by the National Quality Council and placed on the National Training Information Service with the approval of the Commonwealth, State and Territory Ministers responsible for vocational education and training.

Year 10 includes any year before Year 10.

3. **Coverage**

3.1 Subject to clause 3.2 of this schedule, this schedule applies in respect of an employee covered by this award who is undertaking a traineeship whose training package and AQF certificate level is allocated to a wage level by Appendix 1 to this schedule.

3.2 This schedule only applies to AQF Certificate Level IV traineeships for which a relevant AQF Certificate Level III traineeship is listed in Appendix 1 to this schedule.

3.3 This schedule does not apply to the apprenticeship system or to any training program which applies to the same occupation and achieves essentially the same training outcome as an existing apprenticeship in an award as at 25 June 1997.

3.4 Where the terms and conditions of this schedule conflict with other terms and conditions of this award dealing with traineeships, the other terms and conditions of this award prevail.

3.5 At the conclusion of the traineeship, this schedule ceases to apply to the employee.

4. **Types of Traineeship**

4.1 The following types of traineeship are available under this schedule:

(a) a full-time traineeship based on 38 ordinary hours per week, with 20% of ordinary hours being approved training.

(b) a part-time traineeship based on less than 38 ordinary hours per week, with 20% of ordinary hours being approved training solely on-the-job or partly on-the-job and partly off-the-job, or where training is fully off-the-job.

4.2 Employment as a trainee does not commence until the relevant training contract has been signed by the employer and the employee and lodged for registration with the relevant State or Territory training authority, provided that if the training contract is not in a standard format employment

as a trainee does not commence until the training contract has been registered with the relevant State or Territory training authority.

5. **Minimum Wages**

5.1 Minimum wages for full-time traineeships

(a) Wage Level A

Subject to clause 5.3 of this schedule, the minimum wages for a trainee undertaking a full-time AQF Certificate Level I-III traineeship whose training package and AQF certificate levels are allocated to Wage Level A by Appendix 1 are:

Highest year of schooling completed	**Year 10**	**Year 11**	**Year 12**
	$ per week	**$ per week**	**$ per week**
School leaver	245.00	270.00	323.00
Plus 1 year out of school	270.00	323.00	375.00
Plus 2 years out of school	323.00	375.00	437.00
Plus 3 years out of school	375.00	437.00	500.00
Plus 4 years out of school	437.00	500.00	
Plus 5 or more years out of school	500.00		

(b) **Wage Level B**

Subject to clause 5.3 of this schedule, the minimum wages for a trainee undertaking a full-time AQF Certificate Level I-III traineeship whose training package and AQF certificate levels are allocated to Wage Level B by Appendix 1 are:

Highest year of schooling completed	**Year 10**	**Year 11**	**Year 12**
	$ per week	**$ per week**	**$ per week**
School leaver	245.00	270.00	313.00
Plus 1 year out of school	270.00	313.00	360.00
Plus 2 years out of school	313.00	360.00	423.00
Plus 3 years out of school	360.00	423.00	482.00
Plus 4 years out of school	423.00	482.00	

Highest year of schooling completed	Year 10	Year 11	Year 12
	$ per week	$ per week	$ per week
Plus 5 or more years out of school	482.00		

(c) **Wage Level C**

Subject to clause 5.3 of this schedule, the minimum wages for a trainee undertaking a full-time AQF Certificate Level 1-III traineeship whose training package and AQF certificate levels are allocated to Wage Level C by Appendix 1 are:

Highest year of schooling completed	Year 10	Year 11	Year 12
	$ per week	$ per week	$ per week
School leaver	245.00	270.00	312.00
Plus 1 year out of school	270.00	312.00	351.00
Plus 2 years out of school	312.00	351.00	392.00
Plus 3 years out of school	351.00	392.00	437.00
Plus 4 years out of school	392.00	437.00	
Plus 5 or more years out of school	437.00		

(d) **School-based traineeships**

Subject to clause 5.3 of this schedule, the minimum wages for a trainee undertaking a school-based AQF certificate level traineeship whose training package and AQF certificate levels are allocated to Wage Levels A, B or C by Appendix 1 are as follows when the trainee works full-time ordinary hours:

Year of schooling	
Year 11	Year 12
$ per week	$ per week
245.00	270.00

(e) **AQF Certificate Level IV traineeships**

(i) Subject to clause 5.3 of this schedule, the minimum wages for a trainee undertaking a full-time AQF Certificate Level IV traineeship

are the minimum wages for the relevant full-time AQF Certificate Level III traineeship with the addition of 3.8% to those minimum wages.

(ii) Subject to clause 5.3 of this schedule, the minimum wages for an adult trainee undertaking a full-time AQF Certificate Level IV traineeship are as follows, provided that the relevant wage level is that for the relevant AQF Certificate Level III traineeship:

Wage level	First year of traineeship	Second year of traineeship
	$ per week	$ per week
Wage Level A	519.00	539.00
Wage Level B	500.00	519.00
Wage Level C	454.00	471.00

5.2 **Minimum wages for part-time traineeships**

(a) **Wage Level A**

Subject to clauses 5.2(f) and 5.3 of this schedule, the minimum wages for a trainee undertaking a part-time AQF Certificate Level I-III traineeship whose training package and AQF certificate levels are allocated to Wage Level A by Appendix 1 are:

Highest	year	of schooling	completed
	Year 10	Year 11	Year 12
	$ per hour	$ per hour	$ per hour
School leaver	8.06	8.88	10.63
Plus 1 year out of school	8.88	10.63	12.34
Plus 2 years out of school	10.63	12.34	14.38
Plus 3 years out of school	12.34	14.38	16.45
Plus 4 years out of school	14.38	16.45	
Plus 5 or more years out of school	16.45		

(b) **Wage Level B**

Subject to clauses 5.2(f) and 5.3 of this schedule, the minimum wages for a trainee undertaking a part-time AQF Certificate Level I-III traineeship whose training package and AQF certificate levels are allocated to Wage Level B by Appendix 1 are:

Highest year of schooling completed	Year 10	Year 11	Year 12
	$ per hour	$ per hour	$ per hour
School leaver	8.06	8.88	10.30
Plus 1 year out of school	8.88	10.30	11.84
Plus 2 years out of school	10.30	11.84	13.91
Plus 3 years out of school	11.84	13.91	15.86
Plus 4 years out of school	13.91	15.86	
Plus 5 or more years out of school	15.86		

(c) **Wage Level C**

Subject to clauses 5.2(f) and 5.3 of this schedule, the minimum wages for a trainee undertaking a part-time AQF Certificate Level I-III traineeship whose training package and AQF certificate levels are allocated to Wage Level C by Appendix 1 are:

Highest year of schooling completed	Year 10	Year 11	Year 12
	$ per hour	$ per hour	$ per hour
School leaver	8.06	8.88	10.26
Plus 1 year out of school	8.88	10.26	11.55
Plus 2 years out of school	10.26	11.55	12.89
Plus 3 years out of school	11.55	12.89	14.38
Plus 4 years out of school	12.89	14.38	
Plus 5 or more years out of school	14.38		

(d) **School-based traineeships**

Subject to clauses 5.2(f) and 5.3 of this schedule, the minimum wages for a trainee undertaking a school-based AQF certificate level traineeship whose training package and AQF certificate levels are allocated to Wage Levels A, B or C by Appendix 1 are as follows when the trainee works part-time ordinary hours:

Year of schooling	
Year 11	**Year 12**
$ per week	**$ per week**
8.06	8.88

(e) **AQF Certificate Level IV traineeships**

(i) Subject to clauses 5.2(f) and 5.3 of this schedule, the minimum wages for a trainee undertaking a part-time AQF Certificate Level IV traineeship are the minimum wages for the relevant part-time AQF Certificate Level III traineeship with the addition of 3.8% to those minimum wages.

(ii) Subject to clauses 5.2(f) and 5.3 of this schedule, the minimum wages for an adult trainee undertaking a part-time AQF Certificate Level IV traineeship are as follows, provided that the relevant wage level is that for the relevant AQF Certificate Level III traineeship:

Wage level	First year of traineeship	Second year of traineeship
	$ per hour	**$ per hour**
Wage Level A	17.07	17.73
Wage Level B	16.45	17.07
Wage Level C	14.93	15.49

(f) **Calculating the actual minimum wage**

(i) Where the full-time ordinary hours of work are not 38 or an average of 38 per week, the appropriate hourly minimum wage is obtained by multiplying the relevant minimum wage in clauses 5.2(a)-(e) of this schedule by 38 and then dividing the figure obtained by the full-time ordinary hours of work per week.

(ii) Where the approved training for a part-time traineeship is provided fully off-the-job by a registered training organisation, for example at school or at TAFE, the relevant minimum wage in clauses 5.2(a)-(e) of this schedule applies to each ordinary hour worked by the trainee.

(iii) Where the approved training for a part-time traineeship is undertaken solely on-the-job or partly on-the-job and partly off-the-job, the relevant minimum wage in clauses 5.2(a)-(e) of this schedule minus 20% applies to each ordinary hour worked by the trainee.

5.3 **Other minimum wage provisions**

(a) An employee who was employed by an employer immediately prior to becoming a trainee with that employer must not suffer a reduction in their minimum wage per week or per hour by virtue of becoming a trainee. Casual loadings will be disregarded when determining whether the employee has suffered a reduction in their minimum wage.

(b) If a qualification is converted from an AQF Certificate Level II to an AQF Certificate Level III traineeship, or from an AQF Certificate Level III to an AQF Certificate Level IV traineeship, then the trainee must be paid the next highest minimum wage provided in this schedule, where a higher minimum wage is provided for the new AQF certificate level.

6. **Employment conditions**

6.1 A trainee is subject to a probation period of no longer than one month.

6.2 A trainee must be permitted to be absent from work without loss of continuity of employment and/or wages to attend approved training.

6.3 Subject to clause 3.4 of this schedule, all other terms and conditions of this award apply to a trainee unless specifically varied by this schedule.

Appendix 1: Allocation of Traineeships to Wage Levels

The wage levels applying to training packages and their AQF certificate levels are:

1.1 **Wage Level A**

Training package	**AQF certificate level**
Aviation	I
	II
	III
Beauty	III
Business Services	I
	II
	III
Chemical, Hydrocarbons and Refining	I
	II
	III
Civil Construction	III
Coal Training Package	
Community Services	I
	II
	III
Construction, Plumbing and Services Integrated Framework	

Training package	AQF certificate level
Correctional Services	II
	III
Drilling	II
	III
Electricity Supply Industry Generation Sector	II
	III
Electricity Supply Industry Transmission, Distribution and Rail Sector	II
	III
Electrotechnology	I
	II
	III
Financial Services	I
	II
	III
Floristry	III
Food Processing Industry	III
Gas Industry	III
General Construction	I
	II
	III
Information and Communications	I
	II
	III
Laboratory Operations	II
	III
Local Government	I
	II
	III
Manufacturing	I
	II
	III
Manufactured Mineral Products	III
Maritime	I
	II
	III
Metal and Engineering Industry	II
	III
Metalliferous Mining	II
	III
Museum, Library and Library/Information Services	II
	III

Training package	AQF certificate level
Plastics, Rubber and Cablemaking	III
Public Safety	III
Public Sector	II
	III
Pulp and Paper Manufacturing Industries	III
Retail Services	III
Telecommunications	II
	III
Textiles, Clothing and Footwear	III
Tourism, Hospitality and Events	I
	II
	III
Training and Assessment	III
Transport and Distribution	III
Water Industry (Utilities)	III
Wholesale	III

1.2 **Wage Level B**

Training package	AQF certificate level
Aeroskills	II
Animal Care and Management	I
	II
	III
Asset Maintenance	I
	II
	III
Asset Security	I
	II
	III
Australian Meat Industry	I
	II
	III
Automotive Industry Manufacturing	II
	III
Automotive Industry Retail, Service and Repair	I
	II
	III
Beauty	II
Caravan Industry	II
	III
Civil Construction	I

Training package	AQF certificate level
Community Recreation Industry	I
	II
	III
Entertainment	I
	II
	III
Extractive Industries	II
	III
Screen and Media	I
	II
	III
Fitness Industry	III
Floristry	II
Food Processing Industry	I
	II
Forest & Forest Products Industry	I
	II
	III
Furnishing	I
	II
	III
Gas Industry	I
	II
Health	II
	III
Local Government	I
	II
Manufactured Mineral Products	I
	II
Metal and Engineering Industry	I
	II
	III
Off-Site Construction	I
	II
	III
Outdoor Recreation Industry	I
	II
	III
Plastics, Rubber and Cablemaking	II
Printing and Graphic Arts	II
	III

Training package	AQF certificate level
Property Services	I
	II
	III
Public Safety	I
	II
Pulp and Paper Manufacturing Industries	I
	II
Retail Services	I
	II
Sport Industry	II
	III
Sport, Fitness and Recreation	II
	III
Sugar Milling	I
	II
	III
Textiles, Clothing and Footwear	I
	II
Transport and Logistics	I
	II
Visual Arts, Craft and Design	I
	II
	III
Water Industry	I
	II

1.3 **Wage Level C**

Training package	AQF certificate level
Agri-Food	I
Amenity Horticulture	I
	II
	III
Conservation and Land Management	I
	II
	III
Funeral Services	I
	II
	III
Music	I
	II
	III

Training package	AQF certificate level
Racing Industry	I
	II
	III
Rural Production	I
	II
	III
Seafood Industry	I
	II
	III

PAUL C MOORHOUSE

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Re Request from the Minister for Employment and Industrial Relations — 28 March 2008

Award Modernisation Statement (AM 2008/13-24)

[2009] AIRCFB 50

Giudice J, President, Watson VP, Watson, Harrison and Acton SDPP, Smith C

23 January 2009

Awards — Award modernisation — Publication of exposure drafts of modern awards to apply to stage 2 industries and occupations — Publication of draft amendments to two of priority modern awards — Publication of draft schedules dealing with supported wage system for employees with a disability, national training wages and school-based apprentices — Common national training wage schedule favoured — Consideration of modern awards to apply within stage 2 industries and occupations — Consideration of various matters arising in context of preparing modern awards to apply within stage 2 industries and occupations.

Pursuant to s 576C of the *Workplace Relations Act 1996* (Cth) the Minister made an award modernisation request on 28 March 2008. The Minister varied the request on 16 June and 18 December 2008. Following an initial statement and consultation, the Full Bench dealing with award modernisation published a decision in which, inter alia, it determined the industries and occupations to be the subject of the priority modern awards, and set an indicative timetable for the award modernisation process ((2008) 175 IR 120).

The Full Bench subsequently determined the industries and occupations to be dealt with in each of stages 2, 3 and 4 of the award modernisation process, and published a more detailed timetable to apply to each of those stages ((2008) 177 IR 5).

The Full Bench subsequently published exposure drafts of the priority modern awards, expressed certain views on the coverage provisions to be included in modern awards, and adopted proposed model award clauses dealing with a range of matters ((2008) 177 IR 8). The Full Bench later published 17 modern awards to apply in the priority industries and occupation ((2008) 177 IR 364).

This statement follows initial consultation in relation to the modern awards to apply in the stage 2 industries and occupations, and was accompanied by the publication of exposure drafts of 24 modern awards to apply in the stage 2 industries and occupations. This statement was also accompanied by draft amendments to two of the priority modern awards, and draft schedules containing standard provisions dealing with the following matters: the supported wage system for employees with a disability, national training wages and school-based apprentices.

Held: (1) The 18 December 2008 variations to the Minister's request have the potential to affect a number of terms of the priority modern awards. The stage 2 exposure drafts do not attempt to take account of the 18 December 2008 variations, but those variations will be considered in making the stage 2 modern awards. Interested parties were invited to make suggestions and submissions for ensuring that the priority modern awards properly reflect the Minister's request as now varied.

(2) Provisionally, transitional provisions to apply to the stage 2 modern awards would be considered later in the award modernisation processs, as part of the consideration of transitional provisions to apply to modern awards generally.

(3) The Full Bench favoured a common national training wage schedule to be included in all modern awards in which relevant training arrangements are possible.

(4) The Full Bench set out reasons as to why it had published, or not published, a draft modern award applicable to particular sectors or occupations within the stage 2 industries and occupations. Reasons are also provided for the approach to award coverage adopted in some of the stage 2 draft modern awards.

(5) The Full Bench set out reasons supporting, on a provisional basis, the manner in which it had dealt with certain issues in respect of which conflicting submissions had been received. In some instances further submissions from interested parties were invited.

(6) In a number of instances the Full Bench determined that there was no proper basis to continue existing allowances in the relevant draft modern award. In relation to some of the draft modern awards, the Full Bench invited the parties to further consider the rationalisation of existing allowances.

Cases Cited

Employment and Industrial Relations, Re Request from Minister for — 28 March 2008 (2008) 175 IR 120.

Paid Rates Review, Re (1998) 123 IR 240.

Redundancy Test Case Supplementary Decision (2004) 55 AILR 100-240.

Cur adv vult

The Commission

Introduction

1 This statement deals with award modernisation. It should be read in the context of the Commission's earlier statements and decisions concerning award modernisation. We publish with the statement exposure drafts of 24 modern awards and two priority modern awards with draft amendments for Stage 2 of the award modernisation process. We also publish three draft schedules containing standard provisions dealing with the supported wage system for employees with a disability, national training wages and school-based apprentices respectively. A list of the exposure drafts and schedules is in Attachment A to this statement.

2 We deal with matters in the following sections:

- issues of general importance
- consultations on the Stage 2 exposure drafts
- comments on each of the Stage 2 exposure drafts.

Issues of General Importance

3 The Commission made 17 modern awards in the priority stage of award

modernisation on 19 December 2008. Some matters were not finally dealt with in those awards and some matters have arisen since which require further consideration in conjunction with Stage 2 of the process.

Coverage, award flexibility and annual leave

4 The award modernisation process was initiated by a request signed by the Minister for Employment and Workplace Relations (the Minister) on 28 March 2008 pursuant to s 576C(1) of the *Workplace Relations Act 1996* (Cth) (the Act). The Minister varied the request on 16 June 2008 and 18 December 2008 pursuant to s 576C(4) of the Act. We shall refer to the request as amended as the consolidated request. The variations to the consolidated request made on 16 June 2008 were taken into account in the proceedings leading to the making of the priority modern awards and do not require any further comment at this stage. The variations to the consolidated request made on 18 December 2008, however, have not been considered in the award modernisation process so far. They have the potential to affect a number of terms of the priority modern awards which the Commission made on 19 December 2008. Those terms are, at least, the coverage clause, the award flexibility clause and the annual leave clause.

5 Clause 2(e) of the consolidated request now requires that a modern award should be expressed "so as not to bind an employer who is bound by an enterprise award or a Notional Agreement Preserving a State Award (NAPSA) derived from a state enterprise award." The requirement in relation to NAPSAs derived from state enterprise awards was not part of the consolidated request prior to 18 December 2008 and was not therefore taken into account in the making of the priority modern awards.

6 Clause 11AA of the consolidated request now provides that the Commission must ensure that a flexibility term in a modern award:

> • requires the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall;
>
> …
>
> • prohibits an individual flexibility arrangement agreed to by an employer and employee from requiring the approval or consent of another person, other than the consent of a parent or guardian where an employee is under 18.

7 These requirements obviously were not taken into account when the model flexibility clause was formulated.[1] Nor were they taken into account in the making of the priority modern awards.

8 Clause 33 of the amended request provides that modern awards may require employees, or allow employees to be required, to take paid annual leave but only if the requirement is reasonable. The requirement for reasonableness was not part of cl.33 prior to the variations on 18 December 2008. Similarly, it was not taken into account in the making of the priority modern awards.

9 We intend to deal with these variations to the consolidated request, and any others that might be relevant, in making the Stage 2 awards, provided it is practical to do so. We encourage interested parties to bring forward proposals

1 *Re Request from Minister for Employment and Industrial Relations — 28 March 2008* (2008) 175 IR 120.

and submissions as to how these new requirements should be reflected in the coverage, award flexibility and annual leave clauses. The Stage 2 exposure drafts do not attempt to take account of the 18 December variations.

10 It is also necessary to consider the effect of the variations to the consolidated request on the priority modern awards made in December 2008. We would also welcome suggestions and submissions as to the procedure to be adopted in ensuring that the relevant provisions in those awards properly reflect the terms of the consolidated request. There is also the possibility, which we mention below, of considering all variations required in modern awards, for whatever reason, at the same time as transitional provisions are being considered.

Transitional provisions

11 As indicated in its decision of 19 December 2008, the Commission decided to consider any transitional provisions at a later stage in the process. This course was adopted to permit parties affected by the modern awards to give proper consideration to the effect of the terms of the awards and to advance transitional proposals accordingly. It is our provisional view that the same approach should be adopted in relation to the Stage 2 modern awards. If that view is ultimately adopted there would be a further proceeding after June of this year to ensure that all modern awards include any necessary transitional provisions. This also is a matter on which views are sought as part of the Stage 2 consultations.

Other possible variations to modern awards

12 We have already mentioned the need to review some terms of the modern awards as a result of the recent variation to the consolidated request. It may be necessary to vary modern awards for a number of other reasons prior to 1 January 2010. For example, minimum and other wage provisions in modern awards may require variation as a result of any alteration made by the Australian Fair Pay Commission (AFPC) in 2009. On current indications the AFPC is likely to issue a wage determination in early July. Should any application be made to amend modern awards following that determination the application should be dealt with prior to 1 January 2010, the date on which modern awards commence to operate. Modern awards may also require amendment following the passage of the Fair Work Bill. One possible approach to the matter is to provide that when transitional provisions are being dealt with in the second half of 2009 the Commission might also deal with any other variations required in modern awards whatever the source of the variation. Views on this matter also are sought during the Stage 2 consultations. We intend to deal with the matter in our decision on the making of the Stage 2 awards, to be published by 3 April 2009.

Draft schedules

13 In making the priority awards the Commission indicated that modern awards would include schedules dealing with the supported wage system for employees with a disability, national training wages and school-based apprentice provisions. It is anticipated that these provisions will be of general application. Drafts of all three provisions are published with this statement. We invite comments on the drafts during the Stage 2 consultations. The supported wage system schedule and the school-based apprentices schedule do not require comment in this statement. There are, however, a number of issues relating to the national training wage schedule.

14 The first issue is whether there should be one, common national training

wage schedule for all relevant awards or whether there should be some differences on an industry basis. If there is to be one uniform schedule it would need to include all of the available training packages. If there were different schedules this would permit the inclusion of only the training packages relevant to the particular award and the exclusion of others and other differences on an industry basis. At this stage we favour one, common national training wage schedule. The schedule would include the full range of available training packages and would be included in all modern awards in which relevant training arrangements are possible. The exposure draft is put forward on that basis and includes a number of training packages which have been approved since the *National Training Wage Award 2000*[2] was last varied. Nevertheless the final decision on these matters will be made in light of the material and arguments advanced during the consultations.

15 The schedule, like the *National Training Wage Award 2000*, allocates each training package to skill level A, B or C for the purpose of determining the appropriate minimum wage. The draft provides that where a training package has not been allocated to a skill level the default level will be level B. We should also mention that the award provides for special school leaver rates of 25%, 33% and 50%. We have decided not to include these rates in the draft as it appears they have not been used. Like all of the exposure drafts, the draft schedule indicates a preliminary view only. Once the National Training Wage Schedule has been finalised it will be necessary to consider the affect upon trainee provisions which have already been included in modern awards and, in particular, whether those provisions should remain in the award.

Consultations on Stage 2 Exposure Drafts

16 With this statement we publish exposure drafts of a further 24 modern awards and two priority modern awards with draft amendments. Written comments and other material in relation to the exposure drafts are to be lodged with the Commission by 13 February 2009. Comments can be lodged by post, fax or email. It would assist if comments could be directed to a specific clause in a particular draft where it is practicable to do so. All relevant material lodged with the Commission will be made available through the internet as soon as practicable.[3] The Commission will sit in Sydney from 23 to 27 February 2009 inclusive for final consultations. The purpose of the consultations will be to permit discussion on matters arising from the material already filed but not to repeat that material. The dates and times of the consultations will be confirmed in a notice of listing.

17 As we have already indicated, it is intended that the Stage 2 consultations both written and oral, will also deal with a number of matters of general significance identified earlier in this statement.

18 We urge parties to meet the deadlines for the filing of material. While there will be occasions on which some latitude is appropriate they will be rare. The effectiveness of the consultation process is largely dependent on the timetable being met. We also wish to make it clear that we cannot guarantee that the Full Bench will have the opportunity to properly consider material which is not lodged in accordance with the timetable.

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2 AP790899CAN

3 www.airc.gov.au.

Piece work

19 Clauses 43 to 45 of the consolidated request refer to piece workers and to the interaction between modern awards and the entitlements in the National Employment Standards (NES). A number of Stage 2 industries have piece workers. We ask interested parties to address the matters raised in cll.44 and 45 of the consolidated request during the consultations.

Rationalisation of allowances

20 In a number of industries there are many different allowances in federal awards and NAPSAs, some of quite small amounts. It is often difficult to know the origin and purpose of the allowances and whether they are still relevant. In some cases the allowance will not be appropriate for inclusion in a safety net award because it is outmoded, is the result of enterprise bargaining or for some other reason.

21 In some industries there is a strong case for rationalising allowances. The manufacturing and building and construction industries are examples. We encourage parties to give attention to the number, amount and purpose of allowances with a view to rationalising them and eliminating those that are no longer relevant.

Comments on Stage 2 Exposure Drafts

22 For ease of reference we shall deal with the exposure drafts in their industry groupings.

Agriculture group

23 We deal first with the agriculture group of industries. We should indicate that we have decided not to publish an exposure draft for the aquaculture or wine industries. We shall give further consideration to the aquaculture industry in Stage 4 and we intend to deal with the wine industry in Stage 3. We have also decided against a separate agribusiness clerical and administrative draft award—the relevant operations will be included in the award made in the financial services group. We have also decided not to publish a draft award dealing with services to agriculture. There is currently no such award and we have not been persuaded that there should be.

24 We publish an exposure draft of the *Pastoral Industry Award 2010*. The Australian Workers' Union (AWU) submitted that we should make a wool industry award. Such an award could cover work as diverse as shearing and crutching sheep, the processing of fleeces into wool and the storage of wool fleeces for export. We have decided not to publish an exposure draft covering all of these industries. We consider the processing of wool fleeces for the purpose of making wool fibre to be a manufacturing activity covered by the *Textile, Clothing, Footwear and Associated Industries Award 2010*.[4] Other wool activities continue to be covered by the award regulating the pastoral industry.

25 We have decided to publish an exposure draft of a wool storage award along the lines of the agreement between the Agribusiness Employers' Federation and the National Union of Workers (NUW). The draft is entitled *Skin, Hide and Wool Stores Award 2010*.

26 During the pre-drafting consultations an issue arose as to the appropriate award coverage for cotton ginning. Both the AWU and the National Farmers Federation (NFF) to some degree acknowledged that cotton ginning is not an

4 MA000017.

activity which is suitable for regulation as part of the pastoral or horticultural industries. However, it was suggested that it may be suitable to regulate cotton ginning by a discrete part of a pastoral industry award.

27 Cotton ginning is not the growing of crops or the raising of livestock. It is an industrial processing activity rather than an agricultural activity. Awards in the pastoral industry do not presently cover cotton ginning which is regulated by NAPSAs with customised classifications and terms and conditions of employment including night and shiftwork provisions. These terms and conditions bear little resemblance to those in awards covering the pastoral industry. In our view, it may be more appropriate that the industry be regulated by a modern award of specific application or by the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Modern Award)*.[5] We publish an exposure draft of the *Cotton Ginning Award 2010*. In doing so we do not exclude the possibility that the industry might be more appropriately covered by the Manufacturing Modern Award.

28 We also publish exposure drafts of the *Horticulture Award 2010, Nursery Industry Award 2010* and the *Silviculture Industry Award 2010*.

29 We note that major industry organisations encountered difficulties in addressing some complex and important issues concerning classifications, rates of pay and allowances relevant to the pastoral and horticulture exposure drafts. Many of these matters are likely to require significant attention during consultations on the exposure drafts. Rates of pay for shearing and crutching are in this category. The exposure draft for the pastoral industry covers wool harvesting, including piece work rates for shearing and crutching sheep and pressing wool, as well as rates of pay for shed hands. Where submissions were made concerning these issues they were brief or incomplete. The exposure draft includes the existing table of piece and other rates applicable to shearing shed operations. We provisionally note the possibility of adopting the AWU's proposal to introduce the 38-hour week for shearers. That proposal is to adjust the shearers' formula by reducing the number of sheep required to be shorn for the existing per hundred rate from 100 to 95.

30 The draft awards for the pastoral industry and horticulture attempt to bring together a number of awards and NAPSAs containing an extremely diverse range of conditions. In due course, when the awards have been made, attention will need to be given to appropriate transitional provisions.

Building, metal and civil construction group

31 There are four exposure drafts in this industry group:

- *Building and Construction Industry General On-site Award 2010*
- *Electrical, Electronic and Communications Contracting Industry Award 2010*
- *Plumbing and Fire Sprinklers Contracting Industry and Occupational Award 2010*
- *Joinery and Building Trades Award 2010*

32 The first exposure draft is the *Building and Construction Industry General On-site Award 2010* (Building and Construction Modern Award). This draft encompasses the areas covered by the *National Building and Construction*

5 MA000010.

Industry Award 2000 (NBCI Award),[6] the *Australian Workers' Union Construction and Maintenance Award 2002* (AWU Award),[7] the *National Metal and Engineering On-site Construction Industry Award 2002*[8] and associated awards and NAPSAs. The exposure draft also covers other activities currently subject to separate award regulation—for example, landscaping, joinery work, mobile crane work and geomembrane and geotextile installation where undertaken in the building and construction industry.

33 We received an amended draft award from the Construction, Forestry, Mining and Energy Union (CFMEU) on 19 January 2009, in which amendments were made to its proposed scope clause, a new mobile crane table of rates was added, new clauses dealing with apprentices, including school-based apprentices, and trainees were proposed and some transitional arrangements were removed. We have decided to publish the exposure draft in the terms drafted by us prior to the receipt of the CFMEU's amended draft, notwithstanding the fact that the amendments proposed by the CFMEU warrant consideration. We do so on the basis that we will consider the new provisions now proposed during the post-exposure draft consultations, together with any other views expressed by industry participants. The modification of the apprentices and training arrangements is significant, as are the new mobile crane wages proposed and the scope provision. However, given the very late receipt of the third version of the CFMEU draft award and the significant changes involved, we think it necessary to hear its explanation of the changes advanced, together with the views of others during the next part of the Stage 2 consultation process. That process would be assisted if the CFMEU could file its explanation prior to the consultations in order that other parties have an opportunity to consider the basis for the CFMEU approach prior to putting their views during the consultations.

34 We incorporated the mobile crane hire industry into the exposure draft published, utilising classifications drawn from the NBCI Award and the AWU Award. We did consider the publication of an exposure draft for the mobile crane industry to operate beyond the building and construction industry based on the *Mobile Crane Hiring Award 2002* (Mobile Crane Award),[9] including consideration of the possibility of a broader award for an industry based on the provision of equipment and labour for hire beyond the building and construction industry. We decided, however, to defer consideration of such an award on the basis that we received little input from interested parties on the mobile crane hire industry. The most substantial contribution, a two page submission by the Crane Industry Council of Australia (CICA), suggested a need to rewrite the classification system and review the current severance pay provision.

35 On 16 January, we received advice from the CFMEU about an agreement between it, the CICA and the Australian Industry Group (AiGroup) that a separate mobile crane hire award should be made. Similar advice was received from CICA on 19 January. A proposed joint draft award was provided on 20 January 2009. We have decided to proceed with the publication of the exposure drafts prepared by us but to consider the joint CFMEU, CICA and the AiGroup draft during the Stage 2 consultations. We invite them, and any other

6 AP790741CRV.

7 AP815828CRV

8 AP816828CRV.

9 AP816842CRV.

interested parties, to address us on the rationale for and content of the proposed separate mobile crane hire award. In doing so they should address the relationship with mobile crane classifications imported from the AWU Award and the NBCI Award into our exposure draft covering the general building and construction industry. They should also address the relationship between the classifications in their proposed separate mobile crane award and the mobile crane classifications proposed for the general building and construction award by the CFMEU in its third version of its draft. Further, we invite input in relation to the appropriate minimum wages, given that current wage rates in the Mobile Crane Award, when updated for AFPC increases, appear to be in advance of those found in the AWU Award.

36 We have also published separate exposure drafts for the electrical contracting industry and plumbing industry and occupation. The latter draft includes the fire sprinkler industry. The draft awards are the *Electrical, Electronic and Communications Contracting Industry Award 2010* (Electrical Modern Award) and the *Plumbing and Fire Sprinklers Contracting Industry and Occupational Award 2010* (Plumbing and Fire Sprinklers Modern Award).

37 Without deciding the issues, we have not included the asphalt, bitumen and pre-mixed concrete industries subject to further consideration in respect of possible separate awards or integration into the building and construction industry, cement and concrete products or quarrying awards.

38 We note that, during the consultation stage, the industry participants did not fully address the possible content of exposure drafts, preferring to await some indication from us as to the number and proposed scope of operation of exposure drafts for the industry. As a consequence, the exposure drafts published are very much at a preliminary stage and will no doubt benefit from a more detailed input from the industry participants during the consultations. Particular issues that warrant further input from industry participants are identified below, although further input into the terms of the exposure drafts generally would be desirable.

39 We have retained daily hire as an optional employment type, together with hourly rates loaded with the follow the job component of the minimum wage rate and certain additional payments in the exposure drafts for the Building and Construction Modern Award and the Plumbing and Fire Sprinklers Modern Award. We have drawn on the CFMEU draft for this purpose. However, we invite the parties to address us on the continuing role of the daily hire mode of employment, and associated loaded rates, in the context of a contemporary safety net modern award.

40 We have removed, from each award, restrictions on the maximum duration of casual employment, replacing them with a casual conversion clause. In respect of the Plumbing and Fire Sprinklers Modern Award, we have also included provision for part-time employment.

41 The redundancy provisions in the exposure drafts also require further detailed input in light of the current award provisions. A pre-2004 redundancy scale applying to small business employers appears in some awards and NAPSAs in the industry. Most, but not all, awards contain the provision peculiar to the building and construction industry, which defines redundancy more broadly than the definition arising from Commission test cases and reflected in the NES. The provision applies a slightly different redundancy benefit scale in respect of the first four years of service but does not reflect the current standard for larger

employers arising from the 2004 Full Bench decision.[10] The building industry provision also permits an employer to offset its obligations under the redundancy provision by making contributions to a redundancy pay scheme. Our exposure drafts attempt to apply the NES, maintain pre-2004 small business provisions and retain the option of offsetting obligations by contributions to funds. Further input from interested parties is desirable.

42 In drafting the Building and Construction Modern Award we have rationalised a range of State-based differences in rates for apprentices. The allowances provisions generally reflect the current NBCI Award provisions. It may be observed, however, that the allowances provisions are cumbersome and highly prescriptive, as illustrated by the tool allowance provision. We note that the CFMEU and Master Builders Australia (MBA) are open to a rationalisation of allowance provisions.[11] We invite them, and other interested parties, to explore a rationalisation of the allowance provisions in the exposure draft, including the identification of any unnecessary or outdated allowances, as a matter of urgency and to deal with the issue in the consultations.

43 We have included in the exposure draft, an MBA formulation of travel and distant work provisions. We have included two inclement weather provisions—drawn from the NBCI Award and AWU Award. In our provisional view, inclement weather provisions are a modern award matter. However, we would be assisted by an attempt to simplify the provision, removing unnecessary prescription with a view to a standard provision which could be applied across all sectors of the industry.

44 Finally, in relation to the Building and Construction Modern Award exposure draft, we have included in the draft some separate provisions for the civil construction sectors. Those provisions relate to allowances and shiftwork. In the latter respect, for the purposes of the exposure draft, we have simply replicated the NBCI Award and AWU Award prescriptions for shiftwork. We invite further input from interested parties in the post-exposure draft consultations, directed to simplification of the provisions and, to the greatest extent possible, some degree of commonality of shift provisions.

45 Turning now to the draft Electrical Modern Award we have adopted the draft jointly proposed by the National Electrical and Communications Association (NECA) and the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), although with some modification. The major modification involves the expression of wages and allowances as separate amounts, rather than in a rolled-up rate, as discussed below. Otherwise, the modifications involve some editing of the NECA and CEPU draft to remove unnecessary detail and provisions which involve no obligation or entitlement.

46 With respect to the major modification, in our view modern awards should separately identify properly fixed minimum rates and any additional payments and allowances and describe the basis of their application. We have recast the NECA and CEPU draft to this effect, using Victorian provisions in the *National Electrical, Electronic and Communications Contracting Industry Award 1998*

10 *Redundancy Test Case Supplementary Decision* (2004) 55 AILR 100-240, PR032004.

11 Transcript PN480, 1 December 2008 and PN1217-1222, 2 December 2008, before Watson SDP.

(Electrical Contractors Award).[12] In doing so we have omitted the special payment found in Tables A, E, I and M of the Electrical Contractors Award and the service increments found in cl.18.3.1(g) of the award.

47 We have omitted the special rates on the basis that, as we understand it, they constitute the residual amounts arising from the conversion of paid rates to minimum rates in June 1998.[13] On 20 October 1998, the *Paid Rates Review* Full Bench established principles for the conversion of awards which do not contain properly fixed minimum rates.[14] The principles required the establishment of proper minimum rates and set out a process for the introduction of those rates. The principles stated that where the rates do not equate they will require conversion in accordance with the principles that:[15]

> 5. Any residual component above the identified minimum rate, including where relevant incremental payments, should be separately identified and not subject to future increases.
>
> …
>
> 7. Any future increases in rates in the award will only be applied to the minimum rates component and will be absorbed against any residual component; that is, the residual component will be reduced by the amount of the increase in the minimum rates component.
> 8. Increments will only be retained where they have been included in the award pursuant to the relevant work value principle or where it can be established that the increments were inserted by the Commission on grounds of structural efficiency and work value.

48 Subject to further input from relevant parties, it is our view that the special payments in the award should have been absorbed against safety net increases since 1998 and the service increments should have been similarly absorbed unless included on work value or structural efficiency grounds. For this reason, we think that those amounts should not be included in the modern award. In addition, we have not included the attendance allowance in the current Electrical Contractors Award. Subject to further explanation by the parties, we do not see a role for an additional payment for attendance at work within a minimum safety net award.

49 We note that the NECA and the CEPU draft bases the wages provision on the *Electrical, Electronic and Communications Contracting Industry (State) Award (NSW)*.[16] NECA and CEPU need to address us on the appropriateness of the level of the minimum classification rates and the level of and rationale for the inclusion in a safety net award of the various allowances in the total weekly rates they propose. As noted above, whatever wage rates and allowances are included in the final award should be separately identified.

50 The wage-related allowances in the exposure draft have been calculated by adjusting the Victorian rates in the Electrical Contractors Award, last adjusted in 2005, increasing them by the percentage increase in the trade rate since the last adjustment ($54.90/$578.20) and then converting the rate to a percentage of the

12 AP791396CRV.

13 Print Q4287.

14 Print Q7661; *Re Paid Rates Review* (1998) 123 IR 240.

15 *Re Paid Rates Review*. at 256.

16 AN120191.

current trades rate ($637.60). Expense-based allowances reflect current Victorian rates in the Electrical Contractors Award and will need updating.

51 In their joint draft, the NECA and the CEPU noted that some issues are the subject of ongoing discussions. Generally, we have not included such matters in the exposure draft, subject to clarification by the NECA and the CEPU. In relation to one such issue, payment to apprentices, we have included the percentage of the trades rate for apprentices in Victoria reflected in the Electrical Contractors Award in the exposure draft, subject to further consultation.

52 The exposure draft for the Plumbing and Fire Sprinklers Award has both an industry coverage, with respect to plumbing and fire sprinkler contractors and an occupational coverage, with respect to plumbing and fire sprinkler work. Given the common skill-based classification structure, subject to recognition of different plumbing and sprinkler fitting skills, and a general commonality of current award conditions, we have included sprinkler pipe-fitting in the draft, although the draft provides for a range of different conditions for the fire sprinkler sector.

53 The classification structure we have included is a combination of the current "Award restructuring—new classification structure" appendices to the *Plumbing Trades (Southern States) Construction Award, 1999*[17] and the *Sprinkler Pipe Fitters' Award 1998*.[18] Each of the appendices was expressed to operate by agreement for a period of 12 months, after which time it was to be inserted in the award. The appendices appear to have been approved and inserted in the awards in 1997.[19]

54 The exposure draft of *Joinery and Building Trades Award 2010* (Joinery Modern Award) is largely based on the current *National Joinery and Building Trades Products Award 2002* (National Joinery Award),[20] as it applies in the off-site sector. As with each of the exposure drafts published for this industry group, it is desirable that during the consultations consideration be given to rationalising the allowances in the exposure draft published, in particular special rates.

55 The CFMEU filed a draft Off-site Construction Industries Award on 31 October 2008. The AiGroup proposed that the scope of any such award be limited to avoid intrusion into the manufacturing industry. The CFMEU and AiGroup reached an in-principle agreement directed at resolving this tension, although the practical effect of the agreement is difficult to ascertain. The CFMEU lodged an amended draft award on 20 January 2009. The amended award apparently did not resolve the AiGroup's concerns. Nor was the amended draft acceded to by the MBA.

56 We accept the need to consider a modern award or awards covering other work within the awards in the current building, metal and civil construction group, as they apply beyond the building and construction industry. We are conscious, however, of the need to avoid such an award or awards intruding into manufacturing activity, which would be more properly regulated by the Manufacturing Modern Award. The exposure draft of that award, as revised in

17 AP792355CRV.

18 AP796030CRV.

19 Print P4024, 25 August 1997.

20 AP817265CRV.

Stage 2, incorporates elements of the draft off-site award initially proposed by the CFMEU, specifically clay articles, glazing and gypsum and plasterboard manufacturing. As noted above, at this stage, the cement and concrete products industry will be considered in Stage 3.

57 The terms and scope of a modern award applying to building trades and activities off-site was not subject to detailed discussion in our consultations and the CFMEU's amended draft came too late to allow broader input into the issues raised. In the circumstances we have decided to publish an exposure draft for off-site building work largely based on the current National Joinery Award as it applies in the off-site sector. That exposure draft is entitled Joinery Modern Award. We shall give further consideration to the scope of such an award, or any additional awards to cover other off-site work, during the consultations. The CFMEU will have the opportunity to elaborate on its proposal and other parties will be able to provide their views in the next part of the Stage 2 consultation process.

Cleaning services

58 We publish an exposure draft of a *Cleaning Services Industry Award 2010*. The submissions made and material presented during the pre-drafting consultation indicate a large degree of agreement between the industry associations, the Building Services Contractors Association of Australia (BSCAA) and the Australian Cleaning Contractors Association (ACCA), and the Liquor, Hospitality and Miscellaneous Union (LHMU) concerning the contents of an award to cover the contract cleaning industry. While some NAPSAs cover directly employed cleaners the exposure draft covers only employers and employees engaged in the contract cleaning industry.

59 The contract cleaning industry is characterised by high levels of part-time employment. Almost 50% of employees are engaged on a part-time basis often working shifts which may be of very short duration. It is also an industry where there are frequent changes of contract and where commonly employees cease employment with the outgoing contractor and become employees of the incoming contractor. It is an industry in which employees are highly reliant on the award and competition for contracts is primarily based on price.[21]

60 Awards and NAPSAs in the industry currently provide for part-time employees to be rostered to work up to the equivalent of full-time hours without payment of overtime. For the most part this flexibility attracts the payment of a loading equivalent to 15% of the classification rate. Given the nature of the industry and subject to appropriate safeguards this arrangement can be included in a modern award and we have put it in the exposure draft. We have also provisionally decided that there is merit in the proposal by the industry parties to provide for minimum engagement periods based on the size of the job and this is also reflected in the exposure draft.

61 The major parties proposed that the award make provision for an outgoing contractor to be exempt from making severance payments provided for by the NES under certain circumstances. We are of the view that such a provision would be contrary to the terms of the consolidated request, in particular cl.30, and we have therefore not included it in the exposure draft.

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21 See Iain Campbell and Manu Peeters, "Low Pay, Compressed Schedules and High Work Intensity: A Study of Contract Cleaners in Australia", *Australian Journal of Labour Economics*, Vol 11, No 1, 2008, pp 27-46.

62 There are a large number of allowances in the various awards and NAPSAs covering the industry. A number of these allowances are State or location specific and it is not always clear that they are appropriate for inclusion in a safety net award. Many of these allowances have not been included in the draft.

Financial services group

63 This industry sector is a major part of the Australian economy and an employer of over 400,000 people. It covers a range of financial institutions, including banks, building societies, credit unions, insurance companies, trustee companies and related service businesses such as trading, debt recovery, financial consulting, and broking institutions.

64 Award coverage of the sector is long standing. The major banks, merchant banks and several building societies are currently covered by federal enterprise awards. Most other parts of the industry are covered by industry awards and NAPSAs. Award covered employees are predominantly engaged in white collar clerical related roles with particular finance industry knowledge and skills. There are widespread formal and informal overaward arrangements.

65 The Finance Sector Union, the major banks and some other employers supported the making of a single award for the sector. Other employers and the Australian Services Union supported the continuation of awards which had been established for parts of the sector.

66 We have prepared an exposure draft of a single award covering the entirety of the industry entitled the *Banking, Finance and Insurance Industry Award 2010* (Banking Modern Award). We consider that there are advantages in a uniform safety net provided that it is simple to understand and apply and does not lead to significant changes to current terms and conditions. The draft covers all parts of the industry including those currently covered by separate instruments such as the health insurance industry and woolbroking.

67 The terms of the exposure draft reflect, in large part, the current terms of federal awards covering parts of the industry such as the *Insurance Industry Award 1998*[22] and the *Credit Union Award 1998* (Credit Union Award).[23] The draft is intended to ensure that there will be little change for those remunerated in excess of the award and those who currently receive limited overaward benefits. This should minimise disadvantage to employees and additional cost to employers.

68 The classification structure reflects the six level structures applying in many awards and includes a partial exemption from hours, overtime and allowances for employees paid in excess of $44,242. Although the rate is higher, this reflects many of the partial exemption provisions in finance industry awards and particularly the terms of the Credit Union Award.

Graphic arts group

69 On the basis of materials currently before us we are not persuaded that it would be appropriate to incorporate the graphics arts and printing industries into the Manufacturing Modern Award. We publish an exposure draft of a *Graphic Arts, Printing, Publishing and Associated Industries and Occupations Award 2010*. The exposure draft, if made an award, will replace two federal awards in

22 AP784988CRV.

23 AP772291.

the graphic arts industry and nine federal awards and 20 NAPSAs in the printing industry. The draft reflects a significant degree of agreement between the major interested parties.

70 The coverage clause reflects the current *Graphic Arts—General—Award 2000* (Graphic Arts Award)[24] circumstance of both industry and occupational coverage. We are not entirely persuaded that this should pertain in the future and invite further submissions on the issue. While plastics manufacturing is included in the coverage clause, reflecting current circumstances, it is restricted by reference to the printing element involved in manufacturing. We are not currently persuaded that references in current classification definitions to aspects of web design are sufficient for us to include provision for web development/design in the coverage clause.

71 The exposure draft contains a casual employment clause which departs from the current circumstances of conversion from casual to full or part-time employment provided for in the Graphic Arts Award. The clause in the exposure draft is largely reflective of the casual conversion clause in the Manufacturing Modern Award.

72 The classification structure in the draft is identical in substance to that incorporated into the Graphic Arts Award in 2005. The implementation of an eight level structure in 2005 gave rise to a requirement to include award terms enabling employers to absorb increases relating to the transition to the new structure and to argue incapacity to pay. We have not included those provisions in the current exposure draft on the basis that the transition was close to complete. However, an additional timeframe from 1 January 2010 to 30 June 2010 has been included to reclassify employees not currently on the eight level classification structure. Any other issues relating to the implementation of the eight level classification structure should be raised during the consultations.

73 The exposure draft covers employees previously covered by the *Commercial and Industrial Artists Award 2000*.[25] We have had some advice from union and employer organisations, in response to an inquiry made subsequent to the formal consultations, that the skill descriptors in the classification structure in the Graphic Arts Award, which we have included in the draft, are sufficient to cover the skill requirements of those employees. Any related issues should be dealt with during the consultations.

74 A leading hand allowance currently exists in certain awards. The allowance has been included in the exposure draft but its application will be limited. The allowance will continue for those employees who currently receive it until the reclassification of those employees to a level in the classification structure containing commensurate supervisory duties.

Health and welfare services (excluding social and community services)

75 We have decided to publish four exposure drafts in this industry group. They cover; aged care, nursing, professional and support services, and doctors. The Health Services Union (HSU) lodged a further submission at a very late stage. This submission will be taken into account during the consultations.

76 The exposure draft of the *Aged Care Industry Award 2010* not only covers aged care provided in institutions but also extends to services provided in the

24 AP782505CR.

25 AP772248.

home by persons who are covered by the award. This approach may require further consideration. There are a myriad of services for the elderly which are conducted by various organisations including private providers and local governments. Further, aged care activities may be an element in the provision of disability services. This will be examined further in dealing with social and community services in Stage 4.

77 The exposure draft of the *Nurses Occupational Industry Award 2010* is, as its name suggests, cast as an occupational award. Nurses are the single biggest occupational group in health and welfare services[26] and the material advanced suggests at this stage that an occupational award is warranted. The award generally applies to nurses wherever employed although nurses employed in secondary schools have been excluded.

78 The exposure draft of the *Health Professionals and Support Services Industry and Occupational Award 2010* is a generic exposure draft to cover professional and technical classifications together with clerical and administrative classifications. We have sought, in the salary structure and level of salaries, to accommodate all health professionals (except doctors and nurses) employed in both the health industry and industry generally. At this stage we have not attempted to attach particular professions or skills to any particular pay point. We invite the parties to examine this and provide advice during the consultations. We have attached as Schedule B to the award a list of common occupation names which should also be considered.

79 The draft awards covering nurses and health professionals have a common entry rate for a three year degree. We have struck the minimum wage for both classifications at $697.00 per week.

80 We have not included qualifications allowances in the draft awards for nurses or health professionals. Our provisional view is that the classification structure should deal with qualifications in two ways. The first is the entry rate, which the drafts provide for, and the second is the level at which people are classified. The traditional work value notion of skills held and called upon to be used remains valid. We do not see it as appropriate for persons performing the same work to be paid differently based upon additional non-mandatory qualifications. Ordinarily, further study would enhance opportunities for promotion within the structure. Mandatory qualifications should be reflected in the classification structure.

81 In relation to both nursing and health professionals the exposure drafts cover employers whether they are in the health industry or not. Employers who provide nursing or other professional health services under contract would be covered in relation to their employees in the relevant classifications.

82 Finally there is an exposure draft of a *Medical Practitioners Occupational Award 2010*. Salaries are drawn mainly from those prepared by the Australian Salaried Medical Officers Federation as no other party dealt with medical practitioners.

Information and communications technology group

83 These industries cover telecommunications operations and servicing, market research, data processing, the operation of call centres and the servicing of

26 See table on p.4 of the Private Hospital Industry Employer Associations December 2008 submission.

business equipment and computers. Because of the disparate nature of the various types of businesses and the work of employees we consider that the scope for aggregation of awards within these industries is limited.

84 Although some awards are of longstanding, award coverage of the sector is generally of relatively recent origin. A number of federal awards have been developed with a large measure of agreement in recent years.

85 The servicing of business equipment has undertaken many changes in the computer age. We consider that the establishment of an award for electrical contractors with a broad definition of the types of business covered and the work of their employees, combined with the vocational reach of the Manufacturing Modern Award into maintenance activities, probably makes it unnecessary that there be an additional award covering the servicing of business equipment. As already mentioned, an exposure draft of an Electrical Modern Award is published with this statement. A key question to be explored in the consultations is whether that award would be an appropriate safety net for employees engaged in servicing business equipment.

86 We publish an exposure draft of a *Market and Social Research Industry Award 2010*. The market research industry was described as one which involves much more than clerical and administrative work. A modern award was proposed with a large measure of agreement between market research employers and the NUW. The draft largely reflects standard provisions, existing award provisions and the helpful guidance of the parties.

87 We publish an exposure draft of a *Telecommunications Services Industry Award 2010* (Telecommunications Modern Award). The telecommunications services industry covers telecommunications service carriers and related services. Major operators are covered by enterprise awards, but other operators are covered by an industry award of relatively recent origin. The scope of the award revolves around the operation, installation and servicing of telecommunications equipment including any call centre operated by a telecommunications operator. It does not cover manufacturers of telecommunication equipment even though they may operate telecommunications services or install and service the equipment they manufacture. Further, it does not cover employers who install and service equipment and lines but do not operate that equipment or lines. The draft award reflects standard provisions, existing award terms and the significant amount of agreement of the parties.

88 The draft award covers all current award-covered employees apart from professional employees. The parties to the current award agree that the nature of professional employment in the sector makes it more appropriate that there be a separate award for professional employees. The employers proposed an information technology and telecommunications industry award confined to professional employees engaged in those industries. The Association of Professional Engineers, Scientists and Managers, Australia proposed an occupational award covering information technology and telecommunications professionals.

89 We have decided to defer the consideration of awards covering such employees until Stage 3 of the award modernisation process. The nature of awards covering professional employees generally will be considered in Stage 3 and the alternative approaches can be considered in that broader context.

90 Parties subject to the *Contract Call Centre Industry Award 2003* (Contract

Call Centre Award)[27] proposed the establishment of a modern award which largely reflects the scope and content of that award. Call centres are operated by a range of employers in different industries and on a contract basis by specialist call centre service providers. Some employers operate a call centre with respect to their own operations and undertake contract work for other clients. It is a growing industry and subject to intense domestic and international competition.

91 We have included call centre operations within some draft industry awards where appropriate. Those draft awards include the drafts for the Banking Modern Award and the Telecommunications Modern Award. Currently direct, contract and hybrid call centres are covered by common rule clerical awards and NAPSAs and in some cases by the federal Contract Call Centre Award.

92 A range of submissions were put to us as to the future coverage of call centres. We consider that it would be desirable that industry awards cover call centres where appropriate and where not covered, one safety net award apply uniformly to all other contract and direct call centres. Common rule clerical NAPSAs coverage was described as appropriate by operators who made submissions to us. A uniform safety net which also consistently applies appropriate flexibilities to this growing industry would ensure that all competition is on an even base and that international competitiveness can be maximised.

93 We have decided to amend the *Clerks—Private Sector Award 2010* (Clerks Modern Award)[28] on an exposure draft basis, to cater for all call centres not covered by an industry award. The changes reflect flexibilities and additional classifications contained in the contract call centre award. The proposed amendments are marked up in the draft of the Clerks Modern Award we publish with this statement.

Manufacturing group

94 The exposure draft for the Manufacturing group is the Manufacturing Modern Award, which was made in Stage 1, with the coverage clause amended to add the industries in the Stage 2 manufacturing group. The coverage clause has also been altered to exclude employees of electrical contractors from the coverage of the award as a corollary of the publication of the Electrical Modern Award exposure draft. The redundancy clause of the Manufacturing Modern Award has also been amended to reflect the small employer redundancy provisions of the *Furnishing Industry National Award 2003*.[29]

95 The scope of the *Aircraft Engineers (General Aviation) Award 1999*[30] has not been included in the exposure draft, as was suggested by some parties. Nor have provisions concerning aircraft engineers been included. It is proposed they be considered in Stage 3 as part of airline operations.

96 As to other provisions of the exposure draft, this is another proposed modern award which would benefit from a rationalisation of its allowances provisions. The possible inclusion of the small employer redundancy provisions of the

27 AP827785CRV.

28 MA000002.

29 AP825280CAV.

30 AP765552.

Engine Drivers' and Firemen's (ACT) Award 2000[31] in the Manufacturing Modern Award is, as we suggested in our 19 December 2008 decision, a matter interested parties should also address.

Private transport industry (road, non passenger)

97 We have decided to publish three exposure drafts. They are the *Road Transport and Distribution Award 2010* (RT&D Modern Award), the *Road Transport (Long Distance Operations) Award 2010* (RT Long Distance Modern Award) and the *Transport Industry (Cash in Transit) Award 2010* (CIT Modern Award). Each draft is of an industry award with the coverage described by reference to the industry of the relevant employers.

98 The RT&D Modern Award covers the road transport and distribution industry as defined in the exposure draft. The definition is broad and is intended to incorporate the scope of the pre-reform *Transport Workers Award 1998* (Transport Workers Award)[32] and NAPSAs operating in each state as the general industry transport award. It also incorporates the transport activities previously covered by freight forwarding, petrol and petroleum products, crude oil and gas and quarried materials awards. These are a subset only of the sectors covered by the exposure draft and the parties should give close consideration to the definition of the industry.

99 We are aware that the definition of the industry does not reproduce the wording in each of the existing scope or incidence clauses in relevant pre-reform awards and NAPSAs. The parties should give consideration to whether there is a need to specifically identify other activities. In this respect, however, we note the breadth of paragraph 3.1(a) of the definition and it may not be necessary to specifically identify the various subcategories of those goods, wares and merchandise, etc.

100 The coverage of the award also extends to the transport of goods, etc. where the work performed is ancillary to the principal business, undertaking or industry of the employer. This reflects the scope of the pre-reform *Transport Workers (Mixed Industries) Award 2002*.[33] That award contained a majority clause. The wording of that clause is not suitable for a modern award. We have included a draft provision in cl.4.3 of the RT&D Modern Award designed to operate in circumstances where the principal business of the employer is not road transport and distribution and that employer is covered by another modern award as is the relevant employee. The intention is that, in those circumstances, the other modern award will regulate the employee's terms and conditions. This issue has not arisen in any significant way during the making of the priority awards and we invite the parties' submissions in relation to the wording of this clause and any related matters.

101 The coverage of the RT&D Modern Award also extends to activities previously covered by distribution awards. In this respect the definition contained in the pre-reform *Transport Workers (Distribution Facilities) Award 2004*[34] has been adopted. In the pre-drafting consultations the NUW submitted that the scope of this RT&D Modern Award should extend to that currently contained within a number of pre-reform storage awards. The draft RT&D

31 AP805250CRA.

32 AP799474CNV.

33 AP813166.

34 AP832166.

Modern Award does not extend to those activities. The indicative list of awards that might be subsumed into this new modern award does not include the numerous storage industry pre-reform awards and NAPSAs and no employer respondents to those awards made any submissions to us in the Stage 2 pre-drafting consultations. Additionally we note that Storage services is to be dealt with in Stage 3. The matters raised by the NUW may be considered in the context of submissions and consultations in that stage.

102 The classification structure and minimum rates of pay are based on the Transport Workers Award. The majority of pre-reform awards also reflect similar if not identical rates of pay, as do several of the NAPSAs, as the general industry transport award. The rates in the *Transport Industry (State) Award*,[35] a New South Wales NAPSA, are considerably higher and we have not reproduced them in this exposure draft. The parties may wish to confer about the New South Wales rates and make further submissions about how they may be accommodated in a modern minimum safety net award.

103 The exposure draft contains definitions of distribution facility employee and aerodrome attendant. It is likely that a number of other classification definitions will need to be included. The parties are requested to confer about this matter. We have not adopted the Transport Workers' Union of Australia (TWU) proposal for a new five level classification structure based on the standard of licence required to drive a particular type or class of vehicle. The wage rates and relativities in the TWU proposal were said to be based on the *Transport Industry (State) Award (NSW)*. This proposal was put on the day of the pre-drafting consultations and the other parties had no time to consider it. We have received no further submissions about the proposal. We invite the parties to give further consideration to the classification structure. Unless there is a level of consensus reached it is unlikely, in the context of this exercise, we will be able to introduce a significantly different classification structure. However, at the very least, we see this as an opportunity to consider a reduction in the number of grades in this RT&D Modern Award. At the moment there are ten grades, and, in relation to some of them, there is a very small wage increment. Consideration should be given to grouping a number of the grades together.

104 The coverage of the draft RT&D Modern Award does not extend to employees in clerical or maintenance classifications. The TWU submitted that it should not extend to activities covered by awards in the Commission's airline or airport operations. The interaction between these awards and, for example, the work undertaken by an aerodrome attendant will need to be considered. In this respect we also note that the airline operations and the airport operations (other than retail) industries are to be considered in Stage 3.

105 The draft RT Long Distance Modern Award is based on the pre-reform *Transport Workers (Long Distance Drivers) Award 2000* (LDD Award).[36] We considered the TWU submission that no award for this sector of the transport industry should be issued at this stage. We have decided that it is appropriate that we publish this exposure draft. If any relevant legislation is passed which impacts on the terms and conditions appropriate for such an award that will be taken into consideration.

106 The classification structure in the LDD Award commences at Grade 3. The

35 AN120594.

36 AP805988CRV.

minimum weekly wages for Grades 3 to 10 are the same as the corresponding grades in the RT&D Modern Award. In this exposure draft we have described the grades as levels 1 through to 8 however it should be noted that, at least at this stage, the weekly rate in this exposure draft for Grade 1 lines up with that for Grade 3 in the RT&D Modern Award. The comments we have made earlier in this statement about the parties taking this opportunity to merge some of the existing grades apply equally to this exposure draft.

107 The CIT Modern Award is based largely on the *Transport Workers (Armoured Vehicles) Award 2004* (Armoured Vehicles Award).[37] Little more needs to be said about this draft at this stage however we do refer to cl.16.1(d) of the draft. This provides for a Reserve Bank of Australia allowance which is an existing allowance in the Armoured Vehicles Award. The parties should give consideration to whether such an allowance, specific to a particular contract, is appropriate for a modern minimum safety net award.

Quarrying industry

108 We publish an exposure draft of a *Quarrying Industry Award 2010*. The draft award applies to operators and other employees in the quarrying industry but does not include clerical or maintenance classifications. The minimum wages are those found in the *Quarry Industry—Victoria—Award 2000*[38] and are not dissimilar to rates in awards and NAPSAs applying generally in the industry although they are significantly lower than the New South Wales rates. Generally there is no provision for junior rates in the awards and NAPSAs in the industry and we have not included junior rates in the exposure draft.

109 A number of allowances have been included, including an industry allowance. Other allowances, including some trades allowances proposed, have not been included. Relevant awards and NAPSAs have differing provisions in relation to span of hours, shift work penalties and overtime. The draft incorporates provisions approximating to federal award standards in those areas.

Sanitary and garbage disposal services

110 We publish an exposure draft of a *Waste Management Industry Award 2010*. The draft is based largely on the terms of the federal award but also takes into account a degree of consensus between the TWU and the Waste Contractors and Recyclers Association of New South Wales. There was some debate during the pre-drafting consultations about award coverage. We have decided to proceed on the basis that waste management should be covered by an industry specific award rather than an award applying to the transport industry more generally. Interested parties are invited to make further submissions on the issue in light of the terms of the draft and other relevant considerations.

111 The existing federal award is entitled the *Transport Workers' (Refuse, Recycling and Waste Management) Award 2001*.[39] It applies in all States except New South Wales and in the Northern Territory. There are NAPSAs applying in New South Wales. The rates in the New South Wales NAPSAs are considerably higher than the rates in the federal award and reflect a bargained approach to wage outcomes. The rates in the federal award reflect the results of award simplification and it appears, at least at this stage, that they are properly fixed

37 AP833661CR.

38 AP794082CRV.

39 AP812785CNV.

minimum rates appropriate for a safety net award. The exposure draft includes the federal award rates. It also maintains the separate industry allowance in the federal award.

112 The classification structures in the NAPSAs applying in New South Wales vary significantly from the federal award structure. We have not attempted to integrate the New South Wales classifications into the federal structure and would welcome further suggestions. We encourage the parties to confer and attempt to reach agreement on an appropriate structure.

Attachment A to Full Bench Statement of 23 January 2009

List of Exposure Draft Modern Awards and Schedules

- *Aged Care Industry Award 2010*
- *Banking, Finance and Insurance Industry Award 2010*
- *Building and Construction Industry General On-site Award 2010*
- *Cleaning Services Industry Award 2010*
- *Clerks—Private Sector Award 2010*—call centre provisions
- *Cotton Ginning Award 2010*
- *Electrical, Electronic and Communications Contracting Industry Award 2010*
- *Graphic Arts, Printing, Publishing and Associated Industries and Occupations Award 2010*
- *Health Professionals and Support Services Industry and Occupational Award 2010*
- *Horticulture Award 2010*
- *Joinery and Building Trades Award 2010*
- *Manufacturing and Associated Industries and Occupations Award 2010*—coverage clause and small employer redundancy in the furnishing industry
- *Market and Social Research Industry Award 2010*
- *Medical Practitioners Occupational Award 2010*
- *Nursery Industry Award 2010*
- *Nurses Occupational Industry Award 2010*
- *Pastoral Industry Award 2010*
- *Plumbing and Fire Sprinklers Contracting Industry and Occupational Award 2010*
- *Quarrying Industry Award 2010*
- *Road Transport and Distribution Award 2010*
- *Road Transport (Long Distance Operations) Award 2010*
- *Silviculture Industry Award 2010*
- *Skin, Hide and Wool Stores Award 2010*
- *Telecommunications Services Industry Award 2010*
- *Transport Industry (Cash in Transit) Award 2010*
- *Waste Management Industry Award 2010*
- Supported Wage System Schedule
- National Training Wage Schedule
- School-based Apprentices Schedule

PAUL C MOORHOUSE

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Re Request from the Minister for Employment and Workplace Relations — 28 March 2008

Award Modernisation Statement (AM 2008/24, AM 2008/64-92)

[2009] AIRCFB 641

Giudice J, President, Watson VP, Watson, Harrison and Acton SDPP, Smith C

29 June 2009

Awards — Award modernisation — Detailed listing of industries and occupations to be dealt with in stage 4 — Publication of indicative list of relevant awards and NAPSAs — Publication of list of miscellaneous awards and NAPSAs not otherwise dealt with — Revised timetable for dealing with stage 4.

Pursuant to s 576C of the *Workplace Relations Act 1996* (Cth) the Minister made an award modernisation request on 28 March 2008, which was subsequently varied on a number of occasions. Following an initial statement and consultation, the Full Bench dealing with award modernisation published a decision in which, inter alia, it determined the industries and occupation to be the subject of the priority modern awards, and set an indicative timetable for the award modernisation process ([2008] AIRCFB 550; (2008) 175 IR 120).

The Full Bench subsequently determined the industries and occupations to be dealt with in each of stages 2, 3 and 4 of the award modernisation process, and published a more detailed timetable to apply to each of those stages ([2008] AIRCFB 708; (2008) 177 IR 5).

The Full Bench subsequently published exposure drafts of the priority modern awards, expressed certain views on the coverage provisions to be included in modern awards, and adopted proposed model award clauses dealing with a range of matters ([2008] AIRCFB 717; (2008) 177 IR 8). Subsequently, on 19 December 2008, the Full Bench published 17 modern awards to apply in the priority industries and occupations ([2008] AIRCFB 1000; (2008) 177 IR 364).

The Full Bench subsequently published exposure drafts and modern awards to apply to the stage 2 industries and occupations ([2009] AIRCFB 50; (2009) 180 IR 124 and [2009] AIRCFB 345; (2009) 181 IR 19), and exposure drafts of the modern awards to apply to the stage 3 industries and occupations ([2009] AIRCFB 450; (2009) 182 IR 413). These earlier statements and decisions included in some instances deferral of award modernisation for particular industries (or parts thereof) until stage 4.

This statement deals in more detail with the industries and occupations to be dealt with in stage 4 of the award modernisation process.

Held: (1) The Full Bench published an enlarged list of the industries and occupations to be dealt with in stage 4 of the award modernisation process, along with an indicative list of awards and Notional Agreements Preserving State Awards (NAPSAs) relevant to each industry/occupation. The list of industries/occupations included some not included in the initial stage 4 list, and a breakdown of some of the industries into their component sectors.

(2) The Full Bench noted that the stage 4 list included some industries and occupations in respect of which there was a question as to whether there should be any award coverage, or what the scope of award coverage should be.

(3) The stage 4 award modernisation process would also include consideration of modern award coverage of indigenous organisations and services, currently being dealt with by another Commissioner following referral, and any further consideration of the national training wage schedule previously published (see [2009] AIRCFB 345; (2009) 181 IR 19).

(4) The Full Bench also published a list of miscellaneous awards and NAPSAs not falling within any industry or occupation dealt with in any of the stages, and invited proposals for award coverage of those areas as part of the stage 4 process.

(5) The Full Bench revised the previously published timetable for dealing with stage 4.

Cases Cited

Employment and Industrial Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 345) (2009) 181 IR 19.

Employment and Workplace Relations — Award Modernisation, Re Minister for (2008) 177 IR 5.

Cur adv vult

The Commission

1 This statement deals with Stage 4 of the award modernisation process. The Commission published a list of industries and occupations to be dealt with in Stage 4 on 3 September 2008.[1] We now publish an enlarged Stage 4 list and indicative lists of awards and Notional Agreements Preserving State Awards (NAPSAs) for each industry/occupation. The list of industries and occupations is Attachment A and the awards lists are Attachment B [Attachment B not reproduced in this report, but available on the internet].

2 Given the demands of the award modernisation timetable we have decided to extend the deadline for filing pre-drafting material from 10 July 2009 to 24 July 2009. The closing date for lodging written submissions, drafts of modern awards and other proposals concerning the scope, content and transitional arrangements for Stage 4 modern awards will be 24 July 2009. The published timetable will be amended accordingly.

3 The list of Stage 4 industries and occupations now includes a number not on the initial list but which have subsequently been identified as requiring attention or further consideration in Stage 4. Some general descriptions on the initial list have been broken down into their component sectors. The initial list referred to "Health and welfare services (residual)." The relevant sectors are now identified as ambulance services, children's services, fitness, lifestyle and leisure services, social and community services and supported employment services. In the same way, while the initial list included "Industries not otherwise assigned," awards

1 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2008) 177 IR 5; [2008] AIRCFB 708.

in that category have been broken down into designated industry sectors. The initial list also included "Northern Territory (remainder)." As it appears that all Northern Territory awards but one have been accounted for, that designation has been deleted.

4 We draw attention to the fact that the Stage 4 list includes some industries and occupations in relation to which the question of award coverage remains to be determined. To take an example, while labour hire services now appears on the list, whether an award should be made to cover that area and if so the terms the award should contain are matters for decision. Generally the options include a separate modern award for the area in question, no award, coverage under the general award or an alteration to the coverage of an existing modern award.

5 A number of other matters on the list should be mentioned. Indigenous organisations and services are listed separately to provide a focus for the matters currently being dealt with by Commissioner Raffaelli and which will need to be determined by this Bench. We have also included the national training wage on the list. A national training wage draft schedule was included with our 3 April 2009 decision.[2] In that decision we indicated that we would deal further with the national training wage schedule in Stage 4. We also said "parties making submissions on the national training wage draft schedule in Stage 4 should detail the specific amendments they consider need to be made and the reasons for such amendments." Parties should bear that in mind in preparing their material on the national training wage draft schedule.

6 We publish a separate list of miscellaneous awards and NAPSAs: Attachment C [not reproduced in this report, but available on the internet]. We are advised that the awards and NAPSAs on the list are not enterprise and do not appear to be within any of the industries or occupations dealt with in any of the stages. Any proposals for modern award coverage for those areas will be dealt with in Stage 4. Any other proposals based on an alleged gap in modern award coverage will also be dealt with in Stage 4.

Attachment A to the Full Bench Statement of 29 June 2009

Stage 4 Revised list of industries and occupations

Matter Number	AIRC Industry
Stage 4	
AM2008/65	Aquaculture
AM2008/66	Christmas Island
AM2008/67	Cocos (Keeling) Islands
AM2008/68	Diving services
AM2008/69	Dry cleaning and laundry services
AM2008/70	Educational services — Preschool teachers
AM2008/71	Fire fighting services
AM2008/72	Funeral directing
AM2008/73	Gardening services (remainder)
AM2008/74	General award
AM2008/75	Grain handling industry

2 *Re Request from the Minister for Employment and Industrial Relations — 28 March 2008* (2009) 181 IR 19; [2009] AIRCFB 345.

Matter Number	AIRC Industry
Stage 4	
	Health and welfare services (remainder)
AM2008/76	Ambulance services
AM2008/77	Children's services
AM2008/78	Fitness, lifestyle and leisure services
AM2008/79	Social and community services
AM2008/80	Supported employment services
AM2008/64	Indigenous organisations and services
	Industries not otherwise assigned
AM2008/81	Accountancy practices
AM2008/82	Animal care and veterinary services
AM2008/83	Building services
AM2008/84	Correctional facilities
AM2008/85	Labour hire services
AM2008/86	Legal services
AM2008/87	Real estate industry
AM2008/88	Salt industry
AM2008/89	Local government administration
AM2008/90	Mannequins and modelling industry
AM2008/24	National Training Wage
AM2008/91	State and Territory government administration
AM2008/92	Water, sewerage and drainage services

PAUL C MOORHOUSE

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Re Request from the Minister for Employment and Workplace Relations — 28 March 2008

Award Modernisation Statement (AM 2008/24, 35, 41, 64-92, AM 2009/10)

[2009] AIRCFB 865

Giudice J, President, Watson VP, Watson, Harrison and Acton SDPP, Smith C

25 September 2009

Awards — Award modernisation — Provisional determination of modern awards to apply within stage 4 industries and occupations — Exposure drafts of stage 4 modern awards published — Draft miscellaneous award published.

Pursuant to s 576C of the *Workplace Relations Act 1996* (Cth) the Minister made an award modernisation request on 28 March 2008, which was subsequently varied on a number of occasions. Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) provides for the continuation of the award modernisation process resulting from the Minister's request.

Following the Minister's request, the Full Bench dealing with award modernisation determined the industries and occupations to be the subject of the priority modern awards, and the industries and occupations to be dealt with in each of stages 2, 3 and 4 of the award modernisation process, and published detailed timetables to apply to each of those stages (see (2008) 175 IR 120 and (2008) 177 IR 5).

The Full Bench subsequently published exposure drafts of the priority modern awards, expressed certain views on the coverage provisions to be included in modern awards, and adopted proposed model award clauses dealing with a range of matters ((2008) 177 IR 8). Subsequently, the Full Bench published 17 modern awards to apply in the priority industries and occupation ((2008) 177 IR 364), and then the modern awards to apply to the stage 2 industries and occupations ((2009) 181 IR 19) and the stage 3 industries and occupations ((2009) 187 IR 192).

The Full Bench dealing with award modernisation also formulated model transitional provisions to apply to the modern awards ((2009) 187 IR 146).

This statement concerns exposure drafts of the modern awards to apply in the stage 4 industries and occupations, and was accompanied by the publication of 29 draft awards, as well as an amended version of one of the modern awards published previously.

Held: (1) The stage 4 exposure drafts reflect a provisional or tentative view. The Full Bench confirmed the timetable for written comments and consultation hearings in relation to the stage 4 exposure drafts.

(2) The stage 4 exposure drafts all included the model transitional provisions. The Full Bench would decide whether to include all parts of those provisions in each award in light of the further comments and consultations.

(3) By reference to each of the industry groupings within stage 4, the Full Bench set out reasons for publishing exposure drafts covering certain industries and occupations, and for its preliminary determination that no separate award was required in relation to other industries or occupations. The Full Bench also set out reasons in support of some aspects of the exposure drafts.

(4) The Full Bench published a draft Miscellaneous Award 2010 to apply to employees within industries not covered by any other modern award. The draft award contains a four level minimum wage structure and some generally applicable provisions found in modern awards of wide application. The Full Bench noted that it was unclear as to which employees would be covered by the miscellaneous award, and further that the miscellaneous award may well have application to areas of the workforce that had not previously been covered by awards, and considered that it was appropriate to take a cautious approach.

(5) Following consideration of possible distinct award coverage for indigenous organisations or services the Full Bench declined to make a separate award covering indigenous organisations or services. The modern awards to cover a range of industries would be appropriate to indigenous organisations and services within those industries. However, the operation of aboriginal community controlled health organisations should be regulated by a separate modern award, although with coverage of doctors, nurses and dentists employed by such organisations remaining with other proposed modern occupational awards.

(6) The Full Bench decided not to make a separate modern award for the labour hire industry. It was preferable that modern awards be varied where necessary to extend their coverage to labour hire firms and their employees working in the particular industry.

(7) The Full Bench published a draft Local Government Industry Award 2010, while noting that many local government entities would not be constitutional corporations, and thus would not be covered by the proposed modern award. In the absence of any State referral of powers covering the local government sector, the proposed award may apply only to local government owned trading corporations and any local government entities which are, because of their particular circumstances, trading corporations.

Australian Workers Union of Employees, Queensland v Etheridge Shire Council (2008) 171 FCR 102; 175 IR 383, referred to.

(8) The Full Bench had regard to the variation to the Minister's request which required it to create a separate modern award covering the restaurant and catering industry, along with further submissions of the Australian Government clarifying the intention of that variation. The Full Bench published a draft Restaurant Industry Award 2010. The Full Bench set out its reasons for adopting various provisions, including the level of penalty rates, overtime and allowances, contained in the draft award.

(9) The Full Bench considered that no separate award for State government administration was required as part of the award modernisation process.

Cases Cited

Australian Workers Union of Employees, Queensland v Etheridge Shire Council (2009) 178 FCR 252.

Australian Workers Union of Employees, Queensland v Etheridge Shire Council (2008) 171 FCR 102; 175 IR 383.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2008] AIRCFB 1000) (2008) 177 IR 364.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 345) (2009) 181 IR 19.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 640) (2009) 184 IR 240.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 641) (2009) 184 IR 242.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 645) (2009) 184 IR 246.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 800) (2009) 187 IR 146.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 826) (2009) 187 IR 192.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 835) (2009) 187 IR 325.

R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533.

Union of Christmas Island Workers v Christmas Island Resort Pty Ltd (unreported, AIRC (FB), Q1672, 11 June 1998).

United Firefighters Union of Australia v Metropolitan Fire and Emergency Services Board (1998) 83 FCR 346.

Cur adv vult

The Commission

Introduction

1 This statement concerns award modernisation and in particular the exposure drafts for Stage 4 modern awards. The statement should be read in conjunction with earlier statements and decisions but in particular the decisions relating to the making of the priority, Stage 2 and Stage 3 modern awards.[1]

2 The award modernisation process is being carried out pursuant to Pt 10A of the *Workplace Relations Act 1996* (Cth) (WR Act), Sch 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transitional Act) and a request made by the Minister for Employment and Workplace Relations (the Minister) on 28 March 2008 pursuant to s 576C of the WR Act (the consolidated request).[2]

3 Stage 4 covers some 32 industries and industry sectors. With this statement we publish 29 draft awards and a further exposure draft of the national training wage schedule. The draft awards include an amended version of the *Education Services (Teachers) Award 2010*.[3] Proposals, submissions and other material in relation to the exposure drafts are to be lodged with the Commission by 16 October 2009. Lodgment can be by post, fax or email and all material lodged will be made available through the internet as soon as practicable. The Full Bench will sit to conduct consultations in relation to the Stage 4 draft awards

1 *Re Request from Minister for Employment and Workplace Relations—28 March 2008* (2008) 177 IR 364, *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 181 IR 19 and *Re Award Modernisation* [2009] AIRCFB 826.

2 Since that date the request has been varied on 7 occasions: 16 June and 18 December 2008, 2 May, 28 May, 1 July, 17 August and 26 August 2009.

3 MA000077.

from 26 to 30 October 2009 in Sydney and on Wednesday 4 November 2009 in Melbourne, with Thursday 5 November also being available if required. It is intended that so far as practicable contributions should be in written form. The public consultations are not an opportunity to restate what is contained in the written material. We should also stress that while some latitude will be permitted to file written material by way of reply or elaboration in connection with the public consultations, as a general rule material filed outside the published timetable is at risk of being disregarded. Before turning to the exposure drafts some general comments are necessary.

4 The exposure drafts reflect a provisional or tentative view and changes may be made on the basis of the material and arguments advanced. In some cases also, the drafts may be incomplete or based on the draft advanced by a particular party or group of parties.

5 The new exposure drafts all include the model transitional provisions namely, the model commencement and transitional clause and the model phasing schedule.[4] We shall decide whether to include the model phasing schedule in the final awards in light of the consultations. We also encourage parties to agree on transitional provisions where it is practicable to do so. There may also be cases in which special or additional transitional provisions are appropriate. Any proposals for such provisions should be in writing and filed in accordance with the timetable.

6 A number of types of award provisions require some comment. As to coverage clauses, we note that the Transitional Act and the *Fair Work (State Referral and Other Consequential Amendments) Act 2009* (Cth) (State Referral Act) amended the *Fair Work Act 2009* (Cth) (FW Act) to include provisions which do not commence to operate until 1 January 2010. Section 143(8) of the FW Act will be:

> Modern enterprise awards
>
> (8) A modern award (other than a modern enterprise award) must be expressed not to cover employees who are covered by a modern enterprise award, or an enterprise instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*), or employers in relation to those employees.

7 Section 143(10) of the FW Act will be:

> State reference public sector modern awards
>
> (10) A modern award (other than a State reference public sector modern award) must be expressed not to cover employees who are covered by a State reference public sector modern award, or a State reference public sector transitional award (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*), or employers in relation to those employees.

8 Although the two provisions are not in operation, it is appropriate that modern awards are drafted to take account of the requirements contained in them. This is particularly appropriate as the terms of s 143(8) mimic, although in different statutory language, the terms of clause 2(e) of the consolidated

4 *Re Award Modernisation* [2009] AIRCFB 800; (2009) 187 IR 146.

request and s 143(10) reflects the terms of clause 4D of the consolidated request. Appropriate provisions will be included in the coverage clause of each modern award.

9 On a related more general matter, the Stage 4 exposure drafts use the language of the FW Act and the Transitional Act rather than the terms of the WR Act. In a number of cases this language contrasts with the language used in the same context in the modern awards made in earlier stages. We intend that the language of the awards already made will be updated as part of the residual variations.[5]

10 We turn now to the question of part-time work. A variation to the consolidated request made on 26 August 2009 included the following new clause in the consolidated request:

> Overtime penalty rates — part-time work
>
> 53. The Commission should ensure that the hours of work and the associated overtime penalty arrangements in the retail, pharmacy and any similar industries the Commission views as relevant do not operate to discourage employers from:
>
> • offering additional hours of work to part-time employees; and
> • employing part-time employees rather than casual employees.

11 This variation was made after the Stage 4 pre-drafting consultations had concluded on 14 August 2009. Accordingly there has not been an adequate opportunity for all interested parties to comment on the significance of the variation in the context of Stage 4. Any submissions should be made in accordance with the Stage 4 timetable. We also mention that the Commission issued a statement on 10 September 2009 in which it was indicated that any interested party having the view that any modern award should be varied to give effect to clause 53 of the consolidated request should make an appropriate application.[6] We have taken the terms of clause 53 into account in drafting the part-time provision in the exposure draft of the Restaurant Industry Award 2010 and some other exposure drafts.

12 There is a minor change to the model clause dealing with superannuation. The clause has been varied in each of the exposure drafts to include successor funds so as to avoid the need for an award variation where a fund ceases to exist and a successor fund takes over its operations.

13 We turn now to the question of salary packaging or salary sacrifice. In its decision in relation to the priority modern awards, the Commission indicated that it would take a cautious approach to salary packaging.[7] The major parties involved in the consultations for health and welfare services (remainder) - social and community services, strongly supported salary packaging. It is clear that salary packaging provisions have been included in relevant awards in the area. However, we do not have a clear indication of the extent to which employees in the industry need or use the award provisions. Nor do we know the extent to which salary packaging provides a net benefit to employees. At this stage we have maintained the approach previously outlined and have not included a

5 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 184 IR 246 at [4] and [5].

6 *Award Modernisation Statement (AM2008/1)* [2009] AIRCFB 835; (2009) 187 IR 325 at [12].

7 *Re Request from Minister for Employment and Workplace Relations—28 March 2008* (2008) 177 IR 364 at [66].

salary packaging provision in the relevant exposure draft. Although we are prepared to reconsider the position, we would not be inclined to include such provisions without more information about the incidence of salary packaging in the relevant industries and a more detailed explanation of the relative benefits for employers and employees. Submissions should also cover whether such a term can be included in a modern award and, if so, whether such a term would be consistent with the provision of a fair minimum safety net. We make some further comments in relation to salary packaging later in this statement in dealing with the exposure draft for the Social, Community, Home Care and Disability Services Industry Award 2010.

Comments on Stage 4 Exposure Drafts

14 We turn now to the Stage 4 exposure drafts. Notwithstanding our earlier comments in relation to statutory terminology in the exposure drafts, on occasions we continue to use the language used by the parties in the consultations e.g. Notional Agreement Preserving State Award (NAPSA) and pre-reform award rather than award-based transitional instrument.[8]

Accountancy practices

15 We have decided not to publish an exposure draft for accounting practices. Regulation of this area through pre-reform awards and NAPSAs is very limited. Two matters arise for consideration, however. The first is that it would appear that the Miscellaneous Award 2010 will cover the businesses of accountants as this is not an industry covered by a modern award. The second and related consideration is the treatment of transitional provisions where regulation currently exists for accountants.

Animal care/veterinary services

16 We now publish an exposure draft for veterinary services, the Veterinary Services Award 2010. There was a variety of submissions as to the shape and coverage of a proposed award. At this exposure draft stage we have adopted the view expressed by the Australian Veterinary Association (AVA) that any award should only cover private veterinary practices and take into consideration all persons who would be employed in a practice, including animal attendants, practice managers and vets.

17 There was a large amount of agreement between the AVA and the Veterinary Nurses Council of Australia Inc as to the content of the proposed award. However one matter stands out for consideration and that relates to the classification definitions for persons other than veterinary surgeons. We were advised that a veterinary nurse has a certificate IV qualification and yet there was a proposal that such a person be classified and paid at the certificate III level. On its face this would be inappropriate but there may be a suitable explanation for the proposal. We have also provided for a practice manager classification. We intend that this classification be limited to very specific circumstances. It would not apply to a person performing ordinary clerical functions of ordering of supplies and/or making appointments. These functions may well fall within the classification roles of receptionist or similar.

8 See item 2(5) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth).

18 Given the concerns we have outlined we have not, at this stage, included classification definitions for persons other than veterinary surgeons. We invite further consideration of these matters.

Aquaculture

19 We publish an exposure draft of the Aquaculture Industry Award 2010. The industry is currently subject to very limited regulation. There are three NAPSAs and the industry has not been subject to a federal award to date. Consequently, significant components of the industry would be subject to regulation for the first time in the event that a modern aquaculture industry award were to be made. The industry associations have made submissions that we should consider the industry as historically and traditionally award free and therefore no modern award should be made. We have not finally determined this question.

20 Three options arise from the consultations. One is to make a modern award for the industry after having considered responses to the exposure draft. Another is to provide that the industry will be subject to the Miscellaneous Award 2010 currently under consideration as part of Stage 4. If the industry associations' submissions were to be upheld in full the industry would be wholly award free. While we have decided to publish an exposure draft the other options have not been excluded.

21 It is also relevant to note that only the Australian Workers' Union (AWU) filed a draft award and the Commission did not therefore have the benefit of a draft award from the employers or industry associations for comparative drafting purposes. Given that we have yet to decide whether or not a modern award will be made and if so in what form, and that we will have regard to responses to the exposure draft, it would be of assistance to us if the employers and industry associations could give consideration to the form and contents of a modern aquaculture industry award which should be made in the event that we decide to make one.

Building services

22 The main parties who participated in the consultation in this area were the Australian Industry Group (AiGroup), the Australian Federation of Employers and Industries (AFEI), the Liquor, Hospitality and Miscellaneous Union (LHMU), the AWU and a group of employers and associations in the car parking industry.

23 AiGroup was the only body which submitted that there should be a building services industry award. It did not provide a draft however. AiGroup also proposed that the pest control industry could be encompassed within the coverage of the *Manufacturing and Associated Industries and Occupations Award 2010*[9] (Manufacturing Modern Award). Other parties opposed the making of a building services award and supported either or both a car parking industry award and a pest control industry award.

24 We have decided to publish exposure drafts of a Car Parking Award 2010 and a Pest Control Industry Award 2010. Those employees who may be involved in the building services sector and who would not be covered by one of these proposed awards or others such as the *Cleaning Services Award 2010*[10] would appear to be few in number and could be covered by the Miscellaneous Award 2010.

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9 MA000010.

10 MA000022.

25 We have decided to adopt a three level classification structure in the draft Car Parking Award 2010 with rates which are based upon the present Victorian award.[11] We are not confident that the rates which were proposed by AFEI and the car parking employers are properly fixed minimum rates.

26 The span of ordinary hours in the exposure draft is 7.00am to 7.00pm on each day of the week. There was general agreement among the parties that the industry requires ordinary hours to be worked seven days a week. We note that adoption of such a provision means that, in some areas, the working of ordinary hours on Saturday afternoon and Sunday will be introduced for the first time. The impact of this provision upon employees in those areas should be ameliorated by the model transitional provisions which are included in the exposure draft. We have adopted the standard casual loading of 25%.

27 The draft Pest Control Industry Award 2010 contains a five level classification structure which is based upon the structure in the present Victorian award together with the adoption of a level for an inspector which is currently in the New South Wales NAPSA.[12] The wage rates are generally reflective of the current rates in those awards.

28 Although the parties agreed that ordinary hours should be able to be worked on any day of the week as at present, the actual span of hours was in dispute. At this stage we have decided to adopt a span of 6.00am to 6.00pm. These hours reflect the current span in the majority of awards including those in Victoria and New South Wales.

29 We have included a casual loading of 25%. We acknowledge that this is lower than the present rate in the Victorian award however it is higher than in any of the other awards in the sector.

Christmas Island and Cocos (Keeling) Islands

30 The WR Act and the FW Act apply to the Indian Ocean Territories of Christmas Island and Cocos (Keeling) Islands except to the extent that the provisions of those Acts are modified by Regulations.[13] Neither the *Workplace Relations Regulations 2006* (Cth) nor the *Fair Work Regulations 2009* (Cth) exclude the Indian Ocean Territories from the award modernisation process under the WR Act. Accordingly, awards other than enterprise awards applicable to those Islands are subject to the current modernisation process.

31 All awards applicable to employment on Cocos (Keeling) Islands are enterprise awards and do not require further consideration at this stage.

32 There are three non-enterprise awards applying to employment on Christmas Island:

- UCIW Christmas Island Building and Construction Award 2004[14] (CIBCC Award);
- Christmas Island Resort and Christmas Island Laundry Redundancy Award 1998;[15] (Redundancy Award) and

11 *Car Parking (Victoria) Award 2004*, AP836833CRV.

12 *Pest Control Industry (Victoria) Award 2000*, AP792504 and *Pest Control Industry (State) Award*, AN120413.

13 *Workplace Relations Act 1996* (Cth), ss 6, 11, 12 and 13 and *Fair Work Act 2009*, ss 12, 14, 31 and 32.

14 AP834773CRC.

15 AP774892.

- Christmas Island Severance Pay Award 2002.[16]

33 The scope of the CIBCC Award is encompassed within the scope of the following modern awards:

- Building and Construction General On-site Award 2010[17] (Building and Construction Modern Award);
- Electrical, Electronic and Communications Contracting Award 2010[18] (Electrical Modern Award);
- Plumbing and Fire Sprinklers Award 2010[19] (Plumbing Modern Award); and
- Manufacturing Modern Award.

34 We will refer to these awards collectively as the "designated modern awards".

35 Apart from the CIBCC Award provisions for airfares and district allowance there is no reason for excluding Christmas Island from the operation of the designated modern awards. Consequently we will incorporate CIBCC Award provisions for airfares and district allowance into the designated modern awards, subject to what may arise in the consultations.

36 We note that in 1993 the Commission created a nexus between the district allowance in the Christmas Island building and construction industry and the locality allowance paid to persons permanently domiciled on the island.[20] No reason has been shown to disturb that nexus and we will maintain it. In the recent past the amount of the allowance has been assessed and adjusted periodically by the Department of Employment and Workplace Relations and, more recently, the Department of Education, Employment and Workplace Relations (DEEWR). We will fix the amount as it currently stands subject to automatic adjustment in accordance with the periodic assessments issued by DEEWR or any other relevant successor authority. The designated modern awards will include the following Christmas Island specific provisions:

> Airfares
>
> Where an employee is domiciled in the Territory, that employee is entitled to an annual airfare for herself/himself and her/his dependent spouse after 12 months continuous service.
>
> The return airfare payable is the equivalent of an economy airfare from Christmas Island to Perth.
>
> Where an employee completes less than 12 months service with an employer, the employee shall be paid the entitlement on a pro rata basis.
>
> District Allowance
>
> For each employee other than a casual employee domiciled in the Territory, the employer shall pay a district allowance at the rate of:

	$ per annum	$ per week
Employees with dependants	8,430.00	162.115
Single employee	5,210.00	100.192

16 AP819154.

17 MA000020.

18 MA000025.

19 MA000036.

20 *UCIW Christmas Island Infrastructure Rebuilding (Mainland and Domicile) Employees Award 1993*, Print K7270.

> Dependant means the spouse, child or parent of an employee who ordinarily lives with the employee and who is wholly or substantially dependent upon the employee.
>
> If an employee is engaged for a period of less than 38 ordinary hours i.e. a part-time employee, then the amount of district allowance will be that portion of the appropriate weekly allowance as the ordinary hours worked are a portion of 38 ordinary hours as the full week.
>
> "Territory" means the territory of Christmas Island.
>
> Adjustment of district allowance
>
> The rates of district allowance will be increased in accordance with the periodic changes notified by the Department of Education, Employment and Workplace Relations for District Allowance Grade D of the schedule of Remote Locality Allowances Annual Adjustments. The operative date of the increases shall be 1 July each year.

37 The Redundancy Award was made by a Full Bench of the Commission in settlement of an industrial dispute on 6 July 1998.[21] The award applies to the Christmas Island Resort Pty Ltd and Christmas Island Laundry Pty Ltd, their employees and the Union of Christmas Island Workers (UCIW). The Christmas Island Resort commenced operation in 1983. The Redundancy Award was made at the time of the closure of the Christmas Island Resort. The award provides for three weeks pay for each year of service with pro-rata payment for each completed month of service, up to a maximum of 12 weeks pay. The redundancy entitlement is expressed to be in addition to any other contractual, statutory or other award entitlement. Clause 7 provides that the time for payment of the redundancy entitlement "shall … be within 10 days of the issue of this award." Christmas Island Resort Pty Ltd has no employees. Christmas Island Laundry Pty Ltd has sold the laundry business to another corporate entity. Currently there are no employees engaged in the laundry business.

38 The Australian Council of Trade Unions (ACTU) submitted that the Redundancy Award, insofar as it applies to the laundry business, be referred for modernisation in the dry cleaning and laundry services sector. It further submitted that the award be maintained in respect of Christmas Island Resort Pty Ltd. We have decided to defer further consideration of the Redundancy Award at this time.

39 The *Christmas Island Severance Pay Award 2002*[22] (Severance Award) was first made by Mr JE Taylor, Arbitrator for Christmas Island, on 18 May 1981. It was made in settlement of a dispute between the UCIW, the Christmas Island Professional and Salaried Officer's Association and Christmas Island Police Association and the Minister for Home Affairs and Environment and The British Phosphate Commissioners. It was then binding on all parties to the dispute and expressed to be operative from "31 December 1981 and thereafter until superseded or revoked." On 13 December 1995, the Minister for Environment, Sport and Territories was added as a party bound by the Severance Award.

40 The Severance Award confers on employees covered by the award an entitlement to severance payments and certain other award benefits. The benefits conferred by and accrued under the award are in respect of a finite period of continuous employment on Christmas Island, namely the period of 21 years and

21 *Union of Christmas Island Workers v Christmas Island Resort Pty Ltd* (unreported, AIRCFB, Q1672, 11 June 1998).

22 AP819154.

three months between 1 October 1958 and 31 December 1979. In order to qualify for the benefits an employee had to be employed by one of the employers identified in cl.3 of the Severance Award as at 30 June 1981.

41 The benefits conferred by the Severance Award do not become due and payable to an employee covered by the award until termination of employment. Clause 6(c) of the award makes provision for the amount of an entitlement of an employee whose employment had not terminated on 30 June 1981 to be credited to the Provident Account of the employee in the Provident Fund of the appropriate employer.

42 The Severance Award was subject to review in 2002 under Item 51, Sch 5 to the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). At the time of the review the Christmas Island Professional and Salaried Officer's Association had been deregistered. The Australian Federal Police Association, in response to a notice sent to the Christmas Island Police, advised that it had no interest in the award. A dispute as to whether Christmas Island Phosphates was respondent to the award by succession to, or transmission of the former business of, British Phosphate Commissioners was resolved when the UCIW conceded that there was no succession or transmission.

43 In 2002 it was common ground that the Commonwealth had subsisting obligations under the Severance Award and that it should continue in operation to the extent that it applied to the Minister administering the Territory of Christmas Island and the British Phosphate Commissioners.

44 The UCIW seeks to maintain the award because of subsisting employee entitlements under it. We also defer our consideration of the Severance Award.

Correctional facilities

45 Historically, the operation of prisons and correctional facilities has been the exclusive preserve of government. In recent years there has been a move to the privatisation of the operation of prisons in some States. It would appear that that trend will continue and it is appropriate to make a modern award for this industry. The Commonwealth has a number of immigration detention centres which are operated by private contractors. The operation of such detention centres will need to find a home among the modern awards. While there are points of distinction between correctional facilities and detention centres, there are sufficient similarities to make us inclined to include detention facilities within the scope of the modern award that covers correctional facilities. We publish a draft Corrections and Detention (Private Sector) Award 2010. The award will cover private sector employers who operate correctional facilities and detention centres, provide court security and prisoner/detainee transport. As we understand it, there are, at present, only three private sector employers who operate in this industry.

46 Draft awards were submitted by the CPSU, the Community and Public Sector Union (CPSU) and Geo Group Australia Pty Ltd (formerly, Australian Correctional Management) (Geo Group). Following the pre-drafting public consultations there have been private conferences between the key unions and the private sector employers. We understand that progress has been made in those discussions and there is a good prospect that these parties will reach at least substantial agreement on the terms of a modern award for this industry. With some modification we have adopted the draft award prepared by Geo Group. By doing so we do not wish to undermine the effectiveness of the continuing discussions and we stress that we have not made any final decision

in relation to matters on which the parties advanced competing drafts. The modifications we have made relate mostly to the coverage clause and to classifications and associated rates. We have also made some changes to standard clauses and maintained approaches that we have adopted in modern awards generally. We should also point out that material filed by the Geo Group and the CPSU on 22 September 2009 was received too late to be taken into account in the formulation of the draft.

47 In the event that the parties do not reach agreement, we would of course be assisted by submissions that canvass the differences between the CPSU and Geo Group drafts and the relevant supporting arguments.

Diving services

48 We have decided to produce two exposure drafts for the diving services industry. Given the vast disparity in the award terms and conditions currently applying between recreational diving services and industrial diving services, attempts to integrate those terms and conditions into a single document are likely to lead to unwanted confusion.

49 The Professional Diving Industry (Recreational) Award 2010 exposure draft, subject to the inclusion of modern award standard provisions, largely reflects the terms of the *Recreational Diving Industry Award 2001*.[23] On the basis of submissions by both the Association of Marine Park Tourism Operators (AMPTO) and AFEI, a part-time work provision and an increased pay rate for diving instructor have been incorporated into the exposure draft.

50 AMPTO and AFEI provided a joint draft award in which they included certain other amendments to current award terms and provisions. Those amendments have not been incorporated into the exposure draft at this stage, as they lack justification by way of submission.

51 The Professional Diving Industry (Industrial) Award 2010 exposure draft, subject to the inclusion of modern award standard provisions, is largely reflective of the *Professional Divers' — Maritime Union of Australia Award 2002*[24] and the draft modern award provided by the Maritime Union of Australia (the MUA), to the extent that the draft provided for industrial rather than recreational diving services. Certain restrictions in the current award relating to the utilisation of casual employees have not been included in the exposure draft for consistency with modern awards generally.

52 The coverage provisions for both exposure drafts capture the position under existing federal awards as well as such coverage as may exist under relevant NAPSAs.

Dry cleaning and laundry services

53 We publish an exposure draft of a Dry Cleaning and Laundry Industry Award 2010. The main parties who participated in the consultation were the LHMU, the AWU, the Textile, Clothing and Footwear Union of Australia (TCFUA) and the AFEI. Submissions were also received from Spotless Services Australia Limited, Alsco Pty Ltd, Business SA and a number of textile, rental and laundry associations.

54 We have decided to create separate dry cleaning and laundry streams for wages, hours of work and classifications within the award. The wage rates in the

23 AP812348.

24 AP814932.

dry cleaning stream are reflective of the present federal dry cleaning award[25] and indeed of most of the other awards in the sector. The wage rates in the laundry stream are based upon the Victorian award in that sector.[26]

55 The employers submitted that there should be a broad span of ordinary hours of work covering each day of the week. At this stage we have decided to retain the spans as they presently exist in each sector.

56 The classification descriptions are drawn from the existing awards. There may need to be some rationalisation of duplication between levels 3 and 4 laundry employees. We invite the parties to consider this issue. We have adopted the standard casual loading of 25%.

57 We note that the TCFUA raised a number of issues where it submitted that employees presently covered by the Queensland NAPSA in the dry cleaning sector would be disadvantaged by a proposed modern award.[27] The model transitional provisions, which are included in the exposure draft, should ameliorate any potential disadvantage.

Educational services — preschool teachers

58 The issue of appropriate award coverage for preschool teachers was raised when the Full Bench was considering educational services — other than universities, in Stage 3. The decision was made at that time to defer consideration of this issue until children's services were being considered in Stage 4. This would enable all interested parties who might have a view to provide input to our deliberations.

59 Currently the nature of award coverage for preschool teachers is variable. For the most part they have been covered by specific early education teachers' awards and, to a limited extent, by awards covering other teachers. In other cases they are covered by awards which also cover other employees in the child care industry or other employees in preschools or kindergartens.

60 There was strong support for the inclusion of preschool teachers in awards covering the "children's services and early childhood education industry". Equally there were strong arguments put that preschool teachers should be covered by an occupational award.

61 After considering the submissions and the proposals advanced by the interested parties we have decided at this stage that it is more appropriate to include preschool teachers in an occupational award covering both primary and secondary school teachers. We have taken into consideration in reaching this view, the qualifications required by early childhood education teachers, their capacity to work in schools and preschools as well as childcare centres, the lack of any relationship between teaching and children's services employees in terms of classification structures and the differences in conditions of employment.

62 We understand that government policies will lead to an increase in the number of preschool teachers employed in childcare centres. It is, however, also likely that those policies will mean that access to early childhood education for children who are not in long day care will continue to be provided through preschools, kindergartens and preschool facilities attached to schools. The focus

25 *Dry Cleaning Industry Award 2000*, AP779906.

26 *Laundry Industry (Victoria) Award 1998*, AP787052CRV.

27 *Dry Cleaning and Dyeing Industry Award — Southern and Central Divisions 2004*, AN140098.

on the provision of early childhood education by university qualified teachers is appropriately reflected by their inclusion in an occupational award, the *Educational Services (Teachers) Award 2010*.[28]

63 We have drafted amendments to the *Educational Services (Teachers) Award 2010* to reflect the inclusion of preschool teachers and we now release that exposure draft for comment.

Entertainment and broadcasting industry (other than racing)

64 When publishing the Stage 3 modern awards we noted that we intended to make, in Stage 4, a Travelling Shows Award 2010. The exposure draft of this award is based on both the *Theatrical Employees (Showmen's Guild) Award 2002*[29] and the draft submitted on behalf of the Showmen's Guild. This proposed award, which has some unique provisions, is limited to those itinerant employers who operate amusements, rides and other related stands at the various shows and similar events that occur around Australia.

Firefighting services

65 We publish a draft Fire Fighting Industry Award 2010. The award will have limited coverage. In States other than Victoria, and in the Territories, fire services are not "employers" within the meaning of s 6 of the WR Act. Nor are they "national system employers" within the meaning of the WR Act or the FW Act. In addition most, if not all, are covered by enterprise awards or enterprise NAPSAs. It follows that, as things presently stand, none of those fire services will be covered by a modern award for the fire fighting industry. We turn now to the situation of the fire services in Victoria.

66 The Metropolitan Fire and Emergency Services Board (MFESB) and the Country Fire Authority (CFA) are the two employer respondents to the *Victorian Firefighting Industry Employees Interim Award 2000*[30] (Victorian Fire Award). It does not appear that that award can be regarded as an enterprise award because the MFESB and CFA are separate legal entities and their relationship is not such as to permit them to be treated as a single business within the meaning of s 322 of the WR Act. It would seem that the CFA will not be covered by a modern award for firefighting made as part of the current process and we have received no submission to the contrary.

67 However, in *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board*[31] a single judge of the Federal Court held that the MFESB is a constitutional corporation by virtue of its trading activities. No party sought to challenge that decision and there is no contrary authority. We have therefore proceeded on the basis that the MFESB, being a constitutional corporation, is covered by the award modernisation process under Pt 10A of the WR Act and will not be covered by the State reference public sector award modernisation process provided for in Sch 6A to the Transitional Act.

68 Needless to say, the private sector firefighting industry in Australia is very small with only a few employers. The most significant component of the private

28 MA000077.

29 AP816117.

30 AP801881CRV.

31 *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* (1998) 83 FCR 346.

sector is the provision of contract firefighting services to the Department of Defence. In summary, the modern award will cover only private sector employers, which are very few in number, and the MFESB.

69 With minor modifications, the Victorian Fire Award was declared a common rule in Victoria and, as such, covers private sector employers in the firefighting industry in Victoria. These include Transfield Services, which provides firefighting services to the Department of Defence at several defence facilities in Victoria. It is apparent that the MFESB accounts for a substantial majority of the employees who will be covered by a modern award for this industry. Transfield Services' employees in Victoria, covered by the Victorian common rule, make up the bulk of the remainder.

70 In these circumstances the exposure draft we have published, with some exceptions, generally reflects terms and conditions in the Victorian Fire Award and an associated award applying to administrative, engineering and support staff. It is not without some reservation that we have taken this approach in preparing the exposure draft. Some of the entitlements conferred by the Victorian Fire Award seem excessive when compared with award standards more generally, perhaps reflecting the fact that, while technically not an enterprise award, the Victorian Fire Award has many of the characteristics of a public sector enterprise award.

71 One area requiring specific comment is the area of leave. We have excluded from the exposure draft a number of leave entitlements appearing in the Victorian Fire Award on the basis that they seem excessive or inappropriate as part of a minimum safety net. We will, of course, consider submissions in support of the partial or complete inclusion of those leave entitlements in the award that we finally make. In relation to pressing necessity leave, we note that we rejected a claim for the inclusion of this category of leave in the modern award for the black coal mining industry notwithstanding that it appeared in a pre-reform award applying generally in the industry and notwithstanding the consent of the industry parties to the maintenance of that form of leave.

72 We have some concerns over the making of a modern award that applies many standards in the Victorian Fire Award to the private sector throughout Australia. On the other hand, given the very small size of the private sector in this industry when compared to the public sector, it may be inappropriate to set award standards in the private sector that are significantly lower than those generally prevailing in the public sector in awards that are not amenable to modernisation as part of the current process.

Funeral directing

73 Award regulation in the funeral industry is constituted by three pre-reform awards and three NAPSAs,[32] each limited in their scope to a single State or Territory. The federal awards have application in Victoria, South Australia and the Australian Capital Territory.

74 Draft awards have been filed by InvoCare Australia Pty Ltd (InvoCare), Australian Workplace Strategies on behalf of some employers in the industry, Clifford Gouldson Lawyers on behalf of four funeral directors associations, the Funeral and Allied Industries Union of New South Wales and the AWU.

32 *Funeral Industry Award 2003*, AP825425CRV, *Funeral Industry Award (South Australia) 2003*, AP827092 and *A.C.T. Funeral Industry Award 2002*, AP815104CRA, *Funeral Industries (State) Award 2005*, AN120221, *Funeral Services Award — State 2002*, AN140127 and *Funeral Directors' Assistant's Award No. 18 of 1962*, AN160136.

75 We have had regard to all submissions in developing an exposure draft award for the funeral industry. The AWU draft is based on the *Funeral Industry Award 2003*[33] which has application in Victoria. It is this award which forms the basis of the exposure draft.

76 None of the existing awards or NAPSAs contain properly fixed minimum classification rates for funeral directing and coffin manufacturing. We have included a five level classification structure to apply to funeral directing and the manufacturing/assembling of coffins. At this stage we see no basis for the application of incremental payments. We note the submissions by InvoCare regarding funeral directing classification definitions and invite further comment from the parties.

77 We are not persuaded to exclude coffin manufacturing and the transportation of the deceased from the award as submitted by the funeral directors associations. We note the history of regulation within the industry awards and NAPSAs and the specialist nature of these tasks.

78 We have not included the definition of "ordinary pay" contained in the *Funeral Industry Award 2003* and have rationalised a number of allowances, in particular an allowance for attendants has been omitted. We are uncertain of the contemporary role and function of attendants and would welcome any comment.

79 The funeral directors associations, InvoCare and the AFEI submitted the industry should be regarded as seven day operation and there should be no requirement to pay penalty rates for funerals conducted on weekends. The prevailing standard and practice is a spread of hours over Monday to Friday and at this stage we see no compelling reason to alter this. We publish a draft Funeral Industry Award 2010.

Gardening services (remainder)

80 We publish a draft Gardening and Landscaping Services Award 2010. Two parties submitted draft awards. The exposure draft is largely based on provisions from those drafts with some reliance on other pre-reform awards and NAPSAs in the industry. Provisions of the draft submitted by the AWU which were derived from the *Sportsground Maintenance and Venue Presentation (Victoria) Award 2001*[34] have generally not been adopted in the exposure draft, as the main coverage of that award was addressed in the *Amusement, Events and Recreation Award 2010*[35] (Amusement, Events and Recreation Modern Award) published in Stage 3. Additionally, the exposure draft does not contain provisions relating to that area of commercial landscaping within the coverage of the Building and Construction Modern Award. We are not convinced that the coverage of that award in relation to commercial landscaping should be disturbed. Nor do we think a specific award should be made for golf course greenkeepers as requested by the Golf Course Superintendents' Association. We are of the view that there is adequate coverage provided by the Amusement, Events and Recreation Modern Award and this exposure draft.

Miscellaneous award

81 We publish a draft Miscellaneous Award 2010. (We have renamed the

33 AP825425CRV.

34 AP812760CRV.

35 MA000080.

General Award as the Miscellaneous Award to reflect the language of the Transitional Act.) While the coverage clause has been drafted to include employees not covered by any other modern award a number of qualifications are also required. For example, the exposure draft excludes employees in an industry covered by another modern award but who are not in one of the classifications in that modern award or who are specifically exempted from it. There are also provisions ensuring that the general award does not overlap with modern enterprise awards or state reference public sector awards. Proposals for a transitional clause applying to some employees in Catholic Church related employment have not been adopted at this stage but will be considered further during the consultations.

82 The classification structure is very general with only four levels. The first level is set at the minimum wage and applies to employees with less than three months service. The second level covers an employee with more than three months service. The third level requires trade or trade equivalent qualifications. The fourth level is for a graduate employee.

83 The draft provides for full-time, part-time and casual employees and has flexible working hours provisions. The minimum wage levels have been set having regard to minimum wages for lower skill, trades and graduate employees in other relevant modern awards. A range of generally applicable allowances is also included.

84 It is unclear which employees will be covered by this award. It may be that it will have application in some areas of the workforce which have not been covered by awards before. Section 576L of the WR Act provides that the Commission may only include terms in modern awards to the extent that they constitute a fair minimum safety net. Because there is doubt about the existing conditions of employees who might be covered we have taken a cautious approach. We have included some provisions found in modern awards of wide application but not included others so as to reduce the risk of significant cost and employment effects.

85 During the pre-drafting consultations the Shop, Distributive and Allied Employees Association (SDA) proposed that the Commission should make an award known as the Broken Hill Special Conditions Award 2010. The SDA pointed to two awards of the Industrial Relations Commission of New South Wales which apply to the Broken Hill area. The principal award is the *Broken Hill Commerce and Industry Agreement Consent Award 2001*.[36] The award contains a number of special conditions negotiated principally by the Barrier Industrial Council and the Broken Hill Chamber of Commerce and Industry. The SDA proposed that the special conditions should either be included in every modern award to apply in Broken Hill or, preferably, be included in a special modern award to apply as an adjunct to all modern awards for Broken Hill only. The three main special conditions are an additional week of annual leave, an allowance known as the Broken Hill allowance and a casual loading of 50% paid to employees in the manufacturing construction sector.

86 Without detracting in any way from the special nature of industrial relations in Broken Hill and its almost unique place in our industrial history, we do not think that the SDA's proposals should be accepted. There are many parts of

36 AN120088.

Australia that could make a similar claim to special recognition. It would be contrary to the safety net requirement to include the results of bargaining in modern awards. We do not intend to adopt the proposal.

87 The continued operation of district allowances in the Northern Territory and Western Australia has been addressed in earlier decisions and dealt with in a model provision included in all modern awards.[37] It would be possible to deal with the Broken Hill allowance in a similar way. Whether it would be appropriate to do so is a matter for further consideration.

Grain handling industry

88 The industry of grain handling involves the storage, treatment and transportation of grain and similar bulk agricultural products from farms to manufacturing, retail or port destinations. The activities of employers in the industry primarily concern storage and treatment at regional locations and loading onto ships at bulk grain port facilities. The employers are covered by enterprise awards and enterprise NAPSAs. No industry award exists. The largest employer in the industry is Graincorp Operations Ltd which is covered by eight enterprise awards.

89 Discussions during the consultations centred on the need for an award. The parties noted the broad scope of the *Storage Services and Wholesale Award 2010*[38] and the *Stevedoring Industry Award 1999*.[39] The former would apply to the regional storage and handling. The latter would apply to port related activities including ship loading. Following the consultations all parties agreed that no award should be made. We agree with that course and will not publish an exposure draft for this industry.

Health and welfare services (remainder) — Ambulance services

90 We publish an exposure draft of an Ambulance and Patient Transport Industry Award 2010. The written submissions made and the oral material presented during the pre-drafting consultations indicated a large degree of agreement between the majority of the private Non-Emergency Patient Transport (NEPT) providers in Victoria and the LHMU regarding the content of the proposed award. Both the NEPT providers and the LHMU based their draft awards on the federal *Ambulance Services and Patient Transport Employees Award, Victoria 2002*[40] (Victorian federal award). In all of the other states, either pre-reform enterprise awards or NAPSAs derived from state enterprise awards apply.

91 The terms of the exposure draft reflect, in large part, the Victorian federal award which covers both emergency and non-emergency patient transport. The wage rates also reflect the Victorian federal award as proposed by the major parties. It has not been suggested that the adoption of these rates is inappropriate and we have taken account of the wage fixation history of the Victorian federal award.

92 The modern award does not cover the Royal Flying Doctor Service as functions of that service are much broader than emergency and non-emergency

37 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2008) 177 IR 364 at [79] - [82].

38 MA000084.

39 AP796113.

40 AP817765CRV.

patient transport and include such things as the provision of primary health care, communication and education assistance to people who are in rural, regional and remote Australia.

Health and welfare services (remainder) — Children's services

93 We publish a draft Children's Services Award 2010. The classification structures for childcare employees have, in recent times, been the subject of work value assessments by the Commission and this is reflected in the exposure draft. The structure includes family day care co-ordinators. We recognise that these classifications may also be included in the exposure draft for the Social, Community, Home Care and Disability Services Industry Award 2010. Award coverage will depend on the industry of the employer.

94 We have not included family day care workers in the draft award. The only award currently covering these workers is confined in its operation to the Australian Capital Territory.[41]

Health and welfare services (remainder) — Fitness, lifestyle and leisure services

95 We have decided to make an exposure draft called the Fitness Industry Award 2010. The draft award covers employers engaged in the operation or provision of fitness centres, fitness services or classes, group fitness organisations, weight loss/control centres, aquatic centres, aquatic services or classes, indoor sports centres, golf driving ranges, dance centres and martial arts centres and their employees in the classifications in the award. Given the coverage of the draft award, the *Clerks—Private Sector Award 2010*[42] (Clerks Modern Award) may need to be varied to provide that it does not cover employers and employees covered by the draft Fitness Industry Award 2010.

96 We have not created an outdoor industry or outdoor activities, tour guides and lifeguards award as proposed by some parties. We note that we have already made an Amusement, Events and Recreation Modern Award. To the extent that award does not cover those who were to be covered by the proposed outdoor industry or outdoor activities, tour guides and lifeguards award they might be covered by the proposed Miscellaneous Award 2010 or further considered through an application to vary the Amusement, Events and Recreation Modern Award.

97 The classification structure for the draft award was largely agreed between the LHMU and Fitness Australia. With respect to the areas of disagreement we have decided to provide for an introductory level employee at level 1 and a level 7 employee who is engaged in supervising, training and co-ordinating other employees as proposed by the LHMU. Swimming teacher and coach classifications have also been incorporated into the classification structure. The minimum wage rates attached to the classification structure reflect those advanced by Fitness Australia. An annual leave loading has also been provided for in the draft award.

98 The draft award provides for a casual employee to be paid a 30% loading on Saturdays, Sundays and public holidays instead of other Saturday, Sunday and

41 *Family Day Care (Australian Capital Territory) Award 1999*, AP781398.

42 MA000002.

public holiday penalty rates and the ordinary hours of work and rostering provisions set out in the draft award are largely those advanced by Fitness Australia.

Health and welfare services (remainder) — Social and community services

99 We publish an exposure draft of a Social, Community, Home Care and Disability Services Industry Award 2010. The exposure draft incorporates social and community services, home care, the provision of family day care schemes and disability services. For the reasons set out below, employment services has not been included in this exposure draft.

100 A number of the parties suggested that there should be one modern award covering all four industry sectors. Others proposed that disability services and home care should be covered by separate awards. Further, there was also the view that there should be two social welfare awards - one to cover direct client care and the other to cover support services. We have decided that social and community services, home care, the provision of family day care schemes and disability services can all be dealt with in a social and community services framework. There does not seem to be any obvious advantage in taking a more fragmented approach.

101 The classifications and wage rates we have adopted for the social and community services employees largely reflect the federal *Social and Community Services (Queensland) Award 2001*.[43] There are federal awards in this sector in all states except New South Wales, Tasmania and South Australia, where there are NAPSAs. The wage rates in the federal Australian Capital Territory, Western Australian and Queensland awards were reviewed as part of the award simplification process in 2002. They are all currently very similar. The New South Wales NAPSA provides for generally higher wage rates than the federal awards. The South Australian and Tasmanian NAPSA wage rates are generally lower than the federal awards. In adopting the federal Queensland award wage rates, we note that s 576(L) of the WR Act requires that modern awards provide a fair minimum safety net.

102 Crisis accommodation employees have been integrated into the social and community services employee wage rate structure taking into account qualification levels. The wage rates and classification definitions reflect the federal *Crisis Assistance Supported Housing (Queensland) Award 1999*.[44]

103 The classification for family day care scheme employees do not include workers who provide family day care services in their home. The wage rates and definitions are derived from the federal *Family Day Care Services Award, 1999*.[45] The classification of family day care co-ordinator (family day care employee - level 4) and director of a family day care service (family day care employee - level 5), also appear in the *Children's Services Award 2010* exposure draft. Coverage will depend on the industry of the employer.

104 Award coverage of disability services employees is currently spread over federal awards (Australian Capital Territory, Victoria and Northern Territory) and NAPSAs (New South Wales, Tasmania, South Australia and Queensland). Wage rates are largely comparable between the federal awards (the Australian Capital Territory award is slightly higher). The New South Wales NAPSA wage

43 AP808848.

44 AP777903.

45 AP812580.

rates are again the highest rates. All of the other State NAPSAs contain generally lower rates. The classification structure and wage rates we have adopted largely reflect the federal *Residential and Support Services (Victoria) Award 1999*.[46]

105 Home care employees covered by the exposure draft provide care and support for aged persons or persons with a disability in their own home. The *Aged Care Award 2010*[47] also covers the provision of care for aged persons in their home. Whether this draft modern award or the *Aged Care Award 2010* covers a particular employee will depend on the industry of the employer.

106 The wage rates and classification definitions for home care employees are based on the federal *Home and Community Care Award 2001*.[48] The wage rate for a Certificate III qualified home care employee (grade 3) is the same rate as for a similarly qualified aged care employee (level 4) in the *Aged Care Award 2010*.

107 There has been some rationalisation and integration of wage rate structures in the exposure draft. The parties are invited to comment on whether there should be further rationalisation across all or some of the remaining sectors (family day care, disability and home care services).

108 We have not included provision for fixed term employment. It is available as a matter of contract and there does not appear to be any reason to include special provisions.

109 We turn again to the question of salary packaging which we have already dealt with in the introduction to this statement. In its decision of 19 December 2008, the Commission said:

> [66] A number of parties sought provision for salary packaging or salary sacrifice and annualised wages and salaries as standard in awards. We shall deal with salary sacrifice first. A number of employer interests suggested that salary sacrifice was a legitimate, well accepted practice and that employees would benefit from its adoption. Arrangements permitting an employee to sacrifice an amount of wages in exchange for the employer making a payment on the employee's behalf are not a feature of the award system. We think we should take a cautious approach. Consistent with the views expressed in our decision of 20 June 2008 concerning the model award flexibility provision, we do not think that minimum wages should be subject to reduction by agreement other than by bargaining. We have not included salary sacrifice provisions in any of the modern awards.[49]

110 While we maintain the views in this passage, as we have already indicated we are prepared to consider whether there are special circumstances relating to this particular industry which warrant a departure. We have already set out some of the matters which in our view need to be addressed. We should add that there are a number of options in terms of award provisions. If it were decided that salary packaging should not be maintained in the modern award it might be necessary to fashion transitional provisions to take account of the current

46 AP795711CRV.

47 MA000018.

48 AP806214CRV.

49 *Re Request from Minister for Employment and Workplace Relations—28 March 2008* (2008) 177 IR 364.

arrangements. There would also be the possibility of reconsidering the matter in the two year review of modern awards. The views of the parties are invited on these questions also.

111 Differing views were presented by the parties about whether employment services should be included in a broad social, community, home care, family day care schemes and disability services modern award or be covered by a separate award. The unions and some of the employer associations supported the inclusion of employment services in the broad award. The Group Training Association of Victoria (GTA) and the National Employment Services Association (NESA) sought a separate award for each of their respective areas of interest.

112 We have decided to publish a draft Employment Services Industry Award 2010. It covers both the provision of labour market assistance programs and group training services. While we have not reached a final view on the matter, we do not think that the provision of labour market assistance programs or group training should be covered by the draft Social, Community, Home Care and Disability Services Industry Award 2010. Furthermore there appears to be some similarity between the operations of labour market assistance program providers and the operations of group training employers. The exposure draft is based on the terms of the two pre-reform awards — the *Community Employment, Training and Support Services Award 1999*[50] and the *Group Training (Victoria) Award 1999*.[51] Apart from a Queensland NAPSA (the *Group Training Organisations Award — State 2003)*,[52] no other awards or NAPSAs were put forward by the parties as applicable. The draft awards proposed by NESA and the GTA were based on each of the respective federal awards.

113 It is not clear to what extent the award should provide terms and conditions of employment for group training apprentices and trainees. More information is needed on the way in which apprentices and trainees are remunerated prior to initial placement and between placements.

114 We have not included, at this stage, a provision regarding training preparation and associated non-training arrangements which limit the face-to-face training duties of full-time and part-time employees. There may be doubts as to whether such limits would be a modern award matter.

115 For the reasons outlined in our comments regarding the exposure draft for the Social, Community, Home Care and Disability Services Industry Award 2010, we have not included a provision for fixed-term employees.

Health and welfare services (remainder) — Supported employment services

116 We publish a draft of the Supported Employment Services Award 2010. Extensive consultation between the parties has resulted in agreement as to many aspects of the proposal although it remains necessary to comment upon several provisions.

117 Clause 14A of the existing award Wage Assessment — employees with a disability of the *Liquor, Hospitality and Miscellaneous Union Supported Employment Services Award 2005*[53] (the LHMU Award) provides for a percentage of the rate of pay for the relevant grade to be paid to such an

50 AP772299CRV.

51 AP783267.

52 AN140139.

53 AP841959.

employee under the wage assessment tool approved for each supported employment service. Clause 14A.3 review of assessment provides for the varying circumstances under which such a wage assessment can be reviewed - including at the initiative of the employee. An additional provision proposed for the modern award would have the effect of putting wage assessments and the review of wage assessments, beyond the reach of the disputes procedure.

118 Clause 10.2 of the LHMU Award provide as follows:

> The disputes procedure set out in this clause may be used in instances where there is any disagreement with regard to an assessment in accordance with clause 14A, if the assessment tool used does not provide for a dispute resolution mechanism. If the assessment tool does provide for a disputes resolution mechanism and a dispute nevertheless remains with regard to an assessment, either party can invoke step 5 of the procedure in this clause.

119 It is our preliminary view that employees with a disability engaged under the modern award should also be able to raise the matter of their disputed rate of pay or classification level in the event such an issue is not resolved at the local level. We would be assisted by further argument as to why employees in this award ought not have access to such a mechanism.

120 We have accepted the views expressed as to the limited application of the current dry cleaning allowance. The proposed cl.15.4 laundry allowance provides a reimbursement for laundry costs where it is agreed on the job that work required to be performed is of a dirty nature. This allowance acknowledges costs occasioned by dirty work requiring clothes to be washed as a result of the performance of unusually dirty or unusually offensive. This allowance should not to be confused with a disability allowance, sometimes found in awards, but not in this award.

121 The award currently provides for superannuation contributions to be made for employees with a disability. Respondent employers contribute the greater of 3% of a disabled employees' ordinary time earnings or $6.00 per week for an employee being paid less than 80% of the full award wage. These contribution rates have not been increased since 1993. It will be appreciated that disability services employers not currently bound by the LHMU award are required to contribute to disabled employees' superannuation only when the $450 monthly earnings threshold is triggered. It is noteworthy that wages paid under the modern award, when adjusted for an individual's assessed disability, will often be significantly lower than the minimum rates otherwise payable and that very many employees with disabilities are unable to attend to their duties for 38 hours weekly. Earnings will rarely be high and often quite low.

122 National Disability Services agree to the 3% or $6.00 level of contribution applying generally in the modern award but do not accept that the contribution level should be adjusted as sought by the ACTU and LHMU. Australian Business Industrial and Chamber of Commerce and Industry Western Australia (CCIWA) oppose the existing superannuation entitlement being extended beyond those to whom it currently applies. The exposure draft retains a 3% or $6.00 per week obligation. We will be assisted by the parties' views as to how this matter might be further addressed, both as a matter of principle and as to the actual operation of the provision — conscious that in its present form there may be a capacity for disadvantage. Similar issues may arise in the operation of the supported wage system in open employment.

Indigenous organisations and services

123 The Commission received a range of submissions from indigenous organisations seeking to have awards made that were to apply only to those indigenous organisations and their employees. In its decision of 3 April 2009, the Commission referred consideration of possible distinct award coverage of indigenous organisations or services to Stage 4. It also appointed Commissioner Raffaelli to investigate the matters raised by the parties more fully. The Commissioner conducted on-site inspections in Victoria, New South Wales and the Northern Territory and a public consultation hearing in Melbourne.

124 Subject to an exception we deal with later, on the basis of the material before us, including our consultation with the Commissioner, we have decided not to make a separate award covering indigenous organisations or services. We are conscious of many of the difficulties faced by such bodies including as to isolation and climate. Additionally, we were told that many of these organisations by necessity provide a range of services including varied commercial undertakings. It was said that a single award that caters to these unique circumstances is desirable. In our view, many of the features described apply equally in many non-indigenous areas where certain commercial and community organisations face the same difficulties. We believe that the modern awards that we are establishing for a range of industries will be equally appropriate to indigenous organisations and services.

125 We have decided, however, that the operation of aboriginal community controlled health organisations should be regulated by a separate modern award. We are satisfied that the nature of health services that are delivered in a culturally appropriate way is sufficiently different to justify a separate award. The difference is not only about the way the services are established and controlled but is critically seen in the way that employees of the services operate. We accept that the aboriginal health worker within aboriginal community controlled health services is critical. No equivalent health care worker operates in what we might describe as mainstream services. We publish a draft Aboriginal Community Controlled Health Services Award 2010.

126 In making the exposure draft we have largely adopted the draft provided by the National Aboriginal Community Controlled Health Organisation (NACCHO). One significant departure from NACCHO's draft is that we have not included coverage of doctors, nurses or dentists. We have previously made a *Medical Practitioners Award 2010*[54] and a *Nurses Award 2010*[55] to comprehensively cover doctors and nurses. For reasons previously given, we consider that those occupations are best covered by the separate occupational awards already made. We have not to date made any award for dentists and the lack of any significant award coverage for the profession leads us to the conclusion that dentists should not be included in the draft award.

127 We have also decided not to include the proposed clause, "Aboriginal self determination". The clause may have the effect of restricting the legitimate industrial rights of employees. We have included only the standard dispute resolution provision.

128 As to minimum weekly rates and classifications, we have included those rates and classification definitions currently provided in the *Health Services Union of*

54 MA000031.

55 MA000034.

Australia (Aboriginal and Torres Strait Islander Health Services) Award 2002.[56] That is an interim arrangement pending further consideration. Similarly, our prescription of the standard rate may be revisited. We note that NACCHO proposes consulting with unions to develop agreed classification structures and rates. We urge the relevant parties to confer on these matters. We have decided not to make provision for apprentices and school-based apprentices as we are unaware that these employment categories are utilised.

129 We were unsure of the meaning of the proposed cl.25.2(b) which is based on a current award provision. We have inserted in its stead a provision for overtime payments for work outside the span of hours. In relation to the personal/carer's leave and compassionate leave clause we have maintained the standard provisions and not included matters going to evidence requirement and additional entitlements.

130 Finally, we have not provided for public holidays additional to the National Employment Standards (NES) which is consistent with our approach in other awards.

Labour hire services

131 The Commission has previously identified labour hire as an area in which further work may be needed prior to the end of award modernisation. In its decision of 19 December 2008, the Commission noted:

> [25] A number of issues have arisen concerning the operation of modern industry awards in relation to employees of contractors and labour hire firms. While the coverage clause in a number of the priority awards deals specifically with these employees, it is not possible to foresee all of the issues that might arise or to have a full appreciation of them. It is likely that it will be necessary to give special consideration to labour hire firms and their employees, at least, at a convenient time during 2009. Questions which require discussion include whether there should be a separate award for the labour hire industry to cover employment not covered by other modern awards with either industry or occupational coverage and the basis upon which such employment might be covered by one award rather than another. We should also indicate that when these issues are more fully considered it may be necessary to make some modifications to the coverage provisions of some modern awards.[57]

132 In its statement of 29 June 2009, the Commission further noted:

> [4] We draw attention to the fact that the Stage 4 list includes some industries and occupations in relation to which the question of award coverage remains to be determined. To take an example, while labour hire services now appears on the list, whether an award should be made to cover that area and if so the terms the award should contain are matters for decision. Generally the options include a separate modern award for the area in question, no award, coverage under the general award or an alteration to the coverage of an existing modern award.[58]

133 Employees of labour hire firms already fall within the coverage of modern awards with occupational operation, such as the Clerks Modern Award, the

56 AP819920.

57 *Re Request from Minister for Employment and Workplace Relations—28 March 2008* (2008) 177 IR 364.

58 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 184 IR 242.

Manufacturing Modern Award and the Plumbing Modern Award. Other modern awards provide for partial coverage of employees of labour hire firms. The *Mining Industry Award 2010*[59] (Mining Modern Award) for example, covers the provision of temporary labour services in the activities otherwise within the coverage of the award, by temporary labour personnel principally engaged to perform work at the relevant location. Similarly, the *Hospitality Industry (General) Award 2010*[60] (Hospitality Modern Award) includes contract cleaning undertaken by companies operating exclusively in the hospitality industry. Most modern awards, however, do not cover employees of labour hire firms.

134 The options for providing modern award coverage for labour hire employers and their employees are:

- to create a modern award for the labour hire industry; or
- to modify modern awards operating exclusively with industry coverage in order to bring employees of labour hire companies, working within the relevant industry, within the coverage of those awards.

135 In its submissions of 24 July 2009 NESA proposed the making of an Employment Services Industry Award 2010, a proposition advanced in relation to both the industries not otherwise assigned - labour hire services and health and welfare services (remainder) — social and community services consultations. The proposal was advanced on the basis that some employment services firms operate labour hire businesses, in which they provide labour to other employers. The award proposed would cover only those employers who provide employment services and arrange labour hire and would not apply to persons they engage to perform work for other employers. NESA envisaged the continuation of the practice of paying such employees the going rate of pay where they are placed. Accordingly, the award proposed by NESA falls outside of the scope of the labour hire services industry and is more properly considered, as it has been in this statement, in the context of the social and community services industry.

136 During the Stage 4 pre-drafting consultations no employer or employer organisation sought an award to cover persons engaged by labour hire companies to perform work for other employers. In fact, the ACTU, unions and employer organisations without exception opposed the making of a modern award for the labour hire industry. They submitted that the coverage of labour hire employees is more appropriately dealt with by the industry award which covers the industry in which such employees are placed. It was submitted that such awards already contain terms and conditions which take into account the circumstances of the employment and are likely to reflect the terms and conditions of employment applicable to the host organisations' own employees. Similar considerations arise in relation to awards with occupational coverage.

137 Business SA proposed the incorporation into all modern industry awards of a provision based on cl.4.1(f) of the Mining Modern Award, extending coverage to:

> the provision of temporary labour services used in the activities set out in (the substantive coverage clause), by temporary labour personnel principally engaged to perform work at a location where the activities described above are being performed.

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59 MA000011.

60 MA000009.

138 However, there was little support for the insertion of this or any other model provision into all modern awards with industry coverage. The general view is that the variation of modern awards to extend their coverage to employees of labour hire firms should be considered on an award by award basis, where the particular circumstances of each industry can be properly considered.

139 We have decided not to make a modern award for the labour hire industry, consistent with the general view of representatives of employers and employees. We think it is preferable that modern awards should be varied, where necessary, to extend their coverage to labour hire firms and their employees. This will result in a more consistent safety net as between direct and labour hire employees in the relevant industry.

140 This could be done on an award by award basis by application to vary. This will allow the particular circumstances of the industry to be considered and give all interested parties the opportunity to express a view. Such applications might be made immediately, where there exists an evident need to extend the coverage of a modern award to labour hire employees, with a view to the award being varied before it has effect.

Legal services

141 We publish an exposure draft of the Legal Services Award 2010. The award will cover employees up to and including articled clerks/graduates at law. We have not included classifications for lawyers admitted to practice. There is some award coverage for lawyers in the private sector but this is limited and does not appear, in our view, to satisfy the criteria necessary for the making of a modern award. It may be necessary for interested persons to give consideration to what if any transitional provisions may be needed for employees who are currently covered by an industrial instrument but will not be covered by the modern award.

Local government administration

142 We publish a draft Local Government Industry Award 2010. The local government associations of New South Wales, Queensland, South Australia, Tasmania and Western Australia combined to present a single position before us. The Victorian Employers' Chamber of Commerce and Industry (VECCI), representing local government employers in Victoria, initially presented a separate position. Eventually, the combined local government associations and VECCI (together, LGAs) reached an agreed position and proposed a single draft award, albeit with some areas where VECCI continues to press for different provisions. On the union side, the Australian Municipal, Administrative, Clerical and Services Union (ASU) is the main union with coverage of local government in Australia and the lead union for this industry. The ASU also proposed a draft award. No other party proposed a draft award.

143 We shall refer to councils, local councils, county councils, municipal councils, shire councils or other local government bodies created under or regulated by local government legislation of a State or Territory as local government entities. Local government entities in Australia engage in a wide variety of activities in addition to those commonly associated with local government, ranging from the operation of child care centres and tourist facilities to quarrying. It is common for local government entities to conduct particular activities through separate corporate vehicles.

144 There are significant issues as to extent to which employers in the area of

local government are amenable to coverage under a modern award made under Pt 10A of the WR Act. Local government entities in Queensland and New South Wales have been decorporatised (although, in Queensland, the Brisbane City Council was excluded from that process) with the result that, in the absence of a referral of power that extends to local government, those entities do not fall within the WR Act or the FW Act. A modern award made as part of the current award modernisation process can have no application to local government entities in Queensland or New South Wales. In this context we note that in a letter to the Commission, dated 10 August 2009, DEEWR has indicated that, apart from Victoria which has already referred power, "all of the remaining States have indicated a desire at this stage to have their local government sector covered under the relevant State workplace relations system and that the Australian Government is considering the means by which it will implement their wishes."

145 We should also note that there is some uncertainty as to what, as a matter of law, constitutes a trading corporation within the meaning of s 51(xx) of the *Constitution* (constitutional trading corporation). In *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* [61] Spender J undertook a comprehensive review of the High Court authorities and concluded that the local government council in that case was not a constitutional trading corporation and was therefore unable to make a collective agreement under the WR Act. We note his Honour's analysis was endorsed by the Full Court of the Federal Court in an appeal against a costs decision by Spender J in the same matter.[62] Nevertheless, until the High Court considers the position some uncertainty will remain. We recognise that a different view may ultimately be taken by the High Court. On the current state of the authorities, however, a "typical" local council, at least, is not a constitutional trading corporation.

146 As we have noted, it has been relatively common for local government entities to establish companies for the purpose of undertaking particular activities. Depending upon the nature of the activities undertaken by such companies, they may be constitutional trading corporations and therefore within the reach of the WR Act and the FW Act and amenable to coverage under a modern award made as part of the current award modernisation process.

147 Because the award modernisation process under Pt 10A of the WR Act only applies to constitutional trading corporations, we would not expect the modern award to have significant application. It will cover only a small proportion of local government employers nationally, being either local government entities that, because of their particular trading activities, are properly held to be constitutional trading corporations (which class probably does not include "typical" local councils) and perhaps some local government owned companies that are trading corporations. We should mention that any local government entities which are brought into the scope of the FW Act, as a result of a referral of power by a State pursuant to the State Referral Act, will be subject to the State reference public sector award modernisation process provided for in Sch 6A of the Transitional Act rather than this award modernisation process.

148 Despite the significant limitations on the potential coverage of the award,

61 *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2008) 171 FCR 102; 175 IR 383.

62 *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2009) 178 FCR 252 at [6] and [7] per Ryan and Marshall JJ.

both the LGAs and the ASU were adamant that a modern award should be made for the industry of local government. They were also in firm agreement that local government should be treated as a single industry and that, subject to a small number of identified exceptions, all activities of local government should be within the coverage of a modern award for local government to the exclusion of other modern awards. They contend that activities carried out by corporations owned by local government entities should also be covered. We are inclined to accept that position and the coverage clause of the exposure draft has been drafted accordingly.

149 As we have already noted, there were only two draft awards proposed in this industry: a draft proposed by the LGAs (including VECCI) and a draft proposed by the ASU. However, and without implying any criticism, we note that there were no detailed submissions from those parties directed at the relative merits of their respective positions where their drafts differ. In circumstances where, as here, in relation to the content of a modern award there is effectively a common position on the employer side and, putting aside issues going to coverage, a single position on the union side, we would not wish to make a determination on the differing positions without the benefit of submissions on the merits of the competing cases. The exposure draft we have published largely adopts the draft proposed by the LGAs (albeit with some modification including, in particular, to the coverage clause). We have not, at this stage, attempted any modification to the classification structure or the allowances included in the LGAs' draft. However, in adopting the substance of the LGA's draft we should not be taken as expressing, even on a provisional basis, a preference for the position of the LGAs over the position of the ASU on particular issues. We make it clear that we are amenable to suggestions for change, including wholesale change, to the exposure draft.

150 During the consultations an issue arose as to whether the provisions of the awards and NAPSAs applying in New South Wales and Queensland should be taken into consideration in drafting the award. The ASU and other unions argued that the decorporatisation of local government in New South Wales and Queensland meant that underlying awards in those States should be disregarded. The LGAs, on the other hand, noted the potential for those States to refer power in relation to local government in the future and argued that the underlying awards in those States should be taken into account. The parties sought a preliminary ruling on that issue. We conveyed to the parties that we were disinclined to make such a ruling without more detailed submissions going to the implications of adopting one of those alternatives as opposed to the other. Little in the way of additional submissions have been received. On balance, we think it appropriate to take some account of the Queensland and New South Wales awards, particularly where, in relation to a particular condition or entitlement, no clear standard emerges from a consideration of the awards and NAPSAs in the other States. After all, on the present state of the law, "typical" councils in the remaining States would seem not to be amenable to coverage under a modern award for local government made as part of the current process and local government owned corporations that are constitutional trading corporations will be amenable to coverage by such a modern award, irrespective of the fact that they may operate only in New South Wales or Queensland.

Mannequins and modelling industry

151 We have prepared a draft Mannequins and Models Award 2010. Only the

SDA put submissions on a proposed modern award. The exposure draft is drawn largely from the existing federal award with some amendments consistent with the approach we have adopted in other modern awards.[63]

Maritime industry

152 On 22 May 2009 we published a draft Seagoing Industry Award 2010. We subsequently adjourned consideration of the final award, on the application of various employers, pending a variation to the consolidated request. On 17 August 2009 the Minister varied the consolidated request by including the following provisions dealing with the maritime industry:

> Maritime Industry
>
> 47 When creating a modern award covering the maritime industry, the Commission should ensure that the modern award covers employers on licensed, permit or majority Australian-crewed ships (as defined in item 1 of Schedule 2 to the *Fair Work Amendment Regulations 2009 (No.1)*) and their employees.
>
> 48 The Commission should give consideration to the circumstances and needs of the employers and employees in the areas described in these regulations.
>
> 49 As well as giving consideration to the modern awards objective in s 576A of Part 10A of the *Workplace Relations Act 1996*, the other terms of this award modernisation request and the NES, the Commission should consider whether it is appropriate to establish award provisions for employers of the crews of permit ships and their employees relating to accrued entitlements and associated arrangements. In considering this matter, the Commission should have regard to the needs of those employers and employees who may be in Australia for relatively short periods or who are regularly moving in and out of the Australian jurisdiction.

153 We have received a large number of submissions in relation to this variation which in essence requires the extension of award coverage to vessels operating under permits issued pursuant to the *Navigation Act 1912* (Cth). The permit system is utilised by foreign-flagged vessels in the conduct of coastal cargo. Those vessels employ foreign nationals who are currently in receipt of wages and conditions different from those applying to Australian-flagged and licensed vessels which observe Australian awards.

154 A large number of the submissions cautioned against any extension of award regulation to permit vessels on the basis that substantial costs will be imposed. Some of the submissions from shipping interests also opposed the regulation of foreign shipping because it was contrary to Australia's international obligations including those well-established maritime customs of "right of innocent passage" and the "internal economy" rule. Other submissions accepted that some differentiation might be made between vessels which utilise permits but are clearly and regularly engaged in international trade and are only carrying domestic cargo as an incidental activity to foreign trade and those others which have previously been described as "serial participants in the Australian coasting trade". The MUA's position is that the modern award should apply uniformly to all vessels - licensed, permit or majority Australian crewed ships.

155 Conscious of the variation to the consolidated request we have decided to

63 Mannequins and Models Award 2000, AP808516.

divide the award into Part A and Part B. We have tentatively described Part A as applying to non-permit vessels, which are essentially the respondents to the existing award. Part B will apply to permit vessels.

156 The specific provisions applicable to Part B vessels will also require substantial consideration. While we will be better informed by the further submissions of interested parties, including in the public consultations in October 2009, our preliminary view is that Part B conditions will need to pay due regard to conditions applying internationally, including what has been referred to as the ITF agreement. We also note that cll.28 to 35 of the consolidated request govern the manner in which modern award provisions can interact with the NES. Proposals which relate to the effect of the NES on crew covered by Part B of the modern award will need to be framed with those provisions in mind.

157 We have made a number of alterations to the first exposure draft, in what will now be Part A. At the request of the parties we have included a definition of "day" to accommodate the nature of maritime work which may extend over several time zones. We were urged by the unions to insert the existing award provisions as to termination of employment. In our view, at least in respect of an officer with more than five years service and who is over 45 years of age, and where the vessel is decommissioned, the award provisions could operate to an employee's detriment by comparison with the terms of the NES. We have decided to retain the standard provision, which was in the exposure draft.

158 The unions opposed the inclusion of the national training wage schedule on the basis that specific industry arrangements already apply and are better suited. However, no details of these arrangements were provided and we therefore propose to retain the national training wage. Any proposal for an industry specific provision could be the subject of an application to vary the award

159 We have decided to accept the submissions of the Australian Mines and Metal Association (AMMA) and the Australian Shipowners Association (ASA) and to delete the definitions of "chief integrated rating" and "integrated rating". Those definitions seemed to equate those classifications with others which, while still used, are increasingly obsolete. We are aware that the chief integrated rating and integrated rating are classifications that have been developed in more recent times to encompass greater multi-skilling.

160 Although AMMA/ASA urged us to include part-time employment provisions in the award, we note that such an employment type is not a feature of the existing award nor is it a feature of the industry more generally. We are not persuaded to insert such provisions at this time. AMMA/ASA also pressed for the insertion of the current award provisions which restrict the ability of an employee who has undergone paid study leave to resign in the twelve months following such leave. We do not consider that the modern award should regulate the manner in which an employee may or may not resign.

161 At the request of all parties, we have decided to delete the classification definitions found in Schedule A of the exposure draft. We have done so on the basis that it is not practical to define classifications by reference to maritime orders as this provides insufficient differentiation between the classifications. We are satisfied that the classifications named in cl.13 are well understood in the industry and do not need further definition.

162 AMMA/ASA expressed concern that the disturbance of sleep allowance at

cl.14.3 did not include a provision that the assessment of a disturbance is to be made by an officer. We note such assessment is in the existing award and we have inserted an appropriate provision in the draft.

163 Finally, AiGroup sought to exclude employers covered by the Manufacturing Modern Award from this award. We have acceded to that proposal in part and the draft excludes maintenance contractors covered by the Manufacturing Modern Award.

Real estate industry

164 We publish an exposure draft of the Real Estate Industry Award 2010. Prior to the pre-exposure draft consultations one draft award (the real estate parties draft) was filed which was supported by a number of real estate employee and employer associations. The real estate employee associations are The Property Sales Association of Queensland, Union of Employees, The Real Estate Association of New South Wales and the Real Estate Salespersons' Association of South Australia. The real estate employer associations are the Queensland Real Estate Industrial Organisation of Employers, the Real Estate Employers' Federation of NSW, the Real Estate Employers' Federation of South Australia, the Real Estate Employers' Federation of Western Australia and the Real Estate Institute of Australia.

165 The ACTU and ASU do not oppose the making of an award for this industry but submit that clerical and administrative classifications should not be included and should be covered by the Clerks Modern Award. AFEI supports the draft as does Agribusiness Employers Federation (AEF). However the AEF also made submissions about the *Clerical and Salaried Staffs' (Agribusiness) Award 1999*[64] and real estate sales persons who have had their terms and conditions regulated by that award.

166 The National Community Titles Institute Secretariat (NCTI) oppose the draft award extending as it does to strata management (however that function may be described throughout Australia). NCTI had not been part of any consultations with the associations referred to above and highlighted differences in the type and level of certification required of strata and community title managers to that of real estate salespersons. It did not attend the pre-exposure draft consultations so there was no opportunity to discuss the nature of any modern award coverage it submits is appropriate. Late submissions have also been filed by Strata Managers Institute (ACT) Incorporated, Strata Titles Institute of Western Australia (Inc), Community Titles Institute South Australia and the Institute of Strata Title Management Ltd. Each organisation is affiliated with NCTI and supports its submissions.

167 Real estate industry specific awards exist in New South Wales, Queensland, South Australia and Tasmania. Clerical classifications are contained only in the awards in New South Wales and Tasmania. All of these awards are NAPSAs; there are no pre-reform awards. Other than the Victorian minimum wage order made for the property and business services sector, there has been no federal real estate specific regulation. There is however an Australian Pay and Classification Scale for real estate agents paid on a commission only basis (the commission only pay scale) which we refer to later. The Australian Capital Territory, Northern Territory, Victoria and Western Australia were described as award free but we take that to mean there are no real estate specific awards.

64 AP772066.

Obviously employees like clerks would be covered by state common rule awards. Otherwise it seems that the Australian Fair Pay and Conditions Standard applies.

168 The real estate parties draft contained numerous provisions said to be tailored to the needs of the real estate industry. It is, in several respects, different to other modern awards. Clearly the draft reflects the provisions in the existing NAPSAs. They contain, in the case of sales and property management employees, several classifications paid at the federal minimum wage or slightly above, limited overtime and almost no penalties rates.

169 We have made a judgement as to those provisions we think are appropriate for this industry award. This exercise has been informed by the provisions of the existing awards and the fact that in the two Territories and in two States the employers and employees have been award free. We acknowledge the draft filed by the real estate parties reflects a consent position of associations representing a significant part of the industry and is the outcome of lengthy consultations (albeit, consultations about which others complain of not being asked to participate). Furthermore, to the extent that the draft covers sales and property management employees, there was no opposition to its content. However a number of provisions in the draft have not been included in the exposure draft. We refer to the more significant of them in the comments made about specific clauses.

170 We refer first to the definitions clause. We have not included a number of definitions relating to the calculation of base and full rates of pay. For a non commission-only employee the minimum weekly rate in cl.14 will be the reference point for calculations. At this stage it is unclear if the definitions clause requires a full rate of pay to be included. The parties' definition of base rate of pay for a commission-only employee seems to be based on reg 1.09 of the *Fair Work Regulations 2009*. That provides a formula for calculating the base rate of pay expressed as an hourly rate for an award or agreement free employee who is a pieceworker. Consistent with ss 16(2) and 18(2) of the FW Act and clause 45 of the consolidated request we have specified in cl.17 of the draft a base rate of pay and a full rate of pay.

171 The definition of real estate industry includes strata management and accordingly the coverage of the award also includes that activity. We have considered the submissions of the NCTI and its affiliates, but we have nevertheless included strata management in the draft. On the submissions to date no case has been made out for a separate award and it is unclear what modern award coverage is said to be appropriate. We leave it to the parties to consider and discuss this issue. If strata management is to stay in the award it may be that some additional terms and conditions need be inserted for this sector.

172 We have decided to exclude clerical classifications from the exposure draft. The current coverage of clerks in real estate specific awards is limited to the states of New South Wales and Tasmania. Our provisional view is that clerks should be covered by the Clerks Modern Award. We note, however, that although the wages and classifications in that award could probably accommodate clerks in the real estate industry the hours regime, particularly overtime and penalties, in the existing two clerks real estate awards are less beneficial to employees than the Clerks Modern Award. There may be a case for some specific or transitional provisions in that award to accommodate this.

173 We refer next to cl.11 which deals with termination of employment. We have adopted the real estate parties' draft provision but invite further submissions on how it will operate with respect to commission-only paid employees.

174 Clause 14 deals with minimum weekly rates. For the purpose of this exposure draft we have left in the proposed rate for a property sales associate. It is the same as the federal minimum wage. We note that the classification description contains no suggestion this is an entry level position nor is there any limit on the amount of time an employee will remain on this rate. We have also not included the transitional clause for a property sales representative. While the rate in the draft award for this classification is $578.36, the proposed transitional provision would have the effect of allowing employers, other than in New South Wales, to pay the federal minimum wage until December 2014. The parties may wish to make further submissions about these matters.

175 Clause 16 deals with commission-only paid employees. This method of remunerating certain employees is widespread in this industry. It is reflected in provisions in the relevant NAPSAs. It is also said to be commonplace throughout Australia. It is not necessary for the purposes of this statement to do other than note that the commission-only pay scale was made by the Australian Fair Pay Commission in August 2007. The real estate parties' draft award goes beyond the types of sales employees to which the pay scale was limited. It extends to casual employees, employees undertaking sales transactions which do not involve an agency relationship and to commercial leasing transactions. On the submissions made thus far we have decided that a modern award may contain provisions accommodating this type of remuneration on the basis these employees are categorised as pieceworkers. We have excluded casuals but otherwise the clause extends to all employees in property sales classifications. Several safeguards about how this method of remuneration will operate have been included in cll.16 and 17. We have not put cll.17.5(a) and (d) as contained in the real estate parties' draft in the exposure draft. It is not entirely clear what those clauses mean and how the superannuation calculation for a commission-only employee is to be made for the purposes of an employer's contributions. We think it better this be left for the superannuation legislation to operate and for employers to comply with such provisions as may relate to an employee remunerated in this way rather than to provide for it in the modern award.

176 We would be assisted if the parties would again consider the calculations for NES entitlements for these employees and, in doing so, the piecework provisions in the FW Act and the consolidated request. On a provisional basis we have accepted the parties' submissions that it is open to them to agree to incorporate these entitlements into commission-only payments as and when they are made. As noted, a definition of base and full rate of pay has been put into cl.17 and submissions are invited about those provisions. We have also made it clear that any NES entitlements must be in addition to the minimum commission-only rate.

177 We have not included an annualised wage and salary clause as was sought. Despite the parties' agreement about the terms of this clause we cannot identify anything similar in any of the existing awards. It is difficult to understand why it is necessary in this award. It applies, we assume, only to employees on a weekly wage and they are entitled to few provisions that are of the type that are normally rolled up into an annualised salary.

178 We have provided that ordinary hours may be averaged over a period of eight

weeks. If the parties press for averaging over 12 months we require further submissions to explain why the real estate industry requires that period.

179 We have made amendments to the annual leave clause and the parties are invited to make any further submission about the proposed clause they consider necessary. Throughout the exposure draft there are numerous transitional provisions. They reflect the fact that in some cases the relevant provision is to regulate employees and employers who are currently award free. In other cases, although there is an award, it does not provide for the entitlement in question or if it does it is at a lesser or different rate or method of calculation. These provisions are detailed and, although we have made some minor amendments, we have left them largely in the terms proposed. The existence of these provisions does however raise the question as to whether the model phasing schedule should be in this award. We have put it in the exposure draft but the parties should consider if having both the transitional provisions they have agreed in the award as well as the model phasing schedule is desirable.

180 We have retained the parties' schedule D (which is now schedule E) dealing with transitional provisions for written agreements.

Restaurant and Catering industry

181 In this part of our statement, we refer to a number of pre-reform awards and NAPSAs. For ease of reference, and to avoid repetition, we will refer to them in abbreviated form, shown in the table below. As noted earlier we refer to the *Hospitality Industry (General) Award 2010* as the Hospitality Modern Award.

Pre-reform award/NAPSA	**Award code**	**Abbreviation**
Hospitality Industry — Accommodation, Hotels, Resorts and Gaming Award 1998, The	AP783479CRV	Federal Hospitality Award
Liquor and Accommodation Industry — Restaurants — Victoria — Award 1998	AP787213CRV	Victorian Restaurant Award
Liquor and Allied Industries Catering, Cafe, Restaurant, Etc. (Australian Capital Territory) Award 1998	AP787016CRA	ACT Award
Hotels, Motels, Wine Saloons, Catering, Accommodation, Clubs and Casino Employees (Northern Territory) Award 2002	AP812953CRN	NT Award
Restaurants, &c., Employees (State) Award	AN120468	NSW Restaurant Award
Restaurant, & C., Employees' Retail Shops (State) Award	AN120467	NSW Retail Shop Award
Cafe Restaurant and Catering Award — State (excluding South-East Queensland) 2003	AN140052	Queensland non-SEQ Restaurant Award
Hospitality Industry — Restaurant, Catering and Allied Establishments Award — South-Eastern Division 2002	AN140144	SEQ Restaurant Award
Cafes and Restaurants (South Australia) Award	AN150025	SA Restaurant Award

Pre-reform award/NAPSA	Award code	Abbreviation
Restaurant, Tearoom and Catering Workers' Award, 1979	AN160276	WA Restaurant Award
Restaurant Keepers Award	AN170086	Tasmanian Restaurant Award

182 On 28 May 2009 the Minister issued a variation to the consolidated request, which dealt specifically with the restaurant and catering industry. It varied the consolidated request by adding the following paragraph:

> Restaurant and catering industry
>
> 27A. The Commission should create a modern award covering the restaurant and catering industry, separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. The development of such a modern award should establish a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry's core trading times.

183 The effect of the variation was summarised in the Australian Government's submission of 24 July 2009 as:

> asking the Commission to create a separate modern award covering the restaurant and catering industry, separate from those sectors of the hospitality industry providing hotelier, accommodation or gaming services.

184 In its statement of 26 June 2009, concerning the proceedings arising out of the variation, the Commission said:

> Given the circumstances which have led to our consideration of the proposed award, we would be assisted by any indications on behalf of the Minister of the scope and terms of the proposed award, including terms relating to hours of work, penalty rates and overtime.[65]

185 In its Stage 4 submission of 24 July 2009 the Australian Government clarified the intention of the variation to the request in these terms:

> Scope of the modern award
>
> 10 The Minister's variation to the request that "restaurant and catering" be removed from coverage under the HIGA (the Hospitality Award) is intended to refer to those restaurants and catering activities that are operated as part of a restaurant business.
>
> 11 The variation is not aimed at stand-alone catering businesses such as those operating on a contract basis in the airline, defence or mining industries. Nor is it directed towards eateries established within licensed clubs, hotels or other similar premises.
>
> 12 The Government considers that these types of restaurant and catering businesses have a very different operating base to restaurants and should remain covered by the broader Hospitality Award.
>
> …
>
> Penalty rate regime…
>
> 17 The Minister's request variation was not intended to suggest to the

65 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 184 IR 240.

Commission that penalty rates for working unsociable hours, such as late evenings, weekends and public holidays, should not be included in a modern award for the restaurant and catering industry.

18 Rather, the intention of the request variation is to ensure that when considering these subject matters and the most appropriate provisions for the industry, that the Commission has regard to the content and range of provisions concerning hours of work and penalty rates and related conditions currently applying to restaurants and cafés through pre-reform federal awards and NAPSAs. In addition, the Commission should have regard to the weight of coverage of these industrial instruments. That is, the likely number of employers and employees presently subject to these instruments.

19 Consistent with the objects of award modernisation set out in clauses 1, 2, 2A and 2B of the request, and having regard to the remainder of the request, the Commission should select a national benchmark that:

> Establish[es] a penalty rate and overtime regime that takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry's core trading time,

186 We also draw attention to a further variation to the consolidated request which was made on 26 August 2009. That variation dealt with part-time work and added the following new paragraph:

> Overtime penalty rates — part-time work
>
> 53 The Commission should ensure that the hours of work and associated overtime penalty arrangements in the retail, pharmacy and any similar industries the Commission views as relevant do not operate to discourage employers from:
>
> • offering additional hours of work to part-time employees; and
> • employing part-time employees rather than casual employees.

187 We appreciate that Stage 4 submissions in respect of a restaurant and catering industry modern award closed on 24 July 2009, so that those with an interest in that award have not had an opportunity to address the 26 August variation in their submissions. However, all interested persons will have an opportunity to do so in their submissions concerning the exposure draft. It is against this background that we turn to the exposure draft for the Restaurant Industry Award 2010.

Scope of the award

188 The 28 May 2009 variation to the consolidated request requires the Commission to create a modern award covering the restaurant and catering industry, separate from those sectors in the hospitality industry providing hotelier, accommodation or gaming services. The intent of that variation, as explained by the Government's 24 July 2009 submissions, was to require the making of a modern award covering those restaurants and catering activities that are operated as part of a restaurant business. It follows that such an award should not cover restaurants which are operated as part of another business, such as a hotel or a catering operation.

189 The coverage clause of the exposure draft has been developed to achieve that end. Dealing first with restaurants, the clause defines restaurant by reference to a restaurant within a restaurant business. The effect will be to include all restaurants other than those operated in or in connection with premises owned

or operated by employers covered by the Hospitality Modern Award; the *Registered and Licensed Clubs Award 2010*[66] and the *Fast Food Industry Award 2010*.[67] The coverage clause of the Hospitality Modern Award will be varied to exclude restaurants, save to the extent that restaurants are operated in or in connection with premises owned or operated by employers otherwise covered by that award. In relation to catering the coverage of the catering industry will be limited to catering by a restaurant business which is defined as the provision by a restaurant of catering services for any social or business function where such services are incidental to the major business of the restaurant. Otherwise the catering industry will continue to be covered by the Hospitality Modern Award. We have also included in the coverage clause in the exposure draft an exclusion for contract caterers, whose principal and substantial business activity is that of providing catering services and/or accommodation services on a contract or fee for service basis. In light of this general exclusion, it is unnecessary to include a specific exclusion in respect of airport catering or catering under contract to the Department of Defence. The coverage clause of the Hospitality Modern Award will be varied to exclude catering by a restaurant business.

190 The scope clauses in the exposure draft and the Hospitality Modern Award, as it will be amended, are consistent with the intent of the first part of clause 27A of the consolidated request, as clarified by the Australian Government in its 24 July submission. It is also consistent with the scope of most existing awards and NAPSAs regulating restaurants, as set out in Attachment B of the 24 July 2009 submission of the LHMU.

191 As indicated already, we have called the exposure draft the Restaurant Industry Award 2010. Although the award will cover catering activities that are operated as part of a restaurant business, the broader catering industry will remain covered by the Hospitality Modern Award and it would be misleading to include catering in the title.

192 We will not republish the Hospitality Modern Award, as varied in light of the above. However, we now set out the variations we propose to make to the Hospitality Modern Award in order to allow those with an interest in that award to comment on the proposed variations in the post exposure draft consultations on the draft Restaurant Award 2010:

1. Additional definition in cl.3 — definitions and interpretation:

> *catering by a restaurant business* means the provision by a restaurant of catering services for any social or business function where such services are incidental to the major business of the restaurant.

2. Replace current definition of restaurant in cl.3 — definitions and interpretation with:

> *restaurant* means a restaurant, reception centre, night club, licensed cafe and licensed roadhouse, and includes any tea shop, café, fish or oyster shop or liquor booth or any tent, vehicle or building where sandwiches, cakes, hot dogs, meals and drinks of any type are sold retail to the public and catering by a restaurant business but does not include a restaurant operated in or in connection with premises owned or operated by

66 MA000058.

67 MA000003.

employers covered by this award, the *Registered and Licensed Clubs Award 2010* or the *Fast Food Award 2010.*

3. Replace current cl.4.5 — coverage, with:

> 4.5 For the purpose of clause 4.1, *hospitality industry* includes hotels; motor inns and motels; boarding establishments; condominiums and establishments of a like nature; health or recreational farms; private hotels, guest houses, serviced apartments; caravan parks; ski lodges; holiday flats or units, ranches or farms; hostels, or any other type of residential or tourist accommodation; wine saloons, wine bars or taverns; resorts; caterers, restaurants operated in or in connection with premises owned or operated by employers otherwise covered by this award, casinos; and function areas and convention or like facilities operating in association with the aforementioned.

4. Replace in current cl.4.1 — coverage — (h) Off-shore island resorts (in light of our decision of 4 September 2009[68]) with:

> (h) catering by a restaurant business.

5. Add new subparagraph in current cl.4.1 — coverage:

> (k) restaurants covered by the Restaurant Industry Award 2010 (and renumber following sub-paragraphs accordingly)

Content of the award

193 We understand the 28 May 2009 variation to the consolidated request to require the Commission to make a modern award which takes account of the operational requirements of the restaurant and catering industry, including the labour intensive nature of the industry and the industry's core trading times, particularly in considering the penalty rate and overtime regime. Our task is to establish a modern award with appropriate terms and conditions for the industry, having regard to the terms of the consolidated request as varied, and having regard to the content of relevant pre-reform awards and NAPSAs and the weight of coverage of those industrial instruments.

194 The drafts submitted by Restaurant & Catering Australia (R&CA) and the LHMU both contained a number of standard provisions in modern awards. No comment is required in relation to such provisions. There are, however, major differences in the drafts in other respects which we now address.

Types of Employment

195 The drafts submitted by R&CA and LHMU differ in three major respects.

196 First, R&CA does not provide for agreement between an employer and a part-time employee in writing on a regular pattern of work, for written variations to the agreed pattern or for payment of overtime in excess of hours mutually arranged. The LHMU draft includes these provisions in the form in which they appear in the Hospitality Modern Award. The R&CA draft contains a requirement for a two hour minimum shift, rather than the minimum of three hours proposed in the LHMU draft.

197 The requirement for agreement in writing on a regular pattern of work and variations thereto and the associated obligation with respect to overtime payments appear in all pre-reform awards applying to restaurants in Victoria and

68 *Re Award Modernisation* [2009] AIRCFB 826; (2009) 187 IR 192 at [167] and [168].

the Northern Territory and in the SEQ Restaurant Award. They do not appear in other State NAPSAs. The Tasmanian Restaurant Award and Queensland non-SEQ Restaurant Award provide a 10% loading for part-time employees.

198 We have adopted the part-time provision in cl.13.3 of the Victorian Restaurant Award, but we have modified it in light of the requirement in clause 53 of the consolidated request (added on 26 August 2009) to ensure that the hours of work and associated overtime and penalty arrangements in the retail, pharmacy and any similar industries do not discourage employers from offering additional hours of work to part-time employees or from employing part-time employees rather than casual employees. Clause 12 of the exposure draft requires the pattern of part-time hours to be agreed, but cl.12.4 permits a variation to working hours by agreement, provided it is recorded. Clause 12.7 provides that overtime is payable for hours in excess of the agreed hours or the hours as varied under cl.12.4, subject to the general overtime provision in cl.30.1 of the exposure draft.

199 The requirement for written evidence of any variation of hours is important to ensure that part-time employees are genuinely free to accept or decline either an ongoing variation of hours, or a one-off increase in hours on a particular occasion in light of operational circumstances. Absent such agreement the regular and predictable nature of part-time work and the capacity of part-time employees to enter into agreements for working arrangements which meet their family or other responsibilities would be at risk of severe compromise.

200 We have reached this view on a provisional basis, conscious that parties have not had an adequate opportunity to address the 26 August 2009 variation to the consolidated request. That opportunity will be provided in the forthcoming consultations.

201 We will also include the minimum engagement of three hours for part-time employees. That entitlement appears in all current restaurant instruments other than the SEQ Restaurant Award, which prescribes a two hour minimum, and the SA Delicatessens Award.

202 Turning now to casual employment, the R&CA draft does not include any minimum period of engagement for casuals, nor a casual conversion clause. The LHMU draft includes both.

203 There is a two hour minimum engagement in all current restaurant awards, save that a higher number of hours — three or four — is prescribed by SA Restaurant Award, the SA Delicatessens Award, the NSW Restaurant Award and the Queensland non-SEQ Restaurant Award. We have included a minimum engagement of two hours in the exposure draft.

204 There is no casual conversion provision in current federal awards covering restaurants, the Queensland non-SEQ Restaurant Award, the SA Restaurant Award, the WA Restaurant Award or the Tasmanian Restaurant Award. There is such a provision in NAPSAs in other States and in the SEQ Restaurant Award. Having regard to the weight of current coverage, we have not included a casual conversion provision in the exposure draft.

205 Finally in relation to types of employment, the LHMU has proposed general provisions dealing with non-wages matters concerning junior employees and apprentices. R&CA has included similar provisions in the wages clause in its draft. We have included the provisions in the types of employment clause of the exposure draft, in the form proposed by the LHMU, save that we have changed

the reference in the provision dealing with the service of liquor by juniors from "on reaching 18 years" to "when the law permits" to accommodate different liquor licensing laws.

206 We have included the requirement to pay adult wages to juniors engaged in the service of liquor by juniors in the exposure draft, reflecting Federal award provisions and the provisions of the two Queensland NAPSAs.

207 We have included a 25% casual loading in the exposure draft. A casual loading at that level is common to existing pre-reform awards and most NAPSAs. The major exceptions are the NSW Restaurant Award and the SEQ Restaurant Award. The NSW Restaurant Award prescribes a higher aggregate loading for casuals, comprised of a 20% casual loading, together with an additional 1/12 (8.3%) loading in respect of annual leave. The SEQ Restaurant Award provides for a 50% casual loading Monday to Saturday. The transitional provisions contained in our 2 September 2009 decision will be required to deal with the reduction of the casual loading in each case.[69]

Minimum wages and classification definitions

208 The R&CA has proposed a limited number of classifications and minimum wages. Its draft provides only for cooking, waiting and bar staff. The LHMU has included classifications for clerical employees, storepersons, security staff and handypersons, consistent with the Victorian Restaurants Award.

209 We have included the broader range of classifications proposed by the LHMU in the exposure draft. We think it is preferable that a modern restaurant award cover as broad a range of employees as practicable. The fact that the additional classifications appear in the Victorian Restaurants Award suggests that such classifications are utilised in restaurants. We note that additional classifications are also found in State NAPSAs. As an example the NSW Restaurants Award contains reference to storage and handyperson functions. We invite comment on the practical necessity for the inclusion of all of the non-food and beverage classifications in the award.

210 We note that the minimum weekly rates in the exposure draft are common to the R&CA and the LHMU drafts as are the junior and apprentice rates (percentages) and all have been included in the draft. The apprentice and junior rates reflect the rates in the Hospitality Modern Award, which were determined having regard to the diversity of rates in relevant federal awards and NAPSAs.[70] That diversity is equally evident in relevant restaurant awards and NAPSAs. In our view, the same single sets of rates, which involve some increases and some reductions against particular awards and NAPSAs, is an appropriate outcome for the restaurant industry.

211 We have also included the proficiency pay arrangements from the LHMU draft as they appear in the Victorian Restaurants Award. Some additional provisions in the LHMU draft have been included in the types of employment clause.

Allowances

212 The R & CA and the LHMU drafts contained a number of common allowances:

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69 *Re Award Modernisation* [2009] AIRCFB 800; (2009) 187 IR 146.

70 *Re Request from Minister for Employment and Workplace Relations—28 March 2008* (2008) 177 IR 364 at [130]-[137].

- meal allowance, which we have included at the same level as appears in the R & CA draft and the Hospitality Modern Award;
- clothing, equipment and tools, which we included in the form proposed by the R & CA with one minor modification; and
- allowance for distant work/working away from usual place of work, which we have included in the exposure draft in the form proposed by the LHMU.

213 We have also included a split shift allowance proposed by the LHMU on the basis that such a provision is contained in the current Federal awards, the WA Restaurant Award and the Queensland non-SEQ Restaurant Award. There is a similar allowance, although for seasonal workers only, in the NSW Restaurant Award.

214 We have included the common transitional provisions for district allowances in the Northern Territory and Western Australia in the exposure draft, given the application of the Northern Territory district allowance to employees covered by the NT Award and the application of the location allowances general order[71] to employees currently covered by the WA Restaurant Award.

215 We have not included the specific allowances proposed by the R & CA in respect to travel and supervisory allowances for airport catering employees or a uniform/laundry allowance for catering employees as airport catering employees will not be covered by the award. Catering activities are included only to the extent that they are part of a restaurant business and employees will be entitled to the clothing, equipment and tools allowance in the exposure draft.

216 We have not included the overnight stay allowance proposed by the R & CA but we invite further input in relation to the allowance.

Superannuation

217 The R & CA did not include a superannuation provision in its draft. We think there should be a superannuation provision, given such clauses are contained within current awards and NAPSAs. We have included the clause proposed by the LHMU in the exposure draft, but expanded the list of funds to include those named in current awards and NAPSAs.

Payment of wages, annualised salary arrangements and higher duties

218 The R & CA and the LHMU proposed slightly different provisions in relation to payment of wages, annualised salary arrangements and higher duties. We have included the payment of wages clause proposed by the LHMU in the exposure draft, in a modified form, incorporating some elements of the R & CA draft. We have also included the annualised salary arrangements clause proposed by the LHMU on the same basis. Provisions for annualised salary in current instruments are generally in those terms.

219 With respect to higher duties provisions, the main difference between the proposals is that the LHMU proposal provides for payment at the higher rate for a full day where two or more hours is worked at the higher level whereas the R & CA clause provides for payment at the higher rate for the time worked at the higher classification. The LHMU provision is based on terms in the Victorian Restaurant Award, the ACT Award, the NT Award and the SEQ Restaurant Award. The clause proposed by the R & CA is based on the NSW Restaurant Award. The Queensland non-SEQ Restaurant Award, the SA Restaurant Award,

71 [2009] WAIRC 00417.

the WA Restaurant Award and the Tasmanian Restaurant Award provide for payment at the higher rate for a full day after four hours work at the higher level. Existing regulation supports payment at the higher classification rate for a full day after working at that level for part of a day. We have adopted the provision from the Victorian Restaurant Award.

Hours of work

220 The LHMU proposed an hours clause in the terms of that found in Victorian Restaurant Award. The R & CA clause is extremely brief, proposing little more than an average 38 hour week, over a period of up to 26 weeks, for full-time employees and incorporating other very limited provisions for part-time and casual employees from the employment types clause of the draft award.

221 Provision for 38 ordinary hours, averaged over a four week period is common in existing instruments. The hours provision in the Victorian Restaurant Award is broadly reflective of the hours of work arrangements in federal awards and NAPSAs and has been included in the exposure draft. We have, however, simplified that provision to express the hours of work as an average of 38 hours per week over a period of no more than four weeks. The Victorian Restaurant Award contains detailed provisions as to the manner in which hours may be averaged and the manner in which the hours are to be fixed which we have not included. We have retained the spans and spreads of hours and associated matters.

222 We have not included any provisions dealing with rostered days off (RDOs) in the exposure draft. We are unaware of the incidence of RDOs in the industry and the necessity, or otherwise, for the retention of these provisions. We invite further information on the question.

Overtime

223 The LHMU proposed an overtime clause based on that found in the Victorian Restaurant Award. It includes a 50% overtime penalty for the first two hours of overtime worked Monday to Friday and double time thereafter, a 75% penalty for the first two hours of Saturday overtime and double time thereafter and a double time penalty for all Sunday overtime. The R&CA draft proposed an overtime provision based on work in excess of an average 38 hours per week, with a penalty of 25% for the first 8 hours overtime and 50% thereafter.

224 We have included the LHMU proposal in the exposure draft. It is consistent with arrangements in current federal awards and NAPSAs. The calculation of overtime on a daily basis is common to all such instruments. No current instrument provides for overtime calculated by reference to hours in excess of an average 38 ordinary hours per week. The Monday to Friday overtime standard across current instruments is for time and a half for the first two hours and double time thereafter. Whilst time and a half applies for the first three hours in the two Queensland NAPSAs, the SA Restaurant Award and the ACT Award, the most common provision is for time and a half for the first 2 hours only. The Monday to Friday rates in current instruments are without exception time and a half for the first two or three hours and double time thereafter. No current instrument provides for the 25% and 50% penalties proposed by the R&CA.

225 A Saturday overtime payment of a 75% penalty for the first two hours and double time thereafter is found in the Victorian Restaurant Award and the Tasmanian Restaurant Award. Federal awards applying in both Territories

prescribe double time for all overtime on Saturday, as does the WA Restaurant Award. The NSW Restaurant award, both Queensland NAPSAs and the SA Restaurant Award provide for a 50% penalty for the initial overtime hours worked on Saturdays. A penalty of 75% for the first two hours of Saturday overtime and double time thereafter is an appropriate outcome when all of the relevant provisions are taken into account. Double time applies to overtime on Sundays and public holidays in Federal awards and NAPSAs, almost without exception.

226 Both drafts included provision for time off instead of overtime payment by agreement. The LHMU draft provides for time off instead of overtime payment, calculated on the basis of the payment due. The R & CA draft, on the other hand, provides for time off on a time for time basis. Time off instead of overtime is calculated on the basis of payment due, rather than hour for hour worked, in all current awards and NAPSAs which provide for time off instead, except the NSW Restaurant Award and the SA Delicatessens Award. We have included the provision in the exposure draft on a payment due basis.

Penalty Rates

227 There were major differences in the drafts submitted by the LHMU and the R&CA in relation to penalty payments, reflecting very different approaches. The relevant penalties are for work in ordinary hours outside the hours of 7.00am and 7.00pm Monday to Friday and on Saturdays, Sundays and public holidays, for full-time, part-time and casual employees.

228 The LHMU based its draft on the Victorian Restaurant Award, which is also consistent with the Hospitality Modern Award. The R&CA draft was based in some respects on the NSW Restaurant Award but it relied primarily on the operational requirements of the industry and in particular the seven days a week operation of restaurants, predominantly at times directed to the provision of lunches and dinners.

229 The penalty provisions advanced by the LHMU and the R&CA are summarised in the table below, and compared to the provisions in the Hospitality Modern Award, the Victorian Restaurant Award and the NSW Restaurant Award.

Penalty rates for working ordinary hours — full-time and part-time employees

Additional payment

	R&CA draft	**LHMU draft**	**Victorian Restaurant Award [(1)]**	**NSW Restaurant Award[(2)]**
Saturday	0	25%	25%	25%
Sunday	50%	75%	75%	50%
Monday-Friday:				
7pm-midnight	0	10%	10% [(3)]	0
Midnight-7am	0	15%	15% [(3)]	30% [(4)]
Public holiday	150%	150%	150%	150%

Penalty rates for working ordinary hours — casual employees

Additional payment (additional to 25% casual loading)

	R&CA draft	LHMU draft	Victorian Restaurant Award [1]	NSW Restaurant Award [2]
Saturday	0	25%	25%	25%
Sunday	0	50%	50%	25%
Monday-Friday:				
7pm-midnight	0	10%	10%	0
Midnight-7am	0	15%	15%	30% [4]
Public holiday	125%	150%	150%	125%

(1) AP787213CRV

(2) AN120468

(3) Expressed as dollar amount

(4) To 6.00am

230 In its 24 July 2009 submissions, the LHMU provided a table of penalty provisions which we reproduce in the tables below in an edited form:

Restaurant awards — Monday to Friday late and early work penalties

Award/ NAPSA	7pm-midnight	Midnight-7am	Comment
Pre-reform	*Awards*		
Victorian Restaurant Award	$1.60 per hour	$2.30 per hour	
ACT Award	$1.51 per hour	$2.22 per hour	
NT Award	$1.77 per hour	$1.77 per hour	
NAPSAs			
WA Restaurant Award	$1.44 per hour	$1.44 per hour	If majority of hours are between midnight and 7am: $1.51 per hour
Tasmanian Restaurant Award	$1.42	$2.02	
SA Restaurant Award	10% Catering — after 11.30pm: double time	Before 6am: 10% Catering — after 11.30pm: double time	
SA Delicatessens Award	6pm-midnight: 10%		
SEQ Restaurant Award	10pm-midnight: $1.35 per hour	Midnight-6am: $1.96 per hour	
Queensland non-SEQ Restaurant Award	8pm-midnight Non-casual: $3.65 per occasion	Midnight-6.00 am: overtime rates	

Award/ NAPSA	7pm-midnight	Midnight-7am	Comment
NAPSAs			
NSW Restaurant Award	Nil	30%	Clause 11.2 of the NSW Restaurant Award provides that where an employee works more than half of a regular shift between midnight and 6.00am the 30% penalty will apply for all time worked on that shift

Restaurant awards — weekend and public holiday penalty rates (1)

	Saturday		Sunday		Public holidays	
	Full-time %	Casual %	Full-time %	Casual %	Full-time %	Casual %
Pre-reform	*Awards*					
Victorian Restaurant Award	25	50	75	75	150	175
ACT Award	25	50	75	75	150	175
NT Award	50	75	75/100	75	150	150

Restaurant awards — weekend and public holiday penalty rates (1)

	Saturday		Sunday		Public holidays	
	Full-time %	Casual %	Full-time %	Casual %	Full-time %	Casual %
NAPSAs						
WA Restaurant Award	50	50	50	50	150	125
Tasmanian Restaurant Award	25	50	75	75	150	150
SA Restaurant Award (2)	25/50	45/75	100	120	100	100
SA Delicatessens Award (2)	25/50	45/75	100	120	100	100
SEQ Restaurant Award	50	73	50	73	150	173

	Saturday		Sunday		Public holidays	
	Full-time %	Casual %	Full-time %	Casual %	Full-time %	Casual %
Queensland non-SEQ Restaurant Award	50	50 (4)	50	100	150	150
NSW Restaurant Award (3)	25	25	50	50	150	150
(1) Inclusive	of casual	loading				
(2) Hours	worked	before	noon	/Hours	worked	after noon
(3) Plus	1/12th					
(4) Monday	to	Saturday				

231 The R & CA draft accompanied a submission made on 24 July 2009. The R & CA's approach is based on an overriding conviction that penalty payments should be minimal or non-existent during any periods when restaurants trade. The submission was filed before the Australian Government's submission of the same date containing the clarification in paragraphs 10-12 of that submission which we have set out above. The penalty arrangements contained in the R & CA draft pay little regard to the penalty rate provisions in pre-reform awards and NAPSAs applying to restaurants and cafés. The proposal also ignores some penalties in the NSW Restaurant Award, determined by the Industrial Relations Commission of New South Wales, for full-time and casual employees for work on Saturday and between midnight and 6.00am and for casual employees for work on Sunday penalties for full-time and casual employees and Sunday penalties for casuals.[72] R & CA had relied upon the provisions of that award during the priority stage of the modernisation process.

232 The R & CA's approach is directed at substantially reducing or eliminating penalty payments provided for in existing instruments applying to the restaurant industry during times when restaurants are open. That approach ignores the inconvenience and disability associated with work at nights and on weekends — which are the basis for the prevailing provisions in pre-reform awards and NAPSAs. Nor does the R & CA approach take into account the significance of penalty payments in the take-home pay of employees in the restaurant industry. A modern restaurant award based on the penalty rates proposed by the R & CA would give the operational requirements of the restaurant and catering industry primacy over all of the other considerations which the Commission is required to take into account, including the needs of the low paid and the weight of regulation. A more balanced approach is required.

233 There is considerable diversity in the penalty provisions across pre-reform federal awards and NAPSAs in the industry. For example, in relation to penalties for Saturday and Sunday work, the SEQ Restaurant Award, the Queensland non-SEQ Restaurant Award and the WA Restaurant Award all prescribe a 50% penalty for both days, whereas the Victorian Restaurant Award

72 IRC 216 of 1995, 23 August 1996.

provides for different rates — 25% on Saturday and 75% on Sunday. The pattern of some penalty arrangements is more clear cut. Taking all of the provisions into account, and having some regard to the employment levels under the instruments, the weight of coverage supports the following provisions, which we have included in the exposure draft:

- penalty payments for casual employees;
- a 15% penalty for work between midnight and 7.00am Monday to Friday;
- a 25% penalty for work on Saturday, in addition to the 25% casual loading in the case of casual employees;
- a 50% penalty for work by casual employees on Sunday, in addition to the 25% casual loading; and
- a 150% penalty for work on public holidays by full-time and part-time employees.

234 The remaining issues raise matters requiring fine judgment. With respect to work by casuals on public holidays, there is a penalty of 175%, inclusive of the 25% casual loading, in the Victorian Restaurant Award, the ACT Award and the SEQ Restaurant Award. There is a loading of 150%, inclusive of the 25% casual loading, in the NSW Restaurant Award, the Queensland non-SEQ Restaurant Award, the NT Award and the Tasmanian Restaurant Award. The WA Restaurant Award and the SA Restaurant Award provide for a lesser payment to casuals on public holidays. We have decided to include a Sunday penalty of 150%, inclusive of the 25% casual loading, in the exposure draft, the same payment as applies to full-time employees for work on public holidays.

235 In relation to work performed in ordinary time by full-time and part-time employees on Sunday, there is no critical mass for one provision or another or, in the terms of the Government submission, no clear national benchmark for penalties. A review of pre-reform awards and NAPSAs in the industry shows that penalty rates of 50% and 75% are common but having regard to the likely numbers of employees covered by the various instruments there is no basis to prefer one over the other. Taking into account the terms of clause 27A of the consolidated request, the fact that Sunday is a core trading time for much of the industry and the operational requirements of the industry in that regard, we have decided on a 50% penalty for Sunday work.

236 We deal now with night work before midnight on Monday to Friday. There is no clear national benchmark emerging from the pre-reform awards and NAPSAs in the industry. A penalty in the order of 10% for work between 7.00pm and midnight is common to the Victorian Restaurant Award and most NAPSAs. There is a penalty of a similar quantum in both Queensland NAPSAs, but the penalty applies from time later than 7.00pm in each case. However, there is no penalty rate at all in the NSW Restaurant Award, which applies in the largest State. In this circumstance, bearing in mind the terms of clause 27A of the consolidated request and having regard to the fact that evenings constitute core trading times and the operational requirements of the industry in that regard, we have decided to adopt a penalty of 10% between the hours of 10pm and midnight.

Leave and public holidays

237 We have included an annual leave provision in the terms proposed by the LHMU. It is more comprehensive in that it provides a right for employers to

require the taking of leave with notice in the case of excessive accruals. Personal/carers leave and community service leave provisions proposed by the R&CA and the LHMU are in the same terms and have been included in the exposure draft. We have included the additional provisions for full-time workers in the exposure draft public holidays provision.

Industry specific provisions

238 We have included the provision dealing with breakages and cashiering underings in the exposure draft.

239 We have not included the seasonal workers provision proposed by the R&CA. Such a provision is not common in existing instruments, being found only in the NSW Restaurant Award.

Transitional provisions

240 The LHMU proposed a range of transitional provisions, additional to those dealing with district allowances and accident pay. They have not been included in the exposure draft at this stage but will be considered before the final award is made.

Salt industry

241 We publish the Salt Industry Award 2010 exposure draft. AMMA, the ACTU, the AWU and Construction, Forestry, Mining and Energy Union (CFMEU) all submitted that an industry award should be made. AiGroup submitted that no separate modern award is warranted and that the industry could be covered by the *Food, Beverage and Tobacco Manufacturing Award 2010*.[73] AMMA, the AWU and the CFMEU appeared at the pre-exposure draft consultations and each addressed the drafts which had been filed by AMMA and the AWU.

242 We have decided there should be a Salt Industry Award. There are currently several salt industry awards. One is a pre-reform award[74] and four are NAPSAs.[75] There are two enterprise NAPSAs but the only one referred to in submissions is the *Dampier Salt Award 2004*[76] (the Dampier Salt Award). There was no support for the AiGroup proposal as it appears that salt produced for human consumption accounts only for some 4-5% of production throughout Australia.

243 We note the submissions that Australian companies are some of largest exporters of salt in the world. In excess of 90% of salt production is carried out in Western Australia and principally by two companies, Dampier Salt Ltd and Mitsui & Company Limited. Over 95% of the salt is exported. Cheetham Salt Ltd is the next largest producing around 8%. It is the main supplier to the domestic market for human consumption (which accounts for around 50% of its production) and the rest it exports. It seems to be a fact acknowledged by all parties that the majority of salt production both as to volume and location is in remote locations.

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73 MA000073.

74 *Salt Industry (Victoria) Award 2001*, AP812765.

75 *Engine Drivers' Minerals Production (Salt) Industry Award 1970*, AN160118, *Minerals Production (Salt) Industry Award 1969*, AN160215, *Salt Industry Award*, AN150136; *Salt Industry Award — State 2002*, AN140265 and *Cargill Australia Limited — Salt Production and Processing Award 1988*, AN160046.

76 AN160096.

244 In deciding on the provisions to go into this draft we have given consideration to the drafts filed by AMMA and the AWU and the provisions of the existing awards. Each of the parties, for one purpose or another, referred to the Dampier Salt Award. Although generally enterprise awards do not inform this process the fact that this award binds the largest producer of salt in Australia was acknowledged. We now refer to a number of clauses in the draft. We have included the definitions of afternoon shift and standard rate as sought by the AWU. There has been some recalculation of allowances expressed as a percentage and the parties should give consideration to them.

245 In relation to coverage we have retained a reference to shipping but note it seems only to be mentioned expressly in the scope and classifications of the Dampier Salt Award. Submissions are invited about this clause.

246 The classifications contained in the exposure draft are those agreed to by AMMA, the AWU and the CFMEU. The wages reflect the agreed percentage relativities set out in the AWU correspondence of 21 August 2009. We have not included an annualised salaries clause in the draft. One was sought by AMMA and opposed by the AWU and CFMEU. Annualised salary clauses are not in the existing pre-reform award or NAPSAs although we do note the total annual salary provision of the Dampier Salt Award. The parties should have further discussions about this issue.

247 We have deleted the clause sought by AMMA which provided that the minimum weekly rates included compensation for aspects of the work including the location, salt or chemical particles in the air, dust, glare from bulk salt and heat. It justified this by noting the wage rates were at the higher end of the existing rates and some of them were said to compensate for some work related disabilities. We also note the AWU claim for a 4% industry allowance and its justification for that allowance. We think there may be a case for an industry allowance to compensate for all disabilities associated with this work and those allowances that are in existing awards but may not be appropriate for an industry wide modern industry award.

248 We have not included an accident pay clause as sought by the AWU as we cannot identify any such provision currently in awards. We leave it to the unions to make any further submission about this provision.

249 We turn next to hours of work. The parties' drafts were well apart about hours and related matters. The considerations for the Full Bench have been informed by the existing provisions in relevant awards and clause 33AA of the consolidated request. That reads as follows;

> 33AA Where a modern award covers work performed in remote locations, the Commission should include terms that permit the roster arrangements and working hours presently operating in practice in those locations to continue after the making of the modern award.

250 The existing awards (other than the Dampier Salt Award) do not provide for 12 hours shifts to be worked at the direction of the employer. The maximum hours for day workers range between eight and 10 hours per day and the majority provide that those hours are to be worked from Monday to Friday. There are fewer constraints on the days shiftworkers may be required to work but still eight hour shifts are provided for and, as a general rule, there is to be majority consent by affected employees to alter them. These provisions stand in contrast to the hours regime that is in fact being worked in the industry. In this respect we rely on the submissions of AMMA filed on 19 August 2009. This

followed a request made in the pre- drafting consultations that it provide this evidence. To date it has not been challenged by the unions and we have relied on it. It shows that 12 hour shifts are being worked at numerous locations and work is undertaken on all days of the week.

251 We have drafted the hours clause in the exposure draft having considered the above matters, the fact that the majority of salt production occurs in remote locations, and clause 33AA of the consolidated request. In doing so we have adopted the concept behind the compromise suggestion put forward by the AWU. It is now contained in cll.19.2 and 19.3.

State/Territory government administration

252 We deal first with Territory government administration. The governments of the Australian Capital Territory and the Northern Territory take the view that employees involved in the administration of the Territories are covered by enterprise awards and are not part of the award modernisation process under Pt 10A of the WR Act. No party suggested otherwise. We proceed on the assumption that no modern award should be made for employees in Territory administration.

253 In order to assess whether to make a modern award for State government administration, and if so what the award should contain, it is necessary to summarise the effect of the relevant statutory provisions. The legislative regime established by Pt 10A of the WR Act, the FW Act and the Transitional Act provides mainly for modern awards which cover constitutional corporations. State owned corporations which are trading or financial corporations are therefore potentially within the scope of the award modernisation process.[77] There are two relevant qualifications, however. The first is that some state-owned corporations may be covered by modern industry awards and therefore strictly do not require separate consideration. The second is that some may currently be covered by enterprise awards. Enterprise awards are not part of the award modernisation process at this stage.[78] It follows that it is necessary to identify state owned corporations which are trading or financial corporations but which will not be covered by a modern industry award on 1 January 2010 and which are not covered by an enterprise award. Of course a question may arise of whether a particular public sector constitutional corporation which is capable of being covered by a modern industry award should nevertheless be covered by an award for state government administration and the view of the state concerned would need to be considered on such a question.

254 We turn now to the possibility that some parts of state government administration will come into the federal jurisdiction through a reference of powers by one or more state governments. The State Referral Act gives the FW Act an extended operation in a state where there has been a referral of power by that state to the Commonwealth under s 51(xxxvii) of the *Constitution*.[79] The relevant provisions extend the meaning of national system employer and national system employee to include all employers and employees in a referring state subject to the terms of the reference of powers by that state.[80] It is a matter

77 s 6 of the *Workplace Relations Act 1996* and s 14 of the *Fair Work Act 2009*.

78 s 576V(3), 576C(1) of the *Workplace Relations Act 1996* and clause 2(e) of the consolidated request.

79 Division 2A of Pts 1-3 of the *Fair Work Act 2009*.

80 ss 30C, 30D and 30H of the *Fair Work Act 2009*.

for each state to determine the extent to which it will refer its powers to the national system. Clearly the reference can include employees in state government administration.[81]

255 Schedule 6A of the Transitional Act, inserted by the State Referral Act, provides for the making of modern awards covering state reference public sector employers to be known as state reference public sector modern awards. That process, the state reference public sector award modernisation process, is to be undertaken by Fair Work Australia. It is separate to the process of award modernisation currently being conducted by the Commission under Pt 10A of the WR Act. For example, from 1 January 2010 a modern award must be expressed not to cover employees covered by a state reference public sector modern award. [82]

256 Furthermore, it appears that the process of creating modern awards for State reference public sector employers is confined to employers who are not constitutional corporations.[83] This is because Sch 6A of the Transitional Act only applies to employers which come into the national system through a State referral of power. Employers which are constitutional corporations are part of the award modernisation process under Pt 10A of the WR Act because they are national system employers within the ordinary meaning of that expression in the legislation.

257 Thus it would seem that the current award modernisation process potentially applies to public sector employers which are constitutional corporations but which are not covered by an existing enterprise award or NAPSA. Such employers will be covered by the process regardless of whether the relevant state has referred any of its powers in relation to state employment. We can refer to this group as the residual state employers.

258 Workforce Victoria, on behalf of the State of Victoria, and the CPSU, the main union in the public sector in Victoria, have agreed on an award. Both support the making of a modern award for state government administration to cover some of the residual state employers in Victoria and, indeed, some of the Victorian public sector constitutional corporations that would otherwise be covered by modern industry awards. On this approach many residual state employers would be covered by other modern awards.

259 It appears to us that there are two difficulties with the proposal for a modern award to cover residual state employers. The first is that it is by no means clear which employers are constitutional corporations and would be covered by such an award. This means that the identification of relevant conditions is not straightforward. There is a second and more fundamental difficulty. Such a modern award, subject to any transitional provisions, would be required to operate in relation to such employers regardless of state boundaries. It would operate uniformly in all States and Territories in relation to residual state employers falling within its coverage clause, not just in Victoria. Given the uncertainty surrounding the conditions on which states other than Victoria may refer power to the Commonwealth, we are reluctant at this stage to make a modern award for state government administration by reference to prevailing public sector terms and conditions in Victoria. Other states may take a different

81 s 30D(1)(a) of the *Fair Work Act 2009*

82 s 143(10) of the *Fair Work Act 2009*

83 See item 2A(4) of Sch 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and s 30D of the *Fair Work Act 2009*

view as to the contents of such a modern award. It is also relevant that the Commonwealth has indicated that there may be other legislative developments.

260 We do not underestimate the importance of appropriate modern award coverage for residual state employers and their employees. In this regard, we understand that presently all employees who might be covered by a modern award applying to residual state employers in Victoria are covered by collective agreements. Delay in the making of such an award is unlikely to have a great deal of practical significance provided the situation is addressed in the first half of 2010.

261 In all the circumstances we are inclined to think that no separate modern award for state government administration should be made as part of the current award modernisation process. After 1 January 2010 Fair Work Australia will have power to make modern awards on essentially the same basis as the Commission currently does.[84] Fair Work Australia can make a modern award for state government administration if and when it becomes necessary or appropriate to do so.

262 We recognise that our analysis of the legislative provisions, and other matters bearing upon the provisional view expressed in the preceding paragraph, have not been dealt with in great detail in the consultations. We are open to further submissions about the effect of the relevant provisions. We are also prepared to reconsider our preliminary view that we should not make a modern award for state government administration as part of the current award modernisation process.

Water, sewerage and drainage services

263 We publish a draft Water Industry Award 2010. For present purposes we proceed on the basis that the industry is concerned with the harvesting (including by desalination), transportation, storage, treatment and supply of water to commercial, residential and other consumers and the harvesting, transportation, storage, treatment and recycling of waste water, stormwater and sewerage. The submission from the combined LGAs contains a useful summary of how the water industry is constituted across Australia. Historically, it has been the preserve of government, most commonly local government. It appears that there is only one major private sector employer in the water industry in Australia. United Water International (UWI), a joint venture between several major multinational corporations, operates Adelaide's water supply and performs services as a contractor to several other public sector water authorities. UWI is covered by an enterprise award made to cover employees of the South Australian Water Corporation (SAWC) who transferred to UWI when it took over the operation of Adelaide's water supply. That award was based on a pre-reform award and two NAPSAs that applied to SAWC employees.

264 The water industry is characterised by enterprise awards and NAPSAs that have a public sector history. There are only two non-enterprise awards in the list for water, sewerage and drainage attached to our statement of 29 June 2009, the *Regional Water Authorities Award 1999*[85] and the *Rural Water Industry Award 2001*[86] (the two Victorian awards). Between them, these two awards apply to seven employers in Victoria, all of which have a history rooted in local

84 See s 158 of the *Fair Work Act 2009*

85 AP795612.

86 AP806351.

government.[87] We note that a number of NAPSAs have been listed under state government administration that should probably have been listed under water, sewerage and drainage.[88] This is an industry where some regard must be had to enterprise awards and NAPSAs.

265 We have discussed the regime created by the State Referral Act in the context of state government administration. On the approach taken by the High Court in *R v Trade Practices Tribunal; Ex parte St George County Council*[89] it is probable that a typical water authority engaged in the commercial supply of water to consumers, including in States other than Victoria, will be a constitutional trading corporation.

266 As we noted in our consideration of local government, the LGAs and the ASU are unanimous in seeking a modern award for local government that encompasses all activities of local government, including activities in the water industry. We note that the Tasmanian Chamber of Commerce and Industry, on behalf of the four water and sewerage utilities in Tasmania, opposes this course and seeks a modern award for the water industry. As noted in our consideration of local government, we are inclined to accept the unanimous position of the LGAs and the ASU and include all activities of local government within the scope of the proposed Local Government Award 2010. We propose to exclude from the coverage of a modern award for the water industry any employer covered by the proposed Local Government Award 2010. We are also inclined to generally exclude contractors who are not operators of water industry facilities or infrastructure.

267 The only parties to propose draft awards for this industry were the LGAs and the ASU. We note that, should the LGAs' submissions be accepted, local governing entities and their corporations would be excluded from such an award in any event. Apart from submissions concerning coverage, we received no submission of substance on the content of a modern award for the water industry.

268 Similar considerations to those that apply in relation to local government apply also in relation to this industry. Again, and without implying any criticism, there were no detailed submissions from the LGAs and the ASU directed at the relative merits of their respective positions where their drafts differ. The exposure draft is based on the draft proposed by the LGAs (albeit with some modification including, in particular, to the coverage clause). Again, this should not be seen as expressing a clear preference for the position of the LGAs over the position of the ASU where their respective drafts differ. As with our treatment of local government, where there are differences of substance we would be assisted by submissions that argue the merits of the respective positions and we make it clear that we are open to suggestions for change, including wholesale change, to the exposure draft. As a broad generality, we

87 The *Sydney Water and Australian Water Technologies P/L (Professional Engineers) Award 2000* (AP809077) is listed as a (pre-reform) enterprise award. This classification may be incorrect. There are two respondents which appear to be unrelated.

88 *South Australian Water Corporation Terms and Conditions of Employment Award 1999* (AN150154), *Hobart Regional Water Board Staff Award* (AN170044); *Government Water Supply, Sewerage and Drainage Employees Award 1981* (AN160148) and *Government Water Supply, Sewerage and Drainage Foreman's Award 1984* (AN160149). Note also that the *Parks Victoria Award 2002* (AP830825) appears also to have been misallocated as part of Water, Sewerage and Drainage and would appear to more properly belong in State Government Administration.

89 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533.

will favour a position that can be demonstrated to reflect a prevailing standard in the relevant awards and NAPSAs. While we would attach somewhat greater weight to the standards in the two non-enterprise awards in this sector, given that all awards and NAPSAs outside Victoria are enterprise awards and NAPSAs we think it appropriate to have some regard to those enterprise awards and NAPSAs.

National Training Wage

269 The draft of the national training wage schedule attached to our decision of 3 April 2009[90] has been amended to make it clear the schedule applies to the training packages listed in the appendix to the schedule and to relevant replacement training packages and to provide a default wage rate pending the allocation of training packages and their Australian Qualification Framework (AQF) certificate levels to a wage level.

270 The draft has also been amended to allow an employer, with the agreement of a school-based trainee, to pay a loading instead of paid annual leave, paid personal/carer's leave and paid absence on public holidays. The loading has been set at 25% having regard to the casual loading in most modern awards and the basis on which such a loading was established under the federal *National Training Wage Award 2000*[91] (federal NTW Award) Further, the second year wage rate for AQF Certificate Level IV traineeships covered by the schedule has been extended to cover subsequent years where the traineeship extends beyond two years and provision has been made for the year 11 wage rate for school-based traineeships to apply where a school-based traineeship commences before year 11.

271 The weekly wage rates for school-based trainees have been deleted to avoid confusion about the operation of such traineeships. The hourly wage rates in the schedule for school-based trainees can be used to calculate their weekly wage rates. Provisions concerning the commencement of employment as a trainee have been removed from the draft given the existence of state and territory legislation affecting such matters. For similar reasons, provisions concerning the termination of traineeships have not been included in the schedule.

272 We have also decided not to extend the coverage of the national training wage schedule beyond that of the federal NTW Award as part of award modernisation. As a result, the schedule does not cover state developed qualifications which have not been endorsed at the national level or other AQF level traineeships. And, no separate provision for trainees in Queensland has been included in the schedule.

273 It has been considered unnecessary to extend the employment conditions in the schedule as sought by some. The employment conditions in the award to which the schedule is attached will apply unless varied by the schedule.

274 A further exposure draft of the national training wage schedule is attached to this decision.

Attachment A to Full Bench Statement of 25 September 2009

List of Stage 4 Exposure Draft Modern Awards

Aboriginal Community Controlled Health Services Award 2010

90 *Re Request from Minister for Employment and Workplace Relations — 28 March 2008* (2009) 181 IR 19.

91 AP790899CAN.

Ambulance and Patient Transport Industry Award 2010
Aquaculture Industry Award 2010
Car Parking Award 2010
Children's Services Award 2010
Corrections and Detention (Private Sector) Award 2010
Dry Cleaning and Laundry Industry Award 2010
Educational Services (Teachers) Award 2010 — amended to include preschool teachers in the children's services and early childhood education industry.
Employment Services Industry Award 2010
Fire Fighting Industry Award 2010
Fitness Industry Award 2010
Funeral Industry Award 2010
Gardening and Landscaping Services Award 2010
Legal Services Award 2010
Local Government Industry Award 2010
Mannequins and Models Award 2010
Miscellaneous Award 2010
Pest Control Industry Award 2010
Professional Diving Industry (Industrial) Award 2010
Professional Diving Industry (Recreational) Award 2010
Real Estate Industry Award 2010
Restaurant Industry Award 2010
Salt Industry Award 2010
Seagoing Industry Award 2010
Social, Community, Home Care and Disability Services Industry Award 2010
Supported Employment Services Award 2010
Travelling Shows Award 2010
Veterinary Services Award 2010
Water Industry Award 2010
National Training Wage Schedule

PAUL C MOORHOUSE

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Re Request from the Minister for Employment and Workplace Relations — 28 March 2008

Award Modernisation (AM 2008/24, 35, 41, 64-92 and AM 2009/10)

[2009] AIRCFB 945

Giudice J, President, Watson VP, Watson, Harrison and Acton SDPP, Smith C

28 March 2008, 4 December 2009

Awards — Award modernisation — Publication of modern awards to apply to stage 4 industries and occupations — Determination of award provision to be inserted into modern awards to extend coverage to employees of labour-hire and group training employers — Coverage of Miscellaneous Award 2010.

Pursuant to s 576C of the *Workplace Relations Act 1996* (Cth) the Minister made an award modernisation request on 28 March 2008, as provided for by Pt 10A of that Act, which was subsequently varied on a number of occasions. Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the Transitional Act) provides for the continuation of the award modernisation process resulting from the Minister's request.

Following the Minister's request, the Full Bench dealing with award modernisation determined the industries and occupations to be the subject of the priority modern awards, and the industries and occupations to be dealt with in each of stages 2, 3 and 4 of the award modernisation process, and published detailed timetables to apply to each of those stages (see (2008) 175 IR 120 and (2008) 177 IR 5).

The Full Bench subsequently determined the modern awards to apply in the priority industries and occupation ((2008) 177 IR 364), and then the modern awards to apply to the stage 2 industries and occupations ((2009) 188 IR 19) and the stage 3 industries and occupations ((2009) 187 IR 192).

The Full Bench dealing with award modernisation also formulated model transitional provisions to apply to the modern awards ((2009) 187 IR 146), and determined that it would deal with the transitional provisions to be included in the stage 4 modern awards as part of the process of determining the stage 4 modern awards ((2009) 188 IR 20).

On 25 September 2009 the Full Bench published exposure drafts of the modern awards to apply to the stage 4 industries and occupations, and an accompanying statement. The Full Bench subsequently received submissions in relation to those draft awards.

This decision concerns the modern awards to apply in the stage 4 industries and occupations, and was accompanied by the publication of those modern awards.

Held: (1) The Full Bench commented on submissions it had received in relation to the exposure drafts of the stage 4 modern awards, including providing brief reasons for changes made to those drafts, and for rejecting other changes sought by interested parties.

(2) The Full Bench proceeded on the basis that the Metropolitan Fire and Emergency Services Board (MFESB) was a constitutional corporation, and thus that it was not a "State reference public sector employer" subject to the separate award modernisation process contained within Pt 6A of the Transitional Act. It was not necessary for the Full Bench to finally decide that issue. The *Fire Fighting Industry Award 2010* was determined and published on the basis that the MFESB may be covered by that award.

Re Request from the Minister for Employment and Workplace Relations — 28 March 2008 (2009) 188 IR 23, followed.

Poulos v Waltons Stores (Interstate) Ltd (1986) 10 FCR 429; 15 IR 313, referred to.

(3) The Full Bench had already expressed its view that employees of labour-hire and group training employers should be subject to the modern award which covered the host business, and had previously published a draft model provision for insertion into the coverage provisions of modern awards to achieve that outcome. The Full Bench determined a number of variations to draft provision, and published the final version of the model provision.

Re Request from the Minister for Employment and Workplace Relations — 28 March 2008 (2009) 189 IR 415, referred to.

(4) The Full Bench commented on submissions received in relation to the coverage of the *Miscellaneous Award 2010*. The coverage clause of the exposure draft of that Award was varied to more closely reflect the requirements of the Minister's request and the *Fair Work Act 2009* (Cth) to ensure that the Award did not cover employees who have not traditionally been covered by an award.

(5) The Full Bench published 30 modern awards to apply to the stage 4 industries and occupations, as listed in Attachment A to the decision.

Cases Cited

Australian Education Union, Re; Ex parte Victoria (1995) 184 CLR 188; 58 IR 431.

Australian Municipal, Administrative, Clerical and Services Union, Re (2009) 190 IR 286.

Australian Workers' Union of Employees, Queensland v Etheridge Shire Council (2008) 171 FCR 102; 175 IR 383.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2008] AIRCFB 1000) (2008) 177 IR 364.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2008] AIRCFB 550) (2008) 175 IR 120.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 345) (2009) 181 IR 19.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 641) (2009) 184 IR 242.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 800) (2009) 187 IR 146.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 826) (2009) 187 IR 192.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 865) (2009) 188 IR 23.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 925) (2009) 189 IR 415.

Employment and Workplace Relations — 28 March 2008, Re Request from Minister for ([2009] AIRCFB 943) [2009] AIRCFB 943.

Poulos v Waltons Stores (Interstate) Ltd (1986) 10 FCR 429; 15 IR 313.

Victorian Firefighting Industry Employees Interim Award 1993, Re (unreported, AIRC, Hingley C, S3127, 1 March 2000).

Victorian Shops Interim Award 1994, Re (unreported, AIRC (FB), S3850, 6 March 2000).

Cur adv vult

The Commission

Introduction

1 This decision deals with the award modernisation process and in particular the Stage 4 modern awards. The decision should be read in conjunction with earlier decisions concerning award modernisation and in particular our statement of 25 September 2009 accompanying the publication of the exposure drafts for the Stage 4 modern awards.[1] The process is being carried out pursuant to statutory provisions and a request made by the Minister for Employment and Workplace Relations (the Minister) (the consolidated request). We note that the consolidated request has been varied on a number of occasions, most recently on 9 November 2009. To avoid repetition, we do not intend to set out the relevant statutory provisions again. They are, in brief, the provisions of the *Workplace Relations Act 1996* (Cth) (the WR Act) in particular those found in Pt 10A, and the provisions of Sch 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transitional Act), in particular item 2(5).

2 We have dealt with the statutory context governing award modernisation in a number of decisions over the past year or so. We refer in particular to the Commission's decisions concerning the priority modern awards and the Stage 2 and 3 modern awards.[2] We also refer to the decisions concerning the model transitional provisions.[3] Some of the submissions received following the publication of the exposure drafts raised issues of general significance and it is appropriate to make some brief comments in relation to them.

1 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23.

2 *Re Request from the Minister for Employment and Workplace Relations—28 March 2008* (2008) 177 IR 364, *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 181 IR 19 and *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 187 IR 192.

3 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 187 IR 146 particularly at [2]-[5] and *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* [2009] AIRCFB 943.

3 The Australian Council of Trade Unions (ACTU) raised the question of the adjustment of expense-related allowances. It submitted that such allowances should be adjusted in all modern awards by 1 January 2010 to take into account any movement in the relevant CPI group or sub-group up until September 2009. It also proposed that any adjustments in allowances in award-based transitional instruments should be reflected in modern awards also.

4 There was insufficient exchange of views on these proposals to enable us to reach a fair conclusion. They raise a number of further questions about the manner and timing of the adjustment of expense-related allowances in modern awards. We suggest that the major industrial parties have discussions with a view to developing an agreed approach.

5 In a submission directed to economic considerations, the Australian Chamber of Commerce and Industry (ACCI) referred to item 2(5) of Sch 5 to the Transitional Act and continued:

> 81. Consistent with ACCI's previous submissions, we reiterate the following general recommendations for the final Stage IV process:
>
> a. The Commission should provide detailed reasons for its decision in a statement to the modern awards addressing item 2(5) (in addition to considerations in the request and Part 10A that the Commission must take into account).
>
> b. Where evidence is provided that indicates a modern award may increase labour costs, increase the regulatory burden on business or negatively impact upon jobs or productivity, these matters must be addressed by moderating provisions in the modern award as appropriate. ACCI notes that the Full Bench can vary a modern award on its own motion or deal with matters upon receiving an application to vary under s 576H.
>
> c. When considering transitional provisions, these matters must also be taken into account.

6 ACCI advanced similar submissions in the consultations preceding the Commission's decision on model transitional provisions. In that decision we dealt at some length with those submissions.[4] We add the following observations. Where we have been presented with economic material relating to costs, the regulatory burden or employment, we have taken it into account. Material of that kind has not been frequently provided and the material that has been provided has sometimes been incomplete. For example, the material might not deal with actual costs or might focus on provisions which increase costs without any allowance for provisions which reduce costs. This is not a criticism of those concerned, but may help to explain why particular submissions have not been acted on. At the general level, however, our decision, has been made with all of the statutory requirements firmly in mind and the evidence and other material presented to us has been examined in that context.

7 We deal now with the Stage 4 awards.

Stage 4 Industries/Occupations

8 We now make the Stage 4 modern awards as identified and described below.

4 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 187 IR 146 particularly at [9]-[11] and [56]-[61].

A list of the awards is Attachment A. We shall deal with each award by reference to its industry classification, following the order in which the exposure drafts were dealt with in our statement of 25 September 2009.[5]

Accountancy practices

9 We indicated in our statement of 25 September 2009 that we did not consider a modern award should be made for accountancy practices. We said in addition:[6]

> [15] Two matters arise for consideration, however. The first is that it would appear that the Miscellaneous Award 2010 will cover the businesses of accountants as this is not an industry covered by a modern award. The second and related consideration is the treatment of transitional provisions where regulation currently exists for accountants.

10 As we indicate later in this decision, we have made alterations to the coverage of the *Miscellaneous Award 2010*. As a result accountancy practices will not be covered by a modern award. The position in relation to accountancy practices covered by award-based transitional instruments will be considered when those instruments are reviewed as envisaged by item 3 of Sch 5 to the Transitional Act.

Animal care and veterinary services

Animal Care and Veterinary Services Award 2010

11 When the exposure draft was issued the scope of the draft was restricted to private veterinary clinics and hospitals. Since that time, significant submissions have been received from the Royal Society for the Prevention of Cruelty to Animals (RSPCA) who advanced the proposition that the draft should be expanded to include the animal care industry. In addition, the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) continued to press for occupational coverage for veterinarians.

12 Other submissions from interested parties who made comments leading up to the exposure draft stage focussed upon changes which they believed would be appropriate having regard to the draft and the position they took.

13 As a result of the participation of the RSPCA we have been able to consider more fully the existing award coverage together with the submission now made. Against that background we have decided to expand the coverage of the proposed award to cover the RSPCA and like institutions. We have defined the animal care industry to include the work and activities of the RSPCA and like bodies. We have decided not to make the award an occupational award as the potential coverage of such an award, beyond the areas we now propose to deal with, is unclear.

14 We have altered the classification descriptors to make them more generic, covering all employees of private veterinary practices and animal care establishments. We have also included an inspector classification to cover RSPCA inspectors. Because of the nature of the work of inspectors, and the authorities they hold, we have used the veterinarian's rates to strike a relativity.

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5 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23.

6 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23.

15 In our statement of 25 September 2009 we also invited parties to comment on the correct relativity for a veterinary nurse. At the entry level veterinary nurses require a certificate IV. No justification was advanced to classify them at the certificate III level of $637.60. We are satisfied that the correct approach is to classify them at the level above $637.60.

16 A number of other changes have been made to the exposure draft as a result of the submissions which it is not necessary to comment on.

Aquaculture

Aquaculture Industry Award 2010

17 We have decided to make an award which is in similar terms to the exposure draft. We have made some significant alterations in response to the submissions of the National Aquaculture Industry Council (AIC). We have altered the coverage provisions to exclude hatchery work and have therefore removed the corresponding classifications, descriptors and wage rates which were contained in the exposure draft. We have also added to the coverage provisions work performed by employees within the remaining classifications which is done for the initial preparation of aquaculture products for market.

18 We have reformatted the classification structure and adopted the wage rates and wages structure proposed by the AIC. With the exception of the deletion of the hatchery classifications referred to above, the resulting classifications descriptors and wage rates have substantial similarity with those proposed by the Australian Workers' Union (AWU) which we included, albeit in a different format, in the exposure draft. The hours provisions of the award now provide that ordinary hours may be averaged over a period of 12 weeks.

19 We also note that the alterations to the coverage of the *Miscellaneous Award 2010* should ensure that that award will not cover those parts of the aquaculture and fishing industries which have not previously been covered by awards and which are not covered by the *Aquaculture Award 2010*.

Building services

Car Parking Award 2010

20 There are a number of changes to the terms of the exposure draft. In particular, modifications have been made to provisions dealing with payment of wages and rostering, changes have been made to the first aid and laundry allowances whereby part-time and casual employees receive pro rata payments or payments for each shift worked and a new clause has been included relating to employee transfer for operational reasons. There has been no change to the rates of pay, span of hours, or meal and rest break provisions in the exposure draft.

21 We have not included transitional provisions relating to hours of work in Queensland. We are not convinced that there is sufficient reason to depart from our decision of 2 September 2009 which limited the matters to be dealt with in transitional provisions.

22 There is one change in the classification descriptors, being the addition of a further indicative task for a Car Parking Officer Level 2.

Pest Control Industry Award 2010

23 A number of changes have been made to the exposure draft. The definition of pest control industry has been varied to reflect the more detailed and practical

description provided by the Australian Environmental Pest Managers Association (AEPMA) and the *Manufacturing and Associated Industries and Occupations Award 2010*[7] (Manufacturing Modern Award) has been inserted in the list of excluded awards.

24 We have decided not to include a supervisory classification but note that the award provides for a leading hand allowance. A Level 5 inspector classification has been included.

25 The home telephone allowance and the provision for the reimbursement of licence fees have been deleted however the allowances relating to work in a fumigation depot and treatment of verminous or decomposed human bodies have been retained.

26 We have altered the clause relating to the payment of wages as sought by the Australian Federation of Employers and Industries (AFEI) but there has been no change to the span of hours, rest breaks and penalty rates provisions in the exposure draft except for a minor clarification in relation to the interaction of shift penalties with other penalties.

27 A clause relating to annual close-down sought by AFEI has been included in an amended form. We have not included transitional provisions relating to hours of work in South Australia and Queensland. We are not convinced that there is sufficient reason to depart from our decision of 2 September 2009 which limited the matters to be dealt with in transitional provisions.

Christmas Island and Cocos (Keeling) Islands

28 In our statement of 25 September 2009 we said that we intended to defer consideration of the modernisation of the *Christmas Island Resort and Christmas Island Laundry Redundancy Award 1998*[8] and the *Christmas Island Severance Pay Award 2002*.[9] Nothing has occurred in the consultations to lead us to depart from that course. In relation to the *UCIW Christmas Island Building and Construction Award 2004*,[10] we indicated that its coverage would be subsumed in the coverage of a number of modern awards applying in the construction sector. As we said in our statement, those awards will need to be amended to include some provisions which deal with the particular circumstances of Christmas Island. Those provisions deal mainly with fares to the mainland and district allowances.

Correctional Facilities

Corrections and Detention (Private Sector) Award 2010

29 As we understand it none of the public sector correctional services in Australia is amenable to coverage by a modern award made under Pt 10A of the WR Act. There are only three private sector employers in the corrections and detentions industry as we have defined it. Following the publication of the exposure draft for this industry, those three employers and the relevant unions reached complete agreement on the terms of a modern award. We have adopted that agreed draft albeit with some drafting changes that do not alter the substance of the agreed draft. We have changed the wording of cl.20.1(a) to remove a possible tension between cl.20.1(a) and cl.20.2. That change is

7 MA000010.

8 AP774892.

9 AP819154.

10 AP834773CRC.

intended to improve the clarity of the document without changing its effect. This industry operates 24 hours a day, seven days a week and it is a feature of relevant awards that ordinary hours can be worked at any time. Subject to the usual types of restrictions relating to maximum shift lengths and the like, shiftworkers can be required to work their ordinary hours at any time. There is also provision for daywork within the hours specified in cl.20.2, but dayworkers can be required to move to shiftwork to meet operational requirements.

Diving services

Professional Diving Industry (Recreational) Award 2010

Professional Diving Industry (Industrial) Award 2010

30 The awards to apply in the diving industry can be dealt with together. In relation to the recreational award, while there have been a number of minor or technical changes in the terms of the exposure draft, there are also some matters which should be specifically mentioned. We have rejected a proposal for a general clause permitting commission payments to be offset against or absorbed into penalty payments and various proposals to reduce protections for employees in the hours of work provisions. We have provided for a minimum payment of four hours for part-time employees on boat trips. There was no sound basis advanced for the other proposals. On the other hand we have included a provision for a loading for travelling to and from distant work which appears in the relevant award and was inadvertently omitted from the exposure draft. We have decided not to remove a reference to AS2299.3 from the classifications provision. While it was claimed to be irrelevant or confusing or both it appears in the relevant award and its removal from the draft was opposed. This is a matter which could be addressed in due course if the reference to the standard gives rise to problems.

31 In relation to the industrial award, there have been no changes of significance in the terms of the exposure draft. We have decided not to retain the casual loading of 27.5%. To do so would depart from our general approach without justification. The loading will be fixed at the standard rate of 25%. We have also declined to include provisions from the relevant award which place limitations on the employment of casuals and other employees during short term projects. No objective justification was advanced for provisions which appear to us to be unduly restrictive.

Dry cleaning and laundry services

Dry Cleaning and Laundry Industry Award 2010

32 Despite submissions we should do so we have not made any change to the award coverage provisions. It appears to us that the industry definition and coverage clause in the draft are adequate.

33 Some changes have been made to the part-time and casual employment provisions. We have not included any specific provision relating to Victorian part-time employees who were employed prior to August 1998. The special loading which applies to these employees will apply subject to the operation of the model transitional provisions in Schedule A to the award.

34 While we have decided to retain the separate dry cleaning and laundry streams for wages, hours of work and classification structures which appeared in

the exposure draft we do not rule out the possibility that these provisions could be rationalised at some time in the future. On the material available to us maintenance of separate structures seems the least disruptive course.

35 The restriction on the proportion of junior employees who may be engaged in the laundry sector of the industry has been deleted. The limitation on juniors working shiftwork has been reduced to those who are under 18 years of age. The apprentice wage rates have been extended to non school-based apprentices.

36 At the request of the unions and with the support of the Textile Rental and Laundry Associations of Australia we have decided not to include any piecework provisions in the award. Should such provisions be warranted this issue can be reconsidered.

37 In relation to allowances, minor adjustments have been made to the provisions relating to first aid and meal allowances and we have retained the tool and uniform allowances consistent with the exposure draft. A definition of "foul laundry" has been included to clarify the circumstances in which the disability allowance should be paid. If there is later agreement on an amended form of the definition an application to vary the award may be made.

38 In relation to hours of work, we have retained the span of hours for both dry cleaning and laundry sectors as set out in the exposure draft. The penalty rates have also been retained. However a morning shift provision has been introduced at the request of various employer parties and the maximum shift length in the laundry sector has been increased to ten hours. We have decided to retain a paid meal break for employees working more than 1½ hours overtime but have reduced the length of the break to 20 minutes. The provision for washing time has been deleted.

39 We have not included transitional provisions for the reduction of the 40 hour week in Queensland. We are not convinced that there is sufficient reason to depart from our decision of 2 September 2009 which limited the matters to be dealt with in transitional provisions.

Educational services — preschool teachers

Educational Services (Teachers) Award 2010

40 This award has been varied to include pre-school and early childhood teachers employed in children's services. There are only minor changes to the draft variation following consultation. Most of the changes are to achieve consistency with respect to matters such as span of hours for teachers and other workers employed in the same children's service. The provisions in relation to notice periods for varying the hours of part-time employees and the maximum period of employment for casual teachers have also been varied to reflect current differences between teachers in schools and those employed in children's services.

Entertainment and broadcasting industry (other than racing) — Travelling shows

Travelling Shows Award 2010

41 In relation to the *Travelling Shows Award 2010* we have noted concerns about the coverage of this award and have amended the coverage clause to clearly indicate that the award is restricted to employees of itinerant employers. We

have determined that this modern award should not cover any other employers. We have retained the current award exemption for immediate family members but are not persuaded to retain any wider exemption.

42 Other changes sought to the exposure draft have generally not been adopted. We are satisfied that the positions are classified at appropriate levels and that the correct standard rate for the calculation of allowances is the Grade 2 level. While we are not convinced that the salary averaging provision contained in the current award is appropriate for inclusion in a modern award, we have included a provision for the averaging of hours over a four week period which should assist in dealing with uneven workload demands. Finally, although it is not a feature of the current award, we are satisfied that the modern award should provide for the payment of overtime penalties for full-time and part-time employees.

Fire fighting services

Fire Fighting Industry Award 2010

43 A key issue canvassed in submissions was the status of the *Victorian Firefighting Industry Employees Interim Award 2000*[11] (Victorian Firefighting Award) and whether a modern award made as part of the current process under Pt 10A of the WR Act is capable of covering the Metropolitan Fire and Emergency Services Board (MFESB).

44 For reasons that we have already given, we have proceeded on the basis that the MFESB is a constitutional corporation.[12] In submissions made shortly after the publication of the exposure draft, the United Firefighters' Union of Australia (UFUA) argued that the MFESB was part of the "State reference public sector transitional award modernisation process" provided for in Sch 6A of the Transitional Act and, consequently, not part of the current award modernisation process under Pt 10A of the WR Act. We disagree. Relevantly, the State reference public sector transitional award modernisation process only applies to a "State reference public sector employer". That expression is defined in item 2(3) of Sch 6A of the Transitional Act as "a State reference employer that is a State public sector employer as defined in section 30A of the FW Act". A "State reference employer" is defined in item 2 of Sch 2 and item 2A(4) of Sch 3 to the Transitional Act to mean "an employer that is a national system employer only because of s 30D of the *Fair Work Act*." Assuming the MFESB is a constitutional corporation, it is a "national system employer" by virtue of that fact[13] and therefore cannot be a "State reference employer" because it is not a national system employer "only" because of s 30C of the *Fair Work Act 2009* (Cth) (*Fair Work Act*).

45 In a later submission the UFUA advanced a different argument, namely, that the Victorian Firefighting Award, as a pre-reform award, is an enterprise award that applies only to the MFESB and, as such, it is not part of the current award modernisation process under Pt 10A of the WR Act. The MFESB responded with a submission to the effect that the Victorian Firefighting Award, as a pre-reform award, applies not only to the MFESB but also to private sector employers by virtue of a common rule declaration in relation to the firefighting

11 AP801881CRV.

12 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23 at [67].

13 see s 14(a) of the *Fair Work Act*.

industry in Victoria. The UFUA's argument was supported and elaborated upon by the Australian Government in a late submission. In particular, the Government argued that the true effect of item 4 of Sch 4 to the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and the common rule declaration made in relation to the fire fighting industry in Victoria is that only the MFESB is bound by the Victorian Firefighting Award and that private sector employers covered by the common rule declaration are not properly to be regarded as bound by the Victorian Firefighting Award. We note that both the MFESB and the Government have relied upon the decision of the Full Federal Court in *Poulos v Waltons Stores (Interstate) Ltd*[14] as supportive of their ultimate and opposing contentions.

46 The legal position is not clear cut. Resolution of it would need to deal with the argument advanced by the MFESB based on the definition of "enterprise award" in s 576U of the WR Act and the submission that notwithstanding the extended definition of "single business" in s 322 of the WR Act, the Victorian Firefighting Award is not an award "that regulates the terms and conditions of employment in a single business only (being the single business specified in the award)".

47 It is not necessary to decide this question. Our task is to make a modern award for the fire fighting industry. We do so on the basis that it contains an appropriate safety net. We are not persuaded that we should refrain from making any modern award for the fire fighting industry. As required by s 576V(3) of the WR Act, the modern award we have made is expressed not to cover an employer who is bound by an enterprise award. If the contentions of the UFUA and the Australian Government are correct then the modern award we have made will not cover the MFESB. If the contentions of the MFESB are correct then the MFESB will be covered. Of course, only a court can make a binding determination in that regard. Given that the contentions of the MFESB may ultimately be held by a court to be correct it is appropriate that the modern award for this industry be crafted with that in mind. We should note that we do not think it appropriate to make a separate modern award for the public sector that will be, in effect, an enterprise award or have no application at all. However, we have made separate provision for the private and public sectors in relation to some conditions.

48 The Victorian Firefighting Award, in so far as it applies to the MFESB and putting aside the fire service communications controllers, appears only to permit engagement of employees on a full-time basis on a "10/14 roster". That is a roster whereby an employee works a predefined pattern of 10 hour day shifts and 14 hour night shifts such that the employee works an average of 42 hours a week over an eight week cycle with those average weekly hours made up of 38 ordinary hours and two hours of overtime with the remaining two hours accumulating to be taken as accrued leave. The UFUA opposed the exposure draft to the extent that it permitted firefighters to work on a basis other than the 10/14 roster.

49 We acknowledge that the 10/14 roster is the standard method for arranging the work of most firefighters in the various public sector fire services in Australia. It is workable in a large fire service which operates fire stations on a 24 hours a day, seven days a week basis. However, we are not persuaded that a public sector employer covered by a modern award for the fire fighting industry

14 *Poulos v Waltons Stores (Interstate) Ltd* (1986) 10 FCR 429; 15 IR 313.

should be prevented from employing firefighters except on a 10/14 roster. So far as the private sector is concerned, we note the submissions of Transfield which raise the realistic possibility that its key client may require day shift only fire and rescue services. The modern award makes provision for that possibility in the private sector and allows a greater degree of flexibility in hours of work and rostering in that sector. In the public sector it permits employment on bases other than the 10/14 roster provided that the employee receives no less than they would have received on the 10/14 roster. We have also included "special roster" provisions adapted from the part of the Victorian Firefighting Award that applies to the Country Fire Authority (CFA) on the basis that this was one way in which this can be achieved. It may be that the hours of work and rostering provisions in the modern award should be revisited at a time when it is practicable to canvass more extensive argument on these issues.

50 The UFUA made strong submissions against the inclusion of the model award flexibility clause. We are required to include a flexibility clause. The model which has been developed pursuant to the consolidated request applies almost without exception in modern awards.[15] None of the arguments raised by the UFUA warrants a departure from the model clause in this award although they may be relevant in the foreshadowed review of the clause.

51 The exposure draft made provision for part-time employment. The UFUA made strong submissions against that position and contended that the Commission has already made a "determination" that part-time employment is not appropriate in this industry. That contention appears to be based on the award simplification decision by Commissioner Hingley in relation to the Victorian Firefighting Award.[16] As appears from the UFUA's own submissions, part-time employment had not been part of that award and the CFA made application for the inclusion of part-time employment as part of the award simplification proceedings for that award. The UFUA filed evidence arguing against the CFA's application. However, ultimately, the CFA abandoned its claim so that there was a consent submission against the inclusion of part-time employment. Commissioner Hingley's decision makes no mention of part-time employment. In those circumstances, we do not see that decision as constraining us from considering for ourselves whether part-time employment is appropriate in this industry and we are far from persuaded that part-time employment should not be available. We note that while it is not provided for in Victoria it is provided for in several other States. Nevertheless, in the award we have made we have limited the availability of part-time employment to the private sector reserving for further consideration the issue of whether part time employment should also be available in the public sector.

52 In relation to classifications we note that no party supported the inclusion of classifications for administrative and technical employees and several parties opposed the inclusion of those classifications. They have been removed. For private sector employers such employees will be covered by occupational awards, namely the *Clerks—Private Sector Award 2010* (Clerks Modern Award)

15 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2008) 175 IR 120 at [155]-[192].

16 *Re Victorian Firefighting Industry Employees Interim Award 1993* (unreported, AIRC, Hingley C, S3127, 1 March 2000).

and the *Professional Employees Award 2010*[17] (Professional Employees Award). So far as the MFESB is concerned we note that there is an enterprise award covering those classes of employees.

53 We were persuaded by the submissions of the MFESB that the classifications of qualified firefighter (with leading firefighter qualification) and senior firefighter have a particular history that makes them inappropriate for inclusion in a modern award for this industry. Those classifications have been omitted. The classification of commander has also been omitted. We note that commanders in the MFESB are covered by an enterprise award and their position can be dealt with as part of the enterprise award modernisation process.

54 In relation to personal/carer's leave and parental leave, consistent with our approach generally, we have decided not to supplement the National Employment Standards (NES). We are not persuaded that the pressing necessity leave, special leave and study leave provisions in the Victorian Firefighting Award are appropriate for inclusion in a modern award that is intended to be a safety net.

55 The UFUA objected to a number of clauses in the exposure draft in a summary way. We comment on some of those objections. We did not replicate the limitation in cl.4.2 of the Victorian Firefighting Award because we regard it as a restrictive work practice that is inappropriate for inclusion in a modern award. It is not appropriate to make uniforms subject to agreement with a union. The watch room allowance in the Victorian Firefighting Award is enterprise specific applying to one fire station only. The emergency medical services (EMS) allowance in the Victorian Firefighting Award, on its face, relates to a trial that has long since past. The change of residence provision in the Victorian Firefighting Award contain elements that are specific to Victoria and therefore inappropriate for inclusion in a modern award. We are satisfied that adequate provision has been made for reimbursement of such expenses in the award we have made. Consistent with the approach we have adopted in other modern awards, accident pay is provided for by way of a standard transitional clause.

56 We note that in its submissions of 16 October 2009 the UFUA proposed that if we were intending to make an award with terms contrary to particular submissions it had made then it applied to put substantial material before us, including calling evidence. The procedure for the making of modern awards was established many months ago and is referred to in many of the Commission's decisions.[18] The process provided an adequate opportunity to the UFUA to put whatever material it wished before the Commission both before and after the publication of the exposure draft.

Funeral directing

Funeral Industry Award 2010

57 The *Funeral Industry Award 2010* contains a number of changes resulting from submissions following the release of the exposure draft. In relation to classifications, we have included some additional descriptors in the definitions

17 MA000065.

18 See: *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2008) 175 IR 120 at [193]-[196], *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 184 IR 242 and *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23 at [1]-[3].

clause and made other changes to provide clarity in the application of the grading structure. Clauses 12.3 and 15.8 have been redrafted. We have also included an additional grade to cover the qualified embalmer.

58 We have not acceded to a submission by the Liquor, Hospitality and Miscellaneous Union (LHMU) to include an industry allowance. We think that the existing specific allowances are adequate compensation for disabilities.

59 A number of employer parties pressed for a wider spread of ordinary hours than was included in the exposure draft. We are satisfied the prevailing industry standard which provides for averaging of hours over a period of up to four weeks is sufficiently flexible.

60 We have deleted cl.24.2 of the exposure draft which referred to removals on weekends and public holidays. It is not an industry standard and was opposed by the employers. The overtime and penalty provisions sufficiently cover this aspect of work.

Gardening services (remainder)

Gardening and Landscape Services Award 2010

61 A preliminary question arose concerning landscaping works on building sites. A number of representatives of landscape gardening employers submitted that it will be difficult to determine whether the *Building and Construction General On-site Award 2010*[19] (Building and Construction Award) or the *Gardening and Landscape Services Award 2010* applies at particular times. They also submitted that the coverage clause in the Building and Construction Award should be amended to exclude landscaping works on commercial building projects. This position was based primarily on concerns that the Building and Construction Award is designed to cover project-based work and not ongoing employment and that a number of its provisions should not be applied to landscape gardening employers and their employees. Examples were given of the redundancy payments and apprentice payments. The AWU and the Construction, Forestry, Mining and Energy Union (CFMEU) opposed the amendment.

62 It should be made clear that the Building and Construction Award is not intended to cover employers engaged in landscaping which is not part of a building project. This is so even where the work is carried out at a location which is, or has recently been, a commercial building site. The relevant terms of the Building and Construction Award are cll.4.7(a)(i) and 4.7(b)(viii). We note that these provisions require, among other things, a clear connection between the landscape gardening works and the activities of an employer in the construction industry. While we acknowledge that there may be cases in which it will be difficult to draw the line between the coverage of the two awards, the solution proposed may lead to even greater problems. In the circumstances we do not consider it is desirable to disturb existing arrangements.

63 In relation to the coverage of the modern award itself, the award is expressed not to cover employers or employees covered by a number of specified modern awards. We have added three awards to the list. We have decided not to include a provision for conversion of casual employees on the basis that such provisions have only a limited application in the industry. We have given consideration to concerns expressed by employers in South Australia about the increase in

19 MA000020.

minimum wages for some classifications. While we note the concerns the effect of the transition will be ameliorated by the model phasing schedule and we do not think any other action is warranted.

64 We have made some alterations to allowances, including the deletion from the exposure draft of the carpenter's allowance and the curator's allowance, and we have added three funds to the list of default funds in the superannuation provision.

Grain handling industry

65 We noted in our statement of 25 September 2009 that we did not intend to make an award for this industry.[20] We confirm that position.

Health and welfare services (remainder) — Ambulance services

Ambulance and Patient Transport Industry Award 2010

66 A number of amendments were suggested which were designed to delineate those provisions which would apply only to the non-emergency patient transport sector. We have not been persuaded to adopt this approach. The pre-reform award in Victoria has applied to both sectors in this industry since 2002 and it generally does not contain the differentiation sought.[21]

67 The wage rates were not greatly contested and largely reflect the rates in the pre-reform award applying in Victoria. The classification definitions have been altered to provide for some updated education requirements. The rest period after overtime has been amended to eight hours throughout the clause. We have included provision for alternative penalty options for working on a public holiday.

68 We did not include the Royal Flying Doctor Service's communication employees in the exposure draft for the reasons outlined in our statement of 25 September 2009.[22] Our view has not altered and the award will not include them.

Health and welfare services (remainder) — Children's services

Children's Services Award 2010

69 Following submissions and consultations on the exposure draft changes have been made to this award to reflect the consensus of the major parties on span of hours, minimum shift lengths, overtime for part-time employees and junior rates. We have also rectified an error in the classification structure concerning the level for employees classified as "E" workers under the Western Australian transitional award-based instrument and limited the application of non-contact time to employees with programming responsibilities. There are also some minor changes to allowances.

70 We have taken into account the views of the parties with respect to the transitional provisions. This has resulted in some modification of the model clause. We have also taken into account the position of non-teaching staff in pre-schools who currently work according to the same provisions, with respect

20 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23 at [89].

21 *Ambulance Services and Patient Transport Employees Award*, Victoria 2002, AP817765CRV.

22 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23 at [92].

to school vacations, as teachers. The exposure draft has been altered in some other respects to make the conditions of teachers and children's services employees in the same workplace more consistent.

Health and welfare services (remainder) — Fitness, lifestyle and leisure services

Fitness Industry Award 2010

71 The coverage clause of the exposure draft of the *Fitness Industry Award 2010* has been amended to include recreational camps. While YMCA Australia sought the inclusion of recreation services and centres, leisure services and centres and unlicensed child care facilities in the coverage clause, we consider these are already covered by the terms of the clause or by the modern *Amusement, Events and Recreation Award 2010*,[23] (Amusement, Events and Recreation Award) as are contractors to local government running leisure and fitness centres. Further, we consider the classification structure sufficiently indicates the employees covered by the award. The award excludes employers or employees covered by the Amusement, Events and Recreation Award from its coverage. It may be appropriate to include a reciprocal exclusion in the Amusement, Events and Recreation Award.

72 The types of employment largely remain as in the exposure draft and are capable of embracing seasonal and temporary employment. However, we have clarified the operation of the broken shift provisions of the award and also provided for Level 2 instructors to be engaged in casual employment for one hour. We are not persuaded the other changes sought in respect of the types of employment are warranted having regard to the prevailing underlying conditions in the relevant awards and NAPSAs.

73 The LHMU sought higher minimum wages than those in the exposure draft in anticipation of developments expected to occur in relevant training packages in 2010. We are not prepared to anticipate those developments, so the minimum wages reflect those prevailing in the underlying awards and NAPSAs. Nonetheless, we have adjusted the Level 3 rate to overcome an anomaly with the National Training Wage rates. That adjustment has necessitated some minor adjustments to the allowances which are based on the Level 3 minimum wage.

74 We have also limited the leading hand/supervisor allowance to those employees at Level 4 or below, as above that level we consider the minimum rates embrace such duties. A sleepover allowance has been included in the award in light of it now covering recreational camps. First State Super has also been added to the superannuation clause.

75 While YMCA Australia sought changes to the classification definitions, these were not embraced by others and we have retained the classification definitions largely as they were in the exposure draft.

76 We have not been persuaded to make any of the other changes sought to the exposure draft given the prevailing terms of the relevant awards and NAPSAs and the availability of the award flexibility clause. The name of the award will remain as in the exposure draft to avoid confusion with other modern awards.

23 MA000080.

Health and welfare services (remainder) — Social and community services

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

Labour Market Assistance Industry Award 2010

77 We have been persuaded by the submissions of various parties not to make an award to cover the group training sector. Group training apprentices will be covered by the applicable award of the host employer consistent with our conclusions in the part of this decision dealing with labour hire. We have also decided that home care employees will be solely covered by the *Social, Community, Home Care and Disability Services Industry Award 2010*. Clauses 3.1, 4.1 and 22.7(b) of the *Aged Care Award 2010*[24] will be amended accordingly and cll.22.6(b) and 22.7(c) of the award deleted. Both this award and the *Labour Market Assistance Industry Award 2010* contain a salary packaging provision.

78 We have also decided to include provisions relating to salary sacrifice in both awards. We maintain the concern we expressed when we published the exposure draft, however all parties, including the Australian Government, asked that we make provision for salary sacrifice. During any proceedings which may result from the Heads of Agreement between the Australian Municipal, Administrative, Clerical and Services Union (ASU) and the Australian Government, which we refer to in the next paragraph, the interaction between a safety net approach, attraction and retention, award reliance and bargaining may need consideration.

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

79 At the outset it is necessary to deal with proposals advanced by the ASU to defer the operation of parts of the modern award to permit it to pursue an application to establish new wage rates based on pay equity or work value grounds. The ASU and the Australian Government are parties to Heads of Agreement which provide for the adoption of pre-modern award rates in the modern award on an interim basis pending the outcome of the foreshadowed claim. The ASU proposed that we include a schedule of transitional provisions incorporating conditions from some 32 awards and NAPSAs and that any provisions of the modern award affecting pay or pay-related conditions should not come into operation. A number of other interested parties, including some state governments, supported the ASU position. The proposal was opposed to varying degrees by a number of representatives of employers.

80 We have decided to make a modern award based on the terms of the exposure draft but with a number of alterations some of which we deal with below. The award will include the classifications and minimum wages which appear to us, on the material available at this time, to be appropriate for a modern award in this industry. We accept the force of the submissions made that in the circumstances it would be inconvenient to say the least to introduce new classifications and minimum wages for the industry covered by the award when a significant case is contemplated before Fair Work Australia next year. We have decided that the operative date for the implementation of the new classifications and wages should be delayed until 1 July 2011.

81 In relation to transitional provisions, we do not intend to adopt the detailed schedule proposed by the ASU for reasons which we set out in our decision of

24 MA000018.

2 September concerning model transitional provisions. Furthermore, to the extent that the Heads of Agreement are relied upon, it is tolerably clear that the Heads of Agreement are primarily concerned with rates of pay and there is no warrant to delay the implementation of other conditions, whether pay-related or not. The model transitional provisions will be included in the modern award, but cl.2.3 of the phasing schedule will be modified to substitute 2011 for 2010.

82 We mention some of the significant changes from the terms of the exposure draft. The definition of the social and community services sector has been amended to include organisations engaged in policy, advocacy or representation work in this sector.

83 The minimum period of engagement for casuals has been altered to take into account the different sectors of this industry. We have altered the span of hours to provide for work in ordinary hours between 6.00am and 8.00pm Monday to Sunday reflecting what we take to be the critical mass of provisions in the relevant instruments.

84 For social and community and crisis accommodation employees the overtime rate has been amended to provide for payment of time and a half for the first three hours. The minimum payment for an employee recalled to work overtime has been altered to two hours. The penalty rate for working ordinary hours on a Sunday has been amended to double time.

85 We have declined to supplement the NES for the additional personal/carers' leave currently provided for in the *Social and Community Services — Victoria — Award 2000*.[25] Supplementation in this area has been rare in modern awards and no sufficient case has been made out for it in this award.

Labour Market Assistance Industry Award 2010

86 We published an exposure draft called the Employment Services Industry Award 2010 which covered the group training sector as well as the labour market assistance sector. As we have indicated above, we have decided not to make an award for the group training sector. The award is based on the exposure draft but without the provisions referable to the group training sector. The award is called the *Labour Market Assistance Industry Award 2010*.

87 The relevant classification definitions in the draft have not been altered. Although there was consensus between the key parties in this industry that the classification structure was partially outdated and difficult to apply, there was no agreement as to what would replace it. It may be useful for the parties to review the classification definitions in the future.

88 Included in the modern award is an additional week's annual leave arising out of the current remote localities benefit as it applied to particular employees on 31 December 2009.

89 The modern award includes provisions for sessional employees and for flexible working hours none of which were in the exposure draft.

Health and welfare services (remainder) — Supported employment services

Supported Employment Services Award 2010

90 With several minor exceptions the modern award reflects the terms of the exposure draft which had been developed with the assistance of the parties.

25 AP796561CRV.

91 We have decided to provide that those organisations previously permitted to apply an otherwise restricted Wage Assessment Tool (WAT), on or before 27 June 2005, might continue to do so. To do otherwise is likely to create instability for those services involved, although it is not our view that in the future service specific WATs should be taken as appropriate to another service without it being evident that there are circumstances justifying such an approach.

92 The Payment of Wages — Waiting Time provision has been amended to provide that no penalty accrues to an employer where the delay occasioning waiting is for a reason beyond the direct control of the employer.

93 In relation to superannuation, we have decided not to alter the provision, not adjusted for many years, whereby an employee with a disability being paid less than 80% of the full award wage has a superannuation contribution made of either 3% of ordinary time earnings or $6.00 per week, whichever is the greater. This payment has relevance in this sector because significant numbers of employees with a disability earn less than $450 per month. Mindful that many employers not currently bound by the award do make provision at varying levels for superannuation contributions for employees with a disability, we have concluded that the current provision should be included in the modern award. We have also noted the National Disability Services 16 October 2009 written submission, "…that the contribution level should not be adjusted at this stage" and the Parliamentary Secretary for Disabilities and Children's Services 30 November 2009 correspondence to the Commission, indicating that it was the Australian Government's intention to consult relevantly with stakeholders early in 2010. Should an application be made in the future for review of this provision it will be dealt with in the normal way.

94 Submissions have been received over the last few days indicating that agreement has been reached between the ACTU, the LHMU and Australian Business Industrial as to a new allowance and a wide range of detailed classification and progression matters. Although the level of agreement is very encouraging, the late filing of these submissions has not permitted comment from any other industry organisation. Consequently we are unable to give effect to these proposals. Fair Work Australia is of course available in the New Year to assist in ensuring industry wide discussions, and any application to vary, are brought to finality.

Indigenous organisations and services

Aboriginal Community Controlled Health Services Award 2010

95 The National Aboriginal Community Controlled Health Organisation (NACCHO) pressed for the inclusion of an additional clause dealing with the recognition of aboriginal self-determination and its application to the resolution of any disputes.

96 We acknowledge the importance of the right to self-determination for indigenous Australians. We note the particular significance of the United Nations in that regard. We have generally not, in this award modernisation process, inserted provisions that go to an aspiration or declaration. We also note that the provisions suggested by NACCHO are opposed by a number of unions. We have decided not to insert such a provision.

97 We were urged by some parties to revise provisions set out in the exposure draft that went to part-time and casual employment, higher duties, travelling and

fares. We do not consider that there is sufficient reason to alter the provisions that were set out in the exposure draft. They have been included in the modern award.

98 The Health Services Union drew attention to the rates for dental assistants which it said were less than those applying to dental assistants in the *Health Professionals and Support Services Award 2010*[26] (HPSS Award). In our statement of 25 September 2009 we explained that the services provided by aboriginal community controlled health organisations are notably different from what might be called mainstream health services, including as to the work that is performed by its employees. A ready comparison with the HPSS Award is not easily made. However, on closer examination of the definitions, we have decided to adjust the higher grades (4 and 5) so that the rates accord with those found in the HPSS Award.

99 A number of matters arose relating to allowances. We were asked to better define certain provisions in the bilingual qualification allowance and we have done so. The ACTU sought a provision for the payment of a meal allowance in circumstances where some overtime is worked. We agree. We have decided to include the relevant provision from the HPSS Award. The LHMU asked us to include an allowance going to relocation and removal. We consider that the provisions suggested largely go to recruitment. In the absence of more information, we do not consider that this should be regulated by this award.

100 We have accepted the submissions of the Chamber of Commerce and Industry WA and inserted Westscheme as a nominated superannuation fund. We have also confirmed that time off in lieu of payment for overtime is on the basis of an hour off for each hour worked.

101 NACCHO pressed for the provision of National Aboriginal and Torres Strait Islanders Observance Day (NATSIO Day) as an additional public holiday. Some other employers were opposed to this. We recognise that NATSIO Day is an important symbolic and cultural event. We have not, however, inserted additional public holidays in modern awards in recognition of the Parliament's determination to regulate the number of public holidays through the NES. Consequently, we have decided not to insert NATSIO Day as an additional public holiday. The provisions as to substitution (now slightly varied) might in any case be of assistance.

102 There was some difference between the unions and NACCHO concerning the definition of aboriginal health worker. On the basis of those submissions we have revised the definitions to incorporate the draft of NACCHO as well as the suggestions of the LHMU. In particular we have limited Grade 1 to the first year (and not up to the third year) of employment. We have incorporated the emerging occupations of aboriginal community health worker (albeit limiting it to Grades 1 and 2 for now) and finally, have made it clear that Grade 2 is applicable to employees with Certificate III training while Certificate IV trained persons would be classified at Grade 3.

103 There was disagreement as to how aboriginal knowledge and cultural skills (Levels 1, 2 and 3) would apply to the classifications and concern that they might unfairly impact on progression. We have decided to apply the relevant skill to each but as a desirable rather than a necessary skill.

104 Finally, we confirm our earlier decision not to include dentists in this award.

26 MA000027.

We have also rejected the LHMU's submissions that a more comprehensive cleaning structure be inserted. We consider that its proposal is more appropriate to establishments employing large numbers of cleaners or contract cleaning companies.

Labour hire services

105 In our statement of 17 November 2009,[27] we set out, for comment, draft model provisions for insertion into each modern award, where relevant, in relation to employees of labour hire (on-hire) companies and employees of group training organisations. In each case variations of the model clause were published and an indication given as to which model clauses would be inserted into each modern award (including the Stage 4 awards then in exposure draft form). We also noted that some modern awards already contain relevant provisions with respect to on-hire employees and may not require a model clause. This decision should be read in conjunction with our statement of 17 November 2009. We now deal with a number of issues which have arisen from the comments we have received. We indicate at this point that the final version of the model provisions is Attachment B to this decision.

106 Dealing first with the terms of the draft model provisions, AiGroup and Recruitment and Consulting Services Association (RCSA) and others submitted that it was necessary to include the words "This sub-clause operates subject to the exclusions from coverage in this award" in each of the model provisions, in respect of both on-hire and group training employers, to ensure that the coverage of the award in respect to such employers, and their employees, does not extend beyond the general coverage of an award. We agree and have amended the model clauses accordingly.

107 AiGroup and RCSA suggested two further changes to the 17 November 2009 model provisions in relation to group training organisations:

- the use of the term "temporary employment" is inappropriate and will lead to confusion, uncertainty and potentially negative consequences for employers and employees and should be deleted;
- the model clauses appear to permit references to apprentices and trainees to be deleted from the model clause/s inserted into a particular award in appropriate circumstances. The "and/" in respect of the deletion of "apprentices and/or trainees if not relevant to the award" should be removed.

108 We agree with both propositions. The model clause is intended to operate with respect to group training organisations and if the additional words have the potential to suggest otherwise, they should be removed. In relation to the second matter, it was not intended that the model provisions be inserted into a modern award without reference to either apprentices or trainees. There are, however, some awards to which the model clause is not relevant and the model group training clause will not be inserted at all in those awards.

109 The Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), supported by The National Electrical Contractors Association (NECA) submitted that the definition of on-hire in the draft model labour hire provisions should be amended. The definition in the draft reads:

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27 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* [2009] AIRCFB 925; (2009) 189 IR 415.

> *on-hire* means the on-hire of employees by their employer to a client, where such employees work under the general guidance and instruction of the client or a representative of the client.

110 The CEPU, supported by NECA proposed that the words "general guidance and instruction" be replaced with "direction and control". All other submissions supported the definition of "on-hire" in the draft model provisions. We will retain that definition. It appropriately distinguishes between an employee of a contractor and a labour hire employee. It distinguishes, for example, in the context of the *Electrical, Electronic and Communications Contracting Award 2010*,[28] (Electrical Modern Award) between the situation of an employee of a contractor providing labour as part of a contract to provide electrical services and an employee of a labour hire firm supplied to a client to undertake work under the general direction of the client.

111 Turning to the application of the model provisions to modern awards, in our statement of 17 November 2009, [29] we noted that some modern awards and one exposure draft already contain relevant provisions in relation to labour hire employees, and that we would not change those provisions unless requested to do so. Those awards are the *Aluminium Industry Award 2010*; the *Black Coal Mining Industry Award 2010*; the *Contract Call Centres Award 2010*; the *Electrical Power Industry Award 2010*; *Hydrocarbons Industry (Upstream) Award 2010* the *Mining Industry Award 2010*, *Salt Industry Award 2010* and the *Telecommunications Services Award 2010*. We were not requested to change relevant provisions in any of those awards. Indeed submissions made after the publication of our statement of 17 November 2009 by parties with an interest in many of those awards urged us not to make any variation to the award concerned. We will not vary any of those awards in respect of their provisions concerning labour hire employees.

112 The UFUA submitted that neither the model provision for labour hire nor for group training is required in the *Fire Fighting Industry Award 2010*. It submitted that labour hire employees are not utilised in the fire industry and the award does not provide for group training. Given the award is limited in its coverage to operational employees and there is no suggestion that either apprentices or trainees or labour hire employees are utilised in the industry, we will not include either model provision in the award. If circumstances change and a need for either provision arises, application may be made to vary the award.

113 The AiGroup and RCSA (supported by the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)) sought modification to the model provision for two awards with both occupational and industry coverage:

- where the occupational coverage was restricted to particular occupations identified in the coverage clause, in respect of the Manufacturing Modern Award; and
- to reflect a restriction of "principally engaged" consistent with sub-cl.4.2 of the coverage clause of the Professional Employees Award.

114 In a related submission, the Construction, Forestry, Mining and Energy Union

28 MA000025.

29 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* [2009] AIRCFB 925; (2009) 189 IR 415 at [8].

(CFMEU) sought that the reference to "classifications" in the occupational element of the model clause be amended to "occupations" in awards with both an industry and occupational coverage, particularly in the Manufacturing Modern Award and the *Joinery and Building Trades Award 2010*[30] (Joinery Modern Award).

115 We think there is some point to the CFMEU's submission. The two awards referred to identify particular occupations covered by the award on an occupational basis, subject in each case to the requirement that the employee be in a classification contained in the award. We think some minor amendment should be made to the model clause in each case to add reference to the occupations covered by classifications in the award. The provision supported by the AiGroup, RCSA and AMWU, on the other hand, seems to have the same effect as the model clause, save that it identifies with particularity the sub-clause references to be inserted into the model clause. We are not persuaded that any further amendment is required. The labour hire clauses to be inserted into the Manufacturing Modern Award and the Joinery Modern Award are set out in Attachment C to this decision.

116 We are not persuaded that the special labour hire provision proposed by the AiGroup and the RCSA in respect of the Professional Employees Award is required. The provision proposed by the AiGroup and the RCSA seems to draw upon the coverage in cl.4.2 of the award by expressly repeating the terms of cl.4.2, rather than doing so by reference to the clause. Whilst we understand the intent of the provision sought is to reflect the qualification of "principally engaged" within sub-cl.4.2 of the coverage clause of the award, we think that the model provision will achieve this intention by reference to sub-cl.4.2 in respect of the industry coverage and sub-cl.4.1 in respect of the occupational coverage.

117 The CPSU, the Community and Public Sector Union (CPSU) submitted that the model provisions in respect of both on-hire and group training should be amended in respect of the *Airport Employees Award 2010*[31] to refer to employers "that operate airports within the coverage of this award". Given the award currently applies to "employers throughout Australia that operate airports and their employees" the amendment proposed is unnecessary.

118 The Coal Terminals Group put a similar position in respect of the *Coal Export Terminals Award 2010*[32] seeking to amend the model provisions to refer to an employer "who operates a coal terminal". This is unnecessary given the terms of the current coverage clause of the award.

119 In a joint submission the RCSA and Recruitmentsuper sought to amend the superannuation clause in all modern awards into which the model group training provisions are inserted. The effect of the proposed amendment is to authorise a new group training organisation covered by the relevant award to make contributions to any superannuation fund (which may include RecruitmentSuper), provided the superannuation fund is an eligible choice fund in circumstances, where an employee has not exercised a choice of fund. We see no basis to treat a new group training organisation differently, with respect to superannuation, from any other new employer covered by the relevant award.

30 MA000029.

31 MA000049.

32 MA000045.

120 The AiGroup and the RCSA submitted that the model group training provision is required in the *Business Equipment Industry Award 2010*[33] in respect of apprentices as well as trainees because they exist in the industry. We will apply the group training model provision to this award in respect of apprentices and trainees. They also submitted that the model group training provision is required in the *Airline Operations — Ground Staff Award 2010*[34] and the *Textile, Clothing, Footwear and Associated Industries Award 2010*,[35] given that traineeships relevant to each award appear in the National Training Wage Schedule. We will apply the group training model provision to this award in respect of apprentices and trainees in both cases.

121 The CEPU also sought that the model group training clause proposed for the Electrical Modern Award be replaced with an alternate clause adding to the coverage of the award "the placement on a group training, or similar basis, of apprentices undertaking an apprenticeship described in cl.12.2(c) and who undertakes activities set out in cll.4.5(a) and 4.5(b)" (Clause 12.2(c) refers to an apprentice indentured in electrical, instrumentation, electronic/communications, refrigeration air-conditioning or power lines work and cable jointing trades. Clauses 4.5(a) and 4.5(b) define "electrical services".)

122 The group training provision sought by the CEPU would extend the application of the Electrical Modern Award to group training organisations and their employees in respect to placement in employment beyond the general coverage of the award to placement with employers who are not electrical, electronics and communications contractors. This outcome is inconsistent with the general view, noted in our statement of 17 November 2009, that group training organisations, which employ apprentices and trainees and place them with host employers, and the employees, should be covered by the award covering the host employer. We will insert the model group training provision in the Electrical Modern Award.

123 The CEPU, supported by the NECA, also sought that the Electrical Modern Award be varied to include a form of labour hire provision different from that in the model clause. On 6 November 2009, it made application to vary the award to that effect, seeking an additional coverage provision stating:

> 4.5(c) for the avoidance of doubt, the supply of labour to a business on an on-hire basis in respect of on-hire employees in classifications covered by this award where such employees are engaged in the activities described in clauses 4.5(a) and 4.5(b). This subclause (cl4.5(c)) operates subject to the exclusions from coverage in this award.

124 The application was loaded onto the Stage 4 labour hire section of the award modernisation website on 9 November 2009. We have decided to deal with the application as part of our Stage 4 labour hire deliberations.

125 We are not persuaded to vary the Electrical Modern Award in the manner sought by the CEPU. As we have already indicated, the award will be varied to reflect the model labour hire provision. Whilst the Electrical Modern Award covers employers who provide electrical services on a contract basis, which includes the provision of relevantly qualified employees, it does not cover labour hire employers who provide relevantly qualified employees to host

33 MA000021.

34 MA000048.

35 MA000017.

employers to undertake work at the direction of host employer. The clause proposed by the CEPU does not distinguish between an employee of a contractor who supplies labour as part of a contract to provide electrical services and a labour hire employee supplied to a client to undertake work under the general direction of the client. The CEPU proposal would extend the application of the Electrical Modern Award beyond the provision of labour as part of a contract to provide electrical services. It would be inconsistent with the general view, which we accept, that labour hire or on-hire employers and their employees should be covered by the award covering the host employer to whom the employees are on-hired and that most modern awards should have a provision in the coverage clause to that effect.

126 The orders to give effect to this decision in relation to labour hire and group training organisations will be issued in due course. The application of the labour hire/on-hire model provisions to modern awards is contained in Attachment D. The application of the group training model provisions to modern awards is contained in Attachment E.

Legal services

Legal Services Award 2010

127 Since the exposure draft was published there have been significant submissions on four main issues. The issues are:

- the extent of the coverage of the proposed award: in this connection submissions were made on the need or otherwise to cover solicitors admitted to practice as well as law graduates who are undertaking a period of training;
- the classification structure and rates;
- an exemption rate for clerical and administrative employees together with a more flexible hours regime for law graduates if they are to be included; and
- hours of work.

128 There were other ancillary matters to which we have also given our attention. Turning to the first matter, we have decided to include law graduates but not solicitors admitted to practice. Consistent with our earlier views we have not found that there is widespread coverage of solicitors but there is of law graduates. Those seeking coverage appear to be concerned about wage rates and hours of work. Wage rates will be influenced by our decision in relation to coverage of law graduates and the NES deals with maximum weekly hours of work and provides for additional hours provided they are reasonable.

129 As to the classification structure, we have simplified the structure in the exposure draft and removed the previously proposed highest rate. However we have retained the position of law clerk as we see that it may have some work to do in the manner described in the classification definitions. The extent of its use will be determined by how the employer seeks to manage the work. We have not made any other changes in the classification structure or minimum wages.

130 Some submissions sought greater flexibility in working patterns for clerical and administrative employees and law graduates. Submissions were put that there should be an exemption rate for clerical and administrative employees and that the approach adopted in relation to ordinary hours of work in the Professional Employees Award should be adopted in this award. Following our

decision to vary the Clerks Modern Award we have decided to insert an annualised salaries clause for both clerical and administrative employees and law graduates.

131 Finally, we turn to hours of work. We have again examined the various relevant awards and have decided to retain the terms of the exposure draft.

Local government administration

Local Government Industry Award 2010

132 We have proceeded on the basis that the legislative scheme and Constitutional considerations mean that the coverage of the *Local Government Industry Award 2010* (Local Government Award) be limited to the following:

- local government in the Northern Territory;
- local government entities that are constitutional (trading) corporations; and
- constitutional (trading) corporations that are controlled by one or more local government entities.

133 We note that local government entities are "national system employers" in the Northern Territory through the Fair Work Act's reliance on the Territories power in s 122 of the *Constitution*[36] and, moreover, that the relevant pre-reform awards covering local government in the Northern Territory are not enterprise awards. Employers in the other two categories are "national system employers" by virtue of their status as constitutional corporations.

We have previously expressed the view, by reference to the decision of Spender J in *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council*[37] (*Etheridge Shire Council*), that a "typical" local council is unlikely to be a constitutional corporation such that only a limited number of local government entities will fall into the second of the three categories identified above. We received submissions suggesting that the council the subject of Spender J's decision was not a "typical" local council. That may be so, however, our view was based on the proposition that if the reasoning in Etheridge Shire Council is correct then such reasoning will mean that a "typical" local council is not a constitutional corporation. It is possible that some of the uncertainty may be removed by legislative means or further judicial decisions.

134 We note further that where a State refers power to the Australian Government for the purpose of participating in the national system, the referring State can choose not to refer power in relation to local government. More importantly for present purposes, if power in relation to local government is referred, it would seem that local government entities in the State concerned that are not constitutional corporations will, to the extent that they are already covered by a federal award, be covered by the State reference public sector transitional award modernisation process in Sch 6A of the Transitional Act rather than the current process under Pt 10A of the WR Act. This would seem to be so in relation to local government entities in Victoria.

135 On the other hand, the major parties appear to accept that, over time, the practical effect of the making of a modern award for local government will be

36 It may be noted that there is no system of local government in the ACT.

37 *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* (2008) 171 FCR 102; 175 IR 383.

that the terms of that modern award will come to determine the award safety net in a growing proportion of the local government industry as we have defined it.

136 A number of submissions were received in relation to the coverage clause, cl.4.2 and, in particular, in relation to the inclusions of corporations "owned or controlled" by one or more local government entities. We have come to the view that ownership is an unnecessary criterion because, in a practical sense, it adds nothing useful to the criterion of control. We have adjusted cl.4.2 to extend the coverage of the modern award to corporations that are "controlled" by one or more local government entities. The Local Government Associations (LGAs) proposed an amendment that would have defined "control" by reference to s 50AA of the *Corporations Act 2001* (Cth). Not all of the criteria in s 50AA are necessary or appropriate to the notion of control in the context of the coverage clause in this modern award. Therefore we have included a definition of control that adopts the key criterion in s 50AA.

137 We understand that as a consequence of the approach we have taken to cl.4.2 the Tasmanian water authorities will not be covered by the Local Government Award but rather will be covered by the *Water Industry Award 2010*. It was submitted on their behalf that each of those water authorities is owned by a number of local government entities but, by virtue of peculiar arrangements, not controlled by those local government entities in the relevant sense.

138 The LGAs and the ASU reached agreement in relation to a substantial number of changes to the exposure draft and we have generally adopted those agreed changes. We have not included an agreed clause in relation to abandonment of employment because we are inclined to think that there is no power to include a clause on that matter and modern awards generally do not deal with that issue.

139 In a late submission, the ASU expressed support for coverage of "local government fitness industry contractors" under the proposed *Fitness Industry Award 2010* and suggested that an appropriate exclusion be included in the list of exclusions in cl.4.3 of this award. There was insufficient material or argument in relation to that proposal and we are not inclined to accede to it at this stage. Moreover, we note that contractors that are not controlled by one or more local government entities will not be covered by the Local Government Award in any event: a contractor will not be covered by this award merely because it is performing work under a contract with a local government entity.

140 In relation to classifications, several parties, including the ASU, made submissions seeking the inclusion of service increments within particular classification bands. There is a tension between increments based exclusively on length of service and the concept of a modern award safety net and, generally speaking, such increments are not appropriate for inclusion in a modern award that must be a safety net. We are not persuaded that we should alter the classification structure in the exposure draft by the addition of service increments or by the addition of increments that are in substance new and additional classifications. We have changed the classification titles from "Bands" to "Levels".

141 We again note that the classification definitions and wage rates included in the exposure draft were agreed by the LGAs and the ASU. The ASU subsequently made submissions to the effect that the classification descriptions introduced managerial and supervisory responsibilities at too low a level and were excessive at subsequent levels. The ASU and APESMA also submitted that

the classification descriptions in so far as they applied to professional employees introduced managerial functions at too low a level and otherwise needed adjustment to bring them into line with the responsibilities and rates in the Professional Employees Award. We have decided not to vary the classification definitions in the lower bands as sought by the ASU. We have, however, introduced a leading hand allowance that is applicable to employees in Levels 3, 4 and 5. We note that Level 4 is the entry level rate for a tradesperson and that tradespersons entering at this level should receive the C10 rate (the minimum rate for Level 4) in the absence of any supervisory responsibility. If such employees are given supervisory responsibilities it is appropriate that they receive a leading hand allowance. We think it appropriate that such an allowance also apply to Level 3 employees and also to Level 5 employees (who "may" lead large groups of employees at the "work face"). Above Level 5, supervisory functions are comprehended by the minimum wages for those classifications.

142 In relation to allowances, the main area of contention concerned the adverse working conditions allowance and, in particular, the rates and eligibility criteria for the three levels of that allowance. (We note that the rate in the exposure draft for Level 3 working conditions was an error.) The LGAs support a rate of 50% for Level 3 working conditions and the ASU seeks a rate of 100%. The rate for Level 3 is much greater than the rates for Level 1 and Level 2 working conditions because the working conditions covered by Level 3 are extremely obnoxious and involve working in sewerage. We agree with the ASU submission that most of the main awards and NAPSAs contain an allowance at a rate of 100% for working in such conditions. We have adopted that rate. We were also persuaded by the ASU submissions that the rates for Level 1 and Level 2 working conditions were too low. Rather than introduce an additional industry allowance as proposed by the ASU, we have increased the rates for Level 1 and Level 2 adverse working conditions to a level that we regard as appropriate.

143 Hours of work and rostering is the area that caused us greatest difficulty. The exposure draft contained a set of provisions based on a draft award proposed by the LGAs. Those provisions are unusual in a number of respects. We note in particular a continuing reservation about the extent of the areas in which ordinary hours can be worked Monday to Sunday. The ASU sought the replacement of that entire section with a more conventional set of clauses. Not without some hesitation, we have decided to retain the approach in the exposure draft. The industry of local government, as we have defined it, covers a vast array of activities. It is apparent that the LGAs worked hard to craft a set of clauses that would provide the flexibility reasonably required in an area such as local government. There is no suggestion that the LGAs' intent was to prejudice employees. On the contrary, it is apparent that the LGAs have made a genuine attempt to propose a reasonable solution to a very difficult problem. Generally speaking, the ASU has not detailed how particular groups or classes of employees will be prejudiced by the approach in the exposure draft. On the other hand, we have very little information on how the clauses proposed by the ASU would impact on employees in different parts of Australia. The great variation in terms and conditions in the relevant awards and NAPSAs makes that assessment exceptionally difficult without the assistance of industry parties. Nothing we have said should be taken as a criticism of the ASU. We appreciate

that the ASU, like other parties with an interest in a number of industries in the current process, has had its resources stretched in endeavouring to make extensive submissions in those industries. This aspect of the modern award can be revisited at a suitable time, perhaps in the context of an application to vary the award. The position of employees is largely protected for the time being by the standard transitional provisions.

144 In relation to personal/carer's leave and community service leave we have not accepted some of the agreed changes to those clauses. For reasons that we have explained elsewhere we now do not regard it as appropriate to supplement personal/carer's leave or to provide for entitlements in relation to jury service that exceed those in the NES unless there are special circumstances.

Mannequins and modelling industry

Mannequins and Models Award 2010

145 Since the publication of the exposure draft the only submissions received have been from the LHMU. It drew our attention to a number of alterations which did not change the meaning of the proposed award but better expressed the terms. However there was one proposed change which we have not adopted. In two areas it was proposed that the word "casual" be deleted without any corresponding submission as to the impact of the proposed change on minimum wages rates. We are not inclined to take this step without a full examination of its impact in relation to the minimum wages contained in the award.

Miscellaneous award

Miscellaneous Award 2010

146 The principal issue in relation to the *Miscellaneous Award 2010* (Miscellaneous Award) is its coverage. The relevant paragraph of the consolidated request reads:

> 4A. The Commission is to create a modern award to cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards (including State awards). The Commission is to identify this award as such. This modern award is not to cover those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have not traditionally been covered by awards. The modern award may deal with the full range of matters able to be dealt with by any modern award however the Commission must ensure that the award deals with minimum wages and meal breaks and any necessary ancillary or incidental provisions about NES entitlements.

147 Paragraph 2 of the consolidated request contains a number of principles or guidelines which are relevant. We note in particular paragraph 2(a):

> 2. The creation of modern awards is not intended to:
>
> (a) extend award coverage to those classes of employees, such as managerial employees, who, because of the nature or seniority of their role, have traditionally been award free. This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;

…

148 Several parties also drew our attention to s 143(7) of the *Fair Work Act*:

> 143 Coverage terms
>
> Employees not traditionally covered by awards etc.
>
> …
>
> (7) A modern award must not be expressed to cover classes of employees:
>
> (a) who, because of the nature or seniority of their role, have traditionally not been covered by awards (whether made under laws of the Commonwealth or the States); or
>
> (b) who perform work that is not of a similar nature to work that has traditionally been regulated by such awards.

149 Although s 143(7) does not come into operation until 1 January 2010 it is clearly relevant to the coverage of modern awards generally and the coverage of the Miscellaneous Award in particular. Common to all of the provisions we have set out is the requirement that awards should not cover employees who because of the nature or seniority of their roles have traditionally not been covered by awards. Many different approaches and drafting techniques were proposed to encapsulate that requirement. We note also the implication in paragraph 4A of the consolidated request that an award should be created to cover employees not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards.

150 A number of submissions canvassed the purpose or function of the award. The ACTU, for example, submitted that the functions of the award should be twofold. The first is to fill gaps in modern award coverage which became apparent during the process of setting aside award-based transitional instruments as required by the Transitional Act.[38] The second function is to provide interim coverage for emerging industries pending the making of a new modern industry award or an appropriate extension to the coverage of an existing modern award. The Australian Government took a very similar approach, while stressing the importance to the economy of ensuring that employees who have not traditionally been covered by awards remain free from modern award coverage as well. In an earlier stage in the consultations ACCI proposed that the coverage of the award should not be settled until after an audit of modern award coverage to ascertain what if any gaps there are by comparison with the existing pattern of federal and state award coverage. AiGroup and ACCI both suggested that the award be limited to employees covered by a federal or state award or a Notional Agreement Preserving a State Award (NAPSA). AiGroup proposed in addition that industries and employers could be specified in a list attached to the award to permit new industries and employers to be added as necessary.

151 Almost without exception employer representatives criticised the breadth of coverage in the exposure draft. They suggested that employees who have traditionally been excluded from award coverage, particularly professional and managerial employees, would be covered, including those deliberately excluded from modern award coverage in earlier stages of the modernisation process.

152 We have considered all of the submissions and decided to include an additional paragraph in the coverage clause which more closely reflects the

38 See: Schedule 5, item 3 of the Transitional Act.

terms of the consolidated request and the Fair Work Act. The paragraph also contains some greater definition of the types of employees excluded. It reads:

> 4.2 The award does not cover those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards including managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.

153 We deal now with conditions of employment. Our approach to conditions of employment is influenced by the nature of the award's coverage. We agree with those who have suggested that the coverage of the award is very narrow and likely to be limited in time where emerging industries are concerned or where the expansion of coverage of a modern award is involved. Accordingly we do not think the award should contain a comprehensive safety net designed for any particular occupation or industry. Rather it should contain basic conditions only, leaving room for the application of an appropriate safety net in another modern award in due course. That said, there is still room for the exercise of considerable discretion in formulating appropriate wages and conditions.

154 We have decided not to make any alteration in the part-time provisions or casual loadings, despite suggestions from employers we should do so. The part-time provision permits alteration in agreed hours by consent or by the employer on notice while maintaining the essential characteristics of part-time employment. We do not think it is appropriate to exempt casual employees from weekend and other penalties applicable to full-time employees.

155 We have made some alterations to the classification structure. Consistent with the intent of alterations in the coverage clause we have deleted the graduate level and replaced it with an advanced trades/sub-professional classification at a lower minimum wage level. We have decided not to delete the leading hand allowance. It is appropriate that leading hands, who have traditionally been covered by awards, should receive an appropriate allowance. We have included a new reimbursement allowance. The model superannuation provision has been cut down significantly in recognition of the nature of the award.

156 There were suggestions by representatives of employees and employers that we should alter the hours of work provisions in the exposure draft in a variety of ways. In the end we have decided not to make any change. The hours of work in the exposure draft properly balance the need for some basic protections for employees with a great deal of flexibility for employers.

157 In relation to the annual leave loading, we have decided to include provision for an employee to receive the pay they would have received for the period of leave if that amount is greater than the loading. We have not accepted various other proposals in relation to annual leave.

158 The Australian Government submitted that the award should include the model part-time apprentice clause resulting from the Full Bench decision in 2000.[39] We have examined the model clause. Its substantive provisions do not significantly alter the part-time provisions in the award or the model school-based apprentices provisions in Schedule D to the award. Since any other matter dealt with in the clause will be regulated by the relevant training

39 *Re Victorian Shops Interim Award 1994* (unreported, AIRCFB, S3850, 6 March 2000).

contract, we do not think it is necessary to include the model part-time apprentice clause. Should some unforeseen issues arise the matter can be revisited by application.

Maritime industry — Seagoing

Seagoing Industry Award 2010

159 An award for the seagoing industry was originally a matter to be dealt with in Stage 3 of the award modernisation process. In June 2009, the Minister advised that new regulations were to be made extending the application of the Fair Work Act to ships which had been granted a permit under the *Navigation Act 1912* (Cth). Those regulations were made in August 2009. On 17 August 2009 the Minister varied the consolidated request to include the following:

> Maritime Industry
>
> 47. When creating a modern award covering the maritime industry, the Commission should ensure that the modern award covers employers on licensed, permit or majority Australian crewed shops (as defined in item 1 of Schedule 2 to the *Fair Work Amendment Regulations 2009* (No.1)) and their employees.
> 48. The Commission should give consideration to the circumstances and needs of the employers and employees in the areas described in these regulations.
> 49. As well as giving consideration to the modern awards objective in s 576A of Part 10A of the *Workplace Relations Act 1996*, the other terms of this award modernisation request and the NES, the Commission should consider whether it is appropriate to establish award provisions for employers of the crews of permit ships and their employees relating to accrued entitlements and associated arrangements. In considering this matter, the Commission should have regard to the needs of those employers and employees who may be in Australia for relatively short period or who are regularly moving in and out of the Australian jurisdiction.

160 In light of these developments the Commission considered it appropriate to provide interested parties with an opportunity for further consultation and that the modern award for the seagoing industry would be considered in Stage 4 of the award modernisation process, rather than in Stage 3 as originally planned. We were subsequently informed that on 26 October 2009 the Minister indicated that relevant amendments were to be made to the *Fair Work Regulations 2009* (Cth). Those regulations, we were told, would deal with the circumstances in which a vessel which has been granted a permit, whether a single voyage or continuing one, would come within the scope of the *Fair Work Act*.

161 With our statement of 25 September 2009 we published an exposure draft of a seagoing award. We addressed the issue of award coverage of permit ships and made a provisional decision to deal with such ships in Part B of the modern award. Our decision included the following:

> [155] Conscious of the variation to the consolidated request we have decided to divide the award into Part A and Part B. We have tentatively described Part A as applying to non-permit vessels, which are essentially the respondents to the existing award. Part B will apply to permit vessels.
>
> [156] The specific provisions applicable to Part B vessels will also require substantial consideration. While we will be better informed by the further submissions of interested parties, including in the public consultations in

> October 2009, our preliminary view is that Part B conditions will need to pay due regard to conditions applying internationally, including what has been referred to as the ITF agreement. We also note that cll.28 to 35 of the consolidated request govern the manner in which modern award provisions can interact with the NES. Proposals which relate to the effect of the NES on crew covered by Part B of the modern award will need to be framed with those provisions in mind.

162 The lack of certainty as to the applicable legislation has resulted in some difficulties for the parties in putting submissions to us. Indeed, some parties pressed us not make any award until the intention of the Parliament is clear.

163 Several employer groups have submitted that conditions of employment for some or all permit ships should reflect those found in what are termed ITF (International Transport Federation) agreements. We understand that there is no single ITF agreement. There is a range of different standard instruments, which are adopted or modified in agreements applying to a particular enterprise. It was said that there are currently 6500 agreements based on ITF instruments. Not surprisingly, given the fluidity of the legislative environment in which they found themselves, no party provided a specific set of conditions that could apply as Part B.

164 We have also noted that the unions oppose any differentiation of provision between vessels. Their position is said to be strengthened by the proposed regulations which, if made, will point to the Parliaments' intention that certain types of permit vessels should have the same conditions applied to them as apply to licensed and majority Australian-crewed ships.

165 We have decided, for now, to maintain two parts to the award. Part A will apply to all ships other than those operating under a permit and remains unchanged from the exposure draft. Part B will apply to ships operating under the permit system. In all of the circumstances we are not able to make an award that would establish a final set of appropriate conditions for foreign ships operating under the permit system. Notwithstanding the limitations in the material before us we have decided to include some basic conditions in Part B which we consider are consistent with some accepted standards in ITF agreements and which are capable of ready application to permit ships.

166 In respect of minimum wages we have set them out as weekly rates and utilised the broad methodology which was used in the award simplification process. We regard the integrated rating as the key classification and we have then maintained established relativities.

167 We are conscious that the provisions in Part B have been formulated while the legislative arrangements in relation to permit vessels have not been finalised and, as described earlier, for various reasons there has not been comprehensive consultation or debate on critical issues. For these reasons we have decided that while the modern award will commence on 1 January 2010, Part B will not come into operation until 1 January 2011.

168 An additional reason for caution is that permit ships have hitherto never been subject to Australian industrial regulation.

169 Finally, we observe that Fair Work Australia will have the power to vary the award to achieve the modern awards objective. The delayed operative date in relation to permit vessels will provide an opportunity for interested parties to better inform Fair Work Australia in this regard. In relation to Part A of the

modern award, it must be said that the circumstances attending the making of the award have not been ideal and it is likely that in due course the terms of Part A will also require review.

Real estate industry

Real Estate Industry Award 2010

170 In the statement which accompanied the exposure draft of this industry award we indicated that our provisional view was that the coverage of the award should not extend to clerks and that those employees should be covered by the Clerks Modern Award. We referred to the current award regulation around Australia of clerks employed in this industry and noted that it was only in New South Wales and Tasmania where there was any real estate specific awards covering clerks. We now confirm our provisional view there being no submissions made which persuade us that clerical classifications should be contained in this award. The issue which was addressed in some detail in submissions, particularly those made by organisations representing New South Wales employers, concerned whether there should be any special provision for them in the Clerks Modern Award. The ASU opposes any special accommodation being provided and submits the model transitional provisions in the Clerks Modern Award are adequate.

171 We have considered the lesser penalties payable in the two relevant NAPSAs covering clerks in real estate offices and the comparable rates in the Clerks Modern Award. We have also considered the flexibility provisions in the latter award which would be capable of accommodating the need for weekend work to be performed. We have not been persuaded to make any of the variations to the Clerks Modern Award sought by the employers. In our opinion the model transitional provisions and the flexibilities that are contained in that award provide the minimum safety net entitlements of these employees. It would not be fair to allow further reductions in those entitlements on either a permanent or a transitional basis.

172 We have decided that strata and community title management (however that activity is described around Australia) should be covered by this award and those activities are contained in the definition of "real estate industry". As a consequence we have amended the provisions of cl.14 and Schedule B to provide for strata/community title employees.

173 In our statement of 25 September 2009 we raised concerns about the wage rate for property sales associates.[40] The rates for that classification now have 2 levels. They are referable to the first six months of employment in the classification and thereafter.

174 We now turn to cl.16.2 which deals with commission only employment. The employers want casual employees to be able to be paid on a commission only basis. Casual employees were excluded from the relevant Australian Fair Pay Commission pay scale and nothing that was submitted persuades us to include them in this method of remuneration. This is a matter which may be revisited in any forthcoming review of this award.

175 We have adopted the parties agreed definition of full rate of pay and it is now contained in cl.17.5(d). We turn to the model transitional provisions. As the

40 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23 at [174].

exposure draft reflected numerous transitional provisions in the body of the award which the parties had agreed we asked if they also wanted the model phasing provisions. We were advised that they do; they are now in Schedule A to the award.

176 We received a late submission from Real Estate Employers Federation of South Australia asking us to again consider the inclusion of an annualised salary provision in this award. Reliance was placed on the recent decision in respect of the Clerks Modern Award and the annualised salary provision that is to be inserted into that award. The provisions of existing awards in that occupational calling and the specific paragraph of the consolidated request there considered are not applicable to this industry award. We do not propose to revisit this matter at this stage. In the statement which accompanied the exposure draft of this award we observed that this award contained few, if any, overtime and penalty provisions that are commonly compensated for by an annualised salary. This matter can be considered again at the two yearly review of this award when submissions and evidence about the need for such a clause may be addressed.[41]

Restaurant and Catering industry

Restaurant Industry Award 2010

177 For the purposes of this section of our decision, we have referred to existing instruments in the abbreviated form recorded in our statement of 25 September 2009.[42]

178 The submissions put following the publication of the exposure draft to a significant degree reflected positions advanced in the pre-exposure draft consultations, which we considered in formulating the exposure draft and addressed in our statement of 25 September 2009. We have closely considered the further submissions put to us since the publication of the exposure draft but have not been persuaded to depart from the position reflected in the exposure draft and the reasons given in our statement, except as indicated below.

179 A major issue which arose in the post-exposure draft consultations concerned the coverage of the catering industry. Restaurant and Catering Australia (RCA) and AFEI argued that the catering industry generally should form part of the restaurant award, rather then the *Hospitality Industry (General) Award 2010*[43] (Hospitality Award), although the AFEI submission was directed to function caterers. We are not persuaded to alter the scope of the two awards, in respect of the catering industry, for the reasons given in our statement of 25 September 2009.[44] We remain of the view that the coverage in the exposure draft gives proper effect to the 28 May 2009 variation to the consolidated request.

180 Several narrow coverage issues arose in respect of the definition of restaurants in cl.2 of the exposure draft:

1. Business SA sought the deletion of "licensed" before both "café" and "roadhouses." The terms "licensed café" and "licensed roadhouses"

41 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23 at [177].

42 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23 at [181].

43 MA000009.

44 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23 at [188]-[192].

appear to have been imported from the SA Restaurant Award. No distinction based on licensing seems to appear in any other current instrument. Both the Queensland non-SEQ Restaurant Award and Tasmanian Restaurant Award refer to drink and/or food. The NSW Restaurant Award and the WA Restaurant Award contain no reference at all to liquor in their application clauses. The SEQ Restaurant Award explicitly covers licensed or unlicensed establishments. The Victorian Restaurant Award sheds no light on the issue. We will delete "licensed" before both "café" and "roadhouses".

2. Business SA sought the deletion of "tea shop" and "fish or oyster shop" which they say should fall under *General Retail Industry Award 2010* and "tent, vehicle etc selling sandwiches, hotdogs, meals" which they say should be covered by the *Fast Food Industry Award 2010*, the *General Retail Industry Award 2010* or "mobile food vending" in the *Road Transport and Distribution Award 2010*.[45] In our view, a shop selling uncooked fish would fall within the retail industry and the sale of cooked fish consumed other than at a restaurant, or food sold from a vehicle of a take-away nature would fall within the fast food industry. We will remove "fish or oyster shop" and "food sold from a vehicle" from the definition of restaurant. A tea shop retailing tea would also fall within the retail industry. We have amended the terminology in the restaurant definition to refer to a tea room.
3. The AHA argued that a "liquor booth" properly falls within the Hospitality Award, having no association with food or restaurants. We agree. We have deleted "liquor booth" from the definition of restaurant.
4. Business SA and AHA argued that nightclubs were more appropriately covered by the Hospitality Award and should be removed from the definition of restaurants. Nightclubs fall within the scope clause of the Victorian Restaurant Award. They fall within the NSW Restaurant Award if they serve food. They fall within the description of "commercial dance halls, discotheques and cabarets, entertainment lounges, and/or other places of entertainment" in the Queensland non-SEQ Restaurant Award and the description of "providing live or recorded entertainment at licensed or unlicensed venues" in the SEQ Restaurant Award. The situation in the other States is less clear. In our view, the coverage of nightclubs by the Restaurant Industry Award is consistent with current instrument coverage.
5. The AHA also raised the issue of bars, submitting that bars are more appropriately covered by the Hospitality Award. The term "bar" does not appear in the definition of restaurant in either the exposure draft or the Hospitality Award. That will be the case in the Restaurant Industry Award, with bars operated as part of a restaurant business falling within the coverage of that award and other bars being covered by the Hospitality Award.

181 The changes in the definition of restaurant will be reflected in the Hospitality Award in which the definition also appears.

182 The RCA submitted that the part-time provisions in cl.12 of the exposure draft were inflexible and should be amended to allow part-time employees to

45 MA000038.

work additional ordinary hours if they choose. The part-time provisions in cl.12 resulted from modifications made to the part-time provision in the Federal Victorian Restaurants Award. Those modifications make it clear that part-time employees may agree to work additional ordinary hours. The part-time clause modified to that effect provides appropriate flexibility and will remain in the modern restaurant award for the reasons explained in our statement of 25 September 2009.[46]

183 The RCA and AFEI proposed that the classification structure in the exposure draft, which was drawn from the Victorian Restaurant Award, should be replaced with the structure in the NSW Restaurant Award. They argued that this structure suits the industry better and that the structure in the exposure draft, coupled with the definition of "appropriate level of training" in cl.3, does not suit the operational requirements of the industry. An element of their submission was based on the rejection of a linkage between classification levels and qualifications on the basis that some qualifications may not be relevant to the work required in a restaurant. We are satisfied that the classification structure in the exposure draft should be maintained. As noted in our statement of 25 September 2009,[47] it provides a broader range of classifications relevant to the industry. We have addressed the RCA's concern about the linkage between classification levels and qualifications by altering the definition of "appropriate level of training" to refer to qualifications relevant to the classification in which an employee is employed, as proposed by the ACTU.

184 Business SA pointed to an error in relation to the split shift allowance in cl.24.2 of the exposure draft. The allowance is expressed as a percentage of the weekly, rather than hourly rate in the exposure draft. It is an error and the clause has been amended to refer to the hourly standard rate.

185 The Westscheme Superannuation Fund sought to be added to the list of default funds in cl.30. 4. It has been added.

186 The RCA sought to amend cl.31.2 to remove the obligation to provide a minimum shift of six hours in the case of part-time employees. Such an amendment is unnecessary. Clause 12.5 provides a minimum engagement for part-time employees of three consecutive hours on any shift. The RCA also sought provision for an average of 38 ordinary hours per week to be worked over six or 12 months. There is no precedent for such a long period of averaging in any relevant instrument, except in relation to seasonal employees, by agreement, under the NSW Restaurant Award. We reject the proposal.

187 The RCA reargued the position in relation to penalty rates which it had put in the pre-exposure draft consultations. That position is set out in the table at paragraph 229 of our statement of 25 September 2009. The LHMU was more particular in its approach. It sought to amend penalty payments for casual employees working on public holidays, from 150% to 175%, and to have the penalty which applies to work between 10pm and midnight commence at 8pm instead.

188 The penalty provisions generally and the two particular penalties raised by the LHMU were subject to considerable attention by us in preparing the

46 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23 at [198].

47 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23 at [209].

exposure draft. As noted in our statement of 25 September 2009,[48] these issues raise matters requiring fine judgement to be exercised in the context of a diverse range of provisions in the relevant instruments and the terms of cl.27A of the consolidated request. Nothing was put to us which indicates that we should depart from the penalty provisions in the exposure draft and we are of the view that those provisions, including the particular penalties addressed by the LHMU, should be included in the modern award. We adhere to the reasons contained in our statement of 25 September 2009.

189 The AWU continued to seek the inclusion in the modern award of provisions derived from the Queensland non-SEQ Restaurant award. Those provisions relate to Saturday penalty rates, penalty payments for working during rest breaks and the minimum period of engagement for casual employees. We have reviewed the relevant provisions and compared them with those in the exposure draft. We are satisfied that the provisions of the exposure draft are appropriate. In the circumstances provisions which are found in only one existing instrument do not provide a sound basis for altering provisions which are to apply nationally.

Salt industry

Salt Industry Award 2010

190 We have amended cl.4.2(b) in the coverage clause to reflect the wording proposed by the Australian Mines and Metals Association (AMMA) and AiGroup. We have also introduced a new clause, which will be cl.11.3, to provide a job search entitlement where the employer has given notice of termination to an employee. It is in the same terms as cl.11.3 of the *Mining Industry Award 2010*.[49]

191 We have not altered the provisions of cl.14.4 which deal with the rates to be paid to apprentices. The percentages to be paid by reference to the applicable adult weekly rate are similar to those in the Mining Industry Award and the Manufacturing Modern Award.[50] The higher percentages in the *Dampier Salt Award 2004*,[51] an enterprise NAPSA, do not justify an increase in this industry award.

192 In the statement we published with the exposure drafts we said there may be a case for an industry allowance and asked the parties to have discussions about this. No agreement was reached as to the quantum of such an allowance although it seems it is generally accepted that an industry allowance is appropriate. We have considered the parties' submissions, the industry allowances in existing awards as well as the various allowances payable for disabilities associated with work in this industry. We have decided that an allowance of 2.5% of the standard rate should be in the award.

193 We have reconsidered the existing provisions in awards which deal with the payment of overtime. Clause 23.1(a)(i) of the exposure draft provided for overtime at the rate of 50% to be paid for the first three hours worked. The unions submitted it should be for the first two hours. Examples of both

48 *Re Request from the Minister for Employment and Workplace Relations — 28 March 2008* (2009) 188 IR 23 at [234]-[236].

49 MA000011.

50 MA000010.

51 AN160096.

thresholds are in existing awards but on balance we think the weight is in favour of two hours and that is now contained in the overtime clause in the award.

194 There was an omission in cl.23.5 of the exposure draft for the penalty that would be payable to a non permanent night shift worker. The clause now provides for a penalty of 15%.

195 We next turn to the contentious issue of annualised salaries. We did not put such a clause in the exposure draft but asked the parties to have further discussions about this issue. AMMA continued to press for such a clause and submitted that annualised salaries are wide-spread in this industry and have been since the early to mid 1990s. It addressed the various advantages for employers and employees of this method of remuneration and noted that there is no evidence of any disadvantage to employees despite the many years during which this method of payment has operated. It submitted that annualised salaries are also justified by cl.33AA of the Minister's consolidated request noting the types of rosters worked by employees in the industry.

196 We accept the submissions of AMMA and, in this respect, note the unions did not identify any disadvantage to employees but submitted that as the current awards do not have annualised salaries provisions in them neither should this modern award. The patterns of work in this industry are such as to persuade us that a modern award should allow for an employee to be paid by way of an annualised salary.

197 Such a method of remuneration compliments the requirements of cl.33AA which applies to work performed in remote locations which is the case for work covered by this award. The clause we have put into the award is in the same terms as that which we have recently inserted into the Clerks Modern Award.[52] It contains a provision to safeguard against an employee being paid less that they would otherwise be entitled to be paid had they not been on annualised salary.

State and Territory government administration

State Government Agencies Administration Award 2010

198 On 9 November 2009 we published an exposure draft of a state government agencies administration award derived from a document largely agreed between Workforce Victoria and the CPSU. Since that time submissions have been received from Workforce Victoria, the CPSU, APESMA and the AMWU.

199 We have decided to make a modern award, for the most part, in the same terms as the exposure draft. A number of matters are uncontroversial. We have not been persuaded to include other proposals which did not form part of the original joint document. However, the main issue raised related to redundancy provisions.

200 Workforce Victoria argued that the modern award should not include reference to the NES for redundancy pay because of the decision of the High Court of Australia in *Re Australian Education Union; Ex parte Victoria* (*Re AEU*). [53] It also submitted that, for the same reasons, the transitional provision relating to redundancy pay should also be excluded. The CPSU rejected the submission of Workforce Victoria and submitted that the capacity of the Australian Government to regulate state agencies through the proposed award

52 *Re Australian Municipal, Administrative, Clerical and Services Union* [2009] AIRCFB 922.

53 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; 58 IR 431.

can only be determined on a case by case basis, having regard to how central its operation was to the administration functions of the state government concerned.

201 We agree with the CPSU's submission. In any proceedings to interpret or enforce the award the decision in *Re AEU* would be given full effect. We do not think that on the material before us we are able to formulate a satisfactory test for determining which, if any, corporation would fall within the exemption contemplated by the decision in *Re AEU*.

Water, sewerage and drainage services

Water Industry Award 2010

202 AFEI made a submission that there should be no award for the water industry. We disagree. This industry has a history of award regulation, including in the area of local government which historically was responsible for provision of water, sewerage and drainage services in many areas of Australia.

203 As with the exposure draft for local government, the exposure draft for the water industry was substantially based on a draft proposed by the LGAs. The LGAs noted that local government is still a significant provider of water, sewerage and drainage services and the LGAs' interest arose because they could not be sure that the Full Bench would accede to submissions that all activities of local government, including the provision of such services, would be placed within the coverage of a modern award for local government.

204 We have already addressed one aspect of coverage in this industry in our comments on the Local Government Award. Other comments we made in relation to that modern award are equally applicable to the modern award we have made for this industry, including in relation to classifications and allowances. Those comments need not be repeated here. In relation to classifications, given that this industry has gradually moved away from its local government roots, we have removed Level 11 on the basis that senior executives should not be subject to award regulation in this industry. Given the history of award coverage in this industry, we have not accepted submissions from AFEI and Veolia suggesting other limitations on coverage.

205 Local Government Water Services (LGWS) sought a minimum shift length of one hour for part-time employees. A good case for this change was made out in relation to local government. We are not so persuaded in relation to this industry. We note that the two multiple-employer pre-reform awards in Victoria have a minimum shift length of three hours. We note that cl.10.4 as it appears in the modern award will permit part-time employees to work additional ordinary hours (to a maximum of 38 hours per week) by agreement.

206 In relation to cl.19.4(a)(iv), a change suggested by Veolia, is unnecessary because the use of the word "may" confers a discretion on the employer.

207 In relation to hours of work and rostering, we have accepted an ASU submission for wholesale change of those clauses. The circumstances that justified the retention of the LGAs' approach in local government, including the extreme diversity of activities and roles, do not exist in the water industry. We have based the new clauses on the draft proposed by the ASU but with some significant changes. The clauses we have included broadly reflect common standards in relation to hours of work and rostering and ought accommodate Veolia's concerns about the 24 hours a day, seven days a week nature of

operations in this industry. In the event that an interested party is concerned that these clauses will substantially disadvantage either employers or employees, that issue can be addressed by way of a variation application.

208 There is no basis in the relevant awards and NAPSAs for the cashing out of annual leave as suggested by Veolia. We consider changes suggested by LGWS on account of the *Public and Bank Holidays Act 1972* (WA) to be unnecessary given the way in which the NES operates.

National Training Wage

209 The exposure draft of the National Training Wage Schedule has been amended to clarify its coverage.

210 Further, the employment conditions in the schedule have been amended to make it clear that time spent by a trainee, other than a trainee undertaking a school-based traineeship, in attending any training and assessment specified in, or associated with, the training contract is to be regarded as time worked for the purposes of calculating their wages and determining their conditions of employment. The appendix to the schedule which allocates traineeships to wage levels has also been updated. Two of the traineeships are only relevant in Western Australia. State based provisions of the schedule will only apply to 31 December 2014 or further order of Fair Work Australia, whichever is the earlier, due to the operation of statute.

211 We have retained a default wage rate in the schedule as we are not persuaded the application of the schedule to replacement training packages covers all those whose training package and AQF certificate level have not been allocated to a wage level by the appendix to the schedule. In the absence of a default wage rate the other minimum wages in the award would apply to such trainees. We consider the middle ranking Wage Level B in the schedule should apply as the default wage rate. We have also retained the option of a 25% loading for trainees on a school-based traineeship instead of them being provided certain paid leave having regard to the level of the casual loading and the purpose of it in modern awards.

212 We have not included the competency based wage progression provisions of the Queensland Industrial Relations Commission Order *Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) 2003* in the schedule.[54] The model transitional provisions will apply.

Conclusion

213 This decision deals with the Stage 4 modern awards, the final group of awards to be made under Pt 10A of the WR Act. The total number of modern awards is 122. Those awards will replace approximately 1560 federal and state awards. The process commenced on 28 March 2008 when the Minister signed a request to the President under s 576C(1) of the WR Act. A Full Bench was constituted in May 2008. The process has been conducted by the Full Bench with assistance from many other members of the Commission. There has been a total of around 120 days of consultations with interested parties including the consultations on the initial priority issues and transitional arrangements, pre-drafting consultations and consultations on the exposure drafts.

214 We acknowledge the contributions made by scores of people who have participated in the consultations, either in writing or personally, by formulating

54 *Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) 2003* 173 Q Gov Indus Gaz 879, pp.879-930, 11 July 2003.

and advancing proposals, draft awards and submissions. The timetable has placed significant demands on the resources of many, particularly those unions and employer representatives with interests across a number of industries. Overall the level of cooperation and assistance we have received has been of the highest order.

215 The Commission has been very well supported in relation to the research, technical and administrative aspects of the task by the staff of the Australian Industrial Registry and Fair Work Australia. The award modernisation website has played a critical role and has been the primary means of transferring and publishing information. There are over 800 separate pages on the site, including separate sections for each of the 93 industries and occupations being considered. There are currently approximately 3,500 submissions available and many other documents, including 4,700 comparative schedules of award conditions. We thank all those involved for the skill and effort they have brought to the task, in particular the Modern Awards Team and the members' associates.

Attachment A to Full Bench Decision of 4 December 2009

List of Stage 4 Modern Awards

Aboriginal Community Controlled Health Services Award 2010
Ambulance and Patient Transport Industry Award 2010
Animal Care and Veterinary Services Award 2010
Aquaculture Industry Award 2010
Car Parking Award 2010
Children's Services Award 2010
Corrections and Detention (Private Sector) Award 2010
Dry Cleaning and Laundry Industry Award 2010
Educational Services (Teachers) Award 2010 — variation only
Fire Fighting Industry Award 2010
Fitness Industry Award 2010
Funeral Industry Award 2010
Gardening and Landscaping Services Award 2010
Labour Market Assistance Industry Award 2010
Legal Services Award 2010
Local Government Industry Award 2010
Mannequins and Models Award 2010
Miscellaneous Award 2010
Pest Control Industry Award 2010
Professional Diving Industry (Industrial) Award 2010
Professional Diving Industry (Recreational) Award 2010
Real Estate Industry Award 2010
Restaurant Industry Award 2010
Salt Industry Award 2010
Seagoing Industry Award 2010
Social, Community, Home Care and Disability Services Industry Award 2010
State Government Agencies Administration Award 2010
Supported Employment Services Award 2010
Travelling Shows Award 2010
Water Industry Award 2010
National Training Wage Schedule

Attachment B to Full Bench Decision of 4 December 2009

Model Provisions

1. Labour hire/on-hire

Industry awards	Insert in definitions clause: "*on-hire* means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client." Insert in coverage clause: "This award covers any employer who supplies labour on an on-hire basis in the industry (or industries) set out in clause (clauses) xxx in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry (those industries). This sub-clause operates subject to the exclusions from coverage in this award."
Occupational awards	Insert in definitions clause: "*on-hire* means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client." Insert in coverage clause: "This award covers any employer who supplies on-hire employees in classifications set out in clause (clauses) xxx and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This sub-clause operates subject to the exclusions from coverage in this award."
Industry and occupational awards	Insert in definitions clause: "*on-hire* means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client." Insert in coverage clause: "(a) This award covers any employer who supplies labour on an on-hire basis in the industry (or industries) set out in clause (clauses) xxx in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry (those industries)." This sub-clause operates subject to the exclusions from coverage in this award.

	"(b) This award covers any employer who supplies on-hire employees in classifications set out in clause (clauses) xxx and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee. This sub-clause operates subject to the exclusions from coverage in this award."
2. Group training employers	
Industry awards	Insert in coverage clause: "This award covers employers which provide group training or related temporary employment services for apprentices and/or trainees [delete apprentices and/or trainees if not relevant to the award] engaged in the industry (or industries) and/or parts of industry set out at clause/s xx and those apprentices and/or trainees [delete apprentices and/or trainees if not relevant to the award] engaged by a group training or related temporary employment service hosted by a company to perform work at a location where the activities described herein are being performed. This sub-clause operates subject to the exclusions from coverage in this award."
Occupational awards	Insert in coverage clause: "This award covers employers which provide group training or related temporary employment services for apprentices and/or trainees [delete apprentices and/or trainees if not relevant to the award] engaged in any of the occupations set out at clause/s xx and those apprentices and/or trainees [delete apprentices and/or trainees if not relevant to the award] engaged by a group training or related temporary employment service hosted by a company to perform work at a location where the activities described herein are being performed. This sub-clause operates subject to the exclusions from coverage in this award."
Industry and occupational awards	Insert in coverage clause:

"This award covers employers which provide group training services for apprentices and/or trainees [delete apprentices and/or trainees if not relevant to the award] engaged in the industry (or industries), parts of industry and/or occupations set out at clause/s xx and those apprentices and/or trainees [delete apprentices and/or trainees if not relevant to the award] engaged by a group training service hosted by a company to perform work at a location where the activities described herein are being performed. This sub-clause operates subject to the exclusions from coverage in this award."

Attachment C to Full Bench Decision of 4 December 2009

Particular Provisions

Manufacturing and Associated Industries and Occupations Award 2010

Insert in definitions clause:

> *on-hire* means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client.

Insert in coverage clause:

(a) This award covers any employer which supplies labour on an on-hire basis in the industry (or industries) set out in sub-clause 4.2(a) or (b) in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry (those industries).

(b) This award covers any employer which supplies on-hire employees in occupations set out in sub-clause 4.2(c) covered by classifications in this award and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee.

(c) This sub-clause operates subject to the exclusions from coverage in this award.

Joinery and Building Trades Award 2010

Insert in definitions clause:

> *on-hire* means the on-hire of an employee by their employer to a client, where such employee works under the general guidance and instruction of the client or a representative of the client.

Insert in coverage clause:

(a) This award covers any employer which supplies labour on an on-hire basis in the industry (or industries) set out in sub-clause 4.2(a) in respect of on-hire employees in classifications covered by this award, and those on-hire employees, while engaged in the performance of work for a business in that industry (those industries).

(b) This award covers any employer which supplies on-hire employees in occupations set out in sub-clause 4.2(b)covered by classifications in this

award and those on-hire employees, if the employer is not covered by another modern award containing a classification which is more appropriate to the work performed by the employee.

(c) This sub-clause operates subject to the exclusions from coverage in this award.

Attachment D to Full Bench Decision of 4 December 2009

Labour hire/on-hire provision — application to modern awards

Modern Awards which do not require any variation

- *Aluminium Industry Award 2010*
- *Black Coal Mining Industry Award 2010*
- *Contract Call Centres Award 2010*
- *Electrical Power Industry Award 2010*
- *Fire Fighting Industry Award 2010*
- *Hydrocarbons Industry (Upstream) Award 2010*
- *Mining Industry Award 2010*
- *Salt Industry Award 2010*
- *Telecommunications Services Award 2010*

Occupational awards

- *Air Pilots Award 2010*
- *Aircraft Cabin Crew Award 2010*
- *Architects Award 2010*
- *Clerks — Private Sector Award 2010*
- *Commercial Sales Award 2010*
- *Hydrocarbon Field Geologists Award 2010*
- *Mannequins and Models Award 2010*
- *Medical Practitioners Award 2010*
- *Miscellaneous Award 2010*
- *Nurses Award 2010*
- *Surveying Award 2010*

Industry awards

- *Aboriginal Community Controlled Health Services Award 2010*
- *Aged Care Award 2010*
- *Airline Operations Ground Staff Award 2010*
- *Airport Employees Award 2010*
- *Alpine Resorts Award 2010*
- *Ambulance and Patient Transport Industry Award 2010*
- *Amusement, Events and Recreation Award 2010*
- *Animal Care and Veterinary Services Award 2010*
- *Aquaculture Industry Award 2010*
- *Asphalt Industry Award 2010*
- *Banking, Finance and Insurance Award 2010*
- *Book Industry Award 2010*
- *Broadcasting and Recorded Entertainment Award 2010*
- *Building and Construction General On-site Award 2010*
- *Business Equipment Industry Award 2010*
- *Car Parking Award 2010*

- *Cement and Lime Award 2010*
- *Cemetery Industry Award 2010*
- *Children's Services Award 2010*
- *Cleaning Services Industry Award 2010*
- *Coal Export Terminals Award 2010*
- *Concrete Products Award 2010*
- *Corrections and Detention (Private Sector) Award 2010*
- *Cotton Ginning Award 2010*
- *Dredging Industry Award 2010*
- *Dry Cleaning and Laundry Industry Award 2010*
- *Educational Services (Post-Secondary Education) Award 2010*
- *Educational Services (Schools) General Staff Award 2010*
- *Educational Services (Teachers) Award 2010*
- *Electrical, Electronic and Communications Contracting Award 2010*
- *Fast Food Industry Award 2010*
- *Fitness Industry Award 2010*
- *Food, Beverage and Tobacco Manufacturing Award 2010*
- *Funeral Industry Award 2010*
- *Gardening and Landscaping Services Award 2010*
- *Gas Industry Award 2010*
- *General Retail Industry Award 2010*
- *Hair and Beauty Industry Award 2010*
- *Higher Education Industry — Academic Staff — Award 2010*
- *Higher Education Industry — General Staff — Award 2010*
- *Horse and Greyhound Training Award 2010*
- *Horticulture Award 2010*
- *Hospitality Industry (General) Award 2010*
- *Journalists Published Media Award 2010*
- *Labour Market Assistance Industry Award 2010*
- *Legal Services Award 2010*
- *Live Performance Award 2010*
- *Local Government Industry Award 2010*
- *Market and Social Research Award 2010*
- *Marine Tourism and Charter Vessels Award 2010*
- *Marine Towage Award 2010*
- *Maritime Offshore Oil and Gas Award 2010*
- *Meat Industry Award 2010*
- *Mobile Crane Hiring Award 2010*
- *Nursery Award 2010*
- *Oil Refining and Manufacturing Award 2010*
- *Passenger Vehicle Transportation Award 2010*
- *Pastoral Award 2010*
- *Pest Control Industry Award 2010*
- *Pharmaceutical Industry Award 2010*
- *Pharmacy Industry Award 2010*
- *Port Authorities Award 2010*

- *Ports, Harbours and Enclosed Water Vessels Award 2010*
- *Poultry Processing Award 2010*
- *Premixed Concrete Award 2010*
- *Professional Diving Industry (Industrial) Award 2010*
- *Professional Diving Industry (Recreational) Award 2010*
- *Quarrying Award 2010*
- *Racing Clubs Events Award 2010*
- *Racing Industry Ground Maintenance Award 2010*
- *Rail Industry Award 2010*
- *Real Estate Industry Award 2010*
- *Registered and Licensed Clubs Award 2010*
- *Restaurant Industry Award 2010*
- *Road Transport and Distribution Award 2010*
- *Road Transport (Long Distance Operations) Award 2010*
- *Seafood Processing Award 2010*
- *Seagoing Industry Award 2010*
- *Security Services Industry Award 2010*
- *Silviculture Award 2010*
- *Social, Community, Home Care and Disability Services Industry Award 2010*
- *Sporting Organisations Award 2010*
- *State Government Agencies Administration Award 2010*
- *Stevedoring Industry Award 2010*
- *Storage Services and Wholesale Award 2010*
- *Supported Employment Services Award 2010*
- *Sugar Industry Award 2010*
- *Textile, Clothing, Footwear and Associated Industries Award 2010*
- *Timber Industry Award 2010*
- *Transport (Cash in Transit) Award 2010*
- *Travelling Shows Award 2010*
- *Vehicle Manufacturing, Repair, Services and Retail Award 2010*
- *Waste Management Award 2010*
- *Water Industry Award 2010*
- *Wine Industry Award 2010*
- *Wool Storage, Sampling and Testing Award 2010*

Occupational and Industry Coverage

- *Graphic Arts, Printing and Publishing Award 2010*
- *Health Professionals and Support Services Award 2010*
- *Plumbing and Fire Sprinklers Award 2010*
- *Professional Employees Award 2010*

Attachment E to Full Bench Decision of 4 December 2009

Group training organisations — application to modern awards

1. Modern awards to contain the model group training provision:

- *Airline Operations—Ground Staff Award 2010*
- *Airport Employees Award 2010*

- *Alpine Resorts Award 2010*
- *Aluminium Industry Award 2010*
- *Amusement, Events and Recreation Award 2010*
- *Black Coal Mining Industry Award 2010*
- *Building and Construction General On-site Award 2010*
- *Business Equipment Award 2010*
- *Cemetery Industry Award 2010*
- *Children's Services Award 2010*
- *Coal Export Terminals Award 2010*
- *Contract Call Centres Award 2010*
- *Dry Cleaning and Laundry Industry Award 2010*
- *Educational Services (Schools) General Staff Award 2010*
- *Electrical, Electronic and Communications Contracting Award 2010*
- *Electrical Power Industry Award 2010*
- *Food, Beverage and Tobacco Manufacturing Award 2010*
- *Gardening and Landscaping Services Award 2010*
- *Gas Industry Award 2010*
- *General Retail Industry Award 2010*
- *Graphic Arts, Printing and Publishing Award 2010*
- *Hair and Beauty Industry Award 2010*
- *Hospitality Industry (General) Award 2010*
- *Hydrocarbons Industry (Upstream) Award 2010*
- *Joinery and Building Trades Award 2010*
- *Local Government Industry Award 2010*
- *Manufacturing and Associated Industries and Occupations Award 2010*
- *Meat Industry Award 2010*
- *Mining Industry Award 2010*
- *Miscellaneous Award 2010*
- *Nursery Award 2010*
- *Oil Refining and Manufacturing Award 2010*
- *Plumbing and Fire Sprinklers Award 2010*
- *Port Authorities Award 2010*
- *Racing Industry Ground Maintenance Award 2010*
- *Rail Industry Award 2010*
- *Registered and Licensed Clubs Award 2010*
- *Restaurant Industry Award 2010*
- *Salt Industry Award 2010*
- *Stevedoring Industry Award 2010*
- *Sugar Industry Award 2010*
- *Telecommunications Services Award 2010*
- *Textile, Clothing, Footwear and Associated Industries Award 2010*
- *Timber Industry Award 2010*
- *Vehicle Manufacturing, Repair, Services and Retail Award 2010*
- *Water Industry Award 2010*
- *Wine Industry Award 2010*

2. Modern awards to contain the model group training provision without the reference to trainees:

Nil

3. Modern awards to contain the model group training provision without the reference to apprentices:

- *Aboriginal Community Controlled Health Services Award 2010*
- *Aged Care Award 2010*
- *Animal Care and Veterinary Services Award 2010*
- *Aquaculture Industry Award 2010*
- *Asphalt Industry Award 2010*
- *Banking, Finance and Insurance Award 2010*
- *Broadcasting and Recorded Entertainment Award 2010*
- *Car Parking Award 2010*
- *Cement and Lime Award 2010*
- *Cleaning Services Award 2010*
- *Clerks—Private Sector Award 2010*
- *Commercial Sales Award 2010*
- *Concrete Products Award 2010*
- *Corrections and Detention (Private Sector) Award 2010*
- *Cotton Ginning Award 2010*
- *Dredging Industry Award 2010*
- *Educational Services (Post-Secondary Education) Award 2010*
- *Fast Food Industry Award 2010*
- *Fitness Industry Award 2010*
- *Funeral Industry Award 2010*
- *Health Professionals and Support Services Award 2010*
- *Horse and Greyhound Training Award 2010*
- *Horticulture Award 2010*
- *Legal Services Award 2010*
- *Live Performance Award 2010*
- *Market and Social Research Award 2010*
- *Marine Tourism and Charter Vessels Award 2010*
- *Maritime Offshore Oil and Gas Award 2010*
- *Mobile Crane Hiring Award 2010*
- *Passenger Vehicle Transportation Award 2010*
- *Pastoral Award 2010*
- *Pest Control Industry Award 2010*
- *Pharmaceutical Industry Award 2010*
- *Pharmacy Industry Award 2010*
- *Poultry Processing Award 2010*
- *Premixed Concrete Award 2010*
- *Quarrying Award 2010*
- *Racing Clubs Events Award 2010*
- *Real Estate Industry Award 2010*
- *Road Transport and Distribution Award 2010*
- *Road Transport (Long Distance Operations) Award 2010*

- *Seafood Processing Award 2010*
- *Seagoing Industry Award 2010*
- *Silviculture Award 2010*
- *Sporting Organisations Award 2010*
- *State Government Agencies Administration Award 2010*
- *Storage Services and Wholesale Award 2010*
- *Transport (Cash in Transit) Award 2010*
- *Travelling Shows Award 2010*
- *Waste Management Award 2010*
- *Wool Storage, Sampling and Testing Award 2010*

4. Modern awards in which no group training provision is required:

- *Aircraft Cabin Crew Award 2010*
- *Air Pilots Award 2010*
- *Ambulance and Patient Transport Industry Award 2010*
- *Architects Award 2010*
- *Book Industry Award 2010*
- *Educational Services (Teachers) Award 2010*
- *Labour Market Assistance Industry Award 2010*
- *Fire Fighting Industry Award 2010*
- *Higher Education Industry—Academic Staff—Award 2010*
- *Higher Education Industry—General Staff—Award 2010*
- *Hydrocarbons Field Geologists Award 2010*
- *Journalists Published Media Award 2010*
- *Marine Towage Award 2010*
- *Medical Practitioners Award 2010*
- *Mannequins and Models Award 2010*
- *Nurses Award 2010*
- *Ports, Harbours and Enclosed Water Vessels Award 2010*
- *Professional Diving Industry (Industrial) Award 2010*
- *Professional Diving Industry (Recreational) Award 2010*
- *Professional Employees Award 2010*
- *Security Services Industry Award 2010*
- *Social, Community, Home Care and Disability Services Industry Award 2010*
- *Supported Employment Services Award 2010*
- *Surveying Award 2010*

PAUL C MOORHOUSE

FAIR WORK COMMISSION

Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010

[2018] FWCFB 7621

Hatcher VP, Dean DP and Spencer C

7-11 May, 14 December 2018

Awards — 4 yearly review of modern awards — Pharmacy Industry Award 2010 — Minimum wages variation — New classification of "Accredited Pharmacist" sought — Assessment of work value — Whether increase in educational, training and registration requirements — Whether new types of work introduced required additional skills — Whether new types of work resulted in increase in responsibility and accountability — Whether overall increase in workload, pressure and performance — Impact of changes in government policies — Whether flat-dollar increases to award wages had eroded basis upon which work value of pharmacists originally assessed — Fair Work Act 2009 (Cth), ss 134, 135, 138, 156, 284.

Words and Phrases — "Related to" — Fair Work Act 2009 (Cth), s 156(4).

Words and Phrases — "Work value reasons" — Fair Work Act 2009 (Cth), s 156(4).

The Association of Professional Engineers, Scientists and Managers, Australia (the APESMA) made a claim for the variation of the *Pharmacy Industry Award 2010* (the Pharmacy Award) under s 156(3) of the *Fair Work Act 2009* (Cth) (the Act). Section 156(3) of the Act permits the variation by the Fair Work Commission (the Commission) of the minimum wages prescribed in a modern award where it is satisfied that this is justified for work value reasons.

The APESMA's primary claim was for the minimum wages in the Pharmacy Award to be increased by an amount necessary to restore what was said to be the proper relativity with the C10 classification rate now found in the *Manufacturing and Associated Industries and Occupations Award 2010* (the Manufacturing Award) because that was the basis upon which the work value of pharmacists was fixed when the *Community Pharmacy Award* was made in 1998. In the alternative, the APESMA sought a 25% increase to all wage rates in the Pharmacy Award. Both as part of its primary and alternative claims, the APESMA also sought a new classification of "Accredited Pharmacist", to be defined as "a pharmacist who is the holder of an Accredited Pharmacist qualification who undertakes professional services requiring pharmacist accreditation or credentialing".

The APESMA's overarching case was that there had been a paradigm shift in the work of pharmacists since 1998 from the traditional role of simply dispensing medicines for the treatment of particular illnesses to a patient-centred approach in

which the pharmacist operates as part of an integrated health care team treating the entirety of the patient's condition through the provision of a wide range of primary and preventative health care services and through direct interaction with the patient.

The APESMA contended in support of its claims that there had been an increase in the various educational, training and registration requirements for pharmacists, which it submitted was indicative of the increase in the skills, knowledge and responsibility required to perform the role of a pharmacist. It argued that the introduction of new types of work requiring additional skills, knowledge and training, comparatively increased responsibility and accountability for pharmacists. It also asserted that there had been an overall increase in workload, pressure and performance for pharmacists.

The majority of the changes identified by the APESMA were said to have arisen because of changes in government health and medicines policy and industry initiatives designed to respond to these changes in government policy and to patient needs. The APESMA contended that the introduction of the Quality Use of Medicines into the National Medicines Policy in 1999 had been the major instigator of changes to the role and work of the pharmacist; in particular, it had changed the role from being someone who was responsible for safely storing and dispensing medicines to a professional playing an increasing role as part of a multi-disciplinary health care team providing a wide range of preventative and primary health care services. The APESMA pointed to the Community Pharmacy Agreements (CPAs) negotiated every five years between the Pharmacy Guild of Australia and the Commonwealth Government as evidencing the nature of this change in the role and work of pharmacists. Particular initiatives affecting the work of pharmacists introduced as part of CPAs included Home Medicine Reviews (HMRs), Residential Medication Management Reviews (RMMRs), MedsChecks, asthma management and diabetes management.

In addition or in the alternative, the APESMA contended that its claim should be granted on the basis that flat-dollar increases to award wages had eroded the basis upon which the work value of pharmacists had originally been assessed, namely identified relativities with the C10 tradespersons rate in the *Metal Industry Award 1984* (now the Manufacturing Award), and that these relativities needed to be restored in order for the rates of pay to correctly reflect the work value of pharmacists.

Held (by the Commission): (1) Although the mix of work being performed and skills being exercised had changed since 1998, and some skills for which pharmacists had always been trained were not utilised in a more intense and systematised fashion, there had not been the fundamental change in the work of pharmacists since 1998 which would justify wage increases of the order claimed by the APESMA.

(2) The APESMA had demonstrated that there was an increase in work value associated with the introduction of HMRs and RMMRs that justified a discrete adjustment to award remuneration. However, a new classification of Accredited Pharmacist as proposed by the APESMA was neither necessary or warranted. The appropriate course was to establish an allowance for Accredited Pharmacists who were required by their employer to perform HMRs and/or RMMRs. Further submissions about the form and quantum of this allowance were invited.

(3) There had been some increase in the work value of pharmacists since 1998 in respect of inoculations, emergency contraception, downscaling of medicines and a general increase in the level of responsibility and accountability. The parties were invited to make further submissions as to how this should be reflected in an adjustment to remuneration, noting that not all pharmacists administered inoculations or dispensed emergency contraception.

(4) Where the work value of a classification has been assessed on the basis of a relativity relationship with the C10 classification in the *Metal Industry Award*, and that relationship has not been sustained so that the current wage rate for the classification no longer reflects its originally assessed work value, that would constitute a work value reason as defined in s 156(4) of the Act. However, that was not a work value reason that would justify the variation to minimum wages in the Pharmacy Award sought by the APESMA. The alternative basis for the APESMA's claim is rejected.

(5) Regarding the issue of pharmacists' relativities with the C10 rate, and other rates, in the Manufacturing Award, the relativities did not align for equivalent qualifications or consistently relate to the Australian Qualifications Framework. This matter may potentially constitute a work value consideration relevant to the 4 yearly review of the Pharmacy Award. Further submissions were invited from interested parties concerning this matter.

Cases Cited

4 Yearly Review of Modern Awards — Penalty Rates, Re (2017) 265 IR 1.

4 Yearly Review of Modern Awards — Real Estate Industry Award 2010, Re [2017] FWCFB 3543.

Alpine Resorts Award 2010, Re [2018] FWCFB 4984.

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1921) 15 CAR 297.

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4 yearly review of modern awards under s 156 of the Fair Work Act 2009 (Cth)

M Irving QC and *F Knowles*, of counsel, for the Association of Professional Engineers, Scientists and Managers, Australia.

M Seck, of counsel, for the Pharmacy Guild of Australia.

Cur adv vult

Fair Work Commission

Introduction

1 Pursuant to s 156(1) of the *Fair Work Act 2009* (Cth) (the FW Act), the Fair Work Commission (the Commission) is required to conduct 4 yearly reviews of all modern awards. As part of the 4 yearly review of the *Pharmacy Industry Award 2010* (the Pharmacy Award), the Association of Professional Engineers, Scientists and Managers, Australia (the APESMA) has made a claim for the variation of the Pharmacy Award pursuant to s 156(3) of the FW Act. Section 156(3) permits the variation by the Commission of the minimum wages prescribed in a modern award where it is satisfied that this is justified for work value reasons. APESMA's primary claim is for the minimum wages in the Pharmacy Award to be increased by an amount necessary to restore what was

said to be the proper relativity with the C10 classification rate now found in the *Manufacturing and Associated Industries and Occupations Award 2010* (the Manufacturing Award). The APESMA's submissions set out the following table explaining its primary claim as follows (noting that the table is based on the Pharmacy Award rates as they were prior to the 3.5% increase awarded as a result of the 2018 Annual Wage Review):

Employee classification under Pharmacy Award	The 1996 CPA rate compared with the 1996 C10 rate in the Manufacturing Award	Current rates under the Pharmacy Award	APESMA's claim
Pharmacy Interns			
First Half of Training		$853.50	130% of current rate = $1027.18
Second half of training		$882.60	130% of current rate = $1046.94
Pharmacist	140%	$998.50	140% of current rate = $1132.74
Experienced Pharmacist	150%	$1093.50	150% of current rate = $1213.65
Pharmacist in Charge	180%	$1119.20	180% of current rate = $1456.38
Accredited Pharmacist	N/A		210% of current rate = $1699.11
Pharmacist Manager	210%	$1247.20	210% of current rate = $1699.11

2 In the alternative, the APESMA sought a 25% increase to all wage rates in the Pharmacy Award. Both as part of its primary and alternative claims, the APESMA also sought a new classification of "Accredited Pharmacist", to be defined as "a pharmacist who is the holder of an Accredited Pharmacist qualification who undertakes professional services requiring pharmacist accreditation or credentialing".

3 In summary terms, the APESMA contended in support of its claims that there had been an increase in the various educational, training and registration requirements for pharmacists, which it submitted was indicative of the increase in the skills, knowledge and responsibility required to perform the role of a pharmacist. It was also argued that the introduction of new types of work (such as professional services) requiring additional skills, knowledge and training, comparatively increased responsibility and accountability for pharmacists. Finally, it was posited that there had been an overall increase in workload, pressure and performance for pharmacists. These changes had occurred, the APESMA submitted, since the work value of pharmacists was last considered in a decision of the Australian Industrial Relations Commission (the AIRC) issued on 29 June 1998.[1] The changes relied upon by the APESMA fell into the following five broad categories:

1 *Re Community Pharmacy Award 1996* (unreported, AIRC, Hingley C, Q2258, 29 June 1998).

- An increase in various educational and registration requirements which are indicative of the increase in the skills, knowledge and responsibility required to perform the role of a pharmacist.
- The introduction of additional training so a pharmacist can become and retain registration under the legislative requirements for registration of a pharmacist.
- The introduction of new work that requires additional skills, knowledge and training.
- The introduction of new work that has resulted in an increase in responsibility and accountability.
- An increase in workload and an increase in pressure and on skills and the speed with which vital decisions need to be made.

4 The majority of the changes identified by the APESMA were said to have arisen because of changes in government health and medicines policy and industry initiatives designed to respond to these changes in government policy and to patient needs. The key Federal Government policy changes identified related to the following matters:

- Introduction of the Quality Use of Medicines (the QUM) into the National Medicines Policy.
- Medical practitioner shortages, particularly in rural and regional areas.
- Escalating cost to the Australian tax payer of providing a high quality medical service and medicines to the Australian community.
- Increasing number of patients with multiple chronic diseases requiring complex treatment.
- Introduction of many new highly specialised medicines to the Australian market and the extra knowledge required to minimise drug interactions and adverse effects with patients.
- Increasing number of medicines being down-scheduled from prescription only status to pharmacist-only and pharmacy-only status, and the extra knowledge/skills required to safely provide these medicines to the public without a doctor's review.

5 The APESMA contended that the introduction of the QUM into the National Medicines Policy in 1999 had been the "major instigator" of changes to the role and work of the pharmacist; in particular, it had changed the role from being someone who was responsible for safely storing and dispensing medicines to a professional playing an increasing role as part of a multi-disciplinary health care team providing a wide range of preventative and primary health care services. The APESMA pointed to the Community Pharmacy Agreements (CPAs) negotiated every five years between the Pharmacy Guild of Australia (PGA) and the Commonwealth Government as evidencing the nature of this change in the role and work of pharmacists. Particular initiatives affecting the work of pharmacists introduced as part of CPAs included Home Medicine Reviews (HMRs), Residential Medication Management Reviews (RMMRs), MedsChecks, asthma management and diabetes management.

6 The QUM was introduced into the National Medicines Policy in December 1999. It requires all medical professionals, including pharmacists, to select management options wisely, choose suitable medicines if a medicine is considered necessary, and use medicines safely and effectively. Relevantly, it requires:

- identification and implementation of methods to select and communicate the most appropriate medicine or non-medicine option from all available prevention and treatment options, so that the individual gains optimal, cost effective health outcomes;
- identification and implementation of methods to monitor the outcome of the selected treatment option, to allow rapid modification according to response, so that optimal health outcomes are maintained over time;
- provision to patients/consumers of information and counselling to promote quality use of medicines; and
- education of peers and adoption of appropriate standards and models of practice.

7 Home Medicine Reviews are undertaken by Accredited Pharmacists (discussed later) upon a referral from a medical practitioner, and usually require the pharmacist to conduct the review in the patient's home and then write a report for the medical practitioner. The pharmacist is required to review what prescription, non-prescription and complementary medicines the patient is taking and to make recommendations for the medical practitioner to discuss with the patient, which might include showing the patient how to take their medicines correctly, explaining why and when to take their medicines and what to expect when taking them, explaining the proper storage of medicines and what problems should be reported to the medical practitioner, checking that the medicines are appropriate to take together and changing them if necessary, clarifying any confusion with generic medicines, and assisting with the patient remembering to take their medicines. HMRs were introduced as part of the third CPA in July 2001, and are intended to reduce the number of persons hospitalised because of their use of medicines. RMMRs are similar to HMRs but are provided to permanent residents of a government-funded aged care facility, and are conducted in collaboration with the resident's health care team. Like HMRs, RMMRs were introduced as part of the third CPA in 2001 and must be conducted by an Accredited Pharmacist.

8 MedsChecks and Diabetes MedsChecks were introduced under the fifth CPA in 2010, and involve a structured in-pharmacy review of a patient's medicines by a pharmacist. It takes about 30 minutes to complete, aims to help patients learn more about their medicines including their effects, proper use and storage and to identify problems patients may be experiencing with their medicines, and requires additional training to be undertaken. Diabetes management is undertaken pursuant to the National Diabetes Services Scheme (the NDSS), which is an initiative of the Australian Government which is administered through registered pharmacies. The pharmacist's role is to provide patients with the equipment and medicines they need to manage their medicines as well as educating and counselling them on initiatives they can take to reduce or eliminate their diabetes such as through weight loss and exercise. The pharmacist must have additional knowledge and skills in the management of diabetes, which is usually obtained by undertaking an appropriate course delivered by an accredited training organisation. As with the NDSS, pharmacies have since 1999 been charged with delivering asthma management services to patients with the aim of educating patients on the proper use of their inhaler device and to assist them to develop an asthma management plan. Pharmacists

must obtain specialised training in asthma and its treatment to provide this service, with the training usually taking the form of a course delivered by an accredited training organisation.

9 Downscaling from the prescription-only category to the pharmacist-only category has occurred with respect to many medicines since 1998, with a total of 33 having been switched between 2000 and 2011. With respect to these medicines, the pharmacist is now required to diagnose minor illnesses to ensure the patient needs the medicine being requested and to determine the appropriate medicine. Prior to dispensing a pharmacist-only medicine the pharmacist needs to determine if dispensing the medicine is appropriate or whether the patient needs to be referred to a medical practitioner. Pharmacists need to counsel the patient as to the illness and educate them on the appropriate use of the medication, and to avoid dispensing drugs (such as pseudoephedrine and codeine-based medications) to those who might be abusing them. The introduction of generic-based medicines into the Pharmaceutical Benefits Scheme (PBS) has also required pharmacies to place heavier reliance upon them for cost reasons, which has added to the responsibility of pharmacists to manage the risk of dispensing them by ensuring accuracy and compliance. It also requires pharmacists to explain to patients the option of using generic medicines, how they may affect them and what the impact and cost differences are.

10 Other instances of new or changed work relied upon by the APESMA were as follows:

- *Clinical intervention*: This involves the pharmacist identifying a drug-related problem with a patient and making recommendations to a medical practitioner to prevent or resolve it, including by changing the medication, the means of administration or the patient's medication-taking behaviour. To undertake this service, introduced under the fifth CPA in 2010, the pharmacist must have undertaken the required training.
- *Dose administration aids*: Dose administration aids (DAAs) are adherence devices developed to assist medication management by dividing medicines into individual doses and arranged according to the dose schedule throughout the day. They may take the form of a unit dose or multi-dose pack. Since the fifth CPA in 2010 pharmacists have formally provided patients with DAAs, which requires the pharmacist to pack the patient's medicines into a specially-provided bag, with the pharmacist having to ensure that each medicine is correctly included in the appropriate pouches on order to avoid medical misadventure.
- *Staged supply of medicines*: This is a program, introduced under the fifth CPA in 2010, for patients to receive their PBS medicines in instalments, particularly patients with mental illness or drug addiction or who otherwise cannot manage their medications safely. Pharmacists are required to have additional skills and knowledge concerning mental illness, drug dependency, drug seeking behaviours, and interacting with and responding to the therapeutic concern of clients.
- *Certificates for absence from work*: Since the commencement of the FW Act in 2009 pharmacists have been able to provide certificates for absences from work due to illness. Pharmacists who undertake this service must undertake a detailed consultation with the patient to

determine the nature of their illness, assess how long they will be unable to attend work, and determine whether it is necessary to refer the patient to a medical practitioner. Pharmacists must have extensive counselling skills and should have undertaken additional training in order to provide this service.

- *Inoculations*: The Pharmacy Board of the Australian Health Practitioner Regulation Agency (AHPRA) in December 2013 authorised pharmacists to administer vaccinations if they had obtained suitable additional training, and the States have since enacted legislation to facilitate this occurring. Pharmacists are required to have completed a further approved course of study, maintained their authority to immunise, and hold a current statement of proficiency in cardiopulmonary resuscitation and first aid including anaphylaxis training.
- *Increase in use of complementary medicines and vitamins*: The increase in the use of complementary medicines and use of vitamins has required pharmacists to have knowledge of these products, how they affect various illnesses and diseases and any negative side effects. Additional training is recommended in these medicines if it was not covered in the undergraduate degree.

11 It was contended by the APESMA that the work environment of pharmacists had become more complex due to the following matters:

- *Chronic disease*: Chronic diseases such as arthritis, asthma, back problems, cancer, chronic obstructive pulmonary diseases, cardiovascular disease, diabetes and mental health conditions are the leading cause of illness, disability and death in Australia, and 39% of persons aged 45 and over have at least 2 of these diseases. Patients with such co-morbidities are high users of the health system, and half of them have conditions that result in treatment conflict. Pharmacists are involved in not just supplying medicines to such patients but ensuring that they get the best out of their medicines and their conditions are managed effectively. This requires pharmacists to exercise a specific set of clinical knowledge and skills not used back in 1998, as well as social pharmacy skills such as communication skills, inter-professional collaboration, understanding behaviour and understanding psychosocial attributes.
- *Quality Care Pharmacy Program (QCPP)*: This quality assurance program was introduced by the PGA in 2000, and requires pharmacists in QCPP accredited pharmacies to undertake mandatory initial training, ongoing refresher training, implementing and following appropriate policies, ensuring there is evidence of practice in accordance with QCPP standards, and ensuring the pharmacy is prepared for re-assessment every 2 years. This imposes additional responsibilities on Pharmacy Managers in particular.
- *Forward Pharmacy Model of Practice*: This model of practice, adopted by almost all pharmacies since the introduction of the QUM, makes the pharmacist the main point of contact with patients, and requires pharmacists to exercise additional communication, counselling and customer skills not previously required of them.
- *Workloads*: There has been a significant increase in the number of PBS prescriptions dispensed within community pharmacies (at the rate of

almost 13% per year over the last 10-15 years) without any corresponding increase in the number of pharmacies. This together with the ageing population, the consequential increase in the number of patients taking multiple medicines, and the new work tasks and skills required of pharmacists has contributed to an increasing workload and complexity of work for pharmacists.

12 The APESMA also relied on changes to the educational and registration requirements for pharmacists. In respect of the former, the changes relied upon were:

- The phasing out from 2000 of the option of undertaking a three year undergraduate degree. The minimum accredited undergraduate pharmacy degree now requires four years of full-time study.
- Since 2010 the Australian Pharmacy Council has accredited a number of undergraduate degrees of more than the minimum four years' duration which provide extended and more intensive training.
- Undergraduate degrees now cover areas of training not covered before 1998, in particular in relation to the counselling and education of patients in relation to the patient's diagnosis, the reasons for prescribing, and the safe and effective use of the prescribed medicine included any potential adverse effects. This arose largely in response to the introduction of the QUM.
- In 2010, formal recognition was given to the higher qualification of Accredited Pharmacist. The holder of an accredited pharmacy undergraduate degree who is a registered pharmacist can obtain the qualification by undertaking a higher course of study, and the qualification allows a pharmacist to undertake HMRs.

13 The changes in registration requirements identified by the APESMA were as follows:

- The requirements for intern pharmacists to obtain registration had changed since 1998, In 1998 intern pharmacists were required to have completed 1824 hours of supervised practice, but now in addition they have to undertake further study conducted by an approved provider and undertake an oral examination and a written examination conducted by the Pharmacy Board of Australia.
- On and from 2010 the Pharmacy Board has developed Compulsory Professional Development (CPD) requirements for pharmacists to maintain their registration, and the CPD options for further training have been changed and expanded.
- Competency standards for pharmacists were introduced in 1999 which were mainly focused on the safe dispensing of medicines, but which have since been expanded to cover matters such as inoculations, medical certificates and HMRs.

14 In addition or in the alternative, the APESMA contended that its claim should be granted on the basis that flat-dollar increases to award wages had eroded the basis upon which the work value of pharmacists had originally been assessed, namely identified relativities with the C10 rate in the *Metal Industry Award 1984* (now the Manufacturing Award), and that these relativities needed to be restored in order for the rates of pay to correctly reflect the work value of pharmacists.

15 The APESMA's claim was opposed by the PGA, Australian Business Industrial and the NSW Business Chamber (ABI/NSWBC), and Business SA. The PGA's case in opposition to the APESMA's claim was, in summary, as follows:

- The relevant datum point for the assessment of any change in work value was the making of the pre-reform *Community Pharmacy Award 1998* on 24 December 1996, which was the last occasion when a federal industrial tribunal had determined the work value of pharmacists.
- The PGA accepted that the role of a pharmacist inherently involved change, as health services, treatment methods, medical information, community expectations, technology and procedures were changed or refined to better deliver health care services to the community.
- The PGA specifically acknowledged that elements of the competency standards and Bachelor of Pharmacy course had changed since 1998 to assist in the provision of better health care standards, that the provision of Government funded health service provided by pharmacists had been introduced to improve community health outcomes, and that community pharmacies had become more patient centred and focused on the delivery of primary health care to the community.
- However, the PGA contended that the resultant changes to the work of pharmacists had been evolutionary in nature but had not resulted in a significant net addition to the work value requirements of a pharmacist.
- The changes to the Bachelor of Pharmacy course content and duration commenced prior to the 1998 benchmark, were minor in nature, and did not contribute to a significant net addition to work value.
- Some changes to the competency standards had increased or altered the work value of some but not all pharmacist classification levels, but have not resulted in a significant net addition to work value.
- Pharmacists have always been engaged in continuing professional training, and the mandatory CPD requirements did not involve a significant net addition to work value.
- Pharmacists have since 1994 been required to achieve the competency standards for registration in their respective States and Territories, and so this did not represent a significant net addition to work value.
- The requirement to keep abreast of changes and developments is a requirement of a professional role and did not constitute any change in work value.
- The evolution in health care services required to achieve the community's health care objectives has evolved since 1998 due to improved technology, research/medical information and treatment information, but these did not involve any significant net addition to work value. Patient interactions and clinical interventions had always been part of the pharmacist's role.
- Both down-scheduling and up-scheduling of medicines occurred from time to time, but in any event the pharmacist had always needed to understand the nature, purpose and effect of those medicines and advise on managing conditions.

- Most of the changes relied upon by the APESMA did not involve genuinely new work, apart from perhaps inoculations, clozapine clinics and the provision of absence from work certificates.
- There had been no significant net addition in workload since 1998 in circumstances where the number of pharmacies had increased by 13% but the number of registered pharmacists had increased by 43%.
- Offsetting any changes was the fact that certain tasks were no longer done or were only performed in limited circumstances, such as compounding, and technology had simplified a number of tasks such as PBS claiming processes, automated scanning and dispensing of prescriptions, stock administration, dose administration and availability of patient information.
- HMRs and RMMRs fell within the core clinical skill set of a pharmacist, and only about 10% of pharmacists were accredited to perform these.
- It would be inappropriate to establish a new Accredited Pharmacist classification because the role was directly linked or related to several government-funded programs which might not continue, and instead the inclusion of a higher duties allowance should be considered.
- There was no demonstration by the APESMA on what the actual increases to work value were for each classification such as to justify the proposed increases to minimum rates, nor how the modern awards objective in s 134(1) would be achieved by the grant of the claim.

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

APESMA's evidence

17 The APESMA relied on the evidence of the following expert and lay witnesses:

- Professor Ines Krass and Professor Parisa Aslani, who provided an experts' report in two parts entitled "Work value of a community pharmacist" (the Report);[2]
- Professor Philip Clarke, who provided an expert's report "providing data and information on aspects of pharmacy ownership, pharmacy revenues and business sale prices";
- Dr Geoffrey March, President of Professional Pharmacists Australia;
- Ms Amy Thomson, Emergency Medicine Specialist Pharmacist and Specialist in Poisons Information in New South Wales;
- Mr Cameron Walls, Pharmacist Manager in Victoria;
- Ms Katerina Malakozis, Pharmacist in Charge in South Australia;
- Mr Cardin Le, Pharmacist in Charge in New South Wales;
- Mr Leon Wai Hon Yap, Clinical Hospital Pharmacist in Queensland;
- Ms Jennifer Ruth Madden, Locum Pharmacist in New South Wales;

2 Part I of Report entitled "Work Value of a Community Pharmacist", Exhibit 14; Part II of Report Entitled "Work Value of a Community Pharmacist Part II: Semi-structured interviews", Exhibit 15.

- Ms Carmel McCallum, Locum Pharmacist in New South Wales; and
- Mr Alex Crowther, Surveys Manager of APESMA.

18 The APESMA also tendered a large range of documents relevant to matters referred to by their witnesses. It will only be necessary for us to directly refer to some of the Community Pharmacy Agreements tendered by the APESMA.

Professor Krass and Professor Aslani

19 Ines Krass is Professor of Pharmacy Practice at the University of Sydney, and Parisa Aslani is Associate Professor of Pharmacy Practice at the University of Sydney. The APESMA commissioned them to prepare the Report via a "Commissioned Research Brief" which contained as its research proposal "To investigate changes in work value of a community pharmacist comparing 1998 with 2016". The brief noted that the Commission was undertaking a 4 yearly review of the Pharmacy Award, that the APESMA's position was that the rate of pay received by pharmacists was not reflective of the work they do, that the current award minimum rates of pay do not reflect the skill, responsibility and complexity of the work they currently do, that the APESMA had lodged a claim seeking increases in the award rates of pay for pharmacists based on the proposition that there have been significant changes in work since 1998, and that it was necessary for the APESMA to adduce evidence addressing the relevant legislative provisions and demonstrating the facts supporting the proposed pay increases. The brief requested a literature review to identify changes in work value between 1998 and 2016 and semi-structured interviews with a sample of community pharmacists to explore their understanding and experiences of change in work value between 1998 and 2016.

20 Professors Krass and Aslani prepared Part I of the Report, which was the requested literature review. They also prepared, with the assistance of Dr Vivien Tong, Part II of the Report, which was based on the requested semi-structured interviews. Professor Krass gave evidence before the Commission concerning the Report.

21 The Preface to Part I of the Report discloses that the literature review was "conducted to explore the range and evidence for cognitive pharmaceutical services delivered by pharmacists in community settings". The definition of "cognitive pharmaceutical services" (CPS) used was derived from one proposed for use in relation to professional pharmacy services as follows:

> A professional pharmacy service is an action or set of actions undertaken in or organised by a pharmacy, delivered by a pharmacist or other health practitioner, who applies their specialised health knowledge personally or via an intermediary, with a patient/client, population or other health professional, to optimise the process of care, with the aim to improve health outcomes and the value of healthcare.

22 The Preface went on to say that although the definition encompassed services which could be delivered by other health care professionals within a pharmacy setting, the focus of the Report was on the roles, responsibilities, and value of community pharmacists with respect to the provision of cognitive pharmaceutical services in community settings.

23 The background to Part I of the Report included the following (omitting footnotes and references):

> Facilitating quality use of medicines: evolution of community pharmacy practice in Australia
>
> Pharmacists play a vital role in supporting QUM, one of the four key components of the National Medicines Policy, which denotes ensuring medication use by patients is judicious, appropriate, safe and efficacious. The National Competency Standards Framework for Pharmacists in Australia, published by the Pharmaceutical Society of Australia, is underpinned by the National Medicines Policy.
>
> Community pharmacy contributes to the facilitation of quality use of medicines. With the emergence of the concept of pharmaceutical care, patient-centred care within pharmacy practice has gained momentum, challenging the traditional dispensing-oriented role of pharmacists. Evident expansion of the provision of cognitive pharmaceutical services (CPS), within the community pharmacy setting is occurring both nationally and internationally. Pharmacy practice in Australia has since undergone a significant paradigm shift over the last two decades.
>
> Pharmacy education
>
> Accredited pharmacy programs in Australia should deliver a curriculum which helps equip pharmacy graduates with the necessary foundation for commencement of the intern training program, and then to progress on to achieve the competencies set out in the national competency standards for pharmacists. When comparing the overall indicative pharmacy curriculum components in place in 2008 versus those currently implemented (effective from January 2014), several notable differences are evident, reflecting changes in pharmacy practice. Along with changes to pharmacy curricula and subsequent training to upskill graduates to ensure they are workforce-ready, pharmacists are now also required to engage in continuing professional development (CPD) throughout their careers. To be able to provide some of the remunerated CPS, pharmacists must also undertake further training to gain accreditation, in addition to any upskilling necessary to ensure that core professional competencies are maintained.

24 The Prelude went on to discuss "Government funding: supporting the viability of Australian community pharmacy" as follows (omitting footnotes and references):

> In Australia, 5-yearly Community Pharmacy Agreements (CPAs) commenced in 1990 between The Pharmacy Guild of Australia (PGA) and the Australian Federal Government, have secured funding to support community pharmacy initiatives in promoting QUM and the viability of the industry. Over the years, increased funding has been allocated to the provision of CPS in community pharmacy. While the Second CPA (2CPA) (1995- 2000) pledged a modest amount of funding of up to $4 million for CPS, the current Sixth CPA (6CPA) effectively saw a doubling of funds pledged compared to the previous CPA to facilitate remuneration for CPS provision, yielding:
>
> - $613 million in funding to support community pharmacy programs, which comprise many cognitive pharmaceutical services,
> - $50 million for the Pharmacy Trial Program, along with
> - "access to additional funding of up to $600 million over the Term to support new and expanded Community Pharmacy Programmes".

25 The Prelude identified that when the provision of CPS are remunerated, this usually occurred via fee-for-service from government, with most such remuneration being provided to the pharmacy/pharmacy owner. Some CPS, such as DAAs and vaccinations were paid by the user of the service. The overall majority of CPA funding however remained directly linked with the dispensing/supply of medicine products to patients via the PBS. PBS reforms

and price disclosure, which were aimed to reduce PBS expenditure, along with a proliferation of discount pharmacy business models, had led to financial pressure across the community pharmacy sector. An increase in CPS provision had been identified as an additional revenue source. The UTS Pharmacy Barometer, an annual report issued since 2012, highlighted in 2016 that 59% of pharmacist respondent had reported beginning to provide new CPS in the last 12 months, and 80% of employer pharmacists were providing CPS. Further, the Pharmacy Guild Customers' Experience Index reported approximately 80% of respondent customers listed at least one of the six services as being provided by their local pharmacy: blood pressure monitoring, weight management, diabetes screening and management, vaccinations, addiction intervention and mental health support, with blood pressure checks and vaccinations the most frequently reported to be used.

26 In relation to remuneration of pharmacists, the UTS Pharmacy Barometer reported that employed pharmacists perceived an imbalance between wages and workload expectations, and also said that an oversupply of pharmacists was leading to lower wages and devaluing of the skills of the profession. Pharmacy employers also complained that low award rates allowed discount pharmacies to pay low wages, which placed competitive financial pressure on other pharmacies which sought to pay higher wages for good pharmacists. The UTS Pharmacy Barometer reported that 68% of employed pharmacist respondents had received no change to their remuneration over the last 12 months. Pharmacy owners reported that 75% of employed pharmacists were paid $30-$40 per hour, which was broadly consistent with the APESMA's 2015 Remuneration Survey. This reflected that pharmacy owners were cutting salaries and reducing staff in order to compete with discount pharmacies. One study identified the view of Australian pharmacists as being that they "saw minimal opportunities to negotiate salaries" as they were easily replaceable with other pharmacists willing to work for lower remuneration. This position of reduced wages and the devaluation of the skills and the value of employee pharmacists was attributed to the oversupply of pharmacists. More than half of the respondents believed that pharmacists providing CPS should be more highly remunerated than those with dispensing-oriented roles, and there were some indications that there were increasing job opportunities for "professional services pharmacists" providing CPS.

27 Part I of the Report identified the aims of the literature review as being to identify the range of CPS and health services delivered by community pharmacists, changes in services over the past 20 years, changes in policy, legislation and reimbursement, changes in professional expectations and guidelines, and pharmacists' skills, knowledge and expected competencies reflecting educational changes in training at undergraduate, intern and postgraduate levels. The focus of the literature review was said to be "The evidence of benefits surrounding implemented CPS that are currently or have been previously remunerated as part of previous CPSs in the Australian context".

28 The Findings section of Part I of the Report identified in a table the present CPS provided in community pharmacies, and explained in each case the nature of the service provided, the skill or training required, the patient outcome benefits and the economic outcome benefits. The CPS so described were: Medication management reviews (HMRs and RMMRs); MedsCheck and

Diabetes MedsCheck; Clinical Interventions; Medication Adherence Programs; DAAs; Staged Supply; Continued Dispensing; Continuity of Care, including through Community Pharmacy Liaison Services; Aboriginal and Torres Strait Islander (ATSI) QUM Service; Chronic Disease Management; Healthy Lifestyle Support; Smoking Cessation; Screening/Monitoring Activities (Health Checks); Compounding Services; Vaccination; Sleep Apnoea Services: Sexual Health Services: Mental Health Services: Palliative Care Services; Maternal and infant services; Wound Management; Advice on minor ailments; Provision of Pharmacist-Only (Schedule 3) medicines; Complementary and alternative medicine; Opioid Dependence Treatment; Return of Unwanted Medicines; and Absence from Work Certificates. The Report discussed studies which had analysed outcomes and the uptake of the identified CPS, noting that a number of them had not yet been the subject of substantial research evidence.

29 The conclusions in Part I of the Report were, in summary, as follows:

- The roles and responsibilities of community pharmacists have expanded over the last 20 years, with a movement away from dispensing-oriented roles to increasing CPS provision in community settings.
- Fundamental responsibilities related to the dispensing and provision of therapeutic goods have provided a foundation upon which CPS can be expanded.
- Changes to legislation and funding in Australia have aided the facilitation of CPS provision and accessibility of these services to consumers in community settings.
- Pharmacists are now being remunerated for services for which funding was not previously available. Funding arrangements under the CPAs have formalised and refined pharmacists' skills into distinct, targeted CPS.
- Each community pharmacist will likely provide multiple CPS as part of their practice of the profession and thus, increasing their work value (when considering that the evidence available for individual CPS to date is promising in terms of various different factors).
- In many instances, additional training is required to be completed by pharmacists in order to provide specific CPS interventions e.g. HMR accreditation, training to administer vaccinations, and other associated training to ensure professional standards and guidelines are met.
- With an ageing population and thus, potentially more complex medication regimens, medical conditions and potential disease burdens among the patient population, pharmacists' diverse roles can help address the breadth of health and medication-related issues experienced.
- Each CPS provided by community pharmacists and/or in the community setting potentially contributes to improved patient health outcomes and/or economic outcomes for the health care system. Evidence from the literature also highlights the positive impact of CPS on clinical outcomes.
- There is also evidence to suggest that CPS provision is inclined to be cost-effective in many instances, which can yield savings from both the health care system and for patients as well. However, further research is still required to better ascertain the cost-effectiveness of CPS provided

by community pharmacies from the perspectives of the health care system, patients, and also from the service providers where possible.

- To better determine the impact of currently implemented CPS within the Australian context, further Australian health and economic outcomes evaluations are necessary to more adequately determine the current work value of Australian pharmacists based in community settings. This will help to ensure that cost savings to the health care system are being appropriately invested back into remunerating pharmacists who provide these valuable services.
- Additional full economic evaluations are required within the Australian context to establish the extent of cost saving that CPS provide to the health care system. Evidence from the systematic reviews included in this review provide evidence to support the expanding role of community pharmacists and reinforces the need to ensure the implementation and expansion of evidence-based, value-added CPS.

30 The objectives of Part II of the Report were set out as follows:

- to investigate and describe the cognitive pharmaceutical/health services currently provided by community pharmacists;
- to determine the reimbursement/revenue received by community pharmacists for the delivery of cognitive pharmaceutical/health services in their practice;
- to determine the self-reported patient health and economic outcomes of the cognitive pharmaceutical/health services delivered by the pharmacists;
- to determine the self-reported health system economic outcomes of the cognitive pharmaceutical/health services delivered by the pharmacists; and
- to investigate the training received by the pharmacists in delivering the cognitive pharmaceutical/health services.

31 Part II of the Report was prepared by inviting a random sample of pharmacists in the APESMA's database to participate, and also by purposive sampling of pharmacists who were known to the research team as engaging in the provision of CPS, with variation sampling to capture pharmacists from a range of ages, years of practice, practice settings, cultural backgrounds and employee/employer status as well as to ensure gender representation. A total of 25 interviews were conducted, of which 14 were face-to-face and 11 by telephone.

32 The key conclusions reached in Part II of the Report from the interviews may be summarised as follows:

- pharmacists perceived that a core set of services were applicable across the sector, but that the actual services provided varied between pharmacies with smaller pharmacies having to structure and prioritise service provision;
- additional support by way of an increased number of pharmacists and other staff enabled the provision of CPS;
- the role and responsibilities of pharmacists differed in terms of services provided;

- the core 6CPA-funded services reported as being delivered in community pharmacies included DAAs, HMRs, MedsChecks/Diabetes MedsChecks, clinical interventions and stage supply;
- pharmacists were responsible for checking DAAs, where DAAs were seen to facilitate improved patient adherence to medicines and QUM;
- MedsChecks allowed pharmacists to assess patients' understanding and use of their medicines, and were seen as a timely way to identify and address medication-related problems;
- HMRs enabled a detailed assessment and recommendations to be provided on a patient's medication regimen, and positive feedback received on HMRs and the implementation of recommendations were reported;
- clinical interventions encompassed a broad range of potential medication-related problems, and were primarily viewed as a change in the documentation process rather than a change in practice;
- non-6CPA CPS that were more commonly reported as being provided included point-of-care testing such as blood pressure/cardiovascular disease and/or blood glucose checks, pharmacist-delivered immunisation, and opioid substitution therapy;
- a range of other CPS were also reported including other point-of-care testing services, services provided to aged care and related facilities, chronic disease management (with and/or without diagnosis) and medication-oriented services;
- flu vaccinations were associated with a number of perceived benefits such as improved accessibility and uptake of flu vaccinations, increased convenience and perceived cost-effectiveness, and professional satisfaction;
- the most ubiquitous free service for patients was blood pressure checks; pharmacist involvement in these checks varied between pharmacies but pharmacists were involved at some point in the process, particularly in interpreting blood pressure readings;
- sleep apnoea diagnostic services were offered by some pharmacies;
- services provided to facilities such as aged care facilities commonly centred on DAA provision for residents;
- training varied significantly between undergraduate training, self-directed learning and completion of accredited training courses;
- accreditation courses were more likely completed for pharmacist-led immunisation, HMRs, and compounding;
- non-specific training typically included training received from company representatives and/or self-directed learning;
- financial support received for training undertaken by pharmacists varied; the most common course that was financially covered by employers was pharmacist-led immunisation training, but training opportunities received by staff potentially varied depending on their role within the pharmacy;
- reimbursements received for CPS varied; services typically provided at a charge to the patient included flu vaccinations, opioid substitution

therapy, diagnostic testing of sleep apnoea, and absence from work certificates, while the common CPS offered free of charge to patients was blood pressure/cardiovascular disease checks;

- contributions for DAAs together with the funding received from the 6CPA was still regarded as insufficient to cover the costs involved in providing the service;
- a few participants noted that they had to decrease the fee-for-service for pharmacist-led vaccinations due to increased competition;
- pharmacists were cognisant of the notion that fee-for-service, although desired, should not act as a barrier for service uptake among patients, and user-pay funding models were not deemed appropriate for all CPS such as blood pressure checks;
- encouraging customer loyalty and maintaining rapport with other service users (such as aged care facilities) were motives for providing services for "free";
- perceived benefits of CPS included improved patient accessibility to services and convenience, cost-effective facilitation of QUM, improved patient adherence, satisfaction, and loyalty, and improved patient rapport, health management, patient education and empowerment; however, it was noted that it was difficult to determine the true impact of CPS;
- reimbursement received by pharmacists for the provision of CPS was regarded as insufficient;
- CPS provision contributed to the need for increased wage costs for the pharmacy such as by employing an additional pharmacist, which were then offset via earnings from other aspects of the pharmacy such as the dispensing of prescriptions and/or sale of consumables;
- the perceived viability of community pharmacies had been impacted by PBS reforms;
- services were not regarded as a primary source of stand-alone income for pharmacies but rather, had flow-on effects for other aspects of the business which contributed to profitability;
- pharmacists had seen and experienced an evident expansion of services being provided in community pharmacies, and a certain level of service provision had become the status quo across the sector;
- an increased scope of practice for pharmacists has led to perceived opportunities for further role expansion in future;
- the quality of services might not be uniform across all community pharmacies;
- pharmacists' roles and responsibilities have changed, where there were now increased opportunities for clinical involvement and inter-professional collaboration in the provision of patient health care;
- reforms such as accelerated price disclosure and emergence of discount pharmacy models of pharmacy have impacted the sector, and created an impetus for the industry to evolve, so that sole reliance on pharmacy as a supply function was no longer viable;
- decreased revenue generated from dispensing prescriptions had led to increased service provision, used as a point of difference;

- perceived positive changes to the profession included the impact of increased competition leading to innovation and increased CPS remuneration via the 6CPA;
- perceived negative changes to the profession included the price-focused paradigm shift impacting the fee-for-service sought, decreased viability of community pharmacy, and the devaluing of pharmacy due to discount pharmacies and price reductions;
- the core work value of community pharmacists centred on accessibility of health care and advice, and the resultant broader impact on the community;
- pharmacists were perceived to be undervalued by others, influenced by discount pharmacies, and it was perceived that governments should better recognise the value of, and appropriately remunerate, pharmacists;
- a positive outlook on pharmacy stimulated support for increased scope of practice as well as ongoing provision of CPS;
- continued engagement in providing CPS by pharmacists was primarily motivated by patient satisfaction, professional satisfaction, view of the optimal direction towards which pharmacy should be heading, altruism, wanting to provide a service to the community to promote health, and duty of care;
- the service-oriented ethos of the community pharmacy or positive professional experiences involving senior members of the profession contributed to the service-oriented practice of several participants;
- external factors such as decreased profit margins for dispensing medicines and that other pharmacies were also offering services were also motivators for CPS provision;
- pharmacists recognised that there was limited profit earned for many CPS, and pharmacy proprietors noted that many services were being operated at a loss to the pharmacy;
- as pharmacist roles were perceived as having expanded, there was support for recognition of this expansion both professionally and financially;
- the government was seen as an important stakeholder in facilitating the increased remuneration of pharmacists;
- in general, employee pharmacists did not receive additional reimbursements for delivering services within the community pharmacy on top of their wages;
- some pharmacists felt that their wage received as an employee pharmacist was inadequate and did not reflect their knowledge, skills and contribution to health care; and
- a multitude of factors were acknowledged as impacting on pharmacist wage levels; several pharmacists reported negotiating their wage level, and believed that the onus was on the pharmacist to demonstrate their value to their employer and to negotiate their wage accordingly.

33 The authors of Part II of the Report concluded that because the provision of professional services had become part of the status quo for the practice of the

profession, "[t]his change indicates that there has also been a likely shift in the work value of community pharmacists". In cross-examination Professor Krass affirmed this conclusion, saying:

> … I think the notion is that we were coming from the understanding is that the salary levels have not changed; in fact they have declined as I understand it. They have declined very significantly, and yet pharmacists are being expected to do more. The scope of their activities, the skill required to actually execute those activities has increased and changed over time, and that has not been reflected in the remuneration that they've received, and I would argue beyond that, if I might indulge you, that the community pharmacy agreements have delivered remuneration directly to the community pharmacy, but there's been no commensurate payment to the pharmacists themselves. So the employee pharmacists have been expected to do that — to expand the range of activities that they deliver, but that has not been reflected in any change to their salaries.
>
> When you say you would argue you're advocating that as a position or are you advocating that as the outcome of the semi-structured interviews?--- That's what I found out from the interviews, yes.[3]

Professor Clarke

34 Professor Philip Miles Clarke is Professor in Health Economics within the Centre for Health Policy at the Melbourne School of Population and Global Health in the University of Melbourne. He was commissioned by the APESMA via a research brief to provide a report on the current financial status of the community pharmacy industry covering: changes in the income received from government by community pharmacies since the late 1990s; any increases or reductions in remuneration received and the reasons for these changes; the profitability, or otherwise, of community pharmacies within Australia and an analysis of the reasons for their profitability; and whether a work value increase in the minimum rates of pay specified in the Pharmacy Award as proposed by the APESMA would have a significant negative impact on the financial sustainability of community pharmacies.

35 In his report,[4] Professor Clarke explained the regulatory framework in which community pharmacies operated. They are protected from competition by two sets of government regulations that form part of the Community Pharmacy Agreement, which is negotiated every five years between the Federal Government and the PGA and regulates most aspects of the pharmacy sector. The CPA provides for ownership rules which disallow non-pharmacists from owning a pharmacy in Australia and effectively prevent supermarkets and international pharmacy chains from owning pharmacies in Australia, while location rules restrict the establishment of new pharmacies within regulated distances (typically 1½ kilometres). Professor Clarke gave evidence that the ownership and location rule restrictions have prevented new entrants into the pharmaceutical sector, in that the number of pharmacies in Australia has remained relatively static for almost 50 years, over which period the number of medical practitioners had more than doubled. The result was that ratio of the number of persons per pharmacy had increased from around 2000 to 4000.

36 In relation to pharmacy revenues, Professor Clarke referred to a performance audit of the administration of the Fifth CPA by the Australian National Audit

3 Transcript at PN1890-PN1893.

4 See Report of Professor Philip Clarke and associated documents, Exhibit 11.

Office (the ANAO), which quantified the remuneration received by pharmacies from the Commonwealth Government for dispensing and mark-ups. The audit found that payments received by pharmacies from the Government had tripled from around $750 million in 1991 to over $2 billion by 2013, even after adjusting for inflation. Professor Clarke said that this growth in remuneration is due to much higher volumes of dispensing as a result of a combination of population increase, ageing, and expanded prescribing from newer classes of drugs. In addition to increases in the dispensing fees paid to pharmacists, government payments were now around 20% higher in real terms than in the early 1990s due to greater pharmacy remuneration form mark-ups.

37 Professor Clarke outlined the findings of the ANAO report that more than 18% of pharmacies in Australia receive more than $1 million in remuneration from dispensing drugs listed on the PBS, with 140 more pharmacies moving into the top-earning bracket when the 2012 and 2013 financial years were compared. He stated that the high profitability of established pharmacies meant that business sale prices were very high, with the cost of inner-city and suburban pharmacies running into millions of dollars. These prices locked out many pharmacy graduates from ever owning their own business due to inflated business prices, and also mean that new entrants are saddled with levels of debt that turn what should be profitable businesses into marginal ones. Professor Clarke gave evidence that this creates a cycle of rent seeking: the ownership and location rules protect existing owners, forcing the next generation of owners to buy their businesses at inflated prices and thus seek ever more protection from competition in order to be profitable or even viable.

38 In cross-examination, Professor Clarke acknowledged that not all pharmacies are part of the PBS (which is the scheme under which pharmacies are remunerated by the Government for dispensing scripts for scheduled medicines). He accepted that the practice of simplified price disclosure has reduced the benefits that pharmacies were getting, beyond the standard remuneration. Professor Clarke clarified that whilst the location and number of pharmacies in Australia is currently frozen, the number of pharmacists operating within the pharmacies has increased. However it remained the case that the pharmacist to population ratio is falling. Professor Clarke was of the view that this affected the labour market bargaining power of pharmacists, in that if employment opportunities for employed pharmacists are supressed by restricting the number of pharmacies, this may impact on the price of a pharmacist's labour. Alternatively, in the presence of a monopoly, or some degree of monopoly by the employer, the bargaining powers change and that places downward pressure on wages of pharmacists. He stated that ultimately, the impact of the regulatory restrictions on the labour market would be determined by demand and supply factors.

39 Professor Clarke conceded that the available data concerning the profitability of pharmacies is imperfect and is ultimately based on averages rather than looking at the specific profitability of individual pharmacies. He acknowledged that not all pharmacies would be highly profitable and highlighted the lack of good public data in relation to the profitability of pharmacies. However the rules and restrictions applicable to pharmacies provide a regulated operating environment that protects existing pharmacy owners. There is a significant spread of remuneration to pharmacies from dispensing drugs listed in the

ANAO report with only 18% being in the top income bracket, and an increase to wages could affect low-income pharmacies, and in turn have consequences for the employment of pharmacists.

Dr Geoffrey March

40 Dr Geoffrey March is the President of Professional Pharmacists Australia, a division of the APESMA, and is also a National Assembly member of the APESMA. He has held various academic and professional appointments throughout his career, including as a Lecturer at the School of Pharmacy and Medical Sciences at the University of South Australia until his retirement in 2016. He was a registered pharmacist from 1977 until he retired from the profession in 2016, and worked as a practising pharmacist until 1997.

41 He provided two statements in support of the claim. In his first statement dated 10 December 2017,[5] Dr March referred to his period of practice as a pharmacist, and said that when he commenced practice as an intern in 1976, he was ethically prevented from discussing or describing medication to patients, and his training and practice involved a focus on the drug itself, how it worked, dosages and formulation. He was not trained to appreciate consumer wants, desires or needs, and it was expected that the consumer would accept his directions.

42 Dr March described a process of policy reform commencing in 1987 when the World Health Organisation issued a resolution calling upon all member countries to develop a national medicinal drug policy. In 1988 the Australian Government committed itself to the establishment of such a policy. The Australian Pharmaceutical Advisory Council (APAC) was subsequently established as a multi-disciplinary representative body, and in 2000 it published the National Medicines Policy. The QUM strategy was also introduced in conjunction with the policy in 2000. A second committee established by the Australian Government, the Pharmaceutical Health and Rational Use of Medicines (PHARM) committee, also provided advice to the Minister and Department for Health and Ageing concerning strategies for the QUM in Australia.

43 In line with the principles of the National Medicines Policy, the strategy for achieving QUM was based on a partnership approach, in which a "medication team" consisting of consumers, doctors, pharmacists and nurses who each have a role to play in ensuring the medicines are used wisely in an environment that both supports and is conducive to the QUM. The strategy was implemented by pharmacists in a number of ways, including in interactions with individuals patients, community groups and organisations.

44 Dr March gave evidence that he was part of a research team that investigated the development and implementation of a pharmacy practice based on the philosophy of pharmaceutical care as the QUM strategy where pharmacists in collaboration with the consumer and the consumer's medical practitioner worked to identify and resolve medication-related problems. One outcome of this research was the implementation of the HMR program, firstly in aged care facilities and eventually in the community.

45 Dr March considered that the developments he described caused the "practice paradigm" in the pharmacy profession to change from pharmacists dispensing medication for a medical condition to a focus on the person suffering from a

5 Statement of Dr Geoffrey March dated 21 December 2017, Exhibit 1.

medical condition for which medication may or may not be appropriate. In terms of the University education of pharmacists, it was no longer sufficient for pharmacists to be trained only in all aspects of medicines including their formulation and action on the body. They also needed the ability to apply that knowledge through the use of "soft" skills — for example, by effective communication with customers and collaboration with other health professionals. New courses were added to the pharmacy curriculum to teach students the necessary skills to become patient care practitioners. These "Applied Therapeutics" courses covered topics such as pharmacists' roles and responsibilities; understanding the health system; the role of standards, guidelines and ethics in practice; communication theory and skills development; cultural sensitivity; behavioural theory and application; problem solving skills including the basis of the pharmaceutical care model; inter-professional learning and collaboration; literature researching and critical evaluation skills to facilitate access to independent information; and understanding the roles and responsibilities of various professional bodies.

46 By the time of his retirement in 2016, Dr March stated, pharmacy students were being taught to accept responsibility for the outcomes of the prescriptions and over-the-counter medicines they were dispensing by being able to effectively communicate with customers, exploring behavioural strategies to assist consumers in changing behaviours, developing the skill to identify and resolve medication related problems, and communicating effectively with other health professions. These changes in the curriculum preceded changes in practice in the community setting, so that as at 2000 relatively few pharmacies had established a practice involving medication review and it was a challenge to find pharmacists who were beginning to practice in a more patient-centred manner or providing specific patient care services or student placements.

47 Dr March also described the commencement of the accreditation of pharmacy programs in 1998 with the creation of the New Zealand and Australian Pharmacy Schools Accreditation Committee. The latest Accreditation Standards introduced in 2014 include a learning domain relating to the health consumer, which was an acknowledgement of the supremacy of the consumer in practice.

48 In his reply statement dated 30 April 2018,[6] Dr March further detailed the changes in education as a result of adopting a more patient-centric approach. He said that the new patient-centred approach started to be implemented partially in universities in around 1998 and was rolled out in the following few years. In a formal sense patient-centred care became a core part of practice with the National Medicines Policy in 2000. QUM was at the heart of the policy, and it emphasised: selecting management options wisely; choosing suitable medicines; using medicines safely and effectively; greater engagement with the patient; understanding the health-care system and inter-professional learning and collaboration; making more complex judgments in applying standards, guidelines and ethics' communication theory and skills development, cultural sensitivity, behavioural theory and application, and problem-solving skills; and literature research and critical evaluation skills. Dr March set out that pharmacists were now required to engage on a higher level with patients and were not only required to consider the impact of medication on patients, but also matters such as the availability of other therapies, and costs for the individual, the community and the health system as a whole.

6 Reply Statement of Dr Geoffrey March dated 30 April 2018, Exhibit 2.

49 In terms of the impact of the proposed variation on collective bargaining within the pharmacy industry, Dr March stated that, with the exception of one chain of pharmacies, no other community pharmacies have consistently entered into enterprise agreements. He noted that the majority of community pharmacies are geographically diverse and have fewer than 20 employees. He stated that this made it difficult to commence bargaining with these pharmacies.

Amy Thomson

50 Amy Thomson[7] is an Emergency Medicine Specialist Pharmacist employed by NSW Health at the Mona Vale Hospital NSW and a Specialist in Poisons Information at the NSW Poisons Information Centre at The Children's Hospital Westmead. She is currently classified as a Pharmacist Grade 3 at Mona Vale and a Pharmacist Grade 2 at NSW Poisons Information Centre.

51 Ms Thomson stated that her duties as an Emergency Medicine Specialist include:

- the provision and development of clinical pharmacy services;
- obtaining detailed medical histories from patients;
- undertaking medication reviews;
- preparing pharmaceutical care plans;
- providing information to nursing and medical staff on relevant aspects of drug usage and availability; and
- strategic planning for the pharmacy department.

52 In relation to her appointment as a Specialist in Poisons Information, Ms Thomson stated her main responsibilities include:

- the assessment of patients exposed to various toxins and advice on treatment;
- advising on the treatment of bites and stings and on the side effects and interactions of medications; and
- answering general queries relating to poisoning, pesticides and chemical safety.

53 Ms Thomson was awarded a Bachelor of Pharmacy at Sydney University in 2010. She described in detail the content of her undergraduate course, which she said had a focus on the quality use of medicines and how to improve patient outcomes. Relevantly, students were taught how to perform professional services and to integrate into the health care team, why pharmacists as experts were essential to the health care team, and how best to communicate to patients and doctors to improve patient outcomes. As examples of training in this area, Ms Thomson said she did a laboratory exercise about the appropriate use of amitriptyline for different patient groups, particularly the elderly; participated in role plays communicating key health messages to the general public; and learnt how to communicate with medical prescribers.

54 Following the completion of her degree, Ms Thomson obtained provisional registration with the Pharmacy Board of AHPRA. Ms Thomson set out that for her intern year she was required to complete 1824 hours of supervised practice, make and complete a training plan including obtaining 40 CPD points, undertake a written and an oral examination (with an overall pass mark of 65%), and complete the University of Queensland Pharmacy intern training course. The written examination included areas such as professional and ethical

7 See Statement of Amy Thomson dated 10 December 2017, Exhibit 4.

practice, the supply of prescribed medicines, the preparation of pharmaceutical products, and the delivering of primary and preventative health care. There was also a role play element based on a scenario where a patient presented a script for a medication, under questioning disclosed she had a history of seizures, and contact had to be made with the prescriber to recommend alternate treatment. Skills taught in her intern year included detecting, diagnosing and treating minor ailments, detecting more serious conditions, when to refer patients to another professional and how to treat the more serious condition.

Cameron Walls

55 Cameron Walls[8] is a Pharmacist Manager at a pharmacy in Wodonga, Victoria. He completed his degree in pharmacy at Charles Sturt University in 2009, and gained full registration as a pharmacist in 2011. He worked in two other pharmacies before his current position. He is classified as a Pharmacist Manager under the Pharmacy Award. He is paid $44 per hour Monday-Friday, $55 per hour for Saturdays and overtime, and $65 per hour on Sundays.

56 In addition to managing the business, Mr Walls undertakes duties providing prescriptions and medicines (typically dispensing 130-150 prescriptions per day), and performing services such as providing medical leave certificates, in-Pharmacy medication reviews, supervision of daily medication collection, screening and provision of sleep apnoea treatments and weight management consultations, and ensuring the pharmacy operates within the relevant legal framework and professional standards. He is required to supervise or be involved in the supply of Schedule 2 and Schedule 3 pharmacy-only medicines where the patient does not require a prescription. It is necessary form him to ensure that such medicines are safe for the person taking, by considering their medical conditions, other medications they are taking, their age and gender and any other relevant information; it is also necessary for him to make sure that the treatment is likely to be effective, considering the nature and severity of the condition, the treatment options and, when required, to recommend an alternative treatment or make a referral to an alternative healthcare provider.

57 Mr Walls also gave evidence that his duties now increasingly involve the provision of "professional services" which do not necessarily involve the sale of medicines or products. These include such services as:

- pharmacist vaccinations;
- providing medical leave certificates;
- opioid replacement therapy;
- dose administration aids;
- staged supply;
- clinical interventions;
- sleep apnoea screening and treatment;
- weight loss programs;
- in-pharmacy medication reviews (MedsCheck and Diabetes MedsCheck);
- HMRs; and
- blood pressure, blood glucose and cholesterol screening.

58 He stated that with the exception of vaccinations and HMRs, he had personally provided all of these services, and that that many of these

8 See Statement of Cameron Walls dated 15 December 2017, Exhibit 5.

professional services required training and accreditation in addition to his pharmacy degree. He set out that he had received specific training to provide opioid replacement therapy in accordance with Victorian legislation, sleep apnoea screening and treatment, and a specific weight loss program.

59 In addition, Mr Walls stated that as a Pharmacist Manager, he had developed skills in human resourcing, stock control, and financial analysis. He stated that his pharmacy degree did not provide him with these skills nor had he received any formal training from his employer. Finally, Mr Walls set out that increasingly, the responsibility of managing pharmacies is being undertaken by pharmacists who do not have ownership of the pharmacy, and that the training of interns is now falling on employees within the pharmacy, rather than the owner of the pharmacy. In that connection he has taken on the role of Preceptor, which involves supervising the learning and competence of an intern pharmacist during their registration year.

60 Mr Walls also referred to the introduction of compulsory CPD and learning plans, which has occurred since the graduated. This had increased the burden of work in terms of documenting his learning activities, and all CPD activities had to be done in his own time and at his own expense.

Katerina Malakozis

61 Ms Katerina Malakozis[9] is employed as Pharmacist in Charge at National Pharmacies in Adelaide, and is paid $48.51 per hour. She gained full registration as a pharmacist in 1989, and has been employed since then in a range of pharmacies. Her responsibilities extend from managing all employees of the pharmacy and ensuring they have proper training, dispensing prescriptions and checking compatibility with other medications, counselling patients concerning how to take their medications and how they work and what to expect from them, performing MedsChecks, administering influenza inoculations, supplying Pharmacist Only Medicine, issuing absence from work certificates, supplying and packing DAAs, providing health information to patients, taking back and disposing of unwanted medicines, operating diabetes assistance functions under the National Diabetes Supply Scheme, acting as Preceptor for interns, and ensuring the safe storage of medicines and providing advice about this.

62 Ms Malakozis gave evidence that during her period of employment as a pharmacist she had experienced a "dramatic change" in procedures and processes and in her work. At the commencement of her career in 1989/90, the main tasks she performed related to dispensing medication and providing information surrounding prescriptions. The prescriptions also had to be collated and missing scripts identified and removed from the claim, and then sent to Department of Health for payment. These tasks were now performed by dispensary technicians, but the pharmacist still needed to check the claim and personally sign it off. Today, Ms Malakozis said, there was much more work in her daily tasks. Increasingly the general public would seek medical advice from pharmacists rather than from their general practitioner. She stated that pharmacists had become more accessible and now offered services such as providing medical leave certificates, administering vaccinations, providing codeine products, and providing advice in respect of both minor and major health concerns (which often required referral to a GP). Ms Malakozis set out that there is a greater demand by the community to have a pharmacist deal with

9 See Statement of Katerina Malakozis dated 20 December 2017, Exhibit 6.

their health issues before they go to the doctor. Customers also sought advice on weight loss and the use of complementary medicines, and may want their blood pressure, blood sugar and/or cholesterol checked. Other interactions with customers included assistance with medication packs, dealing with requests to get expired scripts renewed, advice about generic medications and dealing with medications that are out of stock.

63 Ms Malakozis said that she typically was involved in the dispensing of 250-350 prescriptions per day, along with constant requests for advice. All products dispensed were scanned using a Medicare/drug scanner to ensure minimal mistakes, and during this time it was necessary to record customer interactions, review customer history and offer advice and MedsChecks. It may also be necessary to administer first aid, deal with a customer in crisis, contact a GP about a prescription and check PBS claims. She also had the management responsibility to ensure staff complied with the new Professional Practice Standards and Code of Ethics. Generally, the scope of regulation of the profession requiring compliance had significantly expanded, including the introduction of mandatory CPD. The downscheduling of medication, which had increased the number of pharmacy-only medicines, had increased the workload.

64 Mr Malakozis' employment was covered by an enterprise agreement, with National Pharmacies having entered into a series of enterprise agreements over 20 years. The current agreement provided for study leave and assisted in contributing towards accreditation of pharmacists to perform HMRs.

Cardin Le

65 Cardin Le[10] is currently employed as a Pharmacist in Charge at a pharmacy in Wagga Wagga, at which he is paid $37 per hour for ordinary hours, $45 per hour on Saturdays and $50 per hour on Sundays and public holidays. He graduated at Charles Sturt University in 2009 and gained full registration as a pharmacist in 2011. His current duties include rostering pharmacists, dispensary management, stock orders and control, inventory, compounding non-manufactured medicines, and reporting to owners. He stated that during his time working as a pharmacist, he had observed a number of changes to the profession. Mr Le said that the profession had evolved from predominately dispensing medicines and administration to an increased demand for professional services. The services included counselling patients, daily staged supply of methadone to assist with the elimination of drug addiction, providing vaccinations, medications reviews, and QUM.

66 Mr Le stated that an ordinary day involved dispensing approximately 250 or more scripts, checking Webster packs (a type of DAA), providing consultations for, on average, 20 walk-in patients per day regarding minor health advice or pharmacist only medicine requests, conducting medication reviews and administer walk-in vaccinations.

67 Mr Le's evidence was that the demographic of the pharmacy in a rural area was significantly different from other pharmacies in that there is diversity in age, ethnic backgrounds and socio-economic circumstances. Dealing with patients with special requirements, such as ones who spoke limited English, in combination with dispensing their prescriptions and managing the supervision of staff, whilst other customers were left waiting, caused pressure in the role particularly when Mr Le was the sole pharmacist on duty. Mr Le stated that

10 See Statement of Cardin Lee dated 13 December 2017, Exhibit 7.

there may be the need to dispense between 250 and 350 scrips during an eight hour shift, some being more complicated than others, and requiring the provision of particular advice to customers.

68 Mr Le emphasised that there was a significant amount of new work in the role not previously undertaken by pharmacists, compared to when he had commenced practising in 2011. This new work included administering vaccinations, the impact of QUM, down-scheduling of medicines, and the administration of medication to an ageing population. Accordingly, Mr Le stated that there is more work and pressure on pharmacists without any additional remuneration. The evidence was that often prescription choices made it necessary to exercise judgement and skill in relation to the suite of appropriate medication.

69 In addition he stated that since the completion of the undergraduate degree, further training has had to be undertaken to perform many of the newly required pharmacy services. The further training included training for vaccinations, medication reviews, and down-scheduling of drugs.

Leon Wai Hon Yap

70 Leon Wai Hon Yap[11] is employed as a Clinical Hospital Pharmacist at the Gold Coast Health and Hospital Service. He completed a Bachelor of Pharmacy at the University of Queensland in 1998, and gained full registration as a pharmacist with the Pharmacy Board in 1999. Mr Yap's employment is classified as a Health Professional Level 3 Paypoint 6 at $45.40 per hour under the *Health Practitioners and Dental Officers (Queensland Health) Award — State 2015*, a Queensland state award. Prior to his current position, he worked in community pharmacies from 1999 until 2016. In his last pharmacy in 2016 he was paid $35 per hour Monday-Friday and $40 per hour on Saturdays.

71 He set out that during his career he had seen changes in both the way he performed his work and the types of work performed. Mr Yap stated that whilst at university from 1996 to 1998, the curriculum focussed on the pharmacology of medicines, basic human anatomy, human physiology, basic medicine compounding, the science behind medicine design and delivery systems, prescription legalities, dispensing, patient counselling, and over the counter prescribing.

72 Mr Yap stated that in 1999, to satisfy the requirements to be eligible for registration in Queensland as a pharmacist, he was required to complete an open book written exam and to complete 48 weeks of supervised practice. He stated that the exam covered topics such pharmacy law and ethics, pharmacological questions, and pharmacy practice questions. His first job as a pharmacist consisted of serving customers with minor ailments, receiving prescriptions from customers, interpreting and dispensing prescriptions, explaining to customers how to use medications, and providing over the counter medications to treat minor ailments, limited to conditions such as colds and flu, minor aches and pain, hay fever and minor skin irritations. Other duties included collating prescriptions for reimbursement by the government under the PBS, ordering stock and placing stock on the shelves. He provided customers with over-the-counter medicines, but the quantity and variety of these was much

11 See Statement of Leon Wai Hon Yap dated 18 December 2017, Exhibit 8.

smaller than today. The minor ailments he diagnosed and treated were limited to conditions such as colds and flu, minor aches and pains, hay fever and minor skin irritations.

73 Mr Yap outlined the responsibilities of contemporary pharmacists, and stated that pharmacists were now required to be trained and competent to diagnose, treat, or to decide when to refer a patient to a doctor for, a much wider range of conditions. These new duties related to "bacterial conjunctivitis (Chloramphenicol), Nausea related to migraine (Metoclopramide and Prochlorperazine), medicated weight loss treatments (Orlistat), provision of Proton pump inhibitors (PPI' s) for the treatment of Gastroesophageal Reflux Disease (GORD), assessing the requirement for and providing nasal decongestants facilitated with the use of Project Stop, providing Emergency Contraception (the morning after pill), oral antiviral treatments for cold sores (Famciclovir), oral treatments for vaginal thrush (fluconazole) and the provision of Naloxone for the emergency treatment of acute opioid overdose".

74 Furthermore, he stated that the provision of Emergency Contraception required pharmacists to be able to determine not only that the product will be appropriate, safe and effective for the particular patient but also to be able to assess and assist in cases where the patient may be underage or there is the possibility that a sexual assault has taken place. He stated that this may require specialist knowledge of local sexual health clinics, sexual assault services as well as the requirements for mandatory reporting of suspected cases of child sexual abuse. Pharmacists also now had to operate a screening and recording database (Project Stop) established by the PGA to facilitate the supply of nasal decongestant products containing pseudoephedrine.

75 Mr Yap said that the dispensing process had become "slightly faster" due to improved technology and better software, but his patients had increased requirements to assess the appropriateness of a treatment due to the higher prevalence of type 2 diabetes, heart disease, neurological conditions, autoimmune diseases, and the increasing complexity of the medicines used to treat these conditions. He stated that this had resulted in more complex and comprehensive patient counselling, in order to better educate patients on the medicines they are taking. He stated that this was in addition to the demands of patients who were generally becoming more interested in their health and medicines and requesting more information about medicines. The introduction of Quality Standards as part of the QCPP from around 2000-1 onwards placed a greater burden on the pharmacist in charge or pharmacist manager, who usually undertakes the role of QCPP standards coordinator. The introduction of dose administration aids, which occurred since Mr Yap became registered, was an important but time consuming and mentally challenging service. Creating a DAA involved repacking a person's dispensed medicine into a single disposable 7-day blister pack that sets out a person's medicines in an easy-to-red and accessible way. The role of packing DAAs is often carried out by pharmacy assistants, although in smaller pharmacies it may be carried out by the pharmacist, but they always need to be checked for accuracy by the pharmacist. The number of persons on opioid replacement had increased in Mr Yap's experience from 5-19 to 20-40, the legal requirements for dispensing opioid had become more explicit and the types of opioid replacement had increased. Each patient who presents to the pharmacy for opioid replacement has to be identified and assessed as to whether they are able to be dosed, and the pharmacist must

then measure out the dose, provide it, watch it being consumed and make sure it is not diverted. In addition, a range of recording requirements must be carried out.

76 Mr Yap stated that with the establishment of the Pharmacy Board of AHPRA in around 2000, pharmacists are now required to complete a certain amount of hours of CPD. For the most part, this learning had to be done in the pharmacist's own time and very rarely were pharmacists paid to undertake this learning.

77 He also referred to the advent of professional services now being provided by community pharmacies. These professional services included HMRs, MedsChecks and Diabetes MedsChecks, and in the case of one pharmacy where Mr Yap was employed, a Clozapine clinic. In order to provide HMRs, a pharmacist had to obtain accreditation, which involved either a face-to-face workshop or online preparatory course, the completion of a communication module, a multiple choice examination and the completion of four case studies by correspondence. In respect of HMRs, a portion of the money the pharmacy receives from the federal government, through 6CPA funding for this service is passed on to the pharmacist. In the case of MedsChecks and Diabetes MedsChecks, he stated that very rarely was any of the money that the pharmacy received as part of 5CPA and 6CPA funding shared with the actual pharmacist performing these services. The conduct of a Clozapine clinic in the last pharmacy Mr Yap worked in involved servicing 30-40 clients per clinic and required a patient's blood test results to be inspected and signed off on a special monitoring website, and the details of dispensing of the Clozapine entered into the website. This process was time consuming and only commenced about 3 years ago.

Jennifer Madden

78 Jennifer Madden[12] completed a Bachelor of Pharmacy at the Victorian College of Pharmacy in 1968, and gained full registration as a pharmacist with the Pharmacy Board of Victoria in 1970. She has worked, always on a part-time basis, in community, hospital, military, academic, research and consulting pharmacy roles. She remains registered as a pharmacist and is currently employed as a locum pharmacist with several pharmacies. She is currently classified as a Pharmacist in Charge, and is paid $40 per hour. Her duties include the usual activities of dispensing and supervising the sale of Schedule 2 and Schedule 3 medicines, and providing advice on medications as requested or necessary. She is not required to pay wages or manage stock, apart from during busy times, and would make corrections to Webster Packs when needed. As an Accredited Pharmacist she manages the HMR process, and also works with nursing homes regarding RMMRs to identify suitable residents and request reviews from their doctor as well as performing them.

79 Ms Madden gave evidence that the university curriculum when she studied pharmacy at that time focused on becoming familiar with medicines prescribed by doctors and becoming expert in over-the-counter medicines, preparations and counter dispensing (for coughs and colds, pain remedies and first aid). She studied pharmacology, physiology and drug scheduling. When she commenced working as an intern in 1969, she said there was very little pressure and responsibility, and she performed typing, compounding and packing of bulk

12 See Statement of Jennifer Ruth Madden dated 14 December 2017, Exhibit 9.

medicines. She did a practical and oral examination at the end of her internship. Ms Madden compared this to her experience of internships in recent years as a tutor and supervisor, and said that the intern year was now intense and demanding with a lot of assignment work and a more strenuous examination at the end.

80 In relation to the work of a pharmacist, she said that in her experience there had been little change in the work until the advent of computers, initially in dispensing, in the 1980s. Computerised records allowed easy access to a patient's history of use of medicines, and facilitated analysis of a patient's profile when dispensing medicines. The introduction of Schedule 3 pharmacist-only medicines in the 1990s added another level of responsibility to pharmacists.

81 Ms Madden said that during the 1990s, the rapidly expanding drug compendium available for prescribing, in conjunction with increased legal obligations, highlighted the need for continuing education which was initially voluntary but is now compulsory, being 40 hours required for continued registration. However it was emphasised that no increased remuneration was provided in response for this compulsory activity. She is required to undertake at least 60 hours of continuing education per year in order to maintain her registration as an Accredited Pharmacist.

82 She set out that she had been accredited to undertake HMRs and RMMRs for about 15 years, and this constitutes about half her work. The skills required to be an Accredited Pharmacist are those of any registered pharmacist, but the accreditation process requires the pharmacist to show good communications skills at the professional and lay level and a good climical understanding of medicines and medical conditions. To become accredited she need to undertake a course accredited by the Australian Pharmacy Council, which included a communication module and ten case studies involving the preparation of a medication profile in each case. The course took almost a year to complete. She stated that she is required to sit an exam every three years to maintain her registration as an Accredited Pharmacist. Now that she is accredited she can write the report to the doctor based on feedback from another pharmacist or her own knowledge without actually interviewing the patient, but in fact of her 800 clients she only participated in one review without actually interviewing the client.

83 Ms Madden also identified the additional professional services and duties performed by pharmacists. She stated that she frequently provided clinical interventions to customers, extending from directing a patient who wanted an antiseptic for a dog bite to go to their doctor as the antiseptic was an inadequate therapy, to a scenario involving checking why a patient was now taking a higher strength asthma medicine than six months prior, or intervening in not selling another patient Ventolin for a cough as they had not been diagnosed with asthma. In addition Clinical Interventions occurred with particular doses of drugs where "black box" warnings apply, that is, the medical professional is alerted to a potential problem with a particular drug or dose of drug. Her evidence was that the intervention may only take a number of minutes, or more than 10 minutes and often involved related phone calls to a doctor or carer. These interventions reduce the burden on the health system.

84 In relating the nature of her changed duties, she stated that in the last two days of work in the community pharmacy, she filled 304 prescriptions between

9.00 am and 5.30 pm. She completed this task with one dispensary assistant and three competent shop staff. In addition she recorded 10 interventions and a range of other discussions with patients. She also checked 50 to 60 Webster packs, made changes to 2 Webster packs and initiated a new pack. In addition she supervised the sale of 20 Schedule 3 medicines and had discussions with two General Practitioners that were time-consuming. She noted that on this day there were no requests for Blood Pressure or Blood Glucose Level checks, no vaccinations or requests from hospitals for patient profiles or supply pick-ups.

85 She stated that increasingly, pharmacists are often asked to respond to symptom based requests where in contrast previously the pharmacist was not called on as often to communicate about medicines, they were just dispensed. She stated that since the 1980s, in terms of Schedule 3 medicines, there has been significant movement of medications down the Schedule, which has placed pressure on Pharmacists to communicate information about these drugs to assist the patient. There is a need to dispense medications in an informed manner, taking into account the patient's circumstances.

Carmel McCallum

86 Carmel McCallum[13] graduated in 1977 at the University of Sydney and gained full registration as a pharmacist in 1977, and retains current registration as a pharmacist. She has worked at a range of community pharmacies, and has previously been an owner of a pharmacy, and is currently employed as a locum pharmacist. She is classified as a Pharmacist in Charge and is paid $40 per hour. Ms McCallum's duties in her current position extend from dispensing and checking prescriptions; dispensing, checking and signing off DAAs; logging Schedule 8 medicines (including opioids, fentanyl, central nervous system stimulants such as Ritalin, and alprazolam); counselling patients regarding new prescription medications, adverse reactions or when interactions with other drugs may occur; counselling, diagnosing and recommending treatments for ailments as the first point of contact for patients; interpreting patient blood pressure readings and blood sugar levels; pain management and alternative recommendations when drug dependence is suspected; dispensing and delivery of methadone or buprenorphrine under the NSW Opioid Treatment Program; issuing medical certificates; overseeing the general day-to-day performance of staff; managing the supply of drugs at the pharmacy; and ascertaining the entitlement of patients to receive prescriptions under the National Health Scheme.

87 Ms McCallum gave evidence that she commenced work in 1977 as an unregistered graduate pharmacist in a small pharmacy in New South Wales. She stated that at that time her duties involved handwriting copies of prescriptions into a log book, handwriting repeats and typing labels on a typewriter, and that all her work was checked off by a more senior registered pharmacist. If a product such as creams, ointments or mixtures had to be prepared, it could take ten minutes to an hour and about 70-80 scripts would be processed per day. Ms McCallum stated that she was able to spend up to 10 minutes per patient, and was able to provide them with advice on minor ailments, such as bites, rashes, minor burns, injuries, allergies, upper respiratory tract infections, vomiting and diarrhoea, difficulties with new-born babies, recommending the

13 See Statement of Carmel McCallum dated 18 December 2017, Exhibit 12.

appropriate treatment which was available over the counter, or other non-drug related action. She also made up proprietary products, such as cough medicine, in bulk.

88 She stated that over her time in the profession she had observed additional expectations, regulations and increases in workloads for pharmacists. She stated that much of the increased workload has come about as a result of the increase in life expectancy, change in medications, and increases in co-morbidity and lifestyle disease states. Pharmacists now had to oversee the accuracy of dispensing huge numbers of prescriptions. A number of pharmacies were now providing dispensing services in locations near large hospitals with casualty wards operating 24 hours per day. She referred to the up-scheduling since the 1990s of products containing codeine, pseudoephedrine and dihydrocodeine to Schedule 3 and 3R (which required recording), which required the pharmacist to ascertain need, usage, possible interactions, adverse reactions and addiction and misuse issues. The up-scheduling of codeine products to Schedule 4 would be challenging in terms of dealing with patients with addictions. The down-scheduling of products since the 1990s also increased pharmacists' responsibilities.

89 Ms McCallum also referred to other changes and new work such as blood pressure measurement (which might lead to a medical referral), training for the Diabetes Medication Assistance Service (although this had not proved successful), an exponential increase in the prescribing of Schedule 8 drugs over the last 6-7 years (which required much longer to be dispensed), and an increase in interventions. She had also dealt with at least six differing digital dispensing systems over the last 35 years.

90 She stated that unlike most professionals, pharmacists were not able to make appointments for enquiries during the work day, as there was an expectation that pharmacists are available at all times during operating hours. Pharmacists were required to be available at all times of the day during opening hours while on the premises, but the pressure and workloads had increased enormously since 1977.

Mr Alex Crowther

91 Mr Alex Crowther is employed as the Surveys Manager of the APESMA. In his first witness statement,[14] Mr Crowther said that his duties include the collection of data using online surveying tools for the purposes of creating market research of interest to APESMA, and he conducts regular surveys of remuneration and employment conditions in a number of industries covered by the APESMA. Relevantly the APESMA had published the Community Pharmacists' Remuneration Survey Report series since 1995. Data published in this series was collected from members of the APESMA's pharmacy division as well as non-member pharmacists who had previously interacted with the APESMA through online campaigns or social media. He stated that the report series benchmarked the employment conditions and remuneration of pharmacists employed in the community pharmacy sector. It collected and reported data including community pharmacists' hourly rates of pay, additional responsibilities required of community pharmacists beyond dispensing medicine, sentiment regarding working in the community pharmacist sector, and demographic information.

14 See Statement of Alex Crowther dated 13 December 2017, Exhibit 17.

92 Mr Crowther's statement annexed copies of the report series since 1995. He stated the following conclusions, derived from the report series, about wages movement for pharmacists:

- The 2016 Remuneration Survey identified mean hourly rates of pay for permanent employee pharmacists at each of the classifications outlined in the Award as follows: Pharmacy Intern ($23.02), Pharmacist ($32.49), Experienced Pharmacist ($36.66), Pharmacist-in-Charge ($35.95), and Pharmacist Manager ($38.49).
- Mean hourly rates of pay reported by community pharmacists were lower in 2016 than they were for community pharmacists surveyed in 2011, with decreases of 5.49% for Pharmacists, 3.73% for Experienced Pharmacists, 7.94% for Pharmacists-in-Charge, and 1.86% for Pharmacist Managers. Prior to 2011 community pharmacists mean hourly rates of pay had increased steadily.
- Growth in the hourly rates of pay for community pharmacists had also fallen behind growth in the Australian wages generally, as measured by the Wage Price Index (WPI), and the cost of living, as measured by the Consumer Price Index (CPI), for each of the classifications above that of Pharmacy Intern.
- Since 1998, Pharmacists had experienced a decline in the real value of their wages of 11.59%, Pharmacists-in-Charge of 7.35%, and Pharmacist Managers of 3.52%. Pharmacists had also experienced wage growth 21.47% below that of the average Australian, 17.69% for Pharmacists-in-Charge, and 14.29% for Pharmacist Managers.
- The underperformance of pharmacist wage growth relative to both CPI and WPI was largely due to stagnant and declining hourly rates of pay since 2011. Prior to 2011 pharmacists tended to outperform both CPI and WPI year on year.

93 In respect of the this decline in wages, Mr Crowther noted that as the report series does not use the same respondents year-on-year, this was likely due to a combination of both stagnant wage movement and new entrants to the industry at each classification being offered progressively lower starting packages.

94 The report series also surveyed whether the respondents were required to provide any professional services as part of their duties, including HMRs, RMMRs, MedsChecks, vaccinations, and other services. The results were as follows:

- MedsChecks services: 85.9%
- Vaccinations: 20.98%
- Other services: 15.41%
- HMRs: 15.41%
- RMMRs: 4.59%.

95 Only 8.4% of respondents that performed one or more of these services reported receiving additional compensation.

96 In his statement in reply,[15] Mr Crowther referred to the Graduate Outcome Survey published by Quality Indicators for Learning and Teaching. He stated that this survey provides information regarding commencing salaries for Australian graduates, and that the latest report published January 2018 identified pharmacy graduates were the most poorly remunerated of any professionals.

15 Reply Statement of Alex Crowther dated 1 May 2018, Exhibit 18.

Based on this survey he said that "… compared to other allied health professionals, pharmacy graduates had commencing salaries 26.7% less than Nursing graduates, and 23.6% less than Psychology graduates in 2017. Compared to Engineering graduates, another professional that requires a four-year degree and covered by Professionals Australia, Pharmacy graduates have a commencing salary 31.3% less in 2017".

Community Pharmacy Agreements

97 The APESMA tendered copies of the six Community Pharmacy Agreements which have been entered into between the Federal Government and the PGA in 1990, 1995, 2000, 2005, 2010 and 2015 (amended in 2017) respectively. We will refer to certain aspects of those agreements relied upon by the APESMA.

98 The First CPA entered into in 1990 had two parts. The first was concerned primarily with the adjustment of the Commonwealth's price for pharmaceutical benefits. That price consisted of two elements: a dispensing fee and a mark-up component. The agreement provided for the dispensing fee to be indexed in accordance with a formula that included a 75% "labour component" which was adjustable in accordance with award wage movements. The second part was concerned with various restrictions on competition in the pharmacy sector and dealt with matters such as the subsidised closure and amalgamation of pharmacies, the payment of an "Essential Pharmacy Allowance" by the Commonwealth "to approved pharmacies to maintain an essential pharmacy service and to maintain access to pharmaceutical benefits", ownership laws, pricing and location rules. The Second CPA entered into in 1995 removed the labour component from the indexation process, and simply used the CPI. It also dealt with various agreed restrictions on competition, and provided for the payment of an additional allowance for isolated and remote pharmacies.

99 The Third CPA entered into in 2000 stated that it was based on a number of principles, one of which was "expanding community pharmacy's professional roles", and also provided for objectives that included "development of enhanced medication reviews, in cooperation with the medical profession, aimed at improving health outcomes and quality use of medicines for the Australian community" and "coordination in the delivery of primary health care services and achievement of a multi-disciplinary approach to the provision of quality health and pharmacy services for all sections of the community". The agreement contained a specific endorsement of the PGA's Quality Care Pharmacy Program as an appropriate quality assurance and professional practices standards program, and noted that funding for such standard were derived from the Pharmacy Development Program (the PDP). The PDP was a program to be administered by the PGA and funded by the Commonwealth to the amount of $188 million over five years for the purpose of promoting "the enhanced involvement of community pharmacy in the pursuit of quality and cost effective service delivery". The agreement also provided for Medication Management Services (MMS) to patients in residential aged care and domiciliary settings to "reduce the risk of drug misadventure and optimise the benefits achieved from drug treatment by focussing on the achievement of quality use of medicines". The Third CPA stated that it "builds on previous arrangements for delivery of medication review by incorporating several new elements", including MMS to residents of residential aged care facilities, domiciliary MMS and case discussion and care planning, and these would be funded to the amount of $114 million over the life of the agreement.

100 The Fourth CPA entered into in 2005 had different principles and objective, one of which was to "ensure that the Programs target areas of need in the community including continued improvement in community pharmacy services provided to Aboriginal and Torres Strait Islander people". It noted that the Third CPA made provision for a total of $400 million for pharmacy programs, which included an amount contributed by the pharmacy that was funded through a reduction in the dispensing fee. The Fourth CPA indicated the amounts of funding assigned to various programs over five years, including $73.5 million for the QCPP, $39.7 million for DAAs, $10.4 million each for the diabetes and asthma pilot programs, $10.5 million for improved counselling for dispensing emergency contraception, $66.75 million of RMMRs and $54.15 million for HMRs.

101 The Fifth CPA entered into in 2010 had further re-formulated principle and objectives, including to "ensure that the Programs are patient-focused and target areas of need in the community …" and, in relation to professional pharmacy programs, had specific objectives including to "recognise that beneficial health outcomes can be achieved through the delivery of evidence based professional pharmacy programs and services". The program finding priorities for the Fifth CPA were identified as including Medication Management Programs, Pharmacy Practice Incentive and Accreditation and Medication Continuance. In addition to the priority programs, there was funding for a new Medicines Use Review Program (to "provide an in-pharmacy medicine review between pharmacists and patients to enhance the quality use of medicines and reduce the number of adverse medicines events") of $29.6 million over five years, and funding for a number of existing programs including HMRs ($52.11 million), RMMRs ($70 million), Diabetes Medication Management Service ($12.2 million), Pharmacy Practice Incentive and Accreditation ($75 million) and Medicine Continuance ($1 million). Other programs funded over the five years included $97 million for Clinical Interventions by Pharmacist (which program was to "build on 3rd and 4th Agreement Research and Development Projects to encourage Approved Pharmacists to provide and document clinical interventions arising from their patients' medicine use" and had the aim to "increase the number of clinical interventions provided and documented and improve communications with patients and prescribers"), $132 million to support the provision of DAAs, $35 million for the Staged supply support allowance (which program would "provide a payment to eligible Approved Pharmacists which meet specified performance requirements in providing dispensed PBS medicines in instalments when requested by the prescriber …"), $5 million to support the Accreditation System and roll-out of Additional Programs to Support Patient Services, and a total of $8 million for other programs.

102 The Sixth CPA entered into in 2015 and amended in 2017 continued to provide funding totalling $613 million for Community Pharmacy Programs including Medication Adherence Programs, DAAs, Staged Supply, Medication Management Programs, Clinical Interventions, HMRs, RMMRs and MedsCheck (a new name for the Medicines Use Review Program initiated in the fifth CPA).

Summary of the PGA's evidence

103 The following persons gave evidence on behalf of the PGA:

- Ms Natalie Willis, pharmacist and owner of two pharmacies in Western Australia;

- Mr Angelo Pricolo, pharmacist and a partner in a pharmacy in New South Wales; and
- Mr Nicholas Loukas, pharmacist and owner of several pharmacies across Queensland.

Natalie Willis

104 Natalie Willis[16] graduated in 1994 and began practising as a pharmacist in 1996 after completing her intern year. She initially worked as a locum pharmacist, and then became an owner of a pharmacy in Western Australia in 1999 (initially as a partner and later as a sole owner). She works in the pharmacy about three days per week performing a variety of clinical and administrative tasks. She is also a partner in a second pharmacy in Western Australia but does not work in the pharmacy itself. She said that all the pharmacists employed in the pharmacies were paid above the minimum wages prescribed in applicable Western Australian State award. No Accredited Pharmacists were employed. All her pharmacists were accredited to provide influenza vaccinations but were not paid more because of this.

105 Ms Willis gave evidence that pharmacists had always been accountable for the safe and judicious use of medicines, but there was now a greater need to record, document and be able to justify the actions of a pharmacist in order to receive government payments and as a defence to litigation. Since 1998 there had been an increase in the level of Federal Government funding for community pharmacy services, in recognition of the capacity of pharmacies to enhance community health outcomes. Payment mechanisms had been developed for some of these services such as HMRs, MedsChecks, staffed supply, clinical interventions and DAAs. However most of these services were being performed by pharmacies prior to Government funding streams; the funding was more a recognition of the contribution of pharmacists to community health and to get these activities recorded, not to encourage pharmacies to do them. The tasks were performed by pharmacies in 1998, but were offered free of charge or on a fee-for-service basis. Because there was no funding available, the need for documentation for these activities was far less. She stated that there had been a shift in government funding in terms of the remuneration moving away from the dispensing function (as this waned) to provide for the true cost of funding the professional services activities of community pharmacy.

106 Ms Willis said that pharmacists now routinely performed services outside dispensing and counselling such as point of care testing and formal MedsChecks. However they were still performed but were less commonplace 20 years ago and pharmacists had always been educated and qualified to perform these. The increased prevalence of these duties was offset by a greater number of dispensing staff. Pharmacists now were able to administer influenza vaccinations, which they had only been able to dispense before. Improvements in technology such as automated dispensing and scanning had improved dispensary speed, efficiency and accuracy, and developments in dispensing software had made it easier to assess the suitability of a medicine for a patient since script history, allergies and interactions with other medicines were more readily apparent. She stated that whilst automated systems existed for packing dosage administration aids, her pharmacies did not use one but instead used a

16 See Statement of Natalie Willis dated 18 April 2018, Exhibit 24.

computer to record medication profiles and track virtual pill counter patients. She stated that computers were increasingly used to record information and communicate with patients.

107 In response to the list of new work claimed by APESMA, she considered that the administration of vaccinations was the only new work that required her to undertake additional training above her degree. She stated that with the exception of HMRs and RMMRs, she had performed every other professional service relied on by APESMA, either formally or informally, and had not required further education. She stated that her pharmacists have performed these services since 1998 and they are seamlessly integrated into their workflows. In the case of HMRs and RMMRs, Ms Willis stated that whilst these services required a pharmacist to obtain additional accreditation, it only required the pharmacist to prove clinical skills and adherence to a standardised documentation process, and does not require any special skills over and above those possessed by any other pharmacist.

108 She stated asthma and diabetes management programs were highly variable, ranging from involving a patient who had an asthma action plan for an understanding of their blood glucose meter operation. Alternatively, it may involve simply ensuring the patient properly took the medication. She stated counselling on these conditions had always been part of her practice since commencement. She stated there were very few pharmacies providing specialised services in these areas where they had undertaken advanced training to provide a new service. Her evidence was that if the government decided to find a more formalised service then most of the training process driven would be a refresher in nature as pharmacists already handled these necessary clinical skills. She stated that pharmacists had always undertaken clinical interventions, with the difference being that these are now recorded.

109 She stated that sleep apnoea services had become possible due to the advances in technology. However, she stated pharmacists understood sleep apnoea, it being a part of the university course requirement. In this regard the pharmacists play the support role in the communication with the patient and fitting of the machines but the sleep apnoea physician gives the actual diagnosis. She gave evidence that all pharmacists have undertaken drug compounding in their degree. She also stated that weight management services in a pharmacy will usually involve information on the use of meal and replacement weigh-ins and that often non-pharmacists conduct these. Point of care blood pressure testing had been undertaken by pharmacists since before she graduated. As for smoking cessation services, in most pharmacies this was largely limited to providing advice on nicotine replacement products, and rarely did pharmacies provide any formalised service involving counselling and cognitive behavioural therapy. The provision of absence of work certificates, which started in 2009, did not involve new skills, and the only training required was how to fill out a form.

110 Ms Willis noted that the requirement to diagnose and treat of minor ailments and if necessary referral of patients to their treating medical practitioner, was not a new duty. Furthermore, in terms of the down-scheduling of various medicines from Prescription Only Medicine to Pharmacist Only Medicine, she stated that pharmacists were required to learn about these medicines when they were prescription only and are already fully conversant in these medications and the conditions they are used to treat, regardless of their scheduling. The Quality

Care Pharmacy Program did not involve changed work, but was just a means of ensuring good practice. Clozapine clinics only required pharmacists to follow a process of recording pathology results into a database prior to supply, and only affected a small number of pharmacists.

111 Ms Willis also gave evidence that there were aspects of pharmacists' work that were no longer performed. Most pharmacies were not doing any significant compounding in 1998, and now compounding pharmacies were doing more and regular pharmacies were doing less. Manual processing of PBS claims, scheduled medicine recording, reporting, ordering and stocktaking had ceased, and while prescription volumes had increased, this had not been evenly distributed. The main change from her perspective was that, unlike 1998, it was now difficult to make a viable profit from dispensing. Any increase in pressure on pharmacists was mainly cause by owners and managers not employing adequate staff in order to minimise costs. In her experience, a typical pharmacist was dispensing less prescriptions and performing more patient services than 20 years ago. Technology had vastly streamlined dispensing and reporting services, and this together with more support staff had created more time for the pharmacist to spend with the patient. The degree of interaction between pharmacists and patients varied depending upon the service model adopted at each pharmacy, but generally the industry was moving towards being a personal service industry.

112 In Mr Willis' opinion, there had been no significant net addition to the work or responsibility of pharmacists since 1998, but pharmacists' role had evolved into one whereby the skills they learned at university were now more frequently used.

Angelo Pricolo

113 Mr Angelo Pricolo[17] is a Pharmacist and a partner in the ownership of a pharmacy located in Melbourne. The pharmacy employs 22 staff, and pays above the minimum rates in the Pharmacy Award. Mr Pricolo graduated in pharmacy in 1986 and was registered as a pharmacist in 1987.

114 He stated that although the work for pharmacists has evolved over the past 20 years, their core tasks have remained the same: supplying prescription medicines to patients, and recommending additional measures and products if required. The drugs and the directions for their use changed over time, but this had always been the case and that was why continuing professional development remained essential. The need to talk to patients, understand their health issues and relevant medicines and their effects had always been part of the role of the pharmacist, although pharmacists had tended to make themselves more accessible to patients.

115 Mr Pricolo stated that the impact of technology meant that pharmacists are now no longer required to remember significant amounts of information about various drugs and medications, and that although there are more drugs and medications available today, this information is easily accessible electronically. Pharmacists made up a lot more extemporaneous medicines in 1998 compared to now, and there are far fewer scripts that require compounding. His pharmacy began issuing medical certificates in about 2008, and this had become a popular service, but it was a relatively straightforward task drawing on the existing skills of the pharmacist to talk to a patient and understand their health issues.

17 See Statement of Angelo Pricolo dated 18 April 2018, Exhibit 21.

116 Mr Pricolo disagreed that there is a significant amount of new work being undertaken by pharmacists. He stated that a variety of professional services now offered by pharmacies, were in many instances done informally, and they had been formalised because they now attracted federal government funding. For instance, he stated that pharmacists have always dispensed inoculation drugs and the fact that some pharmacists are now able to inject some inoculation drugs is a "small additional component" to the existing practice but consistent with health care services a pharmacist had always provided. Asthma and diabetes management programs were also not new, although the form of medical treatment had changed. Similarly, HMRs and RMMRs were performed informally previously, and formal training in these services was now required to be able to claim it through the PBS. None of Mr Pricolo's pharmacists performed this task. Clinical interventions had always been performed, although they are now recorded formally to document how often they happen because the pharmacy can now be remunerated for them. DAAs were also not new, although these were now done differently through the use of blister packs. Sleep apnoea services were not provided in Mr Pricolo's pharmacy. Weight management services required talking to patients, understanding their needs and providing them with advice and products to meet that need; it did not require any additional skill or accountability. There had always been a capacity and knowledge to perform blood pressure level tests and blood glucose tests, and the current devices made this task easier and quicker. Smoking cessation services were not new. Diagnosing and treating minor ailments such as colds and flu, minor aches and pains, hay fever, minor skin irritations and wounds, had always occurred and predominately only the products have developed and changed. Down-scheduling of drugs had not affected the skill, workload or responsibility of pharmacists, and it was still the role of the pharmacist to talk to the patient about the drug. The issue of emergency contraception was not common, but in any event still required the normal responsibility of ensuring that the medication was appropriate and safe.

117 Mr Pricolo gave evidence that the introduction of quality standards had "formalised what we have all aspired to but not in itself added to workload or the responsibility/accountability of a pharmacist". He stated that the pressure faced by pharmacists is not new and prioritising tasks and managing workflow has always been part of the job. He considered that there has not been a significant increase in the workload, accountability or responsibility of a pharmacist. He stated that whilst pharmacists may now spend more time talking to patients, technology has meant that less time may be spent in other areas (such as retrieving patient histories, providing insurance receipts and printing out consumer medicine information leaflets).

Nicholas Loukas

118 Nicholas Loukas[18] graduated as a pharmacist in 1991 and began practising in 1992. He has held ownership interests in pharmacies since 1993, and is currently the owner of five pharmacies in Northern Queensland. He pays all of his employed pharmacists above the minimum wage rates prescribed by the Pharmacy Award. He does this because the market rate is higher than the award and he has to pay more to attract suitable and experienced pharmacists to work in rural locations.

18 See Statement of Nicholas Loukas dated 19 April 2018, Exhibit 22.

119 Mr Loukas stated that since 1998, he has experienced a "lessening" in the administrative workload of pharmacists, so that although more administrative work was required for the Sixth CPA, there was less administrative work overall due to improvements in PBS claiming processes and software advances. PBS claims had in 1998 been a major component of the work, requiring extensive paper work, data claiming and couriering of claims. There had also been a huge drop in extemporaneous dispensing activities, so that it was rare to make up things such as creams and solutions. The scanning of prescriptions since 1998 had meant that the data entry work of a pharmacist had dropped significantly, and higher volumes of prescriptions were now able to be processed with the same resources due to IT improvements, and accuracy had improved, with scan checking of prescriptions taking some pressure off pharmacists. Mr Loukas said that it was his opinion that the accountability of pharmacists had decreased because of the improvements in IT systems such as script scanning and scan checking. He stated reduced administrative responsibilities had allowed pharmacists to have more direct contact with customers. In his statement, Mr Loukas considered that whilst the type of work he performed had shifted, this did not represent an overall increase in how much work was being performed.

120 In relation to the APESMA claim that there had been a significant amount of new work taken by pharmacists, Mr Loukas disagreed and said:

- no one in his pharmacies performed HMRs or RMMRs:
- no one in his pharmacies performed inoculations;
- pharmacists carried out asthma and diabetes management programs in 1998, with there being a drop in the workload requirements but better education for patients and awareness of the use of preventative medicines;
- pharmacists had always done clinical interventions, but the recording of this was new;
- DAA work had been performed since 1998, although there had been a small increase in the number of DAAs provided;
- none of his pharmacies provided sleep apnoea services;
- none of his pharmacies provided compounding services;
- very little weight management services work was performed in his pharmacies and the focus was on providing general medicines advice as pharmacists had always done;
- blood pressure level tests had been conducted in his pharmacies since 1998, and the work was the same and did not require any new skills;
- none of his pharmacies did blood glucose level tests or provided smoking cessation services;
- diagnosis and treatment of minor ailments such as colds and flu, minor aches and pains, hay fever, minor skin irritations and wounds and, if necessary, referral to a medical practitioner was done in exactly the same way as in 1998;
- the introduction of quality standards through QCCP had not led to any further work load, but was just the formalisation of work practises already in place;
- absence from work certificates were not provided in any of his pharmacies as no demand for them had been identified; and

- in respect of Clozapine clinics, only one of his pharmacies had 2 patients, for which very little administrative work was required.

121 Mr Loukas said that with the down scheduling of a large number of previous prescription-only medicines, pharmacists now had to diagnose and treat conditions such as bacterial conjunctivitis (chloramphenicol), nausea related to migraines (Metoclopramide), medicated weight loss treatments (orlistat) provision of pump inhibitors (PPI) for treatment of GORD, nasal decongestants (facilitated with the use of Project Stop), providing emergency contraception(morning after pill), oral antiviral treatments for cold sores (famciclovir), oral treatments for vaginal thrush (fluconzale) and the provision of Naloxone for the emergency treatment of acute opioid overdose. However he said that this had caused very little change in work load as the same amount of the mentioned conditions were presented at the pharmacy; the diagnosis process was the same as it was in 1998, but there were better options for treatment to recommend to patients. Mr Loukas did accept that emergency contraception was new work for pharmacists, and that whilst it did represent an increase in the accountability and responsibility of a pharmacist, there were no other instances of this. He also said that dangerous drug recording was a manual task required in 1998 which was now undertaken electronically.

Statutory framework and the assessment of work value

122 The task required to be undertaken in a 4 yearly review is set out in s 156(2) as follows:

> What has to be done in a 4 yearly review?
>
> (2) In a 4 yearly review of modern awards, the FWC:
>
> (a) must review all modern awards; and
>
> (b) may make:
>
> (i) one or more determinations varying modern awards; and
>
> (ii) one or more modern awards; and
>
> (iii) one or more determinations revoking modern awards; and
>
> (c) must not review, or make a determination to vary, a default fund term of a modern award.

123 The conduct of the 4 yearly review is subject to s 138, which provides:

> 138 Achieving the modern awards objective
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

124 The modern awards objective is set out in s 134 of the FW Act, and provides as follows:

> 134 The modern awards objective
>
> What is the modern awards objective?
>
> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the modern awards objective.

When does the modern awards objective apply?

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

(a) the FWC's functions or powers under this Part; and

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

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

125 The minimum wages objective is set out in s 284(1), which provides:

284 The minimum wages objective

What is the minimum wages objective?

(1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:

(a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and

(b) promoting social inclusion through increased workforce participation; and

(c) relative living standards and the needs of the low paid; and

(d) the principle of equal remuneration for work of equal or comparable value; and

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

This is the *minimum wages objective*.

126 The general principles applicable to the conduct of the 4-yearly review were recently summarised in *Re Alpine Resorts Award 2010*[19] as follows:

- section 156(2) provides that the Commission *must* review all modern awards and *may*, among other things, make determinations varying modern awards;
- "review" has its ordinary and natural meaning of "survey, inspect, re-examine or look back upon";[20]
- the discretion in s 156(2)(b)(i) to make determinations varying modern awards in a review, is expressed in general, unqualified, terms, but the breadth of the discretion is constrained by other provisions of the FW Act relevant to the conduct of the review;
- in particular the modern awards objective in s 134 applies to the review;
- the modern awards objective is very broadly expressed,[21] and is a composite expression which requires that modern awards, together with the NES, provide "a fair and relevant minimum safety net of terms and conditions", taking into account the matters in ss 134(1)(a)-(h);[22]
- fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question;[23]
- the obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process;[24]
- no particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award;[25]
- it is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award;[26]
- the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives;[27]

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19 *Re Alpine Resorts Award 2010* [2018] FWCFB 4984 at [52].

20 *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [38].

21 *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382 at [35].

22 *Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [41]-[44].

23 *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [21]-[24].

24 *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [2000] ATPR 41-742 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154; 244 IR 461 at [56].

25 *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [33].

26 *National Retail Association v Fair Work Commission* (2014) 225 FCR 154; 244 IR 461 at [105]-[106].

27 See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154; 244 IR 461 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

- in giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s 134(1)(a)-(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance;
- what is necessary is for the Commission to review a particular modern award and, by reference to the s 134 considerations and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net;[28]
- the matters which may be taken into account are not confined to the s 134 considerations;[29]
- section 138, in requiring that modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective, emphasises the fact it is the minimum safety net and minimum wages objective to which the modern awards are directed;[30]
- what is necessary to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence;[31]
- where an interested party applies for a variation to a modern award as part of the 4 yearly review, the task is not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation meet the objective.[32]

127 The capacity of the Commission to vary minimum wages in a modern award in the course of the conduct of the 4 yearly review is constrained by s 135 of the FW Act, which provides:

> 135 Special provisions relating to modern award minimum wages
>
> (1) Modern award minimum wages cannot be varied under this Part except as follows:
>
> (a) modern award minimum wages can be varied if the FWC is satisfied that the variation is justified by *work value reasons (see subsections 156(3) and 157(2))*;

28 *National Retail Association v Fair Work Commission* (2014) 225 FCR 154; 244 IR 461 at [28]-[29]; *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [49].

29 *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [48].

30 *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* (2017) 252 FCR 337 at [23]; cited with approval in *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [45].

31 See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382.

32 *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382 at [46].

(b) modern award minimum wages can be varied under section 160 (which deals with variation to remove ambiguities or correct errors) or section 161 (which deals with variation on referral by the Australian Human Rights Commission).

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

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

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

(Emphasis added)

128 Section 156(3), referred to in the italicised part of s 135(1)(a) above, provides:

(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

129 The expression "work value reasons" is defined under s 156(4) of the FW Act:

(4) *Work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.

130 Section 157(2), also referred to in the underlined portion of s 135(1)(a) above, provides for the variation of awards outside the system of 4 yearly reviews for work value reasons in specified circumstances.

131 The fixation of award wages based on an assessment of the value of the work performed has been a feature of the industrial arbitration system in Australia from its earliest days. Work value assessment has its origin in the need to fix the wage margins for skilled workers to be paid in addition to the basic wage for unskilled workers. As was explained by HB Higgins J, in his capacity as President of the Court of Conciliation and Arbitration, in his decision in 1921 to make the first federal award for the metals and engineering industry:

> This Court assumes that a skilled man should, as has been the uniform practice, get more for his *skill or other necessary qualifications* than a mere labourer — more or better commodities, and to that end more money wages. This Court takes the basic wage for the labourer and then adds to it the extra wage without which, under present conditions, lads will not take the trouble of mastering the difficulties of a skilled trade. If there is one thing that has been made clear in all the Australian tribunals it is that the basic wage is the wage at the base — the wage for the unskilled worker; and that the secondary wage for skill and other necessary

> qualifications has to be added to the basis wage. The basic wage must not take into account the conditions appropriate to the skilled workers at all.[33]

(Emphasis added)

132 The considerations taken into account in assessing work value underwent refinement in succeeding decades (including after the introduction of the "total wage" in 1966). For example, in the work value inquiry conducted in relation to the *Metal Trades Award* in 1967, the Australian Conciliation and Arbitration Commission (Gallagher J) referred to the subject matter of the assessment as being the "work, its nature and responsibilities", and took into account:

> … all relevant facts and circumstances, including qualifications, training and skill, technological changes, changed conditions, changes in metals, alterations of methods of work, increased temp of work, responsibilities individually and as a member of a team, availability for skilled work and the length of time which has elapsed since previous fixations … .[34]

133 In the 1968 *Vehicle Industry Award* decision of Senior Commissioner Taylor, regard was had to the following matters in adjusting award rates of pay on the basis of work value:

> 1. The qualifications necessary for the job;
> 2. The training period required;
> 3. Attributes required for the performance of the work;
> 4. Responsibility for the work, material and equipment and for the safety of the plant and other employees;
> 5. Conditions under which the work is performed such as heat, cold, dirt, wetness, noise, necessity to wear protective equipment etc;
> 6. Quality of work attributable to, and required of, the employee;
> 7. Versatility and adaptability (e.g. to perform a multiplicity of functions);
> 8. Skill exercised;
> 9. Acquired knowledge of processes and of plant;
> 10. Supervision over others or necessity to work without supervision; and
> 11. Importance of work to the overall operations of plant.[35]

134 These considerations were considered in the context of manufacturing work, and the Senior Commissioner made it clear that he did not suggest that "these are the only factors proper for consideration in the fixation of wage rates".[36]

135 Both these last two decisions referred to emphasised two important requirements if the assessment of work value: the identification of the date from which the assessment of change is to commence (sometimes referred to in later decisions as the "datum point"), and the need to avoid "double counting" of matters potentially relevant to changes in work value in relation to which wage increases had already been paid. In respect of the former, the *Metal Trades Award* decision of Gallagher J identified the datum point by reference to the last occasion on which there had been a proper work value assessment:

> Proceeding to consideration of wage fixations and first dealing with tradesmen, although Beeby J by 1937 had determined margins which he regarded as proper

33 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1921) 15 CAR 297 at 303-304.

34 *Re Metal Trades Award re Work Value Inquiry* (1967) 121 CAR 587 at 677.

35 *Re Vehicle Industry Award 1953* (1968) 124 CAR 295 at 308.

36 *Re Vehicle Industry Award 1953* (1968) 124 CAR 295 at 308.

> for their classifications, the fact remains that rates for tradesmen in the metal trades industry have not over a period of 30 years been fixed by reference to their training, work, duties and responsibilities. The decision given by Mr Conciliation Commissioner Galvin (as he then was) in 1952 although reached after a hearing in which there had been lengthy evidence resulted in award rates being left as they then stood, with relativities except for minor adjustments remaining undisturbed. There were, of course, prior to the Galvin award and subsequently to it, increases on economic grounds but these were of a general character applying to all employees in all industries. In my opinion, the economic increases taken in the aggregate have failed to provide for tradesmen the award wages to which on the whole of the course of the evidence in this case they are justly entitled.[37]

136 In relation to the latter requirement, Senior Commissioner Taylor in the *Vehicle Industry Award* decision said:

> National productivity is considered in National Wage Cases and any increase is allowed for in the wage rates determined in such cases. As such rates apply to employees in all industries, employees in the industry now under review have already received any increases considered appropriate on account of national productivity. As the productivity of this industry is taken into account in determining the national average, it would be a double counting to again increase wages in this industry on account of its productivity.[38]

137 In 1972, the concept of work value was considered in the *National Wage Case & Equal Pay Cases 1972*[39] in the context of implementing equal pay for women. The Commission determined to move beyond the narrow principle of equal pay for men and women doing the same work covered by a single award (which had been affirmed in the *1969 Equal Pay Case*)[40] to a broader concept of "equal pay for work of equal value". It established a new principle to give effect to this concept which required that "female rates be determined by work value comparisons without regard to the sex of the employees concerned". The new principle relevantly provided that: "Implementation of the new principle by arbitration will call for the exercise of the broad judgement which has characterised work value enquiries. Different criteria will continue to apply from case to case and may vary from one class of work to another".[41]

138 The capacity to adjust award wage rates on work value grounds was regulated and constrained by the adoption of principles of wage fixation by the Australian Conciliation and Arbitration Commission in the *National Wage Case September 1975*.[42] This was done in association with the introduction of wage indexation, and was intended to restrict the extent to which award wages might be increased outside of National Wage Cases following the "wage explosion" of 1974. Principle 7 of the principles then adopted provided that, in addition to wage increases arising from the wage indexation system, the "only other grounds which should justify wage increases" were changes in work value, a catch-up of community movements and anomalies. The work value exception (in Principle 7(a)) was expressed in the following terms:

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37 *Re Metal Trades Award re Work Value Inquiry* (1967) 121 CAR 587 at 679.

38 *Re Vehicle Industry Award 1953* (1968) 124 CAR 295 at 308.

39 *National Wage Case & Equal Pay Cases 1972* (1972) 147 CAR 172.

40 *Australasian Meat Industry Employees Union v Meat and Allied Trades Federation of Australia* (1969) 127 CAR 1142.

41 *National Wage Case & Equal Pay Cases 1972* (1972) 147 CAR 172 at 179-180.

42 *National Wage Case September 1975* (1975) 171 CAR 79.

> Changes in work value being changes in the nature of the work, skill and responsibility required, or the conditions under which the work is performed. This would normally apply to some classifications in an award although in rare cases it might apply to all classifications.

139 The intended operation of this principle was discussed in some detail in the *National Wage Case September 1975* decision. The Commission made it clear that the identification in the principle of the type of changes necessary was intended to be exhaustive and not merely illustrative.[43] It also made it clear that the principle was not intended to codify all previous forms of work value assessment — in particular, the notion of comparative wage justice. In this respect the Commission said:

> Our view in April to which we still adhere was that to extend Principle 7(a) to cover all previously recognized forms of work value assessment would be simply to superimpose indexation on wage fixing methods which in 1974 had created instability both industrially and economically. It is disturbing that this is not apparent to many unions and even to some arbitrators. With a multiplicity of systems, organizations and arbitrators, the pressure of historical relationships and the use of the comparative wage justice concept it is extremely difficult for a wage adjustment to be confined to a particular case. We do not intend that the doctrine of comparative wage justice — that universal test which means all things to all men — should be available to justify every wage increase whenever sought.[44]

140 The Commission also discussed new constraints on the datum point to be used for any work value assessment as follows:

> Another related matter which has caused problems is the time from which work value changes should be measured. Despite strong argument that one should go back to the last "genuine" work value assessment we consider this is an exercise which in itself could cause endless debate. We therefore adopt as a *prima facie* position the pragmatic approach of a Full Bench in the *Municipal Officers Adelaide City Council* case (31 July 1975) when the Bench said "the words are intended to relate to the last movement in the award rates concerned apart from national wage and indexation". That prima facie position can only be rebutted if a party demonstrates that special circumstances exist warranting a departure from it. Should an application be made for an earlier starting point we envisage that the issue would normally be heard and determined as a preliminary matter. Further where the application is successful and the starting point claimed is earlier than 1 January 1970 only changes that have occurred since 1 January 1970 shall be taken into account and this is so even if there has never been a previous work value fixation. We do not agree that before a job has been given a work value there must have been some formal process or announcement. The mere existence of a rate in an award is evidence of the fact that the job has been valued even if only by acquiescence. We take this view because we believe that although we should allow some latitude as to starting point, if we left the matter completely open, people might seek to indulge in protracted unhelpful historical exercises.[45]

141 The Commission also emphasised two other propositions: first, that changes in work by themselves did not necessarily lead to changes in work value and what was required was a "significant net addition to work requirements" and,

43 *National Wage Case September 1975* (1975) 171 CAR 79 at 83.

44 *National Wage Case September 1975* (1975) 171 CAR 79 at 83.

45 *National Wage Case September 1975* (1975) 171 CAR 79 at 83-84.

second, that the expression in the principle "the conditions under which the work was performed" was not intended to the non-wage conditions of the award but rather to the environment in which the work was performed.

142 In the *National Wage Case May 1976*[46] the Commission codified the above propositions into Principle 7(a), so that it read as follows:

> (7) In addition to the above increases, the only other grounds which would justify pay increases are:
>
> (a) Changes in work valueChanges in work value being changes in the nature of the work, skill and responsibility required, or the conditions under which the work is performed. This would normally apply to some classifications in an award although in rare cases it might apply to all classifications.
>
> (i) *Prima facie* the time from which work value changes should be measured is the last movement in the award rates concerned apart from National Wage and Indexation. That *prima facie* position can only be rebutted if a party demonstrates special circumstances and even then changes can go back only to 1 January 1970.
>
> (ii) Changes in work by themselves may not lead to changes in the value of work. The change should constitute a significant net addition to work requirements to warrant a wage increase.
>
> (iii) Where it has been demonstrated that a change has taken place in accordance with the principles, an assessment will have to be made as to how that change should be measured in money terms.
>
> (iv) The expression "the conditions under which the work is performed" relates to the environment in which the work is done.
>
> (v) In respect of new work for which there is no current rate, an appropriate rate may be struck in accordance with proper work evaluation.
>
> (vi) Re-classification of existing jobs is to be determined in accordance with this principle.

143 It is important to observe that the wage-fixing principles were imposed on an award system in which wages rates had been developed on an award-by-award basis through ad hoc combinations of arbitrated work value decisions, consent settlements to industrial disputes and National Wage Cases. That what was being done involved an attempt to graft standardised wage fixing on to an existing system characterised by its irregularity was recognised at the time; for example in 1976 a Full Bench commented that: "The relevant background against which the indexation principle was introduced contained an irregular pattern which no system of wage fixation could entirely reconcile".[47]

144 The principles established in 1975 remained in place until 1981, when the wages indexation system was scrapped by the Commission in the face of a further wage explosion caused by claims made outside of the system. During the 1975-1981 period the system, notwithstanding the apparent restrictiveness of Principle 7(a), accommodated a "work value round" commencing in 1978

46 *National Wage Case May 1976* (1976) 177 CAR 335.

47 *Re Storemen and Packers (Western Australian Potato Marketing Board) Award 1974* (1976) 176 CAR 16 at 17.

which resulted in a remarkably uniform flat $8 increase being granted across most awards. The exception was the 1979 decision of Staples J in relation to the *Storeman and Packers (Wool Selling Brokers and Repackers) Award 1973*.[48] Having apparently been satisfied that the work of the relevant employees had changed in value, Staples J then considered the quantification of the wage increase to be awarded as follows:

> It is one thing to conclude that new minimum rates should now be prescribed. It is another to quantify the change. What shall be the measure? It may not be discovered in the profitability of the enterprise, not in the increased productivity of the relevant workforce. It may not be an adjustment to the burden of taxation of the wage-earner nor reflect any movement in the cost of living. It may not reinstate any losses due to partial indexation in the real worth of the original rate nor may it derive from a comparison with rates paid in other industries. It must not be extravagant or contrived, nor may it be mindless or consequential upon changes elsewhere. The impact in economic terms must be negligible. It should help to reduce inflation. At the same time, it must stabilize industrial relations. For the quantification, then what shall I do? I am already reeling under the advice of the many prophets. There is no Polonius at hand to give me memorable precepts as he did Laertes when he fled the confusion. I shall simply select a figure as Tom Collins selected a day from his diary and we shall see what turns up. Such is life.[49]

145 The amounts awarded by Staples J ranged from $12.50 to $15.90 depending upon the classification. However the decision was overturned on appeal.[50] In substitution for the wage increases ordered by Staples J, the Full Bench ordered that wages be increased by $8 per week.[51]

146 Wage fixing principles were re-established in the *National Wage Case 1983*[52] under which the Accord era of wages fixation commenced. In its decision the Commission emphasised that the work value principle to be established as part of the new wage fixing principles was to be "limited and genuine",[53] in the context of the general objective of limiting any award wage increases outside of National Wage Case increases as part of an accepted policy of wage and price restraint.[54] This emphasis on wage restraint caused the Commission to reject a submission that awards covering female-dominated areas of work should be the subject of full work value assessments:

> The National Council of Women, the Union of Australian Women and the Women's Electoral Lobby contended that in female occupational areas the implementation of the Commission's equal pay decisions had not been accompanied by proper work value exercises. The WEL asked that there be

48 *Federated Storemen and Packers Union of Australia v Albany Wool Stores Pty Ltd* (1979) 231 CAR 388.

49 *Federated Storemen and Packers Union of Australia v Albany Wool Stores Pty Ltd* (1979) 231 CAR 388 at 392.

50 *Federated Storemen and Packers Union of Australia v Albany Wool Stores Pty Ltd* (1980) 233 CAR 365.

51 *Federated Storemen and Packers Union of Australia v Albany Wool Stores Pty Ltd* (1980) 233 CAR 365 at 372. The whole incident is described in the context of Staple J's career on the bench in an article by Michael Kirby, "The Removal of Justice Staples and the Silent Forces of Industrial Relations" (1989) 31 *Journal of Industrial Relations* 334.

52 *National Wage Case 1983* (1983) 4 IR 429.

53 *National Wage Case 1983* (1983) 4 IR 429 at 451.

54 *National Wage Case 1983* (1983) 4 IR 429 at 441.

> provision for a re-evaluation of this work in any centralized system the Commission should introduce, such work value exercises to be carried out as the individual awards came up for variation or through an anomalies or inequities procedure. We consider that such large scale work value inquiries would clearly provide an opportunity for the development of additional tiers of wage increases, which would be inconsistent with the centralized system which we propose for the next two years and would also be inappropriate in the current state of unemployment especially among women. Moreover, many of the problems which the WEL has raised are a matter for management, unions and governments rather than for award provision.

147 The Commission also rejected an ACTU submission that the datum point for work value assessments should be (consistent with the positions stated in the 1967 *Metal Trades Award* decision of Gallagher J) the last wage increase for the award in question outside of national wage increases:

> The ACTU proposed a principle which is substantially similar to the above except that the prima facie datum point from which work value should be measured is not fixed in terms of the last movement in the award apart from national wage. Instead, the proposed prima facie position would require a party seeking the work value change "to demonstrate that the work or the alleged change in question has not been valued previously".
>
> We foresee considerable difficulty with such a provision particularly in relation to rates which were determined by consent and without any formal work evaluation. In view of the extensive round of work value cases which commenced in 1978, we propose to restrict the datum point to the last work value adjustment affecting an award but in no case earlier than 1 January 1978. Care should be exercised to ensure that changes which were taken into account in any previous work value adjustments are not included in any future work evaluation under this Principle.

148 The effect of these conclusions was that there was to be no capacity to obtain wage increases based on any failure to properly assess work value which occurred prior to 1 January 1978, including where this is because of gender undervaluation. The work value principle which emerged from the *National Wage Case 1983* was as follows:

> 4. Work Value Changes
>
> (a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification.
>
> These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle.
>
> However rather than to create a new classification it may be more convenient in the circumstances of a particular case to fix a new rate for an existing classification or to provide for an allowance which is payable in addition to the existing rate for the classification. In such cases the same strict test must be applied.
>
> (b) Where new work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such

new work should be compensated by a special allowance which is payable only when the new work is performed by a particular employee and not by increasing the rate for the classification as a whole.

(c) The time from which work value changes should be measured is the last work value adjustment in the award under consideration but in no case earlier than 1 January 1978. Care should be exercised to ensure that changes which were taken into account in any previous work value adjustments are not included in any work evaluation under this Principle.

(d) Where a significant net alteration to work value has been established in accordance with this Principle, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work. However, where appropriate, comparisons may also be made with other wages and work requirements within the award or to wage increases for changed work requirements in the same classification in other awards provided the same changes have occurred.

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

(f) The Commission should guard against contrived classifications and overclassification of jobs.

(g) Where through technological or other change the impact of work value change on the work force is widespread or general, the matter should be dealt with in national productivity cases under Principle 2.[55]

149 Notwithstanding the rejection of the submission of the women's groups in the *National Wage Case 1983* that there be full work value-reassessments of awards applying to female-dominated areas of work, the Commission subsequently affirmed in *Re Private Hospitals' & Doctors' Nurses (ACT) Award 1972*[56] that cases based on the 1972 equal pay principle could be advanced through the anomalies conference procedure provided for in the wage-fixing principles. However in doing so the Commission rejected any wider proposition that wages could be fixed on the basis of "comparable worth" between different types of work that were not related or similar.[57]

150 There were further significant changes to the approach taken to award wage claims based on work value in the period 1989 to 1991. In the *National Wage Case August 1988*[58] the Commission established a new "structural efficiency" principle which contemplated the examination of awards with a view, among other things, to "create appropriate relativities between different categories of workers within the award …" and "including properly fixed minimum rates for classifications in awards, related appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments". This new approach was the subject of greater elaboration by the Australian Industrial Relations Commission in the *National Wage Case February 1989 Review*,[59] in which the Commission among things discussed how it was apply to the relationship *between* awards. Its consideration

55 *National Wage Case 1983* (1983) 4 IR 429 at 472-473.

56 *Re Private Hospitals' & Doctors' Nurses (ACT) Award 1972* (1986) 13 IR 108.

57 *Re Private Hospitals' & Doctors' Nurses (ACT) Award 1972* (1986) 13 IR 108 at 113.

58 *National Wage Case August 1988* (1988) 25 IR 170.

59 *National Wage Case February 1989 Review* (1989) 27 IR 196.

in this respect primarily arose in response to a proposal advanced by the ACTU for a new overarching framework of award wage fixation, which was described in the following terms:

> It submitted that the Commission should approve in principle a national framework or "blueprint" which would involve restructuring all awards of the Commission to provide "consistent, coherent award structures", based on training and skills acquired, and which would bear clear and appropriate work value relationships one to another. It illustrated its proposal by reference to possible restructuring results — at least as far as classification structures and training are concerned — in awards covering the building industry, metal workers, transport workers, storemen and clerks: these are key awards in the sense that their classifications arguably permeate all areas of industry.[60]

151 The Commission by observing that the then current award wage system contained "irregularities in rates of pay which must be dealt with", and that this had pre-dated the introduction of wage indexation in 1975 as had been recognised at the time.[61] The Commission went on to say:

> The result is there exist in federal awards widespread examples of the prescription of different rates of pay for employees performing the same work but this is only part of the problem. For too long there have existed inequitable relationships among various classifications of employees. That this situation exists can be traced to features of the industrial relations system such as different attitudes adopted in relation to the adjustment of minimum rates and paid rates awards; different attitudes taken to the inclusion of overaward elements in awards, be they minimum rates or paid rates awards; the inclusion of supplementary payments in some awards and not others; and the different attitudes taken to consent arrangements and arbitrated awards.
>
> …
>
> The situation we have described has been tolerated for too long and it is appropriate that it be corrected at this time. The fundamental purpose of the structural efficiency principle is to modernise awards in the interests of both employees and employers and in the interests of the Australian community: such modernisation without steps being taken to ensure stability as between those awards and their relevance to industry would, on past experience, seriously reduce the effectiveness of that modernisation.
>
> Consequently, we endorse in principle the approach proposed by the ACTU though not necessarily the particular award relationships submitted in this case. That is a matter which we expect to be the subject of further debate in the forthcoming proceedings.
>
> This means that minimum rates awards will be reviewed to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other minimum rates awards.[62]

152 It is apparent that the concept being dealt with in the August 1988 decision involved the alignment of benchmark classifications in key minimum rates awards based on work value considerations. This concept of cross-award alignments in pay rates was the subject of further development in the *National Wage Case August 1989*.[63] One of the two main issues which was said to

60 *National Wage Case February 1989 Review* (1989) 27 IR 196 at 199-200.

61 *National Wage Case February 1989 Review* (1989) 27 IR 196 at 200.

62 *National Wage Case February 1989 Review* (1989) 27 IR 196 at 200-201.

63 *National Wage Case August 1989* (1989) 30 IR 81.

require determination in that decision was "how the approach endorsed in principle by the Commission for ensuring stable relationships between awards and their relevance to industry is best translated into practice".[64] In relation to this issue, the Commission gave consideration to a proposal advanced by the ACTU to establish a fixed set of relativities in terms of total pay rates (minimum classification rates plus supplementary payments) across five major awards. The Commission's conclusions on this issue were as follows:

> Without firm guidance on appropriate relativities, individual structural efficiency exercises could create situations which would not only continue but possibly worsen the very position that is required to be rectified. For this reason we reject the proposition that the question of relativities should be left completely until the details of structural efficiency exercises are completed.
>
> Subject to what we say later in this decision, we have decided that the minimum classification rate to be established over time for a metal industry tradesperson and a building industry tradesperson should be $356.30 per week with a $50.70 per week supplementary payment. The minimum classification rate of $356.30 per week would reflect the final effect of the structural efficiency adjustment determined by this decision.
>
> Minimum classification rates and supplementary payments for other classifications throughout awards should be set in individual cases in relation to these rates on the basis of relative skill, responsibility and the conditions under which the particular work is normally performed. The Commission will only approve relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards. Before that requirement can be satisfied clear definitions will have to be established.
>
> We are not prepared to approve specific wage relativities proposed by the ACTU on behalf of the trade union movement. Nevertheless, we consider it appropriate for relativities to be established for both minimum classification rates and supplementary payments for the following key classifications within the ranges set out below:

	% of the tradesperson rate
Metal industry worker, grade 4	90-93
Metal industry worker, grade 3	84-88
Metal industry worker, grade 2	78-82
Metal industry worker, grade 1	72-76
Storeman/packer	88-92
Driver, 3-6 tonnes	88-92.[65]

153 The Commission noted that there was inadequate material before it to establish relativities for clerical classifications,[66] and went on to consider the implementation arrangements for the wage increases (referred to as minimum rate adjustments) necessary to give effect its conclusions.[67] It stated the objectives of the reforms it wished to implement as follows:

> These exercises provide an opportunity for the parties to display the maturity required to overcome the wage instabilities with which the community is only too familiar. It also provides the opportunity to take an essential step towards

64 *National Wage Case August 1989* (1989) 30 IR 81 at 81, 84.

65 *National Wage Case August 1989* (1989) 30 IR 81 at 94.

66 *National Wage Case August 1989* (1989) 30 IR 81 at 94.

67 *National Wage Case August 1989* (1989) 30 IR 81 at 95-96.

> institutional reform which is a prerequisite to a more flexible system of wage fixation. As part of that future we envisage that minimum classification rates will not alter their relative position one to another unless warranted on work value grounds.[68]

154 Later in the decision the Commission discussed whether, in the light of the establishment of the structural efficiency principle, any of the other wage fixing principles should be modified. Critically, the Commission decided that "structural efficiency exercises should incorporate all past work value considerations".[69] The new Structural Efficiency principle referred to structural efficiency exercises as involving, among other things, creating appropriate relativities between different categories of workers with the award and at enterprise level" and "including properly fixed minimum rates for classifications in awards, related appropriately to one another …", and expressly required that structural efficiency exercises should incorporate all past work value considerations. A separate new principle was established for the implementation of minimum rate adjustments. However the datum point requirement in para (c) of the Work Value Changes principle was not at this stage modified.

155 That modification came in the *National Wage Case April 1991*,[70] in which the Commission reaffirmed that "minimum classification rates, once reviewed and fixed in an appropriate relationship, will not be moved from that relative position unless changes are warranted on work value grounds".[71] Consequential upon that position, the Commission determined that any future assessment of change in the nature of work of a particular classification in a future award would be measured from the date of the second structural efficiency adjustment allowable in accordance with the *National Wage Case August 1989*.[72] Hence the Work Value Changes Principle was modified so as to alter para (c) and add a new para (d) (with the following paragraphs correspondingly re-designated) as follows:

> (c) The time from which work value changes in an award should be measured is, unless extraordinary circumstances can be demonstrated in special case proceedings, the date of operation of the second structural efficiency allowable under the 7 August *1989 National Wage case* decision.
>
> (d) Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this principle.

156 Subject only to the narrow exception provided by the capacity to mount a "special case", the effect of this modification was that, once an award had been subject to the structural efficiency process in which, among other things, classifications in minimum rates awards were to be fixed in appropriate relativities with other classifications within the award and in other awards, no adjustment on work value grounds was permissible other than on the basis of changes to work which occurred after the structural efficiency exercise had been completed. Importantly, the new para (d) in the Work Value Changes Principle

68 *National Wage Case August 1989* (1989) 30 IR 81 at 96.

69 *National Wage Case August 1989* (1989) 30 IR 81 at 99.

70 *National Wage Case April 1991* (1991) 36 IR 120.

71 *National Wage Case April 1991* (1991) 36 IR 120 at 160-161.

72 *National Wage Case April 1991* (1991) 36 IR 120 at 172.

prevented any "double-counting" not only of work changes which were taken into account in the structural efficiency exercise, but those which *should have been* taken into account, whether they actually were or not. This meant, for example, that the full work value assessment of awards covering female-dominated areas of work which was sought by various women's groups in the *National Wage Case 1983* was permanently foreclosed (subject again only to the limited capacity to advance a special case).

157 The principles applicable to the proper fixation of minimum rates in awards was the subject of further consideration in the *Paid Rates Review* decision of a Full Bench of the AIRC issued on 20 October 1998.[73] This review was necessitated by application for the Commission to exercise its discretionary power under item 51(4) of Pt 2 of Sch 5 of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) to convert paid rates awards into minimum rates awards by the establishment of properly-fixed minimum rates of pay. The Full Bench determined that, unless there were exceptional circumstances, all paid rates awards should be converted to minimum rates awards:

> We have decided that in principle all awards which provide for rates of pay which are not operating, or not intended to operate, as minimum rates and which do not bear a proper work value relationship to award rates which are properly fixed minima, should be subject to a conversion process so that they do contain properly fixed minimum rates of pay.

158 The Full Bench characterised the minimum rates adjustment process which had arisen from the *National Wage Case August 1989* in the following terms:

> The MRA principle was designed to establish a consistent pattern of minimum rates in awards covering similar work thereby removing inequities and providing a stable foundation for enterprise bargaining. That objective is as important now, perhaps even more important, than it was in 1989.

159 The requirements for the fixation of minimum rates which flowed from the *Paid Rates Review* decision were summarised by an AIRC Full Bench in *Child Care Industry (Australian Capital Territory) Award 1998*[74] (the *ACT Child Care Decision*) in the following terms:

> [155] In the context of the matter before us, the principles established in the *Paid Rates Review* decision mandate a three step process for the determination of properly fixed minimum rates:
>
> 1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA process with particular reference to the current rates for the relevant classifications in the *Metal Industry Award*. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.
> 2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.
> 3. If the existing rates are too low they should be increased so that they are properly fixed minima.

73 *Re Paid Rates Review* (1998) 123 IR 240.

74 *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* (unreported, AIRC (FB), PR954938, 13 January 2005).

160 In the same decision the Full Bench gave consideration to a claim, advanced under the Work Value Changes principle, for increases to the wages of child care workers. The Full Bench referred to the matter taken into account in assessing changes in work value by Senior Commissioner Taylor in the 1968 *Vehicle Industry Award* decision (which we have quoted above), and then set out a number of propositions derived from cases decided under the Work Value Changes principle (footnotes omitted):

> [189] The principle makes it clear that changes in work, by themselves, may not lead to an increase in wages. In *State Electricity Commission of Victoria v The Federated Ironworkers' Association of Australia* (Print G7498), a Full Bench of the Commission expressed this limitation in the following terms:
>
> > In all categories of work except perhaps the most simple, changes become evident with time. It is in the nature of things that new methods of doing the same thing evolve with time, and that skills which qualify a person for a particular category of work may become fully tested, or in some cases the work may thereby be made easier. However it is essential that such changes are not mistaken for genuine work value change.
>
> [190] Previous decisions of the Commission suggest that a range of factors may, depending on the circumstances, be relevant to the assessment of whether or not the changes in question constitute the required "significant net addition to work requirements". The following considerations are relevant in this regard:
>
> - Rapidly changing technology, dramatic or unanticipated changes which result in a need for new skills and/or increased responsibility may justify a wage increase on work value grounds. But progressive or evolutionary change is insufficient.
> - An increase in the skills, knowledge or other expertise required to adequately undertake the duties concerned demonstrates an increase in work value.
> - The mere introduction of a statutory requirement to hold a certificate of competency does not of itself constitute a significant net addition to work requirements. It must be demonstrated that there has been some change in the work itself or in the skills and/or responsibility required. However, where additional training is required to become certified and hence to fulfil a statutory requirement a wage increase may be warranted.
> - A requirement to exercise care and caution is, of itself, insufficient to warrant a work value increase. But an increase in the level of responsibility required to be exercised may warrant a wage increase on work value grounds. Such a change may be demonstrated by a requirement to work with less supervision.
> - The requirement to exercise a quality control function may constitute a significant net addition to work requirements when associated with increased accountability.
> - The fact that the emphasis on some aspects of the work has changed does not in itself constitute a significant net addition to work requirements.
> - The introduction of a new training program or the necessity to undertake additional training is illustrative of the increased level of skill required due to the change in the nature of the work. But keeping abreast of changes and developments in any trade or profession is part of the requirements of that trade or profession

and generally only some basic changes in the educational requirements can be regarded, of itself, as constituting a change in work value.

- Increased workload generally goes to the issue of manning levels not work value. But, where an increase in workload leads to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration.

[191] The principle provides, in paragraph (d), that where a significant net addition to work value has been established an assessment will have to be made as to how that addition should be measured in monetary terms. Such an assessment should normally be based on the previous work requirements, the wage previously fixed for the work, and the nature and extent of the change in work. However, it is open to the arbitrator to make comparisons with other wages and work requirements within the award, and in other awards, provided such comparisons are fair, proper and reasonable in all the circumstances. In particular, regard may be had to the wage increases ascribed to comparable changes in work value in other areas. Care must be taken in relation to making a comparison with a provision found in a consent award.

161 In the *ACT Child Care Decision* the Full Bench found that there had been a significant net addition to work requirements since the 1990 datum point such as to satisfy the requirements of the Work Value Changes Principle. The Full Bench also decided that, based on the Australian Qualifications Framework, that minimum pay alignments should be established between the child care awards under consideration and the *Metal Industry Award* between classifications with equivalent training and qualification levels:

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

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

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

162 The Work Value Changes principle established in the *National Wage Case April 1991* remained unchanged until wage fixing principles became redundant when the AIRC was stripped of its minimum wage-fixing functions by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The concept of work value then played no part in wage fixation until the enactment of the FW Act in 2009.

163 It is against that background that the way in which s 156(3) and (4) are properly to be construed and applied may be considered. A number of

propositions may be stated in that context. The first is that the effect of s 156(3) is to establish a jurisdictional prerequisite for the exercise of power to vary minimum wages in a modern award in the conduct of a 4 yearly review of modern awards, namely the reaching of a state of satisfaction on the part of the Commission that the variation is "justified by work value reasons".

164 Second, because the jurisdictional prerequisite is expressed in terms of the Commission's "satisfaction" concerning whether a variation is "justified" by the prescribed type of reasons — a requirement which involves an element of subjectivity and about which reasonable minds may differ — it requires the formation of a broad evaluative judgment involving the exercise of a discretion.[75]

165 Third, the definition of "work value reasons" in s 156(4) requires only that the reasons justifying the amount to be paid for a particular kind of work be "related to any of the following" matters set out in paras (a)-(c). The expression "related to" is one of broad import that requires a sufficient connection or association between two subject matters. The degree of the connection required is a matter for judgment depending on the facts of the case, but the connection must be relevant and nor remote or accidental.[76] The subject matters between which there must be a sufficient connection are, on the one hand, the reasons for the pay rate and, on the other hand, *any* of the three matters identified in paras (a)-(c) — that is, any one or more of the three matters.

166 Fourth, although the three matters identified — the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done — clearly import the fundamental criteria used to assess work value changes under the wage fixing principles which operated from 1975 to 1981 and 1983 to 2006, the legislature in enacting s 156(4) chose not to import the additional requirements contained in those wage-fixing principle. For example, as was observed in the *Equal Remuneration Decision 2015*,[77] s 156(4) does not contain any requirement that the work value reasons consist of identified *changes* in work value measured from a fixed datum point. The Full Bench in that matter said:

> [292] … We see no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s 156(3) or s 157(2). Those provisions allow the variation of such minimum rates for "work value reasons", which expression is defined broadly enough in s 156(4) to allow a wide-ranging consideration of any contention that, for historical reasons and/or on the application of an indicia approach, undervaluation has occurred because of gender inequity. There is no datum point requirement in that definition which would inhibit the Commission from identifying any gender issue which has historically caused any female-dominated occupation or industry currently regulated by a modern award to be undervalued. The pay equity cases which have been successfully prosecuted in the NSW and Queensland jurisdictions and to which reference has earlier been made were essentially work value

75 See e.g. *Buck v Bavone* (1976) 135 CLR 110 at 118-119 per Gibbs J; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; 99 IR 309 at [18]-[20], [28] per Gleeson CJ, Gaudron and Hayne JJ.

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

77 *Equal Remuneration Decision 2015* (2015) 256 IR 362.

> cases, and the equal remuneration principles under which they were considered and determined were likewise, in substance, extensions of well-established work value principles. It seems to us that cases of this nature can readily be accommodated under s 156(3) or s 157(2). Whether or not such a case is successful will, of course, depend on the evidence and submissions in the particular proceeding.

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

168 Fifth, it would be open to the Commission to have regard, in the exercise of its discretion, to considerations which have been taken into account in previous work value cases under differing past statutory regimes. For example, although as already stated s 156(4) contains no requirement for the measurement of work value changes from a fixed datum point, we consider it likely that the Commission would usually take into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way (that is, in a way which is free of gender bias and any other improper considerations) in assessing wages in the relevant modern award or its predecessor in order to ensure that there is no "double counting". Likewise, we consider that the considerations referred to in [190] of the *ACT Child Care Decision*, which we have earlier quoted, may be of relevance in particular cases, as may considerations in other authoritative past work value cases.

169 Finally, even if the jurisdictional prerequisite in s 156(3) is satisfied, it remains the case that the Commission must, as required by s 138, ensure that the inclusion of the varied minimum wages term in the relevant modern award would be necessary to achieve the modern awards objective and the minimum wages objective. In this connection, it may be noted that the Full Bench in *Re 4 Yearly Review of Modern Awards — Real Estate Industry Award 2010* said that where the wage rates in a modern award have not previously been the subject of a proper work value consideration, there can be no implicit assumption that at the time the award was made its wage rates were consistent with the modern awards objective.[78]

History of award regulation of pharmacists

170 There was no federal award regulation of pharmacists prior to 1994. The first federal award was the *Community Pharmacy (Victoria) Interim Award 1994*,[79] made by the AIRC following the referral by the State of Victoria of its industrial relation powers to the Commonwealth and dispute findings made in 1993. This interim award, made by Drake DP on 27 May 1994, applied only to community pharmacies in Victoria, and replicated the wages and conditions previously prescribed by an award of the former Industrial Relations Commission of Victoria, the *Chemist Shops Award (Vic) 1987*.

78 *Re 4 Yearly Review of Modern Awards — Real Estate Industry Award 2010* [2017] FWCFB 3543 at [80].

79 *Community Pharmacy (Victoria) Interim Award 1994* (unreported, AIRC, Drake DP, L4131, 27 May 1994).

171 In further proceedings in 1995, outstanding issues concerning the interim 1994 award were arbitrated before Drake DP. The PGA sought, as a first step towards the establishment of a national award, that the interim 1994 award be extensively modified to include a new classification structure (derived from relevant the NSW State award) and adjustments to penalty and overtime rates. These changes were opposed by the Salaried Pharmacists' Association (the SPA). In a decision issued on 30 May 1995,[80] the Deputy President declined to make the major changes to classifications and penalty rates sought by the PGA, but made some other modifications. The new award which resulted was the *Community Pharmacy (Victoria) Interim Award 1995*.[81] There were a number of "leave reserved" matters identified in the award, including classifications, pay and pay relativities, which were to be the subject of subsequent arbitration, however agreement between the industrial parties was not reached.

172 These outstanding matters were the subject of a hearing before Commissioner O'Shea in the following year, and were determined by him in a decision issued by him on 6 March 1996.[82] The key conclusion in the Commissioner's decision was that pharmacists covered by the *Community Pharmacy (Victoria) Interim Award 1995* should have a classification structure based upon the reference point of pay rates for professional scientists covered by Part IV of the *Metal Industry Award 1976*. The Commissioner relevantly stated:

> The Commission approaches its determination of this matter in the context of already lengthy proceedings which have produced some measure of agreement and have required some arbitration, but which clearly still have a considerable way to go by reason of the SPA's stated objective of a national award of the Commission covering the retail/community pharmacy sector.
>
> …
>
> Of particular significance in regard to this matter is the "first award" principle and the Commission, noting that this award is a minimum rates award, will fix the matters at issue so that the award meets the needs of the particular industry or enterprise while ensuring that employees' interests are also properly taken into account. It is also relevant for the Commission to ensure that appropriate structural efficiency principles are or have been applied. I include here, considerations of proper alignment by way of the application of a minimum rates adjustment process.
>
> When one applies these considerations to the submissions of the parties in these proceedings one can see a degree of similarity but also some clear divergence. What is apparent is that the rates and classification structure of professional scientists (*Metal Industry Award 1976* — Part IV) have some legitimacy as a reference point for pharmacists employed under this award.
>
> I say this is apparent because, as the SPA demonstrated, the fact was acknowledged by the Victorian Industrial Relations Commission at an earlier point in the wage-fixing history of this award and the PGA/VECCI submissions in these proceedings acknowledged at least some points of comparison between pharmacists and professional scientists.
>
> …

80 *Re Community Pharmacy (Victoria) Interim Award 1994* (unreported, AIRC, Drake DP, M2399, 30 May 1995).

81 *Community Pharmacy (Victoria) Interim Award 1995* (unreported, AIRC, Drake DP, M6246, 13 October 1995).

82 *Re Community Pharmacy (Victoria) Interim Award 1995* (unreported, AIRC, O'Shea C, M9831, 6 March 1996).

An acceptance of the relevance of Part IV of the *Metal Industry Award* does not necessarily mean a direct comparison or direct transposition of rates between the two areas of professional skills. It does, however, provide the Commission with a strong reference point for an assessment of appropriate rates.

A further reference point, given the history and likely developments in these proceedings, are rates for like work elsewhere. First award principles allow the Commission to have regard for a variety of factors in assessing what are fair and reasonable minimum rates vis-a-vis other awards and relative skills and responsibilities.

…

On the basis of the material before it, the Commission accepts the submissions of VECCI that the base level of Pharmacist (first year of experience) can be aligned with a Professional Scientist (4/5 year course) on the basis of *qualifications* and the exercise of comparable skills. But a consideration of the duties of a pharmacist compared with the relevant definitions in Part IV of the *Metal Industry Award* reveals a somewhat higher level of responsibility discharged by a pharmacist dispensing to the public. A direct alignment would produce a rate of 130% of the tradesperson's rate, as contemplated by VECCI, but recognition of the responsibility differential requires a higher rate to be struck.

After consideration of the SPA's submissions, the Commission determines that a fair and reasonable rate for a first year Pharmacist is a relativity of 140% of the tradesperson's rate.

As to the *Pharmacist (second year and thereafter)* classification, as currently defined in the interim award, there needs to be a recognition of the greater capacities that the accrual of experience brings. The current interim award provides a rate some 7% above the base and the new differential should not be any less than that. At present, under the interim award a pharmacist (thereafter) receives a minimum rate of $571.40 per week which is $35.70 per week above the first year pharmacist minimum rate.

A determination of a relativity of 150% would give a wage differential of some $41 per week. In all the circumstances and taking some guidance from salary patterns for pharmacists in other States, I believe this would be appropriate and the Commission so determines.

In determining the rates above, the Commission notes that they are broadly comparable with the range of rates in other States (Exhibit PGA 2). In the course of its submissions (transcript, page 376) the PGA indicated a preparedness to look at the 140/150 end of the relativities provided current penalty rates were varied in the Guild's favour. This matter is addressed later in this decision.

Rates for the supervisory levels within the classification structure can then be properly set by broadly aligning the two higher classifications in the interim award with Professional Scientist Level 3 and Professional Scientist Level 4 respectively from Part IV of the *Metal Industry Award*.

Given the Commission's acceptance of retaining a tiered structure to reflect differences in the size and characteristics of businesses within the industry, the top tier of the Pharmacist-in-charge (as presently defined in the interim award) can be aligned with the Professional Scientist Level 3 rate at $767.00 per week which is a relativity of 180% of the tradesperson's rate.

It is appropriate to keep some differential between the Pharmacist (thereafter) rate and the bottom tier of the Pharmacist-in-charge, which the Commission determines will be set at 160%. The middle tier of the Pharmacist-in-charge (as currently defined) is determined to be set at a relativity of 170%.

The rates determined above are higher at the lower tiers than those advocated by VECCI but are capped at the top tier as advanced in Exhibit VECCI 2. The rates set a relativity of 160%, 170% and 180% for the three tiers of

> Pharmacist-in-charge as currently defined in the interim award and are broadly comparable with the interstate comparisons drawn to the Commission's attention in Exhibit PGA 2.
>
> As to the classification of Pharmacist Manager, the same considerations apply. The definitions and structure in the interim award will be retained and the top tier of the classification will be aligned with the rate of $892.10 per week (a relativity of 210%) for the Professional Scientist Level 4 in Part IV of the *Metal Industry Award*.
>
> To retain a differential above the top tier of the Pharmacist-in-charge, the bottom tier of the Pharmacist Manager (as currently defined in the interim award) is determined to be a relativity of 190%, with the middle tier (as currently defined) being 200%.
>
> …
>
> In summary, the Commission determines that the Victorian award should have salary levels based on the relativities of the metal tradesperson's rate as follows. In all cases, the existing definitions in the interim award will be carried over.
>
> Pharmacist (1st year) 140%
>
> Pharmacist (2nd year and thereafter) 150%
>
> Pharmacist-in-charge
>
> (i) 160%
>
> (ii) 170%
>
> (iii) 180%
>
> Pharmacist Manager
>
> (i) 190%
>
> (ii) 200%
>
> (iii) 210%[83]

173 We interpolate at this point that the classification structure for professional scientists in Part IV of the *Metal Industry Award* that was used as the reference point in the above decision was established pursuant to the structural efficiency principle and by consent of the parties in a decision of Deputy President Keogh of 7 May 1990.[84] The new structure created for professional scientists aligned them with the classification structure in Part 1 of the *Metal Industry Award*, and established percentage relativities with the C10 classification, as shown in the following table.

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83 *Re Community Pharmacy (Victoria) Interim Award 1995* (unreported, AIRC, O'Shea C, M9831, 6 March 1996) at pp 4-8.

84 *Re Association of Professional Engineers, Australia* (unreported, AIRC, Keogh DP, J2540, 7 May 1990); see also the consequential order in Print J3512.

Metal, Engineering and Associated Industries Award 1998				*Professional Engineers and Scientists Award 1998*	
Classification		**Minimum Training Requirement**	**Wage Relativity to C10***	**Classification Title**	**Minimum Training Requirement**
No.	**Title**				
C1	Professional Engineer Professional Scientist	Degree	180/210%	Level 3 professional scientist	A professional scientist performing duties requiring the application of mature professional scientific knowledge. With scope for individual accomplishment and co-ordination of more difficult assignments, the professional scientist deals with problems for which it is necessary to modify established guides and devise new approaches. *OR*

Metal, Engineering and Associated Industries Award 1998				*Professional Engineers and Scientists Award 1998*	
Classification		**Minimum Training Requirement**	**Wage Relativity to C10***	**Classification Title**	**Minimum Training Requirement**
No.	**Title**				
					A wage group C2(b) employee who has completed additional accredited education and training so as to reach a standard equivalent to a four year degree and who is required to perform the work set out above.
C2(b)	Principal Technical Officer	Advanced Diploma or equivalent and sufficient additional training so as to enable the employee to meet the requirements of the relevant classification definition in clause 1.2 of this schedule and to perform work within the scope of this level.	160%	Level 2 professional scientist	Following development through C5 or C6 is an experienced scientist(as defined) who plans and conducts professional scientific work without detailed supervision, but with guidance on unusual features and who is usually engaged on more responsible scientific assignments requiring substantial professional experience. *OR*

Metal, Engineering and Associated Industries Award 1998				*Professional Engineers and Scientists Award 1998*	
Classification		**Minimum Training Requirement**	**Wage Relativity to C10***	**Classification Title**	**Minimum Training Requirement**
No.	**Title**				
					A wage group C5 or C6 employee who has completed additional accredited education and training so as to reach a standard equivalent to a four year degree and who is required to perform the work set out above.
C3	Engineering Associate — Level II	Advanced Diploma of Engineering, or equivalent.	145%		
C4	Engineering Associate 3rd Year of — Level 1	80% towards an Advanced Diploma of Engineering	135%		
C5	Advanced Engineering Tradesperson — Level II	Diploma of Engineering — Advanced Trade, or equivalent.	130%	Level 1 professional scientist (4 or 5 year degree)	The graduate scientist (as defined) commencement level.
C6	Advanced Engineering Tradesperson — Level 1	C10 + 80% towards a Diploma of Engineering — Advanced Trade	125%	Level 1 professional scientist (3 year degree)	The graduate scientist (as defined) commencement level.

Metal, Engineering and Associated Industries Award 1998				*Professional Engineers and Scientists Award 1998*	
Classification		**Minimum Training Requirement**	**Wage Relativity to C10***	**Classification Title**	**Minimum Training Requirement**
No.	**Title**				
C10	Engineering Tradesperson — Level I	Recognised Trade Certificate or Certificate III in Engineering — Mechanical Trade, or Certificate III in Engineering — Fabrication Trade, or Certificate III in Engineering — Electrical/ Electronic Trade or equivalent	100%		

174 One thing is immediately apparent from the above table: professional scientists below Level 3, who require an undergraduate degree, were not aligned with the Part 1 structure on the basis of their qualifications and were not assigned the C1 classification with a starting relativity of 180%. The effect of Commissioner O'Shea's decision to set rates for pharmacists based on professional scientists effectively imported this difficulty into the *Community Pharmacy (Victoria) Interim Award*. Thus, for example, the base level, degree-qualified pharmacist was assigned a 140% relativity to the C10 classification. This lined them up at below the C3 classification, which was the starting point for an employee with an Advanced Diploma under Part 1 of the *Metal Industry Award*.

175 The first national community pharmacists' award, the *Community Pharmacy Award 1996*, was made by consent on 24 December 1996 by Commissioner O'Shea.[85] The classifications and rates of pay in this award differed for each State and Territory and reflected the awards applicable in each State and Territory at the time. This award was subsequently the subject of review in 1998 pursuant to the "award simplification" provisions of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth). The review required, among other things, that the Commission ensure the award contained proper fixed minimum rates of pay. The parties negotiated a new award containing an agreed classification structure for all states and territories except Western Australia,[86] and the new *Community Pharmacy Award 1998* was made by Commissioner Hingley on 29 June 1998.[87] The agreed classification structure modified that previously determined by Commissioner O'Shea contained for the *Community Pharmacy (Victoria) Interim Award* by adding a classification of "Experienced Pharmacist", but apart from this the structure and the relativities used broadly reflected that developed in the 1996 decision.

85 Print N7370.

86 There was a separate and simplified classification structure for Western Australia.

87 *Re Community Pharmacy Award 1996* (unreported, AIRC, Hingley C, Q2258, 29 June 1998).

176 When the Pharmacy Award was developed as part of the award modernisation process conducted pursuant to Pt 10A of the *Workplace Relations Act 1996* (Cth), the classification structure adopted simplified that contained in the *Community Pharmacy Award 1996*. The classification "Pharmacist after first year of experience" was removed, as were the higher grade 1 and grade 2 rates in both of the classification of "Pharmacist in Charge" and "Pharmacist Manager". The remaining classifications, and their existing rates and relativities, were carried over to the Pharmacy Award. The classification structure has not since been modified, and the rates of pay have been adjusted in accordance with Annual Wage Review decisions.

Consideration of the APESMA case

177 The APESMA advanced its case primarily on the basis that the Pharmacy Award and its predecessor, the pre-modern *Community Pharmacy Award 1996*, had last been the subject of work value consideration in 1998, and that changes in the nature of the work and the level of skill and responsibility of community pharmacists since that time justified the wage increases it sought. In essence the APESMA's case was structured on the basis of a datum point even though, as earlier explained, that was not a necessary element for satisfaction of the jurisdictional prerequisite in s 156(3). In closing submissions, counsel for the APESMA submitted that the task for the Commission was to assess the work value of pharmacists under the Pharmacy Award as it was at the time of the assessment, not whether there had been a change in work value. That is an approach available under s 156(3) as we have earlier construed it, but it is not fundamentally consistent with the evidentiary case presented by the APESMA. We will first address the case actually advanced by the APESMA, and then give consideration to some broader issues concerning the work value of pharmacists.

178 It is necessary at the outset to make some comment upon the witness evidence given in the course of the proceedings. We consider that all of the witnesses before us endeavoured to give us truthful and accurate information about the work of pharmacists, but the utility of their evidence differed. Firstly, we consider that the witnesses called by the PGA — Ms Willis, Mr Pricolo and Mr Loukas — gave evidence of significant probative value. They had all worked in the community pharmacy industry since well before 1998, had been employed as pharmacists before becoming pharmacy owners, and had the benefit of a broad perspective drawn from operating pharmacies employing numbers of pharmacists over long periods of time. It is not clear that any of them would be affected by the success of the APESMA's claim: Ms Willis' pharmacies were not covered by the Pharmacy Award since they remained in the Western Australian industrial relations system, and Mr Pricolo's and Mr Loukas's pharmacies paid above-award wages to their pharmacists. In relation to the APESMA's lay witnesses, Ms Malakozis, Ms Madden, Ms McCallum and Mr Yap were able to give evidence concerning their experiences as employed pharmacists over long periods of time, pre-dating 1998 in the case of all of them except Mr Yap, and thus were able to give a proper longitudinal description of changes to their work. However, their perspective was necessarily narrower since they could only give evidence concerning their personal experiences and not those of any broader group of pharmacists. The evidence of Ms Thomson, Mr Walls and Ms Le was of lesser utility because of the comparatively short time they have worked in the profession. Further, they gave evidence that was not necessarily consistent with

the APESMA's case; for example Mr Le, who was registered as a pharmacist only in 2011, gave evidence that when he commenced practice his role was predominantly dispensing medicines and that the change relied upon had occurred since that time. This evidence was inconsistent with that of other of the APESMA's witnesses, who described the change as having occurred earlier over a longer period of time.

179 The two-part expert Report prepared by Professors Krass and Aslani was problematic in a number of respects. They were commissioned by the APESMA to prepare a report analysing changes in the work value of pharmacists since 1998, and the instructions provided to them by the APESMA gave what we consider to be an accurate summary of the nature of the proceedings currently before the Commission and the process by which work value was to be assessed in the industrial context. It is far from clear to us that the Report was properly responsive to those instructions. The first part of the Report in particular was expressly stated to be concerned only with the delivery of "cognitive pharmaceutical services" and did not attempt to undertake a holistic analysis of the work value of pharmacists, noting that it was part of the PGA's case that some elements of pharmacists' work associated with the prescription of medicines had become less onerous. Further, it is apparent that the first part of the Report took a heterodox view of work value, in that the "value" of pharmacists' work was primarily analysed by reference to its value to the community and the health outcomes it produced rather than being concerned only with the nature of the work and the level of skill and responsibility being exercised. The second part of the Report was based on interviews with a sample of pharmacists, but if suffered from the defects that, first, what was obtained from the interviews was necessarily in the nature of subjective perceptions rather than objective information and, secondly, the nature of the work experience (such as the length of time spent in the profession) of the interview participants was not provided. Nonetheless the Report as a whole contained a great deal of useful information concerning new programs and services in the pharmacy industry and the extent to which individual pharmacists were involved in the delivery of those.

180 The expert evidence of Professor Clarke provided a valuable overview of the highly regulated nature of the pharmacy industry, but was unable to answer the question posed to him by the APESMA concerning whether the grant of its claim would have a significant negative impact of the financial sustainability of community pharmacies — a question which, it seems to us, could not be answered without him being provided with or having access to data about the extent to which the market wage rates for pharmacists exceed the minimum award rate. Data of that nature was provided in the evidence given by Mr Crowther concerning the surveys conducted for the APESMA. Those surveys gave evidence concerning market rates for pharmacists which we accept, noting that the results of those surveys (showing a decline in market rates over the last five years) were confirmed by the UTS Pharmacy Barometer (discussed in the first part of the Report of Professors Krass and Aslani). Finally, the evidence of Dr March described developments in policy affecting the pharmacy profession and in the training of pharmacists over the last 30 years. We accept as accurate his description of those developments, but not necessarily some of the inferences he sought to draw from those developments.

181 The evidence adduced by the APESMA referred to a large number of discrete

changes which it will be necessary for us to deal with separately later, but the APESMA's overarching case was that there had been a paradigm shift in the work of pharmacists since 1998 from the traditional role of simply dispensing medicines for the treatment of particular illnesses to a patient-centred approach in which the pharmacist operates as part of an integrated health care team treating the entirety of the patient's condition through the provision of a wide range of primary and preventative health care services and through direct interaction with the patient. It is apparent that the case was advanced in that overarching way in order to justify the scale of the wage increases sought. We will deal with this overarching case first.

182 We are not satisfied that there has been a fundamental change in the nature of the work of pharmacists since 1998, or in their skills or level of responsibility, in the way suggested by the APESMA. We consider that the evidence, considered as a whole, demonstrates the following propositions:

(1) The main function of the pharmacist has always been, and remains, the dispensing of prescription medicines. However over time (both before and after 1998) there has been a decline in the proportion of time spent on this work. There have been a number of reasons for this. The process of issuing prescriptions, and making PBS claims in respect of such prescriptions, has speeded up and been simplified due the transformation effected by information technology. That this has been the case is a matter of everyday observation, although it was confirmed by the evidence of the PGA's witnesses Ms Willis, Mr Pricolo and Mr Loukas, and also to some extent by the APESMA's witnesses Ms Malakozis, Ms Madden and Ms McCallum and in the second part of the Report of Professors Krass and Aslani. As the federal government has over some decades attempted to control the cost of PBS medicines, issuing prescriptions has become relatively less profitable than it was before and has forced pharmacies to seek revenue and profit from other areas of activity. Additionally, the compounding of prescription medicines has virtually ceased (except in some specialist compounding pharmacies), and in addition the preparation of extemporaneous medicines now rarely occurs. Again, this position was made clear in the evidence of the PGA's witnesses, and was either supported or not contradicted by the APESMA's witnesses.

(2) This relative decline in the work of dispensing prescriptions has allowed pharmacists to spend a greater proportion of their time in providing other services to and interacting with patients, and the regulatory framework in which pharmacies operate has encouraged and incentivised this process, consistent with the philosophy articulated by the QUM policy. In the latter respect, the Community Pharmacy Agreements — particularly the Third, Fourth and Fifth CPAs — introduced a number of programs which funded the provision of a range of professional services to the community. All the witnesses to varying degrees gave evidence supporting this proposition.

(3) However, it does not follow that the nature of the work of community pharmacists or their skills or responsibilities have fundamentally changed since 1998 because of the developments described above. Rather, this is a case where, by and large, pharmacists have as a

consequence of these developments been required to perform certain work and exercise certain skills more intensely and more frequently than they did.

(4) Interaction and dialogue with patients concerning medicines to be dispensed, including the proper use of medicines and their effects, and the use of "soft" personal and communication skills in doing so, was a feature of pharmaceutical practice in 1998 and remains so today. Ms Malakozis and Ms McCallum as well as Ms Willis, Mr Pricolo and Mr Loukas described interacting with patients and providing them with information about their prescriptions before 1998, and this is consistent with everyday experience. The degree to which patient interaction occurs has always varied from pharmacy to pharmacy depending on business/retailing model that is used, but it certainly cannot be accepted that this was a new class of work or a new skill that was introduced at some time after 1998. We note Dr March's evidence that university undergraduate courses for pharmacists have added new subjects to the curriculum related to the use of such "soft" skills, but there was imprecision about when this occurred, and it is not clear to us that this was not part of the normal evolution of university courses rather than a radical change required by new developments in the profession. It may be accepted that greater accessibility to information about medications and patients' medication histories through the use of information technology has added to the therapeutic value of patient interactions, but we do not consider that there has been any intrinsic change to the nature of this work or the skills exercise.

(5) Diagnosis and advice as to the treatment of minor ailments such as colds and flu, minor aches and pains, allergies, skin irritations, cuts and abrasions, and referrals to medical practitioners if necessary, is not new and was a feature of pharmacy practice in 1998. We accept the evidence of Ms Willis, Mr Pricolo and Mr Loukas in this respect, which was not the subject of any substantial contradiction on the part of the APESMA's pharmacist witnesses. The degree to which this occurs is likely to have increased as a result of the greater accessibility of pharmacists to the public and a concomitant growth in expectations of the availability of such advice on the part of pharmacy customers, but there is no new work or skills involved.

(6) The introduction of federal-government funded programs for the provision of patient services through the Community Pharmacy Programs is not necessarily to be understood as signifying the introduction of new work or a requirement for pharmacists to learn new skills. We think the evidence supports the proposition that many of these programs provided funding to support the systematised provision of services that were already provided by pharmacists free of charge and on an ad-hoc basis. For example, we accept Ms Willis' evidence that the MedsCheck and Diabetes MedsChecks programs, which were introduced as part of the Fifth CPA and involve a systematised in-pharmacy review of a patient's medicines, represent a formalisation of work which was performed informally before. The skills required to be exercised, including understanding how medications may interact with each other, communicating to patients about the proper use, effects

and storage of medicines, and identifying and responding to problems that may have arisen in the use of medication, are not new and were exercised by pharmacists in 1998 and before. Likewise, we accept the evidence of Mr Pricolo and Mr Loukas that clinical interventions, which are the subject of a formal funding program introduced in the Fifth CPA and involve the identification of any medication-related problem in a patient and the making of a recommendation to the relevant medical practitioner about how to resolve it, are not new, with the change being that they are now recorded for funding purposes and their performance thereby encouraged. That they are not new is confirmed by the text of the Fifth CPA itself, which (as earlier set out) provides that the applicable program had the purpose of increasing the number of clinical interventions provided and documented.

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

184 It is next necessary to determine whether any of the work changes relied upon by the APESMA, considered individually, would justify any increase in the wage rates for pharmacists in the Pharmacy Award for work value reasons. We have already, in the context of our consideration of the APESMA's overarching case, rejected the proposition that there has been any change in the work value of pharmacists because of the QUM, greater interaction and communication with patients, the diagnosis and treatment of minor ailments, the MedsCheck program, or clinical interventions. We have reached the same conclusion, with one qualification to which we will return concerning the level of responsibility and accountability of pharmacists, about the following matters relied upon by the APESMA:

- *Dose administration aids*: The Fifth CPA financially supported the provision of DAAs in order to maximise the safe and effective use of medicines, but this did not represent the introduction of a new form of work or require the exercise of any new skill. We accept the evidence of Mr Loukas and Mr Pricolo that DAAs have existed since at least 1998, although their form and the extent of their usage has changed.
- *QCPP*: This has not in itself required new work or new skills, but has only involved a standardised quality assurance methodology.
- *Blood pressure and blood glucose tests*: These are not new and were offered in at least some pharmacies in 1998 and before. Blood pressure tests are not even necessarily administered by pharmacists.
- *Medical certificates*: It is clear that this service, which is offered at some but not all pharmacies on a fee-for-service basis, is new, having commenced in about 2009. However the evidence does not establish that this requires the exercise of any new skill by pharmacists; in particular the evidence did not suggest that the pharmacist is required to actually diagnose the person requesting the certificate on the basis of any form of medical examination as a medical practitioner would.

- *Weight management services and smoking cessation services*: These services have expanded but are not new, and on the evidence largely involve an explanation of available products for treatment.
- *Asthma and diabetes management*: We accept the evidence of Ms Willis, Mr Pricolo and Mr Loukas that this work had been performed in 1998 and before, and that any change was confined to understanding and providing information concerning new and updated medications, equipment and treatment methods.
- *Sleep apnoea services*: The limited evidence on this topic suggests that only a minority of pharmacies provide this service, and although it involves the provision of information and assistance concerning treatment technology which had been developed since 1998, the underlying condition had always been dealt with in undergraduate pharmacy courses.
- *Continuing professional development*: It is fundamental that any professional must engage in continuing and self-driven education and development in order to stay abreast of new knowledge, technology and other changes in the profession. It is a defining feature of a profession. Accordingly the introduction of CPD requirements merely formalised and systematised something that was (or should have been) already occurring.
- *Staged supply of medicines*: This program involves the management of patients who, because of mental illness, addictions or other problems have difficulty in managing their medications. The very limited evidence about this does not demonstrate that involves entirely new work (in the sense that pharmacist have always had to interact with and manage the medication needs of patients with these difficulties) or the exercise of new skills.
- *Workload and patient profile*: The evidence that the overall workload of pharmacists has risen did not rise above the anecdotal level. We find persuasive the evidence of Ms Willis that where the workload of individual pharmacists might be characterised as excessive, it was generally the result of business decisions made by some pharmacy owners to artificially limit or reduce the number of staff to deal with cost and competitive pressures rather than because of any inherent change in the nature of the work. The evidence of Professor Clarke was that there had been, over some decades, a doubling of the number of persons per pharmacy due to the location and ownership rules preventing new entrants into the industry. However it cannot be concluded from this that the workload of pharmacists has concomitantly increased; it is clear that there have been significant increases in the dispensing productivity of pharmacists due to information technology, and the number of *pharmacists* has grown even though the restrictive arrangements preserved by the PGA and the federal government in the CPAs have stopped the number of *pharmacies* from growing. The demographic of an ageing and progressively more obese population has undoubtedly led to more prescriptions being issued per person and an increased need to manage chronic disease and multiple medications for co-morbidities, but again it is difficult to conclude from

this that the workload of individual pharmacists has increased have regarded to the productivity improvements to which we have referred.

- *Increase in use of complementary medicines and vitamins*: The evidence does not establish that this involves any new work, skills or training.
- *Clozapine clinics*: The limited evidence on this topic does not satisfy us that this constitutes an increase in work value for pharmacists generally. It appears to involve the information checking and recording functions which do not involve the exercise of any new skills, and the duties appear only to be undertaken by a minority of pharmacists.
- *Four-year undergraduate degrees*: The evidence demonstrates that the move from three to four-year undergraduate degrees commenced well before 1998, although it became universal after 1998. We will consider the significance of the requirement of a four-year degree to the wage rates for pharmacists in the Pharmacy Award in a somewhat different context later in this decision.
- *Internship requirements*: The evidence demonstrated that the requirements for the completion of a pharmacist's internship, being a prerequisite for registration as a pharmacist, have become more onerous and rigorous. However this is a matter external to the work of pharmacists and does not constitute a change to the qualifications necessary to become a pharmacist.

185 We are satisfied that the APESMA has demonstrated that there is an increase in work value associated with the introduction of Home Medicine Reviews and Residential Medication Management Reviews that justified a discrete adjustment to award remuneration. We have reached that conclusion for the following reasons:

(1) The performance of these duties requires the higher qualification of Accredited Pharmacist, which may only be obtained after undertaking a training course and successfully completing a communication module, an examination and four case studies.

(2) The performance of HMRs and RMMRs occurs in the patient's home or aged care residence — that is, a different work environment involving the exercise of distinct personal interaction skills — and must be conducted in coordination with the patient's medical practitioner.

(3) There is an entirely new level of responsibility in terms of both medical outcomes and the claiming of CPA funding.

186 However, we do not agree that an entirely new classification of Accredited Pharmacist, as proposed by the APESMA, is either necessary or warranted. Registered pharmacists at any classification level may become Accredited Pharmacists, and any increased remuneration should operate as an equal increment to whatever may be the pharmacist's classification rate. Further, the holding of the qualification of Accredited Pharmacist does not in itself mean that the employer requires the performance of HMRs and/or RMMRs, and the evidence shows that many pharmacies do not engage in this work. These considerations support the conclusion that the appropriate course is to establish an allowance for Accredited Pharmacists who are required by their employer to perform HMRs and/or RMMRs. We consider that the establishment of such an allowance would be consistent with and necessary to achieve the modern awards objective in s 134(1), in that it is required in order for there to be a fair

and relevant safety net for pharmacists performing HMRs and RMMRs. In reaching that conclusion we have taken into account all the matters specified in s 134(1)(a)-(h); each of those matters we consider to be neutral considerations. We consider for the same reason that such an allowance is necessary to achieve the minimum wages objective in s 284(1), to the extent applicable; in that respect we consider the matters identified in s 284(1)(a)-(e) to be neutral considerations.

187 We propose to invite further submissions about the form of this allowance (such as whether it should be an annual or weekly allowance or an allowance payable each time a HMR or RMMR is performed) and its quantum.

188 In addition, we are satisfied that, in respect of some of the matters raised in the APESMA's case, there has been some increase in the work value of pharmacists since 1998, These matters are as follows:

- *Inoculations*: The work of actually administering an inoculation by injection is new work introduced in recent years involving the exercise of a discrete new skill, and requires the completion of additional approved study, the maintenance of authority to immunise, and the holding of statements of proficiency in cardiopulmonary resuscitation and first aid.
- *Emergency contraception*: The provision of emergency contraception, as Mr Yap explained in his evidence, requires not just the usual tasks of ensuring that the issue of the medication would be appropriate, safe and effective, but may also require analysis, advice, assistance and referral in cases where the patient is underage or may have been the victim of a sexual assault. We accept Mr Loukas' evidence that this is new work and involves an increase in accountability and responsibility.
- *Downscaling of medicines*: The downscaling of significant numbers of medications from prescription-only to Schedule 3 pharmacy-only medicines has increased the work value of pharmacists because it requires the pharmacist, in addition to dispensing the drug, to take on the functions previously exercised by a medical practitioner of diagnosing the patient and determining that issuing the medication would be a safe and effective medical response.
- *General increase in the level of responsibility and accountability*: While, for the reasons earlier stated, we have not generally accepted that the work and skills associated with patient programs established and funded under the CPAs has led to an increase in work value, we consider that the requirement for pharmacists to document these activities for the purpose of receiving funding and measuring outcomes represents a new required level of accountability and responsibility on the part of the pharmacist. Both the APESMA witnesses and the PGA witnesses acknowledged that this documentation requirement had not previously been a responsibility of pharmacists in 1998 when the relevant services had been provided on an informal and ad hoc basis.

189 We will invite the parties to make further submissions as to how the above findings should be reflected in an adjustment to remuneration, noting that the evidence demonstrates that not all pharmacists administer inoculations or dispense emergency contraception. It may be necessary for the consideration of this matter to occur in the context of the matters raised in the next part of our decision.

190 Finally, it is necessary to deal with the alternative limb of the APESMA's case, namely that the relativities between pharmacists and the C10 tradespersons rate in the *Metal Industry Award* established in Commissioner O'Shea's 1996 decision should be re-established by reference to the current C10 rate in the current Manufacturing Award because that was the basis upon which the work value of pharmacists was fixed when the *Community Pharmacy Award* was made in 1998. It is not in dispute that those relativities have become compressed as a result of flat dollar increases in Safety Net Reviews and Annual Wage Reviews from the time the *Community Pharmacy Award* was made (and indeed from 1993) through to 2010. That means, for example, that the commencing classification of a Pharmacist, which was intended to have a relativity of 140% compared to the C10 rate, now has a relativity of only 123%.[88]

191 It may be accepted that where the work value of a classification has been assessed on the basis of a relativity relationship with the C10 classification in the *Metal Industry Award*, and that relationship has not been sustained so that the current wage rate for the classification no longer reflects its originally assessed work value, that would constitute a work value reason as defined in s 156(4). The question is whether it is a work value reason that would *justify* the variation to minimum wages in the Pharmacy Award sought by the APESMA. We consider that it is not. The compression of relativities was the intended effect of the award of flat dollar increases to awards, in that it was considered appropriate to adopt an approach to improve the relative position of lower-paid award-wage workers and to depress that of higher-paid award-wage workers. This may be illustrated by the following passage in *Re Annual Wage Review 2009-10* (2010) 193 IR 380 decision, the last in which a flat-dollar increase was awarded:

> [336] We consider there is a strong case for a percentage adjustment to all modern award minimum wages. While not all award-reliant employees are low paid, uniform dollar increases reduce the relevance of the safety net at the higher award levels and erode the real value of award wages at most levels. These are particularly important considerations at the commencement of the modern awards system. Nevertheless most of the major parties supported a dollar increase rather than a percentage one.
>
> [337] With some hesitation we have decided on a dollar increase. There are two reasons. The first is that to the extent there is a choice between a percentage increase benefiting the higher levels and a dollar amount benefiting the lower levels we think that the current circumstances favour a greater benefit for the lowest paid. We are required in particular to take the needs of the low paid into account. In light of the fact that award-reliant employees have not had an increase in wages since 2008, it is desirable that we increase award rates by the largest amount consistent with the statutory criteria. Secondly, we have very little data concerning the impact of a percentage increase on costs and employment. We have insufficient information to be confident that a percentage increase would not have disproportionate effects on employment at the higher award levels …

192 It may also be noted that this position was one urged by the union movement over a long period of time. Because flat-dollar increases were applied across all

88 The current weekly wage rate for a Pharmacist under the Pharmacy Award is $1033.40. The current C10 classification weekly wage rate under the Manufacturing Award is 837.40.

awards, the compression of relativities has occurred across the entire award wages system. We do not think that there is any proper basis to attempt to unwind now, in one award only in response to a claim by a single union, a common approach to the adjustment of wages which was taken for deliberate policy reasons with the support of the union movement as a whole. It is obvious, in addition, that if the approach now urged by the APESMA was taken in relation to the Pharmacy Award, there would be no logical reason why this would not sought to be flowed on to every other modern award, with ramifications that need not be spelled out.

193 Accordingly the alternative basis for the APESMA's claim is rejected. However we give some further consideration to the issue of pharmacists' relativities with the C10 rate, and other rates, in the Manufacturing Award in the next part of this decision.

Relativity between Pharmacist Rates and Manufacturing Award Rates

194 The following table sets out the relative position concerning rates of pay, original relativity with C10 and qualifications as between relevant classification in the Manufacturing Award and the Pharmacy Award (noting that completion of a four-year undergraduate degree and a one-year internship is necessary to qualify for the base Pharmacist grade in the Pharmacy Award):

Manufacturing Award classification	**Minimum qualification**	**Original relativity to C10**	**Current Wage Rate**	**Pharmacy Award classification**	**Original relativity to C10**	**Current Wage Rate**
C1	Degree	180/210%	-	Pharmacist manager	190%[89]	1290.90
C2(b)	Advanced Diploma or equivalent + additional training	160%	1132.40	Pharmacist in charge	160%[90]	1158.40
				Experienced pharmacist		1131.80

89 190% is the original relativity for the Pharmacist Manager Grade 1 classification, which became the Pharmacist Manager classification in the Pharmacy Award.

90 160% is the original relativity for Pharmacist in charge Grade 1 classification, which became the Pharmacist in charge classification in the Pharmacy Award.

Manufacturing Award classification	Minimum qualification	Original relativity to C10	Current Wage Rate	Pharmacy Award classification	Original relativity to C10	Current Wage Rate
C2(a)	Advanced Diploma or equivalent + additional training	150%	1085.00			
C3	Advanced Diploma	145%	1058.60			
				Pharmacist	140%[91]	1033.40
C4	80% towards an Advanced Diploma	135%	1005.90			
C5	Diploma or equivalent	130%	979.60			
C6	C10 (Trade certificate III) + 80% towards Diploma OR 50% towards Advanced Diploma	125%	960.00			
C7	Certificate IV or 60% towards Diploma	115%	913.70	Pharmacy Intern — 2nd half of training		913.50

91 140% is the original relativity for a Pharmacist in their first year of experience.

Manufacturing Award classification	Minimum qualification	Original relativity to C10	Current Wage Rate	Pharmacy Award classification	Original relativity to C10	Current Wage Rate
C8	C10 (Trade certificate III) + 40% towards Diploma	110%	889.90			
				Pharmacy Intern — 1st half of training		883.40

195 The above relativities do not align for equivalent qualifications, reflecting the difficulty arising from the original use of professional scientists as a reference point. Nor do they consistently relate to the Australian Qualifications Framework (the AQF), which ranks educational qualifications above the completion of the Senior Secondary Certificate of Education in ten levels as follows:

Level 1 — Certificate I
Level 2 — Certificate II
Level 3 — Certificate III
Level 4 — Certificate IV
Level 5 — Diploma
Level 6 — Advanced Diploma, Associate Degree
Level 7 — Bachelor Degree
Level 8 — Bachelor Honours Degree, Graduate Certificate, Graduate Diploma
Level 9 — Masters Degree
Level 10 — Doctoral Degree

196 It can be seen, for example, that the rate of pay for a Pharmacy Intern, First half of training, who must possess a bachelor degree and is thus at Level 7 of the AQF, is lower than that of classification C8 in the Manufacturing Award, who is at Level 3 in the AQF. Similarly the base grade Pharmacist, who is at Level 7 in the AQF, is paid less than the C3, who is at Level 6 in the AQF.

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.

198 This matter may potentially constitute a work value consideration relevant to the 4 yearly review of the Pharmacy Award. In the conduct of the review, the Commission is required to discharge its functions under s 156(2) and is not confined to matters raised by interested parties. We will as a first step invite

further submissions from interested parties concerning this matter. We will then consider what course, if any, should be taken. One possibility is that this aspect of the review may need to be referred back to the President of the Commission for consideration as to the procedural course to be taken pursuant to s 582, since the matter raised may have implications for other awards of the Commission, including but not limited to the *Professional Employees Award 2010*.

Next step

199 Interested parties may file further written submissions pursuant to [187], [189] and [198] within 28 days of the date of this decision.

Further written submissions invited from interested parties

CASANDRA FRANCAS

[2019] FWCFB 6067

FAIR WORK COMMISSION

DECISION

Fair Work Act 2009
s.156 – 4 yearly review of modern awards

4 yearly review of modern awards—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—Substantive claims
(AM2018/26)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER LEE MELBOURNE, 2 SEPTEMBER 2019

4 yearly review of modern awards – award stage – group 4 awards – substantive issues – Social, Community, Home Care and Disability Services Industry Award 2010

Attachments

Attachment A– Outstanding claims

Attachment B – Oral evidence and witness list

Attachment C – Draft variation determination

ABBREVIATIONS

ABI	Australian Business Industrial and the New South Wales Business Chamber
Act	Fair Work Act 2009 (Cth)
ADHC	Aging Disability and Home Care
AFEI	Australian Federation of Employers and Industries
Ai Group	Australian Industry Group
ANZSIC	Australian and New Zealand Industrial Classification
ASU	Australian Services Union
Business SA	South Australian Chamber of Commerce and Industry T/A Business SA
Census	The ABS Census of Population and Housing
CoE	Characteristics of Employment Survey
Commission	The Fair Work Commission
EEH	Survey of Employee Earnings and Hours
ERO	Equal Remuneration Order
HSU	Health Services Union
NES	National Employment Standards
NDIS	National Disability Insurance Scheme
NDS	National Disability Services
PC Final Report	Productivity Commission Inquiry Report: Workplace Relations Framework

Review	4 yearly review of modern awards
UV	United Voice

ABBREVIATIONS - Awards

Aged Care Award 2010	Aged Care Award
Hospitality Industry (General) Award 2010	Hospitality Award
Registered and Licensed Clubs Award 2010	Clubs Award
Registered and Licensed Clubs Award 2010, *Restaurant Industry Award 2010* and the *Hospitality Industry (General) Award 2010*	Collectively, the Hospitality Awards
Restaurant Industry Award 2010	Restaurant Award
Social, Community, Home Care and Disability Services Industry Award 2010	SCHADS Award

1. Introduction

[1] This decision deals with a number of claims for substantive variations to the *Social, Community, Home Care and Disability Services Industry Award 2010* (the SCHADS Award) as part of the 4 yearly review of modern awards (the Review).

[2] On 3 April 2019 we issued a Statement 1 addressing correspondence that had been received from the Australian Industry Group (Ai Group) and Australian Business Industrial (ABI). In short, that correspondence dealt with whether or not it would be appropriate to proceed with all of the claims in hearings scheduled to commence on 12 April 2019. The Statement provided a list of claims which we considered could be progressed with the first tranche of hearings and those matters were dealt with at a Mention before the President at 1.00 pm on 3 April 2019. A transcript of the Mention is available on the Commission's website.

[3] We issued a Statement 2 on 8 April 2019 confirming that the first part of the proceedings would deal with the following claims:

- S44A – deletion or variation to 24 hour care clause;
- S40 – consequential variation to the sleepover clause (arising from the deletion of the 24 hour care clause (S44A));
- S47 – variation to excursions clause;
- S51 – variation to overtime clause; and

- S57 – variation to public holidays clause.
- S19 – first aid certificate renewal;
- S43 – deleting the 24 hour care clause; and
- S48 – Saturday and Sunday work (casual employees receiving casual loading in addition to Saturday and Sunday rates).

[4] A list of the remaining claims is at **Attachment A**. Those claims will be the subject of a hearing in October 2019.

[5] The matter was heard on 15 – 17 April 2019. The transcript of the proceedings are available on the 4 yearly review section of the Commission's website. A summary document was published on 12 April 2019 outlining the relevant procedural history, the claims being pursued by United Voice (UV), the Australian Services Union (ASU) and the Housing Services Union (HSU) and a summary of submissions received.

[6] It is necessary to first say something about the Commission's task in the Review before turning to describe the sectors covered by the SCHADS Award and the proposed variations.

2. The Review

[7] Section 156 of the *Fair Work Act 2009* (Cth) (the Act) deals with the conduct of the Review and s.156(2) provides that the Commission *must* review all modern awards and *may*, among other things, make determinations varying modern awards. In this context 'review' has its ordinary and natural meaning of 'survey, inspect, re-examine or look back upon'. 3 The discretion in s.156(2)(b)(i) to make determinations varying modern awards in a Review, is expressed in general, unqualified, terms.

[8] If a power to decide is conferred by a statute and the context (including the subject-matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion confined only by the subject matter, scope and purposes of the legislation will ordinarily be implied. 4 However, a number of provisions of the Act which are relevant to the Review operate to constrain the breadth of the discretion in s.156(2)(b)(i). In particular, the Review function is in Part 2-3 of the Act and hence involves the performance or exercise of the Commission's 'modern award powers' (see s.134(2)(a)). It follows that the 'modern awards objective' in s.134 applies to the Review.

[9] Section 138 (achieving the modern awards objective) and a range of other provisions of the Act are also relevant to the Review: s.3 (object of the Act); s.55 (interaction with the National Employment Standards (NES)); Part 2-2 (the NES); s.135 (special provisions relating to modern award minimum wages); Division 3 (terms of modern awards) and Division 6 (general provisions relating to modern award powers) of Part 2-3; s.284 (the minimum wages objective); s.577 (performance of functions etc by the Commission); s.578 (matters the Commission must take into

account in performing functions etc), and Division 3 of Part 5-1 (conduct of matters before the Commission).

[10] The modern awards objective is in s.134 of the Act:

> **SECTION 134 THE MODERN AWARDS OBJECTIVE**
>
> *What is the modern awards objective?*
>
> 134(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
>
> This is the ***modern awards objective***.

When does the modern awards objective apply?

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

(a) the FWC's functions or powers under this Part; and

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

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

[11] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[12] The modern awards objective is very broadly expressed. 5 It is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h).6 Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.7

[13] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process. 8 No particular primacy is attached to any of the s.134 considerations9 and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[14] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award. 10 Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.11 In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[15] Further, the matters which may be taken into account are not confined to the s.134 considerations. As the Full Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* 12 (*Penalty Rates Review*):

'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).' 13

[16] Section 138 of the Act emphasises the importance of the modern awards objective:

'138 Achieving the modern awards objective

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

[17] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence. 14

[18] In *4 Yearly Review of Modern Awards - Penalty Rates (Hospitality and Retail Sectors) Decision* (the *Penalty Rates Decision*) 15 the Full Bench summarised the general propositions applying to the Commission's task in the Review, as follows:

'1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.

2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.

4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:

- the legislative context which pertained at that time may be materially different from the *Fair Work Act 2009* (Cth);

- the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or

- the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.' 16

[19] Where an interested party applies for a variation to a modern award as part of the Review, the proper approach to the assessment of that application was described by a Full Court of the Federal Court in *CFMEU v Anglo American Metallurgical Coal Pty Ltd (Anglo American)*: as follows: 17

'[28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 – terms may and must be included only to the extent necessary to achieve such an objective.

[29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.'

[20] In the same decision the Full Court also said: '...the task was not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation met the objective.' 18

[21] We will apply the above principles in this decision.

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

3.1 General

[22] The SCHADS Award covers employers in the following sectors:

- crisis assistance and supported housing;
- social and community services (including social work, recreational work, welfare work, youth work or community development work, including organisations which primarily engage in policy advocacy or representation on behalf of organisations carrying out such work and the provision of disability services including the provision of personal care and domestic and lifestyle support to a person with a disability in a community and/or residential setting including respite centre and day services);
- home care (the provision of personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence); and
- family day are (the operation of a family day care scheme for the provision of family day care services),

and their employees in the classifications listed in Schedules B to E of the award.

[23] There are 4 levels within the Australian and New Zealand Industrial Classification (ANZSIC) structure: division, subdivision, group and class. Using a framework 19 developed by Fair Work Commission staff, the SCHADS Award is 'mapped' to the Other residential care services and Other social assistance services industry classes within the ANZSIC.

[24] The information below presents an employee profile of the Social, community, home care and disability services sector from the Census of Population and Housing (Census). The ABS Census of Population and Housing (Census) is the only direct ABS data source with information on employment for this sector. The most recent Census data is from August 2016.

[25] The August 2016 Census data show that there were around 168 000 employees in the Social, community, home care and disability services industry. Table 1 compares characteristics of employees in this industry with employees in 'all industries'.

Table 1: Employee characteristics of Social, community, home care and disability services industry, 2016

	Social, community, home care and disability services industry		**All industries**	
	(No.)	**(%)**	**(No.)**	**(%)**
Gender				

Male	43 797	26.1	4 438 604	50.0
Female	123 996	73.9	4 443 125	50.0
Total	167 793	100.0	8 881 729	100.0
Full-time/part-time status				
Full-time	79 233	49.7	5 543 862	65.8
Part-time	80 213	50.3	2 875 457	34.2
Total	159 446	100.0	8 419 319	100.0
Highest year of school completed				
Year 12 or equivalent	103 982	62.8	5 985 652	68.1
Year 11 or equivalent	16 679	10.1	856 042	9.7
Year 10 or equivalent	34 586	20.9	1 533 302	17.4
Year 9 or equivalent	6174	3.7	273 180	3.1
Year 8 or below	3460	2.1	112 429	1.3
Did not go to school	590	0.4	26 356	0.3
Total	165 471	100.0	8 786 961	100.0
Student status				
Full-time student	8068	4.8	715 436	8.1
Part-time student	13 367	8.0	491 098	5.6
Not attending	145 005	87.1	7 618 177	86.3
Total	166 440	100.0	8 824 711	100.0
Age (5 year groups)				
15–19 years	1797	1.1	518 263	5.8
20–24 years	10 990	6.5	952 161	10.7
25–29 years	16 707	10.0	1 096 276	12.3
30–34 years	17 663	10.5	1 096 878	12.3
35–39 years	16 515	9.8	972 092	10.9
40–44 years	18 998	11.3	968 068	10.9
45–49 years	21 055	12.5	947 187	10.7
50–54 years	21 977	13.1	872 485	9.8
55–59 years	20 345	12.1	740 822	8.3
60–64 years	14 098	8.4	469 867	5.3
65 years and over	7657	4.6	247 628	2.8
Total	167 802	100.0	8 881 727	100.0
Average age	44.0		39.3	
Hours worked				
1–15 hours	20 995	13.2	977 997	11.6
16–24 hours	25 650	16.1	911 318	10.8

25–34 hours	33 569	21.1	986 138	11.7
35–39 hours	42 488	26.6	1 881 259	22.3
40 hours	17 614	11.0	1 683 903	20.0
41–48 hours	8372	5.3	858 120	10.2
49 hours and over	10 755	6.7	1 120 577	13.3
Total	159 443	100.0	8 419 312	100.0

Note: Part-time work is defined as employed persons who worked less than 35 hours in all jobs during the week prior to Census night. Totals may not sum to the same amount due to non-response. For full-time/part-time status and hours worked, data on employees that were currently away from work (that reported working zero hours), were not presented. .
Source: ABS, *Census of Population and Housing*, 2016

[26] The profile of Social, community, home care and disability services industry employees differs from the profile of employees in 'All industries' in four aspects:

- Social, community, home care and disability services industry employees are predominately female (73.9 per cent, compared with 50.0 per cent of all employees);

- around half (50.3 per cent) of Social, community, home care and disability services industry employees are employed on a part-time or casual basis (i.e., less than 35 hours per week), compared with 34.2 per cent of all employees;

- around half (50.7 per cent) of Social, community, home care and disability services industry employees are aged 45 years and over, compared with 36.9 per cent of all employees; and

- fewer than two-thirds (62.8 per cent) of Social, community, home care and disability services industry employees have completed Year 12 or equivalent, compared with 68.1 per cent of all employees.

[27] Interested parties were invited to comment on the data set out in this part of our decision. In a submission dated 17 May 2019, the NDS notes that the industry profile set out above draws on census data for employees working in the 'other residential care services' and 'other social assistance services' industry classes and that the use of this data is consistent with the approach taken by the Commonwealth in its submissions of 18 November 2010 in the ERO case for social and community service workers (C2010/3131). In that submission the Commonwealth also pointed to a number of limitations to this approach but despite these limitations concluded that it provided a reasonable basis for estimating the size and characteristics of the sector. 20 The NDS notes that no party disputed the approach taken by the Commonwealth in its ERO submission, regarding the size and characteristics of the sector and submits:

> ‘The estimate of employment in the current industry profile published by FWC is a similar order of magnitude to that of estimates provided by the Commonwealth government in the equal remuneration case.
>
> By using data for the same industry clauses as was used in submissions for the equal remuneration case, the same limitations of precisely defining the sector identified by the Commonwealth will also apply.
>
> NDIS concludes that the approach taken in the Industry Profile results in a reasonable estimate of the likely size of the sector.’ 21.

3.2 Survey of the members of the employer organisations

[28] During the course of these proceeding a draft survey instrument was prepared by the Commission to elicit information relating to some of the matters before us. A copy of the draft survey instrument was published on the Commission’s website and interested parties were provided an opportunity to file written submissions regarding its contents. The survey questions were finalised in consultation with the interested parties.

[29] The survey was administered via an online survey platform which was ‘open’ for the 5 week period from 18 May 2019 until 19 June 2019. Participation in the survey was limited to members of the parties in the proceeding. The survey was *not* designed to be representative of *all* enterprises employing workers covered by the SCHADS Award.

[30] The survey was sent to about 2980 enterprises 22 and 854 provided a complete response (an approximate response rate of just under 30 per cent).

[31] A report setting out the survey results was published by the Commission’s research section on 26 June 2019 and parties were given an opportunity to file written submissions on the content of the report and the survey results. Submissions were filed by AFEI, AiGroup, ASU and UV. ABI filed a submission in reply. The submissions were the subject of oral argument at a hearing on 16 July 2019.

[32] UV and the ASU contended that the survey was ‘methodologically flawed principally because of the manner in which the sample was constructed’. 23 The short point put was that the survey was of members of various employer organisations and that there was no way of knowing whether the membership of those organisations was representative of all employers covered by the SCHADS Award.

[33] We accept that on the material before us the survey results cannot be said to be representative of all employers covered by the SCHADS Award and, accordingly, the results cannot properly be extrapolated to the relevant population. That said, the Survey Results are the best evidence available to us in respect of certain issues. In particular, the results provide an indication of the utilisation of 24 hour shifts and the pattern of engagement of casual employees amongst a substantial number of employers covered by the SCHADS Award.

[34] It seems to us that the Survey Results are particularly relevant to the claim by the HSU to delete the 24 hour care clause and the Union claims to increase the rates of pay payable to casual employees when working overtime and on weekends and public holidays.

[35] The HSU proposed that the 24 hour care clause be deleted on the basis that the 24 hour provision is unclear and rarely used. 24

[36] The HSU also advanced witness evidence about people's direct experience within parts of the industry and particular geographical areas as to the use of the 24 hour care clause. But that evidence is limited to the direct experiences of the witnesses concerned and cannot be taken as evidence of what takes place in every award covered business.

[37] The Survey Results show that around one in ten enterprises (11.2 per cent) that responded to the Survey used 24 hours shifts in the one year period between 1 March 2018 and 1 March 2019. 25 This supports a finding that 24 hour care shifts are used in the industry.

[38] Further, as pointed out by AFEI:

> 'Given that 24 hour shift provisions only apply to home care employees, the 11.2% of all respondents using 24 hour shifts could be as high as one third of all home care respondents.' 26

[39] In addition, of those providers that do use the 24 hour care clause, the Survey Results show that on average the number of times they rostered a home care employee to work a 24 hour shift was 304 per year. 27 Hence, while not every employer uses the clause, those who do utilise 24 hour shifts do so regularly.

[40] The HSU is also seeking variations to clause 26, Saturday and Sunday work, and clause 34, Public Holidays, to ensure that casual employees receive the casual loading *in addition to* the relevant penalty rates. Further, UV is seeking to amend clause 28 to ensure that casual employees who work overtime are paid the casual loading *in addition to* overtime rates.

[41] The Survey Results show that in the 4 week period from 4 to 31 March 2019, around three-quarters (75.4 per cent) of enterprises that responded to the survey employed casual employees that were covered by the SCHADS Award (Chart 7). Of the enterprises that employed casual employees in that 4 week period, one quarter had casual employees that worked in excess of 38 hours per week or 76 hours per fortnight (Chart 8). Around three-quarters of enterprises (76.4 per cent) responded that casual employees worked on a Saturday during this period, and around seven in ten enterprises (69.9 per cent) responded that casual employees worked on a Sunday.

[42] We also accept that the Survey Results demonstrate that the proposed variations advanced by the HSU and UV in respect of casual employees would materially increase the rates of pay payable to casual employees when working overtime, on weekends, and on Public Holidays.

[43] Indeed UV acknowledged that there appears to be a high utilisation of casual labour by some respondents. 28

3.3 Are SCHADS Award reliant employees low paid?

[44] One of the s.134 considerations which we are obliged to take into account in giving effect to the modern awards objective is 'the needs of the low paid' (s.134(1)(a)). In the *Penalty Rates Case* the Commission determined that a threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid', 29 within the meaning of s.134(1)(a). There is, however, no single accepted measure of two-thirds of median (adult) ordinary time earnings. The two main ABS surveys of the distribution of earnings which are relevant are the *Characteristics of Employment Survey*30 (the CoE) and the Survey of *Employee Earnings and Hours*31 (the EEH).32

[45] The most recent data for median earnings is for August 2018 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of the EEH for May 2018. Using the CoE survey data the operational benchmark for identifying the 'low paid' is $886.67 per week. Using the EEH data the figure is $973.33.

[46] In addition to the minimum rates set out in clause 15 and 16 of the SCHADS Award some employees covered by the award (SACS classification 2-8 and Crisis accommodation classification 1-4) are entitled to equal remuneration payments pursuant to the Equal Remuneration Order (ERO) that commenced on 1 July 2012. The cumulative effect of the award minimum rates and the ERO payments is set out in a joint submission filed by AFEI, ASU and NDS on 21 May 2019.

[47] Based on this data, a proportion of employees covered by the SCHADS Award may be regarded as 'low paid' within the meaning of s.134(1)(a).

4. The SCHADS Sector and the NDIS

[48] The social, community, home care and disability services industry is undergoing structural change by reason of reforms that have been (and continue to be) implemented across the country.

[49] The key features of the National Disability Insurance Scheme (the NDIS) and the similar reforms in the home care sector have been detailed in materials filed in the course of the review of the SCHADS Award, including in:

- Cortis, Natasha, Working under the NDIS: Insights from a survey of employees in disability services (Report prepared for HSU, ASU and UV, June 2017);

- Cortis, Natasha et al, Reasonable, necessary and valued: Pricing disability services for quality support and decent jobs (SPRC Report 10/17, June 2017);

- McKinsey & Company, Independent Pricing Review: National Disability Insurance Agency (Final Report, February 2018);
- National Disability Services, Australian Disability Workforce Report (Report, February 2018);
- National Disability Services, State of the Disability Sector Report (Report, 2018).
- Productivity Commission, National Disability Insurance Scheme (NDIS) Costs (Costs Position Paper June 2017);
- Productivity Commission, National Disability Insurance Scheme (NDIS) Costs (Study Report, October 2017);
- Australian Government Department of Health, The Aged Care Workforce, 2016, March 2017;
- NDIS Price Guide for Victoria, 1 July 2018; and
- NDIS 2018-2019 Price Guide Updates Summary.

[50] The two main reforms are the NDIS and the introduction of 'Consumer Directed Care' for home care packages. Other similar reforms are also taking place in respect of State and Territory funding models. Broadly speaking, these reforms involve a move away from a block funding model to an individualised funding model whereby individual consumers receive a tailored, individualised care plan (with individualised funding), under which consumers have a greater ability to choose how care services are provided to them (including what, when, where, and by whom those services are provided).

[51] The aged care industry is comprised of residential aged care (covered by the Aged Care Award 2010) and home care, which is covered by the SCHADS Award. In the non-residential aged care sector, there are two main programs under which services are delivered: the Commonwealth Home Support Program (CHSP), and the Home Care Packages (HCP) Program. Entry to the system is though My Aged Care operated by the Federal Government. The system is designed, regulated and funded by the Federal Government.

[52] In the home care sector, Federal Government reforms announced in 2012 created Consumer Directed Care (CDC). CDC is a service delivery model designed to give more choice and flexibility to consumers, by allowing individuals to have more control over the types of care and services they access and the delivery of those services (including who delivers the services and when).

[53] CDC was first piloted as a model of care in 2010-11 and from July 2015, all Home Care Packages must be delivered on a CDC basis.

[54] Prior to the introduction of CDC, Home Care Packages were provided as a bundled set of services relatively tightly-specified by government. Availability of Commonwealth funding for these services had been capped by the allocation of funded "places" to a limited group of approved providers (as provided for in the Aged Care Act 1997), by the funding levels prescribed and by a cap on consumer fees.

[55] Home Care Packages are generally available to older persons who need coordinated services to help them to stay in their home, and to younger persons with a disability, dementia or other special care needs that are not met through other specialist services.

[56] The NDIS was established under the *National Disability Insurance Scheme Act 2013* with the objectives of:

> (a) supporting the independence and social and economic participation of people with disability;
>
> (b) providing reasonable and necessary supports, including early intervention supports, for participants;
>
> (c) enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;
>
> (d) facilitating the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability; and
>
> (e) promoting the provision of high quality and innovative supports to people with disability.

[57] The NDIS supports people under the age of 65 who have a permanent and significant disability. Under the NDIS, individual consumers (eligible 'participants') have greater choice and control over how their services are delivered, which includes control over what services are provided to them, when those services are provided, where those services are provided, and by whom those services are provided. Participants have the ability to choose their service providers, and to terminate their service arrangements at their discretion.

[58] Each participant's supports are set out in a 'NDIS Plan' which is developed by the National Disability Insurance Authority (NDIA) in consultation with the individual participant. Service providers do not have any control over, or input into, the NDIS Plans. NDIS Plans specify a 'global' funding amount for different categories of 'fixed' and/or 'flexible' supports, but typically do not specify details of how or when those supports are to be provided.

[59] Participants then typically enter into a service agreement with one or more service providers for the delivery of services outlined in their NDIS Plan.

[60] On 1 May 2019 we issued Directions 33 inviting the parties to comment on whether they took issue with the observations made about the NDIS at paragraphs [554] and [630] – [633] of the Full Bench decision in the Part time employment and

casual employment proceedings issued on 5 July 2017.34 The relevant passages from that decision are set out below:

> '[554] The NDIS, broadly speaking, funds persons with disability directly, rather than via disability services organisations, and thereby allows persons with disability and their carers to purchase the support services they need in accordance with individualised NDIS plans. This has meant that persons with disability are able to exercise a far greater level of choice and control over how, when, where and by whom their disability support services are delivered. ABI contends that the NDIS is radically changing the disability support services sector, in that employers have lost a large degree of control over when work is required to be performed, and accordingly require much greater flexibility in the allocation of working hours to part-time employees so that they can operate in a way which is responsive to client demand. Absent such flexibility, ABI contends that there is a substantial risk that the workforce in the sector, which will need to expand significantly in order to meet the demand for individualised services generated by the NDIS, will become casualised. The ABI claim was supported by Jobs Australia, which is a national peak body of non-profit organisations that assist disadvantaged people into work.
>
> …
>
> [630] We have earlier briefly described the concept of the NDIS. Participants in the scheme (and their carers) are required to prepare a NDIS plan in conjunction with the National Disability Insurance Agency (NDIA) which, in an itemised way, sets out their support needs and the way in which these support needs are to be met. Supports may be fixed – that is, regularly required at a fixed time each day or week – or be flexible, which means the participant has scope to rearrange the supports to suit themselves within the overall budget. In the early trial phase, these plans were prepared in a highly prescriptive format, but by the time of hearing they had become far less so. An example plan that was provided to us 35 set out the basic details of the participant and his/her immediate support persons and lifestyle, the participant's goals for the plan, and the supports to be provided. The supports were identified under the headings of transport to access daily activities; assistance with daily life at home and in the community, education and at work; supported independent living; improved daily skills; assistive technology; improved living arrangements; and improved life funding. Specific supports were identified in the example plan under each heading, and an annual budget (for the period 15 June 2016 to 14 June 2017) set out for each support item. For some items, a maximum number of hours of a particular service per week or per year were specified. The example plan required each identified support to be purchased as described, and prohibited swaps from one item to another. The items in the plans are budgeted for in accordance with a "*NDIS Price Guide*" issued by the NDIA. In pricing items, the NDIA has been aggressive in trying to set the absolute minimal cost so as to control the cost to government of the NDIS as a whole. Labour costs are calculated by reference to the SCHCDSI Award.
>
> [631] Once the plan is prepared, the majority of participants who are self-managed (as distinct from having their plans managed by a support agency) may

then "*buy*" the services budgeted for in the plan from providers which are registered with the NDIA (although the actual payment is made by the NDIA to the provider in accordance with the plan and the NDIS Price Guide). There is no obligation to obtain all the services in a plan from a single provider, so a participant may have multiple service providers. The participant, once he or she has chosen the provider of a specific service, will then enter into a service agreement with the provider. We were provided with an example of a service agreement, 36 which included the following provisions of significance:

- the provider was required to "Work with you the Participant to provide supports that suit your needs and at the times preferred by you" (underline added) and to "Consult with you regarding decisions about how your supports are provided";

- the participant was required to keep the provider "informed of any changes to my support need which may impact on the supports they provide";

- in relation to payment for the services provided, "The NDIA sets the prices to be claimed for each support item and [the provider] may choose to accept or decline the provision of certain support items if the price set does not cover business operating costs";

- in relation to variations to the participant's plan, "The Participant and/or their Plan nominee is responsible for informing [the provider] when their NDIA Plan has been reviewed and/or modified in any way ... [the provider] requires this information so your Service Agreement can be reviewed and modified to ensure it reflects the most current supports you require [the provider] to provide";

- the participant was requested to inform the provider at the time of developing or reviewing the Service Agreement if they intended using multiple service providers "to ensure that sufficient support hours and funds are available as per the Service Agreement" and "Failure to provide this information may result in over-use of certain supports and impact on [the provider's] ability to claim for supports provided";

- in relation to cancellations of supports by the participant, "We understand that situations may occur that mean participants need to change or cancel support. When this happens, it is appreciated if participants provide at least 24 hours notice to reduce any impact on business... Should the Participant not provide 48 hours notice of his or her inability to participate in the service, [the provider] will be entitled to claim from NDIA for payment of such Service... When cancellations or 'no shows' exceed 8 times per year, [the provider] must notify the NDIA so that consideration can be made to review the plan"; and

- in relation to termination of the service agreement by either party, a minimum of 4 weeks' notice was required, and "*If the participant chooses to cease services or engages the services of another provider without giving the agreed notice, an early exit payment will be charged of up to 4 weeks*"

[632] Until mid-2016, the NDIS was implemented in various trial areas throughout the country. The full implementation rollout began in July 2016, but it is not expected to be completed until 2019. It is expected that the total number of participants in the NDIS will increase to about 460,000 by 2019, about 20 times the number of participants in 2016. Many of the new participants will not be living in institutionalised care or group homes with regimented support demands, but will require supports that are shorter in duration and more flexible in order to undertake work, education and social activities. The number of registered providers is also expected to increase significantly. In 2016 there were over 2,000 registered providers, the large majority of which had not been disability support providers prior to the advent of the NDIS.

[633] At the time of hearing, according to data collected and benchmarked by NDS, there were about 26,000 disability support workers in Australia, of which 23% were full-time, 35% were part-time, 37% were casual, and 6% were on fixed-term contracts. This workforce is predominantly female. It was estimated in 2011 that the workforce would have to double by the time of full implementation of the NDIS. There was some evidence that some employers had increased the usage of casuals in order to meet the work demands of the NDIS, against their preference to employ mainly permanent part-time employees, mainly because of the variability associated with the one-on-one attendances which are a new industry feature introduced as part of the NDIS.'

[61] Comments on the above passages were made by:

- ABI on 19 May 2019 37 and 3 June 2019;38
- NDS on 17 May 2019; 39
- HSU on 17 May 2019; 40
- UV on 17 May 2019; 41
- ASU on 17 May 2019; 42 and
- AFEI on 22 May 2019. 43

[62] ABI confirmed that its clients broadly agree with the observations made at paragraphs [554] and [630] – [633] of the Full Bench decision. 44 As to the description in [631] of the way in which participants are able to access services, ABI notes that the description is accurate but states its understanding that the terms of Service Agreements, and the way in which those terms are enforced, vary across operators.45

[63] In relation to the observations about client cancellations at [631], ABI notes that the most recent NDIS Price Guide provides a 'limited ability' to charge participants for cancelled services' and that under the current rules:

(i) providers are not permitted to charge a cancellation fee where a participant cancels a scheduled service and provides notice of cancellation prior to 3pm the day before the scheduled service;

(ii) providers are permitted to charge up to 90% of the agreed price for a cancelled scheduled appointment where the service is cancelled after 3pm the day before the scheduled service (however a provider may only charge a cancellation fee against a participant plan up to 12 times per year for personal care and community access supports, following which the NDIA will require the provider to demonstrate they are taking steps to actively manage cancellations). 46

[64] The NDS submits that the observations of the Part time and Casual Employment Full Bench were accurate at the time they were made and remain 'broadly relevant' in 2019, however, since the 2017 Full Bench observations the NDIS has continued to grow and has undergone some operational changes. 47 Similarly, AFEI notes that since 2017 there have been several developments in the composition of the disability services industry and its workforce.48

[65] The HSU and UV take issue with some of the observations made in the extracted passages from the Part time and Casual Employment decision, in particular the reference in [554] to the ABI's contention that 'employers have lost a large degree of control over when work is required to be performed, and accordingly require much greater flexibility in the allocation of working hours to part-time employees so that they can operate in a way which is responsive to client demand'.

[66] We accept, as the HSU submits, that [554] is simply a summary of ABI's claim and its characterisation of how the NDIS operates; it does not represent the concluded view of the Full Bench on the operation of the NDIS. So much is clear from [636], [639] and [640] of the Full Bench decision which effectively repudiates ABI's characterisation of how the NDIS operates, in particular:

'[636] The evidence makes it clear that there remains considerable uncertainty as to how the NDIS will operate and what will be the pattern of service demand from participants once the NDIS is fully implemented …

[639] The basic elements of the NDIS lend themselves to reasonably predictable workforce planning. Many of the forms of support that are funded in individualised NDIS plans are … regular and predictable …

[640] … we consider it unlikely that the market for disability support services which the NDIS is establishing will give participants the degree of market power that some of the employer witnesses implicitly suggested it would.'

[67] The HSU also takes issue with a number of the other observations made in the extracted passages. We accept that a number of the observations made by the Part time and Casual Employment Full Bench have (understandably enough, given the passage of time) been overtaken by events as the NDIS continues to evolve. We have not found it necessary to address each of the issues raised by the HSU as we need not resolve each of the contested matters in order to deal with the claims before us. As

AFEI put it: ‘To provide a comprehensive account of the operation and nature of the NDIS more recently, would be a substantial exercise’. 49 Such an exercise is not necessary in the context of these proceedings. For present purposes we would simply make the following observations:

1. The NDIS may be characterised as a move from a block funded welfare model of support to a fee-for-service market based approach. 50
2. The initial roll out targets for the NDIS have not been met. The NDS submits that the current rate of roll out is about 75 per cent of the level originally planned in 2011 and that the rollout will extend ‘well into 2019-20 and is unlikely to be completed before then’. 51 Similarly, the HSU submits ‘The rollout targets have not been met and it can be expected that the rollout will continue well into 2020’.52
3. According to the NDIA Quarterly Report, as at 31 March 2019:

- there were 277,155 NDIS participants, of whom 85,489 were receiving support for the first time;

- the total number of registered providers was 20,208, of whom 57 per cent (11,418) were ‘active’ as at 31 March 2019, meaning that they had claimed a payment from the NDIA for delivering a service. 45 per cent of the total number of providers were individual/sole traders. 53

4. The NDS (2019), Australian Disability Workforce Report of July 2018 notes that:

- 48 per cent of disability support workers are permanent (full time or part time) and 46 per cent are casual

- the trend towards casualisation is not universal across the sector and is more prevalent in small and medium organisations and absent in large organisations. 54

5. The NDS has developed a data metrics tool called ‘Workforce Wizard’, to assist disability organisations track workforce trends. This was the source of the data referred to by the Part time and Casual Employment Full Bench at [633] of its July 2017 decision. Since the NDS July 2018 Workforce Report the NDS has obtained data from the ‘Workforce Wizard’ for the December 2018-19 quarter (including from 187 organisations comprising 41,119 workers in the disability and allied health sectors), which shows that:

- the average proportion of casual employment increased from 40.9 per cent in September 2015 to 45.2 per cent in December 2018 (but has remained at around 45 per cent since September 2017, with the exception of the September 2018 quarter, at 47.3 per cent).

Based on this data the NDS submits that:

> ‘While disability service providers are hiring more casual workers, the trend towards increased casual employment since 2015 appears to have stabilised.’ 55

[68] ABI submits that aspects of the sector are under significant financial strain and that a ‘regular complaint’ of service providers in the disability services sector is the inadequacy of the NDIS pricing system. 56

[69] ABI contends that the legitimacy of this concern has been borne out in a range of studies, including in the Final Report of the Independent Pricing Review commissioned by the NDIA and published by McKinsey & Company dated February 2018. 57 Amongst a range of findings, the Final Report of the Independent Pricing Review found:58

> (a) “signals that concerning” in the attendant care market, including a “significant proportion of providers that currently have unprofitable operating models”; and
>
> (b) while some providers have operating models that are profitable at the current price points, “many are struggling, particularly traditional providers delivering attendant care supports”, which is attributable to a combination of factors, including:
>
> > (i) higher overheads;
> >
> > (ii) challenges in adapting to unit pricing and NDIA systems improvement opportunities;
> >
> > (iii) lower utilisation of workers; and
> >
> > (iv) higher labour costs.

[70] Ai Group (and other employer parties) also advanced submissions regarding the cost pressures on employers in the sector, the lack of profitability and the potential adverse impact of granting the Unions’ claims.

[71] In response, the HSU led evidence from Mr Mark Farthing, a senior policy adviser for HSU Victoria No. 2 Branch 59 regarding some recent additional funding allocated to the NDIS. On 18 April 2019 the HSU wrote to the Commission attaching a media release dated 30 March 2019 by the Hon Paul Fletcher MP, Minister for Families and Social Services referred to in the course of Mr Farthing’s evidence (the Media Release).

[72] In a Statement 60 issued on 23 April 2019 we provided an opportunity for parties to file a short written submission in response to the material filed by the HSU. Ai Group subsequently filed a submission in response to that material.

[73] The Media Release announces an increase to price limits for therapy, attendant care and community participation under the NDIS, effective 1 July 2019. According to the Media Release these price increases ‘will inject more than $850 million into the NDIS market in 2019-20. The Media Release also states:

> ‘Minister for Families and Social Services, Paul Fletcher, and Assistant Minister for Social Services, Housing and Disability Services, Sarah Henderson said the new prices include a minimum increase of almost $11 per hour for therapists and up to a 15.4 percent price increase to the base limit for attendant care and community participation.
>
> We are committed to the development of a vibrant disability services market that enables NDIS participants to have genuine choice and control over the services and supports they need,” Mr Fletcher said.
>
> We have consulted widely with participants, providers and the sector to inform and implement these changes.
>
> These changes form part of the National Disability Insurance Agency’s (NDIA) annual price review to update prices that reflect market trends, costs in wages and other influences. It also responds to regular monitoring of markets and responding to emerging issues.
>
> These processes have identified the need to increase prices for attendant care and community participation and we are responding to that.
>
> Substantial increases to the hourly rates for therapy also follow a comprehensive review of the price control arrangements and other market settings for therapy services through December 2018 to March 2019.
>
> These price increases are part of an overarching pricing strategy and commitment to review and respond to pricing evidence as required, and will encourage the development of a disability services market of appropriate size, quality and innovation,” Mr Fletcher said.’ 61

[74] As noted in Ai Group’s submission, the Media Release contains little detail about the specific price increases to be implemented and only refers to attendant care, community participation and therapists. Ai Group also points to some inconsistencies between Mr Farthing’s evidence and the Online NDIA material. At paragraph 5 of its submission, Ai Group says:

> ‘Further, we continue to hold the concerns previously expressed about the funding currently afforded to providers in the industry, the implications that the insufficiency of that funding has had and continues to have on providers (and in turn, on their clients) and the extent to which those implications would be exacerbated if the various unions’ claims were granted. The material here presented by the HSU does not cause us to demur from that position.’

[75] The difficulty with the position put by the various employer parties as to the financial operation of the NDIS is that it reflects their view *prior to* the recent substantial injection into the pricing model. While Ai Group maintains its previously expressed concern, that submission is little more than an assertion of ‘concerns’. No employer participant in the NDIS gave evidence in the proceedings regarding the financial impact of the claims before us; nor did any employer party seek to adduce

any material modelling the financial impact of the Union claims. We are left in the somewhat unsatisfactory position that:

- the previous studies on the costs and profitability in the sector are dated and fail to account for the changes introduced on 1 July 2019;

- while the magnitude of the recent budgetary injection was substantial, little detail has been provided on the implementation and impact of the changes; and

- there appear to be some inconsistencies between Mr Farthing's evidence and the Online NDIA material.

[76] We deal later with the extent to which the NDIS funding arrangements are relevant to the determination of the claims before us.

5. The Claims

5.1 Overview

[77] UV and the HSU both seek the deletion of clause 25.8, which deals with 24 hour care, and seek a consequential variation to clause 25.7, which deals with 'sleepovers'.

[78] In addition, UV is pursuing two other claims:

- the deletion of clauses 28.1(b)(iv)(A) and (B), the effect of which is to ensure that casual employees who work overtime are paid the casual loading *in addition to* overtime rates; and

- a variation to clause 34.2, Payment for working on a public holiday.

[79] The HSU is pursuing three other claims:

- a variation to clause 20.4, First aid allowance;

- a variation to clause 26, Saturday and Sunday work, to ensure that casual employees receive the casual loading *in addition to* the Saturday and Sunday rates prescribed in that clause; and

- the insertion of a new term, clause 34.2(c) to ensure that casual employees who work on a public holiday receive the casual loading in addition to the public holiday penalty in clause 34.2(a).

[80] The ASU is seeking to insert a new allowance for employees who use community language skills during the course of their employment.

[81] In their submission of 18 February 2019, 62 the ASU confirmed that they would not be pressing their claim relating to the coverage clause of the SCHADS Award. During the course of the proceedings UV advised it would not be pursuing its claim to

vary clause 25.9, Excursions, to provide that time off in lieu of overtime would be calculated at the overtime rate.63

[82] A list of the witnesses called by the interested parties is set out at **Attachment B**.

[83] Each of the claims is opposed by the various employer interests.

- ***The 24 hour care clause***

[84] As we have mentioned, UV and the HSU seek to delete clause 25.8 which provides as follows:

25.8 24 hour care

This clause only applies to home care employees.

(a) A 24 hour care shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period.

(b) The employee will normally have the opportunity to sleep during a 24 hour care shift and, where appropriate, a bed in a private room will be provided for the employee.

(c) The employee engaged will be paid eight hours work at 155% of their appropriate rate for each 24 hour period.

[85] The Unions also seek a consequential amendment to clause 25.7(a) as follows:

25.7 Sleepovers

(a) A sleepover means when an employer requires an employee to sleep overnight at premises where the client for whom the employee is responsible is located (including respite care) ~~and is not a 24 hour care shift pursuant to clause 25.8 or an excursion pursuant to clause 25.9.8~~.

[86] UV submits that clause 25.8 of the SCHADS Award requires an employee to work for a 24-hour period whilst only being paid for a maximum of eight hours. 64 It further submits that the entire duration of a 24 hour care engagement is considered 'work' and employees should be appropriately remunerated.65 UV contends that employees should rely on the provisions of the Sleepover clause at 25.7 of the SCHADS Award. Clause 25.7 provides that employees will receive an allowance and payment for time worked during a sleepover. UV submits that this clause is far more appropriate than the 24 hour care clause, which provides no payment for the sleepover portion of the shift.66

[87] UV submits that s.62(1) of the Act, which relates to an employee's maximum working hours and s.62(2) which provides that an employee may refuse to work

additional hours if the request is unreasonable, are relevant to the determination of its claim.

[88] Section 62(3) of the Act sets out some considerations to determine whether a request or direction to work additional hours is reasonable. One consideration highlighted by UV is 'whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours'.

[89] UV submits that the 24 hour care shift clause creates situations where employees are effectively liable to work in excess of the notional hours attributed to their engagement. 67 It further submits that when an employee is directed to undertake a 24 hour care shift there is also a contingent request by the employer that the employee perform additional hours of work in emergency situations or according to the care needs of clients for which they are not remunerated. UV submits that these hours may be considered additional hours in terms of s.62 and that while s.62 does not deal with intra-day durations of work, the fact that the clause allows unreasonable intra-day durations of work which are 'in a practical sense non-negotiable' is a relevant merit consideration.68

[90] As to s.62(2), UV submit that where a 24 hour care shift falls late in the weekly roster cycle, it is likely that an employee will be effectively compelled to work greater than 38 hours and that clause 25.8 does not provide a means for employees to refuse to work the additional hours. 69

[91] UV also contends that Division 2, Part 2-9 of the Act is also relevant, in particular clause 25.8 may breach s.323 in that it permits an employer to require an employee to work for a 24 hour period but does not require the employer to pay the employee in full for the performance of the work. 70

[92] Finally, UV also submits that clause 25.8 does not meet the modern awards objective 71 in that it is not consistent with s.134(1)(d) as the remuneration provided for the unsocial nature of the work is too low72 and the clause does not promote 'social inclusion though increased workforce participation' (s.134(1)(d)).73 UV further submits that the clause is 'inflexible, inefficient and not conducive to productivity', contrary to s.134(1)(d) of the modern awards objective.74

[93] The HSU also seeks the deletion of the 24 hour care clause from the SCHADS Award. 75 It submits the clause is unclear and rarely used, and that extended periods of care should be dealt with in accordance with other provisions in the SCHADS Award.76 The HSU submit the clause does not meet the modern awards objective and provides for remuneration at a discounted rate during a period where an employee is required to be available for work.

[94] The HSU submit the 24 hour care clause leaves employees open to exploitation as:

- it does not compensate employees for the entire time they are required to be available for the performance of duties. In accordance with the principle "*they*

also serve who only stand and wait", 77 where an employee is required by the employer, they should be compensated for that as work;

it does not specify what would happen if an employee works more than 8 hours in a 24 hour period;

the sleepover clause provides that a sleepover span must be a continuous period of eight hours, and that if an employee's sleep is interrupted and they are required to perform work, they are required to be paid overtime rates;

there is no provision for the employee to be provided a continuous number of hours for sleep or what happens if the employee's sleep is broken;

- it provides that a bed in a private room will be provided 'where appropriate' but it is not clear when it would not be appropriate for an employee working a 24 hour shift to not be provided with a bed.

[95] In summary, the submissions advanced in support of the deletion of clause 25.8 are as follows:

- the clause is unclear, in that it provides no certainty regarding the hours of work of an employee or the sleeping arrangements to be applied;
- the clause is rarely used;
- the entire engagement is 'work' and should be remunerated as such;
- the clause does not adequately compensate employees, or provides for remuneration at a "discounted rate", for the time they are required to be available for work;
- the clause may breach s.323 of the Act because it permits an employer to require an employee to work for a 24 hour period but does not require the employer to pay the employee in full for that work;
- the clause creates situations where an employee is effectively liable to work in excess of the notional hours attributed to the engagement, and the hours that such engagements will 'require' the employee to work are not foreseeable; and
- leaving employees for lengthy periods on duty dealing with complex interpersonal matters is problematic.

[96] ABI, NDS and AFEI oppose the claims to delete clause 25.8 and the consequential amendment to clause 25.7.

[97] In its submission in reply of 5 April 2019, ABI deals with the relevant award history and refers to a number of pre-reform awards which contained 24 hour care provisions. 78 It submits that up until these proceedings, aside from a variation by

ASU in 2012 to clarify that the clause only applies to home care employees, the clause has operated without any controversy and that the clause facilitates the provision of a valuable service to elderly Australians who are in receipt of home care services. ABI submits the award should continue to facilitate the delivery of such a service and that the deletion of the 24 hour care clause would be a significant step which would have adverse implications for the relevant community who receive care in their home.79

[98] In the course of its submissions, ABI observed that there may be a lack of clarity in respect of some aspects of the operation of the current clause: the clause is silent as to what happens when an employee is required to work more than 8 hours of work; the lack of certainty about the hours of work of an employee; and that the clause is unclear regarding aspects relating to sleeping. 80 In particular, ABI acknowledges that the clause does not specify what happens where an employee is required to perform more than 8 hours' work during a 24 hour care shift and notes that there is a degree of tension in the provision in that an employee is required to be available for duty for a 24 hour period and yet an employee is required to provide a total of no more than eight hours of care during the period. ABI submits that although an employee is not required to perform any more than 8 hours' work there may be occasions where additional work (if an employee agrees to perform it) is required which would be regulated by the overtime provisions.

[99] ABI also accepts that the current clause does not expressly provide that employees will be provided with "a safe and clean space to sleep" but it is not aware the absence of any wording has raised an issue. 81 However, if the Commission found the existing term ambiguous and that clarification of its operation would be beneficial, ABI would not be opposed to the clause being varied as long as the substance of the clause is not altered and consistent with s.134(1)(g) of the Act. During the course of oral argument Mr Scott, on behalf of ABI, indicated that his clients would not oppose the following amendments to the 24 hour care clause:

- the language in clause 25.7(c) being inserted into the 24 hour care clause;
- to the extent that an employee is required to perform more than 8 hours work then that work being treated as overtime and is paid in accordance with clause 28; and
- with an amendment to the effect that a broken shift can only be worked by agreement with the employee. 82.

[100] The NDS opposes the deletion of the 24 hour care provision and submits that the ambiguity in the clause may be addressed by an amendment so as to provide that the 55% loading is payment for any additional work required of up to 2 hours, with overtime payable for all work performed beyond that amount. 83 NDS contends that such a variation would be preferable to deleting a clause that facilitates the provision of a type of support that is of value to aged and disabled people in certain circumstances.

Consideration

[101] We reject the HSU's contention that the 24 hour care clause is 'rarely used'. 84 As mentioned earlier, the Survey Results show that around one in ten enterprises (11.2 percent) that responded to the Survey used 24 hour shifts between 1 March 2018 and 1 March 2019 and that of those providers that use the 24 hour care clause, on average, rostered a home care employee to work a 24 hour shift 304 times per year. We find that 24 hour care shifts are used in the industry and, further, while only a minority of employers used the 24 hour care clause, those who do utilise the clause do so regularly.

[102] Given the history and the current utilisation of the 24 hour care clause, we think it is appropriate to adopt a cautious approach to the claim that the clause should be deleted.

[103] We acknowledge there are deficiencies in the 24 hour care clause. As submitted by the HSU (and effectively conceded by ABI and the NDS) the clause lacks clarity and fails to address some important matters regarding the practical operation of the clause. In addition to the matters mentioned at [97] to [99] above we would add that the mechanism whereby an employee may refuse to work more than 8 hours when on a 24 hour care shift is unclear.

[104] Despite these deficiencies it is our *provisional* view that the clause be retained. That said, the existing clause does not provide a fair and relevant minimum safety net; it requires amendment.

[105] We propose the following process to address the issues raised:

1. The interested parties are to confer with respect to the amendments to be made to the clause to ensure that it achieves the modern awards objectives.

2. The discussions between the parties will be facilitated by Commissioner Lee and a conference will be convened shortly for that purpose.

3. Arising out of the discussions and conferences a Joint Report will be prepared setting out the extent of agreement and any remaining matters in dispute (Note: in the event that the parties are unable to reach a substantial measure of agreement we will revisit our *provisional* view regarding the proposed deletion of the term).

4. Interested parties will be given an opportunity to make submissions in relation to the Joint Report and in support of their preferred position.

5. We will list the matter for further oral hearing, if we decide that is the appropriate course.

- ***The claims relating to casual employees***

(i) Overtime payments

[106] UV seeks to amend clause 28 to ensure that casual employees who work overtime are paid the casual loading *in addition to* overtime rates.

[107] The SCHADS Award currently provides that casual employees are paid overtime rates for all time worked in excess of 38 hours per week, 76 hours per fortnight or 10 hours per day. However, clause 28.1(b)(iv) provides that the overtime rates payable to casuals

> '… will be in substitution for and not cumulative upon;
>
> …
>
> (b) the casual loading prescribed in clause 10.4(b).'

[108] UV seeks the following variation to clause 28.1(b)(iv):

28.1 Overtime rates

…

(b) Part-time employees and casual employees

(i) All time worked by part-time or casual employees in excess of 38 hours per week or 76 hours per fortnight will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

(ii) All time worked by part-time or casual employees which exceeds 10 hours per day, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.

(iii) Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).

(iv) Overtime rates payable under this clause will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork and are not applicable to ordinary hours worked on a Saturday or a Sunday~~:~~

(A) the shift premiums prescribed in clause 29—Shiftwork; and

~~(B) the casual loading prescribed in clause 10.4(b), and are not applicable to ordinary hours worked on a Saturday or a Sunday.~~

[109] The current arrangements in the SCHADS Award relating to the payment for overtime for casuals were the result of an Appeal Decision 85 from a decision of VP Watson86 during the Transitional Review. In the Appeal Decision the Full Bench found errors in the Vice President's determination of a claim by the ASU regarding overtime for casuals and proceeded to re-determine that issue. The relevant extracts from the Appeal Decision are follows:

‘[37] We consider that the case for an award provision for overtime for casual employees is a strong one. The analyses advanced by the parties concerning the position pertaining in the pre-existing awards and instruments which were replaced by the SCHCDS Award firmly establish that, predominantly, casual employees were entitled to overtime penalty rates for any overtime worked, regardless of when it was worked. Applying the approach generally taken by the award modernisation Full Bench, whereby the most common provisions to be found in the pre-existing awards and instruments were usually adopted unless there was some good reason to the contrary, this should have led to a result whereby the SCHCDS Award contained an overtime penalty rates regime for casual employees as well as full-time and part-time employees.

[38] This did not occur. The Full Bench award modernisation decision which led to the making of the SCHCDS Award did not give any consideration to the pre-existing position with respect to overtime penalty rates for casual employees, did not state any rationale for a departure from that pre-existing position, and indeed did not deal with the issue at all. Therefore we can only conclude that the absence of overtime provisions applicable to casual employees in the SCHCDS Award was an oversight.

…

[41] The result of the omission of overtime penalty rates for casual employees, we find, is that the SCHCDS Award does not achieve the modern awards objective in s.134 because it does not provide a fair and relevant minimum safety net of terms and conditions for casual employees, and that the SCHCDS Award suffers from an anomaly arising from the award modernisation process conducted under Part XA of the Workplace Relations Act 1996 and is thereby not operating effectively. It will be necessary therefore to remedy this by varying the SCHCDS Award to provide for overtime penalty rates for casual employees whenever overtime is worked.

[42] There remains the question of what form that variation should take. The critical question here is whether any overtime penalty rates for casual employees should be in addition to or in substitution for the casual loading. This is a difficult question to resolve. The position which applied in the pre-existing awards and instruments in this respect was somewhat mixed. No clearly predominant position emerges. The question of whether there is a proper basis for the payment of the casual loading in addition to overtime penalty rates was not argued at the level of general principle in this case, and in any event the confined interests of the parties which appeared and made submissions in this appeal means that it is not an appropriate vehicle to decide this issue on a general basis.

…

> [44] In all the circumstances we think a conservative approach is called for. We have decided to vary the SCHCDS Award to provide for a regime for overtime penalty rates which operates in substitution for the payment of the casual loading. The variation we will make will accordingly largely reflect the alternative award variation advanced by the respondents. The provision of overtime penalty rates for casual employees, even without the addition of the casual loading, will be a significant benefit for those casuals who work overtime, and will equalise the overtime cost of full-time, part-time and casual employees. The variation is, we consider, appropriate to remedy the issue of casual employees not being entitled to overtime rates which this review of the SCHCDS Award has identified, having regard to the modern award objective in s.134.
>
> [45] We emphasise that nothing in this decision is intended to foreclose further consideration in the four yearly review process to be conducted under s.156 of the Fair Work Act as to whether, under the SCHCDS Award, the casual loading should be payable in addition to weekend and overtime penalty rates. The four yearly review process, which will involve the review of all modern awards, may result in general and authoritative consideration of this issue at the level of industrial principle. If so, that would provide a sound basis to revisit the issue in relation to the SCHCDS Award.'

[110] In support of its claim UV relies on the *Penalty Rates Decision* and to the references to the views of the Productivity Commission concerning the interaction of penalty rates and the casual loading:

> 'In some awards, penalty rates for casual employees fail to take into account the casual loading, which distorts the relative wage cost of casuals over permanent employees on weekends (and particularly Sundays). The wage regulator should reassess casual penalty rates on weekends, with the goal of delivering full cost neutrality between permanent and casual rates on weekends, unless clearly adverse outcomes can be demonstrated. This would imply that casual penalty rates on weekends would be the sum of the casual loading and the penalty rates applying to permanent employees.' 87

[111] UV relied on what the Productivity Commission described a 'default approach' whereby:

> '… the casual loading is always set as a percentage of the ordinary/base wage (and not the ordinary wage plus the penalty rate). The rate of pay for a casual employee is therefore always 25 percentage points above the rate of pay for non-casual employees.' 88

[112] UV submits that in the *Penalty Rates Decision* the Commission expressed a preference for the default approach generally whenever it reduced or altered rates in relation to the modern awards subject to the review 89 and submits that the default approach is consistent with s.134(1)(g) of the modern award objective, which requires that modern awards are 'simple, easy to understand, stable and [provide a] sustainable

system for Australia that avoids unnecessary overlap of modern awards'.90 Further, UV relies on s.134(1)(da)(iii) which deals with the need to provide additional remuneration for employees working unsocial hours and submits that this provision lends support for the casual loading being an additional amount paid when any penalty or loading applies to work at an unsocial time. It contends that subsuming the casual loading into other penalties and loadings also means that a casual employee is not compensated for the disutility associated with working unsociable hours. 91

(ii) Saturday and Sunday work; Public Holidays

[113] The HSU seeks to vary clause 26 – Saturday and Sunday work and clause 34.2 – Payment for working on a public holiday, to ensure that casual employees receive the casual loading *in addition to* the rates for Saturday and Sunday work, and for working on public holidays.

[114] As to clause 26, the HSU seeks the following variation:

26. Saturday and Sunday work

Employees whose ordinary working hours include work on a Saturday and/or Sunday will be paid for ordinary hours worked between midnight on Friday and midnight on Saturday at the rate of time and a half, and for ordinary hours worked between midnight on Saturday and midnight on Sunday at the rate of double time. These extra rates will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork ~~and the casual loading prescribed in clause 10.4(b),~~ and are not applicable to overtime hours worked on a Saturday or a Sunday.

26.1 (a) Casual employees will receive their casual loading in addition to the Saturday and Sunday rates at clause 26.

(b) The rates are:

(i) in substitution for and not cumulative upon the shift premiums prescribed in clause 29 – Shiftwork; and

(ii) not applicable to overtime worked on a Saturday or Sunday.

[115] In relation to public holiday payments the HSU seeks:

34.2 Payment for working on a public holiday

(a) An employee required to work on a public holiday will be paid double time and a half of their ordinary rate of pay for all time worked.

(b) Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday.

(c) A casual employee will be paid the casual loading under clause 1.4(b) in addition to the public holiday penalty at clause 34.2(a).

[116] In support of its proposed variations the HSU submits that payment of the casual loading in addition to any overtime, weekend and public holiday penalty is consistent with the function of the casual loading, being to compensate employees for the paid leave entitlements available to permanent employees, and with the "default approach" discussed by the Full Bench in the *Penalty Rates Decision*. 92 It submits this approach is simple and easy to understand (see s.134(1)(g) of the Act).

[117] In particular, the HSU relies on the consideration in the *Penalty Rates Decision* of the purposes of penalty rates and casual loadings in the context of the *Hospitality Industry (General) Award 2010* 93 (Hospitality Award) and its finding that the casual loading should be added to the Sunday penalty rate because clause 13.1 of the Award makes clear that "*the casual loading is not intended to compensate employees for the disutility of working on Sunday*."94 The HSU submit that clause 10.4(b) of the SCHADS Award is "relevantly identical" and that it is clear the casual loading is paid in substitution for the leave entitlements otherwise available to permanent employees, not to compensate for any other aspect of the work or its performance.

[118] The Employer parties oppose the UV and HSU claims relating to casual employees.

[119] Ai Group submits that a proper foundation for the Unions' claims has not been made out and they should be dismissed. In addition to its submissions regarding s.138 and the s.134 considerations (at [188] – [189] of Ai Group submissions of 8 April 2019) Ai Group advances three broad lines of argument in support of its position:

- the Commission should have regard to the NDIS funding arrangements;
- the Unions' claims simply seek to relitigate matters ventilated in the Transitional Review; and
- the adoption of the PC's 'default approach' in the *Penalty Rates Decision* was in the context of a small number of awards and did not constitute a general and authoritative consideration of the issue at the level of industrial principle.

[120] We return to each of these arguments shortly.

[121] ABI, the NDS, Business SA and AFEI also advanced submissions opposing the Union's casuals claims and rely on:

- the relevant award history (and in particular the Transitional Review decisions referred to above);
- the absence of evidence in support of the claims; and
- the impact upon businesses covered by the SCHADS Award.

[122] As to the last point, the NDS submit that granting the claim would:

> 'significantly increase the wage cost for the provision of a wide range of social services, including disability support, for employers, who are largely dependent on government funding or, in the case of the NDIS, a fixed price over which they have no control. The result is likely to be a reduction in services to vulnerable members of the community'. 95

[123] As can be seen there is a significant degree of overlap between the arguments advanced by Ai Group and those put by the other Employers. As mentioned, Ai Group advances three broad lines of argument and we now turn to deal with those arguments.

[124] First, Ai Group submits that when determining claims to enhance terms and conditions in the SCHADS Award the Commission should in these proceedings

> 'have regard to the funding arrangements applying to employers covered by the Award. This is because the funding arrangements under the NDIS currently impose limitations on the price that can be charged by providers to their clients for their services. This places an inherent limitation on the capacity of employers to recover any additional costs flowing from variations to the Award. Additionally, it appears that the terms of approved participant plans place further limitations on the extent to which employers are able to claim additional amounts (for example, because plans limit the purpose or "support" for which certain funding can be used).' 96

[125] Ai Group submits that 'the inherent connection between the Award and government funding has long been accepted by the Commission'. 97

[126] Two authorities are relied on in support of this proposition.

[127] The first is the *Equal Remuneration Case* 98 in which the Commission said:

> '[272] We accept that there is widespread reliance on government funding and that because of the pervasive influence of funding models any significant increase in remuneration which is not met by increased funding would cause serious difficulties for employers, with potential negative effects on employment and service provision.'

[128] We note that in that matter the Commission ultimately made an Equal Remuneration Order broadly reflecting the outcome agreed by the applicants and the Commonwealth, supported by a commitment from the Australian Government to meeting its share of the financial burden flowing from the decision. But the Commission's order was not contingent on the increase in employment costs being fully funded, as is apparent from the Full Bench's second decision in that matter:

> 'The Commonwealth has given a commitment to fund its share of the increased costs arising from the proposals. While some state governments are opposed, no government has indicated it will be unable to fund its share. On the other hand there are significant risks which need to be considered. For example, there will be

an impact on employers in relation to programmes and activities that are not government funded. As a number of the opponents of the proposals pointed out, any order we make has the potential to affect employment levels and service provision where costs cannot be recovered. We are also concerned about the effect on the finances of a number of states. We have decided that in the circumstances these risks can be satisfactorily addressed by an extension to the length of the implementation period.' 99

[129] Ai Group contends that the current funding levels are insufficient to cover the cost associated with providing disability services and that the recently announced increase in NDIS funding from 1 July 2019 will not be sufficient to address employers' existing difficulties with operating under the scheme. In this context, Ai Group submits that the material demonstrates that:

"• a substantial number of employers are unable to make a profit under the current funding arrangements;

● the limited funding is having adverse consequences for the extent and quality of services provided by employers. This in turn has consequences for employment opportunities; and

● the limited funding is having adverse consequences for the extent to which employers are able to provide career progression and training to their employees. This again has consequences for service delivery.' 100

[130] It is submitted that the grant of the Unions' claims will serve only to exacerbate the existing concerns voiced by employers about their viability under the scheme and their ability to continue to provide services to persons with a disability. If the Award were varied as sought by the Unions, employers will be faced with substantial additional costs for which there is no funding and no scope to recover from those who need and access their services. 101

[131] Ai Group's submission in respect of this issue is encapsulated at paragraph 163 of its written submission of 8 April 2019:

'The operation of the NDIS and the constraints it places on employers covered by the Award should, in our respectful submission, form the cornerstone of the Commission's consideration of the impact of the Unions claims on employers. Such a consideration necessarily leads to the inevitable conclusion that employers cannot and should not be saddled with the additional employee entitlements sought by the Unions in these proceedings.' 102 (emphasis added)

[132] In our view the proposition advanced by Ai Group overstates the extent to which the NDIS funding arrangements are relevant to the determination of the claims before us. Further, as we note at [75] above, the position put about the impact of the recent budgetary injection amounts to little more than an assertion, unsupported by direct evidence or modelling.

[133] As mentioned earlier, it is the modern awards objective which is central to our consideration of the claims. The modern awards objective is to 'ensure that modern

awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the s.134 considerations. The importance of the modern awards objective is emphasised by the terms of s.138.

[134] The proposition advanced by Ai Group seeks, in essence, to elevate one set of considerations – the impact on business and employment costs – above all others. So much is clear from the submission that the constraints placed on employers by the operation of the NDIS should 'form the cornerstone' of our consideration of the proposed variations leading to 'the inevitable conclusion' that the claims be dismissed.

[135] We reject the proposition advanced. The obligation to take the s.134 considerations into account means that *each of these matters*, insofar as they are relevant, must be treated as a matter of significance in the decision making process. And, as we have mentioned, no particular primacy is attached to any of the s.134 considerations.

[136] We accept that the impact of granting the claims on business and on employment costs is a relevant consideration and weighs against making the variations proposed by the Unions. But we reject the notion that the constraints placed on employers by the NDIS funding arrangements should be given determinative weight.

[137] In the context of the provision of social services where employers are largely dependent on government funding, or, in the case of the NDIS, a fixed price, we are cognisant of the fact that significant unfunded employment cost increases may result in a reduction in services to vulnerable members of the community – a point made by the NDS. But such outcomes are a consequence of current funding arrangements, which are a matter for Government. Further, as we have mentioned earlier (at [75] above) the evidence as to the impact of the recent budgetary increase to the NDIS is somewhat unsatisfactory. Nor was there much consideration given to the extent to which the impact of an increase in casual overtime work and work on weekends and public holidays may be ameliorated by the utilisation of part time and full time employees.

[138] 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.

[139] We recognise that it may take time for a funding arrangement to adapt to a change in circumstances, such as an increase in employment costs occasioned by a variation to the award safety net. Such matters can be addressed by appropriate transitional arrangements.

[140] We would also observe that the approach advocated by Ai Group would result in employees covered by the SCHADS Award effectively subsidising the level of

services delivered by the NDIS (and other government funded social services) through lower minimum terms and conditions of employment than warranted by a merits based assessment of the claims before us taking account of *all* of the relevant s.134 considerations. Such a 'subsidy' would operate in circumstances where a significant number of these employees are low paid.

[141] If, as the employer parties suggest, the NDIS pricing arrangements are underpinned by flawed assumptions and do not reflect the practicalities of providing services to participants or adequately compensate providers for their labour costs, this is a matter for Government to address, as the funder of the services. Such factors do not provide justification for a distortion of the Commission's statutory functions in setting the award safety net.

[142] 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.

[143] The impact upon business and employment costs of any proposed variation is one of a number of considerations to be taken into account. In the context of the matters before us we are not persuaded that such considerations should be given determinative weight.

[144] In its second line of argument, Ai Group contends that the issue of weekend penalty rates and overtime payments for casuals was considered by the Commission in the Transitional Review and that:

> 'The unions' claims simply seek to re-litigate the matters ventilated in the two year review. They have not pointed to any justification for departing from the Full Bench's decision regarding overtime or the Vice President's decision regarding weekend penalty rates. They have not presented any evidence or material that might justify a different approach.' 103

[145] Similar arguments are advanced by ABI and other employer organisations. We have earlier set out some of the extracts from the decision relied upon (see [109] above).

[146] Ai Group submits that the Transitional Review Appeal Bench that heard and determined the ASU's claim expressly considered whether the casual loading should be payable to casual employees in addition to overtime rates and observed that:

> (i) the position which applied in the pre-existing awards and instruments in this respect was somewhat mixed. No clearly predominant position emerges from a review of those instruments; 104
>
> > (ii) the variations made in the two year review to expand the entitlement to overtime rates presented a significant benefit to casual employees; 105 and

(iii) a conservative approach was appropriate in all the circumstances. 106

[147] Ai Group advances the following submission in respect of the Appeal Decision:

> 'These aspects of the Full Bench's reasoning are not directly referable to what has on many occasions been described as the limited scope of the two year review. That is, the Full Bench's reasoning does not appear to be encumbered or confined by the narrower scope of the review. Accordingly, in our submission, although the decision was made in a different legislative context, in the circumstances that is not a cogent reason for not following the decision.' 107

[148] As noted earlier (see [18]), while it is appropriate to take account of previous decisions relevant to a contested issue arising in the Review, the context in which those decisions were made may provide cogent reasons for not following a previous Full Bench decision. Three important contextual considerations are relevant in determining the weight to be afforded to the decisions relied upon by Ai Group:

> (i) The decisions relied on were made in the context of the Transitional Review which was more limited in scope than the Review. The proposition advanced by Ai Group – that the Full Bench's reasoning does not appear to be encumbered or confined by the narrower scope of the Transitional Review – is unpersuasive. The Full Bench's observations must necessarily be confined within the parameters of the jurisdiction it was exercising.
>
> (ii) It is apparent from the decisions relied upon that neither the Member at first instance nor the Appeal Bench gave any proper consideration to the principle of neutrality (which informed the Productivity Commission's default approach adopted in the *Penalty Rates Decision* and to which we shall return shortly).
>
> (iii) It is also significant that the relevant legislation has changed since the decisions relied upon, in that s 134(1)(da) has subsequently been inserted into the Act. We will return to the terms of s 134(1)(da) shortly.

[149] Having regard to these contextual considerations we do not propose to give significant weight to the Transitional Review decisions relied upon by Ai Group (and the other employer bodies).

[150] The third line of argument advanced by Ai Group is directed at the Unions' reliance on the *Penalty Rates Decision*, specifically, the Commission's decision to require the payment of the casual loading in addition to weekend penalty rates in certain awards. Ai Group submit the following in response:

> (a) Whilst the term 'default approach' is referenced by the unions and was referenced by the Commission in the Penalty Rates Decision, the proposition that the casual loading be paid in addition to weekend and overtime penalty rates is not in fact the default approach adopted in the awards system. The term (i.e. 'default approach') is one that was simply coined by the PC for the purposes of its report. Quite appropriately, in our submission, a consistent approach does not in fact appear across the modern awards system.

(b) The issue of whether casual employees are entitled to the casual loading in addition to weekend penalty rates or overtime is one that must be considered on an award-by-award basis. There may be a number of reasons why, in the instance of a particular award, the 'default approach' is not appropriate. Ultimately the matter is one that must be considered by the Commission by reference to the legislative constraints imposed by ss.134(1) and 138. This will necessarily involve a range of considerations including the capacity of employers to absorb the relevant additional employment costs. The history of the award entitlements may also be relevant.

(c) The adoption by the Commission of the PC's 'default approach' in the context of a small number of awards where the Commission decided to reduce Sunday penalty rates does not constitute "general and authoritative consideration of [the] issue at the level of industrial principle", as contemplated by the Full Bench that heard the ASU's appeal. Accordingly, the basis for revisiting the issue, as contemplated by that Full Bench, does not arise.

[151] Contrary to AI Group submission, the Productivity Commission's 'default approach' has been adopted as a matter of general industrial principle.

[152] The relevant aspects of the PC Final Report and the *Penalty Rates Decision* are set out in our recent decision in relation to the substantive claims regarding the Aged Care Award 2010 108 (the 2019 Aged Care Decision). We adopt that analysis and, in particular, we endorse the conclusion at [137],:

'In our view the principle of neutrality of treatment, which underpins the Productivity Commission's 'default approach' and informed the Metals Casuals Decision, is a sound industrial principle and, absent some compelling, countervailing consideration, should generally be applied.'

[153] The application of such a principle to the present matter weighs in favour of the UV claim regarding casual employee overtime rates and the HSU claims regarding the payments to casuals for weekend and public holiday work. A countervailing consideration would be if the 25 percent casual loading in the SCHADS Award contains some compensation for overtime, weekend work or working on public holidays. In our view it does not. It is clear from clause 10.4(b) of the SCHADS Award that the 25 percent casual loading is 'paid instead of the paid leave entitlements accrued by full time employees' and there is no suggestion in the award that the casual loading contains any element of compensation for working overtime; or weekend work; or for working on public holidays.

[154] In the context of the SCHADS Award, the casual loading and the penalty rates associated with overtime, weekend and public holiday work are separate and distinct forms of compensation. Penalty rates compensate for the disutility associated with the time at which work is performed (or the working of additional hours). The casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to full-time and part-time employees, such as annual leave, personal carer's leave, notice of termination and redundancy benefits. Importantly, the casual loading is not intended

to compensate employees for working overtime or for weekend work and public holiday work.

[155] We also note that the application of overtime rates to casuals was the subject of recent detailed consideration by a Full Bench in the Casual and Part time employment common issues. 109 In its decision of 5 July 2017 that Full Bench granted UV's application to vary the *Registered and Licensed Clubs Award 2010* (Clubs Award), *Restaurant Industry Award 2010* (Restaurant Award) and the Hospitality Award (collectively, the Hospitality Awards) to establish that casual employees be paid overtime penalty rates in circumstances where the employees have worked in excess of 38 hours per week or 10 hours per day.

[156] In deciding to vary the Hospitality Awards the Full Bench made the following observations:

- In establishing the modern Hospitality Award, the Restaurant Award and the Clubs Award as part of the award modernisation process, the AIRC Full Bench does not appear to have given explicit consideration to the justification for the exclusion of casual employees from the benefit of overtime penalty rates provisions. The provisions of the modern Hospitality Award were primarily derived from the pre-reform federal *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming - Award 1998*, which excluded casual employees from overtime penalty rates. Because no party contended that there should be a change to that position, the issue was not given any consideration. 110

- The lack of any contest about and consideration of the casuals overtime issue in the award modernisation, and the detailed evidentiary case now presented, provides a cogent basis to now review the issue. It is also significant that the legislative context has changed, in that paragraph (da) was added to the modern awards objective in s.134(1) after the award modernisation process was completed. 111

[157] At [548] – [549] of its decision the Full Bench sets out its conclusions:

> '[548] We are satisfied, having regard to the matters we are required to take into account under s.134(1), that a fair and relevant minimum safety net for casual employees covered by the 3 awards in question requires that casual employees receive the benefit of overtime penalty rates. On the basis of the factual conclusion we have set out, it is apparent that casual employees who work long hours in the course of a day or a week are subject to significant disabilities. Those disabilities are essentially the same as those applying to permanent employees who work lengthy hours and receive overtime penalty rates for doing so. We see no good reason for the different treatment of casual employees, nor was any convincing rationale for this advanced by any interested employer party. These are matters bearing particularly upon the consideration in s.134(1)(da)(i), which we have accordingly assigned particular weight in reaching our conclusion.
>
> …

> [549] Overtime penalty rates serve the dual purpose of compensating employees for disabilities of that nature and establishing a disincentive for employers to require particular employees to work long hours. Employers in the industry sectors in question may be able avoid the cost of overtime penalty rates by adopting rostering systems and practices which ensure that no single employee is commonly required to work excessive hours, and in that sense the introduction of penalty rates need not cause significant additional cost burdens for employers. That is relevant to the consideration in s.134(1)(f), which we have taken into account as not being adverse to the proposition that a fair and relevant safety net should provide for casual overtime penalty rates.' 112

[158] It is apparent that some casual employees covered by the SCHADS Award are working overtime hours. As mentioned earlier, the Survey Results show that in the 4 week period from 4 to 31 March 2019, around three-quarters (75.4 per cent) of enterprises that responded to the survey employed casual employees that were covered by the SCHADS award. Of the enterprises that employed casual employees in that 4 week period, one quarter had casual employees that worked in excess of 38 hours per week or 76 hours per fortnight. Around three-quarters of enterprises (76.4 per cent) responded that casual employees worked on a Saturday during this period, and around seven in ten enterprises (69.9 per cent) responded that casual employees worked on a Sunday.

[159] We now turn to deal with the s.134 considerations.

[160] Section 134(1)(a) requires that we take into account 'relative living standards and the needs of the low paid'. A threshold of two-thirds of median full-time wages provides a suitable benchmark for identifying who is 'low paid', within the meaning of s.134(1)(a). 113 As mentioned earlier a significant proportion of employees covered by the SCHADS Award may be regarded as 'low paid' within the meaning of s 134(1)(a).

[161] The 'needs of the low paid' is a consideration which weighs in favour of the variation proposed by the Unions.

[162] Section 134(1)(b) requires that we take into account 'the need to encourage collective bargaining'. An increase in the payments for casuals working overtime and on weekends and public holidays may increase the incentive for employers to bargain, but may also create a disincentive for employees to bargain. It is also likely that employee and employer decision-making about whether or not to bargain is influenced by a complex mix of factors, not just the level of penalty rates in the relevant modern award. Section 134(1)(b) speaks of 'the need to *encourage* collective bargaining'. We are not persuaded that an increase in the payments for casuals working overtime and on weekend and public holidays would '*encourage* collective bargaining', it follows that this consideration does not provide any support for a change to those rates.

[163] Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. Obtaining employment is the focus of s.134(1)(c). On the limited material before us, the impact of the variations

proposed by the Unions on total employment is not likely to be significant. We regard this consideration as neutral.

[164] It is convenient to deal with the considerations ss.134(1)(d) and (f) together.

[165] Section 134(1)(f) is not confined to a consideration of the impact of the exercise of modern award powers on 'productivity, employment costs and the regulatory burden'. It is concerned with the impact of the exercise of those powers 'on business'.

[166] It is self-evident that if the rates payable to casuals for working overtime and for weekend and public holiday work were increased then employment costs would increase. This consideration tells against an increase in casual rates. However, there may be scope to ameliorate the cost impact of the claims by the substitution of casual labour for part time and full time employees.

[167] We accept that the variations proposed will increase employment costs and to the extent that full time or part-time permanent employees are substituted for casuals, the changes may reduce flexibility.

[168] Section 134(1)(da) requires that we take into account the 'need to provide additional remuneration' for, relevantly:

> '(i) employees working overtime; or …
>
> (iii) employees working on weekends or public holidays; …'

[169] The casual loading in the SCHADS Award does not adequately compensate casual employees for overtime work or for working on weekends and public holidays. Further, permanent and casual employees are likely to experience similar levels of disutility associated with working overtime and on weekends and public holidays. This supports the proposition that the penalty rates for working at those times should be the same for permanent and casual employees and is a factor which weighs in favour of the variations proposed by UV and the HSU.

[170] The considerations in s.134(1)(e) and (h) are not relevant in the present context. No party contended to the contrary. Further, we regard s.134(1)(g) as a neutral consideration.

[171] The central issue in these proceedings is whether the existing penalty rates for casual employees for overtime work and for work on weekends and public holidays provide a 'fair and relevant minimum safety net'.

[172] In substance, the submission put by the Unions is that the existing rates for casuals working overtime and for work on Saturdays, Sundays and public holidays are not fair and proportionate to the disutility experienced by casual employees for performing such work. We agree.

[173] The modern awards objective is to 'ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in sections 134(1)(a)–(h).

We have taken into account those considerations, insofar as they are relevant to the matter before us, and have decided to vary the SCHADS Award in the manner proposed by the Unions. We deal with the transitional arrangements associated with these variations later in our decision.

- ***Community language skills allowance***

[174] The ASU seeks to insert a new clause 20.10 to provide for a community language allowance to remunerate employees when they use a language other than English in the course of their duties. The new clause is set out below:

> **20.10 Community Language and Signing Work**
>
> **20.10.1** Employees using a community language skill as an adjunct to their normal duties to provide services to speakers of a language other than English, or to provide signing services to those with hearing difficulties, shall be paid an allowance in addition to their weekly rate of pay.
>
> **20.10.2** A base level allowance shall be paid to staff members whose language skills are required to meet occasional demands for one-to-one language assistance. Occasional demand means that there is no regular pattern of demand that necessitates the use of the staff members language skills. The base level rate shall be paid as a weekly all purposes allowance of $45.00.
>
> **20.10.3** The higher level allowance is paid to staff members who use their language skills for one-to-one language assistance on a regular basis according to when the skills are used. The higher level rate shall be paid as a weekly all purposes allowance of $68.00.
>
> **20.10.4** Such work involves an employee acting as a first point of contact for non-English speaking service users or service users with hearing difficulty. The employee identifies the resident's area of inquiry and provides basic assistance, which may include face-to-face discussion and/or telephone inquiry.
>
> **20.10.5** Such employees convey straightforward information relating to services provided by the employer, to the best of their ability. They do not replace or substitute for the role of a professional interpreter or translator.
>
> **20.10.6** Such employees shall record their use of community language skills.
>
> **20.10.7** Where an employee is required by the employer to use community language skills in the performance of their duties
>
> a) the employer shall provide the employee with accreditation from a language/signing aide agency
>
> b) The employee shall be prepared to be identified as possessing the additional skill(s)

c) The employee shall be available to use the additional skill(s) as required by the employer.

20.10.8 The amounts at 20.10.2 and 20.10.3 will be adjusted in accordance with increases in expense related allowances as determined by the Fair Work Commission. 114

[175] The Employer parties oppose the claim.

[176] After the completion of the oral hearing the following additional material was filed in relation to this clause:

- Submission filed by National Disability Services on 17 May 2019;
- Submission filed by Australian Services Union on 17 May 2019;
- Submission filed by Health Services Union on 17 May 2019;
- Submission filed by United Voice on 17 May 2019;
- Submission filed by Australian Business Industrial and NSW Business Chambers and others on 19 May 2019;
- Submission filed by Australian Federation of Employers and Industries on 22 May 2019;
- Joint submission filed by the Australian Services Union and Australian Industry Group on 17 May 2019;
- Submission in reply filed by Australian Business Industrial and NSW Business Chambers and others on 3 June 2019; and
- Submission in reply filed by Australian Services Union on 4 June 2019

[177] We do not propose to determine the ASU's claim at this time. A Background Paper will be prepared summarising the submissions, evidence and other material before us and we will issue a Statement setting out how we propose to finalise our consideration of this claim.

- ***First aid certificate renewal claim***

[178] The HSU seeks to vary the existing first aid allowance to provide for payment of an allowance for first aid certificate renewal and CPR training. 115 Clause 20.4 of the SCHADS Award currently provides:

20.4 First aid allowance

(a) First aid allowance—full-time employees

A weekly first aid allowance of 1.67% of the standard rate per week will be paid to a full-time employee where:

(i) an employee is required by the employer to hold a current first aid certificate; and

(ii) an employee, other than a home care employee, is required by their employer to perform first aid at their workplace; or

(iii) a home care employee is required by the employer to be, in a given week, responsible for the provision of first aid to employees employed by the employer.

(b) First aid allowance—casual and part-time employees

The first aid allowance in 20.4(a) will apply to eligible part time and casual employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

[179] The HSU seeks to vary clause 20.4 to insert a new paragraph (c) as follows:

(c) First aid refresher

(i) Where an employee is required to maintain first aid certification, the employer will pay the full cost of the employee updating their first aid certification by:

a. reimbursing the employee's registration and attendance expenses; or

b. paying the registration and attendance costs.

(ii) Attendance at first aid refresher courses will be work time and paid as such.

[180] In support of its claim the HSU contends that many employees engaged in disability support or home care roles are required to hold a current first aid certificate in their roles 116 and, further, even when not explicitly required, the holding of such qualification is likely to benefit employers as employees are better equipped to deal with a medical emergency. It submits that where an employee is required to maintain their first aid certification, they should be entitled to reimbursement of the costs of maintaining the certification by their employer.

[181] Four witnesses called by the HSU gave evidence relating to this claim. This evidence is extracted below:

- Robert Sheehy, an employee of HSU NSW said:

'The cost of renewing first aid certificates is an issue commonly raised with me and my organisers by member.' 117

- William Elrick, an organiser with HACSU Victoria said:

> ‘The cost of renewing first aid qualifications is something that is often raised by members a an issue. First Aid and CPR are essential to work in disability services. Without a first aid certificate, an employee can’t work this sector. Costs vary depending on the training provider, but, for example, St John Australia charges $159 for a one day refresher course for those who hold a current first aid certificate less than 2 years old, and $75 for a CPR course.’ 118

- Thelma Thames, a support worker employed by an aged care provider said:

> ‘I hold a first aid certification. My employer pays or us to do the training through Red Cross. First aid is essential or employees doing the work we do. I used to be an enrolled nurse so I have some nursing experience. That training comes in handy when working with clients.’ 119

- Bernie Lobert, a disability support worker said:

> ‘As a disability support worker you are required to have a current first aid certification, otherwise you can’t get work. You need a CPR update every year and a new first aid certificate every three years. It costs approximately $100 or the first aid training once every three years, and $60 for the CPR training once a year. That works out to a cost to the employee of roughly $90 dollars a year.’ 120

[182] The evidence to the cost was summarised by counsel for the HSU in the course of closing argument, as follows:

> ‘I think the evidence in the material about the cost of a course is that it’s in the territory of a hundred to $150 to do that sort of training each year.’ 121

[183] The evidentiary case advanced by the HSU falls well short of what would be required to persuade us to grant the claim. There is simply no probative evidence that establishes:

- the prevalence of employees covered by the Award being required to retain current first aid certificates;

- what (if any) training or refresher training is required in order for an employee to hold a current first aid certificate;

- the duration of such training;

- the frequency with which such training must be undertaken in order to retain a current first aid certificate (if at all);

- whether the fees payable differ between different training providers; or

- any other amounts payable to attend such training.

[184] Given the paucity of the Unions' evidentiary case, the Commission is unable to even estimate the potential cost of the claim.

[185] Further, the HSU's submissions failed to adequately address the s.134 considerations and give scant attention to s.138.

[186] Given the absence of a cogent merit argument it would be patently unfair to impose a new unquantified financial obligation on employers.

[187] We are not satisfied that the variation proposed is necessary to ensure that the SCHADS Award achieves the modern awards objective. The evidence adduced in support of the claim is very limited and is insufficient to establish the requisite merit for the claim to succeed.

[188] We note ABI's alternate submission that consideration be given to introducing a requirement requiring employers to reimburse employees for the time and cost associated with maintaining their first aid certification but that such a requirement be limited to employees who are designated as first aid officers to provide first aid to fellow employees at their workplace. This proposal can be the subject of further discussion between the parties. The Commission is available to facilitate such discussions if requested to do so.

- ***Variation to public holidays clause***

[189] UV seek to vary clause 34.2(c) of the Award as follows:

34.2 Payment for working on a public holiday

> (a) An employee required to work on a public holiday will be paid double time and a half of their ordinary rate of pay for all time worked.
>
> (b) Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday.
>
> (c) Rosters must not be altered for the purpose of avoiding public holiday entitlements under the Award and the NES.

[190] UV cites ss.114 and 116 of the Act and submits that employers are altering the rosters of part-time employees to avoid the payment of public holiday rates. UV contends that the variation proposed is consistent with the modern awards objective, primarily in ensuring that the SCHADS Award is 'fair and relevant' and provides that part-time employees do not receive less pay than they are entitled to.

[191] The 'highpoint' of UV's evidentiary case was in the witness statement of Robert Sheehy an employee with HSU NSW Branch, who said:

‘20. Our branch has run a number of disputes for members where employer have altered rosters to avoid paying employees public holiday entitlements.

21. It’s not uncommon for employers to change the roster shortly before a public holiday, with the consequence that the employee is not paid for that day. For example, an employee may work every Monday but will be taken off that Monday for the two week period where the public holiday falls. Often employers will cite client cancellation as the reason for changing an employee’s roster.’

[192] No evidence was provided as to any dispute notified to the Commission in respect of the issue to which the proposed variation is directed.

[193] UV effectively conceded 122 that no cogent evidence was advanced in support of the proposition that employers were systematically altering rosters to avoid public holiday entitlements. The submission put amounted to little more than an assertion by UV that ‘some of our members have reported having their rosters changed in a manner inconsistent with clauses 8A and 10.3 of the Award’.123

[194] We are not satisfied that the variation proposed is necessary to ensure that the SCHADS Award achieves the modern awards objective. The Award already prescribes the circumstances in which rosters may be altered and changes may be made to set patterns of work and UV has failed to adduce probative evidence of systemic abuse of these provisions. The claim is rejected.

6. Conclusion and Transitional Arrangements

[195] In summary, we have decided to:

- set out a process for addressing the lack of clarity and other deficiencies in the 24 hour care clause;
- vary the rates of pay of casual employees who work overtime and on weekends and public holidays (subject to the views we express below about transitional arrangements);
- defer consideration of the ASU’s claim for a community language skills allowance;
- reject the first aid certificate renewal claim; and
- reject UV’s claim to vary the public holiday clause.

[196] We now turn to consider the appropriate transitional arrangements in respect of our decision to vary the rates of pay of casuals working overtime and working on weekends and public holidays.

[197] In the *Penalty Rates – Transitional Arrangements decision* 124 the Full Bench made the following observation about the determination of transitional arrangements:

> 'the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgment, rather than a formulaic or mechanistic approach involving the quantification of the weight accorded to each particular consideration.' 125

[198] The Full Bench went on to observe that the following matters were relevant to its determination of transitional arrangements in relation to the *reduction* of penalty rates.

> (i) The statutory framework: any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective. The Full Bench also noted that it must perform its functions and exercise its powers in a manner which is 'fair and just' (as required by s.577(a)) and must take into account the objects of the Act and 'equity, good conscience and the merits of the matter' (s.578).
>
> (ii) Fairness is a relevant consideration, given that the modern awards objective speaks of a '*fair* and relevant minimum safety net'. Fairness in this context is to be assessed from the perspective of both the employees *and* employers covered by the modern award in question. 126 The Full Bench said "while the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, it is not appropriate to 'totally subjugate' the interests of the employers to those of the employees."127

[199] We adopt the above observations and propose to apply them to the matter before us. It is our *provisional* view that the increase in the weekend and public holiday penalty rates for casuals should be phased in as follows:

	Saturday	**Sunday**	**Public holidays**
	(% of ordinary rate, inclusive of casual loading)		
1 December 2019:	160	210	260
1 July 2020:	175	225	275

[200] It is our *provisional* view that the increase in overtime rates for casuals be operative from 1 December 2019.

[201] A draft variation determination reflecting our *provisional* views is set out at Attachment D.

7. Next Steps

[202] Interested parties are to file any submissions in relation to the *provisional* views set out at [200] and [201] above and the draft variation determination by **4pm on**

Friday 20 September 2019. Any reply submissions are to be filed by **4pm on Friday 4 October 2019. A**ny issues in contention will be the subject of a hearing on **Monday 14 October 2019 at 2pm**. All submissions are to be sent to AMOD@fwc.gov.au.

[203] A mention will be held shortly in relation to the programming and materials relating to the second stage of these proceedings.

PRESIDENT

Appearances:

Mr Robson for the Australian Services Union with G South

Ms L Doust for the Health Services Union with Ms R Liebhaber

Ms N Dabarera for United Voice with Ms Bolton

Mr B Ferguson for the Australian Industry Group with Ms R Bhatt

Mr K Scott for Australian Business Industrial and the New South Wales Business Chamber; Aged and Community Services Australia and Leading Age Services Australia with Ms Tiedman

Ms M Pegg for National Disability Services

Ms N Shaw for Australian Federation of Employers and Industry

Hearing details:

Sydney

2019

15, 16 and 17 April

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ATTACHMENT A – Outstanding Claims

UV claims:

S2 – variation to ensure the payment of travel time for home care workers
S2A – variation to the clothing and equipment allowance

- *– variation to the rosters clause*
- *– paid travel time*

S21 – variation to telephone allowance

S37 – Broken shifts

S49 – variation to correct a cross-referencing error

Minimum engagements

HSU claims:

S16 – Amendments to various classification criteria

S19 and S20A – Phone allowance, travel allowance and damaged clothing allowance

S22 – On call and recall allowance

S24 – Payment of wages

S28 and S32 – Variation to ordinary hours of work and rostering clauses

S29 – Variation to client cancellation provisions

S35 – Deletion or variation of broken shifts clause

S38 – Amendments to sleepover clause

S45 – Excursions (new entitlement to additional annual leave for employees engaged in excursions)

S50 – Variation to overtime clause

S54 – Variation to shift work clause

ASU claims:

S36 – Variation to broken shifts clause

ABI claims:

S5 – variation to include a 'remote response payment'

S23 – On call allowance

S25 – ordinary hours of work

S29 – client cancellation

S53 – recall to work overtime

ATTACHMENT B – Oral Evidence and Witness list

Tab	Exhibit No.	Tendered by	Witness Statements and TN's
1.	**ASU1**	**ASU**	Witness statement of **Dr. Ruchita** dated 14 February 2019 (with amendments) PN525 – PN540: Examination in chief by ASU (Mr Robson) PN540 – PN585: Cross-examination by ABI & NSW BC (Mr Scott)
2.	**ASU2**	**ASU**	Witness statement of **Ms Nadia Saleh** dated 14 February 2019 (with amendments) PN591 – PN597: Examination in chief by ASU (Mr Robson) PN597 – PN633: Cross-examination by Ai Group (Mr Ferguson) PN635 – PN643: Re-examination by ASU (Mr Robson)
3.	**ASU3**	**ASU**	Witness statement of **Ms Natalie Lang** dated 18 February 2019 (with amendments) PN647 – PN652: Examination in chief by ASU (Mr Robson) PN654 – PN700: Cross-examination by Ai Group (Mr Ferguson)
4.	**ASU4**	**ASU**	Witness statement of **Mr Lou Bacchiella** dated 13 February 2019 (with amendments) PN702 – PN714: Examination in chief by ASU (Mr Robson) PN716 – PN758: Cross-examination by Ai Group (Mr Ferguson) PN759 – PN776: Cross-examination by ABI & NSW BC (Mr Scott) PN778 – PN790: Re-examination by ASU (Mr Robson)
5.	**Ai Group 1**	**AiG**	**Community Language Allowance Scheme Handbook 2018** – Multicultural NSW; NSW Government PN687 – PN695: Examination by Justice Ross
6.	**HSU1**	**Health Services Union**	Witness statement of **Thelma Thames** dated 15 February 2019 PN1408: HSU (Ms Doust) – paragraphs 20 to 22 not to be read for the present purposes PN1417, PN1426 – PN1429: Ai Group (Mr Ferguson) – objection to paragraph 15

			PN1430: Ai Group (Mr Ferguson) – objection to paragraph 16 PN1434: Ai Group (Mr Ferguson) – objection to paragraph 19
7.	**HSU2**	**Health Services Union**	Witness statement of **Mr Bernie Lobert** dated 15 February 2019 PN1410: HSU (Ms Doust) – paragraphs 18 to 21 not to be read for the present purposes
8.	**HSU3**	**Health Services Union**	Witness statement of **Mr Mark Farthing** dated 15 February 2019 (with amendments) PN1581 – PN1601: Examination in chief by HSU (Ms Doust) PN1603 – PN1631: Cross-examination by ABI & NSW BC (Mr Scott) PN1635 – PN1645: Re-examination by HSU (Ms Doust) PN1648 – PN1651: Ai Group (Mr Ferguson) sought leave to have the witness recalled in the event that something fell out of the update re the budget point
9.	**HSU4**	**Health Services Union**	Witness statement of **Mr Robert Sheehy** dated 15 February 2019 PN1668: No cross-examination required by ABI & NSW BC (Mr Scott)
10.	**HSU5**	**Health Services Union**	Witness statement of **Mr James Eddington** dated 15 February 2019 (with amendments) PN1668: No cross-examination required by ABI & NSW BC (Mr Scott)
11.	**HSU6**	**Health Services Union**	Witness statement of **Mr William Elrick** dated 15 February 2019 PN1668: No cross-examination required by ABI & NSW BC (Mr Scott)

ATTACHMENT C – draft variation determination

DRAFT DETERMINATION

MA000100 PRXXXXXX

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—Substantive claims
(AM2018/26)

JUSTICE ROSS, PRESIDENT MELBOURNE, XX OCTOBER 2019

DEPUTY PRESIDENT CLANCY

COMMISSIONER LEE

4 yearly review of modern awards – award stage – group 4 awards – substantive issues – Social, Community, Home Care and Disability Services Industry Award 2010.

A. Further to the decision [2019] FWCFB 6067 issued by the Fair Work Commission, the above award is varied as follows:

1. By deleting the words "and the casual loading prescribed in clause 10.4(b)" in clause 26.

2. By numbering the paragraph in clause 26 as 26.1

3. By inserting clause 26.2 as follows:

26.2 Casual employees will receive their casual loading in addition to the Saturday and Sunday rates at clause 26.1.

4. By inserting clause 26.3 as follows:

26.3 The rates are in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork and are not applicable to overtime worked on a Saturday and Sunday.

5. By inserting clause 26.4 as follows:

26.4 A casual employee who works on a weekend will be paid the following rates:

(a) From 1 December 2019 to 30 June 2020

> **(i)** Between midnight Friday and midnight Saturday – 160% of the ordinary hourly rate (inclusive of the casual loading); and
>
> **(ii)** Between midnight Saturday and midnight Sunday – 210% of the ordinary hourly rate (inclusive of the casual loading).

(b) From 1 July 2020

> **(i)** Between midnight Friday and midnight Saturday – 175% of the ordinary hourly rate (inclusive of the casual loading); and

(ii) Between midnight Saturday and midnight Sunday – 225% of the ordinary hourly rate (inclusive of the casual loading).

6. By deleting clause 28.1(b)(iv) and inserting the following:

(iv) Overtime rates payable under this clause will be in substitution for and not cumulative upon the shift premiums prescribed un clause 29—Shiftwork and are not applicable to ordinary hours worked on a Saturday.

7. By inserting clause 34.2(c) as follows:

(c) A casual employee will be paid the casual loading under clause 10.4(b) in addition to the public holiday penalty at clause 34.2(a).

8. By inserting clause 34.2(d) as follows:

(d) Casual employees from 1 December 2019 to 30 June 2020

(i) A casual employee will be paid only for those public holidays they work at 260% of the ordinary hourly rate for hours worked (inclusive of the casual loading).

9. By inserting clause 34.2(e) as follows:

(e) Casual employees from 1 July 2020

(i) A casual employee will be paid only for those public holidays they work at 275% of the ordinary hourly rate for hours worked (inclusive of the casual loading).

10. By updating cross-references accordingly.

B. This determination comes into operation from XX XXXX 2019. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect until the start of the first full pay period that starts on or after XX XXXX 2019.

PRESIDENT

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1 Statement – [2019] FWCFB 2207.

2 [2019] FWCFB 2324.

3 *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [38].

4 *O'Sullivan v Farrer* (1989) 168 CLR 210 at p. 216 per Mason CJ, Brennan, Dawson and Gaudron JJ.

5 *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35].

6 (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44].

7 [2018] FWCFB 3500 at [21]-[24].

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

9 *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].

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

11 See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

12 *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161.

13 Ibid at [48].

14 See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

15 [2017] FWCFB 1001.

16 Ibid at [269].

17 *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123.

18 Ibid at [46].

19 Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) '*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006*: *Phase 1 report*', Research Report 2/2012, Fair Work Australia.

20 Australian Government submissions in matter C2010/3131, 18 November 2010.

21 NDS Submissions 17 May 2019 at [16] – [18].

22 This figure is an approximation as it may include organisations that are members of more than one party to the matter and may have been sent the survey more than once.

23 Mr Bull transcript 16 July 2019 at [18].

24 HSU Submissions of 15 February 2019, at paragraph 64.

25 Page 11.

26 AFEI written submission 3 July 2019 at [11].

27 AM2018/26, Survey – SCHADS Award, 2019, Question 14

28 Transcript at [114].

29 [2017] FWCFB 1001 at [166].

30 ABS, *Characteristics of Employment, Australia, August 2017*, Catalogue No. 6333.0.

31 ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0.

32 [2017] FWCFB 1001 at [166].

33 Directions 1 May 2019, at [14] – [16].

34 [2017] FWCFB 3541.

35 Exhibit 255.

36 Exhibit 230.

37 ABI submission 19 May 2019 at 4.1 – 4.4

38 ABI reply submission 3 June 2019 at 4.1 – 4.6

39 NDS submission 17 May 2019 at 32 - 42

40 HSU submission 17 May 2019 at 2 - 29

41 UV submission 17 May 2019 at 1 - 26

42 ASU submission 17 May 2019 at 30 - 36

43 AFEI submission 22 May 2019 at 26 - 36

44 ABI submission 19 May 2019 at 4.2

45 Ibid at 4.3.

46 Ibid at 4.4 and see page 18, *NDIS Price Guide New South Wales, Queensland, Victoria, Tasmania* (Valid from: 1 February 2019)

47 NDS submission 17 May 2019 at 33-34

48 AFEI submission 22 May 2019 at [26] – [36]

49 AFEI submission 22 May 2019 at [28]

50 Productivity Commission Study Report, October 2017, National Disability Insurance Scheme (NDIS) Costs, p8.

51 NDS submission 17 May 2019 at [35].

52 HSU submission 17 May 2019 at [27].

53 Ibid at [28]; AFEI submission 22 May 2019 at [32].

54 NDS (2018) Australian Disability Workforce Report July 2018 at p6.

55 NDS submission 17 May 2019 at [41].

56 ABI submission 5 April 2019 at 4.11.

57 McKinsey & Company, Independent Pricing Review: National Disability Insurance Agency (Final Report, February 2018).

58 Ibid, p.5.

59 Exhibit HSU3 and Transcript at [1581] – [1646].

60 [2019] FWC 2756.

61 HSU submission 18 April 2019.

62 ASU submission, 18 February 2018.

63 Transcript 15 April 2019 at [146]-[148].

64 Ibid at [35]–[36.]; UV submission 4 February 2019 at [8], p3.

65 Ibid at [23]–[24].

66 UV submission, 4 February 2019 at [40].

67 UV submission 4 February 2019 at [20].

68 UV submission, 15 February 2019 at [20].

69 Ibid at [22].

70 Ibid at [30].

71 Ibid at [31].

72 Ibid at [32].

73 Ibid at [34].

74 Ibid.

75 HSU Submission, 15 February 2019 at [5].

76 Ibid at [64] – [66].

77 Ibid at [65].

78 ABI submission 5 April 2019 at 6.5 – 6.17.

79 Ibid at 6.44.

80 Ibid at 6.22 – 6.30.

81 Ibid at 6.28.

82 Transcript at [1997] – [2000].

83 NDS submission 5 April 2019 at [24].

84 HSU Submissions of 15 February 2019 at paragraph 64.

85 [2014] FWCFB 379.

86 [2013] FWC 4141.

87 Ibid at [333]

88 Ibid at [335]

89 Ibid

90 Ibid at [333]-[338]

91 UV submission, 15 February 2019 at para [161]

92 [2017] FWCFB 1001 at [338].

93 Ibid at [889] – [891].

94 Ibid at [896].

95 NDS Submissions 5 April 2019 at [46].

96 Ai Group submission in reply 8 April 2019, at [159].

97 Ai Group submission 8 April 2019 at [153].

98 [2011] FWAFB 2700.

99 *Equal Remuneration Order* [2012] FWAFB 1000 at [65].

100 Ibid, at [160].

101 Ibid, at [162].

102 Ibid, at [163].

103 Ibid, at [185].

104 *Re Australian Municipal, Administrative and Clerical Services Union* [2014] FWCFB 379 at [42].

105 Ibid, at [44].

106 Ibid.

107 Ai Group submission in reply 8 April 2019, at [182].

108 [2019] FWCFB 5078 st [119] – [137].

109 [2017] FWCFB 3541.

110 Ibid, at [539].

111 Ibid, at [545].

112 Ibid, [548] - [549].

113 [2017] FWCFB 1001 at [166].

114 ASU draft determination, 9 November 2018.

115 HSU Submission, 15 February 2019, [5]

116 Ibid at [63]

117 Exhibit HSU4 at [17].

118 Exhibit HSU6 at [45].

119 Exhibit HSU1 at [23].

120 Exhibit HSU2 at [22].

121 Transcript at [1948].

122 Transcript at [337].

123 Transcript [328] – [340].

124 [2017] FWCFB 3001.

125 Ibid at para [142].

126 Ibid at paras [117] – [119].

127 Ibid at para [148].

The attached document replaces the document previously issued with the above code on 19 April 2021.

- In paragraph [541], footnote 455 should read '25 March 1994, Print L2535'
- In paragraph [665], the reference to s 134(1)(g) should read s 134(1)(f)
- Correction to the appearances

Associate to Vice President Hatcher.

Dated 12 May 2021.

FairWork Commission

DECISION

Fair Work Act 2009
s 302 - Application for an equal remuneration order
s 158 - Application to vary or revoke a modern award

Independent Education Union of Australia
(C2013/6333 and AM2018/9)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT DEAN — SYDNEY, 19 APRIL 2021
DEPUTY PRESIDENT SAUNDERS

Application for equal remuneration order for early childhood teachers - Application to vary Education Services (Teachers) Award 2020 on work value grounds

CONTENTS

ABBREVIATIONS

ABS - Australian Bureau of Statistics
ACA - Australian Childcare Alliance
ACARA - Australian Curriculum, Assessment and Reporting Authority
ACECQA - Australian Children's Education and Care Quality Authority
ACT Child Care decision - *ALHMWU re Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998 - re Wage rates* [2005] AIRC 28, PR954938, (13 January 2005)
ACTU - Australian Council of Trades Unions
AEU - Australian Education Union
AFEI - Australian Federation of Employers and Industries
AFPC - Australian Fair Pay Commission
AIRC - Australian Industrial Relations Commission
AITSL - Australian Institute for Teaching and School Leadership
APEA Report - Professional Engineers Employment and Remuneration Report 2017
APST - Australian Professional Standards for Teachers
AQF - Australian Qualifications Framework
ATAR – Australian Tertiary Admission Rank
CCER - Catholic Commission for Employment Relations
CELC – Catholic Early Learning Centre
CELCs - Catholic Early Learning Centres
COAG - Council of Australian Governments
CoE Award - *Teachers' (Victorian Government Schools) Conditions of Employment Award 1995*
CS Award - *Children's Services Award 2010*
ECT Award - *Victorian Independent Schools - Early Childhood Teachers - Award 2004*
EST Award - *Educational Services (Teachers) Award 2020*
EYLF - Early Years Learning Framework
FW Act - *Fair Work Act 2009* (Cth)
ICT - Information and communication technology
IEU - Independent Education Union of Australia
Interim IE Award - *Independent Education (Victoria) Interim Award 1994*
Interim GS Award - *Teachers (Victorian Government Schools Interim) Award 1993*
Manufacturing Award - *Manufacturing and Associated Industries and Occupations Award 2010*
MCEECDYA - Ministerial Council for Education, Early Childhood Development and Youth Affairs
Melbourne Declaration - Melbourne Declaration on Educational Goals for Young Australians
Metal Industry Award 1998 - *Metal, Engineering and Associated Industries Award, 1998*
Metal Industry classification structure - the classification structure in what was originally the *Metal Industry Award 1984 - Part I* and subsequently became the *Metal, Engineering and Associated Industries Award, 1998*, and substantially retained in the *Manufacturing and Associated Industries and Occupations Award 2010*
NAPLAN - National Assessment Program – Literacy and Numeracy
National Law - *Education and Care Services National Law Act 2010*
National Regulations - *Education and Care Services National Regulations*
NCAC - National Childcare Accreditation Council
NCCD - National Consistent Collection of Data

NESA - NSW Education Standards Authority
NFTR - National Framework for Teacher Registration
NPAITQ - National Partnership Agreement on Improving Teacher Quality
NQF - National Quality Framework
NQS - National Quality Standard
NSW IRC - Industrial Relations Commission of New South Wales
NSW Teachers Award 2020 - *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award 2020*
NSW School and TAFE Teachers Award - *Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award*
NSW School Teachers decision - *Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* [2004] NSWIRComm 114, 133 IR 254
PAT - Progressive Achievement Testing
PAT-R - Progressive Achievement Test – Reading
PAT-M - Progressive Achievement Test – Mathematics
PE Award - *Professional Employees Award 2010*
Pharmacy Award decision - *4 yearly review of modern awards - Pharmacy Industry Award 2010* [2018] FWCFB 7621, 284 IR 121
PLP - Personalised Learning Plan
proposed ERO - *Early Childhood Teachers in Long Day Care Centres and Preschools Equal Remuneration Order 2019* proposed by the IEU
QCT - Queensland College of Teachers
QIAS - Quality Improvement and Accreditation System
QIP - Quality Improvement Plan
QKFS – Queensland Kindergarten Funding Scheme
QKLG - Queensland Kindergarten Learning Guideline
SACSA Framework - South Australian Curriculum Standards and Accountability Framework
STEM - Science, Technology, Engineering and Mathematics
VECTEA - *Victorian Early Childhood Teachers and Educators Agreement 2016*
VET - Vocational Education and Training
VEYLDF - Victorian Early Years Learning and Development Framework
VIST Award - *Victorian Independent Schools - Teachers - Award 1996*
WWCC – Working With Children Check
2001 decision - *Teachers (Non-Government Pre Schools) (State) Award* [2001] NSWIRComm 335, 120 IR 3
2006 decision – *Re Teachers (Non-Government Early Childhood Service Centres Other Than Pre Schools) (State) Award* [2006] NSWIRComm 4
2009 decision - *Teachers (Non Government Early Childhood Service Centres other than Preschools) (State) Award 2006* [2009] NSWIRComm 198, 191 IR 14
2015 decision - *Re Equal Remuneration Decision 2015* [2015] FWCFB 8200, 256 IR 362
2018 decision – *Application by United Voice and the Australian Education Union* [2018] FWCFB 177, 274 IR 1

A. INTRODUCTION AND BACKGROUND

A.1 The applications and the proceedings

[1] This decision concerns two applications made by the Independent Education Union of Australia (IEU). The first application is for an equal remuneration order pursuant to s 302 of the *Fair Work Act 2009* (FW Act), to apply to early childhood teachers employed in long day care centres and preschools who are covered by the *Educational Services (Teachers) Award 2020* (EST Award) (equal remuneration application). The second application is made pursuant to s 158 of the FW Act, and seeks to increase the minimum salaries for all teachers covered by the EST Award on work value grounds (work value application).

[2] The IEU's equal remuneration application was filed on 8 October 2013. In procedural terms, it initially travelled together with an application made by United Voice and the Australian Education Union (AEU) for an equal remuneration order to apply to employees in long day care centres and preschools covered by the EST Award, the *Children's Services Award 2010* (CS Award) and the *Educational Services (Schools) General Staff Award 2010* that had been filed 15 July 2013. Early in the course of the proceedings, it was determined in respect of both applications that the Commission should determine a number of legal and conceptual issues in a preliminary hearing prior to the parties presenting their respective evidentiary cases. These preliminary issues were determined in a Full Bench decision delivered on 30 November 2015[1] (2015 decision).

[3] One of the key matters determined in the 2015 decision, which we discuss in greater detail later in this decision, was that an application for an equal remuneration order must proceed on the basis of a comparison with the work of another employee or group of employees of the opposite gender. On 28 September 2016, United Voice and the AEU amended their application to provide for male comparators, namely employees covered by the C5 and C10 levels in the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award). In connection with this amended application, these two unions then sought a preliminary hearing concerning whether their selected male comparators were suitable comparators for the purposes of s 302 of the FW Act. In a decision issued on 6 July 2017[2] (2017 decision), the Full Bench determined that it was prepared to conduct a preliminary hearing, but it reformulated the question to be determined on the basis that it was confined to a comparison between employees under relevant classifications in the CS Award and employees under the C5 and C10 levels in the Manufacturing Award. The Full Bench also indicated that any such preliminary hearing would have to proceed on the basis that, if the question was determined against the position of the applicant unions, the consequence would necessarily be the dismissal of their application. The unions acceded to this course, and a hearing in relation to the reformulated question occurred on 30 November 2017. In a decision issued on 6 February 2018[3] (2018 decision), the Full Bench decided against United Voice and the AEU on the question and dismissed their equal remuneration application.

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[1] *Re Equal Remuneration Decision 2015* [2015] FWCFB 8200, 256 IR 362

[2] [2017] FWCFB 2690, 268 IR 36

[3] [2018] FWCFB 177, 274 IR 1

[4] That left the IEU's equal remuneration application to be determined. Directions were made for the filing of evidence and submissions in relation to this application, and 14 days were listed for the hearing of the application commencing on 26 July 2018.

[5] After the completion of the first and second days' hearing, the Full Bench (as currently constituted) issued the following statement on 27 July 2018:[4]

> "[1] The Full Bench considers, on the basis of the opening submissions received on 26 July 2018 as well as our very preliminary perusal of the evidentiary and other materials filed to date, that there may be an issue as to whether the minimum rates of pay applicable to early childhood teachers in the *Educational Services (Teachers) Award 2010* are properly set having regard to the value of the work performed by such teachers.
>
> [2] This proceeding is being conducted outside the current 4-yearly review of modern awards. We note that the Commission has the power under s 157(2) and (3) of the *Fair Work Act 2009* to make a determination varying the minimum wages in a modern award for work value reasons on its own initiative as well as upon application.
>
> [3] We invite the parties to give consideration to this potential issue in the future conduct of the proceeding."

[6] On the next hearing day on 30 July 2018, the IEU sought and was granted an adjournment for it to file a further or amended application addressing the potential work value issue identified in the statement.[5] The IEU then filed its application pursuant to s 158 of the FW Act to vary the rates of pay in the EST Award on work value grounds on 17 August 2018. The hearing dates which had previously been set were vacated, and a new program was established for the filing of evidence and submissions concerning the IEU's new application. Both the IEU's applications were then the subject of hearings before us on 11-13 June, 17-20 June, 25-27 June, 1-4 July and 4-5 September 2019. We also conducted inspections at the following early childhood facilities on 1 August 2019:

- KU Phillip Park, 2-10 Yurong Parkway, Sydney, NSW; and
- Bambini of Lilyfield, 284 Balmain Road, Lilyfield NSW.

[7] Before we turn to our direct consideration of the IEU's equal remuneration application and work value application, it is appropriate that we first set out the non-contentious factual background concerning the characteristics of the teaching sector, the regulatory framework governing the teaching profession, the early childhood education and care sector and the award coverage of the teaching sector. During the course of the hearing, we directed the parties to file an agreed statement of facts, and this was filed on 20 March 2020. We will draw upon this agreed statement of facts in describing the background to this matter immediately below, as well as in our findings of fact later in this decision.

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[4] [2018] FWCFB 4433

[5] [2018] FWCFB 4467

A.2 Overview of the teaching profession

[8] As of August 2019, there were approximately 488,000 teachers employed in Australia, of which about ten percent were employed as early childhood teachers. The number of early childhood teachers grew by 48 percent between 2011 and 2016. The gender profile of the profession as at August 2019 may be broken down as follows:

- 99% of all early childhood teachers were female;
- 86% of all primary school teachers were female; and
- 58% of all secondary school teachers were female.

[9] School teachers were, as at 2018, employed across 9,477 primary and secondary schools in Australia (including schools for students with special needs). These schools may be broken up into the following categories:

- 70% were government schools;
- 18% were Catholic systemic schools; and
- 11% were other independent schools.

[10] In 2018, 3,893,834 students attended primary and secondary schools, in the following proportions:

- 66% attended government schools;
- 20% attended Catholic systemic schools; and
- 14% attended other independent schools.

[11] As at 30 June 2019, there were a total of 10,850 early childhood and care centres approved under the National Quality Framework (NQF) operating in Australia, of which 7,744 were long day care centres and 3,106 were preschools/kindergartens.

[12] The number of children attending approved child care services in Australia was 825,432, broken up into the following age groups:

0 years old	28,657
1 years old	129,548
2 years old	176,039
3 years old	197,119
4 years old	176,293
5 years old	117,776

[13] Customised data provided by the ABS (Australian Bureau of Statistics) sourced from the *Survey of Employee Earnings and Hours, May 2016* shows that:

- Early childhood teachers' average hourly cash earnings were $38.90 and average weekly cash earnings were $861.70;
- Primary school teachers' average hourly cash earnings were $45.90 and average weekly cash earnings were $1,305.80; and
- Secondary school teachers' average hourly cash earnings were $48.70 and average weekly cash earnings were $1,532.40.[6]

A.3 The regulatory framework for teachers in Australia

[14] Prior to 2011, teacher registration was primarily regulated at the State and Territory level. Queensland and South Australia introduced mandatory registration schemes for school teachers in the 1970s, and South Australia also introduced registration for early childhood teachers in preschools at the same time. Victoria followed in 2001 with registration of school teachers through the Victorian Institute of Teaching, and New South Wales, Western Australia and the Northern Territory commenced registration of school teachers in 2004. The Australian Capital Territory implemented registration of school teachers in 2011.

[15] A national approach to the regulation of the teaching profession had its origins in December 2007 when the Council of Australian Governments (COAG) agreed to a partnership between the Commonwealth and State and Territory Governments to pursue substantial reform in the areas of education, skills and early childhood development, to deliver significant improvements in human capital outcomes for all Australians. In 2008, the Commonwealth, State and Territory Education Ministers agreed upon the *Melbourne Declaration on Educational Goals for Young Australians* (Melbourne Declaration), which identified two overarching goals for the education system in Australia:

(1) The promotion of equity and excellence in Australian schooling.

(2) All young Australians become successful learners, confident and creative individuals, and active and informed citizens.

[16] The Melbourne Declaration stated that the Education Ministers, as signatories, sought "*to achieve the highest possible level of collaboration with the government, Catholic and independent school sectors and across and between all levels of government*".

[17] In the same year, the COAG entered into the *National Partnership Agreement on Improving Teacher Quality* (NPAITQ). The stated objectives of the NPAITQ included:

[6] The release of this data by the ABS was subject to caveats that (1) the data is subject to sample variability and volatility; (2) the survey data was not designed for use as a time series; and (3) the release was subject to confidentiality rules. The ACA and the AFE also had concerns about the sample size for early childhood teachers.

- to contribute to achieving the objectives, outcomes and targets for schooling under the COAG participation and productivity agenda, the National Education Agreement, and Melbourne Declaration;

- to drive and reward systemic reforms to improve the quality of teaching and leadership in Australian schools;

- aiming to deliver system-wide reforms targeting critical points in the teacher "*lifecycle*" to attract, train, place, develop and retain quality teachers and leaders in our schools and classrooms; and

- a specific focus on professional development and support for principals.

[18] The NPAITQ stated that it would contribute to "*outputs*" which included:

(a) New professional standards to underpin national reforms;

(b) Recognition and reward for quality teaching;

(c) A framework to guide professional learning for principals, teachers and school leaders;

(d) National accreditation of pre-service teacher education courses;

(e) National consistency in teacher registration;

(f) National consistency in accreditation/certification of Accomplished and Leading Teachers;

(g) Improved mobility of the Australian teaching workforce;

(h) Joint engagement with higher education to provide improved pre-service teacher education; new pathways into teaching; and data collection to inform continuing reform action and workforce planning;

(i) Improved performance management in schools for teachers and school leaders; and

(j) Enhanced school-based teacher quality reforms.

[19] Also in 2008, the Commonwealth enacted the *Australian Curriculum, Assessment and Reporting Authority Act 2008*, which established the Australian Curriculum, Assessment and Reporting Authority (ACARA). The functions of the ACARA, as provided for in s 6 of the Act, are, relevantly, to:

> (a) develop and administer a national school curriculum, including content of the curriculum and achievement standards, for school subjects specified in the Charter; and
>
> (b) develop and administer national assessments; and

(c) collect, manage and analyse student assessment data and other data relating to schools and comparative school performance; and

(d) facilitate information sharing arrangements between Australian government bodies in relation to the collection, management and analysis of school data; and

(e) publish information relating to school education, including information relating to comparative school performance; and

(f) provide school curriculum resource services, educational research services and other related services; and

(g) provide information, resources, support and guidance to the teaching profession…

[20] In July 2009, the Ministerial Council for Education, Early Childhood Development and Youth Affairs (MCEECDYA) was established as a merger/re-alignment of pre-existing ministerial councils, with responsibility for overseeing progress towards the goals stated in the Melbourne Declaration. Its areas of responsibility include early childhood development, including early childhood education and care, and primary and secondary education. Pursuant to the NPAITQ and on behalf of the MCEECDYA, the Commonwealth then incorporated the Australian Institute for Teaching and School Leadership (AITSL), which came into being on 1 January 2010. The AITSL describes its "*Strategic Direction*" as follows:

"AITSL's primary purpose is to provide national leadership for the Commonwealth, state and territory governments in promoting excellence in the profession of teaching and school leadership.

AITSL has a significant role in delivering the reforms agreed to through the Council of Australian Governments (COAG) National Partnership on Improving Teacher Quality, which targets critical points in the teacher lifecycle to attract, train, place, develop and retain quality teachers and leaders in schools and classrooms.

AITSL has responsibility for rigorous national professional standards and fostering and driving high quality professional development for teachers and school leaders by working collaboratively across jurisdictions and engaging with key professional bodies. Basing its work on the national professional standards for teaching, AITSL will guide reform in the areas of teacher registration, accreditation of pre-service teacher education, accreditation of teachers at the graduate, proficient, highly accomplished and lead teacher levels, and will deliver prestigious national awards for teachers and school leaders."

[21] The AITSL developed the National Framework for Teacher Registration (NFTR), which was agreed to by the MCEECDYA in October 2011. The key elements of the NFTR are, for relevant purposes:

- in every State or Territory, only registered teachers may be employed to teach in schools;

- each State and Territory has established an authority or agency with responsibility for the registration (licensing) of teachers;

- to achieve full registration, evidence of performance is required at the Proficient stage of the *Australian Professional Standards for Teachers* (APST);

- an initial period of provisional registration is allowed during which a new teacher has a form of "licence" that allows them to be employed as a teacher and undertake workplace learning and development that will equip them to meet requirements for becoming fully registered;

- the maximum period for meeting the requirements for full registration is five years, with provision for extension on a case-by-case basis;

- regulatory authorities will specify a minimum time period (of no less than 80 days of teaching and not exceeding the equivalent of one year full-time teaching) in a school setting in which the teacher demonstrates they have met the APST to the satisfaction of the regulator before an applicant may apply for full registration;

- after a fixed period of registration, teachers are required to demonstrate their ongoing proficiency and suitability to teach in order to renew their registration;

- the minimum requirements for the renewal or continuation of a teacher's registration are that: suitability has been maintained on the basis of a national criminal history records check that is no older than five years; recency of professional practice requirements is established on the basis of 100 days of professional practice in the last five years; proficiency against the APST has been maintained; and professional learning is demonstrated on the basis of at least 100 hours of professional development activities in the last five years as referenced in the APST;

- there will be provision for a recognised authority to impose sanctions or withdraw a teachers' registration if they fail to meet the required standards of personal and professional behaviour or professional performance;

- there must be a requirement for an applicant for registration to be suitable to both work with children and be a teacher, based upon an assessment of character and criminal history, and regulatory authorities may take into account information from other registration bodies and overseas employers, analysis of previous misconduct based on the level, nature, frequency, recency and seriousness of the offences, and any other information relevant to an assessment of suitability for registration as a teacher such as fitness to teach;

- there will be a minimum qualification, including a professional qualification, for registration, consisting of at least four years of higher education study (full-time or equivalent) study, including an initial teacher education program accredited in Australia, leading to the achievement of a recognised qualification, or an overseas qualification assessed as equivalent;

- registration will require achievement of a level of professional proficiency in spoken and written English, with defined assessment scores used to measure this; and

- a person registered to practise as a teacher in one jurisdiction is entitled to apply for registration in another jurisdiction based on that registration.

[22] The requirements of the NFTR have been implemented in respect of school teachers in all States and Territories (with a three year registration renewal requirement in South Australia, annual registration in Victoria and the ACT, and five-year registration in the other States and Territories). The NFTR did not directly address registration for early childhood teachers. Teacher registration has been extended to early childhood teachers to the following extent:

- in South Australia, all early childhood teachers must be registered regardless of setting;

- in New South Wales, Western Australia and Victoria, all early childhood teachers in NQF approved services must be registered; and

- in Queensland, the ACT, the Northern Territory and Tasmania, early childhood teachers in school-attached services must be registered, with voluntary registration available in out-of-school settings including long day care in Queensland and the Northern Territory.

[23] In all states except Victoria, early childhood teachers are registered in a single register together with school teachers. In Victoria, they are in a separate division of the register.

[24] In its September 2018 publication *One Teaching Profession: Teacher Registration in Australia*, the AITSL recommended that early childhood teachers in all employment settings be required to be registered by teaching regulatory authorities under a consistent national approach. The remaining jurisdictions where this is not the case are moving to implement this recommendation.

[25] In conjunction with the NFTR, the AITSL developed the APST. The APST were endorsed by MCEECDYA in December 2010. The stated purpose of the APST is as follows (footnotes omitted):

> "The Standards are a public statement of what constitutes teacher quality. They define the work of teachers and make explicit the elements of high-quality, effective teaching in 21st century schools that will improve educational outcomes for students. The Standards do this by providing a framework which makes clear the knowledge, practice and professional engagement required across teachers' careers.
>
> They present a common understanding and language for discourse between teachers, teacher educators, teacher organisations, professional associations and the public.
>
> Teacher standards also inform the development of professional learning goals, provide a framework by which teachers can judge the success of their learning and assist self-reflection and self-assessment.

Teachers can use the Standards to recognise their current and developing capabilities, professional aspirations and achievements.

The Standards contribute to the professionalisation of teaching and raise the status of the profession. They could also be used as the basis for a professional accountability model, helping to ensure that teachers can demonstrate appropriate levels of professional knowledge, professional practice and professional engagement.

The Standards are organised into four career stages and guide the preparation, support and development of teachers. The stages reflect the continuum of a teacher's developing professional expertise from undergraduate preparation through to being an exemplary classroom practitioner and a leader in the profession."

[26] The APST consist of seven interconnected standards stipulating what teachers should know and should be able to do, which are grouped into three domains of teaching as follows:

Professional Knowledge

Standard 1: Know students and how they learn

Standard 2: Know the content and how to teach it

Professional Practice

Standard 3: Plan for and implement effective teaching and learning

Standard 4: Create and maintain supportive and safe learning environments

Standard 5: Assess, provide feedback and report on student learning

Professional Engagement

Standard 6: Engage in professional learning

Standard 7: Engage professionally with colleagues, parents/carers and the community

[27] The three domains of knowledge are explicated in the APST as follows:

"**Professional Knowledge**

Teachers draw on a body of professional knowledge and research to respond to the needs of their students within their educational contexts.

Teachers know their students well, including their diverse linguistic, cultural and religious backgrounds. They know how the experiences that students bring to their classroom affect their continued learning. They know how to structure their lessons to meet the physical, social and intellectual development and characteristics of their students.

Teachers know the content of their subjects and curriculum. They know and understand the fundamental concepts, structure and enquiry processes relevant to programs they teach.

Teachers understand what constitutes effective, developmentally appropriate strategies in their learning and teaching programs and use this knowledge to make the content meaningful to students.

Through their teaching practice, teachers develop students' literacy and numeracy within their subject areas. They are also able to use Information and Communication Technology to contextualise and expand their students' modes and breadth of learning.

Professional Practice

Teachers are able to make learning engaging and valued. They are able to create and maintain safe, inclusive and challenging learning environments and implement fair and equitable behaviour management plans. They use sophisticated communication techniques.

Teachers have a repertoire of effective teaching strategies and use them to implement well designed teaching programs and lessons. They regularly evaluate all aspects of their teaching practice to ensure they are meeting the learning needs of their students. They interpret and use student assessment data to diagnose barriers to learning and to challenge students to improve their performance.

They operate effectively at all stages of the teaching and learning cycle, including planning for learning and assessment, developing learning programs, teaching, assessing, providing feedback on student learning and reporting to parents/ carers.

Professional Engagement

Teachers model effective learning. They identify their own learning needs and analyse, evaluate and expand their professional learning both collegially and individually.

Teachers demonstrate respect and professionalism in all their interactions with students, colleagues, parents/carers and the community. They are sensitive to the needs of parents/carers and can communicate effectively with them about their children's learning.

Teachers value opportunities to engage with their school communities within and beyond the classroom to enrich the educational context for students. They understand the links between school, home and community in the social and intellectual development of their students."

[28] The APST provide for four career stages of professional capability which:

"…provide benchmarks to recognise the professional growth of teachers throughout their careers. The descriptors across the four career stages represent increasing levels of knowledge, practice and professional engagement for teachers. Progression through

the stages describes a growing understanding, applied with increasing sophistication across a broader and more complex range of situations."

[29] The four professional career stages are defined in the APST as follows:

"**Graduate teachers**

Graduate teachers have completed a qualification that meets the requirements of a nationally accredited program of initial teacher education. The award of this qualification means that they have met the Graduate Standards.

On successful completion of their initial teacher education, graduate teachers possess the requisite knowledge and skills to plan for and manage learning programs for students. They demonstrate knowledge and understanding of the implications for learning of students' physical, cultural, social, linguistic and intellectual characteristics.

They understand principles of inclusion and strategies for differentiating teaching to meet the specific learning needs of students across the full range of abilities.

Graduate teachers have an understanding of their subject/s, curriculum content and teaching strategies. They are able to design lessons that meet the requirements of curriculum, assessment and reporting. They demonstrate the capacity to interpret student assessment data to evaluate student learning and modify teaching practice. They know how to select and apply timely and appropriate types of feedback to improve students' learning.

Graduate teachers demonstrate knowledge of practical strategies to create rapport with students and manage student behaviour. They know how to support students' wellbeing and safety, working within school and system curriculum and legislative requirements.

They understand the importance of working ethically, collaborating with colleagues, external professional and community representatives, and contributing to the life of the school. Graduate teachers understand strategies for working effectively, sensitively and confidentially with parents/carers and recognise their role in their children's education.

Proficient teachers

Proficient teachers meet the requirements for full registration through demonstrating achievement of the seven Standards at this level.

These teachers create effective teaching and learning experiences for their students. They know the unique backgrounds of their students and adjust their teaching to meet their individual needs and diverse cultural, social and linguistic characteristics.

They develop safe, positive and productive learning environments where all students are encouraged to participate.

They design and implement engaging teaching programs that meet curriculum, assessment and reporting requirements. They use feedback and assessment to analyse and support their students' knowledge and understanding. Proficient teachers use a range of sources, including student results, to evaluate their teaching and to adjust their programs to better meet student needs.

Proficient teachers are active participants in their profession and with advice from colleagues, identify, plan and evaluate their own professional learning needs.

Proficient teachers are team members. They work collaboratively with colleagues; they seek out and are responsive to advice about educational issues affecting their teaching practice. They communicate effectively with their students, colleagues, parents/carers and community members. They behave professionally and ethically in all forums.

Highly Accomplished teachers

Highly Accomplished teachers are recognised as highly effective, skilled classroom practitioners and routinely work independently and collaboratively to improve their own practice and the practice of colleagues. They are knowledgeable and active members of the school.

Highly Accomplished teachers contribute to their colleagues' learning. They may also take on roles that guide, advise or lead others. They regularly initiate and engage in discussions about effective teaching to improve the educational outcomes for their students.

They maximise learning opportunities for their students by understanding their backgrounds and individual characteristics and the impact of those factors on their learning. They provide colleagues, including pre-service teachers, with support and strategies to create positive and productive learning environments.

Highly Accomplished teachers have in-depth knowledge of subjects and curriculum content within their sphere of responsibility. They model sound teaching practices in their teaching areas. They work with colleagues to plan, evaluate and modify teaching programs to improve student learning.

They keep abreast of the latest developments in their specialist content area or across a range of content areas for generalist teachers.

Highly Accomplished teachers are skilled in analysing student assessment data and use it to improve teaching and learning.

They are active in establishing an environment which maximises professional learning and practice opportunities for colleagues. They monitor their own professional learning needs and align them to the learning needs of students.

They behave ethically at all times. Their interpersonal and presentation skills are highly developed. They communicate effectively and respectfully with students, colleagues, parents/ carers and community members.

Lead teachers

Lead teachers are recognised and respected by colleagues, parents/carers and the community as exemplary teachers. They have demonstrated consistent and innovative teaching practice over time. Inside and outside the school they initiate and lead activities that focus on improving educational opportunities for all students. They establish inclusive learning environments that meet the needs of students from different linguistic, cultural, religious and socioeconomic backgrounds. They seek to improve their own practice and to share their experience with colleagues.

They are skilled in mentoring teachers and pre-service teachers, using activities that develop knowledge, practice and professional engagement in others. They promote creative, innovative thinking among colleagues. They apply skills and in-depth knowledge and understanding to deliver effective lessons and learning opportunities and share this information with colleagues and pre-service teachers. They describe the relationship between highly effective teaching and learning in ways that inspire colleagues to improve their own professional practice.

They lead processes to improve student performance by evaluating and revising programs, analysing student assessment data and taking account of feedback from parents/carers. This is combined with a synthesis of current research on effective teaching and learning.

They represent the school and the teaching profession in the community. They are professional, ethical and respected individuals inside and outside the school."

[30] The APST were written for school teachers and do not directly address the position of early childhood teachers. In Victoria and Western Australia, amended versions of the APST have been developed to be inclusive of early childhood teaching practices and settings, and in New South Wales an evidence guide has been produced to support early childhood teachers to confidently interpret the Proficient Teacher standards and apply them to their context. In *One Teaching Profession: Teacher Registration in Australia*, the AITSL recommended that the APST be amended to ensure their relevance and applicability to early childhood teachers.

A.4 National regulation of the early childhood and care sector

[31] Regulation of the early education and care sector was previously divided between pre-schools and childcare (principally, in respect of children aged 0-5, long day care). Pre-schools were previously the regulatory and funding domain of State and Territory Governments. The Commonwealth became responsible for the quality accreditation of child care as a function of its provision of the Child Care Benefit. Such quality accreditation was carried out by the National Childcare Accreditation Council (NCAC). The NCAC administered, in respect of participating long day care centres, the Quality Improvement and Accreditation System (QIAS). The QIAS was introduced in 1994. The QIAS outlined 33 principles of quality care incorporated in seven quality areas, namely: Staff relationships with children and peers; Partnerships with families; Programming and evaluation; Children's experiences and learning; Protective care and safety; Health, nutrition and wellbeing; and Managing to support quality. In addition, State and Territory Governments generally had in place licensing schemes for child care services.

[32] In March 2008, the COAG issued a communique in which it endorsed a comprehensive set of aspirations, outcomes, progress measures and future policy directions in the area of early childhood. The agreed aspiration was that children are born healthy and have access, throughout early childhood, to the support, care and education that will equip them for life and learning, delivered in a way that actively engages parents and meets their workforce participation needs. In the 2008-9 Budget, the Commonwealth Government set out a comprehensive plan to make the early childhood years a national priority and, to this end, to reform early childhood education and care. Relevant elements of this plan were:

- to improve access to quality early childhood education and care through universal access to preschool for all children in the year before formal schooling, for 15 hours per week, 40 weeks per year, delivered by a university-qualified early childhood teacher;

- to improve the quality of early childhood education through strong national quality standards, a quality rating system, support for education and training of the early childhood workforce, and the development of an Early Years Learning Framework.

[33] In August 2008, the Early Childhood Development Sub-group of the COAG Productivity Agenda Working Group published a discussion paper, *A national quality framework for early child education and care.* This paper summarised the then Government's agenda for early childhood education and explained the Commonwealth's role as follows (footnotes omitted):

> "Improving health and development outcomes for young children is the combined responsibility of parents, carers, and government on behalf of the community. While parents have primary responsibility for raising children, carers also play a significant role. The role of government in formal early childhood education and care is to provide a comprehensive service system, regardless of setting, that responds effectively to the health and developmental needs of children in the years before formal schooling. The way parents, carers and government carry out this responsibility has an impact on children's early learning and development, as well as later success in school and the workforce.
>
> The early childhood education and care service system in Australia encompasses two sectors - child care and preschool - that have largely been planned, funded and delivered separately. Research literature and practice in other countries demonstrate that the delineation between child care and preschool rests in part on a false distinction between 'education' and 'care'. Children are ready and willing to learn wherever they are, and start learning from birth.
>
> The boundaries between child care and preschool are blurring. In some jurisdictions, long day care can include a preschool program. With evidence mounting about the value of early childhood education, traditional child care settings need to refocus on learning and development. In addition, integrated models of care, such as wraparound care and co-located services, are emerging to meet the needs of families. As the two sectors come together to service changing community need, families need to be able to expect a consistently high level of quality across all formal early childhood education and care settings."

[34] The discussion paper stated that the current regulatory arrangements were fragmented and complex because of the shared responsibility for the regulation of the early childhood and care sector between the Commonwealth and State and Territory Governments, the different regulatory arrangements for different services within the sector, overlap between State licensing schemes and Commonwealth accreditation, and gaps and inconsistencies in the regulatory schemes in the different jurisdictions. The paper stated that the COAG reform agenda could be achieved by the development and implementation of a National Quality Framework which would:

- enhance learning and development outcomes for children in different care settings, with an initial focus on early learning in the years prior to formal schooling; and

- build a high-quality, integrated national quality system, including accreditation, for early learning and care that took account of setting, diversity of service delivery and the age and stage of development of children.

[35] The overall policy rationale for this was described in the following way (footnotes omitted):

> "…early childhood education and care improves outcomes for children, particularly disadvantaged children, as well as benefiting society more broadly. However, the evidence also shows that the quality of these early childhood education and care experiences is of key importance. Research shows that a quality early childhood environment provides for the basic needs of children, including health and safety, positive relationships and opportunities for stimulation and learning from experience. Research also shows that prime structural indicators of the quality of formal care, sometimes referred to as the 'iron triangle', are staff qualifications, child-to-staff ratios and group size. As noted earlier, the OECD highlights these factors, as well as educational concept and practice, interaction and process quality, child outcome quality or performance standards, and standards pertaining to parent/community outreach and involvement."

[36] The paper identified that there were significant demand, supply and retention issues for early childhood education and care professions, and pointed to the following causal factors in this respect:

- demand for early childhood teachers was strong in most jurisdictions and would only get stronger with the implementation of arrangements to support universal access to early childhood education programs;

- the level of remuneration;

- child care workers had been in short supply across the nation for many years;

- job turnover was high, with over one in five child care workers leaving the occupation every year;

- although there had been growth in enrolments in Certificate III child care courses, enrolments in Diploma child care courses have fallen since 2002; and

- the early childhood education and care workforce comprised both qualified and unqualified staff, with staff shortages more significant among qualified staff.

[37] The discussion paper proposed that, in addition to the NQF, a National Early Years Learning Framework would be established. The purpose of this was described as follows (footnotes omitted):

> "A National Early Years Learning Framework is an early childhood curriculum framework which will guide early childhood educators in developing quality early childhood programs in a range of early childhood education and care settings. It will enhance children's learning from birth to five years of age, including in early childhood education programs in the year before formal schooling, as well as their transition to school.
>
> The framework will improve the integration of [early childhood education and care] services through a consistent focus on individual and group learning and development for children in all [early childhood education and care] settings. It will also enhance the professional profile and approach of the early years workforce through a common understanding of child development and learning, and consistent practice and language. It will outline the desired outcomes for children in [early childhood education and care] settings across the birth to five age range, including the year before formal schooling, and enhance their transitions to school.
>
> It will inform parents, families and all Australians about young children's learning. [Early childhood education and care] services will draw on the framework and associated resources to assist in planning and describing children's learning to parents, families, communities and government.
>
> The framework will underpin the National Quality Standards and the COAG commitment to universal access to quality early learning in the year before formal schooling."

[38] The role of university-qualified early childhood teachers in early childhood education was identified as being of key importance:

> "The role of early childhood educators is also a critical element of quality. Because they are skilled in early childhood learning and development, early childhood teachers are able to continually monitor the progress of each child and provide learning and development experiences that maximise their potential. They have an important role in providing feedback to parents about their child, and in helping the child make the transition to formal schooling through the provision of information to parents."

[39] Finally, the discussion paper identified the underlying public policy rationale for investment in early childhood education as follows (footnotes omitted):

> "There is increasing recognition of the social and economic benefits of investing in early childhood. The rates of return are much higher from early investments than those made later in life. It has been argued that a nationwide commitment to high-quality early childhood development would have a substantial long-term payoff. The early

> years of children's learning and development needs to be seen as important in their own right as well as being a foundation for life outcomes. During the early years children inquire, explore and discover much about the world around them, establishing attitudes to learning that remain with them throughout their lives.
>
> Cost-benefit studies show that prevention and early intervention strategies are more effective than treatment programs with clear, flow-on benefits for individuals, families and the broader community. On the basis of an extensive analysis of the evidence, research concludes that investing in quality early childhood programs, particularly for disadvantaged children, has a high economic return."

[40] The Early Years Learning Framework (EYLF) was delivered in 2009. This is discussed further in the next section of the introduction to this decision.

[41] The NQF was introduced in 2012 as the first national regulatory system to apply to all early childhood education and care services, including preschools and kindergartens. It was implemented by way of a model law, the *Education and Care Services National Law Act 2010* (National Law), which was enacted by State and Territory legislatures, and by the *Education and Care Services National Regulations* (National Regulations) which were made pursuant to State and Territory enactments (with some modification in Victoria). Its key features are to:

- provide for a regulatory authority in each state and territory which is responsible for the approval, monitoring and quality assessment of services in each state and territory;
- provide for a national body, the Australian Children's Education and Care Quality Authority (ACECQA), which replaced the NCAC and guides the implementation of the NQF and works with regulatory authorities;
- require services to comply with the National Quality Standard (NQS);
- establish an assessment and quality rating process linked to accreditation;
- mandate staff to children ratios, that is, the minimum number of staff that must be directly working with children based on how many children are present at any given time;
- prescribe minimum qualification requirements for staff counted towards the above ratios, with a general proposition that 50% are required to have or be actively working towards at least a diploma and the remainder are required to have or be actively working towards at least a Certificate III;
- mandate teacher to children ratios, that is, the minimum numbers of qualified early childhood teachers that must be accessible to or in attendance at services based on how many children are present at any given time; and
- mandate that all services have a Quality Improvement Plan (QIP) in place.

[42] As earlier discussed, the NQF established by the National Law and the National Regulations does not require early childhood teachers to be registered; however as mentioned above, registration is a requirement under some state and territory legislation. To work as an early childhood teacher, a person must hold or be "*actively working towards*" an approved early childhood teaching qualification, a formerly approved qualification that was commenced prior to the introduction of the NQF or an equivalent qualification as determined by ACECQA. The early childhood qualifications approved by ACECQA are four-year bachelor degrees or post-graduate qualifications.

[43] The NQS, which was established by the National Regulations and replaced the QIAS, acts as a benchmark for early childhood education and care services. There are seven broad standards relating to the following "*quality areas*":

(1) *Educational program and practice*: The educational program and practice of educators is stimulating, enhances and extends children's learning and development. In services for children over preschool age the program nurtures the development of life skills and complements children's experiences, opportunities and relationships at school, at home and in the community.

(2) *Children's health and safety*: Every child's health and wellbeing is safeguarded and promoted.

(3) *Physical environment*: The physical environment is safe, suitable and provides a rich and diverse range of experiences which promote children's learning and development.

(4) *Staffing arrangements*: Staffing arrangements create a safe and predictable environment for children and support warm, respectful relationships. Qualified and experienced educators and co-ordinators encourage children's active engagement in the learning program. Positive relationships among educators, co-ordinators and staff members contribute to an environment where children feel emotionally safe, secure and happy.

(5) *Relationships with children*: Relationships that are responsive, respectful and promote children's sense of security and belonging free them to explore the environment and engage in play and learning.

(6) *Collaborative partnerships with families and communities*: Collaborative relationships with families are fundamental to achieve quality outcomes for children. Community partnerships that focus on active communication, consultation and collaboration also contribute to children's learning and wellbeing.

(7) *Governance and leadership*: Effective leadership contributes to sustained quality relationships and environments that facilitate children's learning and development. Well documented policies and practices that are developed and regularly evaluated in partnership with educators, co-ordinators, staff members and families contribute to the ethical management of the service. There is a focus on continuous improvement.

[44] Within each quality area, there are more specific standards and elements of those standards. In respect of the first quality area, *Educational program and practice*, these are:

"**Standard 1.1--Program**

The educational program enhances each child's learning and development.

Element 1.1.1 - Approved learning framework
Curriculum decision-making contributes to each child's learning and development outcomes in relation to that child's identity, connection with community, wellbeing, confidence as learners and effectiveness as communicators.

Element 1.1.2 - Child-centred
Each child's current knowledge, strengths, ideas, culture, abilities and interests are the foundation of the program.

Element 1.1.3 - Program learning opportunities
All aspects of the program, including routines, are organised in ways that maximise opportunities for each child's learning.

Standard 1.2--Practice

Educators facilitate and extend each child's learning and development.

Element 1.2.1 - Intentional teaching
Educators are deliberate, purposeful, and thoughtful in their decisions and actions.

Element 1.2.2 - Responsive teaching and scaffolding
Educators respond to children's ideas and play and extend children's learning through open-ended questions, interactions and feedback.

Element 1.2.3 - Child-directed learning
Each child's agency is promoted, enabling them to make choices and decisions and influence events and their world.

Standard 1.3--Assessment and planning

Educators and co-ordinators take a planned and reflective approach to implementing the program for each child.

Element 1.3.1 - Assessment and planning cycle
Each child's learning and development is assessed or evaluated as part of an ongoing cycle of observation, analysing, learning, documentation, planning, implementation and reflection.

Element 1.3.2 - Critical reflection
Critical reflection on children's learning and development, both as individuals and in groups, drives program planning and implementation.

Element 1.3.3 - Information for families
Families are informed about the program and their child's progress."

[45] The ACECQA has published a detailed guide to the NQS which explains the purpose of each standard and element and how they are to be assessed, and sets out questions for critical reflection in respect of each standard.

[46] Services are assessed and rated against the NQS by the relevant state or territory regulatory authority. There are four assessment grades:

- Exceeding NQS
- Meeting NQS
- Working towards NQS
- Significant Improvement Required.

[47] In addition, a ranking of "*Excellent*" may be awarded by the ACECQA on application by a service which has already been rated as "*Exceeding*" in all seven quality areas. The ratings are publicly available.

[48] Since 2014, the National Law and National Regulations have mandated teacher/children ratios in early childhood centres. Initially, the following ratios were mandated:

- services providing care to less than 25 children on any given day – an early childhood teacher must be in attendance for at least 20% of operating hours; and

- services providing care to 25 or more children on any given day – an early childhood teacher must be in attendance for six hours on that day (where a service operates for 50 or more hours per week), or 60 percent of operating hours (where a service operates for less than 50 hours).

[49] In 2020, additional teacher/children ratios were mandated in early childhood centres:

- services providing care to between 60 and 80 children on any given day – a second early childhood teacher must be in attendance for at least three hours on that day (where a service operates for 50 or more hours per week), or 30% of operating hours (where a service operates for less than 50 hours); and

- services providing care to more than 80 children on any given day - a second early childhood teacher must be in attendance for at least six hours on that day (where a service operates for 50 or more hours per week), or 60% of operating hours (where a service operates for less than 50 hours).

[50] Several jurisdictions mandate standards higher than those in the National Law and National Regulations and the NQF with respect to early childhood teacher qualification ratios. For example, in New South Wales a second teacher must be present where a service cares for more than 40 children, with an additional teacher for every 20 children thereafter up to a

maximum of four teachers. The National Regulations also specify educator to child ratios as follows:

(a) for children from birth to 24 months of age -1 educator to 4 children;

(b) for children over 24 months and less than 36 months of age - 1 educator to 5 children;

(c) for children aged 36 months of age or over (not including children over preschool age) - 1 educator to 11 children;

(d) for children over preschool age - 1 educator to 15 children.

[51] For the purpose of the above ratios, the National Regulations provide that at least 50 percent of the educators must have or be actively working towards an approved diploma level education and care qualification, and all other educators must have or be actively working towards at least an approved certificate III level education and care qualification.

[52] The National Regulations require that the "*approved provider*" of an early childhood education and care service must designate in writing a "*suitably qualified and experienced educator, co-ordinator or other individual*" to be the "*educational leader*" of the service who has the responsibility to "*lead the development and implementation of educational programs in the service*". The National Law provides that the "*approved provider*" must be the operator of the service and have responsibility for the management of the staff. Services must also have at least one "*nominated supervisor*" for the service who has the responsibility to ensure that all children being educated and cared for by the service are adequately supervised at all times that the children are in the care of that service. They must also nominate staff members to be a "*person in day-to-day charge*" of the service. A Nominated Supervisor and a person in day-to-day charge must, among other things, have completed child protection training. The Approved Provider, a Nominated Supervisor or a person in day-to-day charge must be present at all times that the service is in operation.

A.5 Development of national curricula

[53] Prior to 2009, school curricula and, to the extent they existed at all, curricula for early childhood education, were a matter for State and Territory governments. As earlier mentioned, following the publication in August 2008 of *A national quality framework for early child education and care*, the EYLF foreshadowed in that discussion paper was delivered the following year.

[54] The EYLF describes its core function in the following way:

> "The Framework forms the foundation for ensuring that children in all early childhood education and care settings experience quality teaching and learning. It has a specific emphasis on play-based learning and recognises the importance of communication and language (including early literacy and numeracy) and social and emotional development. The Framework has been designed for use by early childhood educators working in partnership with families, children's first and most influential educators."

[55] The introduction to the EYLF states that its main elements and objects are as follows:

"The Framework conveys the highest expectations for all children's learning from birth to five years and through the transitions to school. It communicates these expectations through the following five Learning Outcomes:

- Children have a strong sense of identity
- Children are connected with and contribute to their world
- Children have a strong sense of wellbeing
- Children are confident and involved learners
- Children are effective communicators.

The Framework provides broad direction for early childhood educators in early childhood settings to facilitate children's learning.

It guides educators in their curriculum decision-making and assists in planning, implementing and evaluating quality in early childhood settings. It also underpins the implementation of more specific curriculum relevant to each local community and early childhood setting.

The Framework is designed to inspire conversations, improve communication and provide a common language about young children's learning among children themselves, their families, the broader community, early childhood educators and other professionals."

[56] The elements of the EYLF are further described as follows:

"The Framework puts children's learning at the core and comprises three inter-related elements: Principles, Practice and Learning Outcomes… All three elements are fundamental to early childhood pedagogy and curriculum decision-making.

Curriculum encompasses all the interactions, experiences, routines and events, planned and unplanned, that occur in an environment designed to foster children's learning and development. The emphasis in the Framework is on the planned or intentional aspects of the curriculum.

Children are receptive to a wide range of experiences. What is included or excluded from the curriculum affects how children learn, develop and understand the world.

The Framework supports a model of curriculum decision-making as an ongoing cycle. This involves educators drawing on their professional knowledge, including their in-depth knowledge of each child.

Working in partnership with families, educators use the Learning Outcomes to guide their planning for children's learning. In order to engage children actively in learning, educators identify children's strengths and interests, choose appropriate teaching strategies and design the learning environment.

Educators carefully assess learning to inform further planning."

[57] The EYLF emphasises the importance of the role of professional expertise, judgment and pedagogy in the delivery of children's education. In this respect it relevantly states:

> "Educators' professional judgements are central to their active role in facilitating children's learning. In making professional judgements, they weave together their:
>
> - professional knowledge and skills
> - knowledge of children, families and communities
> - awareness of how their beliefs and values impact on children's learning
> - personal styles and past experiences.
>
> They also draw on their creativity, intuition and imagination to help them improvise and adjust their practice to suit the time, place and context of learning.
>
> Different theories about early childhood inform approaches to children's learning and development. Early childhood educators draw upon a range of perspectives in their work which may include:
>
> - developmental theories that focus on describing and understanding the processes of change in children's learning and development over time socio-cultural theories that emphasise the central role that families and cultural groups play in children's learning and the importance of respectful relationships and provide insight into social and cultural contexts of learning and development
> - socio-behaviourist theories that focus on the role of experiences in shaping children's behaviour
> - critical theories that invite early childhood educators to challenge assumptions about curriculum, and consider how their decisions may affect children differently
> - post-structuralist theories that offer insights into issues of power, equity and social justice in early childhood settings."

[58] The EYLF states that five principles underpin practice that is focused on assisting all children to make progress in relation to the learning outcomes:

(1) Secure, respectful and reciprocal relationships with children.

(2) Partnerships with families and support professionals.

(3) High expectations and a commitment to equity.

(4) Respect for diversity.

(5) Ongoing learning and reflective practice in order to build professional knowledge and develop learning communities.

[59] In terms of practice, the EYLF states:

"The principles of early childhood pedagogy underpin practice. Educators draw on a rich repertoire of pedagogical practices to promote children's learning by:

- adopting holistic approaches
- being responsive to children
- planning and implementing learning through play
- intentional teaching
- creating physical and social learning environments that have a positive impact on children's learning
- valuing the cultural and social contexts of children and their families
- providing for continuity in experiences and enabling children to have successful transition
- assessing and monitoring children's learning to inform provision and to support children in achieving learning outcomes."

[60] The practice of "*Intentional teaching*" is explained in the following way:

"Intentional teaching is deliberate, purposeful and thoughtful.

Educators who engage in intentional teaching recognise that learning occurs in social contexts and that interactions and conversations are vitally important for learning. They actively promote children's learning through worthwhile and challenging experiences and interactions that foster high-level thinking skills. They use strategies such as modelling and demonstrating, open questioning, speculating, explaining, engaging in shared thinking and problem solving to extend children's thinking and learning. Educators move flexibly in and out of different roles and draw on different strategies as the context changes. They plan opportunities for intentional teaching and knowledge-building. They document and monitor children's learning."

[61] The practice of "*assessment*" is also explained in detail in the EYLF:

"*Assessment* for children's learning refers to the process of gathering and analysing information as evidence about what children know, can do and understand. It is part of an ongoing cycle that includes planning, documenting and evaluating children's learning.

….

Educators use a variety of strategies to collect, document, organise, synthesise and interpret the information that they gather to assess children's learning. They search for appropriate ways to collect rich and meaningful information that depicts children's learning in context, describes their progress and identifies their strengths, skills and understandings. More recent approaches to assessment also examine the learning strategies that children use and reflect ways in which learning is co-constructed through interactions between the educator and each child. Used effectively, these approaches to assessment become powerful ways to make the process of learning visible to children and their families, educators and other professionals."

[62] In relation to each of the five outcomes earlier identified, the EYLF further explicates the outcome and its elements and sets out when children evidence the outcome and the means by which educators may promote it.

[63] Since 2012, early childhood education and care services have been required under the National Law and the National Regulations to provide an educational program based on an approved learning framework. The only frameworks for early childhood education approved by ACECQA are the EYLF and, for Victoria, the *Victorian Early Years Learning and Development Framework* (VEYLDF). The VEYLDF is substantially based on the EYLF.

[64] In primary and secondary schools, the Australian Curriculum was implemented in 2011 and was the first national school curriculum in Australian history. The Australian Curriculum is aligned with the EYLF and builds on EYLF learning outcomes. The Australian Curriculum's content specifies the knowledge, understanding and skills that young people are expected to learn across the years of schooling Foundation/Kindergarten to Year 10 and what teachers are to teach, and the achievement standards describe what students are typically able to understand and able to do. The Australian Curriculum is designed to ensure students develop the knowledge and understanding on which the major disciplines are based and emphasises seven general capabilities, being literacy, numeracy, information communication technology competence, critical and creative thinking, ethical behaviour, personal and social competence and intercultural understanding.

A.6 Educational Services (Teachers) Award

[65] Clause 4.1 of the EST Award provides that it covers employers throughout Australia in the "*school education industry*" and the "*children's services and early childhood education industry*" and their employees, to the exclusion of any other modern award. The industries referred to are defined in clause 4.2 as follows:

> **4.2** For the purposes of this award:
>
> **(a)** **school education industry** means the provision of education, including preschool or early childhood education, in a school registered and/or accredited under the relevant authority in each State or Territory or in an early childhood service operated by a school and includes all operations of the school. Where the provision of school education is directed, managed and/or controlled by a central or regional administration of a system of schools it may also include the persons involved in providing such services to schools; and
>
> **(b)** **children's services and early childhood education industry** means the industry of long day care, occasional care (including those occasional care services not licensed), nurseries, childcare centres, day care facilities, family based childcare, out-of-school hours care, vacation care, adjunct care, in-home care, kindergartens and preschools, mobile centres and early childhood intervention programs.

[66] The coverage of the EST Award is subject to certain exclusions specified in clause 4.4, which relevantly include: teacher/integration aids; helpers; classroom assistants; director/supervisors in or in connection with childcare, preschool, long day care centres,

childminding centres or outside of school hours care services (other than university qualified early childhood teachers);[7] and principals and deputy principals.[8]

[67] Clause 14 of the EST Award deals with the classification structure in the award. There are 12 classification levels. There are no classification definitions as such since the classifications are based on annual progression. Clause 14.2(a) provides that "*On appointment, an employee will be classified and placed on the appropriate level on the wage scale in clause 17—Minimum rates, according to their qualifications and teaching experience*". In this respect, clause 14.4 provides:

> **14.4 Progression**
>
> **(a)** An employee who is 3 year trained will commence on Level 1 of the wage scale in clause 17—Minimum rates and progress according to normal years of service to Level 12 of the scale.
>
> **(b)** An employee who is 4 year trained will commence on Level 3 of the wage scale in clause 17—Minimum rates and progress according to normal years of service to Level 12.
>
> **(c)** An employee who is 5 year trained will commence on Level 4 of the wage scale in clause 17—Minimum rates and progress according to normal years of service to Level 12 of the scale.
>
> **(d)** All other teachers and 2 year trained teachers as defined in clause 2—Definitions will commence on Level 1 of the wage scale in clause 17—Minimum rates and progress according to normal years of service to a maximum of Level 5.

[68] As will be discussed later in this decision, all currently graduating teachers are 4 year trained, which means that the minimum starting salary for a newly-qualified teacher is, pursuant to clause 14.4(b), the Level 3 salary.

[69] Clause 15 provides for the hours of work for employees covered by the EST Award except for teachers (including teachers appointed as director) employed in an early childhood service which operates for 48 or more weeks per year who are covered by Schedule A of the award.[9] Clause 15.1 states that the clause "*provides for industry specific detail and supplements the NES that deals with maximum weekly hours*". The clause relevantly provides as follows:

- clause 15.3 provides that the ordinary hours of an employee may be averaged over 12 months;
- clause 15.4 provides that an employee's ordinary hours during term weeks are variable and, in return, the employee is not generally required to attend for periods

[7] Clause 4.4(c)

[8] Clause 4.4(d)

[9] Clause 15.2

of time when students are not present subject to the needs of the employer with respect to professional development, student-free days and other activities requiring the employee's attendance;

- clauses 15.5 and 15.6 provide that the maximum number of days an employee will be required to attend during term weeks and non-term weeks is 205 in each school year (i.e. 41 weeks), subject to specified circumstances which are not included in calculating the 205 days; and

- clause 15.9 provides that the annual salary and any applicable allowances payable under the EST Award are paid in full satisfaction of an employee's entitlements for the school year or a proportion of the school year, and that the employee's absence from school during non-term weeks is deemed to include their entitlement to annual leave.

[70] In summary, teachers to whom clause 15 applies are required to work no more than 41 weeks per year (subject to some exceptions), are paid a salary which is intended to compensate for all hours worked, and may not take annual leave during school term weeks.

[71] Clause 17.1 provides for the minimum rates of pay under the EST Award, which are expressed as a "*Minimum annual rate*" for a full-time employee. The current pay scale is as follows:

Classification	Minimum annual rate (full-time employee)
	$
Level 1	52,420
Level 2	53,500
Level 3	54,956
Level 4	56,938
Level 5	58,922
Level 6	60,769
Level 7	62,615
Level 8	64,597
Level 9	66,582
Level 10	68,565
Level 11	70,550
Level 12	72,531

[72] Clause 17.2 provides for an additional payment of 4% on the minimum annual rates in clause 17.1 for full-time employees who work in an early childhood service which usually provides services over a period of at least 8 hours each day for 48 weeks or more. Clause 17.2 is principally applicable to teachers employed in long day care centres, with clause 17.1 mainly applying to teachers in schools and preschools. The effective minimum annual salaries for employees covered by clause 17.2 are:

Classification	Minimum annual rate (full-time employee)
	$
Level 1	54,517

Level 2	55,640
Level 3	57,154
Level 4	59,216
Level 5	61,279
Level 6	63,200
Level 7	65,120
Level 8	67,181
Level 9	69,245
Level 10	71,308
Level 11	73,372
Level 12	75,432

[73] Clause 17.3 provides that weekly rates for employees covered by the EST Award can be calculated by dividing the annual rate by 52.18.

[74] Clause 19 provides for various allowances. Clause 19.2 provides that full-time teachers who are appointed as a director of an early childhood service are entitled to an allowance calculated on the basis of the number of places at the centre for which they are responsible as follows:

Level	**Number of places**	**$ per annum**
1	Up to 39 places	6028.30
2	40–59 places	7469.85
3	60 or more places	9068.66

[75] Clause 19.3 provides for a "*leadership allowance*" applicable to a teacher in schools in relation to whom the employer requires "*the performance of administrative, pastoral care and/or educational leadership duties additional to those usually required of teachers by the employer*",[10] with the allowance being "*linked to a position of leadership rather than tied to an individual employee*".[11] Clause 19.3(c) divides the leadership allowances into three categories: Category A covers schools with more than 600 students, Category B schools with between 300-600 students, and Category C schools with between 100-299 students. Clause 19.3(f) provides that a school with less than 100 students will "*determine positions of responsibility and allowances which are appropriate to its structure*". The leadership allowance also has three levels: level 1 applies to positions of leadership "*such as responsibility for the management of a major department or a pastoral care or educational leadership position of equivalent status*", and Levels 2 and 3 apply to positions of leadership "*such as small learning area department heads, additional responsibilities such as co-ordination of a school publication, sports co-ordinator or similar responsibilities*". The quanta of the allowances are:

Level	**$ per annum**		
	A	**B**	**C**
1	4193.60	3669.40	3302.46
2	2883.10	2489.95	2096.80
3	1441.55	1231.87	838.72

[10] Clause 19.3(a)(ii)

[11] Clause 19.3(a)(iii)

[76] Schedule A of the EST Award applies to teachers employed in early childhood services operating for at least 48 weeks per year. It relevantly provides that:

- a full-time employee's ordinary hours of work will be 38 hours per week, which may be averaged over a period of 4 weeks;[12]
- a casual employee's maximum ordinary hours will be 38 hours per week;[13]
- the ordinary hours of work will be worked between 6.00am and 6.30pm on any five days Monday to Friday, and will not exceed 8 hours on any day;[14]
- the employer and employee may agree to a rostered day off system operating on the basis that 19 days will be worked in each 4 week period;[15]
- an employee responsible for programming and planning for a group of children will be entitled to at least 2 hours' non-contact time per week for the purpose of planning, preparing, evaluating and programming activities, during which the employee must not be required to supervise children or perform other duties directed by the employer;[16]
- an employee will be paid overtime for all authorised work performed outside or in excess of the ordinary or rostered hours at the rate of 150% of the minimum hourly rate for the first 3 hours and 200% thereafter;[17]
- however part-time employees who agree to work hours in excess of their ordinary hours will be paid at the ordinary rate for up to 8 hours in a day during the ordinary hours of operation of the early childhood service;[18]
- the standard time off in lieu of overtime provisions apply;[19] and
- a system of shiftwork, with shiftwork loadings, is provided for.[20]

[12] Clause A.1.1

[13] Clause A.1.2

[14] Clause A.1.3

[15] Clause A.2

[16] Clause A.3.2

[17] Clause A.4.1(a)

[18] Clause A.4.1(b)

[19] Clause A.4.2

[20] Clause A.5

B. THE IEU'S EQUAL REMUNERATION APPLICATION

B.1 The application

[77] The IEU proceeded at the hearing on the basis of an amended application dated 27 September 2017. That amended application sought an "*Early Childhood Teachers in Long Day Care Centres and Preschools Equal Remuneration Order 2019*" (proposed ERO). The proposed ERO would cover teachers, other than those employed by a State or Territory government, employed in long day care centres and preschools, and their employers, and would also encompass labour hire employees engaged in working in long day care centres and preschools, and their employers. The salary obligations that the proposed ERO would impose are as follows:

Level (as determined in accordance with clause 13 of the Award)	Equal Remuneration Payment Per Year (Preschools)	Equal Remuneration Payment Per Year (Long Day Care)
	$	$
1	68,929	71,686
2	68,929	71,686
3	68,929	71,686
4	68,929	71,686
5	83,136	86,461
6	83,136	86,461
7	90,236	93,845
8	93,793	97,545
9	102,806	106,918
10	102,806	106,918
11	102,806	106,918
12	102,806	106,918

[78] These salary levels were set relative to the EST Award salary levels as they were at the time that the amended application was filed. The proposed ERO provided that any increase in minimum wages in the EST Award had to be applied to the above salary amounts. If percentage increases to the EST Award minimum rates of pay awarded since the date of the IEU's amended equal remuneration application are applied to the rates of pay in the proposed ERO, they would be as follows:

Level (as determined in accordance with clause 14 of the award)	Equal Remuneration Payment Per Year (Preschools)	Equal Remuneration Payment Per Year (Long Day Care)
	$	$
1	74,768	77,758
2	74,768	77,758
3	74,768	77,758
4	74,768	77,758
5	90,178	93,785
6	90,178	93,785

7	97,880	101,794
8	101,738	105,808
9	111,514	115,975
10	111,514	115,975
11	111,514	115,975
12	111,514	115,975

[79] The salary rates claimed by the IEU would involve salary increases of about 36% for a graduate early childhood teacher and about 54% for an early childhood teacher at the top of the pay scale. The proposed ERO also contains ancillary provisions concerning the payment of salaries and providing employees with access to the ERO.

[80] The grounds for the application contend that early childhood teachers employed in long day care centres and preschools covered by the application do not receive equal remuneration for work which is of equal or comparable value to work performed by other professionals in other industries and by teachers employed in other parts of the education industry. The following factual contentions are advanced:

- the sector is highly gender- segregated, with over 95% of early childhood teachers employed in long day care centres and preschools being women;
- there is a high turnover of staff compared to other occupations and industries, and an acute shortage of appropriately qualified staff;
- the workforce in long day care centres is younger compared to the Australian workforce overall;
- there is low union density;
- the employers in the sector are either not-for-profit organisations or operate with relatively small profit margins because of the nature of the service and funding arrangements;
- the main source of revenue is fees charged to parents, and there is constant pressure to minimise fees charged to ensure accessibility to the service;
- the federal government provides subsidies to parents in relation to the cost of child care, and State governments provide direct funding for the operation of preschools;
- early childhood teachers are university-qualified professionals;
- early childhood teachers employed in long day care centres or preschools who are covered by the EST Award are employed either as teachers or Directors;
- in most cases, early childhood teachers are employed as such because of government requirements that such a teacher must be employed or in attendance as a condition of operation;

- early childhood teachers have overall responsibility for the educational program provided by long day care centres or preschools, and teachers develop the curriculum applying their tertiary skills and knowledge, are the pedagogical leaders at the service, and professionally develop and support the delivery of education by other employees;

- a Director covered by the EST Award is an early childhood teacher appointed to be responsible for the overall management and administration of a long day care centre or preschool, and the Director's role includes ensuring compliance with regulatory requirements; pedagogical leadership; overall management; administration and leadership; accounting and financial management; recruitment and human resources management; communication and engagement with staff members, children, parents, business contacts, community/local leaders and other stakeholders; and supporting and participating in management committees or other groups;

- the environment in which early childhood teachers perform their work is intense, noisy, requires dealing with human waste, is physically and emotionally demanding, and likely to lead to higher levels of illness;

- research has linked the employment of university-qualified early childhood teachers to higher quality education and care;

- early childhood education and care delivers significant social and economic benefits to the Australian economy, society, families and individuals;

- high quality early childhood education and child care environments lead to positive intellectual and cognitive development and later-life learning outcomes in children and improved social, health and behavioural outcomes in children; and

- the workforce participation of women, and the consequent economic benefit, is directly linked to high quality and accessible child care.

[81] The IEU contends that the majority of early childhood teachers covered by the EST Award are award reliant, in that the minimum award rates are usually the actual rates of pay received by such teachers. Prior to the making of the EST Award, there were award wage rates for teachers in long day care centres in a number of states. The transition from higher State award rates in New South Wales to the rates in the EST Award resulted in minimum wages for early childhood teachers in that State dropping by between $3,000 and $11,000 per annum, which exacerbated the undervaluation of early childhood teachers. The IEU contends that the incidence of over-award payments and collective bargaining in the sector is low and, where over-award payments are made through collective agreements or individual contracts, they are rarely significantly above the wage rates in the EST Award.

[82] The IEU's central contention as to the existence of gender-based undervaluation is that the wage rates paid to early childhood teachers in long day care centres and preschools do not adequately reflect the skills, responsibilities and qualifications required to perform the work, when compared to work of equal or comparable value requiring equal or comparable qualifications, skills and responsibilities in other occupations and/or other industries. This has been caused by a variety of factors that result from the predominance of women working in the sector, including:

- social undervaluation of the skills and responsibilities required to perform the work because of the perception that they are "*soft*" skills, an extension of the unpaid work performed by women in the domestic sphere, skills that "*naturally*" occur in women rather than are learnt or developed, and caring work; and

- the limited bargaining power of early childhood teachers in long day care centres and preschools to achieve recognition of the skills, responsibilities, qualifications and benefit of the work through enterprise bargaining.

[83] The IEU contends that the undervaluation can be seen by comparing the work performed by early childhood teachers and the remuneration paid to them to the following comparator occupations:

(1) primary school teachers employed in schools; and

(2) professional engineers.

[84] In respect of the first comparator, primary school teachers employed in government and non-government schools are also covered by the EST Award, to the extent that they are in the federal industrial relations system, and the same minimum salary rates generally apply. The only difference in the award minimum remuneration is the additional 4% loading which applies to early childhood teachers in long day care centres who do not receive school holidays. The actual remuneration paid to primary school teachers, the IEU contends, is much higher than for early childhood teachers employed in long day care centres and preschools, and the same is the case for primary school teachers in promotional positions compared to Directors of long day centres and preschools. However, early childhood teachers in preschools that are part of government schools are paid the same as primary school teachers in government schools.

[85] As to the second comparator, the IEU contends that the work of early childhood teachers is comparable to the work of professional engineers with three or four year university qualifications, but remuneration paid to professional engineers is much higher than remuneration paid to early childhood teachers in long day care centres and preschools.

[86] The IEU contends that the effects of undervaluation on early childhood teachers include that:

- it is difficult to retain them in employment in long day care centres and, to a lesser extent, in preschools, because many teachers leave the sector to obtain higher paying, less stressful jobs in other educational settings;

- some teachers use employment in long day care centres and preschools as a "*stepping stone*" to entry into school teaching positions with higher pay;

- low wages and poor industrial conditions result in job vacancies remaining unfilled or exemptions being sought to permit under qualified employees to be appointed to perform work; and

- children's developmental outcomes and emotional wellbeing are affected by the shortage of early childhood teachers and the lack of continuity of educators.

[87] The IEU contends that there is no suitable alternative remedy to an equal remuneration order to address the identified undervaluation. A low paid authorisation pursuant to s 243 of the FW Act, or a low paid workplace determination pursuant to Division 2 of Part 2-5 of the FW Act, even if available, would not adequately address the gendered undervaluation of the work. An application to vary the EST Award pursuant to s 158 of the FW Act could not, it submitted, result in increases to minimum award wages comparable to actual wage rates earned in other occupations and/or other industries and would therefore not meaningfully address the gendered undervaluation of the work.

B.2 Principles applicable to equal remuneration applications

[88] Section 302 of the FW Act, pursuant to which the IEU's equal remuneration application is made, provides as follows:

> **302 FWC may make an order requiring equal remuneration**
>
> Power to make an equal remuneration order
>
> (1) The FWC may make any order (an **equal remuneration order**) it considers appropriate to ensure that, for employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value.
>
> *Meaning of **equal remuneration for work of equal or comparable value***
>
> (2) **Equal remuneration for work of equal or comparable value** means equal remuneration for men and women workers for work of equal or comparable value.
>
> *Who may apply for an equal remuneration order*
>
> (3) The FWC may make the equal remuneration order only on application by any of the following:
>
> (a) an employee to whom the order will apply;
>
> (b) an employee organisation that is entitled to represent the industrial interests of an employee to whom the order will apply;
>
> (c) the Sex Discrimination Commissioner.
>
> *FWC must take into account orders and determinations made in annual wage reviews*
>
> (4) In deciding whether to make an equal remuneration order, the FWC must take into account:

(a) orders and determinations made by the FWC in annual wage reviews; and

(b) the reasons for those orders and determinations.

Note: The FWC must be constituted by an Expert Panel in annual wage reviews (see section 617).

Restriction on power to make an equal remuneration order

(5) However, the FWC may make the equal remuneration order only if it is satisfied that, for the employees to whom the order will apply, there is not equal remuneration for work of equal or comparable value.

[89] There is no contest between the parties that the IEU's equal remuneration application is to be determined in accordance with the principles established in the 2015 decision. Broadly speaking, the 2015 decision identified two necessary stages in the consideration of an application for an equal remuneration order. First, the Commission must reach a state of satisfaction under s 302(5) that "*for the employees to whom the order will apply, there is not equal remuneration for work of equal or comparable value*". The 2015 decision characterised this as a jurisdictional prerequisite for the making of an equal remuneration order on the basis that s 302(5) provides that the Commission may only make such an order upon reaching this state of satisfaction. The 2017 decision summarised what would be necessary for the state of satisfaction to be reached in relation to an application for an equal remuneration order to apply to a group of workers which was founded upon a comparison with another group of workers as follows (footnotes omitted):

"[18] The "comparative exercise" which is required as a jurisdictional prerequisite to the making of an equal remuneration order under s.302(5) to be carried out between the group of employees to be covered by the proposed order and an identified comparator group has three elements:

(1) the two groups must perform work of equal or comparable value;

(2) they must be of the opposite gender; and

(3) they must be unequally remunerated."

[90] The second stage of consideration under s 302(5) identified in the 2015 decision is the exercise of a discretion as to whether an order should be made. Considerations that are relevant to the exercise of such a discretion were summarised in the 2017 decision as follows:

"[19] Once this jurisdictional prerequisite is demonstrated, the Commission has a discretion as to whether to make an equal remuneration order. The circumstances which may be relevant to the exercise of the discretion include:

(i) the circumstances of the employees to whom the order will apply;

(ii) eliminating gender based discrimination;

(iii) the capacity to pay of the employers to whom the order will apply;

(iv) the effect of any order on the delivery of services to the community;

(v) the effect of any order on a range of economic considerations, including any impact on employment, productivity and growth;

(vi) the effect of any order on the promotion of social inclusion by its impact on female participation in the workforce; and

(vii) the effect of any order on enterprise bargaining."

[91] In addition to the above, s 302(4) requires the Commission in the exercise of the discretion to take into account orders and determinations made by the Commission in annual wage reviews and the reasons for those orders and determinations.

[92] The nature of the comparative exercise which upon satisfaction under s 302(5) must be founded was elaborated upon in the 2015 decision in a number of important respects. Firstly, as to the need for a comparator of opposite gender, the Full Bench:

> "[278] 'Equal', according to its ordinary meaning, posits one thing being the same or alike in quantity, degree or value as another thing. Therefore when s.300 and s.302(1) refer to ensuring equal remuneration for employees, this must necessarily involve making the remuneration for one employee or group of employees equal to that of another employee or group of employees in circumstances where the Commission is satisfied under s.302(5) that they do not currently have equality of remuneration. In order to determine that the remuneration of relevant employees or groups of employees is unequal and needs to be equalised, it is necessary for a comparison between the employees or groups of employees to be made. The nature of this comparison - that is, who is to be compared with whom for the purposes of s.302 - is described by the words 'for men and women workers for work of equal or comparable value'.
>
> [279] The words 'for men and women workers' (as used in ss.300 and 302(2)) are clearly fundamental, since (apart from the reference to the Sex Discrimination Commissioner in s.302(3)(c) as one of the persons who may apply for an equal remuneration order) they are the only express indicator in Part 2–7 that the Part is concerned with *gender* inequity in remuneration, and not inequity based on other criteria such as, for example, race or disability. No party before us contended that Part 2–7 had any non gender-related purpose. The words must therefore do the work of ensuring that the comparative task under Part 2–7 is based on gender. They can only do that work if the 'and' in the expression is given a dispersive effect, so that the words are read as meaning 'for male workers on the one hand and female workers on the other hand'. An alternate reading whereby 'men and women workers' is read as referring to a single undifferentiated group within which equal remuneration for work of equal or comparable value must be ensured would mean that the gender foundation of Part 2–7 is removed. This approach cannot be accepted as correct for that reason."

[93] The Full Bench said in relation to the selection of the comparator group:

> "[291] It is not necessary for the purpose of this decision to attempt to prescribe or establish guidelines in respect of how an appropriate comparator might be identified. It will ultimately be up to an applicant for an equal remuneration order to bring a case based on an appropriate comparator which permits the Commission to be satisfied that the jurisdictional prerequisite in s.302(5) is met. It is likely that the task of determining whether s.302(5) is satisfied will be easier with comparators that are small in terms of the number of employees in each, are capable of precise definition, and in which employees perform the same or similar work under the same or similar conditions, than with comparators that are large, diverse, and involve significantly different work under a range of different conditions. But in principle there is nothing preventing the comparator groups consisting of large numbers of persons and/or persons whose remuneration is dependent on particular modern awards."

[94] As to the comparison of work value required, the Full Bench in the 2015 decision summarised the proper approach to be taken as follows:

> "8. The inclusion of the concept of 'comparable' value serves the purpose of applying the provisions of Part 2–7 not just to the same or similar work that is equal in value, but also to dissimilar work which is none the less capable of comparison.
>
> 9. The comparison may be between different work in different occupations and industries. Traditional work value criteria will be applicable in determining whether the work of the comparator employee(s) is of equal or comparable value, but other criteria may also be relevant depending on the nature of the work. Work value enquiries have been characterised by the exercise of broad judgment. Depending upon the specific characteristics of the work under consideration, it may be appropriate to apply different or additional criteria in order to assess equality or comparability in value. Job evaluation techniques may useful in comparing work. Each case will turn on its own facts in this respect."[21]

B.3 The IEU's primary comparator – primary school teachers in NSW

[95] The primary comparison relied upon by the IEU for the purpose of satisfying the jurisdictional prerequisite in s 302(5) of the FW Act for the making of an equal remuneration order is between female employees who would be covered by its proposed ERO and male primary school teachers employed in the government and catholic systemic schools in New South Wales. It contends that the three elements of the jurisdictional prerequisite are satisfied, in that:

(1) early childhood teachers in long day care centres and preschools perform work of equal or comparable value to male school teachers in the comparator group;

(2) early childhood teachers are an overwhelmingly female group, and the comparator group is (by definition) entirely male; and

(3) male government and catholic systemic school teachers in New South Wales earn significantly more than early childhood teachers.

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[21] [2015] FWCFB 8200, 256 IR 362 at the Summary following [367]

B.3.1 Comparison of pay rates

[96] In respect of the third proposition, it not in contest that that early childhood teachers earn less than government and Catholic systemic school teachers in New South Wales. We have earlier set out the current payscales for teachers under the EST Award, which sets the legal minimum wage rates for early childhood teachers in the federal system. It was not in dispute and was, in any event, firmly established by the evidence that the EST Award rates constitute the actual or close to the actual wage rates for the large majority of early childhood teachers. The IEU provided an analysis of a sample of job advertisement for early childhood positions which showed that the rates of pay on offer were very close to the EST Award rates.[22] It also provided an analysis of 224 enterprise agreements operating in the sector. These only cover a minority of early childhood teachers, and in over 90% of cases provided for wages that were less than the salaries claimed by the IEU in its proposed ERO which were necessary to equalise remuneration with primary school teachers in NSW.[23]

[97] Primary school teachers in the New South Wales Government school system are covered by the *Crown Employees (Teachers in Schools and Related Employees) Salaries and Conditions Award 2020* (NSW Teachers Award 2020), an award of the Industrial Relations Commission of New South Wales (NSW IRC). The current pay scale in this award, contained in Schedule 1A, is:

Band/Level of Accreditation	Salary from the first pay period to commence on or after 1.1.2021 $
Band 1(Graduate)	72,263
Band 2 (Proficient)	87,157
Band 2.1	94,601
Band 2.2	98,330
Band 2.3	107,779
Band 3 (Highly Accomplished/ Lead)	114,720

[98] The above rates range from 31% higher than the EST Award rates for a 4-year trained graduate teacher in a preschool, to 58% higher than for a preschool teacher at the top of the pay scale.

[99] Primary school teachers employed in Catholic systemic schools in New South Wales are covered by the *NSW and ACT Catholic Systemic Schools Enterprise Agreement 2020*. The current salaries for teachers under this agreement (except for the Archdiocese of Canberra and Goulburn) who have been employed since 2014 are provided for in Table 1A of Schedule A, and are, from 1 January 2021:

[22] Exhibit 76, Document 99

[23] Exhibit 76, Document 97

Conditionally Accredited Teacher (Level 1)	65,165
Conditionally Accredited Teacher (Level 2)	72,263
L Band 1 (Graduate)	72,263
Band 2 (Proficient Teacher) Level 1	87,157
Band 2 (Proficient Teacher) Level 2	87,157
Band 2 (Proficient Teacher) Level 3	94,601
Band 2 (Proficient Teacher) Level 4	98,330
Band 2 (Proficient Teacher) Level 5	107,779
Band 3 (Highly Accomplished)	114,720

[100] The salary rate for a 4-year trained graduate teacher under the above agreement is 31% higher than under the EST Award for a preschool teacher, and the salary rate for a teacher at the top of the scale is 58% higher.

B.3.2 Whether an appropriate comparator

[101] However the first two of the IEU's propositions are in contest. It is convenient to deal with the second proposition first. The Australian Childcare Alliance (ACA) submitted that:

- the subset of primary school teachers which the IEU wishes to use as a comparator forms part of a sector that is predominantly female;
- on the basis of the ABS data provided by the IEU as part of its case, the comparison really being advanced is between early childhood teachers, who are 95.5% female, and primary school teachers, who are 83.1% female; and
- the approach taken by the IEU is fundamentally inconsistent with the work of Part 2-7, Division 2 of the FW Act in that it was comparing what in truth is a female dominated sector to another female dominated sector.

[102] The Australian Federation of Employers and Industries (AFEI) similarly submitted that the comparison urged by the IEU is effectively a comparison between two female-dominated vocations, which does not assist achieving the remedial purpose of the provisions of Part 2-7 to remedy gender wage inequality and promote equal pay. The AFEI pointed to statistical information published by the NSW Department of Education which indicated that the proportion of female teachers in NSW public primary schools was 82% in 2016, 81.7% in 2015 and 81.3% in 2014. It submitted that it followed that the work performed by primary school teachers is not characteristically male work and therefore that the wage outcomes for primary school teachers cannot be explained as either the manifestation of considerations unique to male workers or some form of advantage enjoyed predominantly by male workers.

[103] The IEU submitted in reply that the focus of the legislation is on identifying one or more employees of one gender and comparing them to one or more employees of the other gender who do work of equal or comparable value. There is no reason, as a matter of principle or policy, why the fact that a subgroup of workers who are male cannot be used as a comparator merely because the majority of workers in that subgroup are female. It submitted that the employers' approach would tend to undermine the essential purpose of the Division 2 of Part 2-7: if male call centre operators were being paid 10% more than female call centre operators, the fact that call centre operators are predominantly female not only would not, but

as a matter of policy should not, be able to defeat a claim. The IEU submitted that it cannot be gainsaid that the comparator group are workers who are male.

[104] We consider that the submissions of the ACA and the AFEI must be accepted on this point. As stated in the 2015 decision, Part 2-7 is concerned with *gender* inequity in remuneration, and its function is to equalise the remuneration of male workers on the one hand and female workers on the other who perform work of equal or comparable value in circumstances where they do not currently have equality of remuneration. The starting point of the consideration required by s 302(5) is therefore the proper identification of the two workers or groups of workers of opposite gender who are to be compared. We will assume, without deciding, that where two *groups* of workers are being compared, the first group may consist of workers of *predominantly* one gender and the second group may consist of workers of *predominantly* the opposite gender.[24] But it appears to us that it is essential that where groups of workers are to be compared, each group must have an authentic group identity in order for the purpose of the legislation to be served. By this we mean that the first group that is to be the subject of an equal remuneration order sought must consist of one category of workers who together perform the same work for a lower rate of remuneration and are of one gender (or, perhaps, predominantly of one gender), and the comparator group must consist of another category of workers who together perform the same work for a higher rate of remuneration, and are of the opposite gender (or, perhaps, are predominantly of the opposite gender). If the work of the two categories of workers is found to be of equal or comparable value, the requisite state of satisfaction under s 302(5) may then be reached.

[105] The identity of either comparator group will not be authentic if it has been constructed or manipulated to produce an appearance of gender pay inequity when, in substance, no relevant gender pay inequity actually exists. As earlier stated, the IEU referred in its submissions to a hypothetical example of female call centre operators in a female-dominated workforce being compared to the male call centre operators in the same workforce, where the former group is being paid 10% less than the latter group. Both groups would have an authentic group identity if they each comprised the entirety of the relevant gender component of the call centre operator workforce. Because the two groups are obviously performing work of equal value (because they perform the same work), but have unequal remuneration, it would be open for the Commission to reach the requisite state of satisfaction under s 302(5).

[106] However, if we modify this example of a call centre workforce somewhat, the difficulties which arise from an invalid manipulation of the identities of the comparator groups become apparent. If the half of the female component of that workforce is paid $800 per week and the other half of the female workforce is paid $900 per week, and half of the male component of the workforce is paid $800 week and the other half of the male workforce is paid $900 per week, then it is possible to construct the following two scenarios:

(1) An equal remuneration order is sought for that half of the female workforce earning $800 per week on the basis of a comparison with the half of the male workforce earning $900 per week and performing the same work.

[24] Cf. [2015] FWCFB 8200, 256 IR 362 at [240]-[243]

(2) An equal remuneration order is sought for that half of the male workforce earning $800 per week on the basis of a comparison with the half of the female workforce earning $900 per week and performing the same work.

[107] In each case, the comparator groups have been artificially selected in a way which gives the appearance of there being unequal remuneration for men and women workers for work of equal value. They potentially lead to a result whereby the entire workforce is raised to a wage of $900 per week. However, as a matter of substance, there is no *gender* pay inequality. There may be unfair and unjustified pay differentials in the hypothetical workforce, but they are not differentials which run along gender lines. A comparison between the whole of the female component of the hypothetical workforce and the whole of the male component would suggest that there is no inequality of remuneration as between the genders. This demonstrates that the Commission must guard against artificially constructed comparator groups which are in substance being used as a vehicle to achieve "comparative wage justice" rather than remedying genuine gender pay inequality.

[108] In this case, the IEU nominally seeks to compare female early childhood teachers to male primary school teachers in NSW. However, no rational basis is apparent for the extraction of male primary school teachers from the entire workforce of primary school teachers in NSW beyond a need on the part of the IEU to construct a male comparator group. We have referred to instruments which set the higher pay rates of teachers in government and Catholic primary schools in NSW. Not surprisingly, there is no distinction in the rates of pay for male and female teachers. The evidence upon which the IEU relied to demonstrate an equality or comparability in the work value of early childhood teachers and primary school teachers dealt with the latter group in an entirely undifferentiated way as to gender.

[109] In substance, the comparison being made is really one between a female-dominated workforce consisting of early childhood teachers and another female-dominated workforce consisting of primary school teachers in NSW government and catholic schools. The extraction of male teachers from the latter group for use as a comparator is simply a sleight of hand to avoid the fact that a female-female comparison is being relied upon. There is no *gender* inequality in remuneration as between early childhood teachers and NSW primary school teachers. Accordingly, we are not satisfied under s 302(5) that, for early childhood teachers who are covered by the IEU's proposed ERO, there is not equal remuneration for men and women workers for work of equal or comparable value on the basis of the principal comparison relied upon by the IEU.

[110] This conclusion renders it unnecessary to consider, in the context of the proposed work value comparison between early childhood teachers and male primary school teachers, the evidence of the IEU's witnesses concerning the work of the two groups and the evidence of the ACA in response, as well as the evidence relevant to the exercise of the discretion had we been satisfied as to the jurisdictional prerequisites in s 302. However, that evidence was also relied upon, in part or whole, in respect of the IEU's alternative comparison with professional engineers and in relation to the work value application, and will therefore be considered in due course in that context. It may also be noted that, in respect of the work value application, we make a finding later in this decision that the work value of early childhood teachers and primary school teachers is equal or comparable. However, for the reasons we have given, that finding is not sufficient for the success of the IEU's equal remuneration application.

B.4 The IEU's alternative comparison – professional engineers

[111] The alternative basis for an equal remuneration order relied upon by the IEU is by way of a comparison with male professional engineers. The IEU contends that professional engineers are, compared to early childhood teachers:

(1) overwhelmingly male;

(2) paid higher remuneration; and

(3) perform work of comparable value.

B.4.1 Gender and remuneration comparison

[112] The first two propositions were not seriously contested, and in any event were firmly established by the evidence.

[113] In relation to the first proposition, the IEU relied on ABS data, *Employed Persons by Occupation*.[25] This date showed that, as at May 2016, the female share in the subcategories of the occupational category Engineering Professionals (ANZSCO code 233) was as follows:

ANZSCO Code	**Occupational subcategory**	**Female share %**
2331	Chemical and materials engineers	25.2
2332	Civil Engineering Professionals	13.8
2333	Electrical Engineers	8.1
2334	Electronics Engineers	0
2335	Industrial, Mechanical and Production Engineers	2.9
2336	Mining Engineers	24.7
2339	Other Engineering Professionals	26.9

[114] As to the second proposition, although the award minimum salaries for professional engineers set by the *Professional Employees Award 2020* (PE Award) are broadly comparable (and indeed slightly lower in most cases) than those under the EST Award, the actual or market rates of pay for professional engineers are significantly higher. A report prepared by Leanne Issko of Mercer Australia (Mercer Report)[26] which was commissioned by the IEU used position matching data to analyse the salaries paid to engineers. It showed that the median annual remuneration for a 4-year qualified graduate engineer as at July 2017 was $83,863, with remuneration at the 25th percentile being $65,700 and at the 75th percentile being $110,869. For experienced engineers with 4-7 years' experience, the median remuneration was $140,173, with remuneration at the 25th percentile being $104,532 and at the 75th percentile being $157,762. The Mercer Report took into account the base salary of employees plus the monetary value of all other benefits excluding bonus and incentive payments.

[25] ABS 6291.0.55.033, IEU outline of submissions dated 22 December 2017

[26] Exhibit 5

[115] The IEU also relied upon a survey report prepared by the Association of Professional Engineers Australia, the *Professional Engineers Employment and Remuneration Report 2017* (APEA Report).[27] This showed that that, for graduate engineers, the median annual remuneration (total package) was $71,589, with remuneration at the 25th percentile being $65,700 and at the 75th percentile being $79,935. For experienced engineers who would be classified at Level 3 under the PE Award, the median annual remuneration was $124,145, with remuneration at the 25th percentile being $104,558 and at the 75th percentile being $142,350.

[116] Although there are some substantial differences between the Mercer Report and the APEA Report as to the median remuneration and remuneration at the 75th percentile, they are remarkably consistent as to salaries at the 25th percentile. The annual remuneration even at that level is higher than the remuneration paid to early childhood teachers at equivalent career stages.

[117] The IEU also relied upon ABS data by which the total average hourly cash earnings of Early Childhood (Pre-Primary School) Teachers (with the ANZSCO code 2411) may be compared with various subcategories of Engineering Professional (ANZSCO code 233).[28] The total average hourly cash earnings for the former group in May 2016 was $38.90, while in the subcategories of Engineering Professional it ranged from $45.90 for Electronics Engineers (ANZSCO code 2334) to $78.70 for Mining Engineers (ANZSCO code 2336).

B.4.2 Work value comparison - evidence

[118] It was the question of whether early childhood teachers performed work of equal or comparable value to professional engineers that was the subject of the substantive contest between the parties. On this matter the IEU relied upon the Mercer Report, evidence given by six early childhood teacher witnesses - Lauren Hill, Emily Vane-Tempest, Amanda Sri Hilaire, Lily Ames, Gabrielle Connell and Emma Cullen - and the evidence of two professional engineers: Kenan Toker and Brad Broughton. This evidence is summarised below.

Mercer Report

[119] The Mercer Report used the Mercer CED job evaluation methodology to compare the work of early childhood teachers to engineers. The Mercer Report summarised this methodology as follows:

> **"Overview**
>
> - Job Evaluation is a method for assessing the work value of jobs. It provides a systematic and defensible approach for the grading of positions within a job classification system. Therefore, it provides a sound basis for salary administration and human resource management.

[27] Exhibit 134

[28] IEU outline of submissions dated 22 December 2017

- The Mercer CED methodology was developed in the 1960s as a robust and universal job evaluation system. It has gone through several stages of maturity in response to changes in the way work is organised and jobs are designed, but the fundamental principles remain and are still recognised as valid in the marketplace.

- The Mercer CED Job Evaluation System is designed to measure the relative size of positions. It measures the major components of job worth to achieve this. This well established method examines the complexity of job demands of individual positions in a way that allows a systematic and analytical comparison of positions. Information used in the job evaluation process may come from interviews with incumbents or managers, from specifically designed questionnaires completed by job incumbents and/or from position descriptions.

- In conducting evaluations (whether it be in a particular organisation or according to a set of generic position descriptions), a position is measured in terms of the actual requirements of the job, rather than the experience or skills possessed by the particular incumbent of the position. The position is evaluated assuming it is performed at a competent level.

- The Mercer CED Job Evaluation System expresses the worth of a position in work value points. These points are determined by assessing eight sub-factors that are considered to be common to all positions. Hence, the system is described as a points factor evaluation system. The eight sub-factors are based on a systems approach to understanding jobs."

[120] The Mercer CED methodology groups the eight sub-factors referred to above into three primary factors: *Expertise*, which consists of the required inputs in terms of the skills, knowledge and experience need to do the job; *Judgement*, which refers to the processing components of the job, defined in terms of the complexity of tasks and the requirement for solving problems; and *Accountability*, being the outputs from the job defined in terms of the impact, influence and independence of the position. The report went on to explain that in the evaluation process for each job, assessments are made for each of the eight sub-factors, with each sub-factor typically having from three to eight levels. The definitions for each level determine how the position is rated on each sub-factor. The requirements of the positions the subject of evaluation are compared with detailed, standard definitions to find the level of each sub-factor which most accurately describes the characteristics of the job. Once each sub-factor has been assessed, work value points can be determined. The total of the points assigned for all factors is the work value score for the position and is intended to indicate the relative size of the job in terms of intrinsic work value.

[121] In undertaking the job evaluation exercise, five early childhood teachers or Directors employed in metropolitan, regional or remote preschools and profit and not-for-profit long day care centres were interviewed. Mercer evaluated the positions of Graduate Early Childhood Teacher and Graduate Childhood Teachers with 5 years' experience and prepared a summary of the requirements for each role based on the EST Award classification descriptors, inputs from the interviewees and information obtained from the IEU.

[122] For the comparative exercise, Mercer used the position of Graduate Engineer and Experienced Engineer, with the summary of the requirements for these roles having been taken from the PE Award. No further information was obtained in respect of the job

requirements for engineers. The results of the comparison, in terms of work value points produced by the job evaluation exercise, were as follows:

	Expertise	Judgement	Accountability	Total
Graduate Teacher	101	66	101	268
Teacher + 5 Years	134	72	116	322
Graduate Engineer	101	66	88	255
Experienced Engineer	134	76	116	326

[123] The Mercer Report identified the key points arising from this analysis as follows:

> "Key points to note:
>
> - At the Graduate level, the ELC teacher role is slightly higher than the engineer stream roles. This reflects that an ELC graduate teacher will lead a class independently whilst the professional services roles operate under close supervision. Typically a graduate engineer operates with limited scope and all outputs are subject to review. The level of independence that a graduate ELC teacher operates at is still under general supervision, for example, lesson plans are reviewed. In Mercer's view for this sub-factor, the graduate ELC teacher has a higher level of independence than the equivalent graduate engineer role.
>
> - The ELC teacher with 5+ years corresponds to the experienced engineer level. The complexity of the Job Environment was evaluated as slightly higher for the experienced engineer reflecting that these roles operate in a less structured environment that may be subject to adaptation and/or change.
>
> - Overall, there was strong alignment with the corresponding work value scores for the education roles and the engineer stream roles."

Lauren Hill

[124] Lauren Hill is an early childhood teacher. At the time she made her witness statement dated 18 December 2017,[29] her most recent employment had been as a temporary maternity leave replacement teacher at the Catholic Early Learning Centre at Stanhope Gardens in Sydney (CELC), with her employer being the Catholic Diocese of Parramatta. In this placement, she taught two days per week and did additional days on a casual basis. She had previously worked as a Senior Business Analyst at a pharmaceutical company, but she had a career change after the birth of her children and undertook a Bachelor of Education (Early Childhood Education) degree at Macquarie University. She completed her degree in 2015, which qualifies her to teach children from birth to 12 years of age. She commenced working in her first teaching role, at a preschool, in that year. She received a salary of $49,046 in her first year of teaching, and when she left the maternity leave replacement role she was on Level 4 under the EST Award.

[125] Ms Hill said that the CELC was licensed for 40 places for 3–5-year-olds, and it had three early childhood teachers (including the Director), two Certificate III-trained educators, one Diploma-qualified educator and a trainee educator. The CELC is located on the same

[29] Exhibit 17

grounds as John XXIII Catholic Primary School. She was involved in school transitions from the CELC to the primary school whereby she took children from the preschool to the Kindergarten class in the primary school for half an hour each week to engage in transitional activities with their future teacher. Ms Hill is accredited as a proficient teacher with the NSW Education Standards Authority (NESA). She said that to maintain her accreditation, she has to complete 100 hours of professional development over five years and at all times meet the APST.

[126] Ms Hill summarised her responsibilities in the CELC role as follows:

- She had to ensure that the NQF is met, which included meeting the NQS.

- She was involved in developing and reviewing the QIP, which set out the areas of the NQS, the areas of improvement and the aspirational goals of the service. The QIP was updated at least annually, and needed to be available for the regulatory authority or for parents on request. Ms Hill used reflections and evaluations of the program to assess the CELC against the NQS, and communicated with families about the areas they were working to improve and to seek their contribution. As an example, Ms Hill as part of a team identified the PALS Social Skills Program as a method to assist new children first starting preschool to develop their sharing, negotiation and communication skills.

- She had the responsibility to ensure the safe arrival and departure of children at the CELC and complete the required documentation. This included the responsibility to exclude inappropriate people from the premises in accordance with the National Law and knowing and monitoring restrictions under Family Court Orders. It also included following procedures to minimise the spread of infections, making sure that children had sun protection and promoting dental health. She also monitored the safety of the play environment, including ensuring that the building and equipment were safe and in a good condition, administered the prescribed medication policy, and dealt with allergy issues. She also had mandatory reporting obligations, which created difficulties in judging and assessing things children often say which are difficult to interpret.

- Ms Hill promoted the inclusion of children with additional needs and created tailored programs to ensure their active participation and to review more regularly their program in developmental areas. She described an instance where she identified a child with behavioural issues, and assisted the child's parents to seek specialist help and make funding applications on his behalf. She also described another instance in she worked with an external therapist to develop a routine and program for a child with a sensory processing disorder and autism.

- She described her ultimate responsibility as being to guide children through the critical early years of life to ensure they reach the developmental stages in a timely way through physical, emotional, social and cognitive development.

[127] Ms Hill described the skills she exercised as including the following:

- creating and implementing stimulating, interesting and exciting learning activities within the framework of the EYLF;

- analysing each child's learning and implementing an individual cycle of planning using researched and informed curriculum decisions;

- exposing children to content and concepts around language, literacy, science and creativity, building their extended thinking and promoting problem-solving capacities through extended conversations with children, analysis, hypothesising and investigation;

- assessing her practice against the goals of the EYLF and the NQS;

- creating opportunities for children to interact with technology;

- doing portfolios and documentation for 18 children and creating mid-year reports and transition to school reports;

- creating two observations per child per term;

- creating an Individual Education Plan for the child with additional needs in her class;

- documenting links to the EYLF through reflections on each child's learning and development, incorporating where relevant the children's work samples, quotes, photos, stories and structures;

- providing care to children and promoting children's participation in interesting and exciting physical activities;

- implementing positive physical behaviour management; and

- liaising and communicating with families, including communicating with parents on a daily basis both face to face and via email.

[128] Ms Hill said that she worked autonomously in programming and teaching, mentored the Certificate III and trainee educators at the centre, and collaborated and communicated with other staff. She also said that working with children in early childhood involved close emotional and physical contact with children, required reassurance and nurturing in interactions with children, and also required the provision of assistance with toileting and other forms of personal contact with children.

Emily Vane-Tempest

[129] Emily Vane-Tempest was, at the time she made her statement of evidence filed on 22 December 2017,[30] an early childhood teacher at Sandcastles Childcare in Chatswood, Sydney. She holds an integrated double degree of Bachelor of Early Childhood Education and Bachelor of Teaching (Primary) from the University of Newcastle, where she graduated in 2015. She is qualified to teacher children from 0-12 years of age (that is, up to Year 6). In her

[30] Exhibit 39

statement of evidence, she said that she began work at Sandcastles as an early childhood teacher in the preschool room in January 2015, took the Lead Educator position nine months later, and became the Educational Leader in December 2015. She said that Sandcastles operates as a long day care centre, and is licensed for 50 children a day with a total of 70 enrolled across the week. Ms Vane-Tempest still teaches in the preschool room, where there are 26 children a day with 37 children over the week. She is the Lead Educator in the room, and she supervises another recently graduated early childhood teacher and an educator who holds a Certificate III. The Director and the second-in-charge at the centre are diploma-trained. Ms Vane-Tempest said that Sandcastles is owned and operated by G8 Education Limited (G8), an early childhood provider with 490 centres as at 31 December 2016, over 10,000 employees, and a total combined licensed capacity of 38,713 places with 75,000 children attending in a given week. The Director of Sandcastles reports to an Operations Manager who oversees 11 centres and who in turn reports to a Senior Operations Manager who oversees 4 or 5 Operations Managers. Senior Operations Managers report to the General Manager of Operations of G8. Ms Vane-Tempest said that her hourly rate when she first started was $0.49 above the minimum EST Award rate. When she became Lead Educator and then Educational Leader, her pay rate was not increased.

[130] Ms Vane-Tempest identified her responsibilities as follows:

- She analyses and assesses how her practice and the centre meet the NQS and the requirements of the National Law and the National Regulations.

- She undertakes the professional development necessary to maintain her accreditation as a proficient teacher. She explained that G8 has its own Learning and Development department which runs professional development workshops which educators can volunteer to attend. As an Educational Leader, she attends these to support the educators in the centre to make any relevant changes. She said that every couple of months she does educational professional development on programming, transition to school, mandatory reporting and getting ready for school.

- Ms Vane-Tempest has responsibilities in the creation and carrying out of the QIP requirement of the NQF and NQS. The QIP must identify areas of improvement and include a statement of philosophy. The first step involved is to conduct a self-assessment critically reflecting on current practice. She said that if, as a teacher, she identified something lacking in the engagement and relationships with children, then she would decide in consultation with the team to focus on this area. The next step is to identify the opportunities where quality improvements can be made and to plan and effectively implement them. She said that she constantly reassesses the centre's progress towards the identified goals and needs to collect evidence of meeting the goals through observation, reflection or photos.

- Her role requires her to implement policies to ensure they are individualised to the requirements of her centre. G8 has a website called Jigsaw that staff members must use to increase their knowledge of centre requirements and policies and, as Lead Educator, Ms Vane-Tempest needs to ensure that the staff she supervises are completing this program and are familiar with the policies. She ensures that the policies are followed in her room, including the maintenance of child ratios, resourcing and equipment.

- Ms Vane-Tempest is responsible the safety and wellbeing of the 24 or more children in her room every day, which includes administering first aid where necessary, ensuring medication is properly administered and ensuring that children have the correct food. She is also responsible for illness management and hygiene practices, and she uses her professional judgment in allowing children to gain responsibility and test their skills through risky play. She is responsible for completing and updating risk assessments for her room every six months, and must identify child protection risks and children with higher needs or troublesome behaviour.

- She works with other professionals including occupational therapists, speech therapists and psychologists to ensure that children with additional needs have those needs met within the centre and receive an appropriate educational program.

- She has the responsibility to build children's confidence, sense of wellbeing and security, and their motivation to engage actively with others.

[131] Ms Vane-Tempest identified the skills she exercised as including:

- acting as the facilitator of the EYLF, and she uses the skills of observation, analysis, planning and intentional teaching to allow children to progress towards the outcomes in the EYLF;

- using a program and documentation file to determine what is needed to assess and guide each child's learning in terms of the EYLF outcomes;

- engaging in intentional teaching, which involves observing children's activities and engaging with them to ascertain their interests, encouraging further research into and investigation of those interests, developing the language development of the child by asking them to express their thoughts about their interests, and designing learning tasks arising from those interests which are appropriate to the child's age and developmental stage;

- documenting children's progress through the use of G8's program called "Kindyhub" as well as through day books, floorbooks, and writing individual learning journeys, reflections on children's learning and suggestions about where extensions need to be made;

- maintaining a flexible and adaptive approach to children's learning;

- providing each child with a respectful and reciprocal relationship in consultation with parents;

- implementing strategies that help demonstrate respect and understanding of individual children and providing them with the social skills to resolve their own conflicts; and

- engaging in respectful and supportive relationships with parents and families.

[132] Ms Vane-Tempest said that when first employed, she assisted the Lead Educator in performing different duties and was only provided with limited support and guidance in relation to the systems in place at the centre and no support or guidance as to her role as a teacher. When she was appointed Lead Educator within 12 months, she was expected to take on a leadership role and make decisions on programs and implement them. She said that, as an Educational Leader, there is an expectation that she supports all rooms including other teachers and diploma-qualified educators in their programming and planning. She sits alongside the Director of the centre with her own sphere of responsibility for pedagogical and educational planning, programming and observations.

[133] Ms Vane-Tempest gave oral evidence to the following effect:

- she is currently an early childhood teacher at another G8 school, Community Kids Empire Bay and is the Lead Educator of a preschool room but is not the Educational Leader;[31]
- in October 2018, all early childhood teachers employed at G8 centres were given a 10% increase in pay;[32]
- G8's professional development and learning program for educators was revised to include webinars, which she said she often does at home in her own time because she does not have time at work to complete them;[33]
- early childhood teachers in G8 centres also have to attend a learning program called Teachers for Tomorrow to assist early childhood teachers improve their practise, which they are paid to complete;[34]
- she communicates with families on a daily basis using an application called Xplor (which replaced Kindyhub) about children's learning and to provide observations on goals and projects, which can include photos or videos of the experience, a description, the learning involved with that activity and how this links to the relevant EYLF outcomes;[35]
- she also records children's movements throughout the day in real time to update their parents using the Xplor application, which includes their meals, sleeps, sunscreen and nappy changes;[36]
- as Educational Leader at her previous centre, she had approximately three afternoons a week off the floor which she used to review educators' work, create workshops for educators, meet with individual educators to discuss goals, issues

[31] Transcript, 19 June 2019, PNs 2217-2222

[32] Ibid, PNs 2225-2229

[33] Ibid, PNs 2231-2234

[34] Ibid, PNs 2235-2241, 2304

[35] Ibid, PNs 2247-2249

[36] Ibid, PNs 2269-2273

they were experiencing and discussing how she could support them and recording observations;[37] and

- in her first year, she was sick every two weeks because she was working with children.[38]

Amanda Sri Hilaire

[134] Amanda Sri Hilaire was, at the time of her first witness statement filed on 22 December 2017,[39] employed in a part-time teaching position at Kamalei Children's Centre at Bowral in NSW and, additionally, taught casually three days a week at the Southern Highlands Christian School (a K-12 school). She holds a Bachelor of Teaching (Early Childhood) degree from the University of Wollongong, which qualifies her to teach children from 0-8 years of age. She had initially undertaken teaching in both early childhood centres and primary schools in the period 2001-2005, but then took a break from teaching because of parental responsibilities, and resumed teaching in 2015.

[135] She said the Kamalei Children's Centre is a for-profit long day care centre with 28 places. The Director is diploma-qualified. The centre has two rooms: a 4-5 year old preschool room, in which Ms Hilaire works, and a 3-year old room. The centre has a Nominated Supervisor who is also an early childhood teacher, two trainees, one Certificate III staff member and two other staff members working towards their diploma. Ms Hilaire said that she teaches 18 children in the pre-school room, in which she is the Room Leader two days a week, and is assisted by a trainee. At the time of her statement, she was paid as a Level 8 teacher under the EST Award, and received a total of $241 per day. At the Southern Highlands Christian School, she was employed pursuant to the *NSW Christian Teaching Staff Agreement 2015-2017* and was paid $380 per day as a casual teacher. She was, at that time, working towards her Proficient Teacher accreditation with the NESA.

[136] Subsequent to the making of her first witness statement, Ms Hilaire left the Kamalei Children's Centre and worked as an early childhood teacher at the Gumnut Preschool and Bundanoon District Community Preschool.

[137] Ms Hilaire described her responsibilities as an early childhood teacher as including the following:

- ensuring compliance with the National Law and the National Regulations;
- ensuring the centre complies with the NQS;
- working collaboratively with the centre's leadership to create and maintain the QIP – in particular, working with the Nominated Supervisor on Quality Area 6, which concerns collaborative partnerships with families and communities;

[37] Ibid, PNs 2332-2337

[38] Ibid, PNs 2364-2365

[39] Exhibit 54

- discharging her responsibilities under regs 168-172 of the National Regulations to read, review and supervise compliance with policies in the centre, and to supervise and re-direct the practice of other educators where there is a failure in compliance;

- ensuring the health, safety and wellbeing of the 18 children in her room, which includes checking buildings and equipment, analysing the risk to learning ratio when observing children, providing first aid, and checking that the correct food is provided to children with allergies;

- dealing with the requirements and safety of the additional needs student in her class, including adjusting the activities he engages in to allow for his emotional and physical behaviour, modelling to other children how to relate to him and the adjust their expectations of interactions with him, and liaising with occupational therapists and other staff in relation to his progress and expectations; and

- managing children through their developmental stages, building their language, communication skills and their relationships with one another, and introducing them to literacy, numeracy and information and communications technology.

[138] Ms Hilaire said the skills required of her employment included:

- teaching to achieve the outcomes prescribed in the EYLF, which requires her to plan a developmentally appropriate activity for each child and to ensure that the relationship she has with the child is trusting, secure and allows them to feel sufficiently comfortable to be able to meaningfully learn;

- collecting information about each child's strengths and abilities and identifying any concerns by way of formal and informal observations, and engaging in intentional teaching with the use of that information;

- documenting children's experiences and their response in order to make learning visible to the children themselves, their parents and to her and her colleagues, and to allow her to professionally reflect and analyse her practice and decision and each child's engagement with the program;

- providing a range of activities, including programmed and spontaneous activities designed for individuals or groups, and evaluating the programs each week to make sure they are meeting the outcomes, principles and practices of the EYLF;

- completing a formal report for each child twice a year which gathers all observations and learning stories and comments on every learning outcome and where the child is placed;

- creating individual programs for six children in her room as well as group programs;

- ensuring quality relationships with children by constantly encouraging children to express themselves, providing positive guidance and allowing and encouraging activities that develop self-reliance and self-esteem; and

- managing conflicts between children and assisting them in recognising their emotions, understanding there is an underlying need that is not being met and assisting them in formulating a request of the people around them to support them in meeting their needs.

[139] Ms Hilaire said that she worked very autonomously as an early childhood teacher, with only limited support and mentoring. She said that there was a graduate early childhood teacher in her centre who, from the commencement of her employment, was assumed would be the leader in her room whether or not she had experience and although she was working with educators with Diploma or Certificate III qualifications who had many years' experience. She said that graduate teachers can struggle with the leadership elements of their role. Ms Hilaire said in her statement that she is responsible for what happens in the room which she leads, mentors the other educators, ensures that the staff adhere to the routine, and makes decisions about behaviour management in the room and communicates strategies to other staff. She does not receive pedagogical or programming direction, advice or support.

[140] Ms Hilaire said that operating in a for-profit centre places pressure on staff and, because centres compete with each other for places, this limits collaboration and assistance across the profession. She described how early childhood teachers carry the mental load of the day, and said her job was both physically demanding and emotionally exhausting. She also said that the background noise from 18 children in her room was constant all day long.

[141] Ms Hilaire was, because of her dual employment, able to compare early childhood teaching with primary school teaching. She said that, as a school teacher, she programs and plans for the 10-week terms across a range of curriculum areas, has fixed breaks and two hours release from face-to-face teaching each week, and non-term periods to utilise. By comparison, she said that early childhood teaching did not allow for enough time to properly plan and program. She considered that early childhood teaching requires a more comprehensive and detailed knowledge of child development across physical, social, emotional and cognitive domains. In the school setting, she did not have guidelines around governance or the many other responsibilities placed on teachers in the early childhood sector through the NQF, and the level of support provided to teachers was much greater in schools. Beyond this, she said, teaching is doing exactly the same type of work, simply at different levels for what is developmentally appropriate for the children in question. However, there was much less community understanding about what early childhood teachers do compared to primary school teachers.

[142] Ms Hilaire also filed a witness statement in reply dated 19 July 2018.[40] The evidence it sought to respond to was not adduced by the ACA.

Lily Ames

[143] Ms Lily Ames is employed by the City of Yarra as a Kindergarten teacher at the North Carlton Children's Centre in Victoria. She has worked in the profession since January 2012. Ms Ames graduated with a Bachelor of Early Childhood Education degree from the University of Melbourne in 2011 and is qualified to teach children up to Grade 6 in primary school. She currently teaches seasonal kindergarten programs for 3 and 4-year-olds. In

[40] Exhibit 55

Victoria, a sessional kindergarten program operates for a set number of hours each week, and parents may drop-off and pick-up their children at the same times each session, with the children being in a particular group for the whole year. These programs are government-funded, and costs on average $400 per term and are free for disadvantaged families. The 4-year-old program, which is for the year before formal schooling, is for 15 hours per week during school terms. The centre in which Ms Ames works has 108 places across the long day care and sessional preschool. There are two teachers (including Ms Ames) and three co-educators (one Diploma-qualified and two Certificate III qualified) in the sessional program over two groups. The employment for Ms Ames and other staff at the centre was, at the time Ms Ames made her first statement, regulated by the *City of Yarra Enterprise Agreement: 2013-2017*. This agreement maintains parity with school teachers' salaries, and Ms Ames was at that time classified as an Accomplished Teacher 2.1 and was paid $36.22 an hour (derived from a salary of $71.579.03).

[144] In her witness statement filed on 22 December 2017,[41] Ms Ames described her responsibilities as an early childhood teacher as including: implementing the NQF; maintaining professional standards; creating and maintaining a QIP; creating, maintaining and applying centre policies; ensuring children's safety; dealing with additional needs children; and managing the development of children and fostering lifelong learning. In respect of professional standards, Ms Ames said that, like primary and secondary school teachers, early childhood teachers in Victoria are required to be registered by the Victorian Institute of Teaching and that, once a teacher graduates and finds a mentor in their educational practice, they receive provisional registration. She said that finding a mentor in the early childhood education sector can be difficult because of the organisational isolation of such teachers. She is also required to undertake and document the 20 hours per year professional development required under the APST. In relation to the QIP, she collaborates with the centre's Director and other teachers and educators to create and implement a QIP in accordance with the National Regulations. The QIP requires her to identify needs, hazards and risks which may require improvement, and then once these are identified she must plan on how to improve them in a practical way and outline timelines and methods of achievement. Teachers like herself are expected to be leaders in the industry for other staff who are Diploma or Certificate III-qualified and to be experts in early childhood education.

[145] As an early childhood teacher, Ms Ames said that she has been responsible for developing and reviewing policies around children's wellbeing and hygiene practices in the past, and is responsible for compliance with the centre's policies by the (up to) five educators which she supervises. She also is expected to manage the performance of these educators, ensure that they are undertaking all the necessary duties and functions of their employment, and are adhering to policies and regulation including handling confidential records, WHS requirements and child protection. She is also required to ensure the maintenance of mandated child to staff ratios and to implement appropriate procedures when children hurt themselves. The government funding requirements for sessional kindergartens requires her to be at the centre of the operation of the kindergarten and ensure that there is adequate supervision of children at all times. In respect of ensuring children's safety, she has to engage in behaviour guidance and risk management by maintaining positive interactions with children and encouraging them to critically reflect on risky behaviour. Ms Ames also said that providing medications and care to children with illnesses, injuries and medical condition such as

[41] Exhibit 58

anaphylaxis is one of her major responsibilities and a duty of care that she holds. She also has a statutory responsibility to report child abuse, which requires her to use her skills and training to observe children and their behaviours to notice changes over time.

[146] Ms Ames gave evidence that the requirement to ensure children's safety is amplified when they have additional needs, and she described her responsibilities with respect to a child in her class who has Dravet Syndrome (a serious form of epilepsy) as well as ADHD and a developmental delay. She had to develop a risk management program for this child and an action plan to be followed if the child had a seizure (which has happened three times while the child has been in her care). She has to ensure that the assistants in her room, who are not trained in special education or child development, are aware of the child's medical condition, the routine, emergency procedures and relevant policies. She also has to observe the children and consider whether there is a concern about their development, and make contact with parents is necessary. Ms Ames said that she will often be the first contact that parents have with an external service when it comes to identifying additional needs children. Any observation of this nature must be documented, her conversations with parents must be informative and supportive in accordance with the applicable NQF standards. She must also deal with violence from some additional needs children, including one child in her care who has severe autism and can lash out at her and others. Ms Ames also described the fact that for some children in foster care or who have been victims of abuse, she may be the one person they have a secure attachment with.

[147] In relation to the skills required of her job, Ms Ames said that the core skill in teaching is the cycle of observation, analysing learning, planning and implementation, based on the principles, practices and outcomes prescribed by the VEYLDF. The VEYLDF is mapped to the Victorian Curriculum for schools, and there is intended to be a continuum of learning and teaching between the VEYLDF and the development outcomes of the Victorian Curriculum.

[148] In respect of the planning phase of the teaching cycle, Ms Ames said that she firstly observes children's interests and development level, and then assesses how she can scaffold each child's learning to ensure that the are learning more than they currently know. She designs experiences through play and discovery to that end, and then designs an assessment to show that the child has learnt through that experience. She makes further observations, evaluates and assesses what the child has learnt against the knowledge of the developmental stages, and determines how she can further extend their learning. This must take into account the five learning outcomes of the VEYLDF, which explains the developmental stages within the early years and defines learning areas including literacy, language, arts and maths concepts. Implementation utilises intentional teaching methods, with the use of language to promote critical reflection being the main intentional strategy at all times. She gave the following example of this:

> "The complexities and subtleties of the teaching process is best depicted by way of example. On one occasion I observed some children playing, a girl and a boy who I knew were friends; and I noticed that the boy tended to come up and squeeze the girl, and this seemed to cause her some discomfort. To notice this, I needed to be constantly observing and be attuned to each child's emotional state. I asked the girl if she liked when the boy did that to her, and she told me no. I told her it was ok to say that she did not like it. She said, 'well he is my friend, I don't want him not to be my friend, so I don't want to say that to him.' I analysed her response and assessed her social development. I identified a need to introduce the idea of consent to the class, to talk

> about what is ok, and what is not ok, and how to communicate this to others. To achieve this, I planned an activity based on the wellbeing and identity outcomes of the VEYLDF. I researched and identified the appropriate resources to achieve my plan. Which led me to a story called 'Don't Let the Pigeon Drive the Bus.' I also made this a group outcome to help extend to all children's learning, a non-direct method of introducing these ideas in a safe and unidentified way.
>
> I read the story with the children, and in it the bus driver told all the people on the bus that they could not let the pigeon drive the bus. Through the story the Pigeon pleads and begs, and the children have an opportunity to say no aloud at certain points in the story. Simultaneously building on their language skills, as they follow the story. In the days after we read the story, I then observed the girl to see if there had been any effect, and I noticed that she was now saying no much more frequently than she used to. I then decided to extend her social response by introducing her to new language of not just saying no, but explaining why she does not like the behaviour, and getting her to explain how it makes her feel to the other person. In this way, I am introducing a complex idea of social interactions and consent, to further her social and emotional wellbeing, building on Outcome 3 and Outcome 1 of the VEYLDF, which aim towards children having a strong sense of identity and wellbeing."

[149] Ms Ames said that she has an individual learning goal for each child, and she documents the child's development towards this goal through anecdotal conversations and learning stories of the narrative of the child's learning. She completes these once a month for all 43 children across her two classes, and uses this to perform an evaluation and undertake future planning. She also writes summative assessments each term.

[150] Ms Ames described getting to know each child and building a positive relationship with them to be a cornerstone of what she does. She does this by taking an interest in who they are as people, learning about their interests and their families, knowing when to step into their play and step back, and interacting with them in a way that makes them feel important. She also used the care regime to take advantage of teaching moments in the elements of care, including health, hygiene, healthy eating and toileting. Ms Ames said that positive and collaborative relationships with families are also important. Dealing with families can be challenging, as she works with a diverse group of parents including parents from high socio-economic backgrounds and parents who are refugees migrants with African backgrounds. She said that is necessary for her to manage parents' expectations and their understanding of learning outcomes and how and what children learn in kindergarten. She also needs to have positive relationships with primary school teachers in connection with the transition between early childhood and school.

[151] In relation to the level of decision-making required of her, Ms Ames said that she works quite autonomously, has most of the responsibility of the room that she teachers, and runs all the operational and day-to-day aspects of the Kindergarten program. She only receives support if she actively seeks it out. Ms Ames said that there is a high expectation of autonomy and supervisory capacity from when early childhood teachers graduate. Mentorship is difficult to arrange, and she said that most of skill development has been on-the-job, learning by doing. She said that early childhood teaching involves working in organisational isolation, and she does not have the collegial support that school teachers have. The environment in which she works may be challenging because of the level of communicable disease, the noise because of the age of the children, and the stress arising from children's

demand for attention throughout the day while she is trying her best to implement her educational programs.

[152] Ms Ames also filed a witness statement in reply dated 18 July 2018.[42] The evidence it sought to respond to was not adduced by the ACA.

Emma Cullen

[153] Emma Cullen was, at the time she made her first witness statement, employed as a full-time Director at Abbotsford Long Day Care Centre in Sydney, New South Wales. She subsequently left that employment and became a Teaching Director at Banyan Park Early Learning Centre, Norfolk Island. Ms Cullen was awarded a Bachelor of Education (Early Childhood Education) (Honours) in 2004 and a Master of Educational Leadership (Early Childhood Education) in 2011 from Macquarie University and a Graduate Certificate in Autism from Wollongong University in 2017.

[154] Ms Cullen's witness statement filed on 22 December 2017[43] was concerned with her employment at the Abbotsford Long Day Care Centre, which is a community-based centre catering for children aged 0-5 years. It has 55 places, and has 79 children attending across the week. There are four full-time teachers, including Ms Cullen. She is not required to undertake face-to-face teaching, but in fact does so approximately eight hours per months to provide a release for other teachers. There is a total of about 25 staff at the centre, which includes teachers, educators, cooks, support workers and an administrative assistant. All the staff are female. Under the *Abbotsford Long Day Care Enterprise Agreement 2015* which applies at the centre, Ms Cullen was (at the relevant time) paid $42.77 per hour for her teaching with a Director's allowance of $152.99 per week.

[155] Ms Cullen said that she had overall responsibility for ensuring that the centre maintains its accreditation under the NQF with the ACECQA. She maintains her accreditation under the *Teacher Accreditation Act 2004* (NSW), which requires her to meet and maintain the APST. She formed part of the panel which advised the then Board of Studies, Teaching and Educational Standards NSW on the creation of the *Proficient Teacher Evidence Guide, Early Childhood Teachers*, which provides information about the evidence that an early childhood teacher can provide to demonstrate that they meet the APST at the Proficient Teacher level. She undertakes the professional development needed to remain accredited, and she identifies her own priorities for professional development and engages with other teachers at her centre in ongoing critical reflection on their professional practice. Ms Cullen said that she requires teachers in her centre to assist in the development of pedagogical documents and the implementation of the QIP, which is integrated into the daily work of teachers. She also requires teachers to be part of the process of developing and implementing policies and procedures, including those required by the National Law. Teachers are also responsible for a budget of $2,500 per room per year to be spent on maintenance and to ensure that the centre is fit-for-purpose. Ms Cullen said that, when in the classroom, she has to constantly monitor the environment to make sure that all children are safe. This includes administering medication preventing children harming others and themselves, caring for children after an accident, and dealing with dietary requirements. If a teacher is proposing an excursion or other activity,

[42] Exhibit 59

[43] Exhibit 68

they must engage in the proper risk management process including formulating an assessment outlining the potential risks and how they will be managed.

[156] In relation to children with additional needs, Ms Cullen gave evidence that she requires teachers working with such children to liaise with specialists such as paediatricians, psychologists and social workers. Such teachers are also required to write regular reports on these children, understand and interpret specialist reports and act on and implement the recommendations of specialists. Ms Cullen said that teachers are often the first professionals to identify issues of additional needs through their ongoing observations of children and the application of their knowledge of the developmental stages. If a concern is identified, teachers at the centre may raise the concern with families after consultation with professional colleagues, and may suggest a referral to a specialist. Ms Cullen's evidence was that the role of monitoring subtle yet important changes in the development of a child over time requires teachers to be aware of current practices and emerging research relating to child development.

[157] Ms Cullen said that the key aspect of teaching children between birth and five years of age is understanding that they learn best through play, and the EYLF emphasises the role of play-based learning. She said that the complexity of play is very much underappreciated outside of early childhood learning. The EYLF provided for five learning outcomes but, unlike in primary education, these are not endpoints but rather involve a continuing process of working towards those outcomes utilising the teaching skills of assessing, reviewing and implementing. Ms Cullen stated that she required teachers to both assess and document the development and progress of each child in accordance with the NQS, and teachers produce a daily reflective learning journal which contains observations and photos of the children's experiences through the day. She described the flexibility and adaptability necessary for teachers to integrate basic reading skills into all activities involving each child depending on their capabilities level of engagement and how it fits within their chosen activity. She requires teachers to plan effectively for children's current and future learning, determine the extent to which children are progressing towards learning outcomes, identify what is impeding development, and also identify which children need additional support and determine the method and amount of that support.

[158] Ms Cullen's evidence was that the caregiving functions of early childhood teachers, such as nappy changes, dressing, applying sun protection and toileting are also important as learning time, since it gives teachers opportunities for teachable moments. She said that care goes beyond physical care and extends to both providing emotional support and managing conflict between children. For example, early childhood teachers have the training to use an instance of conflict between children to encourage the children to reflect on their feelings of each other and equip them with the words and phrases to better manage conflict in the future. Care functions also extend to using the provision of food in the centre to sit with them and intentionally teach by modelling eating and talking about healthy choices and nutrition.

[159] Interaction between early childhood teachers and parents occurs daily, Ms Cullen said, and teachers must be ready for face-to-face conversations every morning and afternoon at drop-off and pick-up. Additionally they are required to interact with parents by email. She gave evidence that teachers as part of their daily teaching practice need to know children and their families intimately to understand children's learning development, and events such as divorce and custody issues have a big impact requiring teachers to adapt their teaching practices accordingly.

[160] Ms Cullen said that at her centre, early childhood teachers assume a leadership role in relation to other staff and the management of the service almost from the commencement of their employment. She said that a new graduate is expected to approach their work with the same responsibility as a more experienced teacher, although their skill level will be different, and they may be required to lead other staff with more experience but lesser qualifications. Teachers at the centre are required to teach for 40 hours per week, and are released for about eight hours per months to complete their developmental records of their focus children. The formal position of Educational Leader under the NQF is a treated as a promotional position, and is usually filled by a teacher who has quite a lot of experience and is very passionate.

[161] Ms Cullen said she had done her honours thesis on perceptions of the similarities and differences between primary and early childhood teachers. She said that many people see early childhood as play, as babysitting and as work that anybody could do, which impacted genitively on pay negotiations with management committees and employers generally. She said:

> "I have always received less pay than an equivalent teacher in a school. Within my experience as an early childhood professional, this pay differential has been an issue for many early childhood teachers. Many teachers face a drop in pay in moving from the primary field to early childhood. Early childhood teachers might initially enter the field because they love it, because it is something they are really passionate about, or they really want to work with young children; without at first realising the pay differential. I am the only one left of my peers from University working in long day care that I know of - of those who started in early childhood, all of them have moved into primary teaching or on to other employment."

[162] Ms Cullen also said that because the majority of early childhood degrees now qualify graduates to teach children from the ages of 0-12, many students undertaking their practicum at the centre have advised that they ultimately intend to teach in primary school although they might accept an early childhood position while waiting for a primary school position. She said that recruiting within an early childhood setting is an ongoing challenge and, because the workforce is female-dominated, teachers often want to take time off to raise their family or seek part-time or family friendly hours. This, she said, is not always possible in a long day care setting.

[163] Ms Cullen filed a statement in reply dated 18 July 2018,[44] in which she replied to the witness statement of Jae Dean Fraser dated 25 May 2018[45] and Gary Carroll dated 22 May 2018.[46] She said that in her experience, the roles of Director or Educational Leader are not held interchangeably by early childhood teachers and non-degree qualified educators, rather they are usually performed by early childhood teachers given their attainment of a higher qualification and capacity to perform at a higher level. Ms Cullen disagreed with Mr Fraser's characterisation of play-based learning, stating it takes careful consideration and planning by an early childhood teacher who will use their teaching skills and training to extend children's knowledge about areas of interest using play as a vehicle.

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[44] Exhibit 69

[45] Exhibit 84

[46] Exhibit 94

Gabrielle Connell

[164] Gabrielle Connell was, until shortly before giving her evidence, a part-time early childhood teacher at Albury Preschool Incorporated, which is rated as "*Excellent*" under the NQS. Ms Connell previously worked as the teaching-director of the centre for 18 years before returning to a teaching-only role in 2017. She is now retired from her permanent teaching position but continues to work as a casual early childhood teacher. Ms Connell was awarded a Bachelor of Education (Early Childhood) from the Canberra College of Advanced Education and a Graduate Diploma in Special Education from the University of Southern Queensland. Her Bachelor's degree allows her to teach children between 3-8 years of age.

[165] In her witness statement filed on 22 December 2017,[47] Ms Connell said that Albury Preschool is a community based, not for profit standalone centre, licensed for 50 children aged 3-6 years, with 130 students enrolled. It also operates an after school program. The centre is governed by a Committee of Management drawn from families and members of the community and employed one full-time teacher/ Director, four part-time teachers, six classroom assistants with diploma qualifications or Certificate III and one part-time office manager. At the time of her statement, she was employed pursuant to the *Albury Preschool Employee Collective Agreement 2016-2019* and was paid as a four-year trained teacher on step 9. Under the agreement, all teachers were paid in parity with equally qualified primary school teachers.

[166] Ms Connell summarised her responsibilities at Albury Preschool as follows:

- She had to ensure that the centre was meeting the NQS, National Law and National Regulations.

- She was required to maintain her accreditation and status as a proficient teacher with the NESA, which included completing 100 hours of professional development over a seven year cycle, writing and submitting a report at the end of the cycle and keeping abreast of new research in educational practice, funding and other developments in the education field.

- In collaboration with all teachers at her centre, she was involved in creating and maintaining a QIP, identifying areas that require improvements and outline the philosophy of the centre. The QIP was updated every term and was required to be available to parents or the regulatory authority on request. She gave an example of implementation of the QIP, which required more sustainable practices at her centre. As part of a team, she developed a Sustainability Booklet, established a worm farm and vegetable garden for the children and created a composting program.

- She was involved in the development, research and review of policies to ensure they were meeting requirements of the National Law and National Regulations and other relevant legislation. As a senior teacher, she assisted in the training of staff in the National Law, policies and procedures and ensure they are implemented. She was also involved in completing documentation including fundraising, community

[47] Exhibit 61

planning and implementation and budgets and maintained confidentiality of personal records in accordance with the National Regulations.

- She described her greatest responsibility as the ensuring the safety of the children in her care in accordance with the NQF and NQS. She continually managed the balance of risk and responsibility in play, applied her professional judgment and monitored each child to assess what level of risk was acceptable. She provided care to children who were ill or injured, made decisions on when a child should go home, provided first aid, was trained in first aid and anaphylaxis response, conducted WHS risk assessments and kept records of accidents and near misses. Ms Connell also complied with safe food handling practices and hygiene and checked lunchboxes due to a number of children in the centre having serious food allergies.

- In respect of additional needs children, Ms Connell was required to liaise and integrate with a large number of agencies, meet at least once a term with parents and support agencies, write reports for therapists, paediatricians, parents and schools, and keep Daily Communication books. She said that each early childhood teacher in her service is responsible for the development of an Individual Education Plan for each additional needs child in collaboration with families and any other services. She was also responsible for identifying undiagnosed disabilities in a new class, speaking with the child's parents and advising where they can get extra help. Ms Connell said she was required to keep detailed programs, implement plans created by other professionals and train in and provide care to severely disabled children, including tracheostomy tubes, colostomy bags and provide support to a girl waiting for a heart transplant who was required to be attached to a machine.

[167] Ms Connell described the skills she exercised as including the following:

- creating educational programs which are based on the EYLF that aim to improve children's skills in a range of areas including language, literacy and mathematics;

- planning intentional teaching practices based on each child's stage of development, their interests and abilities, and her observations;

- assessing her programs against the NQF, EYLF and her obligations under the APST;

- document the development of up to 26 children, take observations, keep daily/ weekly diaries and digital documentation of portfolios and profiles;

- report to parents on a regular basis to keep them informed of their child's progress and being a point of contact for the parents to discuss this if needed;

- develop individual programs for each child, which must be evaluated regularly and objectives formulated accordingly;

- maintain a flexible and adaptable approach in a room where children are on different programs and at different developmental stages all at once; and

- formulate strong relationships with the children and their families, which includes building trust and confidence, to assist children in building their sense of wellbeing.

[168] Each teacher in her service serves as the certified supervisor a day a week without additional payment, and are required to ensure all of the National Regulations are being met, ratios are appropriate and accidents are reported. Ms Connell said that in her role as a Room Leader, she was responsible for what happened in her room, doing the majority of programming and reporting, supervising the planning and documentation kept for each child, ensuring that staff conduct themselves in accordance with the regulations and keep communication positive with families. She had to have a greater knowledge of the NQF and the EYLF to ensure educators are meeting the standards and provided supervision and mentorship to graduate teachers at her centre. Ms Connell also maintained her own classroom budgets.

[169] Ms Connell also described the level of responsibility of Educational Leaders, having performed this role for several years until 2016. She said that it is a very senior role in centres but there is no extra money attached to it, which makes it difficult to attract the right person. Educational leaders are supposed to review all profiles and programs of staff in the centre and are usually allocated two hours to do so, however she thinks they require at least half a day to perform this role properly. Ms Connell had also previously performed the Director/Nominated Supervisor role. The Director has overall responsibility for ensuring that the centre is meeting the NQF, its regulations and learning framework and she could have been fined personally for any failures under the National Regulations.

[170] In a further statement of evidence dated 18 July 2018,[48] Ms Connell responded to statements of various ACA witnesses. She stated that the EYLF does provide an early childhood curriculum framework which is harder to implement than the primary school curriculum as it is philosophical and there are no rigid, "tick-the-box" outcomes. In her experience, working within the confines of a rigid and specific curriculum tends to require less work and skill than working in a less structured framework, as early childhood teachers are required to do. She said that early childhood teachers create skilled and complex documentation as part of their day-to-day role, which includes records of the children's learning, assessments of learning, portfolios, learning journals, individual learning plans, reflections on practice and programming and daily diaries. Ms Connell stated that tertiary trained early childhood teachers can generally exercise these functions at a higher level than non-tertiary trained workers in the sector. In her experience, early childhood teacher turnover does not occur in large part due to the attraction of lower contact hours and school holidays in the school sector but rather the better pay that draws potential early childhood teachers away from the early childhood sector.

Kenan Toker

[171] Kenan Toker is a Graduate Software Engineer at Langdale Consultants Pty Ltd in Belrose, NSW. He was awarded a Bachelor of Engineering (Electrical Power) and a Bachelor of Arts from the University of Sydney in 2016. In his witness statement filed on 22 December 2017,[49] he said that his Engineering degree was a 4-year degree, and the Arts degree was an

[48] Exhibit 62

[49] Exhibit 52

additional year. He elected to major in Electrical Power as a subfield of his electrical engineering specialisation. Mr Toker commenced employment at Langdale Consultants Pty Ltd in October 2016 as a Software Support and Development Technician on a casual basis. Langdale is a small consultancy group consisting of three principal engineers and a software engineering student completing work experience in addition to Mr Toker. Langdale holds an ongoing contract with a power provider company to oversee its operational technology. Mr Toker's original role was primarily programming with elements of system management, but his role expanded and in 2017 became that of Graduate Software Engineer. He did not study software engineering in his degree, but did study software programming. Mr Toker now works full-time on the basis of a 38-hour week, with usual hours of work between 9am to 5.30pm with the understanding that he will work overtime on an unpaid basis as needed. His annual salary in 2017 was $72,000.

[172] Since taking up a full-time role, Mr Toker identified his responsibilities as including the following:

- He became more accountable in his role and is left more often to perform tasks on his own.

- He uses software to solve engineering problems within an electricity network. He gave the example of organising meters and readings in a way that is accessible and meaningful rather than leaving it as indecipherable data.

- He undertakes systems and network maintenance; checks the health of and the logs in the system each day, engages in a diagnostic should anything go wrong and informs the principal engineer. This is escalated where necessary and resolved. He is also required to log issues and their resolutions into the internal reporting system.

- He has a role in the development environment, and gave an example of building and configuring virtual machines which are computers running in another computer, testing and ensuring they work, configuring software on them and ensuring the development environment performs the same as the production environment but does not impact the production environment in any way. He was provided with the requirements of this task but was left to implement it on his own.

- He builds computer systems in which he programs and models a piece of software, tests it for compatibility or installation problems and measures or analyses its results. He gave an example of creating a program that will generate a load estimate for distribution substations.

- He also writes documentation for the projects he works on so another person can understand how they are coded, as he is the only person who will know how the program works.

[173] Mr Toker identified the skills he exercised as including:

- the management and coordination of a project within a timeframe;

- the utilisation of a working knowledge of hardware, software and programming language and an excellent knowledge of computer-aided software engineering tools;

- the use of a creative approach to problem-solving;
- specialised communication skills to communicate the technical aspects and details of the software with other engineers; and
- versatility and flexibility to work with changing and evolving problems and to learn new technologies.

[174] Mr Toker said that he receives informal assistance and feedback from the principal engineer, and does not oversee any employee or provide mentoring support. When he started his job, he said that he was not provided with any formal mentoring or introductory procedure but there have been informal meetings, questions and instructions that have shown him the basics at his work. His current responsibilities mean that if he makes a mistake, nothing of consequence will follow, whereas engineers with 5-10 years' experience run their own projects and are responsible for problems that arise. His job does not require him to be registered and there is no external regulation of the engineering profession, but he is required to comply with international electrical standards. He works in an office-based environment but has some elements of travel in his job.

[175] In his oral evidence, Mr Toker described the systems and network maintenance aspect of his role. If there is a problem, he is responsible for ascertaining what the reason is, triaging it depending on the urgency, then must decide whether it is something he needs to pass on to his supervisor and whether this is in the form of an informal comment or something more formal. He then checks the database and messaging queues and decides whether he needs to discuss the issue with the client.[50] He described the developing aspect of his role which involves administering a later version of programs or developing another program that sits in the same environment that has some new functionality.[51] Mr Toker said when performing network maintenance for clients, this is in the context of his own office rather than onsite.[52] He must always be aware of security during his work, as it is a particular issue during maintenance.[53] He said that in his current role, he is only drawing on a portion of his training as an electrical engineer.[54]

Brad Broughton

[176] Mr Brad Broughton was, at the time he made his witness statement, a Project Engineer at York Civil Pty Ltd and worked in construction management. He has since commenced employment as a civil design engineer at Paradigm Design in Michigan, USA. He graduated in 2012 with a 4-year Bachelor of Engineering degree, majoring in Civil and Structural Engineering and with first class honours from the University of Adelaide. In his witness statement filed on 22 December 2017,[55] he said the degree is four years long irrespective of whether honours is undertaken. He is a trained civil engineer, however the common industry

[50] Transcript, 25 June 2019, PNs 3058-3073

[51] Ibid, PNs 3075-3076

[52] Ibid, PNs 3099-3100

[53] Ibid, PNs 3083, 3102-3104

[54] Ibid, PN 3138

[55] Exhibit 57

job titles are site engineer, project engineer and project manager. Mr Broughton commenced employment with York Civil in 2012 through an undergraduate program, and became a site engineer after graduating in 2013 with an annual salary of $54,000. York Civil is a civil construction company based in Adelaide, South Australia and has offices in various capital cities and a staff of over 400. There were approximately 25 civil engineers that worked in the Adelaide office. Mr Broughton's initial duties were primarily in quality assurance, for which he completed testing on site to monitor the project and compile quality assurance reports, and he also had the responsibility for procurement on the projects he was working on. He then worked under the direction of the project engineer and project manager prior to being promoted to the position of Project Engineer in 2016, and earned an annual salary of $100,000 (including superannuation), and received in addition a car, phone and laptop.

[177] Mr Broughton identified his responsibilities as including the following:

- As a Project Engineer, he worked on one project at a time, with the last project he completed being in Berri, 3 hours' drive away from his location in Adelaide. He had to drive there on Monday afternoon, work on the project for 10 days until the following Thursday, and then return to Adelaide the following Friday.

- In relation to this project, he managed and supervised the site engineer to ensure that procurement was conducted correctly, made decisions about the engagement of suppliers, wrote and reviewed management plans that covered the environmental impact, and worked on the program of the project to ensure completion within expected timeframes.

- He organised the machinery, offices and staff for the site, working in conjunction with the site manager; attended the site to commence the build; oversaw quality assurance and provided direction to the site engineer and checked his calculations and measurements; and engaged in redesign work to deal with problems on the site as they arose.

- He was required to follow the suite of Australian Standards in the course of his project work.

- It was necessary to engage with a client representative on most projects, which requires interpersonal and communication skills.

- He was very involved in the budgeting of projects, which required him to track spending on a day-to-day basis and measure it against the production value achieved to ensure that each project is delivered within budget. At the end of each month, he assisted the project manager on the project reporting to monitor spends and estimate remaining tasks and budget requirements which is then reported to the state manager and financial manager.

- He needed to ensure that the project complies with legal requirements, particularly health and safety, and in this respect he was involved in determining the safest way of carrying out the work, ensuring that workers maintain a high safety standard and safety reporting, and investigating, reporting and remedying any safety issues which arise.

[178] Mr Broughton described the skills he exercised including:

- problem-solving and thinking methodically to solve arising problems to ensure that projects meet their deadlines within budgets;
- interpersonal skills, the ability to negotiate, supervise and lead;
- written communication skills, in reducing design changes into a written proposal to the client in a succinct and persuasive manner; and
- the use of a broad range of mathematical and computational functions, such as Microsoft Excel and Microsoft Project.

[179] In his role, Mr Broughton generally worked autonomously and, when assigned a site engineer, had the task of training and supervising them. As a Project Engineer, he would eventually take on bigger projects with greater responsibility. The level of responsibility attached to his health and safety role was stressful, because the management team (which he was part of) would be blamed in the first instance for injuries on a project which occurred due to ignorance. It was not necessary for him to be registered or accredited, and he chose to not be accredited as a chartered engineer because it did not add any value to his work. His job required him to travel frequently outside of Adelaide and spend long periods of time away from home, and he spent long hours on site (6.30am to 6.00pm Monday to Friday and 6.30am to 2.30pm on Saturdays). There was always is a risk to his personal safety when on site because of the presence of moving heavy equipment, and on some projects he had to work at heights or in confined spaces.

[180] In his oral evidence, Mr Broughton described his new role as a civil design engineer as designing stormwater management systems for new and existing warehouses and other sites.[56] He said he produces the designs that a project engineer would implement and works, engages in redesign work and now works in an office-based environment.[57] In his previous role at York Civil, he worked on projects with budgets between $1-30 million,[58] engaged contractors to conduct tests on building materials[59] and ensure the project met expected timeframes otherwise the company could have been liable for liquidated damages.[60] When he engaged in redesign work, he had to address the technical challenges, communicate with the client and persuade them to accept the deviation from the plan.[61]

Egan Report

[181] In response to the Mercer Report, the AFEI relied upon a report prepared by John Egan, the Principal of Egan Associates Pty Limited (Egan Report).[62] Mr Egan has a long career in remuneration consulting, and it was he who developed the CED job evaluation

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[56] Transcript, 26 June 2019, PNs 3445-3446

[57] Ibid, PNs 3454-3457

[58] Ibid, PN 3465

[59] Ibid, PN 3473

[60] Ibid, PNs 3502-3505

[61] Ibid, PNs 3511-3513

[62] Exhibit 115

methodology. The Egan Report used the CED methodology (the same as that used in the Mercer Report) to compare the same categories of employees, and in addition analysed primary school teachers (graduate and with 5 years' experience). In evaluating early childhood teachers and engineers, the Egan Report used the same position descriptions developed in the Mercer Report for the former category and the same PE Award classification descriptors for the latter category. The Egan Report produced the following results from the job evaluation it conducted (set out in the same way as for the Mercer Report above):

	Expertise	Judgement	Accountability	Total
Graduate Teacher	88	58	76	222
Teacher + 5 Years	134	69	116	319
Graduate Engineer	88	72	76	236
Experienced Engineer	134	94	134	362

[182] The Egan Report stated the following conclusion on the basis of the above results:

> "The CED evaluations I have performed indicate that there is a difference between the respective work values of an Early Childhood Teacher and an Engineer (at both graduate level and with 5 years' experience) compared to the CED evaluation conducted by Mercer. At the graduate level, while both jobs require similar level of knowledge and experience, in my professional opinion, the level of technical reasoning and judgment is higher for an Engineer, who is required to interpret well-established procedures and examine scientific and technical information which would likely require a more complicated level of analysis and problem-solving skills."

[183] The Egan Report also made the following points (in summary):

- engineers are required to apply a high level of applied mathematics, science and technology to their work and are required to be analytical, logical and focused in detail;
- engineering positions exist to plan, analyse and develop products, processes and systems, and they inevitably require advanced analytical skills;
- the Mercer Report suggests that the level of accountability is the only difference between a graduate early childhood teacher and a graduate engineer, and states that a graduate level early childhood teacher will lead the class independently, whilst the professional services roles operate under close supervision, but the Mercer Report elsewhere states that a graduate early childhood teacher is generally supervised and mentored;
- an early childhood teacher operates in a highly regulated environment where the national and state based guidelines and standards determine almost all aspects of their deliverables including their work environments;
- in Mr Egan's opinion, the level of regulations and guidelines that an early childhood teacher needs to abide by restricts his/her level of judgment and independence compared to an engineer;

- as engineers become more experienced, they either lead teams or become more specialised in a technical subject, and engineers who do not want to become supervisors tend to become technical experts by specialising in a specific technical area; and

- an experienced early childhood teacher, on the other hand, is not required to choose between these two career paths as a part of their career progression unless they change jobs.

[184] The Egan Report also used a separate job evaluation methodology, the Egan Associates Job Evaluation (eJE) methodology, to compare the work value of the same categories of early childhood teachers and engineers. This methodology assigns a point score and a grade to the position being evaluated. The application of this methodology produced the following results:

	eJE Points	eJE Grade
Graduate Teacher	99	4
Teacher + 5 Years	124	7
Graduate Engineer	110	5
Experienced Engineer (non-supervisory role)	149	8
Experienced Engineer (supervisory role)	172	9

[185] The Egan Report also sought to draw a contrast between the career development of early childhood teachers and engineers. In respect of early childhood teachers, the Egan Report stated:

> "Early Childhood Teachers are equipped with the knowledge and skills to deliver most of their accountabilities when they graduate. They also work under supervision; receive mentoring and follow the requirements of a heavily regulated curriculum and a national framework. As they become more experienced, the level of supervision they receive is minimised and they provide more advice and undertake independent discussions with parents. However, regardless of their years of experience, they continue to operate in the same heavily regulated environment.
>
> After 5 years in the job, despite having an increased level of job specific experience, an Early Childhood Teacher would still perform similar tasks unless the curriculum and applicable industry standards are amended by the relevant governing authority."

[186] The Egan Report contrasted this with the position of engineers with 5 years' experience as follows:

> "On the other hand, an Engineer with 5 years' work experience would either have a supervisory role with specialised focus in one or more technical areas or become a seasoned individual contributor with increased depth and breadth of technical knowledge. Career progressions of Early Childhood Teachers and Engineers are very different from each other.
>
> Further to his/her graduation, an engineer could choose to specialise in a number of technical areas which could be either mining, civil, chemical, electrical, mechanical, industrial, petroleum or a role in the emerging technologies in artificial intelligence, robotics, computers or medical devices, etc. This reflects the nature of an Engineer's

> role in a period within 5 years of graduating, highlighting the various areas in which engineering graduates can find themselves employed while pursuing their profession whereas for an Early Childhood Teacher, who remains in that occupation, there is a limited degree of role change.
>
> An engineer could be required to work on multiple projects simultaneously and could be also assigned to work on or lead projects which could be of a very different scale and scope compared to the subsequent ones. Engineers are required to solve technical and operational challenges which could have a significant immediate and long term financial consequences to their employers."

Nida Khoury

[187] The ACA obtained, in response to the Mercer Report, an expert report from Mr Nida Khoury.[63] Mr Khoury is a remuneration specialist and has been a Director of Godfrey Remuneration Group since May 2016. Mr Khoury has previously worked as a senior Consultant for Hay Group and AMP, as the Head of Human Resources, Research and Development at Consolidated Contractors International Company and in several operations and senior personnel roles since 1980. Mr Khoury holds a Bachelors Degree in Public Administration and Political Science from the American University of Beirut in Lebanon (1977-1980) as well as an Associate Degree in Human Resources Management from the Human Resources Professional Association of Ontario (1993).

[188] Mr Khoury was asked to comment in his report on the conclusions drawn in the Mercer Report with respect to job sizing difference between graduate and five-year experienced early childhood teachers and engineers. Mr Khoury was not engaged in his export report to comment directly on changes in the work value of teachers covered by the EST Award or changes in the work of teachers over the past two decades resulting from the increased professionalisation of teaching work, the increased complexity of the work and the increasingly intense and demanding nature of the work.

[189] In his report, Mr Khoury said that work measurement methodologies are not scientific and the usefulness of its outputs is highly dependent on the objectivity of the person applying both their knowledge of the methodology and the jobs being assessed. In respect of the conclusion in the Mercer Report on the job sizing difference between graduate and five-year experienced early childhood teachers and engineers, Mr Khoury questioned the lack of specificity in the information provided that was relied upon for the job size assessments. This lack of specificity, he submitted, meant that the Mercer Report could not draw accurate conclusions as it was unclear what job information was assessed and what assumptions were made in doing so. In respect of early childhood teachers, he gave the example that only two of five early childhood teacher statements (Gabrielle Connell and Emma Cullen) and the G8 position descriptions were provided in the Mercer Report and do not necessarily set an industry standard for such roles. For engineers, no job information was provided at all apart from the role requirements provided in the PE Award. Mr Khoury also took issue with the Mercer Report in that it made no reference at all related to what type of engineer position is being assessed. He concluded that without sufficient clarity of the abovementioned information regarding early childhood teachers, he could not understand how anyone could

[63] Exhibit 105

establish with any degree of certainty or accuracy what the job size should be for either role or the difference between them. He opined that at best, he agreed with the Mercer Report's conclusion that the five-year experienced early childhood teacher role may be bigger than graduate early childhood teacher role but not by a lot. In comparing graduate and five-year experienced engineers, Mr Khoury concluded that Mercer assessed two engineering roles only based on them carrying out unspecified professional engineering duties that require having a university level qualification or equivalent in experience and therefore a range of job sizes can be used for even a graduate engineer. He said it is likely Mercer's assessment results are "*overweight*" in focusing on one or two subfactors and are very "*underweight*" on the remaining six subfactors due to a generous interpretation of the operating context of such roles. He could not provide specific job values for the various roles for the reasons set out above.

[190] Concerning the comparability of teachers and engineers, Mr Khoury said this rationale eluded him and he questioned whether, merely because both roles require a base level university degree of four years, this meant that any discipline that required a four-year length university degree could be compared. On an overall basis, he said the nature of teaching roles for a certain category of students are a more repetitive type of experience, whereas the nature of most engineering roles is more a cumulative type of experience. Mr Khoury also took issue with the scope the Mercer Report adopted in determining the pay level of jobs by focusing on job size. He said job size is only one of four main determinants of pay with the others being market premium or discount, person premium and capacity to pay. He criticised the Mercer Report's position matching analysis which, he submitted, disregarded job environments, complexities and skill requirements. He also noted Mercer conducted job matching based on education requirements, years of experience and staff management responsibility, as instructed by the IEU. Mr Khoury said that these key indicators are so generic they could easily apply to any other function.

[191] In his oral evidence, Mr Khoury stated that:

- the fact that teaching is a low paid profession is unsurprising as it is low paid compared to other occupational groups including female only samples of similar job size;[64]

- he did not have access to the same information used by the author of the Mercer Report and that, because of this, it was not possible to provide a specific job value for the roles in question;[65]

- there are subtle differences in responsibilities and day to day responsibilities between a graduate early childhood teacher and an early childhood teacher with five years of experience, including the graduate role being supervised, mentored, requiring less contact with parents and no expectation for graduates to immediately develop lesson plans or identify potential development and behavioural issues;[66]

[64] Transcript, 3 July 2019, PNs 7691-7700

[65] Ibid, PNs 7774-7779

[66] Ibid, PNs 7787-7793

- in contrast, and in most cases, the initial level of responsibility of a graduate or trainee professional engineer is quite different to that of an experienced engineer of some years' standing;[67]

- for primary school teaching years 2 to 6 and secondary teaching years 7 to 12 role, it is not necessary to differentiate in job size between a graduate and an experienced teacher because both front the class on their own from day one and the job size will not change much because in both roles, a graduate and an experienced teacher are doing the same thing;[68]

- the conclusions Mr Khoury formed in his expert report and which were "based on a high level understanding of the roles" from his personal knowledge of teachers and their teaching environment in different schools;[69] and

- he characterised repetitive experience as performing the exact same job for 10 years, and while a person may become faster and more efficient in the role, it is not a different job and the job size will likely remain the same. This can be distinguished from cumulative experience where a person gains additional knowledge as time goes on usually leading to higher responsibilities, and this usually translates to a higher job size.[70]

Nicola Johnson

[192] The ACA also relied on the evidence of Nicola Johnson in relation to the comparator work of engineers. Ms Johnson is the People and Culture Lead at Deputec Pty Ltd, a company which provides an online employee management tool called Deputy. She was awarded a Bachelor in Marketing and Business from Derby University, England and has been employed by the company since 2017. In her statement of evidence dated 23 May 2018,[71] Ms Johnson said that the company engages 100 or so employees, of whom 33 are Product Developers that perform roles either within web or mobile development. The remainder are engaged in other office-based roles. All of the Product Developers engaged by the company at the time of her statement were male and the company had not received many (if any) applications from female developers. Ms Johnson said the software industry does not attract many females. The company pays Product Developers salaries that are above-award, and also pays them an amount each year to cover professional development. Product Developers work in an office environment or remotely. She said Product Developers are required to work approximately 40-50 hours per week and hours of work can be unpredictable because Deputy services a vast majority of clients in the hospitality industry who use their products outside of ordinary work hours. Some developers are almost always on call in case a system is disrupted and requires servicing.

[193] Ms Johnson was not required for cross-examination.

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[67] Ibid, PNs 7794-7796

[68] Ibid, PNs 7821-7825

[69] Ibid, PNs 7827-7831

[70] Ibid, PNs 7857-7859

[71] Exhibit 130

B.4.3 Consideration

[194] The IEU's selection of the entirety of the engineering profession as its alternative comparator gives rise to the difficulty identified in paragraph [291] of the 2015 decision, which we have quoted above - namely, it is "large, diverse, and involve[s] significantly different work under a range of different conditions". We do not necessarily accept the proposition advanced in the Egan Report about the difference in the career development of early childhood teachers as compared to engineers in terms of work value, but the report does at least in this respect point to the diversity of the engineering profession in terms of the specialised areas in which engineers operate, including as mining, civil, chemical, electrical, electronic, mechanical, industrial and production engineers as compared to the comparative uniformity in the early childhood teaching profession. Thus the selection of the entire engineering profession as the comparator immediately raises the question of whether the work value of the profession is consistent across its different specialisations and sub-categories. If it is not, then the use of the profession as a comparator becomes highly problematic.

[195] The difficulty may be illustrated this way. The conditions under or environment in which work is performed is a major element of the assessment of work value. In the case of early childhood teachers, the IEU's evidence permits a number of fairly accurate generalisations to made be made in respect of this consideration: such teachers work in a fixed location with controlled and confined indoor and outdoor settings; they are required to interact closely with young children who will display a variety of behaviours, including noisy and disruptive behaviour; they will have to face emotionally challenging situations and deal with human waste; and they are exposed to a greater risk of infectious disease. However, it is difficult to make any such generalisations with respect to engineers, as the limited witness evidence before us demonstrated. Mr Toker's evidence was that he worked wholly or principally in an office-based environment, and that offers some basis for comparison with early childhood teachers. However, Mr Broughton's description of his work environment at York Civil places it in an entirely different category: he worked primarily at the site of the particular project he was working on at any particular time, which could be some distance from where he resided and required him to live away from home for periods of time and to work long days at the site. A building site is a dynamic work environment, with well-recognised disabilities and safety risks. That working environment is not comparable to that of Mr Toker, let alone that of any early childhood teacher. The difficulty becomes more acute when, for example, the position of a mining engineer working in a remote mine location is considered. There is simply no stable point of comparison, and thus no proper basis to conclude a comparability of work value.

[196] The same problem arises with the nature of the work performed and the level of skill and responsibility required. Mr Broughton and Mr Toker are engineers, but their evidence indicates significant differences in the nature of the work they each perform. It is also readily apparent that Mr Broughton has worked on large-scale projects and has had a very wide range of responsibilities in respect of those projects, and his level of remuneration at York Civil was likely to be reflective of this. Even leaving aside his greater career experience, it is difficult to compare his work with that of Mr Toker. By contrast, the evidence concerning the work of early childhood teachers shows a substantial uniformity in the nature of the work and the level of skill and responsibility required.

[197] At a broader scale, the IEU's evidence concerning remuneration shows that there are very large differences in remuneration between the subcategories of engineer and between

different industry sectors so that, for example, the median total remuneration package for an engineer in the electricity or mining industries is approximately 50% higher than in the construction industry. It is likely that these substantial wage differentials at least in part reflect differences in work value. This diversity in remuneration in the engineering profession is to be contrasted to remuneration in the early childhood teaching profession, which is confined to a fairly narrow range of incomes.

[198] The Mercer Report essayed a general comparison between early childhood teachers and engineers with the use of the CED job evaluation system. However, we do not consider that the conclusions of the Mercer Report in this respect can be accepted as demonstrative of equality or comparability in work value for three fundamental reasons. The first is that the fact that the Egan Report used the same methodology and the same information base to produce different results suggest that the methodology itself is incapable of producing reliable, objective and reproducible outcomes. Mr Egan (who, we repeat, developed the methodology) gave the following evidence about this:

> So we have two people using the same methodology and getting different results? -Yes. Our interpretation of the demands of the job are different.[72]

[199] It is apparent that the results produced by the methodology depend to a significant extent on a subjective assessment of the requirements of a role from the limited information contained in the position description, as the evidence of Mr Khoury indicated. It is also apparent from the Egan Report that Mr Egan's "*interpretation*" of the respective roles of early childhood teachers and engineers was informed by his understanding of their roles from information obtained independently of the evaluation process. To say this is not to criticise his evidence but rather it illustrates the degree of subjectivity in the CED methodology.

[200] Ms Issko, the principal author of the Mercer Report, defended the CED methodology in a report which responded to the Egan Report.[73] This reply report stated (footnote omitted):

> "One of the key principles that underpins job evaluation is the concept of a discernible (or noticeable) difference. The definition of a discernible difference within the Mercer CED and Hay Group Job Evaluation methodologies is based on Weber's Law – a fundamental law of psychometrics. This law as it relates to job evaluation uses a minimum perceivable difference between levels of 15%, hence the numerical pattern and scoring grids are geometric progressions. Anything less than a 15% difference is recognised as not large enough to be a noticeable difference. This is also the rationale behind why many organisations cluster "like sized" roles into grades within a classification framework.
>
> Given Weber's law, and recognising that job evaluation is a subjective systematic approach and not a scientific approach, it is not surprising that there may be minor differences between evaluations across evaluators. Notwithstanding this, if evaluation outcomes are within 15%, they are generally considered to be broadly in line with each other. With this in mind, we have compared the outcomes of the Mercer CED evaluations from the Egan Associates and Mercer Reports in Table 1 overleaf."

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[72] Transcript, 4 July 2019, PN9255

[73] Exhibit 6

[201] Mr Egan gave the following evidence in response to this (underlining added):

> I'm pointing to an earlier witness who said something to the effect that even with your scores, 222, 230, 236, that, having regard to the element of subjectivity involved, that that is really not a meaningful difference in work value when the numbers are that close. Do you agree with that, or do you disagree with that? -I don't disagree in principle. I think one of the challenges as job evaluation methodologies are being applied to technical, administrative, graduate positions in the workforce is that the degree of granularity using a 15 per cent differential for any element isn't sufficient to evaluate difference between a cleaner, an administrative officer, a customer service person, or a school teacher, because the systems don't establish that granularity at the very low levels of roles in the workforce. That may become increasingly more complex with increased mechanisation, robotics and technology.
>
> . . . .
>
> But with this sort of job is that a meaningful difference or not? -I would say it is meaningful but I would equally say that the methodologies don't have the level of granulation to reveal a significant difference. I believe there's a difference based upon my 30-odd years' work in this field, but the way there would be a difference in the world of work would be how they use those points to band them. In other words, if they have jobs between 100 and 120 as one band and 120 and 140 as another band, that may indicate a difference, whereas if you're just looking at the absolute point scores, you might say, they're broadly comparable, and I don't think that's an unreasonable judgment at that level, your Honour.[74]

[202] This evidence points to the difficulties of using the CED methodology in the current context. Job evaluation systems were originally established, and are primarily used, to allow disparate positions within large organisations to be placed in a common pay grade structure. Differences in work value point scores may be immaterial in that context if they result in the positions being compared falling within a band that aligns with a particular pay point. However they cannot be dismissed as immaterial when the purpose of the use of the CED methodology is to demonstrate equality or comparability in work value.

[203] Secondly, we consider that the reference point used to assess the work value of the engineering profession in its entirety is misconceived. As we have explained earlier, the Mercer Report (and the Egan Report in response) took the relevant classification definitions in the PE Award as the representative descriptor of all jobs in the engineering profession at the graduate and 5-year levels. However, the classification definitions were never constructed for the purpose; their function is only to describe what is necessary to qualify for the minimum levels of remuneration prescribed by the award. There is no basis whatsoever to conclude that these classification definitions accurately describe the duties, skills, responsibilities and work environment of all engineers in the engineering profession or to assume that a graduate or 5-year engineer who is remunerated at levels well in excess of the minimum rates of pay prescribed by the award is required to do work of no higher value in their position than is described in the award classification descriptions. The basis of comparison in the Mercer Report must therefore be rejected for reasons similar to those for the rejection in the 2018 decision of the comparison sought to be advanced by the applicant unions in that matter:

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[74] Transcript, 4 July 2018, PNs 9260-9263

> "[48] Finally, the applicant unions' proposed comparator group is to a significant degree composed of persons who, as earlier discussed and was not in dispute, are in receipt of over-award payments either through formally bargained enterprise agreements or less formal arrangements. In the absence of any evidence about the basis for the payment of those over-award payments, we would not be prepared to assume that those over-award payments do not include any element of work value that is not included in the classification descriptors for the C5 and C10 classifications in the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award). For example, it may be that an over-award payment is reflective of some aspect of the conditions under which the work is performed which is not dealt with in the classifications descriptors, such as a remote work location or unpleasant working conditions, or that it is paid for the exercise of some special skill unique to a particular workplace. That may mean, whatever was found in the 2005 Decision, that members of the comparator group under the C5 and C10 classifications on over-award payments in fact perform work of a greater value than those under the relevant classifications in the *Children's Services Award*, notwithstanding the pay nexus in award minimum rates."

[204] Third, the CED methodology does not take into account the environment in which the work is performed. Mr Egan gave the following evidence in this respect:

> Mr Egan, does the CED methodology take into account the environment in which the work is performed? So say with this example, what's his name, Yohan, as a geologist, has to travel to the Pilbara or something and work in remote areas and be away from his family for long periods of time. Is that something that the CED methodology would take into account or not? -Your Honour, to the best of my knowledge, it does not, but there are methodologies today which do take the work environment into account and would also give consideration to the level of risk, which the CED methodology doesn't directly take into account in order to determine work value.[75]

[205] The CED methodology therefore excludes a significant element of work value which necessarily arises for consideration under s 302.

[206] Accordingly we cannot be satisfied that the job evaluation analysis in the Mercer Report (or the Egan Report) provides a proper basis for the conclusion that the work of early childhood teachers is of equal of comparable value to that of engineers across the entire engineering profession.

[207] None of the above is intended to suggest that there is no basis for comparison between early childhood teachers and engineers. At a high level, both are professional groups requiring a 4-year bachelor's degree, and both require the application of the knowledge and skill acquired through study and ongoing professional learning. At the more granular level, a comparability between the work value of a graduate early childhood teacher and an office-based engineer in the very early years of their career such as Mr Toker may be recognised, having regard in particular to the health and safety responsibilities and degree of autonomy of the early childhood teacher at that level. However the degree of diversity in the engineering

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[75] Ibid, PN 9241

profession which we have earlier described, and the very limited evidentiary material before us concerning the work, skills, responsibilities and working environment of engineers, makes it impossible to reach the conclusion that early childhood teachers at the graduate and 5-year levels perform work of equal of comparable value to that of their equivalents in the engineering profession, taken as a whole.

B.5 Conclusion

[208] We are not satisfied that the prerequisite in s 302(5) for the making of an equal remuneration order is satisfied on either basis advanced by the IEU. Accordingly the IEU's application for an equal remuneration order is dismissed.

C. THE IEU'S WORK VALUE APPLICATION

C.1 The application

[209] As filed, the IEU's work value application sought to vary clause 14.1 of the 2010 version of the EST Award, which then set the minimum rates of pay in the award, as follows:

> 14.1 The minimum salary per annum payable to a full-time employee will be determined in accordance with the provisions of clause 13—Classifications, and the following table.
>
> | Level | $ Per year |
> |---|---|
> | 1 | ~~50,017~~ 55,543 |
> | 2 | ~~51,049~~ 58,534 |
> | 3 | ~~52,438~~ 61,615 |
> | 4 | ~~54,329~~ 64,696 |
> | 5 | ~~56,222~~ 67,776 |
> | 6 | ~~57,984~~ 70, 857 |
> | 7 | ~~59,746~~ 73,938 |
> | 8 | ~~61,637~~ 77,019 |
> | 9 | ~~63,531~~ 80,099 |
> | 10 | ~~65,423~~ 83,179 |
> | 11 | ~~67,317~~ 89,341 |
> | 12 | ~~69,208~~ 92,422 |

[210] The IEU explained that the proposed adjustment to the EST Award salary rates has two elements. The first is that "*internal relativities are adjusted to remove the inappropriate internal compression at the higher levels*". In this respect, the IEU submitted that the current salary scale does not properly reflect the growth in skill level based on years of service because of this inappropriate compression, and a relativity adjustment is necessary to rectify this. The second is that a 17.5 percent increase is applied to the salary rates, better reflecting the work value of teachers. The two elements of IEU's proposed claim are presented in the table below:

Level	Award Rate	Current Award Relativities	IEU Claim Relativities	Adjusted Award Rates	+ 17.5% Work Value Increase
1	$50,017	95%	90%	$47,194	$55,453
2	$51,049	97%	95%	$49,816	$58,534
3	$52,438	100%	100%	$52,438	$61,615
4	$54,329	104%	105%	$55,060	$64,696
5	$56,222	107%	110%	$57,682	$67,776
6	$57,984	111%	115%	$60,304	$70,857
7	$59,746	114%	120%	$62,926	$73,938
8	$61,637	118%	125%	$65,548	$77,019
9	$63,531	121%	130%	$68,169	$80,099
10	$65,423	125%	135%	$70,791	$83,179
11	$67,317	128%	145%	$76,035	$89,341
12	$69,208	132%	150%	$78,657	$92,422

[211] Since the time that the IEU filed its work value application, the salary rates in the EST Award have increased by 4.8 percent as a result of the *Annual Wage Review 2018-19*[76] and the *Annual Wage Review 2019-20*.[77] The IEU's claim in the context of the current salary rates is therefore as follows:

Level	Award Rate[78]	Current Award Relativities	IEU Claim Relativities	Adjusted Award Rates[79]	17.5% Work Value Increase
1	$52,420	95%	90%	$49,460	$58,116
2	$53,500	97%	95%	$52,208	$61,344
3	$54,956	100%	100%	$54,956	$64,573
4	$56,938	104%	105%	$57,704	$67,802
5	$58,922	107%	110%	$60,452	$71,031
6	$60,769	111%	115%	$63,199	$74,259
7	$62,615	114%	120%	$65,947	$77,488
8	$64,597	118%	125%	$68,695	$80,717
9	$66,582	121%	130%	$71,443	$83,946
10	$68,565	125%	135%	$74,191	$87,174
11	$70,550	128%	145%	$79,686	$93,631
12	$72,531	132%	150%	$82,434	$96,860

[212] In the alternative, the IEU claimed a uniform 25 percent increase across all classifications. This would produce the following current rates of pay:

Level	$ Per year
1	65,525
2	66,875
3	68,695
4	71,173
5	73,653
6	75,961
7	78,269
8	80,746
9	83,228
10	85,706
11	88,188
12	90,664

C.2 Statutory framework and general principles

[76] [2019] FWCFB 3500, 289 IR 316

[77] [2020] FWCFB 3500, 297 IR 1

[78] Last adjusted as at 1 July 2020

[79] Based on the IEU relativities

[213] The IEU's work value application is made pursuant to s 158(1) of the FW Act. For relevant purposes, s 158(1) authorises a registered organisation of employees to apply for the making of a determination varying a modern award under s 157. Section 157 relevantly provides:

> **157 FWC may vary etc. modern awards if necessary to achieve modern awards objective**
>
> (1) . . .
>
> (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
>
> > (a) the variation of modern award minimum wages is justified by work value reasons; and
> >
> > (b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.
> >
> > Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).
>
> (2A) ***Work value reasons*** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
>
> > (a) the nature of the work;
> >
> > (b) the level of skill or responsibility involved in doing the work;
> >
> > (c) the conditions under which the work is done.
>
> (3) The FWC may make a determination or modern award under this section:
>
> > (a) on its own initiative; or
> >
> > (b) on application under section 158.

[214] The modern awards objective referred to in s 157 is set out in s 134(1), which provides:

> **134 The modern awards objective**
>
> *What is the modern awards objective?*
>
> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> > (a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

[215] Section 135(1) provides that, apart from variations pursuant to ss 160 or 161, modern award minimum wages can be varied under Part 2-3 of the FW Act (in which s 134(1), 157 and 158 are located) only if the Commission is satisfied that the variation is justified by work value reasons (as referred to in s 157(2)). Section 135(2) provides that, in exercising powers to set, vary or revoke modern award minimum wages under Part 2-3, the Commission must take into account the rate of the national minimum wage as currently set in a national minimum wage order. In addition, s 138 provides:

138 Achieving the modern awards objective

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

[216] Section 284(2)(b) provides that the minimum wages objective also applies to the performance or exercise of the Commission's powers under Part 2-3 so far as they relate

to setting, varying or revoking modern award minimum wages. The minimum wages objective is set out in s 284(1), which provides:

> **284 The minimum wages objective**
>
> *What is the minimum wages objective?*
>
> (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
>
> (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
>
> (b) promoting social inclusion through increased workforce participation; and
>
> (c) relative living standards and the needs of the low paid; and
>
> (d) the principle of equal remuneration for work of equal or comparable value; and
>
> (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.
>
> This is the ***minimum wages objective***.

[217] The cumulative effect of the above provisions is that, in order to exercise the power in s 157 to grant the IEU's work value application in whole or part, we need to:

(1) be satisfied that the variation to minimum wages prescribed in the EST Award is justified by work value reasons;

(2) be satisfied that the variation is necessary to achieve the modern awards objective;

(3) be satisfied that the variation is necessary to meet the minimum wages objective; and

(4) take into account the rate of the national minimum wage as currently set in a national minimum wage order.

[218] In the 2018 Full Bench decision in *4 yearly review of modern awards - Pharmacy Industry Award 2010*,[80] (*Pharmacy Award decision*) the construction of the requirement in s 156(3) of the FW Act that a variation to modern award minimum wages in the 4 yearly review of modern awards be "*justified by work value reasons*", and the definition of the expression "*work value reasons*" in s 156(4), was considered at length in the context of the genesis and

[80] [2018] FWCFB 7621, 284 IR 121

development of the concept of the fixation of wages based on work value in the history of industrial arbitration in Australia.[81] Section 156 has since been repealed, but we consider that the conclusion stated in the *Pharmacy Award decision* are applicable to subsections 157(2) and (2A) because those provisions are in terms relevantly identical to subsections 156(3) and (4). The Full Bench stated the following conclusions (footnotes omitted):

> "[163] It is against that background that the way in which s 156(3) and (4) are properly to be construed and applied may be considered. A number of propositions may be stated in that context. The first is that the effect of s 156(3) is to establish a jurisdictional prerequisite for the exercise of power to vary minimum wages in a modern award in the conduct of a 4 yearly review of modern awards, namely the reaching of a state of satisfaction on the part of the Commission that the variation is "*justified by work value reasons*".
>
> [164] Second, because the jurisdictional prerequisite is expressed in terms of the Commission's "*satisfaction*" concerning whether a variation is "*justified*" by the prescribed type of reasons - a requirement which involves an element of subjectivity and about which reasonable minds may differ - it requires the formation of a broad evaluative judgment involving the exercise of a discretion.
>
> [165] Third, the definition of "*work value reasons*" in s 156(4) requires only that the reasons justifying the amount to be paid for a particular kind of work be "*related to any of the following*" matters set out in paragraphs (a)-(c). The expression "*related to*" is one of broad import that requires a sufficient connection or association between two subject matters. The degree of the connection required is a matter for judgment depending on the facts of the case, but the connection must be relevant and nor remote or accidental. The subject matters between which there must be a sufficient connection are, on the one hand, the reasons for the pay rate and, on the other hand, *any* of the three matters identified in paragraphs (a)-(c) – that is, any one or more of the three matters.
>
> [166] Fourth, although the three matters identified - the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done - clearly import the fundamental criteria used to assess work value changes under the wage fixing principles which operated from 1975 to 1981 and 1983 to 2006, the legislature in enacting s 156(4) chose not to import the additional requirements contained in those wage-fixing principle. For example, as was observed in the *Equal Remuneration Case 2015*, s 156(4) does not contain any requirement that the work value reasons consist of identified *changes* in work value measured from a fixed datum point. The Full Bench in that matter said:
>
> > "[292] … We see no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s 156(3) or s 157(2). Those provisions allow the variation of such minimum rates for 'work value reasons', which expression is defined broadly enough in s 156(4) to allow a wide-ranging consideration of any contention that, for historical

[81] Ibid at [131]-[162]

> reasons and/or on the application of an indicia approach, undervaluation has occurred because of gender inequity. There is no datum point requirement in that definition which would inhibit the Commission from identifying any gender issue which has historically caused any female-dominated occupation or industry currently regulated by a modern award to be undervalued. The pay equity cases which have been successfully prosecuted in the NSW and Queensland jurisdictions and to which reference has earlier been made were essentially work value cases, and the equal remuneration principles under which they were considered and determined were likewise, in substance, extensions of well-established work value principles. It seems to us that cases of this nature can readily be accommodated under s 156(3) or s 157(2). Whether or not such a case is successful will, of course, depend on the evidence and submissions in the particular proceeding."

> [167] Likewise, s 156(4) did not incorporate the test in the wage-fixing principles that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification. In substance, section 156(3) and (4) leave it to the Commission to exercise a broad and relatively unconstrained judgment as to what may constitute work value reasons justifying an adjustment to minimum rates of pay similar to the position which applied prior to the establishment of wage fixing principles in 1975.

> [168] Fifth, it would be open to the Commission have regard, in the exercise of its discretion, to considerations which have been taken into account in previous work value cases under differing past statutory regimes. For example, although as already stated s 156(4) contains no requirement for the measurement of work value changes from a fixed datum point, we consider it likely that the Commission would usually take into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way (that is, in a way which is free of gender bias and any other improper considerations) in assessing wages in the relevant modern award or its predecessor in order to ensure that there is no "double counting". Likewise, we consider that the considerations referred to in paragraph [190] of the *ACT Child Care Decision*, which we have earlier quoted, may be of relevance in particular cases, as may considerations in other authoritative past work value cases."

[219] The considerations in paragraph [190] of the *ACT Child Care decision*,[82] a decision of a Full Bench of the Australian Industrial Relations Commission (AIRC), referred to in the last paragraph of the extracted passage above were as follows (footnotes omitted):

> "[190] Previous decisions of the Commission suggest that a range of factors may, depending on the circumstances, be relevant to the assessment of whether or not the changes in question constitute the required "*significant net addition to work requirements*". The following considerations are relevant in this regard:

(a) [82] *ALHMWU re Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998 - re Wage rates* [2005] AIRC 28, PR954938 (13 January 2005)

- Rapidly changing technology, dramatic or unanticipated changes which result in a need for new skills and/or increased responsibility may justify a wage increase on work value grounds. But progressive or evolutionary change is insufficient.

- An increase in the skills, knowledge or other expertise required to adequately undertake the duties concerned demonstrates an increase in work value.

- The mere introduction of a statutory requirement to hold a certificate of competency does not of itself constitute a significant net addition to work requirements. It must be demonstrated that there has been some change in the work itself or in the skills and/or responsibility required. However, where additional training is required to become certified and hence to fulfil a statutory requirement a wage increase may be warranted.

- A requirement to exercise care and caution is, of itself, insufficient to warrant a work value increase. But an increase in the level of responsibility required to be exercised may warrant a wage increase on work value grounds. Such a change may be demonstrated by a requirement to work with less supervision.

- The requirement to exercise a quality control function may constitute a significant net addition to work requirements when associated with increased accountability.

- The fact that the emphasis on some aspects of the work has changed does not in itself constitute a significant net addition to work requirements.

- The introduction of a new training program or the necessity to undertake additional training is illustrative of the increased level of skill required due to the change in the nature of the work. But keeping abreast of changes and developments in any trade or profession is part of the requirements of that trade or profession and generally only some basic changes in the educational requirements can be regarded, of itself, as constituting a change in work value.

- Increased workload generally goes to the issue of manning levels not work value. But, where an increase in workload leads to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration."

[220] The principles concerning the assessment of what is necessary to meet the modern awards objective may be summarised as follows:

- the modern awards objective is very broadly expressed,[83] and is a composite expression which requires that modern awards, together with the NES, provide "*a*

[83] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480, 205 FCR 227, 219 IR 382 at [35]

fair and relevant minimum safety net of terms and conditions", taking into account the matters in ss 134(1)(a)–(h);[84]

- fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question;[85]

- the obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process;[86]

- no particular primacy is attached to any of the s 134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award;[87]

- it is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award;[88]

- the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives;[89]

- in giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance;

- the matters which may be taken into account are not confined to the s 134 considerations;[90]

- section 138, in requiring that a modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective (and, to the extent applicable, the minimum wages objective), emphasises the fact it is the minimum safety net and minimum wages objective to which the modern awards are directed;[91]

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[84] *Penalty Rates Decision* [2017] FWCFB 1001, 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [41]- [44]

[85] *Re Annual Wage Review 2017-2018* [2018] FWCFB 3500, 279 IR 215 at [21]- [24]

[86] *Edwards v Giudice* [1999] FCA 1836, 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]- [84]; *National Retail Association v Fair Work Commission* [2014] FCAFC 118, 225 FCR 154, 244 IR 461 at [56]

[87] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [33]

[88] *National Retail Association v Fair Work Commission* [2014] FCAFC 118, 225 FCR 154, 244 IR 461 at [105]- [106]

[89] Ibid at [109]-[110]

[90] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [48]

[91] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, 252 FCR 337 at [23]

- what is necessary to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence;[92] and

- where an interested party applies for a variation to a modern award as part of the 4 yearly review, the task is not to address a jurisdictional fact about the need for change, but to review the award and evaluate whether the posited terms with a variation meet the objective.[93]

[221] In respect of the minimum wages objective in s 284, the Expert Panel in the *Annual Wage Review 2017-18*[94] stated the following propositions:

- as with s 134(1), the matters specified in s 284(1) must be considered and treated as matters of significance in the decision-making process;[95]

- there is a substantial degree of overlap in the considerations the Panel is required to take into account under the minimum wages objective and the modern awards objective;[96]

- the statutory task in s 284(1) (similar to s 134(1)) is an evaluative exercise, in which the statutory considerations inform the evaluation of what might constitute a safety net of fair minimum wages but do not necessarily exhaust the matters which might be considered relevant;[97] and

- fairness is central to the minimum wages objective (as it is to the modern awards objective), with fairness to be assessed from the perspective of employees and employers.[98]

C.3 The IEU's contentions

[222] The central proposition in the IEU's case is that there have been significant changes in the work value of teachers covered by the EST Award, including early childhood teachers, since 1996 that have not been taken into account in the fixation of minimum wage rates for such teachers. The IEU identified three major categories of change in this respect:

(1) Increased professionalism that has given rise to higher quality teachers, demonstrated by:

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[92] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* [2012] FCA 480, 205 FCR 227, 219 IR 382

[93] *CFMEU v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, 252 FCR 337 at [46]

[94] [2018] FWCFB 3500, 279 IR 215

[95] Ibid at [8]

[96] Ibid at [9]

[97] Ibid at [14]

[98] Ibid at [17]

- changes to initial teacher education, in particular quality assurance of teaching programs, higher qualification entry requirements, increased degree length and, in NSW, additional requirements for employment in Government schools;

- new national registration requirements for teachers which involve new ethical standards and standards for proficiency;

- new post-registration requirements, in particular mandatory continual professional development requirements;

- substantial increases in accountability, driven by increased student testing and reporting of results;

- new national quality measures for early childhood education introduced in 2009; and

- increases in accountability arising from changes in community and parental expectations.

(2) An increase in the complexity of the work arising from:

- the change to an outcome-based curriculum, which requires differentiating the teaching for each child and substantially increases the level and intensity of teaching;

- the requirement to constantly record the level of achievement of each child at a granulated level which assesses each child's proficiency in various categories of skill and knowledge for each subject;

- the need to analyse data on the level of achievement of each child to determine how to target those areas that need attention and then teach to that individual level;

- an increase in students with special needs, behavioural difficulties or additional needs which has given rise to substantial additional work, such as individualised teaching, altered assessments, individual student plans determined in conjunction with parents and health professionals, a different and more intense teaching approach, and the need to lead and supervise teacher's aides;

- the need to use technology in the classroom, which is a required part of the EYLF and the national teaching framework; and

- standardised curriculums with greater content and scope, requiring more to be covered in the same period of time.

(3) Substantially more intense and demanding work resulting from:

- the need to produce constant updated reports as to progress based on regular assessments accompanied by a withdrawal of administrative support;
- substantially increased reporting requirements to parents, from once a term or year reports to regular reports on subjects via app technology;
- substantially increased accessibility for parents including via emails and phone;
- substantially increased obligations to document a variety of information;
- a substantial increase in policies which must be understood and applied; and
- an increase in extra-curricular activities requiring teaching time.

[223] In relation to its first category of change, the IEU submitted that initial teacher education requirements had been reformed since 1996, resulting in the lengthening of the time taken to complete an undergraduate degree to four years and a master's degree to two years, the introduction in 2011 of a national course accreditation scheme superintended by the AITSL which imposed strict quality assurance standards, the introduction by the Commonwealth in 2015 of increased entry requirements including higher and more sophisticated entry criteria to university degrees, extensive assessment of graduates to ensure classroom readiness, standardisation of induction systems, increased practicum requirements while undertaking a degree, higher quality assurance measures in relation to university study, and focused research of teacher education effectiveness and practice. The IEU also pointed to the introduction of specialised birth to age 8 degrees, which permit employment in early childhood education and primary schools, and to the NSW Government's imposition of academic benchmark results for teachers who seek employment as a teacher in NSW public schools.

[224] The IEU also submitted that the uniform registration requirements for teachers introduced in 2011, coupled with common national professional standards, represent a significant change in that they established standardised minimum skill levels which ensured accountability and lifted the level of professionalism. In addition, teachers are now required to engage in ongoing professional development of 20 hours per year, or 100 hours over five years, as a result of the introduction of minimum standards and reporting requirements, and schools and education facilities are also introducing internal training and professional development programs for teachers.

[225] As to the second category of change, the IEU submitted that changes in pedagogical understanding and practices have greatly altered the complexity and intensity of work performed by teachers at all levels of schooling. The IEU identified the starting element of this as being differentiation, by which alternative assessment and learning techniques are developed to meet the needs of particular individual children or groups of demographically similar children. More recently, this had evolved into the personalisation of learning experiences requiring the teacher to provide different learning plans and resources for each child in the class. The IEU submitted that although, by necessity, individualised learning has always been a feature of quality early childhood education, it has become more prevalent following the introduction of the NQF. In both schools and early childhood education, it was submitted, individualisation added further complexity in respect of children with special

needs or requiring additional support. These developments have had a revolutionary effect on day-to-day teaching practice, with the drive for quality outcomes leading to more complex work.

[226] The IEU also relied upon significant changes in the nature and volume of standardised testing that teachers are required to undertake, including National Assessment Program – Literacy and Numeracy (NAPLAN), Progressive Achievement Testing (PAT), and State-specific and school-specific testing. This testing, the IEU submitted, constituted part of a program of ongoing individual assessment which included test design, data entry, result analysis, ongoing planning based on individual outcomes, determining individual teaching goals, assessing individual student outcomes against their individual plans, and report writing and other documentation. This process involved, it was contended, marking for a range of competencies, and facilitates identification of students with learning difficulties and the design of individual teaching targeted for them. It also increases the accountability of teachers within a school and to parents since test results and outcomes are increasingly used as a metric to assess teacher performance.

[227] The IEU also contended that as a consequence of the above changes, parental expectations of professionalism and quality outcomes have increased, particularly in the early education sector, with parents expecting and enjoying an extraordinarily high degree of communication and reporting about their child's experiences and learning through phone applications, report books and observations tailor-made for each child and written to engage and educate parents. This has, it was submitted, consequently increased the accountability and accessibility of teachers, and has presented complex challenges for teachers and exposed them to a range of new and potentially very difficult interactions and a corresponding increase in the level of interpersonal skills required.

[228] The introduction of the standardised national curricula in the form of the EYLF in 2009 and the Australian Curriculum in 2010 has, the IEU submitted, led to increased work for teachers because of regulatory scrutiny. The IEU rejected the suggestion that the EYLF was not properly to be characterised as a curriculum because it was outcomes focused rather than content-prescriptive. The IEU also pointed to developments in pedagogical understanding which have driven continuous change in teachers' practice by enhancing the sophistication and breadth of skills required of teachers and the quality of outcomes for students. In addition, it was submitted, demographic changes involving an increase in students with diagnosed learning difficulties and other disabilities, or with non-diagnosed issues requiring additional support, and students from challenging and non-traditional family backgrounds, had altered the nature, complexity and challenges involved in teachers' work, both in schools and early childhood education. This in many cases involved liaising with other agencies and professionals, regular meetings with parents and support agencies and extensive record keeping, report writing and the development of individual education plans.

[229] In respect of changes in technology, the IEU submitted that the EYLF and the Australian Curriculum require that technology be integrated into the learning experience, whereby teachers are required to be both a facilitator as well as an instructor in the use of such technology and must ensure the safe and appropriate use of technology. The IEU also relied upon the increase in the number of policies which teachers have been required to understand and implement, covering issues such as child safety, child protection requirements, diversity issues, occupational health and safety and complex medical issues. This had in particular occurred in early childhood education, it was submitted.

[230] In relation to the third category of change, the IEU submitted that the changes earlier described had led to a significant increase in the overall workload of teachers in addition to the increase in the skill requirements, complexity and quality of teachers' work, including greater detail in respect of programming, increased documentation requirements, an increased need to work out of hours, a requirement to work with less administrative support, greater participation in a greater range of extra-curricular activities, and a greater need to mentor and provide leadership to junior staff seeking accreditation.

[231] The IEU also submitted that the environment in which teachers work has changed, with a move from traditional classrooms to open plan classrooms, "agile space" environments including with multi-age groupings, and self-paced learning environments for students who might be using their own devices. These changes, it was submitted, bring additional challenges in early childhood education in terms of creating noisy, chaotic and crowded teaching spaces full of very young children who have difficulty in controlling their emotions and following instructions.

[232] In relation to early childhood teachers specifically, the IEU placed emphasis upon the introduction of the NQF, which imposed a uniform national scheme of quality regulation on the early childhood sector and, in respect of teaching work, mandated a national curriculum for the first time, identified and applied the EYLF and teaching outcomes, improved the professionalism and quality of outcomes of early childhood teachers, and also increased their workload.

[233] The IEU identified the following discretionary considerations as weighing in favour of the grant of its claim:

- the shortage of early childhood teachers was not just caused by increased demand resulting from government-imposed teacher/child ratios but also by the difference in remuneration and conditions between early childhood teachers and primary school teachers;

- those early childhood employers which had increased the remuneration of early childhood teachers above the minimum rates of pay set by the EST Award had been motivated by a desire to improve their capacity to recruit and retain early childhood teachers;

- it was in the public interest to address the shortage of early childhood teachers to ensure the best educational outcomes for children in that stage of education;

- the maintenance of wages for early childhood teachers at levels so clearly below those for school teachers is not fair and should be rectified;

- the gender-biased perception that early childhood education is of lower value in the eyes of the community, and that it is caring work which women are inherently capable of doing, would be at least in part addressed by the grant of the IEU's claim;

- the growth in the for-profit long day care sector, the government subsidy scheme introduced effective from 1 July 2018, the capacity of the sector to increase charges

without losing patronage in recent years, and the ability of some employers to increase teachers' pay meant that the IEU's claim could not be said to be unaffordable; and

- the compression in teachers' salaries caused by flat-rate wage increases had meant that the work value acquired through years of experience in teaching has not been appropriately rewarded, and the grant of the IEU's primary claim would rectify this.

C.4 The IEU's evidentiary case

[234] The IEU adduced evidence from a number of expert and lay witnesses in support of its work value case. In addition, it relied upon its witness evidence adduced in support of its equal remuneration application, except for the Mercer Report (although, unhelpfully, it did not explain precisely what aspects of this evidence related to the work value application). The IEU's evidentiary case is summarised below except to the extent that it has already been summarised in connection with the equal remuneration case.

Associate Professor Susan Irvine

[235] Susan Irvine is Associate Professor at the School of Early Childhood and Inclusive Education in the Faculty of Education at the Queensland University of Technology. She was awarded a Diploma of Teaching (Early Childhood) from the Brisbane Kindergarten Teachers College in 1980, a Bachelor of Educational Studies in 1986 and a Master of Educational Studies in 1990 from the University of Queensland and a PhD from the Queensland University of Technology in 2005. She has previously worked as an early childhood teacher, Director of a childcare centre, a primary school teacher and was the CEO of Lady Gowrie kindergartens in Queensland. She has also held public service, management and academic roles in the area of early childhood education and care over a career of almost 40 years. She was requested by the IEU to prepare a report[99] identifying changes in the nature and value of early childhood teaching from 1996 to the present day, divided into two time periods: 1996 to 2009, and 2010 to 2018. In her report, Associate Professor Irvine focused on the work of early childhood teachers, which she characterised as degree-qualified teachers who have completed an initial teacher education program (that is, covering the age range birth to 8 years or birth to 12 years) that enables them to work in preschools and long day care as well as the early phase of school. She also emphasised that while she concentrated on changes impacting upon early childhood teachers, the vast majority of the changes she identified impacted on the work of *all* teachers through to secondary school.

[236] At the outset Associate Professor Irvine identified that a major area of change was the focus placed on effective or quality teaching, which acknowledges the teacher as the key determinant of positive educational outcomes at both the individual and national level. This was based on research which disclosed the extent to which the quality of teaching accounted for variance in student achievement. In Australia, the Melbourne Declaration recognised the link between education, society and the economy, identified priority goals to improve educational outcomes for all young Australians and acknowledged the fundamental importance of teachers and school leaders in achieving these goals. The Melbourne Declaration shaped Australian education policy for the next decade in respect of:

[99] Exhibit 14

- more rigorous teacher preparation;
- the introduction of national curricula (the Australian Curriculum, the EYLF);
- the development of the APST;
- initiatives to improve educational outcomes for children experiencing disadvantage; and
- strengthened accountability and transparency in education.

[237] Associate Professor Irvine said that each of the above has had a profound effect on the nature, complexity and volume of work of teachers.

[238] Associate Professor Irvine identified specific changes in the areas discussed below.

Teacher registration

[239] Associate Professor Irvine said that in the period 1996 to 2009, initial teacher education programs became longer with the phasing-out of three-year programs and the introduction of a requirement for a four-year study program. It was reported in 1998 that most States and Territories were making the transition at this time as a response to increased demands and complexities in contemporary schooling. The duration of study for graduate entry was also generally increased from one to two years, although in Queensland this did not occur until 2017. Introduction of mandatory requirements for ongoing learning were also recommended in 1998.

[240] In the 2010-2018 period, a commitment was made to the establishment of a national system of teacher registration based on a new national professional framework for teachers known as the APST. The APST strengthened professional expectations in relation to:

- inclusive teaching practices (including differentiated teaching for Aboriginal and Torres Strait Islander students and students with disability);
- assessment and reporting, including the use of diagnostic, formative and summative approaches to assess student learning, interpreting student data and documenting and reporting on student learning;
- information and communication technology (ICT), specifically using ICT and teaching students to use ICT to expand learning; and
- engaging in ongoing professional learning, including using the APST to assess and plan professional learning needs and engaging in professional learning to improve practice and student learning.

[241] Associate Professor Irvine said that while the above aspects of teaching have historically been recognised as important (except for ICT), the APST present these as universal standards for teaching and sets new benchmarks for teaching practice and performance. She said that, today, the national requirement for registration is the completion

of a four-year undergraduate degree accredited by the AITSL and, for employment as an early childhood teacher in prior-to- school teaching, the program must also be approved by the ACECQA. Graduate students need to complete two years of professional study in education to be recognised as a teacher, which will usually be Master of Teaching program set at Australian Qualifications Framework (AQF) Level 9 (in comparison with the prevision Graduate Diploma set at AQF Level 8). To maintain registration, teachers are required to complete a minimum of 20 hours of professional development in education each year, often undertaken out of hours and at the teacher's own expense.

More rigorous teacher preparation

[242] Associate Professor Irvine's evidence was that, in the period 2010-2018, apart from the duration of initial teacher education programs, there have been major changes in the content of such programs with the intention of lifting entry requirements, strengthening pre-service teacher performance and ensuring that teachers are equipped to work in a dynamic, demanding and complex profession. These changes include more selective entry requirements (including literacy and numeracy prerequisites), a strengthened focus on content/discipline knowledge, teaching pedagogies and assessment practices linked to the introduction of the Australian Curriculum and the EYLF, an expectation of digital literacy and a renewed emphasis on connecting theory and practice through professional experience while training.

Introduction of the Australian Professional Standards for Teachers

[243] The APST, which were introduced in 2011, constitute the first set of national professional standards for teachers in Australia and describe the professional knowledge, professional practice and professional engagement required of teachers in the 21st century. Associate Professor Irvine said that the APST was a key element in the professionalisation of teaching in Australia and an important step forward in raising the status of the teaching profession. She said that the APST comprises seven standards which are presented in four career stages: Graduate, Proficient, Highly Accomplished and Lead Teacher. The expectations for teaching performance increase with each new level. Preservice teachers are expected to provide evidence that upon completion of their initial teaching program they meet the APST at Graduate level in order to obtain provisional registration. Beginning teachers are then required to work with their employer to transition to full teacher registration following the completion of one year of teaching, and this requires the beginning teacher to collect evidence to demonstrate they meet the APST at Proficient level.

Changes to curriculum and an increased focus on assessment

[244] In relation to the 1996-2009 period, Associate Professor Irvine said that prior to the introduction of the Australian Curriculum, State and Territories designed and implemented their own school curricula, with considerable variation between jurisdictions. There were few curricula designed for education and care services prior to school entry. In Queensland, the *Preschool Curriculum Guidelines* were introduced in 1998 for use by early childhood teachers in a non-compulsory education setting. Following the cessation of State pre-schools and the introduction of the (then) non-compulsory Preparatory year, the Queensland Government implemented the *Queensland Early Years Curriculum Guidelines,* which provided the basis for teaching in the Preparatory year until the phasing-in of the Foundation year in the Australian Curriculum beginning in 2010. The EYLF was introduced in 2009, and was described by Associate Professor Irvine as marking "*a significant historical milestone in*

Australian early education, and recognition of education and care services as the foundation to Australia's education system". Associate Professor Irvine said that the EYLF led to a strengthened focus on quality teaching in the early years and increased expectations of early childhood teachers and other educators working in these settings. Under the EYLF, it is expected that early childhood teachers will:

- respect and enable children's agency in their learning;
- play an active role in promoting and extending children's learning;
- draw on an expanded range of teaching and learning theories, including developmental, socio-cultural, socio-behavioural, critical and post-structural theories to support and extend children's learning;
- implement an integrated and holistic approach to teaching and learning, contributing to the five high level learning outcomes;
- work in partnership with families and communities to achieve and sustain the best outcomes for children;
- provide rich and inclusive educational programs that cater for individual learners;
- promote cultural awareness and respect for diversity;
- monitor, document and assess children's learning;
- promote lifelong learning dispositions; and
- support successful transition to school, including liaising with schools and the development of transition statements at the end of the kindergarten/preschool year.

[245] Associate Professor Irvine said that while the above practices have long been associated with quality in early childhood education and care, the EYLF draws on contemporary research and practice wisdom to raise professional expectations for all teachers which are defined, monitored and subject to ongoing external assessment as part of the NQF Assessment and Rating System. Associate Professor Irvine also said that, like the Australian Curriculum, the EYLF includes a focus on increased discipline knowledge, teachers as highly skilled pedagogues, individualised and personalised learning approaches and ongoing documentation and assessment of children's learning progress against predetermined learning outcomes. Her opinion was that the implementation of the EYLF, in conjunction with the broader NQF for early childhood education and care, has raised professional and community expectations of teachers and other educators working in these contexts. There was evidence to show that these initiatives had increased workload, in particular in relation to curriculum documentation and other administrative expectations.

[246] In relation to the Australian Curriculum, Associate Professor Irvine said that it strengthened the emphasis on disciplinary knowledge, regular and ongoing assessment of learning, integrated approaches to teaching and learning, and the development of general capabilities such as literacy, numeracy, ICT capability, critical and creative thinking, personal and social capability, ethical understanding and intercultural understanding. The Australian

Curriculum presents a developmental sequence of learning from Foundation to Year 10 and provides detailed content descriptions and national achievement benchmarks to support quality teaching and learning. Associate Professor Irvine said that it has led to a much greater focus on ongoing formative and summative assessment of individual learning, and requires more time to be spent on observing, monitoring and testing children's developing knowledge and skills against national expectations for their year level. This, she said, has cumulatively meant a much greater focus on data collection and analysis to inform teaching and learning.

[247] Associate Professor Irvine was cross-examined upon her report at the hearing on 12 June 2019, as well as upon her reports prepared in connection with the IEU's equal remuneration application. She gave evidence to the following effect:

- the professional role and responsibilities of an early childhood teacher are similar regardless of whether the context is an early childhood and care prior-to-school service or whether it is the early phase of school;[100]

- non-school early childhood teachers in Queensland are not required to be registered, but that is currently being reviewed and is anticipated to be changed;[101]

- the NQF applies to non-degree qualified early childhood educators as well as degree-qualified early childhood teachers, but not in the same way;[102]

- there is no provision of the National Law which deals with teachers differently to non-degree educators:[103]

- when Associate Professor Irvine was CEO of the Lady Gowrie kindergartens in Queensland, she employed a mix of degree qualified and non-degree qualified teachers, with the former responsible for the design, implementation and evaluation of preschool education programs and the latter supported the delivery of the programs;[104]

- non-degree qualified educators may occupy Educational Leader roles and Director roles;[105]

- the Early Childhood Australia Code of Ethics applies to everyone who works in early childhood services, and has been in place in various versions for 28 years;[106]

- the capacity to reflect on both teaching and learning is a defining professional skill, but the strengthened emphasis on critical reflection takes this to a new level;[107]

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[100] Transcript, 12 June 2019, PN 936

[101] Ibid, PNs 941-942

[102] Ibid, PNs 952-959

[103] Ibid, PNs 962-963

[104] Ibid, PNs 966-970

[105] Ibid, PNs 976-977

[106] Ibid, PNs 980-988

[107] Ibid, PNs 995-996

- ongoing professional development is a feature of the work or practice of any profession;[108]

- difficulties in the recruitment and retention of early childhood teachers in the early childhood and care sector, particularly in long day care, are caused by difficulty in competing with schools as to pay and conditions, and also by the increased demand for early childhood teachers caused by the higher number of teachers required to be employed by the NQF;[109]

- the NQF recognises three streams of early childhood educators: the assistant educator with a Certificate III level qualification, the Lead Educator who is in charge of a room and has an AQF Level 5 diploma, and the degree-qualified early childhood teacher who can lead a program in any room;[110]

- the NQF has different expectations of people in these particular roles, so that when it comes to early childhood teachers, the focus is on their role in terms of active teaching, how they can maximise children's learning, and monitoring and assessing learning against the new high level learning outcomes introduced by the EYLF;[111]

- Associate Professor Irvine could not however identify any aspect of the NQF which referred to differentiated expectations for early childhood degree-qualified teachers;[112] and

- the research, including the E4 Kids study, suggest that more highly qualified educators are able to apply a higher level of knowledge in the design, delivery and evaluation of children's learning experiences.[113]

[248] Associate Professor Irvine prepared a supplementary report at the request of the IEU dated 19 June 2019.[114] This report concerned three issues: the impact of the NQF and its various elements; the overarching professionalisation agenda in early childhood education and care; and the related focus on quality teaching in all education contexts. In relation to the NQF, Associate Professor Irvine said that it constitutes a holistic and integrated framework consisting of different elements which have been designed to work together to drive quality improvement in early childhood education and care. The National Law and National Regulations, which set the baseline for service provision, raised qualification requirements for all educators, including the need for long day care centres to engage a degree-qualified early childhood teacher, with most needing to engage a second early childhood teacher from 2020. The NQS has shifted the focus away from structural inputs to children's experiences and outcomes and emphasises early learning and raises expectations regarding educational programs and practices. The EYLF provides the reference point for educational programs and practices, and all educators, regardless of qualifications, are expected to work within it. The

[108] Ibid, PN 997

[109] Ibid, PNs 998-1075, 1153-1156

[110] Ibid, PN 1126

[111] Ibid, PN 1127, 1134

[112] Ibid, PNs 1160-1165

[113] Ibid, PNs 1140-1142

[114] Exhibit 133

NQF sets higher expectations for educators' professional practice and detail practice that is typically associated with teachers. The expectation is that early childhood teachers will lead effective teaching and learning with their group of children, most often the preschool group, and make a positive contribution to educational programs and practice across the centre in both formal and informal leadership roles. The expectation regarding the roles of lesser qualified educators is different. An assistant educator holding a vocational qualification (Certificate III) is expected to work with the EYLF, with direction and support from a Lead Educator (Diploma) or early childhood teacher. In jurisdictions where preschool funding is available to long day care centres, Diploma-qualified educators work with the EYLF (or approved State preschool curriculum), with direction and support from an early childhood teacher. Associate Professor Irvine compared this to the school context, where teacher's aides work with the Australian Curriculum with direction and support from a teacher.

[249] Associate Professor Irvine described the practical effects of the NQF on the work of early childhood teachers. She said that NQS data had shown continuing quality improvement in early childhood education and care since the introduction of the NQF, with many services now achieving a higher quality rating than before. In respect of the EYLF, Associate Professor Irvine said that early childhood teachers are now expected to exercise their professional judgment and select teaching approaches to maximise individual learning, drawing from an expanded suite of evidence-informed teaching strategies, and higher expectations of early childhood teachers is evidenced by the requirement for an early childhood teacher to reach the preschool education program where this is funded by government, regardless of service type. The EYLF identified five high-level learning outcomes, and requires all staff to learn how to plan engaging learning experiences based on the EYLF principles and practices and contributing to the new national learning outcomes. The EYLF requires monitoring, assessment and documentation of children's learning progress against the five high-level outcomes. While all staff contribute to this documentation, there is an expectation that early childhood teachers leading the preschool education program will regularly engage in formative and summative assessment of learning and use this to develop a transition statement for each child in their group on learning over the preschool year, which is shared with the child's family and primary teacher to support a successful transition to school.

[250] Associate Professor Irvine said that the APST, which identify seven professional standards to support effective teaching and learning, closely align with the NQS, particularly in relation to educational programs and practices. In a growing number of jurisdictions, early childhood teachers in early childhood education and care are required to be registered, and it is expected that there will be a move to national registration. She also pointed to the growing diversity of children in early childhood education, which she said increases the demands and complexity of work for all staff. The NQF requires all educators to engage in inclusive practices in early childhood education and care and, in this respect, the NQS and the EYLF promote the need for and the benefits of individualised teaching and learning practices. The APST requires teachers to differentiate their teaching to optimise children's learning, and to design and implement teaching strategies that are responsive to the learning strengths and needs of students from diverse linguistic, cultural, religious and socio-economic backgrounds.

[251] The IEU also relied on Associate Professor Irvine's reports prepared for the purpose of its equal remuneration application, dated 7 December 2017[115] and 19 July 2018.[116] In respect of the 7 December 2017 report, the IEU requested that Associate Professor Irvine focus on the nature of the work of early childhood teachers, the skills and responsibilities required of them and the conditions and context in which the work is performed.

[252] Associate Professor Irvine outlined that early childhood teachers are expected to:

- engage in curriculum planning and decision-making, using the EYLF alongside their knowledge of individual children and professional judgment;
- observe, document, monitor and assess children's learning and report on their learning progress;
- build respectful and reciprocal relationships with families to inform teaching and to support continuity of learning for children;
- establish and maintain stimulating, safe and supportive learning environments;
- work effectively as pedagogical leaders and members of an educational team and build the capacity of less-qualified educators to critically reflect and build their pedagogical knowledge and skills;
- build partnerships with schools and other local child and family services to strengthen continuity and learning and support families in their child rearing responsibilities;
- critically reflect on their teaching practice, engage in ongoing professional learning and development and strive for continuous improvement in their daily work with children and families;
- act in the best interests of all children and to demonstrate professional and ethical behaviour in all aspects of their work;
- keep up to date with contemporary educational policy, research and practice wisdom; and
- undertake mandatory annual training requirements such as child protection and CPR.

[253] Associate Professor Irvine outlined what she called "*the ECT workforce challenge*", that is, the shortfall of early childhood teachers prepared to work in prior to school early childhood education and care services, in particular long day care. She pointed to less favourable wages and working conditions and lower professional status than colleagues in primary schools as significantly impacting recruitment and retention of early childhood teachers in long day care services. In turn, the majority of early childhood teacher preservice

[115] Exhibit 12

[116] Exhibit 13

teachers express a preference to work in the school system, making it more difficult to recruit early childhood teachers to work in long day care compared to in preschools or schools, and turnover in long day care is persistently high. She said early childhood teacher turnover compromises children's attachments and relationships and is detrimental to their learning, development and wellbeing. She pointed to government and employer initiatives to address the early childhood teacher shortfall that have focused on upskilling vocationally qualified educators, however the 2016 *Early Years Workforce Study* found that educators studying to become early childhood teachers were more likely to leave their current centre once qualified to seek a heightened professional status and better pay and working conditions. Associate Professor Irvine said that the reason early childhood teachers are not being remunerated the same as teachers in the school sector is due to historical artificial and unhelpful distinctions between care and education based on the premise that education begins close to or upon entry at school, which is now challenged by international research that has found that learning begins at birth and affects achievement in school.

[254] In her expert report in reply dated 19 July 2018, Associate Professor Irvine was commissioned by the IEU to respond to the ACA's submissions and witness evidence filed in respect of the equal remuneration application. Much of this report outlined the regulatory changes in the sector set out in her reports above. She said there has been a strengthened focus on promoting early learning in formal education and care services and pointed to the introduction of the NQF, NQS and the EYLF and the increased qualification requirements for educators working in these services, including the requirement for services to engage more early childhood teachers. She referred to the E4 Kids study, which found that degree-qualified teachers scored higher than educators without a degree in respect of instructional support and supported the benefits of higher-level educator and teacher qualifications on children's learning outcomes. Associate Professor Irvine said that while play continues to be recognised as a rich context for learning in the early years, emphasis is placed on the early childhood teacher's role to facilitate play-based learning and challenge and extend children's thinking and learning. early childhood teachers plan meaningful learning experiences drawing on their knowledge of individual children, the relevant curriculum and by using intentional teaching strategies.

Dr Frances Press

[255] Frances Press, at the time of giving evidence, was the Head of the School of Childhood, Youth and Education Studies at Manchester Metropolitan University in the United Kingdom. Up until the end of 2018, she was Professor in Early Childhood Education at the School of Teacher Education at Charles Sturt University in Bathurst, and also held the position of Associate Dean Research at that university. She had earlier held positions in early childhood education at Macquarie University and the University of Western Sydney in the period 1996-2005. Immediately prior to this, Dr Press was the Director of the Office of Childcare in the NSW Department of Community Services, and had earlier held various positions in NSW and the Northern Territory in children's services resource and training agencies. She holds Bachelor of Arts from the University of NSW (1981), a Master of Arts (Interdisciplinary Studies) from the University of NSW (1983), and a PhD in Sociology at Macquarie University (2010).

[256] The IEU commissioned Dr Press to prepare a report[117] setting out what, in her opinion, are the changes in the value of the work performed by teachers since 1996. The report prepared by Dr Press, dated 22 November 2018, focused on teachers employed in early childhood education and care centres. She addressed the issue the subject of her report under a number of headings, as set out below.

Changes in teaching theory and practice and their impact on the complexity of teachers' work

[257] Dr Press said that in Australia the creation of the NCAC in 1994 drew attention to the quality of children's experiences in early childhood education and childcare and led to more attention being paid to research in the area, and the generation of additional research. This research has resulted in changes to teaching theory and practice. It has underscored the importance of early childhood education and care being of good quality, increased the knowledge and understanding of the types of teaching approaches that are associated with good quality early childhood education and care and support positive developmental outcomes for children, and identified that good quality early childhood education and care is an effective early intervention strategy for children facing disadvantage.

[258] Dr Press pointed to the increase in the numbers of children entering early childhood education and care at very young ages. Historically, she stated, early childhood programs for children under three were focused primarily on infants' health and safety, but more recent research has bought the learning and development needs and capacities of very young children to the fore, emphasised their agency, and has underscored the need for teachers to be acutely observant and well versed in pedagogies that are suitable for infants and toddlers. Dr Press also pointed to the diversity of children in any one early childhood program in terms of cultural background, developmental needs and stages, family type and composition and socio-economic composition. As a result, she said, the norms and expectation around children's development, behaviour and learning will vary, and early childhood teachers must be attuned to such variations. Dr Press said that teachers are expected to be familiar with a range of theoretical frameworks, and to have the capacity to critically reflect on these and make considered decisions about their application to their observations, planning and assessment. She said, as an example, that the EYLF refers to a range of theories in this respect. Dr Press said that these changes, taken together, represent a change in the demands and complexity of the work, in that teachers must worker with a greater age range of children, with more diversity, and have the capacity to draw upon and appropriately apply a range of theories, and keep abreast to a growing body of research about what constitutes good quality early childhood education and care.

Changes in the accountability of teachers

[259] Dr Press said that the accountability of early childhood teachers has increased with the introduction of the National Partnership Agreement on the National Quality Agenda for Early Childhood Education and Care in 2009, which effectively raised the bar on the quality of early childhood education and care. Prior to 2009, she said, early childhood education and care services were regulated by different State and Territory licensing regulations and, in addition, from 1994 to 2012, the NCAC accredited all childcare centres through the QIAS, which focused specially on children's experiences within the early childhood setting. The

[117] Exhibit 11

National Partnership Agreement resulted in the NQF for early childhood education and care being introduced on 1 January 2012. The NCAC was replaced by the ACECQA as the statutory body that oversees the implementation of the NQF. The NQF is comprised of the National Law and the National Regulations. The NQS is a core component of the NQF, and sets seven quality areas by which early childhood education and care services are quality-rated against the benchmark established by the NQS. The National Regulations, among other things, set minimum requirements as to the number of qualified teachers to be employed in all centre-based early childhood education and care services.

Changes in the professional recognition of teachers

[260] Dr Press said that professional recognition of early childhood teachers occurs in two ways: first, through accreditation of teacher education programs and, second, by individual teacher registration or accreditation. In relation to the first, she said that teacher education programs may be subject to accreditation requirements by the ACECQA in relation to the early childhood component, and by the AITSL for courses that cover both early childhood and primary school years. The ACECQA requires that courses cover certain topic areas: psychology and child development, teaching pedagogies, early childhood professional practice, the history and philosophy of early childhood, family and community contexts, and education and curriculum studies. The AITSL is a Commonwealth agency which sets professional standards for teachers and is responsible for approving courses and which, in 2011, introduced the NFTR which embedded the APST in registration requirements. Dr Press said that the process of teacher accreditation is undertaken by State and Territory teacher regulatory authorities, and registration of early childhood teachers is required in New South Wales, South Australia, Victoria and Western Australia and in Tasmania and the Northern Territory in respect of kindergartens/preschools that are part of schools. A 2018 AITSL report has recommended that all early childhood teachers be required to be registered.

The administrative function of teachers and whether they are more complex

[261] Dr Press said that the volume and extent of regulation and quality-related policies requires high levels of accountability from early childhood teachers, who need to be well-informed and vigilant about meeting the standards established by regulatory and accrediting bodies. She said that, as a result of the 2009 reforms, all early childhood teachers need to be familiar with the requirements of the NQS and ensure that they acquit their responsibilities under the NQS. According to the National Regulations, early childhood teachers are now required to work directly with children, plan programs, mentor/coach educators facilitating education and care, and perform the role of Educational Leader. She said that, typically, early childhood teachers oversee the development of the educational program within the room or centre, and that they may also be employed as Directors, with responsibility for the day-to-day management of the centre and staff and for ensuring that all regulatory requirements are met.

Changes in curriculum and their impact of the work of teachers

[262] Dr Press said that, prior to 2009, not all early childhood education and care settings in Australia were required to implement an agreed curriculum. The 2009 reforms introduced the first national curriculum framework in Australia. The National Law required that the educational program provided within any early childhood education and care service must be based on the developmental needs, interest and experiences of each child and designed to take

into account the individual differences of each child, and approved learning frameworks must be implemented as part of early childhood education and services meeting national standards. Dr Press said that the EYLF is the nationally approved framework and, in addition, the specific state-based frameworks (in Victoria and Western Australia) are approved. The five overarching outcomes for children identified in the EYLF are that children have a strong sense of identity, are connected with and contribute to the world, have a strong sense of wellbeing, are confident and involved learners, and are effective communicators.

[263] Dr Press described the NQS Quality Area 1, which concerns the educational program and practice and which emphasises child-centred practices and child-directed learning. This requires, she said, that teachers have a sound knowledge of each child, including the child's strengths, challenges and interests, and the capacity to develop a curriculum that effectively responds to this knowledge. In this respect, the practice of educators must facilitate and extend each child's learning and development through intentional teaching, responsive teaching and scaffolding, and child-directed learning.

The nature of changes in student assessment processes and their impact on the work of teacher and their level of skills and/or responsibility

[264] In respect of these matters, Dr Press said that the assessment of each child and the program is a recognised aspect of the teacher's role, and that Standard 1.3 of NQS Quality Area 1 requires a planned and reflective approach to implementing the program for each child. This requires each child's learning and development to be assessed or evaluated as part of an ongoing cycle of observation, analysis, learning, development, planning, implementation and reflection. There must be critical reflection of children's learning and development, both as individuals and as groups, which must drive program planning and implementation, and families must be informed about the program and their child's progress. Dr Press said that the complexity of children's assessment in the early years arise partly from variability in developmental norms and the rapid pace of children's development, which means that children in the same age group will be developing differently and will not reach the same developmental milestones at the same time. This means, Dr Press said, that assessment must be an ongoing process rather than the result of a snapshot in time, and requires close observation of what children are doing and saying over time, both individually and in groups, and tracking this over time. It also requires close communication with parents, who are able to provide insights from children's activities and behaviours at home. Observations must be documented through notes, photos and formal templates, and such documentation forms the basis for reflection that in turn informs future actions. In addition, Dr Press stated, it is necessary for early childhood teachers to actively support children's transition to school through transition programs and providing reports to the child's school on the child's strengths, challenges and achievements.

The complexity of teachers' work

[265] Dr Press said that the increasing complexity of teaching in early childhood services arises from the following factors:

- More children attend early childhood education and care services in Australia than ever before, and from younger ages. In 2009, 30% of children aged 0-5 attended; by 2017, this had risen to 43.2%, with attendance being 10% for children aged under 1

and 61.8% for 3-year-olds. In the year before school, 92.4% of children attended either a Commonwealth-funded service or a preschool.

- Attendance patterns are often highly variable, with children attending on different days, times, and periods during the year. This means that teachers can be working with varying groups of children from day to day as well as throughout the year, must become familiar with and build meaningful relationships with a great many individuals and families, and have the skills to work well with changing groups of children.

- There are greater community and government expectations of teachers, including that children will have their learning and development actively nurtured.

- Research has underscored the role of early childhood teachers, and also managers with early childhood teacher qualifications, in promoting quality.

- The internal work environment has become more complicated as teachers endeavour to respond to the changing needs of families.

- Early childhood teachers are expected to be adept at teamwork, and must mentor lesser-qualified staff and provide pedagogical leadership across the centre.

- It is necessary for early childhood teachers to build strong relationships with families because of the very young ages of the children attending, noting that parents are able to enter a service at any time their child is there.

- Teachers must develop and implement an inclusive curriculum that takes into consideration a wide range of variation in development as well as measures that help remediate the impact of physical or cognitive impairment or social disadvantage. This also necessitates early childhood teachers developing strong relationships with other professionals, such as allied health professionals, and agencies.

- It is necessary for early childhood teachers to respect and enact children's rights in accordance with the principles of the United Nations Convention on the Rights of the Child. This requires early childhood teachers to be attuned and responsive to the repertoire of verbal and non-verbal communication strategies used by young children.

[266] In addition to her report outlined above, the IEU also sought to rely on Dr Press' reports prepared for its equal remuneration application. In her report filed 22 December 2017,[118] Dr Press focused on the main areas of responsibility and skill required of early childhood teachers and the challenges faced in the early childhood education and care sector, such as recruitment and retention of early childhood teachers.

[267] Dr Press identified the main responsibilities and skills of early childhood teachers (in addition to those outlined above) as maintaining registration; demonstrating a high level of

[118] Exhibit 9

accountability and to be well informed about meeting the standards established by various regulatory and accrediting bodies; and upholding their duty of care through vigilant supervision because of the high risk of accident and injury with very young children.

[268] In respect of recruitment and retention of early childhood teachers, Dr Press said that it is difficult to attract students to work in the early childhood sector. In 2016, the Department of Employment placed early childhood teachers on a skills shortage list in the NSW metropolitan area. Diploma-qualified educators often undertake further study so they can leave the long day care workforce and teach in standalone preschools or schools because of better pay and working conditions and the perception of a higher professional status. She said where teachers graduate with a dual qualification, only a small percentage appear to choose early childhood education and care as a first preference and referred to a Queensland University of Technology study that found over 60% of employed graduates were working in primary schools compared to 13% in childcare a year after completing their degree. Dr Press said that the better wages and conditions available in public schools, in addition to targeted graduate programs run by education departments, meant that the best education graduates tend to work in public schools. Dr Press referred to the 2013 National ECEC workforce staff survey which found 80.4% of all workers (including educators) expected to be with the same employer or business in 12 months time. For those wishing to leave their current job, 30.2% of workers surveyed wanted to seek work outside the sector and 28.5% had dissatisfaction with pay and conditions. Dr Press pointed to research which has found job dissatisfaction in the sector stems from long hours and expectations of unpaid work for meetings and planning.

[269] The IEU also relied on the expert witness report in reply prepared by Dr Press dated 18 July 2018[119] for the equal remuneration application. The report addressed a proposition advanced by the ACA, namely whether the work of early childhood teachers is essentially the same as that of other educators in early childhood settings. Dr Press stated that simply because early childhood teachers share certain work responsibilities and activities with other educators does not mean that the work of early childhood teachers is identical to that of other educators in early childhood settings, and such a proposition downplays the skills required to be an early childhood teacher. She said early childhood teachers bring a specialist knowledge and skills to their work that inform decisions and what they hope to achieve in terms of children's experiences and outcomes. She referred to the introduction of the regulatory requirement to employ early childhood teachers under the National Quality Reform Agenda in order to improve the quality of early childhood care and education children receive. Dr Press also referred to the E4 Kids and the Effective Provision of Preschool and School Education studies which both found higher-level qualifications were associated with higher quality early childhood education and care and improved child outcomes. In her experience teaching a subject in an early childhood degree designed to enable students to transition from a diploma qualification to an early childhood teaching degree, Dr Press said she receives comments from students about how the subject changes their thinking and approach to their work as educators, which she said is further evidence of the fact that teaching graduates gain a distinct set of skills and knowledge to bring to their work.

[270] Dr Press's oral evidence included the following:

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[119] Exhibit 10

- the reasons for teacher shortages in the early childhood sector are complex, but include dissatisfaction with the wages and conditions paid;[120]

- she did not identify when, in her statement concerning work value, classrooms became more diverse or there first emerged a multiplicity of pedagogical theories "*because these things accumulate over time and they are likely to be an accumulation of incremental changes*";[121]

- licensing regulation focusing on matters such as floor space numbers and qualifications of staff, and quality improvement and accreditation systems, applied around the country in various forms in different jurisdictions prior to the NQF;[122]

- the obligation to be familiar with and acquit responsibilities under the NQS do not apply differentially to teachers as opposed to any other workers in early childhood education and care, but teachers often have more responsibility in ensuring compliance because they are more likely to be appointed to roles of responsibility such as Educational Leader or Director;[123]

- while the National Law requires an Educational Leader to be appointed in each service, that person is not required to be a qualified teacher;[124]

- before the EYLF, there were other frameworks in place in various jurisdictions;[125]

- the impact of government policy is to push early childhood teachers towards working with older children, particularly in preschools, but in many services early childhood teachers do work with children from birth;[126] and

- a typical early childhood teacher interacts with more children in a year than a typical primary school teacher because variability in attendance and the proportion of students attending long day care on a part-time basis means that early childhood teachers deal with a less stable cohort.[127]

Professor Tania Aspland

[271] Tania Aspland is a Professor and Dean of Education at the Australian Catholic University. Since 2004 she has been a Professor and Head of the Faculty of Education at a number of Australian universities. She has held various academic positions since 1980. She has also worked as a primary school teacher and a special education teacher. She holds the degrees of Bachelor of Education Studies (University of Queensland, 1978), Bachelor of Arts (University of Queensland, 1983), Masters in Education (Deakin University, 1992) and

[120] Transcript, 11 June 2019, PNs 588-589, 604

[121] Ibid, PNs 671-672

[122] Ibid, PNs 676-680

[123] Ibid, PNs 683-687

[124] Ibid, PNs 695-697

[125] Ibid, PN 702

[126] Ibid, PN 711

[127] Ibid, PNs 712-713

Doctor of Philosophy (University of Queensland, 1999). She was commissioned by the IEU to prepare a report concerning changes in the nature and value of teachers' work from 1996 to the present day, structured by reference to the time periods 1996-2009 and 2010-2018. Professor Aspland's report dated 22 November 2018[128] dealt with this issue by reference to eight difference facets of teachers' work, which are set out below.

The introduction of special needs students into the mainstream classroom

[272] Professor Aspland referred to the position in Queensland whereby the *Education Act 1992* (Qld) and the *Disability Standards for Education* in 2005 supported the full enrolment of students with disabilities in mainstream classes. The legislation required teachers to teach students with physical, intellectual and emotional disabilities who had previously attended Special Schools. As a result, Professor Aspland said, teachers were required to upskill their knowledge about the nature of a broad range of disabilities and the pedagogies required to engage such children in alternative modes of learning, and to learn how to manage the behaviour of children with special needs, some of whom were very disruptive in the mainstream classroom, Professor Aspland characterised this as highly demanding. Teachers had to acquire new knowledge about each child's disability and write individual programs for each child in consultation with parents and support therapists while they continued to teach their mainstream students, this leading to an intensification of the workload.

The introduction of technology into the classroom

[273] Professor Aspland said that teachers have had little choice but for ICT to be incorporated across the curriculum, since regardless of their training it is a curriculum requirement and an expectation of students and many parents. She said that an "*educational revolution*" is underway with the value of teachers' work potentially integral to its success, but the rapidity of technological change is outpacing teachers' capability to reconceptualise their work which, as a result, is causing widespread demoralisation and frustration across the profession.

The modification of assessment requirements due to a renewed focus on international and national testing

[274] National testing was introduced for students in Years 3, 5 and 7 across Australia with the purpose, Professor Aspland said, of using evidence as the basis for intervention and further teaching. She said that this has required teachers to become upskilled in test design, implementation and interpretation, which has required a good deal of professional training for teachers most of which has, until recently, been completed in an ad hoc manner and self-funded by teachers. She further said that the psychometric underpinning of testing has placed huge demands on teachers, many of whom consider that testing does not contribute to positive learning outcomes and actually detracts from quality teaching. Professor Aspland said that national testing has led to a reconfiguration of teachers' work, in that research has demonstrated that it has narrowed the focus on curriculum, reduced pedagogical innovation and caused stress to both students and staff.

The management of disruptive children in the classroom

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[128] Exhibit 15

[275] Professor Aspland referred to the 2013 OECD *Teaching and Learning International Survey* in which teachers reported that managing difficult students has the largest impact on the success of their work and that they are losing, on average, 45% of their class time on keeping order in the classroom. Research has identified that behavioural problems in the classroom are a factor in the retention of teachers in the profession. She said that there is no recipe for teachers to adopt to overcome the management of disruptive students, and in this contested field teachers must continually access research and contemporary literature in order to upskill their repertoire of professional practice to address the many diverse disruptive behaviours in the classroom. Professor Aspland stated that teachers are expected to continue in the traditional role in delivering the curriculum to all despite the increasing level of behavioural disruptions.

Increased regulation of the profession

[276] The AITSL was incorporated in 2010 as a national body with the responsibility, authority and resources to develop and maintain standards for the professional practice of teachers. Professor Aspland said that since 2011, teachers are required to demonstrate that they are meeting the professional standards generated by AITSL in all aspects of their professional work. She said that all teachers in Australia must now be registered and perform against a set of professional standards to maintain their status as a teacher, to ensure that they are deemed to be ethical members of the profession and to classify their status as a law-abiding citizen. She noted that it has been argued that the introduction of the professional standards has demonstrated a significant leap forward in developing a cohesive approach to teaching quality across Australia to achieve the best possible student outcomes no matter what state a student resides in, indicating an increasing recognition of the complex work of teachers. However Professor Aspland also noted there is an alternative view that the current regulatory context promotes conformity rather than the autonomy and diversity needed to deal with the complexity of teaching and the student population.

Sustained and non-systematic curriculum reform

[277] Professor Aspland identified that the first national curriculum framework was established by the Australian Education Council in 1991, consisting of eight designated Learning Areas. Each Learning Area was described in terms of Statements, which provided a framework of what was to be taught, and Profiles, which set out what students were expected to learn. These closely matched the existing State and Territory curriculum documents to a greater or lesser degree, based on an outcome-based educational approach in which outcomes were more significant than content. Professor Aspland said that this move away from a content-based curriculum to an outcomes-based one meant that teachers were required to reconceptualise their planning and assessment, but were granted greater freedom to select content and pedagogy. She said that this placed extra demands on teachers that were not present prior to 1998.

[278] In May 2009, the ACARA was established, and this led eventually to the Australian Curriculum being mandated in 2013. Professor Aspland said that this required teachers to revise their planning, teaching and assessment processes in line with a very crowded curriculum across eight learning areas. She said that in many schools the intensification of work involved in scoping and sequencing the content of the Australian Curriculum became so complex that curriculum coordinators were appointed to deconstruct the curriculum

documents into grade or year level programs. Professor Aspland expressed the view that in the domain of curriculum policy from 1999 to 2018, political intervention has had an "*unsettling impact*" on the work of teachers. She said that with every curriculum change, the teaching and assessment are conceived from different orientations and this requires teachers to rethink, redevelop and represent their curriculum work. More recently, she said, the introduction of the "*high stakes test agenda*" has meant that teaching work has greatly intensified, "*with curriculum, teaching, learning and assessment misaligned in their purposes and as such, having a negative impact on student learning*".

Changing theories of teaching and learning

[279] Professor Aspland said that in 2009 OECD study, teachers reported using teaching practices aimed at ensuring learning is well-structured more often that they used student-oriented practices which involve adapting teaching to the individual needs of the student. She said that both of these teaching practices are used more often than activities such as project work which requires more active participation by students, particularly in the areas of mathematics and science. She said that further research had evidenced a significant trend towards direct forms of teaching for enhanced student learning outcomes, and had emphasised the significance of quality teaching as the most significant factor to enhance learning outcomes, indicating a significant turn-around in the value of teachers' work. She added that with the introduction of national professional standards, mandated teacher registration, NAPLAN national testing and visible learning, "*the profile of quality teaching in Australia has never been more important*" and that schools across Australia are "*engaging in teacher development and the reconceptualization of teaching and learning to foreground direct and explicit instruction with a view to enhancing the quality of learning outcomes and national test results*".

Increased administration and accountability

[280] Professor Aspland referred to data which showed that Australian teachers work an average of 42.7 hours per week compared to an international average of 38 hours, that they are struggling with the comparative lack of quality teaching time in front of classes due to administrative and extra-curricular activities, and that 25% of teachers lose at least 30% of their class time and 11% lose at least 50% of their class time to factors other than effective teaching and learning. She said that this can be correlated to new accountability requirements related to risk assessment, reporting, regulations regarding supervision, child protection, routines, family law, custody and access, communications with parents, financial management of resources, case management of identified students with disabilities or behavioural challenges, issues related to culture, gender and sexuality, and recording matters of harassment, bullying or workplace issues. Professor Aspland said that the administrative tasks implicit in these responsibilities had at one time been the duties of the leadership teams, not the classroom teacher, but in the contemporary context were now completed by teachers after hours or in lieu of teaching responsibilities.

[281] In conclusion, Professor Aspland referred to a 2013 survey result that 60% of Australian teachers do not feel valued in their work, and that a significant factor in this was the devaluing of teachers' work amongst the media, politicians and parents. She said that this was "*surprising*" when the complexity of the profession has been increasing over time and that teachers "*are no longer public servants who deliver a finite curriculum to compliant and homogenous classrooms*".

[282] In her oral evidence, Professor Aspland said:

- increases in resources and teacher's aids accompanied the mainstreaming of special needs students;[129]

- in earlier years, when students with an IQ of 70 were removed from mainstream classes and placed in special schools, teachers had few challenges in their classroom, their major responsibility was to disseminate and deliver content to the class, classes were tested every six weeks or so, and as long as the class fell within the normal bell-shaped curve it was considered normal;[130]

- previously, teachers only tested content from their own layperson's perspective and re-taught what students did not pick up, whereas now test data is interpreted from a psychometric perspective which is based on norms and deviations for which special training is required;[131]

- in the early childhood and primary sector the priority is human development, holistic development and integrated teaching where the teacher starts with the child and not the content, and looks at the developmental needs of each of the children to try to align their development with what is in the curriculum;[132] and

- as at 2014, an evaluation of the APST suggested that only half of teachers said that the standards informed their practice, but a more recent evaluation has shown a greater level of engagement.[133]

Professor Sue Dockett

[283] Sue Dockett is a Professor in Early Childhood Education at the School of Education, Charles Sturt University in Albury/ Wodonga. She has been employed at Charles Sturt University since 2007. Prior to this role, she held academic positions in early childhood education at the Macarthur Institute of Higher Education (1988-1996) and the University of Western Sydney (1996-2006). Before working as an academic, she was employed as a teacher in the early years of school (1981-1983), the inaugural Director of a childcare centre (1983-1987) and founding Director of a work-based, extended hours childcare centre (1987-1988). Professor Dockett was awarded a Bachelor of Education (1980), Master of Education with first class honours (1987) and a PhD (1994) from the University of Sydney.

[284] The IEU commissioned Professor Dockett to write a report in respect of its equal remuneration application upon which it sought also to rely in respect of its work value application concerning the accreditation requirements prescribed by the NESA in NSW and her understanding as to why early childhood teachers took longer than other teachers to be

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[129] Transcript, 13 June 2019, PNs 1210-1213

[130] Ibid, PNs 1219-1220

[131] Ibid, PNs 1225-1229

[132] Ibid, PN 1235

[133] Ibid, PNs 1259-1264

subject to these requirements. In her report dated 3 December 2017,[134] Professor Dockett focused on the introduction of accreditation requirements for early childhood teachers in NSW. From July 2016, all early childhood teachers working in an early childhood setting as a teacher must be accredited which involves registering with the NESA, providing evidence of their identity, qualifications, employment and a Working With Children Check (WWCC) and paying the annual accreditation fee. Once completed, an early childhood teacher is considered to have Provisional accreditation. At the time of her statement, there were no finalised procedures by the NESA for early childhood teachers to obtain Proficient accreditation. In NSW, early childhood teachers must maintain their registration by maintaining and developing their teaching practice against the relevant APST, complete 100 hours of professional development during their maintenance period, pay an annual fee and hold a current WWCC.

[285] Professor Dockett outlined the rationale for the introduction of the NESA accreditation requirements for early childhood teachers. Prior to 2016, only teachers in primary and secondary schools were required to be accredited. Arguments advanced in favour of early childhood teacher accreditation from the sector itself included:

- early childhood teachers and teachers in the school sector are required to have a university degree that often qualified teachers to work across prior-to-school and school sectors, however only those working in the school sector were recognised as teachers through professional accreditation;

- perceptions that "*real teaching*" only occurred in schools, resulting in a lack of professional recognition or respect for early childhood teachers; and

- recognition of the significant reforms in early childhood education, such as the introduction of the first national curriculum framework for children in prior-to-school services and commitments to increasing professionalisation in the sector.

[286] Professor Dockett said her understanding of why early childhood teachers took longer than other teachers to be subject to registration requirements is multifactorial. Firstly, she referred to the history of fragmentation and the complexity of the early childhood education sector with its range of service types, such as preschool, long day care, occasional care, out of school hours care, family day care, mobile children's services and multifunctional Aboriginal children's services, and its many different providers, including community-based, private, not-for-profit and corporate organisations covered by different industrial awards. Secondly, she suggested that, traditionally, the national emphasis on education focused on schools and schooling and came under the responsibility of State and Territory education departments. On the other hand, early childhood education and care was moved between the departments of education and family or community services and reflected an historical dichotomy between care and education. Finally, Professor Dockett suggested that the nature of the work of many early childhood teachers being the only teacher in the service and working in a setting that has "*care*" in the title means the nature of their pedagogical work is often not clearly visible to families and communities outside the sector. She said that coupled with often limited access to professional development opportunities, early childhood teachers may be professionally isolated and not in a position to advocate for their own professional recognition.

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[134] Exhibit 44

[287] Professor Dockett was not required for cross-examination.

Dr Keith Heggart

[288] Keith Heggart is currently employed as an organiser at the IEU (NSW/ACT Branch) and as a casual academic at the University of Technology Sydney. Dr Heggart has worked as a secondary school teacher for 13 years, teaching in a number of public and independent schools in Australia as well in the United Kingdom during this period. Dr Heggart's qualifications include a Bachelor of Arts/Bachelor of Education from the University of New South Wales in 2002, Master of Education in 2010 and a Doctor of Philosophy from University of Technology in 2018. In his statement of evidence dated 21 November 2018,[135] Dr Heggart described his experience across different school systems in different countries which, he said, highlighted the significant increase in the complexity of teacher's work.

[289] In regards to technological change in school education, Dr Heggart stated that email has facilitated a move from teaching as something done during business hours (with exceptions such as parent-teacher evenings) to a model where teachers are required to be available outside of business hours to respond to parent emails. Dr Heggart said that this change became particularly discernible after he returned to Australia in 2008. At the last school he worked in, there was an expectation that emails would be responded to within 24 hours. He also said that teachers are now expected to make use of a wide range of digital and online tools such as learning management systems, and this requires a new suite of skills in instructional and learning design of a different nature to the face-to-face skills required for classroom teaching. Teachers are also expected to make use of digital tools to communicate more thoroughly with parents and stakeholders, to teach students about the responsible use of social media, and to deal with the emotional and mental consequences of technology including cyber-bullying.

[290] Dr Heggart stated that the process of "educationalisation' in schools has also added to the complexity of teachers' workloads and the responsibility of teachers. Dr Heggart described this process as one which "*posits that society's ills can be addressed through educational programs delivered via formal schooling institutions*." Dr Heggart stated that several initiatives of this type are now mandated in the NSW curriculum, focusing on digital safety for students, domestic violence and road safety.

[291] Dr Heggart also said that changes to teaching theory and practice have contributed to increased workloads and have increased the complexity of work. One area of teaching practice that has changed in NSW is the emphasis being placed upon teachers and schools to ensure that students are actively engaged, which denotes a shift from a passive model of learning to one that emphasises more active learning models that, he said, treat the responsibility for student achievement as one solely of teachers. An example of this is "flipped learning", which is an educational strategy which requires teachers to "pre-load" student learning, often in the form of educational videos which a student is required to watch before attending class. Dr Heggart said that another recent change has been the movement towards increased reliance on evidence-based learning, which requires teachers to be conversant with a wide range of academic literature and research and to adopt that into their

[135] Exhibit 16

practice. There has also been a growing emphasis on students working in groups of collaboratively in order to teach "soft skills" or "21st century skills". This has meant that teachers are required to teach students how to work as part of a group, and requires teachers to act as both instructors and facilitators. Dr Heggart said that teachers need to work in a more complex fashion in order to both cover the curriculum in the allotted time as well as to develop these skills.

[292] Dr Heggart gave evidence that another aspect of teaching theory that had changed was the movement towards greater differentiation and personalisation of teaching approaches, which requires teachers to alter specific teaching methods and resources to meet the needs of students with special or additional needs which involves tailoring teaching approaches to student's individual needs, such students with Asperger's Syndrome, Autism Spectrum Disorder or Oppositional Defiance Disorder. This means, Dr Heggart said, that teachers have to develop engaging lessons for students working at different stages of learning and development in circumstances where, for example, a teacher working at a Year 7 class may have students within their class operating at a Year 4 level and a Year 10 level. This may require teachers to set a number of different exams and provide alternative assessment processes. Dr Heggart said that many students with special needs require individual learning plans, with strategies that must be utilised by the teacher in the classroom, which require teachers to be able to meet the needs of different learners at the same time. Dr Heggart described this as "*a complex feat that is new to teaching*". He described his experience teaching mixed ability English classes whereby, out of 25-30 students, 3-4 would require differentiation because they were more able than the others and 3-4 would require differentiation because they were less able and, in addition, those or other students would require modifications to ensure they could access the content satisfactorily.

[293] Dr Heggart's evidence provided several other examples of teachers' increasingly complex workloads, including:

- the increased accountability of teachers involved in maintaining accreditation/registration requirements, maintaining and recording professional development, and the use of management practices and technology to track the learning growth of individual students compared with their peers to determine the effectiveness of teacher interventions and pedagogy;

- the requirement to keep increasingly detailed records of students' pastoral and academic matters, using IT systems, compared to previous years;

- liaison with third parties such as allied health professionals like speech and language therapists, occupational therapists and educational psychologists, which may require teachers to implement strategies beyond their traditional expertise and also adds to administrative complexity;

- the need for teachers to ensure their lessons are consistent with the Australian Curriculum introduced in 2014, which is more complex than previous iterations and includes for example the require to weave themes such as Sustainability, Aboriginal and Torres Strait Islander Histories and Australia's Engagement with Asia into different key learning areas;

- the changes in students' assessment practices particularly with the introduction of the standardised testing regime, which had led to a process of almost constant testing and requires teachers to place greater emphasis on providing formative and qualitative feedback; and

- the changing view that education is a "*private value proposition*" rather than a public good, which results in additional responsibilities outside the classroom involved in attracting new students.

[294] Dr Heggart also stated that various legislative and regulatory changes by way of the *Disability Discrimination Act 1992* (Cth) and child protection legislation have made positive albeit complex changes to the work value of teachers, including ensuring lessons accommodate students with disabilities as well as greater responsibility and scrutiny of teachers with regards to ensuring their compliance with the child protection regime.

[295] In his oral evidence, Dr Heggart referred to an open source application called Moodle, which was introduced in the school he then taught at in 2010. This allows teachers to upload materials that they wish students to look at, and also allows students to upload assessment tasks for marking, and Dr Heggart said that it requires a different set of skills to be used effectively.[136] He also referred to an online behavioural management tool called ClassDojo, which teachers can use to score students for good or poor behaviour, and which is often made accessible to parents.[137] Dr Heggart gave the following evidence about the effect of standardised testing on teachers' work:

> What are the consequences of that in terms of the teacher's actual work? -Well, teachers need to be able to interpret, analyse and make sure of that data, you know. And that's - there's some quite considerable challenges involved. I remember when I first started working for the Diocese of Parramatta which would have been about 2010, they were still talking about things like, you know, we need to be above national averages and things like that. And that conversation has changed and this portrays the increasing complexity of what teachers are required to do. It's now changed into we need to talk about learning game or learning growth, you know, which is a measure of how much each student actually grows rather than whether as a whole the class or the school is above the national average.[138]

[296] He also described the extent of testing in Year 7 at one school, and compared this to his own previous experience as a teacher:

> What is the mathematical assessment interview? -Well, just on the regime. It's something that continually I find in my experience working with teachers is that they - and this happens at Gilroy College in Castle Hill. They said barely a week goes by for Year 7 in term 1 where there is not some form of testing. So for example the new Year 7s when they arrive at the school, they undergo what's called the mathematical assessment interview. Now that's a 40 minute individual diagnostic tool that has to be between one teacher and one student, and there has to be time provided for that which

[136] Transcript, 13 June 2019, PNs 1318-1325

[137] Ibid, PNs 1349-1350

[138] Ibid, PN 1359

> is a real challenge. Then from that point there is some kind of test, they might do the PAT reading test or the PAT M test and then by the time they get to the end of term one, they're doing practice NAPLAN or pre-NAPLAN tests. That ranges from everything from in-class assessment and writing tasks to - honestly, this did happen at Gilroy - practice for entering into the exam room and then exiting the exam room, so it wasn't unusual and they weren't concerned about it. Then as soon as term two starts I think you've got a week and a half and then you're straight into NAPLAN so over the course of 12 or 13 weeks, there has been some kind of test, you know, every week.
>
> MR FAGIR: This requirement for testing and standardised testing, you will say, has changed the face of teaching in schools? -Yes, absolutely - I mean, when I started teaching at Kincoppal in 2003 almost entirely the school had control of our testing regime and that meant we did some in-class assessments and we did some end-of-year assessments and that was it.[139]

[297] Dr Heggart also referred to his experience as an IEU official with a teacher who did not adopt into their teaching practice contemporary teaching methods based on academic literature and research:

> Another requirement, you suggest a bit later in your statement, is that teachers are required to develop sufficiently engaging lessons? -That's a NESA requirement. NESA is the New South Wales Educational Standards Authority.
>
> What I haven't been able to discern from your statement is what happens if a teacher is not conversant with a wide range of academic literature and research? -If teachers aren't - and I can draw on my own experience as an organiser - yes, I'll give you an example of what's happened. I was working at Cerdon College, Merrylands, with a member and the principal had identified that she felt that member in particular was not making best use of the online tools. That had Google Classroom at that respect and that the work that she was placing on it was not sufficiently engaging and they were talking about John Hattie and Helen Timperley's work about feedback and in order to generate engagement there needs to be regular and constant feedback. So that member was placed on a performance-management plan which might have led to the termination of their employment because they weren't meeting the Australian Professional Standards for teachers because they weren't making use of those kind of requirements.
>
> I see? -Fortunately the union was able to be involved and the member made better use of the Google Classroom.
>
> I see. Was it the use of Google Classroom that allowed the principal to detect the issue that was raised between the principal and the teacher? -Well, they were talking about online engagement, so it wouldn't have happened without some kind of online mechanism.[140]

Christopher Watt

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[139] Ibid, PNs 1368-1369

[140] Ibid, PNs 1375-1378

[298] Christopher Watt is the Federal Secretary of the IEU and has occupied this role since 2009. Mr Watt has previously occupied the positions of Assistant Secretary of the IEU, an organiser within the NSW/ACT branch of the IEU and worked as a secondary school teacher from 1982 to 1996. In his statement of evidence dated 22 November 2018,[141] he referred to a range of national reforms and requirements over the last decade which, he said, have significantly increased the complexity of work for teachers and placed greater expectations on teachers' skills and capacity. These included:

- the increase in academic publications have required more regular review, re-assessment and consideration of teaching practices, often accompanied by higher expectations on the teaching profession to update and sustain their skill development;

- numerous government inquiries since 2014 concerning early childhood and school education have impacted on policy settings and changed the nature and complexity of teachers' work;

- new research on student learning, including changes and nuances in pedagogical approaches and understandings about brain development have significantly changed the work of teachers in the classroom, demanding more individualised, targeted and flexible approaches to teaching and learning and a significantly more complex approach to curriculum programming and development;

- the introduction of teacher registration requirements as mapped against the APST for all school teachers and for early childhood teachers in NSW, Victoria, South Australia and Western Australia. Mr Watt stated that compliance with the APST requires reflection on teachers' practice, complex mapping of teacher's attributes against the standards for graduate teacher registration and substantial evidence to meet the requirements of registration. Mr Watt also stated that assessment and reporting expectations for teachers conducting vocational education and training (VET) has also increased in volume and complexity;

- since 2018, teachers have been required to use the teacher performance assessment tool to measure the progress of practicum/initial teacher education undertaking pre-service experience in schools against the APST, which has significantly increased the detail, complexity and evidence requirements to judge the suitability of practicum/initial teacher education candidates;

- the development of teaching programs has become increasingly complex with the approval of the Australian Curriculum and the way in which the National Assessment and Reporting Program, of which the NAPLAN regime is one element, Australian Government initiatives such as the 2018 *National School Reform Agreement*, international testing regimes and employer mandated standardised assessments require that teachers interpret, analyse and report students' individual data and implement new structures and expectations on lesson-planning and delivery expectations;

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[141] Exhibit 22

- teachers are required to provide and assess more detailed data at transition points in a student's progress through schooling, including more complex data that arrives with the child from the early learning education centres (including preschools and long day care) and academic, social and behaviour-related notes about students transitioning from primary to high school;

- under the *National School Reform Agreement*, "learning progressions" are being established in 8 learning areas and 7 general capabilities which are designed to align with the Australian Curriculum, help identify student needs and support classroom planning and reporting, and when fully developed and implemented they will increase workload and the complexity of teaching;

- the increased awareness in the profession of how socioeconomic considerations and demographics affect student learning outcomes and efforts expected to reduce these differences in the classroom;

- the impacts of technology in facilitating and increasing the amount of parent-teacher contact and the requirement that teachers develop the necessary skills to effectively use these technologies in their own professional time, such as synchronising various technologies into lesson plans and performing IT maintenance and troubleshooting; and

- new regulatory and legislative changes concerning child safety and children with disabilities. In relation to child safety, this includes child protection and WWCCs, reportable conduct schemes and the conduct of complex risk assessments prior to potentially dangerous activities in school and out-of-school. In relation to children with disabilities, the increased collection of data relating to students with disability has increased expectations on teachers in relation to providing learning adjustments and managing complex situations such as accommodating a combination of multiple learning needs and managing situations previously not encountered.

[299] Mr Watt gave the following oral evidence:

- 18% of enrolments in Australian schools are students with a disability, but those students who are subject to a learning adjustment constitute a subset of this number;[142] and

- the source of his information that students are increasingly presenting with multiple disabilities is anecdotal and based on information and responses provided by IEU members and organisers.[143]

Carol Matthews

[300] Carol Matthews is an Assistant Branch Secretary of the NSW/ACT Branch of the IEU. She has been employed by the IEU or the associated state union since 1984, having held

[142] Transcript, 17 June 2019, PNs 1565-1567

[143] Ibid, 1570-1573

various positions including Industrial Officer, Assistant Federal Secretary and Assistant Secretary of the NSW/ ACT Branch. Ms Matthews was awarded a Bachelor of Arts and Bachelor of Law from the Australian National University. She has been engaged in many of the cases before the NSW IRC concerning early childhood teachers, federal award matters relating to teachers and modern award coverage of early childhood teachers.

[301] The IEU sought to rely on Ms Matthews' evidence filed in respect of its equal remuneration application in its work value application. Ms Matthews' witness statement filed 22 December 2017[144] set out the challenges facing early childhood teachers working in the early childhood education and care sector, which she characterised as staff turnover being relatively high, a shortage of qualified teachers in the sector caused by low remuneration, and low union density. In respect of staff turnover, she referred to ABS data that demonstrated the average tenure of educators (including early childhood teachers) in long day care centres was 3.7 years, and 21.2% of educators had less than one year tenure compared to an average of 18% across all industries and occupations and 7% for professionals. She described the shortage of qualified teachers in the sector across a number of states, and referred to a Department of Employment survey in 2017 which found only 65% of vacancies across NSW were filled on average, this being the third consecutive year of recruitment difficulties. Ms Matthews also noted that the shortage of early childhood teachers in the sector is caused by low remuneration and poorer conditions than those in the school sector, such as longer shifts and fewer holidays. She also noted union density is lower amongst early childhood teachers compared to in the school sector and that the small sizes of the workplaces hamper recruitment.

[302] Ms Matthews described the nature of the work performed by early childhood teachers as follows:

- creating the educational program provided by the centre based on the approved learning framework;

- if appointed as Director, the early childhood teacher is responsible for the overall management and administration of the service including compliance with regulatory requirements, pedagogical leadership, management administration, accounting, financial and human resources management and liaising with staff, parents and other stakeholders;

- in addition to their educative role, early childhood teachers are required to perform care functions such as changing nappies, assisting children with toileting, supervising meals or feeding babies; and

- maintaining a safe and secure environment for children, acting as the emotional support and child development expert for parents.

[303] Ms Matthews filed a statement in reply dated 19 July 2018[145] in response to various witness statements relied on by the ACA. In respect of Mr Fraser's evidence regarding the Queensland Kindergarten Funding Scheme (QKFS), she said that she understands that all the

[144] Exhibit 1

[145] Exhibit 2

centres in Queensland he owns or operates are in receipt of state government kindergarten funding. She noted that the QKFS Funding Requirements stipulate that centres can use this funding to pay significantly above-award wages to an early childhood teacher delivering the kindergarten program. She also commented on Mr Fraser's assertion that children do not need goals or testing, stating that although goals and testing are not the same in early education as they are in schools, outcome and assessment are still very important. Ms Matthews disagreed with Ms Prendergast's evidence that early childhood teachers not delivering an educational program are not required to be registered as a teacher in Western Australia and that, prior to the regulatory change in 2012, early childhood teachers were not required to be paid as teachers.

Lisa James

[304] Lisa James an Early Childhood Organiser at the IEU (NSW/ACT Branch). Ms James previously worked as an early childhood teacher from 1998 to 2001 and as a Special Needs Teacher in a long day care centre from 2002 to 2007. Ms James holds a Bachelor of Teaching (Early Childhood) in 1997 and a Master of Early Childhood in 2007 from Macquarie University. She is qualified to teach children from 0-8 years of age.

[305] The IEU sought to rely on a statement prepared by Ms James dated 20 December 2017[146] concerning the equal remuneration application. In that statement, she said there is a shortage of early childhood teachers in the early childhood sector. In her experience having given lectures to students studying to be early childhood teachers, she asked the students whether they intended to work in the early childhood sector. The majority of students she asked indicated that they intended to work in primary schools because of the higher wages and superior working conditions such as paid school holidays and shorter face-to-face teaching hours. Ms James stated that in her work, she has also observed a trend within the sector where early childhood teachers work in the sector until a position becomes available in a school. Some early childhood teachers work casually in both sectors with the hope of securing permanent future employment in a primary school. She was aware of a significant number of services struggling to attract and retain early childhood teachers, with some centres reporting vacancies for over 6 months and others experiencing very high staff turnover. By way of example, she was aware of a non-profit organisation where early childhood teachers are programming for up to 26 children per week due to the inability of the centre to employ permanent qualified staff. She also said that in her experience, early childhood teaching is female-dominated and in over nine years of teaching, she has only ever worked with female teachers. She referred to research citing the perception that caring for young children is devalued because it epitomises what has traditionally been viewed as "*women's work*". Ms James said that whilst ever the status, standing and wages are early childhood teachers are low she considers there will be a shortage of early childhood teachers in Australia.

[306] In this respect, Ms James referred to the following finding from the 2011 *Early Childhood Development Workforce* research report by the Productivity Commission:

> "In order to attract and retain a sufficient number of early childhood teachers to achieve the reforms set out in the National Quality Standard and the National Partnership Agreement on Early Childhood Education, salary and conditions offered by long day

[146] Exhibit 25

> care centres will need to be competitive with those offered to primary teachers in the school sector. Community- and privately-managed preschools in New South Wales will also need to offer similarly competitive salaries and conditions for their teachers, which is already the case in other jurisdictions."

[307] Ms James outlined the nature of the work performed both through her employment in the industry and her discussions with teachers and employers. She described the responsibilities of a graduate early childhood teacher as being abreast of the regulatory framework, WHS obligations and centre policies, and observing and recording children's development to plan and implement an educational program to extend children's learning with assistance from a more experienced colleague. With support, graduate early childhood teachers also start to develop strategies for inclusion and support of children with additional needs, challenging behaviours and culturally and linguistically diverse backgrounds. A more experienced early childhood teacher who is not a Director leads and mentors the team in their room and assists lesser-qualified staff to build on their skills. They are responsible for developing an overall daily timetable, designing the learning environment, developing a Supervision Plan for indoor and outdoor areas, develop Individual Behaviour/Learning Plans, provide information to specialists such as paediatricians, psychologists and social workers, record management of medication and accidents, perform risk management assessments prior to excursions and implement transition to school plans. Experienced early childhood teachers are expected to display a high level of autonomy in decision-making, understand the NQS and EYLF and impart this knowledge on to lesser qualified staff. An experienced early childhood teacher may also be Educational Leader, whose responsibilities include overseeing the program for the entire centre, reviewing other employees' programs and lesson plans to ensure they reference the EYLF and developmental theorists, providing feedback and keeping up to date with new early childhood research to share with other employees. Educational leaders are usually early childhood teachers where one is employed and do not receive an allowance under the award to perform this role.

[308] Ms James described the conditions of the work of an early childhood teacher as being physically and emotionally demanding because they are often bending down to be at eye level with children, sometimes are required to lift or physically assist children, young children require their constant attention and need assistance in resolving conflicts, going to the toilet or tying their shoelaces. She said early childhood teachers can be face-to-face with children for 8 hours per day except for during break times. In respect of remuneration, Ms James focused on the difference in pay rates between early childhood teachers and primary school teachers in NSW despite early childhood teachers having four years of university training, also being accredited with the NESA and many early childhood teachers being qualified to teach in primary schools with the same qualification. She gave the example of a full-time early childhood teacher working in long day care she had spoken to in the course of her work who has had to take on a second job because as a single mother she cannot support her family on the amount she is paid.

[309] Ms James made a statement in reply to various witness statements filed by the ACA in respect of the equal remuneration application dated 19 July 2018.[147] She gave evidence in relation to the transferability of early childhood teaching degrees. She said that in South Australia and Victoria, registered early childhood teachers who are qualified 0-8 or 0-12 need

[147] Exhibit 26

only register as a primary school teacher with the relevant authority to be eligible to teach in a primary school and, in Western Australia, once an early childhood teacher is registered, they do not need to take any further steps to be eligible to teach in a primary school. She disagreed with Mr Carroll's claim that there is no real hierarchy between early childhood teachers and educators. Ms James said that when she worked as an early childhood teacher in a preschool, she was solely responsible for programming and evaluating learning experiences and when educators contributed to her work, she reviewed their contributions and assisted them. When she worked in long day care, early childhood teachers and educators both completed documentation of learning and contributed to a program, however early childhood teachers were responsible for the documentation for a higher number of children. Ms James disputed Mr Fraser's claim that the EYLF is not a curriculum because it does not require children to have goals or testing, referring to the EYLF itself which stipulates how children are to be assessed, namely by gathering and analysing evidence about what children know, can do and understand. She also said early childhood teachers set educational and socialisation goals for children. Ms James referred to Ms Viknarasah's evidence in which she stated she takes full responsibility as the Director for all regulatory and compliance issues. Ms James said it is the Approved Provider and the Nominated Supervisor who are accountable and can be personally fined for breaches to the National Regulations, not the Director.

[310] In her statement prepared for the work value application dated 16 June 2019,[148] Ms James provided a summary of the day-to-day work of an early childhood teacher and relevant changes to these tasks. She stated that since the NSW Government has introduced "Start Strong" funding to preschools in 2016, children have begun attending services earlier as the funding requires children to attend 15 hours a week, and be enrolled for 7.5 hours a day. Children are now, as a result, attending preschool in the period between 8.00am to 4.00pm rather than 9.00am to 3.00pm. As a result, early childhood teachers have less time to set up indoor and outdoor activities, complete documentation and routinely stay back past their scheduled roster times to finish work. Ms James stated that this program has resulted in preschools enrolling more students, which means each early childhood teacher has become responsible for documenting and programming learning for an increased number of students without a guaranteed increase in programming time. Time traditionally used for completing documentation, such as the standard rest time after lunch, is no longer available to complete these tasks due to changes in regulations. Ms James gave evidence that planning and implementation of indoor and outdoor learning programs has become a more complex and structured process since the introduction of the NQF and teacher accreditation. Early childhood teachers are required to observe children's skill levels and development during group activities, review the strategies used during these activities and assess their effectiveness, and record them for future planning and evaluations. In particular, she gave the example that the teacher must link the observations (and the resulting educational program) to specific child development theorists or EYLF curriculum outcomes.

[311] In her oral evidence, Ms James said that:

- she agreed that the number of early childhood teachers in the workforce has increased very significantly in recent years, however she thinks the shortage of early childhood teachers has been exacerbated because under the NQF, all services

[148] Exhibit 27

are now required to employ teachers whereas previously other states except NSW did not have to;[149]

- despite not currently teaching, she believes she would be able to competently deliver the EYLF if she took a job in an early childhood centre, as she has read it and reflected on what it would look like in a classroom;[150]

- Educational Leaders review other programs and lesson plans, give feedback to staff to ensure the learning the child has exhibited that is documented is linked to the relevant outcome in the EYLF;[151]

- Educational Leaders are required to keep up to date with new early childhood research, as part of their role is to assist in meeting the professional development needs of the staff at their centre by determining how individual staff or the centre as a whole can further develop their skills;[152]

- in her experience, the majority of graduates prefer to work in schools rather than in early childhood because of the higher wages and better conditions;[153] and

- observation and documentation requirements are much more significant and complex now, as the early childhood teacher must link the observations and resulting educational program to specific theorists and EYLF outcomes.[154]

[312] Ms James also gave the following evidence about the NSW Government's Start Strong funding program in response to questions from the bench:

> "… It may well be that my understanding about this is wrong, that's why I wanted to explore it with you. You say in the second sentence that the funding system requires children to attend 15 hours a week? -Yes.
>
> My understanding is that the system doesn't actually require 15 hours of attendance. That's just what you need to do if you want to maximise - obtain the maximum funding? -The funding, yes. So services are penalised if children are enrolled for less than that 15… hours if they're funded.
>
> Yes, so the funding is different based on the number of hours? -That's right.
>
> So likewise then with the rest of that sentence it says:
>
> *Funded children must be enrolled for 7.5 hours a day.*

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[149] Transcript, 26 June 2019, PNs 4087-4088

[150] Ibid, PNs 4133-4135

[151] Ibid, PNs 4147-4153

[152] Ibid, PNs 4154-4158

[153] Ibid, PNs 4197-4203

[154] Transcript, 27 June 2019, PN4322, 4325-4332

> Now my understanding is there's no requirement for them to be enrolled 7.5 hours a day. That that's - - -? -Once again that's to maximum funding. So what preschools have done is instead of having a three day and a two days pattern as they previous did, they're enrolling children for 7.5 hours a day, two days a week, so they can put one child on Monday, Tuesday, another child Tuesday, Wednesday, another child Monday, Wednesday. So in that - out of that 20 places they can actually get 30 children in in that part of the week and then the second part of the week on Thursdays and Fridays, children will attend 7.5 hours.
>
> I understand they might schedule it a particular way but it's not actually an enrolment - a requirement is it? -No, they don't have to be enrolled for that but once again to maximum funding, if they're enrolled for less than that 7.5 hours the preschool will be penalised in terms of their funding."[155]

Pam Smith

[313] Pam Smith is an Assistant Secretary of the IEU NSW Branch and is based in its Parramatta office. In her statement dated 19 July 2018,[156] Ms Smith said she organises principals and other teachers within the NSW Catholic School sector in her role and has had extensive dealings with the Catholic school campus at Stanhope Gardens in Western Sydney which consists of St Marks Secondary School, St John XXIII Primary School and the CELC. Teachers working at this campus are employed by the Catholic Education Diocese of Parramatta. From her discussions with the Diocese and teachers working on this campus, she was aware that at the time of making her statement, the Diocese paid its primary and secondary school teachers in accordance with the *NSW and ACT Catholic Systemic Schools Enterprise Agreement 2015*, however it pays its early childhood teachers at the early learning centre in accordance with the EST Award, despite those teachers having identical qualifications (in some cases) and performing similar work to the teachers in the schools on campus. Ms Smith said this is a source of tension within the Diocese.

[314] Ms Smith was not required for cross-examination.

Cathryn Hickey

[315] Cathryn Hickey is an Education and Policy Officer and the Assistant Secretary of the Victoria Tasmania branch of the IEU. Previous to these roles, Ms Hickey worked as a policy and education officer with the NSW/ACT Branch of the IEU for nine years and as a secondary school teacher for eight and a half years. Ms Hickey was awarded a Master of Education from the University of Sydney in 1991, a Post Graduate Diploma of Education from the University of Queensland in 1978 and a Bachelor of Arts from the University of Queensland in 1977. Ms Hickey has also been a member of various advisory boards, including the NSW Ministerial Advisory Committee on the Quality of Teaching, and is currently the Director of the Centre for Strategic Education, an organisation that provides teacher professional development and expertise in teacher pedagogy and policy.

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[155] Transcript, 17 June 2019, PNs 1700-1706

[156] Exhibit 32

[316] Ms Hickey's witness statement dated 23 November 2018[157] set out in detail what she described as the increased professionalisation of teaching and the expectations placed on students in respect of lifting the performance and participation of all students in learning. She said that the establishment of professional regulatory authorities and the registration of teachers has been a key feature of this, and referred to the APST and the requirement for all teachers in Australia to meet, and continue to meet, the thirty seven standards outlined in this framework to continue their registration at a level of proficiency, as well as the "*highly complex and technical aspects*" of meeting these standards. Ms Hickey also said the profession demands higher and more extensive qualifications and candidates than in the past, with the minimum qualification for all registered teachers in Australia currently being four years of higher education. The central role that teachers have played in both federal and state government education reform agendas was also identified by Ms Hickey as contributing to the higher and higher standards of teaching practice and commitment.

[317] Ms Hickey also referred to *The Australian Teacher Performance and Development Framework* published by the AITSL in 2012, which outlines the critical factors for creating a performance and development culture in schools, including the essential elements that should be present in all Australian schools. The AITSIL has also produced a series of "*Illustrations of Practice*", which are video presentations of how each of the APST standards can be achieved in practice.

[318] Ms Hickey gave evidence that the nature of teachers' work has not only become more complex and technical, but also significantly more explicit, and that teachers are expected to possess and utilise broad and deep skills in diagnosing and assessing the learning and social development needs of all students in their classes, including those with significant learning needs, challenging emotional and behavioural needs, disabilities and complex health needs, and to develop individualised learning sequences and activities for all students in their classes. She said that significant change in the nature of the work of teachers has been largely driven over the last two decades by a nationwide re-focusing on key national goals of schooling and subsequent systemic reforms in Australian schooling, and specific emphasis on the following aspects have resulted in required increases in the skill, knowledge and accountability levels of teachers:

- the development and maintenance of high quality teaching through more complex and sophisticated initial teacher education programs, increased and more highly specialised professional development requirements, performance appraisal and school improvement cycles;

- the significant movement to individualised student learning and greater focus on individual student learning needs and the need to scaffold learning, tailoring programs, assessment and reporting to each individual student despite key enabling conditions such as class sizes and scheduled teacher preparation time remaining at substantially the same levels over the period;

- the significant movement to include students with significant levels of special needs/disabilities into mainstream classes;

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[157] Exhibit 29

- the need to work with students in more holistic ways, including development and utilisation of strategies to deal with the significant increase in complex social issues affecting students and their learning,

- the adoption of targeted strategies to increase retention of students in Years 11 and 12 school education, including more vocationally orientated curriculum and innovative pedagogy;

- the development and implementation of new and innovative curriculum, including the incorporation of ICT, general capabilities in student learning programs, cross curriculum approaches and increased focus on Science, Technology, Engineering and Mathematics (STEM);

- significant increases in monitoring, data collection and detailed reporting, including high stakes national reporting, of student and school performance to parents, governments and the wider community;

- the importance and pressure placed by governments on schools and teachers by international comparisons of the performance of Australian students on international standards testing regimes; and

- the tying of school funding agreements to the adoption by systems and schools of strategic government reforms and improvement measures.

[319] Ms Hickey also said that sustained federal and state government focus on these areas has had an unprecedented effect on raising the expectations of governments, schools, teacher education providers and regulatory authorities on the required skills for knowledge of teaching. Ms Hickey said that technology-driven changes such as student e-learning, increased communication with students and parents online have required teachers to develop sophisticated and complex understandings in relation to the technology as well as the ways in which this technology enhances student learning. The steady increase of legislation in the area of child wellbeing and safety has also meant that teachers now require a heightened and sophisticated understanding of their obligations under law and increased knowledge as to how to meet these obligations.

[320] Ms Hickey also expressed the view that the conditions under which school teaching work is done have changed, and in this connection she pointed to:

- greater diversity in student populations;

- the associated need for teachers to provided targeted and specialised teaching including individual assessment of students and individualised personal learning plans;

- a movement away from traditional classroom structures to multi-age groupings, agile space learning environments, self-paced learning, and managing student work placements in vocational education subjects;

- the increased inclusion of students with significant special needs in mainstream classes requiring facilitation of the learning of students of very different ability/learning stages in the one classroom; and

- greater interaction with parents and health and welfare providers.

[321] In her oral evidence, Ms Hickey said that:

- there had been an increase in the ratio of educators to students in early childhood education over the last two decades "*to a small degree*", and the focus on the individual child may have started slightly earlier in early childhood education than in schools;[158]

- she had not identified in her witness statement any data quantifying any increase in the number of students with special needs or disabilities into mainstream classrooms;[159]

- in respect of her contention that divorce and custody issues having to be dealt with by teachers had increased, albeit the rate of divorce is lower than it has been at any time since the 1970s;[160]

- while teachers have always had to deal with students who are socio-economically disadvantaged, teachers were now expected to specifically address this through individual programming;[161]

- NAPLAN testing has significantly increased pressures on schools and teachers to lift NAPLAN scores because of the publicisation of the results;[162]

- required ATAR (Australian Tertiary Admission Rank) scores for university education courses have been raised in some states (in Victoria to 70), but the minimum university entry requirements have been and are low compared to other courses;[163] and

- ATARs only form part of the picture because only about half of the population of student teachers come from schools who have an ATAR, and the remainder come from many other pathways.[164]

John Spriggs

[322] John Spriggs is a Senior Industrial Officer at the IEU – Queensland and Northern Territory Branch and has been in this position since approximately 1995. In his role, he is

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[158] Transcript 18 June 2019, PNs 1826-1835

[159] Ibid, PNs 1837-1839

[160] Ibid, PNs 1843-1846

[161] Ibid, PNs 1848-1851

[162] Ibid, PN 1863

[163] Ibid, PNs 1868-1872

[164] Ibid, PN 1878

responsible for matters dealing with all teachers and employees other than teachers in non-government education and has particular responsibility for the early childhood education sector.

[323] In his witness statement filed 22 December 2017,[165] Mr Spriggs said that the early childhood education sector in Queensland essentially consists of approximately 430 community kindergartens and 1,500 long day care centres. Community kindergartens provide children (aged 3.5-4.5 upon commencement) with an educational program prior to their attendance to school. Long day care centres historically did not provide an educational program; however, this has since changed when in approximately 2009 the Universal Access scheme was introduced by the federal government, which resulted in a number of centres introducing an educational program as part of their services for children commencing 3.5-4.5 years of age. In Queensland, both community kindergartens and long day care centres receive funding through the QKFS for the delivery of these educational programs. Early childhood teachers delivering an educational program subject to the scheme is considered to be teaching for the purposes of teacher registration in Queensland and must hold an educational qualification acceptable to the Queensland College of Teachers (QCT).

[324] Mr Spriggs described the pay and conditions of early childhood teachers in Queensland. He said the majority of community kindergartens are operated by standalone not-for-profit associations and are subject to enterprise agreements, 90-95% of which provide wages and conditions comparable to those that apply in various schools. He said many agreements, such as the *Jacaranda Street Community Preschool and Kindergarten Early Childhood Education Enterprise Agreement 2016*, contain a term such as the following:

> **2.2.6 Future Wage Increases and Claims**
>
> (a) The parties acknowledge that employees to whom this Agreement applies have, traditionally, received wage increases which are the same as (or comparable to) the wage increases which have applied to teachers employed in State Schools. It is the intention of the signatories to this Agreement that this relationship be retained. That intention is formalised in paragraphs (b), (c) and (d) below.
>
> (b) It is an enforceable term of this Agreement that the wages for teachers will be increased by the same percentage movement, and will be the same quantum, as wages for teachers employed in Queensland State Schools. Further, the wages for employees other than teachers will be increased by the same percentage movement which applies to teachers.
>
> (c) The commitment to match the wage increases in Queensland State Schools will apply only to the classification levels contained in this Agreement and the counterpart (if such levels are amended) classification levels in State Schools.
>
> (d) The allowances provided in clause 2.4 will receive the same increase as applies to wage rates.

[165] Exhibit 33

[325] In respect of long day care centres, Mr Spriggs stated that in his experience few centres have an enterprise agreement and are therefore covered by the award. Historically the wage rates for teachers employed in long day care did not match the rates for teachers employed in community kindergartens because there was neither a requirement that they be a registered teacher nor a requirement that an educational program be delivered.

[326] In a statement dated 19 July 2018,[166] Mr Spriggs replied to evidence given by Jae Dean Fraser in his statement dated 25 May 2018.[167] Mr Spriggs disputed Mr Fraser's characterisation of the ACA as "the peak body" in the early childhood education and care sector, noting that its membership is generally limited to for profit long day care centres and none of the large not-for-profit operators such as C&K in Queensland, KU in NSW and Goodstart are represented by the ACA. In respect of staffing in kindergarten rooms, he said that in his experience, the Educational Leader is usually an early childhood teacher. He said that kindergarten programs have generally been developed and delivered by an early childhood teacher with a certificate III educator assisting, in accordance with the intent of the National Law and the QKFS. In respect of funding, Mr Spriggs noted that Mr Fraser failed to explore four subsidy payments available under the QKFS, namely the standard per child subsidy, remote area subsidy, low socio-economic subsidy and QKFSPlusKindySupport. Mr Spriggs submitted that QFKS specifically allows the standard per child subsidy to be used to pay more appropriate rates of pay to early childhood teachers.

[327] In his oral evidence, Mr Spriggs said that:

- he accepted not all early childhood teachers in Queensland are required to be registered, however a number of early childhood teachers will move from conditional to full registration after 12 months regardless of whether their employer or something else requires them to be teachers because they want to attain that status;[168]

- there is a very small discrepancy between the requirements of the ACECQA and the QCT as to what constitutes a teacher to be recognised, which means they are qualified according to the ACECQA but not the QCT;[169] and

- early childhood teachers in Queensland have been registered for decades if they were covered by the *Early Childhood Education Award* and were responsible for delivering an educational program.[170]

Martel Menz

[328] Martel Menz is the Vice President Early Childhood at the AEU – Victorian Branch and is the elected leadership representative of branch members in the early childhood sector. She has been in this position since 2016 and prior to that was the Deputy Vice President Early

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[166] Exhibit 35

[167] Exhibit 84

[168] Transcript, 18 June 2019, PNs 1961-1962

[169] Ibid, PNs 1963-1967

[170] Ibid, PNs 1984-1990

Childhood from 2007-2015. Early childhood teachers are eligible to be members of the AEU in Victoria, except if employed in an independent school.

[329] In her statement dated 20 December 2017,[171] she focused on the regulation of and conditions in the early childhood sector in Victoria. Her evidence repeated much of the regulatory framework governing teachers in Australia as set out above. She said that 405 independent community-based preschools in Victoria are covered by the *Victorian Early Childhood Teachers and Educators Agreement 2016* (VECTEA), the *Victorian Early Childhood Agreement 2016* applies to a further 41 community-based preschools and she is aware of eight further enterprise agreements that apply to community-based preschools and school councils. Early childhood teachers are paid the same annual salaries under each of these agreements. Ms Menz said that early childhood teachers covered by the abovementioned agreements are sometimes paid more than Victorian primary school teachers covered by the *Victorian Government Schools Agreement 2017*. In her experience, long day care sector employees are paid the award rates of pay or marginally above them. She said there are very few enterprise agreements that cover early childhood teachers employed at long day care centres and in those agreements, wage rates are very close to those prescribed by the EST Award. Ms Menz gave evidence that early childhood teachers paid the minimum rates under the EST Award were to be paid 23.69% to 32.81% less than a primary school teacher in a government school as of 30 June 2018.

[330] Ms Menz prepared a statement in reply dated 19 July 2018,[172] in which she responded to various matters raised in the statement of Jennifer Kearney dated 23 May 2018.[173] Ms Menz said that not only local government operators are able to provide higher wages because they have access to State Government funding, as this funding (the Early Childhood Teacher Supplement Funding) is also available to private operators who provide a four year-old kindergarten program if they have an enterprise agreement in place with a classification structure based on the progression requirements in the VECTEA. She said there are mechanisms for Ms Kearney's services to access this funding stream and match those rates. Ms Menz disagreed with Ms Kearney's characterisation of the responsibilities of early childhood teachers in respect of program delivery. She said that the responsibility of delivering a kindergarten program in Victoria rests with the early childhood teacher engaged to teach the program and referred to the Victorian Kindergarten Funding Guide, which she said has mandatory requirements for delivering funded kindergarten programs. These include planning and delivering a preschool curriculum in accordance with the EYLF and VEYLDF, against the NQF and the QIP. She said certain responsibilities can only be undertaken by a qualified early childhood teacher, such as writing transition statements for all children attending school the following year.

[331] Ms Menz was not required for cross-examination.

Gabrielle Connell

[332] In addition to the evidence she gave concerning the equal remuneration application, which has earlier been set out, Ms Connell made a further statement of evidence which was

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[171] Exhibit 30

[172] Exhibit 31

[173] Exhibit 77

filed on 23 November 2018[174] specifically concerning the work value application. In that statement, Ms Connell stated that early childhood teachers in NSW entered the teacher accreditation process in July 2016, and are increasingly considered professionals. Accordingly, she said, there is now a greater expectation from families that she is knowledgeable, delivers results and provides more regular documentation. She has to be cognisant of the EYLF, the NQF, the NQS, the National Law and the National Regulations, as well as a range of other regulatory requirements. She also engages in more research and reading than in the past, and there is a growing expectation from universities that early childhood teaching centres will participate in research projects, which requires increased administrative work and extensive involvement for centres which become involved in these research projects.

[333] Ms Connell also said that, since July 2016, she has been required to engage in 20 hours of NESA-accredited professional development as well as 80 hours of teacher-identified professional development over a period of five years, and newly-accredited teachers will now have to engage in 50 hours of NESA-accredited professional development and 50 hours of teacher-identified professional development. She said that before this, although she was expected to participate in professional development, there was no recommended amount that she had to complete, and she did not undertake 50 hours of teacher-identified professional development. Ms Connell said that NESA-accredited professional development was often difficult to access in regional settings, that her centre could not readily afford to send its teachers to conferences in the cities, that teachers usually had to pay for their own professional development once centres exhausted their limited professional development budgets, and she often needed to do online professional development in her own time after working hours in order to meet accreditation requirements.

[334] Ms Connell also said that, now early childhood teachers in NSW are accredited under the same regime as all school teachers in NSW, they are able to achieve the Highly Accomplished Teacher and Lead Teacher accreditations through the NESA. Achieving these accreditations involves a significant amount of work, including that teachers must demonstrate that they have a "*sphere of influence*" greater than their own classroom, that they are contributing to programming and planning across the whole centre and within the wider early childhood community, that they have taken on lead roles in their centres and wider networks, and are contributing to the professional development of early childhood teachers across these wider fields. There is currently no extra amount of remuneration for teachers with these higher levels of accreditation.

[335] Because, since 2012, the NQF has prescribed the number of teachers each centre must have and for other workers to be Diploma or Certificate III-qualified, Ms Connell's role has included ensuring that these requirements are met through assisting staff to gain the necessary qualifications. She has also provided mentoring and tutoring to Diploma or Certificate III-qualified workers who are training to become teachers. Ms Connell gave evidence that there is currently a big push by ACECQA to embed family and community participation in the centre in accordance with the NQF, and this has led to a growing amount of family and community interaction, including an open-door policy within the centre that that allows parents greater accessibility to their child's teacher.

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[174] Exhibit 63

[336] Ms Connell said that the career progression of an early childhood teacher will now be from teacher to Room Leader, to Director or certified supervisor, and to Educational Leader. Since the NQF was introduced, there has been a great deal of work for teachers in ensuring centre accreditation, including demonstrating that every staff member has contributed to the QIP, policy development and self-assessment, and has knowledge of the regulations. Ms Connell's evidence was that compliance with the NQF is far more evidence-based than it was before, requiring teachers to provide a great deal more administrative evidence of compliance, and she now has to be able to demonstrate that the elements of the EYLF and the NQF are embedded in her practice. She said that there has also been a whole range of new policies introduced which for the most part did not exist before the implementation of the NQF and the EYLF.

[337] Ms Connell described the changes to early childhood teaching methodology and the requirement to implement a play-based curriculum in her teaching as mandated by the EYLF. Ms Connell stated that it is difficult to ensure the effectiveness of a play-based curriculum, and it requires more reflection and planning, collection of resources and evaluation from teachers. It also requires the ability to flexibly respond to the child by tailoring a lesson to their individual intelligence and needs, as well as increased communication with families to explain the methodology and its value. Ms Connell said that the EYLF also requires teachers to implement intentional teaching and "Scaffolding of Learning" methods into their practise, which requires her to be knowledgeable about this methodology and the pedagogy underlying it. She said that the EYLF is aimed at building literacy, numeracy, social development and community belonging through multiple methods including language, drama, music, movement, art and craft, creative play, gross and fine motor skill development, technology, science, engineering and research. In implementing a play-based curriculum, Ms Connell said she is teaching children to think creatively and logically, hypothesise, experiment, plan, work co-operatively and be in charge of their own learning. She uses intentional teaching strategies to scaffold each child's learning and sets up the environment to become the "third teacher". It is necessary for her to promote children's learning through worthwhile and challenging experiences and interactions that foster higher level thinking skills. Ms Connell said that intentional teaching is the opposite of teaching by rote or continuing with traditional styles of teaching, and she had to learn this new style of teaching since the introduction of the NQF in 2012. Before the EYLF, Ms Connell said, there was a NSW-based curriculum, but it was not mandatory, and the Practice of Relationships document was not widely incorporated into centres and did not refer to specific teaching techniques.

[338] Ms Connell also described a significant increase in curriculum resources since the introduction of the NQF and the EYLF, especially in the area of online publications, blogs and communities. These inform teachers' compliance with standards and support the adoption of new, more radical methods of teaching such as outdoor or bush programs. Ms Connell said she now performs summative and formative assessments on a weekly basis. She looks at the observations which detail what each student did each day, maps them against the learning outcomes of the EYLF, analyses how she can extend the child's learning in the future and engage them in further learning and interest. Twice a year she conducts a more formative assessment against the EYLF outcomes, which sets out the child's achievements and ongoing developmental plans. Ms Connell compared this to the position before the introduction of the EYLF, around 10-15 years ago, when she only kept a developmental checklist on each child and conducted an interview with the parents after the checklist. Ms Connell said that the current system requires far more accountability for early childhood teachers, in that she has to regularly provide parents with observations, plans and assessments.

[339] Ms Connell gave evidence that compliance with multiple standards and regulatory requirements involves extensive administrative work compared to previous years, such as signing in and out of the centre approximately five times a day, recording daily reflections and all interactions with parents in a communication book, writing risk assessment plans (including for individual children with specific conditions) and completing forms for excursions, medication, illness, accidents and WHS hazards.

[340] Ms Connell described several changes in the enrolments of children attending her centre that require extra work, attention and vigilance from staff, including catering to an increasing number of children who speak English as a second language, an increase in speech and language problems, an increase in allergies such as anaphylaxis, an increase in disorders such as reactive attachment disorder and/or sensory processing disorders as well as being aware and sensitive to family issues that may be affecting the children, such as trauma, drug abuse and/or divorce. Ms Connell further described the increased contact and expectations of parents, such as communicating formally with all parents on a weekly basis via a learning journal, providing daily and/or weekly updates to parents on their child and being available to communicate with parents during the working day as well as out of hours via email or new digital platforms. She said there was also an expectation that teachers create transition to school statements for children. She compared the position to that earlier in her career, when she would send information to parents once or twice per year, with verbal updates and arranged interviews to discuss specific concerns.

[341] In a further statement of evidence made for the work value proceedings on 17 June 2019,[175] Ms Connell stated that teachers often leave the early childhood sector before completing their accreditation, and that in her experience, services that pay award rates rather than higher wages have problems recruiting and retaining early childhood teachers. Ms Connell also stated that many preschool Directors have observed university students who undertake practical experience in preschools choose primary school teaching over early childhood teaching because the pay and conditions are better, and make this choice in spite of "*loving the early childhood sector*". Ms Connell also listed several preschools that have or are working towards reaching wage rates on parity with primary school teachers.[176]

[342] Ms Connell said that the newly introduced Principle 5 in the EYLF, "*Critical Reflection*", is different to the previous requirement of teachers providing a simple reflection of what happened during the day and what was observed about a child's development. Ms Connell stated that critical reflection involves higher order thinking, creative thinking and considering multiple perspectives and that teachers must, through research and discussion, promote and develop critical reflection skills as part of a team. In terms of workload, Ms Connell said that at her previous centre, she was routinely working additional time that was unpaid to complete her daily tasks as well as spending at least six hours at home completing documentation.

[343] Ms Connell gave oral evidence to the following effect:

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[175] Exhibit 64

[176] Ibid at [7]

- the Albury preschool was the first standalone centre to obtain an "excellent" rating under the NQS;[177]

- her experience has largely been in community-based preschools, and she does not have a great knowledge of privately-operated long day care centres;[178]

- in the long day care services that she does have knowledge of, there has always been an early childhood teacher in the room, and the EYLF is followed;[179]

- in her experience, Directors usually work in that role part-time and are otherwise teachers with classroom responsibilities;[180]

- early childhood teachers at the Albury preschool are required to work according to the National Law, and this encompasses ensuring that the service operated in accordance with the National Law;[181]

- in the Albury preschool, the Room Leader and responsible person or certified supervisor was always an early childhood teacher with responsibility for seeing that the service adhered to the National Law and Regulations;[182]

- non-teacher qualified educators have mandatory reporting obligations as well as teachers;[183]

- long day care centres had a version of the quality improvement plan and self-assessment prior to the NQS;[184]

- the Albury preschool has just started using a digital online reporting app called Storypark to upload observations, pictures and learning outcomes related to particular activities, and to send that to families;[185]

- although the National Law requires that a centre have an Educational Leader, it is best practice supported by research to have a Room Leader who is an early childhood teacher to drive the program, since the Educational Leader is not in the classroom with every child and is not aware of the needs, interests or observations of every child or the input from families;[186]

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[177] Transcript, 26 June 2019, PN 3706

[178] Ibid, PNs 3714-3719

[179] Ibid, PNs 3721-3722

[180] Ibid, PNs 3734-3737

[181] Ibid, PNs 3739-3757

[182] Ibid, PNs 3761-3766

[183] Ibid, PNs 3774-3775

[184] Ibid, PN 3782

[185] Ibid, PNs 3790-3797

[186] Ibid, PNs 3809-3813

- the Albury preschool moved to pay parity for early childhood teachers with school teachers over a period of six years to September 2016, requiring an almost 40% increase in wages;[187]

- the take-up of higher-lever teacher accreditations amongst teachers has been miniscule, but amongst early childhood teachers there is already a group of 20 early childhood teachers who are working towards highly accomplished accreditation;[188]

- there has always been a requirement for play-based learning in early childhood education, but it became mandatory and was emphasised in the EYLF;[189]

- the requirement for a child-focused program worked differently before the EYLF, and communication with families was done in different ways and less frequently;[190]

- intentional teaching is, in her opinion, an innovation;[191]

- in NSW, there was the Children's Service Regulation, the QIAS in relation to long day care, and the NSW Curriculum (Practise of Relationships) prior to the EYLF, but the curriculum was non-mandatory and there was no training or professional development for it;[192]

- although the EYLF says nothing about STEM, there is a "*big push*" for it and the APST talk about it;[193]

- the idea of extended learning did not arise just in 2012, but intentional teaching and the scaffolding of learning required by the EYLF made a big difference;[194]

- when Ms Connell underwent university training, the emphasis was on a thematic approach, but when the EYLF came in, teaching became child-centred whereby the child would lead the program with input from the parents and the use of intentional teaching methods, and the program became more dynamic and teaching styles changed;[195]

- there are far more resources for teachers than there were in the past, which is unequivocally positive;[196]

- Ms Connell has concerns about the quality of Certificate III and diploma-qualified teachers who have been trained by online training organisations rather than through

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[187] Ibid, PNs 3830-3833

[188] Ibid, PNs 3875-3878

[189] Ibid, PN 3883

[190] Ibid, PNs 3882-3883

[191] Ibid, PN 3884

[192] Ibid, PNs3885-3890

[193] Ibid, PNs 3894-3895

[194] Ibid, PNs 3901-3902

[195] Ibid, PN 3903

[196] Ibid, PNs 3913-3925

TAFE, and the requirement for educators to be qualified has not made things easier for early childhood teachers because they have to be tutored and helped to qualify;[197]

- the degree of contact with parents has increased dramatically in association with the NQS in terms of send out documentation on a regular basis to parents and send out learning journals on a weekly basis;[198]

- there is an expectation by parents that if they send an email, on an alert on Storypark which goes through to phones instantly, there will be a response;[199]

- email addresses for each group were provided to parents from 2012, but email communication has not reduced the amount of communication that occurs at handover;[200] and

- early childhood teachers perform a significant amount of work, including documentation associated with the EYLF, out of hours.[201]

Lauren Hill

[344] In addition to the evidence she gave concerning the equal remuneration application, which has earlier been set out, Ms Hill made a further statement of evidence dated 11 June 2019[202] concerning the work value application. At the time of making the further statement, Ms Hill was working as a casual early childhood teacher via an agency and worked in different preschools and long day care centres as required. Ms Hill referred to Independent Education Plans she has prepared for children, which are long documents and involve discussions with parents and external healthcare providers such as speech therapists and occupational therapists. She said that while such plans are usually prepared for children with special learning needs, she had recently worked in preschools where similar, less formal documents were developed for all children by teachers in consultation with parents. She provided an anonymised example of an Individual Education Plan for a child who was seeing a speech therapist, and whose needs are described in the plan as "*Language needs, focus and attention, social skills*". The plan, which is in tabular form, identifies a number of long-term goals (including "*To be able to participate in group experiences. - Develop friendships within his peer group and interact in play. - Articulate words clearly and speak in sentences. Express himself and use his words. - Transition to school in the following year (2017)*") and short term goals (including "*To sit in small groups for short periods of time… increase joint attention… to play 1:1 or with small groups of peers… to use words and increase his vocabulary and feel confident when using new words… Develop a collaborative approach in planning and monitoring strategies to assist… transition to school*"), and sets out some 33 teaching strategies and resources to meet these goals. These all involve individualised attention to the particular student (for example, "*Educators to obtain Student Name's*

[197] Ibid, PNs 3930-3936

[198] Ibid, PNs 3945-3948

[199] Ibid, PN 3955

[200] Ibid, PNs 3956-3963

[201] Ibid, PNs 3968-3972

[202] Exhibit 18

attention before instruction… Educators to implement visual expectations (Peppa Pig reward system) and explore other visual aids/prompts… Educators to outline clear expectations prior to group time with visual aids… Educators to use Peppa Pig reward system and visual expectations to remind Student Name Removed of routine and expectations. Once completed, provide Student Name Removed with preferred item e.g. sensory toy… Educators to provide 'warm-down' activity prior to group time… Educators to provide opportunities for movement activities prior to group times to wake up or calm down… Encourage Student Name Removed to do a calming activity prior to sunscreen times, then encourage him to use sunscreen). The plan records outcomes on a regular basis.

[345] In her oral evidence, Ms Hill said that at the CELC, her documentation responsibilities in respect of 18 children required two observations to be reported each term, a mid-year report to be prepared, and then either an end-of-year report or a transition to school statement. She described an observation as being documentation showing the learning that is occurring as well as a follow-up experience that is building on that learning and includes photographs and links to early childhood theorists.[203] She said that when she worked two eight-hour days per week at the CELC, she was released for three hours to do preparatory and documentation work and the remainder was face-to-face teaching time.[204]

Margaret Gleeson

[346] Margaret Gleeson is an early childhood teacher and the Managing Director of Keiraville Community Preschool, a not-for-profit, standalone preschool in NSW. She has managed the preschool since 2001. She was awarded a Diploma of Teaching Primary Infants in 1978, a Bachelor of Teacher Early Childhood in 1998 and a Diploma of Management in 2010. She has previously worked as a school teacher. She is paid at the top of the salary scale, receiving a rate of pay of $75,626 with a Managing Director's allowance of $7,880. The preschool has 40 places each day for children ages 3-5 years and three early childhood teachers, one certificate III-qualified educator and two diploma-qualified educators work each day.

[347] In her statement of evidence dated 18 July 2018,[205] Ms Gleeson responded to various matters raised in the statement of Merran Toth dated 16 May 2018, which was withdrawn by the ACA and re-filed as an amended version dated 27 March 2019.[206] She said Keiraville Community Preschool recognise that early childhood teachers are historically underpaid and are committed to moving towards pay parity and appropriate remuneration for early childhood teachers. Ms Gleeson agreed with Ms Toth's concern that many early childhood services are not able to find employees to fill early childhood teacher roles or retain them, as in her experience, there is a significant pay gap between the salary of an early childhood teacher and that of a primary school teacher and many early childhood teachers resign to work in the school sector because of better wages and conditions. In respect of qualities of early childhood teachers, Ms Gleeson agreed that there are qualities that are essential for both early childhood teachers and educators, however stipulated that early childhood teachers have an additional significant theoretical knowledge of pedagogy and children's learning as a result of

[203] Transcript, 13 June 2019, PNs 1458-1466

[204] Ibid, PNs 1467-1470

[205] Exhibit 66

[206] Exhibit 99

their degree qualifications and undertake extensive ongoing learning. Ms Gleeson said that early childhood teachers at her centre are responsible for ensuring the preschool is meeting the requirements of the National Law and National Regulations and implementing the NQS and have a greater degree of responsibility in supervision each day. The early childhood teachers at her centre also form a leadership team which support the management committee. Ms Gleeson also compared the role of an early childhood teacher with that of a primary school teacher from her own experience. She said that early childhood teacher work is more complex in many ways, as they are responsible for writing applications for additional support for additional needs children, mentoring of other teachers, writing and reviewing policies, overall responsibility for the safety of children and their security and writing funding or grant applications.

[348] In her statement of evidence dated 22 November 2018,[207] Ms Gleeson said that in regard to the qualifications for early childhood teachers, teachers can no longer rely on their formal degree qualifications and that there is an increased pressure to participate in ongoing professional development and obtain additional qualifications and skills, such as management skills, delegation skills and leadership skills. This has been said this followed the introduction of the NQS and the increasing focus on excellence in early childhood education. Since 1996, Ms Gleeson has extended her teaching practice by studying and adopting the Reggio Emilio approach from Italy, which relies on self-directed, experiential learning by students. She has also researched the forest schools of Scandinavia and Germany which involve first-hand sensory experiences with regular visits to forests to reconnect children with nature. This has led to a "*bush preschool*" model of learning in Australia, and a great part of Ms Gleeson's professional development has been to increase her skills so that she could implement some of the bush preschool principles into her preschool. She said that the preschool's ability to put into practice this new form of teaching pedagogy took a lot of thinking, planning and learning and required significant new skills in leadership, management and organisation. In addition, Ms Gleeson said that another strong focus within her professional development has been the inclusion of Aboriginal culture within the curriculum and the preschool.

[349] Ms Gleeson's increasing amount of professional development has involved attending more and more conferences on early childhood education, and a number of new early childhood education events have been created. She said that early childhood teachers have in the last 7-10 years increasingly participated in research studies in early childhood education. When this is done, it is necessary for her to obtain parental permission, collect data, conduct interviews and carry out surveys in collaboration with the researcher.

[350] Ms Gleeson said that the introduction of the NQF in 2010 together with the NQS has led to the ACECQA introducing a new rating systems for assessing early learning centres. This now includes an "*excellent*" rating, which is a step above the "*exceeding*" rating. The range of criteria for assessing against the standards includes collaborative partnerships with professional, community and research organisations. As a result, early childhood teachers are required to engage in significant networking and collaborating with external agencies and community involvement.

[351] Ms Gleeson said that there has been a significant increase in the amount of data that a teacher is able to access in the development of their teaching practice, and the internet has

[207] Exhibit 67

enabled her to access resources that she can incorporate into her professional practice. Ms Gleeson also outlined changes to the curriculum over the last 20 years. She referred first to the introduction of the NSW Curriculum Framework for Children's Services in 2002 which, while not compulsory, set out the concepts, obligations and qualities of early childhood professionals. It was necessary for Ms Gleeson to undertake many hours of personal study and professional development to become competent in implementing this framework, and she developed a workshop to share the NSW Curriculum Framework for Children's Services with preschool staff and other early childhood services. This was overtaken in 2010 by the introduction of the NQF and the EYLF. This required a great deal of learning by teachers, and required a series of meetings to be conducted to train staff. Ms Gleeson said that the content and delivery of these meetings are planned by teachers and involves familiarity with adult learning techniques and engagement.

[352] Ms Gleeson said that teaching methodology has changed in recent years. She said that 20 years ago, the teaching style segmented time into small chunks and was highly regimented, so that when she started work at her preschool in 1999 the children's day was strictly timetabled with many transitions. Children had little choice in their learning, their time, what they did and when. Ms Gleeson said that, now, the rhythm of the day is more relaxed, larger amounts of time are dedicated to when children are directing their own learning, and teachers are responsible for providing an appropriate educational setting as an invitation to learn and guiding and scaffolding their children's learning as appropriate.

[353] Ms Gleeson referred to other significant changes in preschools over the past 20 years including a threefold increase in children who have no English skills. These children require significant amounts of teacher support to achieve appropriate learning, and also requires adaption of the communication style with the parents of such children. She said that changes in funding systems and resources allocated to preschools presented administrative challenges and led to difficulties explaining these changes to parents when they affected fee structures. These challenges were particularly acute with respect to special needs students. Ms Gleeson also described the changes in parents and community expectations over her career, including increased communication and the requirement to convince prospective parent customers "*of our merit*", having the skills to navigate complex family dynamics and breakups and shouldering changing parenting styles which she said has heightened children's behavioural issues.

[354] Ms Gleeson also described the range of administrative duties teachers are involved in at her centre that require complex skills for which teachers are not formally trained, including nurturing a team learning culture which is consistent with the NQF, monitoring the financial viability of the centre, undertaking various management, legal and recruitment responsibilities. Ms Gleeson further described the way in which stand-alone preschools often require that teachers are entirely responsible for all aspects of the centre's viability, including resourcing the management committee, preparing recruitment criteria, monitoring and potentially misinterpreting the funding guidelines, juggling ethical decisions regarding what the priorities of the preschool are, and supporting and mentoring university students on placement in the preschool.

[355] In her oral evidence, Ms Gleeson said that:

- the Keiraville preschool has an enterprise agreement in place which is moving early childhood teachers towards pay parity with school teachers;[208]

- "focus group leaders" at the preschool (being equivalent to Room Leaders) have an hour per day relied from face-to-face teaching;

- based on her experience, she believes the role of an early childhood teacher is more complex than that of a primary school teacher, in part because the roles of certified supervisor and Nominated Supervisor (which are filled by early childhood teachers) have a greater role in planning for the safety and supervision of children;[209]

- she considers that the Reggio Emilia approach is compatible with the EYLF and the NQF, in that they emphasise the capability of the child learning through play;[210]

- there are different ways on which an educational program can be delivered consistent with the EYLF, provided the principles and practices are put in place and the curriculum works towards the outcomes for children;[211]

Jenny Finlay

[356] Jenny Finlay is a teacher and Director at Borilla Community Kindergarten in Emerald, Central Queensland, and has been employed there since 1997. She has a Diploma of Teaching (Primary), Graduate Diploma of Education (Early Childhood) from Queensland University of Technology and a Master of Education from the University of Central Queensland and has been in the teaching profession since 1980. She has worked at a number of educational facilities prior to commencing her current position.

[357] In her witness statement dated 21 November 2018,[212] Ms Finlay said that she holds a 0.5 FTE teaching load as part of her Director's duties. At her centre, there are 4 other early childhood teachers employed (3 full-time and 2 part-time/casual) and 15 educators. When the Kindergarten is operating, one early childhood teacher and one educator is attached to each Kindergarten room. The Kindergarten employs more educators because they provide a service that has high numbers of special needs children (often now 30-40% of children in each class) and require more inclusion staff. The Kindergarten educates up to 140 children in any one week, who are all aged between 3½ years and school age. Teaching staff are covered by an enterprise agreement.

[358] Ms Finlay gave evidence that the biggest change that has occurred in the early childhood sector in the past two decades is the introduction of universal access funding, which aims to increase the number of children attending preschool. She said that the impact of this initiative is that now a lot more children from families facing social disadvantage, such as low income and indigenous children, children in the care of Child Safety and children with disabilities are attending the Kindergarten. Whilst she considered this to be a positive

[208] Transcript, 27 June 2019, PNs 4423-4424

[209] Ibid, PN 4453, 4478-4479

[210] Ibid, PNs 4466-4469

[211] Ibid, PN 4471

[212] Exhibit 50

development, with subsidies now almost fully covering the fees, she said that these families are more likely to require support with multiple and complex needs. She stated that the initiative has:

- increased the administrative workload and reporting requirements for staff, such as in relation to keeping current registers of family health care card details;

- increased the need for different skills in respect of educating and caring for children with special needs and significant and complex problems, such as children from families with poor literacy skills or families experiencing domestic violence;

- placed a focus on the increasing importance of risk management, Behaviour Support Plans and Individual Support Plans for children with specific health or behavioural issues;

- meant that teachers need to understand the protections and accompanying bureaucratic procedures for children in the child safety system, such as processes involving parental consent; and

- required staff to navigate situations where the children are the subject of custody disputes, such as who is able to pick up the child from the Kindergarten.

[359] Ms Finlay stated that, in 2018, the mainstreaming of children with significant physical and intellectual disabilities is now the norm, which means that teachers in ordinary kindergartens now need the skills required to deal with the added complexity that comes with educating and caring for such children. She also said that reporting of a reasonable suspicion that a child has suffered or is at risk of suffering abuse has become mandatory in Queensland since 1 July 2017, whereas before it was merely a professional responsibility. Ms Finlay said that this requires her to monitor children for changes in behaviour which may indicate child safety issues at home (such as self-harming) even where the matter does not meet the threshold for mandatory reporting. When such behaviours are observed, Ms Finlay is expected to record the occurrence and liaise with her team and, where necessary, with external government child protection agencies. Ms Finlay described interactions with families in the context of child safety and protection issues as being both confronting and complex.

[360] Ms Finlay said in her statement that, although early childhood teachers were "*viewed as less of a teacher*" than those in schools, the job expectation was greater because of the degree of their liaison with the families of the children, developing relationships with whom was a fundamental and essential part of the curriculum and the job. She said that the focus on increasing interaction with parents and communities made her job more complex, and this had expanded hugely since she started teaching. Previously, she said, it was sufficient to red-flag an issue with a parent; now, the expectation was that the teacher would actively help the parent manage or solve the developmental issue.

[361] In respect of teaching, Ms Finlay said that the complexity of the teaching role of early childhood teachers had become more evident through the implementation of the NQF and the Queensland Kindergarten Learning Guideline (QKLG). She said that, compared to schools, the teaching and assessment cycle is more dynamic, cannot be planned for a term in advance, and has to be more responsive to the children whilst still meeting the national guidelines and curriculum. Ms Finlay said that a key part of the EYLF was intentional teaching, which

requires deliberation and purpose in all of a teacher's actions. She gave the following example of this:

> "For example, I may introduce a story about how we are all different - and simultaneously, how we are the same. We are all the same - we all have a head but we are all different – look at our hair. This is very intentional - about how being different is okay. This then leads to a discussion about respecting difference and feeling safe and secure and belonging. The deliberate choice of that book/story and the timing of its delivery is a purposeful act, given that the room has a cohort of children with disabilities, or from different cultural or linguistic backgrounds.
>
> Intentionality goes way beyond what resources are made available for the children. On a simple level, the story example involves intentionality - to highlight that there are physical similarities shared by all people. At the same time there is intentionality to show that there is physical diversity between children in the class, and people more generally. Yet the intentionality goes beyond this: it goes beyond the provision of information with the intention of encouraging positive acceptance, indeed almost celebration of this diversity. This is the nub of the key objectives of EYLF: Being, Becoming, Belonging."

[362] Ms Finlay said that teachers at her centre are required to follow the mandated curriculum as set out in the QKLG, which any centre in Queensland which receives subsidies under the QKFS must follow. The QKLG is similar but not identical to the EYLF, and uses different language and frames some concepts in a slightly different way. Ms Finlay said they both involve planning and assessment – observing children, analysing the learnings or assessing needs, and applying professional skills and judgment to the various developmental stages of children and planning their learning. Each stage in the learning process must be documented in accordance with the relevant state and federal standards.

[363] Ms Finlay said that her day-to-day work as a teacher operates as a cycle in which she observes and documents the children and their needs and, from that, plans for the next day. Documentation is necessary to show families what is happening throughout each day and to demonstrate how the day's activities are linked to the curriculum, and also to track children's strengths, how a child may need to be extended, and how to harness a child's interests. She described this as a "*cycle of assessment, intentional teaching and then critical reflection that feeds back on itself*". This requires adaptation of learning for particular children based on a particular situation or development, such as where a specific weakness in a child is addressed through intentional teaching. It was also necessary, Ms Finlay said, to use the process of "scaffolding" to support the child in a process until they can manage it themselves, particularly with high needs children. She also gave evidence of the increase in monitoring and documentation required by teachers . She gave the following examples:

> "For example, we may specifically plan to have a teacher involved in playing with a particular child where they model a particular behaviour. The teacher may encourage block building to model 'turn taking' ("my turn, your turn") and asking the questions to scaffold that learning: "*How are we going to make this higher?*" "*What blocks will we use?*" "*What would happen if put this here?*" "*How will this balance?*" In this case, the teacher is scaffolding with language, spatial concepts and introducing social skills as well – all through presence and intentionality.

> We also have to follow the children's lead and follow their interests. You may have something planned for a day, yet the child may turn up to the Centre with some special object – you can't say "put that away until next week, we can't do it today". The child's interest in the object needs to be responded to – it may mean you are changing what you are doing on a particular table or in the classroom that day."

[364] Ms Finlay said that the documentation requirements, including "*writing up individual learning stories that reflect on the learnings of the children*", take a considerable amount of time and skill as the needs to meet the high quality expectations of the QKFS and the NQS. The matters described by Ms Finlay caused her to conclude that the complexities and skills of the work of early childhood teachers have significantly increased, particularly over the last decade.

[365] In her oral evidence, Ms Finlay said:

- universal access funding in Queensland has led to mid to high 90s (percent) of children now attending kindergarten, according to 2018 Australian Early Development Census data;[213]

- it was not correct that early childhood teachers are in no different position to any other educator in terms of the demands of dealing with special needs children, because teachers lead the room, assess the developmental level of each child and where they need additional support, write the behaviour management plans and individual education plans and liaise with speech therapists and other members of the transdisciplinary team;[214]

- all educators in a classroom will interact with a special needs child, but it is the early childhood teacher's role to devise the individual education plan or behaviour management plan which guides the team as to what they will do with the child and how they will do it;[215]

- it would be typical to have 3-4 additional needs children in a classroom with an early childhood teacher, a non-degree qualified educator and two additional educators referred to as inclusion support staff, and they would interact with the children under the guidance of the early childhood teacher's individual education plan and under the leadership of the early childhood teacher, who has a deeper knowledge of child development and how to implement different strategies;[216]

- the role of the early childhood teacher has become more important and more complex, especially with the removal in Queensland of advisory visiting teachers who had the role of visiting centres and giving advice on how to work with the children and what the goals should be;[217]

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[213] Transcript, 25 June 2019, PNs 2873-2874

[214] Ibid, PNs 2884-2889

[215] Ibid, PN 2896

[216] Ibid, PNs 2897- 2899

[217] Ibid, PN 2900

- inclusion support staff do not work one-on-one with any particular special needs children, and their role is analogous to that of a teacher's aide in a school classroom;[218]

- early childhood teachers are now mandatory reporters under s 13E of the *Child Protection Act 1999* (Qld);[219] and

- there has always been intentional teaching, but under the NQF it now has to be document and evidenced.[220]

Amanda Sri Hilaire

[366] In addition to the evidence she gave in respect of the IEU's equal remuneration application, which we have summarised above, Ms Hilaire gave evidence concerning the IEU's work value application. In her statement dated 18 June 2019,[221] Ms Sri Hilaire observed that since returning to work in 2017, the day-to-day role of early childhood teachers had dramatically changed. Following the introduction of the NQF, the programming requirements for early childhood teachers have become considerably more complex changing to an EYLF outcomes-based format, requiring written evaluations reflecting on both philosophy and practice and requiring the completion of individual educational programs for each child. These programs include collecting photographs, making and recording observations in light of the EYLF and current child development research, critical reflections, updating both the room and individual children's programs, planning future programs, communicating with parents and considering their input with regards to the program and updating children's individual portfolios. Ms Sri Hilaire also said that the increased complexity of programming has added to the complexity of conversations with parents where she is now required to explain and engage them in the learning process and underlying pedagogical processes in terms accessible to lay persons.

[367] In her oral evidence, Ms Sri Hilaire said that:

- in her opinion, she believes that under her contract she must herself ensure the service and the activities within it are complying with the National Law and National Regulations, including where her practice influences and impacts those she is supervising;[222]

- while she did not have a different responsibility to any other educator working in the service in respect of risk to learning ratio, other staff would often ask for her professional opinion as an early childhood teacher on any kind of risky play and in helping them to assess the level of risk;[223]

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[218] Ibid, PNs 2903-2906

[219] Ibid, PNs 2920-2930

[220] Ibid, PNs 2936-2938

[221] Exhibit 56

[222] Transcript, 25 June 2019, PNs 3227-3237

[223] Ibid, PN 3266

- the EYLF covers all of the interactions that happen daily with the children, and she was required to bring her expertise in delivering the curriculum;[224]

- educators and early childhood teachers do not necessarily have different responsibilities of any other educator caring for a child with special needs, however the level of expertise that an early childhood teacher can bring in dealing with such children is above that, and extends to supporting other staff;[225]

- at the Kamalei centre, she was required to undertake planning, programming and completing individual learning plans for six children as well as programming the entire class and group times;[226]

- there was not a significant amount of time that documentation work could be done in working hours, so she did planning and programming at home outside of her work hours until she was told not to do that;[227]

- when she had to complete planning and programming during work hours, it was difficult to complete it to the same standard with the same depth and scope for critical reflection due to increased time pressures;[228]

- the requirement to critically reflect and have conversations between educators regarding pedagogy and practice are not a new development for early childhood teachers, but is now formalised as a process through the EYLF;[229] and

- the use of digital technologies to create a child's portfolio takes up more time, not less, and can interfere with educators' supervisory duties if they are working on an iPad rather than watching the students.[230]

Lily Ames

[368] Lily Ames gave evidence specifically concerning the IEU's work value application in addition to the evidence she gave in respect of the IEU's equal remuneration application, which we have set out above. In her statement dated 17 June 2019,[231] Ms Ames described her day-to-day work as a Kindergarten teacher at the North Carlton Children's Centre from 7.30am to 5.00pm. Ms Ames' day-to-day work is summarised as follows:

- Ms Ames arrives at work at approximately 7.30am prior to her shift commencing at 8.00am, in order to complete various tasks before children arrive at the centre. This includes setting up the classroom, completing an indoor safety checklist and

[224] Ibid, PN 3284

[225] Ibid, PNs 3274-3276

[226] Ibid, PNs 3308-3309

[227] Ibid, PNs 3317-3319

[228] Ibid, PNs 3320-3321

[229] Ibid, PNs 3370-3371

[230] Ibid, PN 3379

[231] Exhibit 60

organising play-based and individual learning activities which are tailored to individual children and their developmental needs.

- After 8.00am, Ms Ames will set up the outdoor area with her colleague "*in an inviting way that promotes curiosity, exploration and team work*" and complete a safety check of the outside area, write the day's learning intentions on the whiteboard and monitor emails for any urgent communication.

- From 8.30am, the children start to arrive which involves greeting families and addressing any queries or concerns with parents, assisting children with separation from parents and settling them in for the day.

- The morning's tasks include: the morning meeting; group time involving teaching children important social and self-regulation skills; supervising and assisting children during morning tea which involves teaching children both social skills and good nutrition while also observing their development and fine motor skills; the implementation of individual learning programs through indoor and outdoor play which focus on developing skills such as collaboration and team work, gross motor skills and coordination; and a second group activity before lunch which involves reading and discussing a story relevant to the educational program.

- Following lunch, the afternoon's tasks include supervising and observing children's free play with reference to their individual learning plans with a focus on the EYLF, facilitating rest and relaxation time through a guided meditation and/or yoga, reading stories or playing quietly. Following this, educators supervise further indoor and outdoor play-based learning before packing up and mat time where children are encouraged to reflect on the day and what they have learnt.

- Children are picked up at approximately 4.00pm which typically involves discussion with parents regarding their child's development. If parents are late to pick-up their children, this impacts the tasks left to complete in Ms Ames' non-contact time.

- Further tasks in non-contact time include cleaning the classroom, preparing resources for the following day, responding to emails or missed calls, talking to the Director and typing up notes from her daily observations. While Ms Ames' shift is rostered to finish at 4.30pm, Ms Ames usually leaves work at 5.00pm.

[369] Ms Ames gave the following oral evidence:

- during her time at the North Carlton centre, she generally worked 19 hours of face-to-face teaching and 19 hours of non-contact time per week, however sometimes she was asked to perform more teaching duties;[232]

- she had four paid days for professional development at the centre, being two days off for professional development purposes and two involved the centre running its own professional development;[233]

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[232] Transcript, 26 June 2019, PNs 3580-3584

- she felt that it was her responsibility to ensure that the centre is meeting the NQF and NQS alongside the leadership team, as there is an expectation that qualified early childhood teachers will take more responsibility and lead by example;[234]

- there are graduates with teaching qualifications who want to work as early childhood teachers, however cannot find positions that offer conditions that are commensurate with their qualifications, in particular employment in accordance with the early childhood teacher provisions of the VECTEA;[235]

- the VECTEA is the union industry standard agreement which offers conditions similar to those of primary school teachers for early childhood teachers working within kindergartens and preschools and some community long day care centres;[236]

- in her work, she has not dealt with a student bullying another through social media or had to teach through an online device such as Moodle or Google Classroom;[237] and

- she has dealt with non-verbal children with special needs that have been quite physically violent towards her and her colleagues.[238]

Emma Cullen

[370] Emma Cullen also gave evidence directed to the IEU's work value application in addition to the evidence she gave in respect of the IEU's equal remuneration application summarised above. In her statement dated 17 June 2019,[239] Ms Cullen described her duties mostly as an early childhood teacher but also as a Director of her centre. Ms Cullen's day at work usually involves arriving at the centre at 7.15am, spending approximately 45 minutes setting up the classrooms with planned learning experiences and attending to administrative tasks such as responding to parent or staff enquiries. Children arrive at the centre between 8.00am and 9.30am which involves greeting and talking to families, settling, monitoring and supervising the children including their toileting and self-care, completing the daily safety checklist and observing and recording children's engagement with their planned learning experiences. Throughout the day, children are supervised in both indoor and outdoor spaces in line with an "*emergent curriculum style of programming*" which involves responding to children's interests, comments and questions as they occur and planning activities around this. Meal times (morning tea and lunch) involve preparing and disinfecting the space, assisting and monitoring the children while eating to ensure they follow hygienic food practices and that they are not sharing food in case of food allergies and recording any unusual food behaviours. Ms Cullen said that meal times are often moments for "intentional teaching" where comments or conversations between children about their food can move into

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[233] Ibid, PNs 3585-3587

[234] Ibid, PNs 3590-3599

[235] Ibid, PNs 3605-3610

[236] Ibid, PN 3611

[237] Ibid, PNs 3624-3625

[238] Ibid, PNs 3626-3627

[239] Exhibit 70

discussions about healthy eating and food sustainability. Prior to the centre closing at 4.00pm, Ms Cullen liaises with parents and ensures children are awake and prepared to go home. Once the children have left for the day, Ms Cullen will perform any incidental cleaning tasks, debriefs with remaining colleagues and completes any outstanding or ongoing administrative tasks such as writing reports, preparing for visitors, meetings or professional development courses. While Ms Cullen usually leaves the centre at approximately 6.00pm, these non-contact tasks can result in Ms Cullen working past her rostered finish either at the centre or at home which can make it harder to relax or "*switch off*" out of work hours and effectively plan for future programs.

[371] As the Director of the centre, Ms Cullen described the challenge of balancing her duties as an early childhood teacher with her duties as a Director throughout the day. Ms Cullen's non-contact duties as a Director include checking emails and returning phone calls, liaising with health professionals who attend the centre to work with children with extra needs such as speech therapy or Autism Spectrum Disorder, preparing additional resources for these children as part of their individualised learning plans, and supervising, mentoring and providing feedback to junior staff on their practice which typically occurs throughout the day through "*snatched moments*". All staff are required to share photos and document observations on an online communication platform called "Seesaw" throughout the day. As both the early childhood teacher and Director, however, the bulk of the documentation is left to Ms Cullen due to her capacity to provide "*deeper insight*" into learning and development. Ms Cullen said that this process requires significant interpersonal skills and takes considerable time as the expectations from parents for sharing updates has increased. Ms Cullen is also responsible for guiding and preparing "*school readiness*" activities and learning with the children transitioning into primary school the following year which involves preparing experiences with each individual child in mind.

[372] During cross-examination, Ms Cullen described the five learning outcomes under the EYLF as not being endpoints but rather an evolving process where children are set goals to work towards in their learning and development journey. She accepted that there is no particular point when a specific EYLF learning outcome is achieved but rather a matter of contributing to each of the outcomes every day.[240]

Aleisha Connellan

[373] Aleisha Connellan is the Assistant Principal, Pastoral at St Francis' College at Crestmead in Queensland and has worked as a primary school teacher for thirty years. Ms Connellan was awarded a Diploma of Teaching from McCauley College of Teacher Education in 1987; Bachelor of Education from the Australian Catholic University in 1994; Postgraduate Certificate in Education (Early Years) from the Australian Catholic University in 2010; Masters of Education Leadership from the Australian Catholic University in 2014; Masters of Religious Education from the Australian Catholic University in 2016 and completed a Company Directors Course from the Australian Institute of Company Directors in 2018. Ms Connellan also currently serves as the Deputy Chair of the Queensland College of Teachers Board.

[240] Transcript, 27 June 2019, PNs 4526-4530

[374] In her statement of evidence filed on 23 November 2018,[241] Ms Connellan stated that the increased emphasis on external accountability of teachers in Brisbane Catholic Education has led to a significant increase in the data teachers are required to collect, store and use. She said that in previous years, the expectation was that teachers assessed and monitored their classes at the classroom level, which resulted in a report card and benchmarking at the end of the year. Now, this information needs to be collated into the internal administrative system so that the principal can access school, cohort, class and individual student results. She gave as an example of this the requirement for teachers to record correct and incorrect student responses in the Letter Sound Knowledge checklist, which now has 116 combinations, and then upload this online. Ms Connellan said that the requirement to complete this task for 28 children, while continuing to address learning and behaviour needs of others in the class created complexity in delivering effective teaching. There was pressure on teachers to plan, teach and assess in three-week blocks, plan unit delivery in a more collaborative fashion, and display the collected data on both a physical wall as well as upload it online. Teachers are now required to use the date to inform their planning at the class, group and individual levels and use targeted teaching to "*move students along*" and to achieve the school's "*smart goal*" of having a certain percentage of students reading at a particular level by the end of the year.

[375] Ms Connellan said that her school is increasingly engaged in using standardised testing, including the ACER Progressive Achievement Test – Reading (PAT-R) and Progressive Achievement Test – Mathematics (PAT-M), which are taken every twelve months online. As a teacher, Ms Connellan needs to interpret and implement the outcomes of these tests and their results into her teaching practice, which involves identifying from the data which students have not managed to meet the expected "*effect size*" to show learning growth, and then determining what is necessary in terms of changes to learning cycles and planning specific learning experiences and targeted teaching in order to provide opportunities for growth.

[376] Ms Connellan also said that teachers in Queensland are required to attend 20 hours of professional development training a year, ten of which must be dedicated to specific training to be accredited to teach in a Catholic school. She also said that Catholic Education had begun to look into the Highly Accomplished and Lead Teacher categories for accreditation and to encourage staff to apply. She said this is "*a very different space to what existed industrially in the past in Queensland, in terms of the rates of pay and allowances*", and required teachers to collect a portfolio of evidence to be submitted to an external assessor who then attends the school and speaks to nominated teachers and observes the teaching in practice.

[377] Ms Connellan said that approximately 45% of the students in her school came from broken homes, which was a significant increase from when she started teaching. This created difficulties in terms of teachers navigating appropriate communications with families. There was also an increased prevalence of children being exposed to domestic violence or students who experience gender dysphoria, which demanded more sophisticated skills and knowledge from teachers. Ms Connellan stated that teachers must be sensitive and conscious when communicating with parents or guardians in complex family situations, and deal with the distinct challenges an issue such as gender dysphoria raises for teachers who work within Catholic institutions and who are not mental health professionals.

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[241] Exhibit 41

[378] Ms Connellan expressed the opinion that the expectation of accountability on the part of parents is much higher than it used to be, with parents becoming easily agitated over small issues with their child's learning. Teachers are now also required to manage more of children's social difficulties in the classroom and to account for this to parents. She said that there is an increasing expectation of accessibility to parents, and she is required to provide her email address to parents at the beginning of the year which enables them to contact her at any time of the day. While there is no formal obligation on her to respond to emails outside of office hours, there is difficulty in managing parents' expectations as to what level of accessibility and response is reasonable. In addition, there has been an increase in the use of app technology within the classroom as a method of parental communication.

[379] Ms Connellan described the increased use of technology in the classroom. Her school has a one-to-one laptop program in Grades 4 and 5, and she said that teachers have needed to upskill in order to deal with the growing use of technology which involves using it to provide opportunities beyond a mere word processor, including the greater levels of communication and people skills required for teachers now that they are increasingly accessible to contact by way of email. Teachers have four professional development sessions a year to assist in developing the necessary technological skills, as well as support from a specialised IT teacher.

[380] Ms Connellan stated that teaching has also shifted in recent years to a more individual than collective focus, with differentiation of work tasks, instruction and assessments for different ability levels and modifications and accommodations for children's learning based on their emotional, physical or other particular needs. Changes to funding requirements for special needs students in 2015 has increased the documentation requirements for teachers, tailoring specific support, strategies and opportunities for differentiation for multiple students with learning difficulties. She gave as an example a student in her class who is reading below where they need to be. As part of her teaching practice she routinely provides abbreviated instructions, allows for "*preferential seating*", provides extra "*think time*", adjusts the expectation about what needs to be produced for a given task, provides specific support around comprehension strategies and sight words, and provides opportunities for differentiation through targeted teaching within a smaller group or individually. Ms Connellan says she now has to document all of these accommodations as well as liaisons with learning support teachers and contact with parents. There may be five or more students in her class for whom such a process is required.

[381] Ms Connellan also said that there has been a change in pedagogy in the early years of school whereby it is necessary for teachers to be able to explain to students what they are learning and the criteria they need to meet to be successful. This requires teachers to have a clear understanding of what it is they are trying to teach, with a focus on the creation of meaning within students, and means that Ms Connellan must spend greater amounts of time planning and upskilling teachers in terms of their understanding and knowledge of the curriculum and age-appropriate pedagogy and how to put it into child-friendly language.

[382] Ms Connellan gave the following oral evidence:

- in the Prep year (the terminology for the kindergarten year in Queensland), there is an initial test conducted in the first 5-6 weeks, the results of which are uploaded into the system, and then there is ongoing testing after that;[242]

- the use of computers and online learning by students commences and gradually increases after Year 2, but nonetheless Year 2 students are required to use a mouse and navigate a screen for the purpose of NAPLAN testing;[243]

- students in Years 4-5 need to be able to access a variety of Microsoft Office applications, such as Sway, PowerPoint and Excel, and to safely and efficiently use different internet browsers, and it falls on the teacher to instruct them in the use of these things;[244]

- consistent with standard practice in Brisbane Catholic Education, Ms Connellan would email parents at the beginning of each week to notify them about what was happening in the classroom across the week, and if there were specific concerns about particular children she would make contact either with the parents via email or via phone to let them know what was happening with a particular child or to provide an opportunity to have further discussion;[245] and

- it was a Government requirement that parents be offered two formal teacher interviews per year, and additional ad hoc interviews might be required for children with learning, behavioural or social difficulties.[246]

Philip Margerison

[383] Philip Margerison currently works as a primary school teacher as St John XXIII Primary School in Stanhope Gardens, NSW. His school is part of a campus that also consists of St Marks Secondary School and the CELC. He holds a Bachelor of Teaching (1998), Bachelor of Education (Primary) (2000), Masters in Religious Education (2005) and a Masters of Educational Leadership (2008) from the Australian Catholic University. He is employed by the Catholic Education Diocese of Parramatta and was, at the time of his statement, paid in accordance with the *NSW and ACT Catholic Systemic Schools Enterprise Agreement 2017* and received an annual salary of $100,299. He commenced teaching in 1998 as a primary school teacher.

[384] In his statement of evidence dated 19 July 2018,[247] Mr Margerison outlined the responsibilities and the skills required in his role, which include implementing the K-6 syllabuses and assessing students upon them, acting in accordance with school and Diocese policies, keeping learning progress and behavioural records, ensuring children's safety through constant supervision, implementing personalised plans for students with additional

[242] Transcript, 20 June 2019, PNs 2426-2431

[243] Ibid, PNs 2432-2435

[244] Ibid, PNs 2436-2438

[245] Ibid, PNs 2441-2443

[246] Ibid, PNs 2448-2450

[247] Exhibit 37

needs and formally and informally reporting student progress to parents by way of biannual formal reports, phone calls and meetings.

[385] In his statement of evidence filed on 23 November 2018,[248] Mr Margerison stated that there has been a significant increase in the amount and complexity of data collection and assessment over his 21-year career. He said that when he began his career, a teacher was required to complete half-yearly reports and collected student data that was thought relevant to teaching practice. He said that teachers now experience a constant call for school-based data that needs to be updated every three or four weeks, and he is now required to not only be aware of how each student is performing but also to report, input, upload and change their individual data on a periodic basis. Mr Margerison said that he is now expected to test his students in mathematics on a weekly basis, assess whether his students are meeting certain mathematics "growth points", and to use writing "clusters" to identify where students sit within a set of standards three or four times per year. Mr Margerison characterised this as part of a trend towards each individual student receiving an individual lesson.

[386] Mr Margerison gave evidence that NAPLAN testing was a form of standardised data collection, and created a parental expectation that he spend time teaching students how to complete a NAPLAN test. There is also an expectation that he takes all standardised testing results, analyses them and implements them into his teaching practice taking into account the performance of individual students. This requires him to report, input, upload and change students' individual data on a data wall. He spends a considerable amount of time obtaining this data through regular assessment, recording the data online, interpreting the individual data to discern different levels of performance amongst students and to meet those individual differences. He also said that his school had begun to implement PAT-R and PAT-M standardised online testing, which provides another source of data about student performance.

[387] Mr Margerison stated that the expectation of accountability to parents has been constantly growing, with parents communicating with teachers through email and text message and often wanting several meetings per semester. He said this was not the case 20 years ago, when teachers would only be accessible through the front office by pre-arranged meetings. The push for individual learning plans for every student requires Mr Margerison to take notes about each student's performance during every reading group to ensure so that he can report to parents about any student's progression at any time. He noted several changes amongst students in his teaching career, saying that "*students these days are less resilient*" or are in need of more familial support, and that the growing requirements for teachers to attend to the growing social needs of students makes the work more challenging, particularly in light of child protection laws.

[388] Mr Margerison also stated that significantly more students attend school who speak English as a second language and that teachers are not adequately supported in effectively communicating and facilitating engaging learning for these students. Mr Margerison also described the "open classroom" space accommodating over a hundred students with a large TV screen in each corner which he shares with three other teachers. He said that the open classroom space produces greater noise, with an increased propensity for disruptions to affect more students, and require a level of collaboration between teachers that has not existed before. Mr Margerison also described how 50-60% of his teaching is now delivered through

[248] Exhibit 38

Google Classroom and that students' increasingly project-based learning through devices like iPads demands new approaches to lesson delivery and integrating technology into past units.

[389] Mr Margerison also said that leadership positions in schools have become increasingly undesirable as the extra reporting, data collection and other administrative functions have placed too much pressure on teachers. Mr Margerison said that the new registration and accreditation of teachers in NSW as of 2018 also require teachers to complete 100 hours of professional learning over a five-year period and that, unlike 10 or 15 years ago, there is an expectation that the content of professional learning will be easily and immediately applied in the classroom.

[390] In his oral evidence in chief, Mr Margerison gave greater detail about the concept of the open classroom space. He said that he still has his own class of 27 students for which he is responsible, but the day depends on the subjects. Sometimes one teacher might present to the whole 108 students, and at other times each class may be taught separately or one group might be taken aside while the other three teachers work with the larger cohort. He said that "agile spaces" are common practice in the Parramatta diocese and are the preferred method of teaching. All the students are in the same Year (in his case Year 6).[249]

[391] In cross-examination, Mr Margerison gave the following evidence:

- "writing clusters" identify in fairly minute details what an individual child can do, from punctuation to the use of descriptive or emotive language;[250]
- the requirements in schools as to recording disciplinary incidents is well above anything he experienced 22 years ago, and all cases of student interaction which might not be favourable must be documented so that, if a parent rings, there is evidence of what the school did and what action was taken;[251]
- if the teacher thinks that a student may receive a D or E on their report based on assessments that have been done, it is necessary to ring the parents and ask them to come in for an interview;[252]
- notwithstanding the Australian Curriculum, the NESA produces its own curriculum documents and has been updating the syllabus each year in each curriculum area, which requires programming to be revisited;[253]
- the requirement for 100 hours of professional development at his school can largely be met by attending staff meetings involving professional development, which was not done 20 years ago;[254]

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[249] Transcript, 19 June 2019, PNs 2112-2115

[250] Ibid, PN 2140

[251] Ibid, PN 2141

[252] Ibid, PNs 2142-2143

[253] Ibid, PNs 2148-2151

[254] Ibid, PNs 2152-2154

- what children are being asked to produce is a lot different to 22 years ago, the use of technology has meant that children may be asked to produce videos, sound files and podcasts, and his teaching resources are put on Google Classroom which means that students can go back and look at what he has done;[255]

- on average he would spend 2½ hours marking children's literacy work and about another hour marking homework on the iPad, and he also makes phone calls to parents at night when they can be contacted after work;[256] and

- in relation to the increase in the number of students speaking English as a second language, Mr Margerison referred to one school, East Granville, where upwards of 98% of students came to school with English as a second language, with many being unable to speak English, making it necessary for teachers to teach English as distinct from the subject of English.[257]

[392] Mr Margerison also gave the following evidence about these hours of work in response to questions from the bench:

> What time do you typically get to school in the morning, Monday to Friday? -In my statement I said 7.45. Again I was being on the generous side there. It's not unusual for me to be there just after 7.00 and in the afternoons it varies but normally 4.30 would be an early afternoon for me.
>
> And what's a typical finish time for you? -4.30 in the afternoon.
>
> Right. You talked about doing some work on Sundays? -Mm-hm.
>
> Have you always done that throughout your 22 years or has it changed more recently? -With the move to a different style of learning in which case we give children the choice in our literacy program of activities. So we will have a range of literacy activities there where they choose which ones they complete and when they complete them. The days of a teacher standing up the front and marking a comprehension sheet because they've all done it in the last 30 minutes, has gone, because choice in education these days is a big thing. And so we give them the choice of completing a certain minimum number of activities during the week. So I can't - it's very difficult to mark that work day by day. So now I have to take it into my own time at home and mark that literacy on the weekend.
>
> When did you start doing that? -Over the last couple of years we'd mark that. In particular, this year, we also asked them to reflect on their learning. So they actually have to write reflections on - every day - on their literacy learning and set goals for the next day. And that's something was unheard of - you know - 20 years ago. But, again, I have to mark that as an additional amount of work.[258]

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[255] Ibid, PN 2165

[256] Ibid, PNs 2169-2170

[257] Ibid, PN 2171

[258] Ibid, PNs 2178-2182

Anthony Atkinson

[393] Anthony Atkinson is a primary school teacher and, at the time of his witness statement, the Wellbeing Coordinator at Merri Creek Primary School in Melbourne. He has taught at the school since 2006, having graduated with a Bachelor of Arts from the University of New England and a Bachelor of Education from the Australian Catholic University in 2005. He is qualified to teach as an early childhood teacher and up to Year 8 in high school. He has 22 teaching hours a week, and also fulfils administrative duties within the leadership team and provides mentoring support to graduate colleagues. Mr Atkinson was, at the time of making his statement, paid in accordance with the *Victorian Government Schools Agreement 2017* on the top of the scale.

[394] In a statement dated 19 December 2017,[259] Mr Atkinson described the responsibilities of his role. He is required to be registered by the Victorian Institute of Teaching, maintain his WWCC and professional standards in accordance with the APST. He must develop and implement the Australian Curriculum in a logical and consistent order whilst differentiating it for all the ability levels in his class, which can be up to 4-5 capability levels. He described his paramount responsibility as ensuring the safety of children within his care, including producing risk management plans and completing first aid and anaphylactic training. He described the additional complexity where there is a child with additional needs in his class, including when supported by a teacher's aide, as he has to manage the learning of that child in addition to differentiating for the rest of the class. Mr Atkinson said the prime responsibility of a primary school teacher is a personal relationship and emphasised the importance in the role he plays in helping children to develop as people.

[395] Mr Atkinson said the core skill in teaching is the cycle of observation, analysing learning, planning and implementation, and this cycle is based on the principles, practices and educational outcomes of the curriculum. He has a planning day at the end of each term for the following term and creates plans for each week and term. He assesses whether his class are ready to cover a curriculum area and conducts assessments halfway through each unit to check whether they are being challenged by the content. He documents his students' learning using a phone application called Class Dojo, which allows him to share photos or information with parents. Mr Atkinson teaches autonomously and, as a mid-career teacher, is expected to take on other duties and provide greater support to his colleagues. As Wellbeing Coordinator, he oversaw wellbeing programs and policies at the school and was responsible for implementing these programs in classes across the school. The conditions of his employment mean he comes in contact with communicable diseases, and some very young children have high needs and rudimentary communication skills. Mr Atkinson is no longer the Wellbeing Coordinator and has since commenced in the role of Learning Specialist.[260]

[396] In his oral evidence, Mr Atkinson said:

- his salary is now $107,601 per annum;[261]

[259] Exhibit 36

[260] Transcript, 19 June 2019, PNs 2030-2031

[261] Ibid, PN 2034

- there is substantial latitude in what teachers do in delivering the curriculum because differentiation has to occur where children learn at different rates and different paces and within one class;[262]

- teaching to test is not an onus at his school at all and NAPLAN in particular is a test that is used as a departmental and policy mechanism that is not so much about student learning as a standardised test;[263]

- he has to engage in emotional management of older students in addition to younger students, as there are varying levels in emotional maturity;[264] and

- his school has four specialist teachers who take classes to give generalist teachers four hours release to plan their lessons, which is higher than the mandated amount of two and a half hours.[265]

James Jenkins-Flint

[397] James Jenkins-Flint is currently an Organiser at the IEU. Prior to his appointment in April 2017, he worked as a permanent full-time teacher at a number of Sydney primary schools for 11 years, most recently at St Brigid's Primary in Marrickville. He was awarded a Bachelor of Arts (Social Sciences) from the University of New South Wales in 2002 and Bachelor of Teaching in 2006. He is qualified to teach students from Kindergarten to Year 8 and was accredited as a Proficient Teacher by the NESA.

[398] In his statement of evidence dated 20 December 2017,[266] Mr Jenkins-Flint said that during his time as a teacher, he was responsible for creating engaging programs, lessons and assessments to deliver the curriculum and its outcomes to the students in his classroom, keeping abreast of changing views of teaching best practice, completing 100 hours of professional development over five years to maintain his accreditation and adhering to professional standards expected of teachers in addition to the particular policies and theological protocols of his particular school. He had a responsibility for providing a safe and effective learning environment, undertook first aid training every year and conducted risk assessments any time a novel activity was introduced to the classroom, such as a science experiment. In respect of children with additional needs, he was responsible for raising any concerns he had with parents and had contact with other professionals, such as therapists, to assist in planning and programming relating to that child. He also had access to special needs teachers within the Catholic system.

[399] Mr Jenkins-Flint gave evidence that as soon as he was a graduate teacher, he was expected to teach autonomously without supervision and or much assistance. He completed a new program for each class for every subject, each term of every year, which amounted to 7-8 programs for each subject and curriculum area. These programs and the subsequent assessment needed to be differentiated for students of different ability groups. Kindergarten

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[262] Ibid, PN 2047

[263] Ibid, PN 2056

[264] Ibid, PN 2059

[265] Ibid, PN 2071

[266] Exhibit 23

classes have a certain amount of time each week to engage in play-based learning, which evolves into project-based learning following the end of Year 1. He believes that the primary sector is increasingly modelling that of early childhood, where programming and assessment is on an individual basis, which takes longer to program but results in each child being more engaged in their learning. In communicating each student's progress, he was required to create two reports for each student throughout the year whereby they were assessed and comments made against a set of performance areas for each subject. Interactions with parents in the Catholic system were generally limited to parent-teacher interviews or by appointment, there was largely no direct emailing between parents and teachers.

[400] In a further statement of evidence dated 19 July 2018,[267] Mr Jenkins-Flint responded to evidence given on behalf of the ACA. Mr Jenkins-Flint said that early childhood and primary education are the same in that they have curricula that provide outcomes that are aimed to be achieved prior to the child moving to the next set of outcomes. He provided a table in which he compared outcomes provided in the EYLF compared to the primary school curriculum, which he said is indicative of a broader pattern whereby the primary outcomes progress and extend the EYLF outcomes, and in some cases are almost identical. Play-based pedagogical strategies that are used in early childhood centres are also used in primary school teaching. He gave an example from his time at St Brigid's, where a constructive play-based program was in place for Kindergarten students during break periods. Mr Jenkins-Flint also referred to the similarity of assessment in early childhood teaching and primary schools based on observations undertaken by a professional teacher.

[401] In his oral evidence, Mr Jenkins-Flint said that the primary school curriculum is set up with outcomes and indicators that guide the teacher to know whether a student has reached a particular outcome but does not identify exactly what needs to be done.[268] He also said that at St Brigid's, the constructive play-based program was instigated in both break periods and lesson time for Kindergarten and Year 1 students.[269]

Luke Donnelly

[402] Luke Donnelly was, at the time of his first witness statement filed on 22 December 2017,[270] employed as a teacher and Religious Education Coordinator at St Joseph's O'Connor in the ACT. Mr Donnelly holds a Certificate III in Children Services (Diploma of Children's Services), a Bachelor of Early Childhood Education from the University of Canberra in 2007, a Masters of Education from the Australian Catholic University in 2012 and a Masters of Religious Education from the Australian Catholic University in 2016. Mr Donnelly has also worked as an early childhood educator prior to becoming a teacher.

[403] In his role, he taught two days a week, fulfilled his leadership role, mentored an early career teacher one day a fortnight and worked within the English as Additional Language or Dialect Program. There is an early learning centre operating as a long day care centre attached to the school, however ir is operated administratively as a separate entity. His school has 240 students and a further 60 at the Early Learning Centre. He was paid in accordance with the

[267] Exhibit 24

[268] Transcript, 17 June 2019, PNs 1604-1605

[269] Ibid, PNs 1615-1618

[270] Exhibit 42

NSW and ACT Catholic Systemic Schools Enterprise Agreement 2015 with a REC allowance, which amounted to a salary of $112,381 with his coordinator duties.

[404] Mr Donnelly described his responsibilities as implementing the Australian Curriculum by ensuring he is covering the content descriptors in all subject areas. The cross-curriculum priorities are embedded within all that he does and the general capabilities which are skill-based are emulated within all class activities, which requires collaborative planning with grade level teams of teachers. He is required to be registered as a teacher in the ACT through the Teacher Quality Institute, and maintaining this registration involves completing 20 hours of professional development and 20 days of teaching each year. At St Joseph's he mentored teachers to move from graduate to full registration with the Teacher Quality Institute, which requires them to meet the proficient standard under the APST. He was responsible for ensuring children's safety through adequate supervision and monitoring, though if a student is ill or injured, they are sent to the front office administrator to be attended to. When working with children with additional needs, his workload increased because he needed to put in place strategies and interventions to support the child whilst also assessing and teaching the other children in his class. Mr Donnelly decides on what assessment the class will take and how he will assess whether the outcomes are achieved. This involves differentiating activities and assessments to tailor to each individual student. He provides verbal and non-verbal feedback to students and builds positive relationships with students to maximise students' learning.

[405] Mr Donnelly's level of responsibility involves mentoring graduate teachers, spending the day in their classroom and establishing goals, identifying areas of improvement or where support may be needed, demonstrating different strategies and methods that they could adopt and continuing the cycle of feedback. As the school's Religious Education Coordinator, he coordinated and oversaw the Catholic life of the school through facilitating staff spirituality, prayer and working with parents and students in the Christ-centred Community Focus. He managed a budget in his Coordinator role and another in his classroom and the Religious Education program. He said he would never have gone to work in long day care or preschools due to the pay and job prospects, as even Directors earned less than what primary school teachers early in their career earned when he commenced teaching.

[406] In a further statement of evidence filed on 23 November 2018,[271] Mr Donnelly said that there has been a consistent increase in the emphasis on professional practice and the proper documentation of learning over the past eight years, with a greater need for teachers to engage in an ongoing process of reflection and evaluation in their learning and to engage in goal setting.

[407] Mr Donnelly said that because he teaches at a Catholic school and studied at a non-Catholic university, it was necessary for him to pursue a Masters of Education with a major in Religious Education to enable him to teach in a Catholic School. He said that in the last ten years there had been a change in parental attitudes from being a partner in their child's learning to see the school as a business that is there to achieve for their child. His experience was that while parental expectations of their children's outcomes had increased, parental engagement with the learning process was not very high. It has become necessary for teachers to accommodate out-of-hours work more regularly to facilitate the involvement of working parents.

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[271] Exhibit 43

[408] Mr Donnelly said that assessment has now taken on three types: the diagnostic, which is data collected before teaching is delivered; the formative, which is data collected as the learning occurs to inform what happens next; and summative, where data is collected to determine whether the outcomes are achieved. He said that there has been an increasing emphasis on the formative stage, and in this respect it is necessary for him to analyse his students, determine whether they know what they need to do, whether they have achieved it, and whether they know what to do next. He said that teachers are now accountable for formative assessment, whereas this was much less emphasised and formalised in the past. Mr Donnelly also referred to the increase in standardised testing over the last 10 years, including the use of PAT and NAPLAN, and said that this is a part of a desire to have more data for parents in respect of school targets, thus making teachers more accountable.

[409] Mr Donnelly said that there has been an increasing trend to make teaching and learning individualised for the student, and in that respect there had been a move away from teaching in sequence whereby the curriculum was taught as it was regardless of whether the students knew it or not or needed more support. Now, there was a movement to understanding the student as an individual, getting to know their stage of progress and identifying methods of moving their learning forward. He said this was similar, in his experience, to the philosophy and pedagogy in early childhood education, and that standardised testing was evidence of the increasing trend to differentiated education and individualised learning.

[410] Mr Donnelly expressed the view that the introduction of the National Consistent Collection of Data (NCCD) had led to a significant increase in administrative responsibility, and there was a requirement that he create a Personalised Learning Plan (PLP) for students who have a diagnosed disability or he suspects have an underlying disability that affects their learning. He said that of a class of 16 in 2018, four of those had PLPs which required at least two meetings with parents each year and for the plan to be updated every term. Thus, he said, the integration of special students into mainstream teaching had increased the level of complexity in delivering classroom teaching.

[411] Regarding technology, Mr Donnelly said that he has to skill himself on a new type of technology every year as well as facilitate the proper functioning of technologies in the classroom such as Google Classroom and the students' use of iPads in class. Mr Donnelly also said that the use of emailing and online platforms to communicate with parents has increased accessibility of teachers to parents. He referred specifically to an app called "Seesaw", which is an online portfolio on which teachers and students can upload their work for parents to view or comment on, and includes a function for parents to message teachers directly.

[412] At the time of his oral evidence, Mr Donnelly had left his role at St Joseph's and commenced employment as a teacher and Assistant Principal at St Monica's Primary School in Evatt in the ACT. In his oral evidence, Mr Donnelly said:

- at his current school, there are 401 students of whom 98 are on PLPs;[272]

[272] Transcript, 20 June 2019, PN 2507

- parents have access to teachers by email (with the schools providing teachers' email addresses on their website), telephone, and by apps such as Class Dojo, and parents may have physical access at two parent-teacher interviews per year and through annual "Learning Journeys" where parents are present in the classroom;[273]

- early childhood teachers had more parental interaction than school teachers because they saw parents at drop-off and pick-up and also interacted through online platforms, but their individual email addresses were not usually provided to parents;[274]

- in terms of the EYLF, early childhood teachers assess students' ability to communicate, gather data on the level of effective communication in their classroom, and then plan learning for the future to improve their ability to communicate and, similarly with social skills, early childhood teachers do some sort of assessment of their students in terms of observations and anecdotal records in their ability to socialise with each other, gather that data together and see where to go next;[275]

- observations are not short documents, typically includes some photographs, perhaps a video, a description of a task conducted, a short description of the skills to which the activity contributed and an identification of the EYLF outcome that the activity was related to, and may produce quantitative date concerning social skills and the ability to communicate and use of vocabulary that can be analysed;[276]

- the assessment in the early childhood setting of children's social and emotional and communication skills is, like NAPLAN and PAT in schools, "high stakes" with implications for teachers and services;[277]

- both the EYLF and the Australian Curriculum have a focus on the whole student in terms of their social skills, their rational skills and their ability to communicate but that the main difference is that the Australian Curriculum stipulates content that children are required to learn, and it also stipulates many both broad and specific outcomes;[278]

- the Australian Curriculum for each subject has a mandatory achievement standard for each year, and also has content descriptions which are optional and which may be selected and adapted for a teacher's particular classroom cohort;[279]

- teachers have to deal with regular changes to the Australian Curriculum, an overcrowded curriculum, and changes in teaching method;[280]

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[273] Ibid, PNs 2547-2556

[274] Ibid, PNs 2567-2570

[275] Ibid, PN 2613

[276] Ibid, PNs 2616-2621

[277] Ibid, PNs 2626-2627

[278] Ibid, PNs 2641-2642

[279] Ibid, PNs 2645-2656

[280] Ibid, PNs 2660-2666

- there is diagnostic assessment both in early childhood and primary school settings but the process is different, so that where children in a primary setting are able to complete a worksheet task or sit a test, teachers in an early childhood setting need to adapt their diagnostic assessment tool to the children in that setting and their capabilities through the use of observation, anecdotal records and images;[281]

- formative assessment is probably the form of assessment that is most similar in early childhood and primary school settings in the sense that it is through questioning and gathering small pieces of information and data from the students that then informs where to go next;[282] and

- summative assessment occurs in both settings, but in the primary school setting summative assessment is much more attached to a product which is reported back to parents, whereas in the early childhood a summative assessment product would be some sort of informal portfolio or journal or some sort of entry on an online platform.[283]

Clinton Foster

[413] Clinton Foster is a secondary school teacher at Bayview College in Portland, Victoria. Mr Foster teaches classes in Physics, Mathematics and Chemistry across all year groups and holds a Bachelor of Science and a Diploma of Education (1997) from Deakin University. Mr Foster has worked as a teacher since 1998, commencing his employment at Bayview College before entering roles as a Leading Teacher-Director of Teaching and Learning and Expert Teacher at Heywood and District College between 2002 to 2009, before then returning to Bayview College in 2010.

[414] In his statement of evidence filed on 27 November 2018,[284] Mr Foster said that he began his career teaching chemistry and mathematics, but began teaching physics in a hard to staff rural school about three years ago due to a shortage of physics teachers. He said that this required a significant amount of work in non-term time to learn the physics course, but that in rural schools it was an expectation that teachers pick up subjects outside of their teaching area.

[415] Mr Foster described the effect of the introduction of technology into classrooms. He said that he cannot attend class without a laptop, and that the facility of email has created investment of time and resources outside of work hours and that teaching in unfamiliar subject areas has created the expectation that teachers are contactable by parents at any hour via email and that any requests or alternative arrangements for students made via email can be actioned quickly. He gave as an example of this a student with mental health issues who sometimes misses class, and whose parent have requested that he send through class work including worksheets and handouts when this happens. This requires him to assess her capability to do the work and to ensure he is not overburdening her in the context of her

[281] Ibid, PN 2683

[282] Ibid, PN 2685

[283] Ibid, PN 2687

[284] Exhibit 7

health concerns. Previously, he said, he was not accessible to parents. Mr Foster also described the difficulty in managing student behaviour with respect to the use of mobile phones.

[416] Mr Foster also said that the level of diagnosis of mental health issues is much higher in recent times, which has required schools to build a strong welfare team to ensure the mental health of all students. It has also required an increased individualisation of teaching. Mr Foster said that, 20 years ago, he would essentially be required to teach the mathematics program to a typical class of 25 in which there might be one or two students with learning difficulties requiring a modified workload expectation. He compared that to a current class of 20 in which there are 7-8 who have specific learning needs. He said that the introduction of PLPs, and the expectation and requirement to meet the needs of each individual student is extremely challenging. It was necessary for him to assess each student facing a learning difficulty and make an estimation of what they are capable of, create tasks that they can perform up to their ability, and modify assessments to meet their ability. Each stage of this process must be documented. Mr Foster said that "*The days of writing one exam or assessment for a group of students are almost gone*". The introduction of "Math Pathways" in junior secondary school, which is an interactive online textbook, builds an individual program for each students through the use of adaptive modules, and requires Mr Foster to manage each student on their own individual learning plan. Mr Foster also said that the introduction of standardised testing meant that it was necessary for him to establish goal-setting exercises for students who fail to achieve to or above their projected results.

[417] In a further statement of evidence made on 10 June 2019,[285] Mr Foster attached an example of an individual learning plan of a student who spoke English as a second language, having moved from China two years previously with very little knowledge of English. The plan identified the student's specific learning needs, teaching strategies to address those needs, personal learning targets, special provisions applicable to undertaking examinations and assessments, monitoring and assessment arrangements (which included ongoing communications between teachers, the Inclusion Team, the student and the family, and parent/teacher interviews), and success criteria.

[418] In his oral evidence, Mr Foster said that teaching Year 12 students in a given subject was more difficult that teaching Year 7 students because of the greater academic difficulty in the content and the need to prepare them for external demands.[286] He also said that teaching is more individualised and differentiated in the early years of higher school than in Year 12 where, in Victoria, the Victorian Curriculum Assessment Authority is far less flexible in allowing individualised learning plans.[287] He said that he had eight out of 20 students in his Year 7 class on individual learning plans, but only one out of 10 students in his Year 11 physics class.[288] In relation to the analysis of standardised testing results, he said:

> And again can you just explain again, keeping it as simple as you can, what's involved in analysing the results of standardised tests? -Yes, so our faculty leader gets all of the

[285] Exhibit 8

[286] Transcript, 11 June 2019, PNs 429-434

[287] Ibid, PNs 444-448

[288] Ibid, PNs 480-481

> results. We sit down as a faculty and analyse where there's deficiencies across the board for our students and whether we can better teach certain content.
>
> And how is the analysis actually carried out? Is it a matter of sitting down looking at the results and - well, what happens then? -Yes. Yes, so the faculty leader has the results, goes through them with us. She actually has on her wall like sheets of paper where she has the students' names and the different - so she does a lot more work than obviously we do. We sort of look at it and then reflect on it and then look at how we can implement improvements to the curriculum, which seems to be an ongoing thing.
>
> Right, and are you also referring at paragraph 10 to improvements in data analysing? What are the improvements that you're referring to? -Well, I guess 20 years ago we didn't really look at data at all and I guess certainly with the VCAA their tools for analysis are a lot greater. So we get a printout of say our Year 12 results, how every student has gone and how they line up with their predictor score from the general achievement test, and then the onus is more on staff to ensure we're evaluating. In other words the students are getting their projected score or better. If not then, you know, the question's asked are we teaching at the level that we should be teaching at.
>
> That's a kind of accountability for you that if the student's not reaching what their projected to achieve, that you have to do something about it? -Yes, it's a fair accountability but it's certainly due to the improvement in analysis tools I guess it's improved our work - you know, our work complexity of what we can do to help, which improves - increase - it improves the student outcomes which is our end goal, but increases our complexity or workload I would suggest.[289]

[419] In relation to individualised learning plans, Mr Foster explained that they are prepared by school's Welfare Team in collaboration with the teacher.[290] He described the process as follows:

> Okay, can you just explain that process to me a little bit? The student goes to see the welfare team and together they come up with this plan or what's the process? -The process is fairly long and complicated but I'll go through it quickly. So when the student comes in in grade 5 they have a trial day then in grade 6 they have a second trial day. Then, when they enrol, information is fed from the primary schools and that information starts a template of the initial individual learning plan. So it's determined from their primary school report if we feel that they would be candidate to have some additional time spent on them with an individual learning plan and then this student - this is probably finalised by the end of term 1 after you've had six, seven, eight weeks working with a student. As a group of teachers you get together and help finalise the learning plan but the actual writing it is a collaborative effort.[291]

[420] Mr Foster described the Math Pathways diagnostic tool, which his school had been using for three years. He said that it is an adaptive online textbook used in Years 7, 8 and 9 which diagnoses what level a student is at, what their deficiencies are and the facilitates

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[289] Ibid, PNs 452-455

[290] Ibid, PN 469

[291] Ibid, PN 470

individualised learning.[292] Finally, Mr Foster gave the following evidence about the use of standardised testing at his school:

> Now this is the final issue, Mr Foster. You deal at paragraph 10 of your statement with standardised testing. Can you just again in simple terms explain what standardised testing is required at your school? -Certainly. So we try to I guess triangulate data. We don't just take it from one source. So we might have, say, the Math Pathways as a source of some data as you've suggested, through their diagnoses tools and what they're doing. We'll have NAPLAN data, which is only biannually, and we'll do things like ICAS maths testing or some other tool, adaptive testing online, and then that gives us - you know, triangulates at least three sources to give an accurate snapshot of where the students are at and then we use that data obviously to try to see how we amend curriculum programs to improve learning. So we obviously don't teach the same class - if you have a Year 8 maths you're not going to teach the Year 8 maths the same from year to year. It will change with the cohorts.
>
> And having conducted that standardised testing at point A, that then provides some kind of base line or some picture of where each student is at that you can then measure that student's progress against as time goes on. Is that right? -Yes, that's correct, and I guess there's a lot of focus on the NAPLAN or NAPLAN data with My School's website and that kind of thing, because it does affect enrolments is the message that we get from the top down. So we certainly work hard to try to improve student performance as well - you know, not just day to day but also toward standardised testing.[293]

Simon Huntly

[421] Simon Huntly is a secondary school teacher at Mount Carmel Catholic College in Varroville, NSW teaching PDHPE and Religion. Mr Huntly has been a teacher for 28 years and previously worked at as an Assistant Principal at Kildare Catholic College in Wagga Wagga for 10 years and as a PDHPE teacher at St Gregory's College in Campbelltown for 14 years. Mr Huntly was awarded a Bachelor of Education from the University of Wollongong in 1989, a Graduate Certificate in Religious Education from the Sydney College of Divinity in 2008 and a Masters in Educational Leadership from Charles Sturt University in 2017.

[422] In his statement of evidence dated 23 November 2018,[294] Mr Huntly observed that the introduction and incorporation of technology into teaching, and its use in standardised testing and results, has been the biggest change to teaching in his career. He said that the proliferation of student management platforms and individualised data generated for each student has placed a greater demand on teachers in the classroom. This includes having to manage "teething problems" when integrating new platforms and interpreting data as it pertains to individual students and planning lessons accordingly. He said that the requirement to break down standardised test results, analyse teaching methodology accordingly and plan creative and effective strategies was entirely new and allowed him to identify particular strengths and weakness of students and adapt accordingly. PAT, which allows instantaneous feedback on

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[292] Ibid, PNs 471-474

[293] Ibid, PNs 475-476

[294] Exhibit 28

the performance of students, requires teachers to analyse and filter significant amounts of data and implement it in their teaching practice by identifying student strengths and weaknesses and to further differentiate students' learning on that basis.

[423] Mr Huntly also described adapting to a new teaching pedagogy and method which has accompanied increased technology whereby the emphasis on creativity, problem-solving and collaborative learning in the classroom requires teachers to become "*the problem solver for students*" for any topic, to respond with agility and tie the exercise back to the curriculum and learning outcomes.

[424] Mr Huntly stated that his role has also changed as the number of students with learning difficulties and behavioural problems has increased and as teachers have become expected to manage a broad range of welfare concerns across the student body while supporting students in their social and emotional development. This includes increased administrative functions like navigating new system referral processes from schools to support officers, liaising with counsellors and drafting personalised lesson plans to accommodate these needs. Mr Huntley also stated that there is little formal training at university which adequately prepares teachers for the social and emotional aspects of the profession and that these skills are learnt on the job.

[425] Mr Huntly said that developments in the curriculum and the requirement to assess students "*in the moment*" requires a greater amount of attention to an individual student's performance during class time. The need for teachers to comply with legislative requirements relating to teacher registration, their work health and safety obligations, child protection matters and national curriculum programming is also increasingly difficult to balance on top of developing and delivering lessons.

[426] Mr Huntly further stated that parental accountability and contact with teachers has increased compared to previous years, where teachers are now expected to be accessible during non-term periods and the recent requirement for teachers to keep a written record of any phone contact with parents.

[427] In his oral evidence, Mr Huntly said that:

- the development of technology has allowed almost instantaneous feedback on tests that students sit, which allows the teacher to have access to standardised norms based on how students are performing compared to other students across the State and country, and based upon analysis of the results, teachers may adjust their teaching programs and implement various strategies;[295]

- PAT testing was initially used to identify students who might have learning deficiencies, but it is now a more mainstream test for all students as a means to analyse every student's abilities;[296]

- testing was historically of a summative nature which was used at the end of a unit and was closely aligned with the curriculum content, while NAPLAN and PAT

[295] Transcript, 18 June 2019, PN 1772

[296] Ibid, PNs 1773-1775

testing is specifically targeted at literacy and numeracy and provide comparative data that indicate a student's capacity on a given day and can be used to strategise different interventions that may be needed;[297]

- the use of Google, Moodle and similar programs have allowed 21st century learning skills of collaboration, teamwork, critical thinking and creativity to be incorporated by teachers, and allows work to be individualised for particular groups of students and for more adept students to lead others through working in small team situations;[298]

- social media has created new problems with discipline, such as disputes between students about postings on social media, and interactions which may cause friction and upset are "*relentless*";[299] and

- at his school, staff emails are made available to parents, so there is an unlimited capacity for parents to be in contact with teachers "*24/7*", and there is an expectation of a response at some stage even if not outside of working hours.[300]

Anthony Cooper

[428] Anthony Cooper is a secondary school teacher who has worked in the teaching profession for 21 years. At the time that he made his witness statement, he was employed as a History and English teacher at Clairvaux Mackillop College in Mount Gravatt, Brisbane, and had held the positions of Deputy Head and Head of Social Science at various times during his employment at the College. Mr Cooper was awarded a Bachelor of Arts (1992) and a Diploma of Education (1997) from the University of Queensland, and was awarded a PhD (2001) from Griffith University. He retired in 2019.

[429] In his statement of evidence filed 23 November 2018,[301] Mr Cooper first described the marked increase in professional development required to maintain teacher registration and accreditation, whereby 10 hours a year professional development was mandated by the QCT about 10 years ago, and this was increased to 20 hours a year about five years ago. Mr Cooper said that professional development directed by Catholic Education at a system level as well as that provided by his school meant that he and other teachers approached about 40 hours professional development per year, well above the minimum. He said that while professional development was undertaken prior to the QCT requirements, the total quantum has certainly increased.

[430] Mr Cooper also described "*constant changes*" in teaching methodologies and pedagogies that have characterised the last 12 to 13 years of his career and created "*an entirely new language of teaching*". He said that he had been required to learn a range of new abstract frameworks (including their theory, underpinnings, intention and meta-language), integrate them into teaching and lesson plans, move between the frameworks and navigating

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[297] Ibid, PNs 1779-1782

[298] Ibid, PNs 1787-1791

[299] Ibid, PNs 1794-1795

[300] Ibid, PNs 1796-1798

[301] Exhibit 46

the compatibility of new teaching methodologies with other changing frameworks such as those relevant to behaviour management protocols. They required him to adapt his language in the classroom to the use of the new frameworks and revise documentation that is sent to students and parents to ensure that it properly references the language of the framework. He said that the Graduated Release of Responsibility Model is currently being used in his school and in his teaching practice. This model provides an exacting and specific framework for lesson and unit planning and requires each lesson to be segmented into four stages: first, the teacher explicitly models the learned content or skill; second, the teacher works with the students as a group to apply the model or skill or acquire the knowledge through guided practice; third, the students apply the model, skill or knowledge working within their own groups without teacher input; and, finally, the students attempt to apply the model, skill or knowledge individually.

[431] In relation to the various teaching models he has been required to adopt, Mr Cooper said that "*irrespective of what they are called or the meta language that is being used, it is usually the same thing being described*", but that the "*constant churn amounts to a significant cognitive complication*" and that is was "*my impression that the anxiety at a system and school level to outcompete other schools causes this constant churn*." In this respect, Mr Cooper pointed to the increasing publication of standardised testing including NAPLAN results, as well as ATAR results, as allowing his school to compare itself competitively to others, both at the Catholic system level as well as on a school level. He said that this had led to cycles between teaching models and frameworks being short, "*as school managers become more and more anxious about improving the school's data*". Mr Cooper said that, in addition to teaching and pedagogical models, other frameworks had changed including those relating to behaviour management.

[432] In relation to teacher accountability more generally, Mr Cooper said that when he began his career, he conducted only an annual parent-teacher interview per year. This has been changed to two parent-teacher nights per year of longer duration, and parents are increasingly attending such interviews. In addition, he said that over the past 10 years there has been a proliferation of interviews in addition to scheduled parent-teacher interviews, including mentoring, intervention or enrolment interviews with parents. Mr Cooper also described the increased accessibility of teachers to parents by email, and he said that managing these interactions was an increasingly complex task. Parents' emails might concern their child's learning performance, behaviour, disciplinary issues, assessments, the teacher's teaching style and the child's relationship with their teacher. This has resulted in an escalation of work by teachers, with teachers having to conduct correspondence at all hours of the day, including from home and having to answer emails when they arrive at work in the morning before they can attend to planning and carrying out their day. There has also been an increased tendency, Mr Cooper stated, for the school to encourage or direct teachers to phone parents at home to discuss behavioural management, academic underperformance and other issues. Mr Cooper said that this was very rarely done earlier in his career, and was part of a shift towards more intensive one-on one student management which required him to be more careful and reflective in the way he considered student discipline and related to parents.

[433] Mr Cooper said that there has been an increase in standardised testing over the past ten years, including the national introduction of NAPLAN, the Queensland Core Skills test required for all Year 12 students in Queensland, and the use of PAT-R which measures the extent to which student literacy has improved over the year. Data produced by these tests is represented visually on "data walls", which portray the relative placement of students in their

year on a large, wall-sized chart. Mr Cooper said that teachers are required to prepare classes for these tests, administer the test, assess the test papers, analyse test results, discuss the patterns of the data, and meet in teams to identify specific learning strategies for specific students. This, he said, constituted an escalation of work demands on the teacher, both in quantum and complexity. In the case of his teaching load of 160 students, he is required to accommodate his lesson plans to enable everyone to have their specific learning needs met, no matter where the student is placed on the hierarchy of learning, by providing individualised instruction to enable them to improve. Mr Cooper said that he found it difficult to use and adequately respond to the significant amount of data being generated by the testing.

[434] Mr Cooper also said that teacher administration has increased in various ways, resulting from the requirement to write academic programs and assessments for specific subjects, the need for teachers to ensure they are covering the "*content-heavy*" Australian Curriculum, the reduced clerical support for teachers, the requirement to design alternative assessments and planning lesson delivery to cater to specific students such as those with special needs, the planning and delivery of lessons which take into account students' previous academic results and data, and the need to record data for the adjustments made for students with learning difficulties as required by the NCCD reporting requirements. In relation to NCCD reporting requirements, Mr Cooper said that adjustments made for special needs students such as reading out a text to the student, assigning the student a "study buddy", or giving the student a "chill-out card" allowing the student to leave the classroom to settle down, have to be recorded.

[435] Mr Cooper referred to the Business Intelligence Tool used in Brisbane Catholic Education, which he described as a "*one-stop-shop for teachers to get data on their students*", and which he uses to identify the academic profile of each of his students and then tailor the planning and delivery of learning based on his analysis of the date shown on Business Intelligence. He is also issued with a Students With Additional Needs list, which identifies every student who has a learning difficulty, and has to individualise the planning and delivery of students on the list. Mr Cooper said that "*the aggregation of these types of measures add up to a significant escalation of work from teachers, both in quantum and complexity*".

[436] In relation to the curriculum, Mr Cooper said that for junior levels in Queensland schools prior to about 2001, there was an ill-defined syllabus which largely left schools free to compose the course. In about 2001, an outcomes-based curriculum was introduced, which required an entirely different approach to assessment. The 5-point A-E grade structure was abolished and replaced with a requirement to report on the student's learning outcomes or demonstrated abilities by non-judgmentally reporting on what they could do and what they knew using descriptive language sourced from a curriculum cognitive hierarchy. Mr Cooper described this as a "*radically different teaching practice to what teachers understood and performed*" and as "*challenging, both cognitively and practically*".

[437] In regard to the changes in expectations of schools, Mr Cooper said that the increase in students' co-curricular activities, the increased pastoral care expected from teachers and expectations in regard to the use of IT and new technologies have escalated work demands for teachers both in quantum and complexity. In relation to IT, Mr Cooper referred to the program to deliver one-to-one computers to high schools introduced by the Federal Government in 2008; he said that, prior to this, his school only had a few computer rooms, many classes scarcely used computers at all and many teachers did not have computers either. Since that time, every student and staff member has been provided with a laptop by the

school. Accompanying this, many aspects of work have been computerised, including report cards and behaviour management records. However, Mr Cooper said, the lack of professional development provided in relation to IT and deficiencies in the design of applications have meant that computers have not reduced work demands on the teacher, either in quantum or complexity.

[438] Mr Cooper was not required for cross-examination.

Larry Grumley

[439] Larry Grumley is a teacher and English Coordinator for Catherine McAuley High School in Westmead, NSW, which is operated by the Catholic Education Diocese of Parramatta and is a girls Years 7-12 school. He has been a teacher at a number of other schools prior to his current position and was also a Supervisor of Marking for the Higher School Certificate and chaired and was a member of several committees for the (then) Board of Studies, Teaching and Educational Standards. He now sits on the Curriculum Committee for the NESA. He received his Diploma of Education in 1970 from Drake University, Iowa, USA and has taught in Australia since 1974.

[440] Mr Grumley gave evidence in his witness statement filed on 26 November 2018[302] that there has been a fundamental change in teaching due to the introduction of outcomes-based syllabuses as the result of NESA directives. He said that all syllabuses specify outcomes to be achieved by students which are detailed and specific in nature but also often expressed in abstract or theoretical terms. All assessment must now be designed to test specifically whether students have achieved the specified outcomes, and a marking scale needs to be developed based on achievement of the outcomes. The assessments must also be broken into formative and summative assessments. Mr Grumley said, by way of example, that previously an essay would be marked holistically and given a mark of 14/20; now, individual outcomes are marked separately, and the marks are added up to give a total out of 20. All assessment tasks must be precisely constructed, as the full range of outcomes must be assessed. If a student misses an assessment task, an alternative task must be constructed or a mark estimated on the basis of data collected and in accordance with strict criteria. The teacher is accountable for any estimated mark.

[441] Mr Grumley gave evidence that there is constant change and amendment to or clarification of the syllabuses of which he is required to stay abreast and in some cases this means assessment schedules must be altered during the term. There are also weekly NESA updates which he must review and communicate to his staff. In addition to NESA requirements, his school must meet system/diocesan requirements, such as completing review documentation which is time consuming and extensive.

[442] In addition to class preparation and teaching, Mr Grumley gave evidence that teachers are now also expected to be technologically proficient, insofar as they must assist students in computer-based learning, use them to complete administrative tasks and be conversant with Google Drive/Spreadsheets/Classroom. He noted that his school has also changed the programs they are expected to use, such as OneNote, Publisher and Garage Band but within two years moved to others and no longer supports these. He also referred to the increase in

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professional development to maintain his accreditation. The NESA requires a Proficient teacher to complete 100 hours of professional development over 5 years, 50 hours of which must be NESA-accredited. Mr Grumley stated that in previous years this professional development was mostly completed during school time, whereas now the majority is completed outside of work hours.

[443] Mr Grumley gave evidence that teachers' work had changed and their workload increased in the following respects:

- There has been as increase in parents' expectations from schools compared to 10 years ago, based on their knowledge of schools' NAPLAN and ATAR results, and parents may pressure teachers to make a student sit a particular course in the belief that it will maximise their mark and may challenge outcomes of assessments.

- Teachers are more obliged to have ongoing contact with parents. Mr Grumley's email address is now available to all parents and he is expected to respond to any parental emails in a timely manner and may be required to call parents as well. This type of accessibility and engagement did not exist 10 years ago. Parents' emails are often demanding and challenge teachers' professionalism, and dealing with these types of inquiries and complaints is new to teaching and stressful for new/younger staff especially.

- Schools are demanding more participation in and organisation of extracurricular activities, so much so that prospective teachers are assessed on their ability to contribute to extracurricular activities at the school.

- WWCCs, anaphylaxis and epi pen training, fire training, first aid, CPR and WHS training, working with diversity students, child protection updates and Canberra Disability Standards for Educator's Training have been introduced.

- The school maintains a Diversity is Normal folder, which gives details for every student with special needs. Mr Grumley said that every school would have its own iteration of this. He is required to look through the folder and identify every student that has been determined to have learning needs or other special circumstances. He has six such students in one of his classes, and it is necessary for him to complete a written record for what he has done to accommodate the student's learning and his evaluation of his success in this regard. This was not required to be done 10 years ago. Mr Grumley said that the number of students in his Diocese identified through the use of standardised testing such as PAT-R with special needs has been growing.

- Changes in teaching methodology which means only some classes are streamed, thereby resulting in a very wide range of abilities in non-streamed classes. When this occurs, teachers need to cater for a wide range of abilities by offering different options. Teachers are required to differentiate so that, rather than setting a single assessment task for all students in a class and then marking them, teachers must consider different kinds of assessment for students of different capabilities to allow students to grow and learn at appropriate rates and to demonstrate their achievement in accordance with the requirements. Differentiated assessment tasks create considerable difficulty in grading students in a single class.

- Mr Grumley is required to demonstrate that he has analysed data from standardised testing. He said that this takes a significant amount of time, and that this is an entirely new feature of teaching with no equivalent value to any work done by teachers 10 or 20 years ago.

[444] Mr Grumley was not required for cross-examination.

Mark McKinnon

[445] Mark McKinnon is the Mathematics Coordinator at St John the Evangelist Catholic High School in Nowra, New South Wales, which is a part of the Catholic Education Office Diocese of Wollongong. He has a Diploma of Education from the University of Wollongong and a Bachelor of Engineering (Electrical) from the University of New South Wales and has been teaching for approximately 25 years. In his statement of evidence filed on 23 November 2018,[303] he first stated the view that there had been a significant increase in the complexity and quantity of teaching over his career. Mr McKinnon said that the biggest change in teaching during his career is the move towards differentiation in teaching. He said that when he started teaching, he taught a class to a single program, and differentiated for individual students to a level he thought appropriate. In 2018, he said, a teacher is required to teach 30 individuals at their respective levels, which involves a significant increase in accountability towards individual students and their education. He said that teachers are increasingly being required to think, plan and record variations of their programs and teaching practices to account for the different learning requirements of different students and special needs students and other individual learning needs. While teaching involved levels of differentiation in the past, the trend to do this to a greater degree only increases and the requirement to record the differentiation and be accountable for it is entirely new.

[446] Mr McKinnon referred to an increase in students on special learning plans or other behavioural management plans, which represent about 74 students (10%) at his school, whereas 10 years ago this was only about 5 students in the school. He said that in 2018, a new program was introduced for specialised learning plans, which are negotiated with students and their parents, and are reviewed every six months or so. Mr McKinnon stated that he receives approximately two new notifications a week of learning plans for students in his classes and for other medium-high risk students. The plans will identify his responsibilities as a classroom teacher, and affect his teaching by requiring him to differentiate the program and assessment for that individual student, and provide specialised and sensitive pastoral care. Mr McKinnon said that differentiation is especially important for special needs students because of the new level of recording and accountability required for funding of these students, which is based on the data collected by him as the teacher. He said that the school only received its first special needs student about 10 years ago, and the number has increased to approximately 6 or 7 students in each year group with significant needs. These increased numbers of special needs students at his school have created more work in terms of recording data in order to receive funding, specialised attention in class and differentiation such as altering assessments in line with the student's learning needs, even with specialised support present.

[447] Mr McKinnon gave evidence that assessment structures had changed in recent years, and he is now required to plan the year's assessment ahead of time to be provided to the

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students, rather than changing and deciding assessments as necessary throughout the year. Under the NESA he has been required in the past 3-4 years to complete "progress grades" - that is, a grade provided to parents in approximately Week 7 in Terms 1 and 3. He described this as challenging because most assessments have not yet been completed by this stage and instead, he has to make continual assessment of students by way of entries in a mark book for a "Record of Progress" throughout the term as students prove their ability. In terms of marking, teachers are now required to record not just a single mark, as was the case when Mr McKinnon began his career, but also to record all of the various curriculum outcomes as part of the trend towards outcomes-based teaching. This has increased his marking time from 15 minutes per paper to at least one hour's work. Teachers are required to retain students' work so as to allow for increased accountability by being subject to checking by inspectors.

[448] Mr McKinnon said that the Catholic Education Office now requires all schools to administer PAT tests in maths and English to students, and together with HSC Minimum Standards, a year 10 student could have up to 11 standardised tests per year. He said that pressure to use the results of standardised testing to adjust teaching programs is increasing and constant, with the expectation being that he would identify a need within the results and then build that into future learning. Mr McKinnon said that data is complex and difficult to interpret in a meaningful way, requiring an entirely new set of skills, but must be used to identify individual student progress. HSC Minimum Standards is a new form of standardised testing introduced in NSW in 2018, to ensure that students reach a certain band of NAPLAN before they undertake the HSC. Teachers are required to use the results in a similar fashion to PAT testing to inform teaching practice, particularly for students in the bottom percentiles.

[449] Mr McKinnon stated that there is also an increasing expectation to contact the parents of underperforming and misbehaving students in accordance with a directive issued at his school. In the first 15 years of his career, he would usually keep track of any such issues but was never required to phone parents, however he is now required to make these calls and record incidents in the school's admin database. He gave evidence that he makes about one of these calls a week as a coordinator, however most classroom teachers would make about 3-4 calls to parents each week. The NESA's guidance is that teachers cannot fail students, which means that students' performance must be assessed halfway through an assignment period and, if the student has not met the required standard, it is necessary for him to inform the parents. Additionally, in recent years, parents also phone or turn up at the school unannounced wanting to see him to ensure he is meeting their child's individual needs, whereas previously teacher-parent contact would be limited to parent-teacher nights or if a serious issue arose.

[450] Mr McKinnon said that professional development planning was introduced into his school around 2010, and as a coordinator he is responsible for ensuring that teachers in his department meet their professional development requirements, which requires him to coach, interview and develop plans with them. Professional development planning, he said, has become more important as teacher accreditation has grown in importance. Undertaking this professional development, and the recording of plans by him as a coordinator, was according to Mr McKinnon an additional level of responsibility.

[451] Mr McKinnon gave evidence on impact of technology on teaching methods. He stated that in some ways, it requires more teacher time and learning new skills. He gave the example of the introduction of "flip learning", which involves him recording a video lesson to upload to Google Classroom for his students to watch at home and then allocated class time is used to assist students work through maths problems. This he compared to the traditional method of

teaching which involved giving a lecture at the front of the classroom. He described as a big change the use of online software programs, such as Maths Pathway, to assess students' capabilities, provide them with relevant problems, and build pathways of learning to ensure that students' master initial concepts before they move on. This program reports to Mr McKinnon as the teacher on the levels of growth of each individual child, which he can then monitor closely and feed back into his teaching practice. Mr McKinnon said that this required a significant re-skilling of teachers, and has required him to shift from being a "*sage of the stage*" to being a motivator of 30 individuals. He also referred to the increasing amount of resources available online and the additional time required to ensure links to websites and internal digital folders of resources within the maths department are up to date, rather than just relying on textbooks and worksheets as was the case when he commenced his teaching career. McKinnon also described the burden placed on him by the increasing expectation to check and respond to emails throughout the teaching day.

[452] Mr McKinnon was not required for cross-examination.

Ruth Pendavingh

[453] Ruth Pendavingh is a generalist teacher at Catholic Ladies College in Eltham, Victoria who teaches across the Science, English and Humanities faculties in addition to teaching Religious Education. She has been in the teaching profession for 39 years and holds a Bachelor of Behavioural Science from La Trobe University (1978), a Diploma of Education in from Australian Catholic University (1979) and a Postgraduate Diploma in Child Psychology from the University of Melbourne (1990). In her statement of evidence filed on 23 November 2018,[304] Ms Pendavingh stated that over the last 15 years she increasingly needs to tailor her teaching and practice to the individual needs of students, particularly for students with special and additional needs. She said that in the past Special Education Teachers would look after students with additional needs but over the last 20 years special need students have been increasingly integrated into mainstream schools. She stated there had been a shift from teaching classes that had been "streamed" based on ability to mixed ability classes, which might include bright and talented students as well as students with significant difficulties in literacy and numeracy.

[454] Ms Pendavingh also described the effect upon her work of the NCCD, which has required her to attend NCCD professional development sessions, write descriptions of the learning needs of special needs students, create PLPs, set learning Smart Goals and outcomes, collate evidence from each student to report on the goals and outcomes, and report to parents at meetings each term. She said that funding depends on the proper documentation of all these measures. In addition, she also has to prepare modified material and specific learning plans form students with additional needs who do not qualify for funding and said that there had also been an increase in students with learning difficulties and social emotional issues such as mental health difficulties. Ms Pendavingh said that she is required to take into account all of the learning difficulties and social and emotional issues outlined in a student's PLP in her teaching, as well as to ensure the student's wellbeing. In the case of students with mental health difficulties, this can necessitate time-intensive individual teaching. She also said that compliance with child protection legislation has become very onerous in terms of the amount of responsibility held by classroom teachers, and she said that the professional development

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required to ensure that she has an understanding of her responsibilities in child safety and mandatory reporting has increased.

[455] Ms Pendavingh gave evidence that her school is currently moving "*beyond differentiation*", which she said had increased substantially in practice over the last 10 years, to a model of individual learning, which inherently requires students to perform more project-based learning and allows students to have greater control over what content they learn and how they learn it. She said this was far removed from teaching earlier in her career "*which involved students sitting at their desk and receiving a lecture from the front of the class, to which they would simply listen together*" and described her role as having become one of a "*facilitator of multiple learnings*". She outlined an individual learning project being undertaken at her school as a collaborative exercise between herself and 10 other teachers, in which each student must work on a program they have devised themselves, with the teacher's role being to support them, whilst completing more documentation to ensure that the curriculum is being addressed. The aim of this is to build a methodology for project-based learning for students on one entire day each fortnight. She said her role now is to enable and develop skills in information management, including to inform and guide the use of information that is available on the internet, and described this as involving an entirely new set of skills.

[456] Ms Pendavingh described how the development and delivery of the curriculum is increasingly being completed through collaborative exercises between teachers, with the design of programs, lesson plans and assessment instruments now being always done between groups. She also described how technology has also changed her role. She has had to become proficient in computer programs and apps provided by the school, such as Education Perfect, or STILE, which is a web-based science learning program created by science teachers and the CSIRO. This internet has vastly increased the range of accessible content, but this needs to be identified, assessed and filtered. She has also had to learn how to use Google Classroom to interact with her students, which is a learning management system which allows her to post her lessons, interact with students online, check their work and allow them to hand up work. Ms Pendavingh said that the use of technology has been difficult for her to adjust to, requires a huge commitment of time, and allows tasks previously carried out by administrative staff to be undertaken by teachers. She also described how email increased accessibility of teachers to parents. Teachers at her school have been instructed not to respond to parents' emails after 8pm, but she said that there are many emails out of hours and on weekends, and parents are not always patient about waiting for a reply.

[457] Ms Pendavingh stated that her work has become more complex due to standardised testing such as NAPLAN and PAT, and there is an expectation that she analyses results data to incorporate into planning and assessments. The interpretation of this data can be challenging to interpret and she stated that she has not been given additional time to complete this work in her working week. She also mentioned the requirement to be registered with the Victorian Institute of Teaching and the 20 hours of CPD required to maintain her registration each year. She must also document and provide evidence of her skills measured against the standards set by the APST, which are reviewed annually. Ms Pendavingh also mentioned that "best practice" for pedagogical and student welfare interactions is changing increasingly quickly and she is required to keep on top of each new approach introduced at her school.

[458] Ms Pendavingh was not required for cross-examination.

C.5 The ACA's Case

[459] The ACA's area of interest in respect of the IEU's work value claim is confined to early childhood teachers. It opposed the claim on the basis that the IEU had not demonstrated, in respect of early childhood teachers, that any increase in award wages on work value grounds is justified. It submitted that the Commission should make the following factual findings:

- the evidence in relation to primary and high school teachers is inadequate to permit any realistic assessment of the work value of those teachers;

- changes to the regulation of early childhood teaching, while substantial, have not resulted in substantial changes to the nature of the work of early childhood teachers, their working conditions, or the skills and responsibility exercised, with the objective and effect of regulatory change having been to promote uniformity and consistency, not to bring about fundamental change in the work of early childhood teachers or other educators;

- the responsibilities of early childhood teachers are no different to those of any other educators in early childhood education and care, namely to care for and educate the children directly in their care;

- early childhood teachers do not have any broader responsibility for broader educational or operational management of a service;

- the duties and responsibilities highlighted by the IEU's witnesses as indicia of increased work value attach not to the role of early childhood teacher but to the statutory positions of Educational Leader, Nominated Supervisor, Approved Provider and person in charge;

- there are various ways in which the work of early childhood teachers has become easier over time, including by the prescription of child/teacher ratios and increased use of technology; and

- if anything, the evidence indicates that the premiums currently paid to early childhood teachers by comparison with diploma-qualified educators and to experienced early childhood teachers by comparison with newer early childhood teachers cannot be justified on work value grounds.

[460] The ACA submitted that the Commission should conclude that the variations sought are not justified by work value reasons, are not necessary to achieve the modern awards objective, and that there are powerful discretionary reasons to refuse the claim, including because the grant of the claim would jeopardise the viability of many services and would substantially increase childcare costs.

[461] In relation to the National Law and the National Regulations, the ACA submitted that the IEU's contention that early childhood teachers are responsible for their implementation and enforcement and are otherwise charged with operational and educational leadership is wrong. Rather, it submitted:

- the National Law prescribes in minute detail the allocation of responsibilities to owners, Directors, Educational Leaders (or Room Leaders) and educators;

- the National Law does not impose any obligations at all on early childhood teachers specifically, as distinct from educators more broadly, and in that way does not distinguish between early childhood teachers and non-degree qualified educators or impose any additional responsibilities on degree-qualified early childhood teachers;

- the obligations imposed by the National Law on educators are limited to the children directly in the care of the educator, with the single exception that an educator is required to ensure that every reasonable precaution is taken to protect children being cared for by the service from harm;

- educators have no responsibility for the overall management and quality control of a service, unlike the Nominated Supervisor and Approved Provider;

- the responsibilities imposed on educators are intrinsic to childcare and in effect consist of the requirements of adequate supervision and care together with some simple record keeping, risk assessment and notification requirements, and in that sense the National Law and the National Regulations did not impose any fresh responsibilities on early childhood teachers or other educators;

- most of the responsibilities described by the IEU's witnesses as attaching to early childhood teachers in fact attach to Nominated Supervisors, Approved Providers or Educational Leaders, including responsibility for the development and implementation of the educational program, the development and enforcement of policies, the preparation and maintenance of the QIP, and the observance of staff ratios; and

- services are legally required to have in place an appropriately-qualified Nominated Supervisor, a person in charge who is appropriately trained, and a "responsible person" must be present at all times, so that early childhood teachers and other educators are always supported.

[462] The ACA submitted that the tenor of the IEU's lay witnesses is that early childhood teachers, as opposed to educators, Directors or owners, bear the burden of educational and operational leadership of childcare services, but that this cannot be reconciled with the legislative framework. It referred, as an example, to the evidence of Ms Connell, who was for 18 years a Director of a community pre-school and failed to distinguish between her duties in that role and the duties of an early childhood teacher in the service in which she worked.

[463] Much of the IEU's lay and expert witness evidence, it was contended, took the form of "*broad conclusory opinions unsupported by factual observations or reasoning*". It submitted in relation to the IEU's lay witnesses:

> "[36] … It is replete with broad conclusions, commonly couched in passive tense, describing the alleged requirements and expectations of ECTs. It consistently fails to reveal the source and extent of the alleged demands on ECTs and lacks any serious attempt to distinguish the duties of ECTs from directors, educational leaders, room leaders and non-teacher educators.

> [37] A further recurrent problem in the lay evidence is that it simply does not describe the day-today work of ECTs in any comprehensible way. For reasons which are unclear, the lay witnesses adopt an academic and abstract style of description which conceals more than it reveals…"

[464] As a result, it was submitted, the IEU's evidence gives little assistance in understanding the essential matters relevant to the work value application, being the real nature of early childhood teachers' work, the conditions under which it is done, and the way in which the work and the conditions have changed over time.

[465] The ACA submitted that although there had been significant regulatory change in recent years, that is not of itself an indicator work value changes, with the question being whether and to what extent those changes have in fact impacted upon the work of early childhood teachers. While those changes had codified and harmonised standards, and perhaps established a common minimum standard, it had not been demonstrated that the standards are more demanding than those which applied in the past or have resulted in a greater degree of difficulty in the work of early childhood teachers.

[466] In relation to the EYLF, the ACA submitted that this was a high-level document identifying broad principles to be applied in early childhood education, was not directed to early childhood teachers specifically but applies to all educators and providers, did not on its face prescribe new content and outcome expectations (as contended by the IEU), and did not increase the burden on early childhood teachers. The IEU's witnesses left unclear how the EYLF actually translated into changes in day-to-day work, and the ACA's witnesses explained that the EYLF, as well as the NQS and related innovations have codified existing expectations of educators and rationalised and harmonised, rather than increased, standards. Therefore, it was submitted, the EYLF and the NQS have not affected the day-to-day work of educators.

[467] In relation to the increased integration of technology into the classroom, the ACA submitted that the evidence of the IEU did not explain how this had created more difficult working conditions, and that the use of technology in some respects had made the job easier. It gave an example of this as being the preparation of daily reports by the use of iPad applications, which it contended reduced the time and effort required to produce reports.

[468] The ACA submitted that the IEU's evidence concerning changes in pedagogical understanding and practices and a shift to a focus on individual child outcomes rather than collective assessment, did not demonstrate that that this is a recent innovation or indicates increased work value. As to the IEU's contentions concerning changing student demographics, the ACA submitted that there has been little or no increase in the inclusion of additional needs students into mainstream classrooms, and the burden of such students has if anything been reduced as a result of funding increases and the increased presence of teachers' aids.

[469] The ACA submitted, in response to the IEU's contentions concerning an increase in the level of skill and responsibility exercised by early childhood teachers, that:

- the IEU's evidence does not explain exactly how the complexity of the work of early childhood teachers has increased in recent years;

- there is no real evidence to suggest that early childhood teachers prepare complex day-to-day reports, that there has been a change in the nature of reports produced, or that the production of such reports has increased in a substantial way the burden on early childhood teachers;

- the requirement for a 4-year degree is already comprehended in the wages structure in the EST Award, and this requirement has no relationship to any increased complexity introduced by the NQS, the EYLF, or the National Law or National Regulations;

- ATAR qualifications for the relevant teaching degrees are among the lowest of all bachelor degrees;

- the introduction of professional development requirements merely formalised or systematised something that was, or should have been, already occurring, and is not in any event onerous;

- the IEU's evidence did not demonstrate that the introduction of the APST impacted upon the day-to-day work of early childhood teachers, or give any insight into whether the APST had increased rather than merely formalised teaching standards or required a level of teaching skill higher than that inherent in any four year teaching degree;

- the requirement for registration of teachers has no bearing on work value, and is simply a procedure for achieving national harmony;

- the evidence did not support the contention that greater engagement with parents constitutes an increase in work value;

- new teacher-student ratios are not an indicator of increased responsibility on the part of early childhood teachers, but have rather reduced their responsibility; and

- there is no evidence of any changes to the physical layout of classrooms in the early childhood sector.

[470] The ACA also submitted that:

- working conditions of early childhood teachers have improved substantially in recent years, having regard to the introduction/lowering of teacher-student ratios, increased levels of funding and support for additional needs children, and the use of technological aids which have simplified and expedited some tasks; and

- the divergence between NSW and modern award rates for the same work is not peculiar to teaching or indicative of a failure to reflect work value in modern awards, but is rather a function of the fundamentally different approaches to wage fixation as well as differences in award coverage.

[471] The ACA submitted that the variation sought by the IEU would create serious disconformity between the EST Award and other modern awards. It submitted that the

internal relativities between classifications proposed by the IEU had no apparent logical or principled basis, and the relativities between more experienced workers and the work of a graduate cannot be justified on work value grounds. The external relativities between the rates proposed and other modern award rates would render the rate of pay for an early childhood teacher with eight years' experience higher than that of any other award worker except for the most senior doctors, some very senior academics and some Directors of Nursing, and on par with senior medical specialists and internationally recognised academics. The grant of the IEU's claim would, it was submitted, destabilise minimum wage fixation and generate unsustainable claims.

[472] The ACA also submitted that the grant of the claim would result in an increase to childcare fees, which will operate to suppress female workforce participation. Additionally, the wage increases proposed, or even more modest wage increases, would represent an "*existential threat*" to the viability of many early childhood businesses because of an incapacity to pay. These constituted discretionary reasons for the rejection of the IEU's application.

C.6 The ACA's evidence

[473] The ACA filed four statements in opposition to the work value application made by persons involved in the operation or management of early childhood businesses. In addition, it relied on the nine witness statements it filed in respect of the equal remuneration application (five of which were made by its work value witnesses), except for part of one statement (although, unhelpfully, it also did not explain precisely what aspects of this evidence related to the work value application). The evidence given by these witnesses is summarised below insofar as it relates to the issue of whether there are work value reasons for a change to the rates of pay of early childhood teachers. These witnesses also gave a significant amount of evidence concerning the capacity of their respective witnesses to pay the wage rates proposed in the IEU's claim. For reasons which are explained in our later conclusions concerning the work value claim, it is not necessary or appropriate for us to deal with this evidence at this time. Accordingly it is not referred to in our summary of the witness evidence below.

Jennifer Kearney

[474] Jennifer Kearney is one of three Directors and an Approved Provider Representative of Kekeco Childcare Pty Ltd as a trustee for Kilmore Kids Trust, which operates four centres in Victoria. Sutherland Street Childcare and Kindergarten Long Day Care (Kilmore) and Dudley Street Childcare and Kindergarten Long Day Care are long day care centres which offer kindergarten programs. The other two centres are both out of school hours care centres and are not relevant to these proceedings. In her roles, she is responsible for managing the operations of the four separate sites, including relationships with landlords who own the premises, compliance, employee relations, rostering, budgeting and relationship management with various local, state and federal government and regulatory authorities. She said this is a full-time commitment. Prior to working in the early childhood education and care sector, Ms Kearney worked in the telecommunications sector.

[475] In her statement of evidence dated 23 May 2018,[305] Ms Kearney said that in her two long day care centres, there are approximately 77 permanent part-time employees, the majority of staff work 37.5 hours per week and there are an additional 3-4 casual employees that can be called upon as needed. Employees in these centres are employed under the CS Award and the EST Award. The Dudley Street centre is licensed for 90 children, operates 6.30am to 6.30pm 52 weeks per year and only closes for designated public holidays. It has 22 core staff including two Victorian Institute of Teaching registered early childhood teachers, one who teaches the kindergarten program and one who is not currently employed in a teaching capacity by request. The Sutherland Street long day care centre has the same operating hours, is licensed for 120 children and has 28 employees including two Victorian Institute of Teaching registered early childhood teachers, one who runs the kindergarten program as Room Leader and one who is Centre Director and does not teach. She also employs other staff with degrees who are not engaged as early childhood teachers. Ms Kearney said that most of her educators work a 7.5 hour day, five days a week between the centres' hours of operation. She pays some employees above-award rates of pay where they have performed well and consistently delivered an excellent service. Some early childhood teachers are paid above-award rates in order to retain the staff at her centres due to the presence of five council-operated early learning centres in the region who offer higher wages because they are eligible for different funding arrangements. Above-award payments are also used to attract prospective employees relocating from Melbourne.

[476] Ms Kearney said that changes to the NQS that came into effect on 1 February 2018 created an enormous amount of additional work for early childhood education and care operators and staff. The ultimate responsibility of ensuring staff are compliant with the NQS falls to her as the Approved Provider Representative or the Centre Director by delegation. Centre Directors, Room Leaders and Educational Leaders are responsible for day-to-day compliance with the NQS, relevant legislation and established procedures and the development and application of programs which comply with the EYLF. In respect of children with additional needs, early childhood teachers are generally only involved with dealing with external parties when the child is in the kindergarten program or if the child is in their room. Educators and early childhood teachers have a personal responsibility to ensure processes developed to comply with children under Family Court Orders.

[477] In respect of responsibilities, Ms Kearney said that in Victoria, Room Leaders do not have to be registered teachers and four out of five Room Leaders in her long day care centres are diploma-qualified educators rather than early childhood teachers. Her centres have one Educational Leader who works between the four centres and is not an early childhood teacher. In Victoria and under the National Law, the Educational Leader is not required to be a Victorian Institute of Teaching registered early childhood teacher. Ms Kearney identified several responsibilities she considered to be shared by everyone employed at the centres, regardless of whether the employee is an early childhood teacher or not. These include ensuring children's safety, supervising children in the service at all times and taking and sharing observations of the children's behaviour, development, comments or action to be incorporated into the child's development plan. Ms Kearney said all of her educators perform the same sorts of functions, unless they are more experienced, and referred to educators that had been employed with her centres for 10 years. She said these educators possess more practical child management knowledge than some of their newly graduated early childhood

[305] Exhibit 77

teachers. Ms Kearney also described a typical day for their early childhood teachers, commencing at 7am to undertake two hours of planning or programming prior to running an educational program for the children in the classroom for 1.5 hours. The children then have morning tea, during which the early childhood teacher often takes their 10 minute morning break. The early childhood teacher then runs an outdoor educational program for an hour, weather permitting, prior to the children's lunch time. The early childhood teacher will usually take their 30 minute lunch break during this time. Finally, the early childhood teacher will return to the classroom and run further educational programs for the children for two hours before both the children and the early childhood teacher finish at 3pm.

[478] Ms Kearney gave evidence that the recruitment of early childhood teachers at her centres is affected by the labour market in a rural location and the prevalence of the aforementioned council-operated centres that pay higher wages as they receive funding from local and state governments. Her centres have a policy of recruiting from within where possible by encouraging young staff to undertake further study and assessing student teachers on placement from Melbourne universities for future employment potential. In the past 10 years, early childhood teachers have resigned from her centres for various reasons, and she gave the example of one early childhood teacher who left to work at a higher paying council-operated centre and two early childhood teachers leaving to work at primary schools. She said her centres' income is derived from fees and a low level of universal access funding for operating a kindergarten program for 4-year-olds.

[479] In her statement of evidence dated 28 March 2019,[306] Ms Kearney gave evidence that:

- the regulatory changes introduced in the past 12 years, including the introduction of the NQF, the NQS, the EYLF, registration requirements for early childhood teachers and requirements for additional qualified staff, have codified and regularised the standards across the industry, have not affected one section or type of employee more than any other, and have impacted more on the administration of the business than at the early childhood teacher or Room Leader level;

- the regulatory changes have not increased the need for early childhood teachers to have more time off the floor as, in her centres, early childhood teachers have always had considerably more time off the floor than other staff because time is allocated depending on the number of children enrolled in each room;

- at her centres, the overall centre-wide educational program is developed between the Educational Leader, the Nominated Supervisors and an Approved Provider Representative, any of whom may or may not have a degree and be a teacher;

- Room Leaders develop the educational program for each room, with the exception of kindergarten, which is created by each early childhood teacher for their kindergarten room only;

- there has always been an expectation that educators provide quality care and teaching to children, and the regulatory changes have not altered this;

[306] Exhibit 78

- she has not observed an improvement in graduate quality due to new entry requirements such as literacy tests and, in her experience, bachelor degrees are not an indicator of the quality of an educator, as they often commence work with little to no working experience;

- the Approved Provider is responsible for the creation of policies and QIPs, with collaborative input from all staff whether they are early childhood teachers or not;

- the purpose of the introduction of the APST was to create a uniform national standard for teachers across the country, not to create or set new benchmarks for teachers, and in any case, has not impacted the work of early childhood teachers in her centres;

- at her centres, teachers must maintain registration with the Victorian Institute of Teaching. The purpose of the registration system was not to improve standards of early childhood teachers but to create compliance with standards and expectations that already existed and to document continuing professional development, which was already always provided to early childhood teachers and educators at her centres;

- at her centres, early childhood teachers have always been given paid days off and paid travelling costs to attend professional development and the centres usually pay for these courses. In her experience, the cost of professional development is borne by most centres;

- early childhood teachers at her centres do not guide and mentor junior early childhood teachers at her centres, as she does not have enough early childhood teachers employed for there to be a junior/ senior distinction, however early childhood teachers do mentor students carrying out a placement at their service;

- early childhood teachers at her centres are the Room Leader of the kindergarten room and are expected to supervise and direct other employees working in that room, but that function arises from them being Room Leader and is not tied to being an early childhood teacher or having a degree;

- diploma-qualified Room Leaders in rooms other than the kindergarten room also supervise and direct other employees in their rooms consistent with the CS Award which covers them, and this has been the practice at her centres for as long as she can remember;

- there is a system whereby experienced early childhood teachers are paid to mentor graduate Provisionally Registered Teachers as part of the transition from Provisional to Full Registration, and her centres engage an independent mentor who is a fully-registered early childhood teacher to undertake this function;

- the duties of early childhood teachers at her centres do not vary as they gain experience unless they take on a more senior role;

- Directors and Educational Leaders are not usually roles held by degree-qualified teachers at her centres;

- her centres are not required to have any early childhood teachers at the two outside of school hours care centres as those educators are not teaching an educational program, but rather are caring for children outside of school hours;

- technology has made early childhood teaching easier and more efficient, for example: the federal government has mandated the use of iPads in foreign language learning rather than using a blackboard; communications with families are now done using electronic systems, digital photos and videos rather than talking with every family each day to update them on their child's progress as in the past; and an electronic sign in and sign out system is used to check attendance;

- early childhood teachers are not required to liaise with families any more than other educators in her centres, and this has always been a task of any senior employee and has been listed as a duty under the CS Award in Level 4 and above;

- how much an educator interacts with parents is determined by the needs of the children in the room each year;

- there has not been any change in the overall numbers of additional needs children in her centres since the regulatory changes commenced and, in any case, early childhood teachers and educators have the same responsibilities in this respect;

- changes in the numbers of additional needs children tend to be a reflection of government funding, as each child is first assessed and if diagnosed and deemed necessary, additional funding is applied for where additional non-degree support staff are required;

- if there is a child demonstrating difficult behaviours with no diagnosis, the centre engages additional staff without third party funding; and

- her staff have never had to assist children with colostomy or tracheotomy bags or interpret reports from medical specialists.

[480] Ms Kearney also identified improvements in working conditions for early childhood teachers that have made the job easier, such as the introduction of technology into the planning and recording of programs and outcomes which record information more quickly rather than operating off hardcopy documents; meetings of early childhood teachers between her centres to enable staff to share ideas and maintain consistency; and ratio changes from 1:15 to 1:11 educators to children which has increased staff numbers in the rooms, providing more time for each child with an educator.

[481] In her oral evidence, Ms Kearney said:

- she has no qualifications in early childhood education, having come from a corporate background;[307]

[307] Transcript, 27 June 2019, PN 4672

- the two long day care centres operated by the business are rated "exceeding" under the NQF, and they are funded by the Victorian Department of Education and Training to provide a kindergarten program (for the last year or, for some children, two years before school);[308]

- she accepted that kindergarten services provide an important role in identifying children and families that may be vulnerable and in delivering services that meet their needs;[309]

- she had not experienced an increase in the proportion of children who are at risk or in out-of-home care attending her centres, but said that most such children are referred to a council kindergarten or a not-for-profit kindergarten in her area;[310]

- Victorian Government kindergarten funding is predicated on the kindergarten year being taught by an early childhood teacher to ensure the highest quality of the teaching program, and (subject to temporary exemptions) the program must be planned and delivered 15 hours per week for 40 weeks a year by an early childhood teacher;[311]

- her business had not considered entering into an enterprise agreement in order to access the Victorian Government's early childhood teacher supplement funding because when the kindergarten started there was only one teacher employed;[312]

- her business supports its two early childhood teachers to practice in accordance with the APST by sending them to a minimum of four days training per year, ensuring they comply with all of the reporting procedures, develop and write transition statements and work with families of children who are special needs or might need additional support;[313]

- her two early childhood teachers had approached her about the gap between their pay and conditions and those applying under the VECTEA, and one had left and the other stayed on a renegotiated arrangement whereby she received close to VECTEA conditions in return for spending more hours on the floor;[314]

- the teacher who had left was replaced with a kindergarten teacher with New Zealand qualifications, who was also placed on conditions similar to the re-negotiated arrangement;[315]

- the business has had to deal with the position that there are five council-operated early learning centres within the region which provide higher pay and better

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[308] Ibid, PNs 4675, 4678, 4683

[309] Ibid, PNs 4698-4699

[310] Ibid, PNs 4702-4704

[311] Ibid, PNs 4705-4712

[312] Ibid, PNs 4736-4753

[313] Ibid, PNs 4762-4765

[314] Ibid, PN 4771, 4779

[315] Ibid, PNs 4772-4774

conditions to early childhood teachers, and an early childhood teacher who left went to work for one of these centres, as well as two previous early childhood teachers who went to work in primary schools;[316]

- at the two long day care centres, in each kindergarten room there is an early childhood teacher Room Leader supported by subordinate educators, and the early childhood teacher is the person responsible for the planning and programming of the children's educational activities;[317]

- when the business started in Kilmore in 2007, early childhood education was referred to as creches or day care, there was no respect for any of the educators, and staff recruits did not understand the level of professionalism required;[318]

- she has tried to raise the professional and educational levels of staff and the level of understanding in the community about what the educators are doing;[319]

- the early childhood teachers wear a different coloured uniform shirt to other staff, to give them respect and assist in visual identification as to whether required staff ratios are being maintained;[320]

- her centres use a software program to record individual and group observations and quality improvement data and communicate with parents in real time, and it prompts staff when they are doing observations to link them to particular parts of the EYLF and identify to parents how their children' activities relate to EYLF outcomes;[321]

- the role of the Educational Leader in the business is to operate autonomously across all the centres, undertake performance reviews, observe staff practices and gives individual feedback, but not to assist the early childhood teachers to plan and deliver the teaching program;[322]

- the integration of specials needs children is the responsibility of Room Leaders with the assistance of the Centre Director and sometimes third-party providers;[323]

- kindergarten teachers are required to personally observe and complete an individual observation of each child in their care a minimum of once a month;[324]

- child-guided learning programs are focused on listening to the child's voice and trying to develop the program for the children based upon how they will be

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[316] Ibid, PNs 4800-4805

[317] Ibid, PNs 4814-4817, 4934-4937

[318] Ibid, PN 4862

[319] Ibid

[320] Ibid, PN 4902

[321] Ibid, PN 4905-4922

[322] Ibid, PN 5121

[323] Ibid, PNs 5126-5132

[324] Ibid, PN 5185-5188

interested and be engaged, rather than learning by rote as was done a very long time ago;[325]

- although she has found some educators without degrees to be better qualified or more experienced that qualified early childhood teachers, that is not to suggest that early childhood teachers have the same responsibilities or duties as educators;[326]

- a top-quality diploma-qualified educator may be better than a poor quality early childhood teacher;[327]

- the APST may create benchmarks but in her experience, no-one checks the benchmarks;[328]

- early childhood teachers are not required to liaise with families any more than any other Room Leader;[329]

- early childhood teacher meetings between the centres to enable staff to share ideas in paid time have made the job easier because early childhood teachers have additional peer support;[330]

- the teachers in her centres attend conferences on changes, research outcomes and developments on a regular basis, which gives them knowledge which they can use to further improve the program;[331] and

- ratio changes from 15:1 to 11:1 have increased staff numbers in the kindergarten rooms, which in her opinion, has potentially allowed an early childhood teacher to produce a better program for the children.[332]

Jae Dean Fraser

[482] Jae Dean Fraser is the Vice President of the Australian Child Care Alliance Queensland and is a member of ACA's National Committee. He characterised the ACA as the peak body in the early childhood education and care sector. Mr Fraser was awarded a Bachelor of Education from Griffith University and an Advanced Diploma of Early Childhood from Gold Coast Early Childhood College. Mr Fraser has worked in the early childhood education and care sector for 18 years. At the time of making his first statement dated 25 May 2018,[333] Mr Fraser was the Managing Director and Approved Provider of Edge Child Care Management Pty Ltd and Little Scholars School of Early Learning Pty Ltd. Prior to these roles, Mr Fraser worked as an early childhood teacher and primary school teacher

[325] Ibid, PN 5262

[326] Ibid, PNs 5268- 5271, 5281-5282

[327] Ibid, PN 5288

[328] Ibid, PNs 5326-5328

[329] Ibid, PN 5337

[330] Ibid, PNs 5349-5356

[331] Ibid, PNs 5358-5360

[332] Ibid, PNs 5361-5367

[333] Exhibit 84

before being employed as the General Manager of G8 Education between 2006-2014. In his current roles, he is responsible for the day-to-day operation of the centres that the companies operate and must ensure they operate in accordance with the National Law. He is also a member of several workforce groups which regularly meet with the Queensland Department of Education to discuss issues in the sector.

[483] Little Scholars has 36 full-time employees, 96 permanent part-time employees and 33 casuals engaged under either the CS Award or EST Award. Edge Child Care operates five long day care services across Queensland and NSW and employs more than 100 employees. Mr Fraser's centres are open five days a week for 12 hours a day and most centres open between 6.30am and 6.30pm. The majority of early childhood teachers in his business work core hours of between 8.30am and 4.30-5.00pm. Early childhood teachers are given 3-4 hours per week off the floor for programming (in excess of the statutory mandated 2 hours) and Lead Educators who are diploma-qualified get 2 hours. He said that the workload of an early childhood teacher compared to a Lead Educator is not any greater in terms of programming and this extra time allocated is about "*keeping them happy*". Early childhood teachers and Lead Educators work together with parents to set a play-based program that is aligned with the interests of the children. All employees write up observations about the children, which are ultimately recorded on an iPad or tablet. Mr Fraser observed that in his experience, early education is very different to school because at school, children are assessed on their knowledge of a much more prescriptive curriculum whereas early education is a play-based program with no set curriculum, goals or testing. All staff are equally responsible for ensuring the health and safety of the children, including maintaining a WWCC and carrying out or conducting training for other staff on emergency procedures and fire safety. Mr Fraser said that all educators develop relationships with families for there to be a consistent dialogue about the child. He noted that consistency of care is important in relation to developing and maintaining relationships with the families of the children, and is often created from a centre that has more reliable, consistent (and generally permanent) staff members. Childcare centres are also rated by ACECQA on consistency of care.

[484] Mr Fraser said that when graduate early childhood teachers first start working at any of his centres, they are not immediately equipped to carry out the practical demands of childcare work and require ongoing development and on the job training to get them up to speed. In his experience, his diploma-qualified educators with many years' experience in early childhood education and care often run a much smoother program and classroom than graduate early childhood teachers. He described the daily duties of an early childhood teacher in his centres as caring for children aged 0-5 years and engaging and participating in play-based learning such as drawing, painting, arts and crafts, fitness and games. Generally, the Lead Educator is in charge of the educational program. There is often an early childhood teacher in his kindergarten rooms, which makes compliance with the QKFS easier. He said that the Department of Education QFKS audit team recommend that the Educational Leader role is assigned to a Lead Educator that is not the early childhood teacher in the kindergarten room. In other rooms, there is no requirement or increased likelihood that an early childhood teacher would perform the Lead Educator role and this is more likely to be allocated to a diploma-qualified employee.

[485] Mr Fraser stated that the daily rates received by his centres are from fees paid by parents and subsidies from government, which are paid to centres on behalf of parents. The federal government also provides funding to early childhood education services to support the provision of kindergarten programs in the National Partnership Agreement on Early

Childhood Education, which is available to all children in the year before school. In Queensland, this funding is provided by the QKFS. He referred to the 2017 IBISWorld Child Care Services in Australia Report, which found that long day care centres account for 51% of 4-5 year-olds enrolled in a kindergarten/ preschool program for that year. Children enrolled in this program at his centres have access to an early childhood teacher during all core hours of operation in accordance with funding requirements. At the time of his statement, centres also received the Childcare Benefit and Childcare Rebate for the entire day an eligible child attended, irrespective of how many hours the child actually attended. This was set to change to the Childcare Subsidy from 2 July 2018, which was to be calculated on a sessional rather than a daily basis.

[486] At the time Mr Fraser gave evidence in his witness statement dated 29 March 2019,[334] Mr Fraser had assumed the duties of Managing Director and Approved Provider of The Scholars Group Pty Ltd and Scholars Consulting Pty Ltd. He gave evidence that:

- the regulatory changes introduced in the early childhood education and care sector between 2012 and 2019 have streamlined state-based regulations and implemented a national quality framework for early childhood teachers to work within, and have codified the standards and expectations early childhood teachers and all educators at his centres were already subject to;

- the regulatory changes do not require early childhood teachers to have more time off the floor, however many Approved Providers such as himself allow early childhood teachers additional time off the floor to ensure they have quality educational programs;

- the EYLF describes the principles, practices and outcomes that support and enhance young children's learning from birth to five years of age, as well as their transition to school, and is the framework that educators must use when planning and delivering an educational program;

- the EYLF is the childcare version of a school curriculum, but it is different in outcome and delivery and sets out principles in broad terms only;

- Room Leaders, who are early childhood teachers or diploma-qualified educators, are responsible for creating and developing an educational program for the group of children they are responsible for in accordance with the EYLF. This was the responsibility of Room Leaders even prior to the implementation of the EYLF;

- the introduction of the EYLF has not changed the role of an early childhood teacher but rather has streamlined individual state requirements of early childhood teachers and ensured educators are focused on outcomes. If anything, the introduction of the EYLF has reduced workload as the program is developed based on children's interests and ideas and is not a formal curriculum;

- the EYLF has raised the professional expectations of all teachers and educators, but this does not mean that they have more work or any greater responsibility since

[334] Exhibit 85

early childhood teachers have always been required to deliver quality educational programs;

- the EYLF has ensured that all employees, not just early childhood teachers, focus on outcomes, and it is up to the teachers and educators as to how these outcomes are obtained;

- as an example, an EYLF outcome is that "*children are effective communicators*", and a teacher or educator could reach this outcome by planning an experience (such as a group story time or a game whereby children tell each other a secret or a story), and can determine whether the children are participating and communicating effectively through these activities;

- the EYLF has given clearer direction for educators and early childhood teachers to meet the required outcomes, and has encouraged a focus on the individual child and desired outcomes, but it has not changed what teachers do;

- Bachelor's degrees are not an indicator of a quality educator at his services, and many of his experienced diploma educators are far stronger educators than some of his Bachelor-qualified teachers;

- the quality of graduates has not improved due to degree entry requirements such as literacy tests;

- under the National Law the Approved Provider is responsible for the creation of policies and QIPs, and early childhood teachers should not have responsibility for this work as it would not be legal, and would not have the skills or knowledge to complete this work unless they held a more senior role such as Director or Approved Provider;

- he has not seen a change in work that early childhood teachers do since the introduction of the APST because they are simply a uniform framework/standard rather than a detailed proscriptive curriculum or list of duties, and he does not think the standards define the work of teachers due to differences in teaching environments;

- the creation of a registration system for teachers in Queensland was not about improving the quality of teachers but rather to determine how many teachers were actually working in the early childhood education and care sector;

- all educators, whether early childhood teachers or not, have always engaged in some form of professional development, long before any mandated legal requirement under the NQF. In his experience, most services pay for professional development of teachers and other educators in their centres;

- at his centres, both early childhood teachers and diploma-qualified educators can engage in mentorship of junior employees, however this is not a requirement. Early childhood teachers never supervise and direct non-teacher educators, rather this is the work of Room Leaders or the centre manager;

- in his centres, Room Leaders might have a teaching degree, but only in the kindergarten room;

- early childhood teachers are employed to deliver a quality educational program to a group of children, but their duties and responsibilities do not change as they gain more experience;

- the use of technology such as iPads and apps (such as the ELLA program, which is a digital, pay-based learning program for preschool children) has made it easier and more efficient for early childhood teachers to deliver a quality educational program as they can document learning outcomes in real time rather than manually;

- there has been no increase in the requirement for early childhood teachers to deal with parents/liaise with families due to the NQF;

- there has been a decrease in additional needs children enrolling in his centres due to a funding decrease in 2018, however when such children are enrolled, educators in Queensland are provided with additional support in the form of the Inclusion Support Subsidy which provides another educator for one-on-one interaction and support with the additional needs child;

- in his 20 years in the industry, he has never had to assist children with colostomy or tracheotomy bags and is not aware of this occurring at his centres; and

- there have been some changes in recent years that have made the job of early childhood teachers and educators easier, such as the reduction of student/ teacher ratios and the introduction of kindergarten funding in Queensland which allows Approved Providers to put additional staff in the room, invest in additional resources and provide more professional development and non-contact time.

[487] In his oral evidence, Mr Fraser said that:

- online platforms such as Kindyhub have streamlined the role of an early childhood teacher or educator. Kindyhub is a platform to both communicate with families and to capture observations, reports and learning examples of children and activities throughout the day using premade templates whereby staff type up information in fields. Prior to the implementation of these online platforms, everything was manual and was required to be handwritten or printed out;[335]

- since the NQF was introduced, assessors encourage less paperwork as they would prefer that educators and early childhood teachers are interacting with children, engaging in meaningful conversations and participating in experiences rather than documenting them;[336]

[335] Transcript, 1 July 2019, PNs 5548, 5551

[336] Ibid, PN 5554

- in Queensland, privately owned long day care centres generally only started employing early childhood teachers when the NQF was introduced because centres were then required to do so;[337]

- he accepted that early childhood teacher ratios are not about a minimum number of teachers in a room but rather about access of a service to the skills of a teacher;[338]

- he shares the ACA view that he is unconvinced as to the benefits of teachers being employed in early childhood education;[339]

- he accepted that the early childhood industry has experienced very high growth in the past few years, but was not sure if a contributor in this growth was the movement of the sector from childcare to early education;[340]

- average wages are increasing due to early childhood teacher ratio requirements stipulated by the NQF, award wage increases getting larger and Approved Providers paying staff above award wages to attract them to the industry and retain them;[341]

- approximately half of educators and early childhood teachers are paid above award;[342]

- some early childhood teachers are paid above award to retain them, in particular because early childhood teachers often leave for the school system where they are afforded more holidays and the conditions are different, such as school hours;[343]

- private long day care centres also compete for early childhood teachers with community preschools who pay their teachers at above award rates;[344]

- the early education sector is undervalued in terms of wages which is a barrier for men entering the sector, as men typically have to forfeit higher salaries;[345]

- in an ideal world, he would like to see his early childhood teachers paid better than they are now, being no less than the rates they might get if they taught at a government primary school;[346]

- his long day care centres receive kindergarten funding from the Queensland Government, which involves a learning program being delivered 15 hours a week

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[337] Ibid, PN 5577

[338] Ibid, PN 5594

[339] Ibid, PN 5616

[340] Ibid, PNs 5623-5628

[341] Ibid, PNs 5679-5681

[342] Ibid, PNs 5683-5686, 6289

[343] Ibid, PNs 5688-5689

[344] Ibid, PN 5693

[345] Ibid, PNs 5698-5699

[346] Ibid, PNs 5789-5790

over 40 weeks to children the year before attending school and must be delivered by a qualified early childhood teacher;[347]

- his centres receive approximately $1,700 per child to deliver the kindergarten program and this funding is used to reduce fees for parents or to provide professional development for those early childhood teachers, not pay above award wages;[348]

- early childhood teachers in his centres receive an additional 2-4 weeks paid annual leave;[349]

- he reiterated that he doesn't view the EYLF as a curriculum but rather a guideline because it is not as structured as a curriculum, instead stipulating learning outcomes for educators and teachers to use for children to achieve and work towards;[350]

- he did not find his degree to have any utility in equipping him to be an early childhood teacher;[351]

- he accepted that an early childhood education degree would potentially provide early childhood teachers with skills and knowledge which allow them to deliver the EYLF;[352]

- he accepted that his degree-qualified workers obtain a more thorough understanding of pedagogical principles than his other educators;[353]

- early childhood teachers are no more able than educators to provide the educational program required under the EYLF;[354]

- early childhood teaching is less rigorous than primary school teaching because early childhood teachers do not need to follow a set curriculum and teaching is planned around children's interests;[355]

- to plan and have children play in a way which achieves the EYLF requires careful consideration and planning by educators, but this does not mean early childhood teachers have to exercise a greater degree of individual decision-making as to how to best achieve EYLF outcomes;[356]

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[347] Ibid, PNs 5806-5812

[348] Ibid, PNs 5829-5832, 5839

[349] Ibid, PNs 5832-5837

[350] Ibid, PNs 5908-5912

[351] Ibid, PNs 5900-5903

[352] Ibid, PN 5906

[353] Ibid, PN 6024

[354] Ibid, PNs 6031-6033

[355] Ibid, PN 6082

[356] Ibid, PNs 6091-6095

- in his centres, only two children are special needs students medically diagnosed with a condition;[357]

- at his centres, the service and relevant Lead Educator sometimes develop individual education plans/ inclusion support plans for children who do not qualify for special needs funding but need additional assistance prior to speaking with the family and engaging a medical expert;[358]

- he agreed somewhat that he has a higher expectation as to the quality and complexity of the work of university-educated teachers as against your other educators;[359] and

- if a service is rated "working towards" under the NQS, it is a matter of consequence because the community image of that service is lower than its competitors and there is a higher level of interaction and observation from the regulatory authority, which can be weekly, monthly or fortnightly assessment or observations.[360]

Alexandra Hands

[488] Alexandra Hands is a Director of two companies that hold the approved provider certificate for two long day care centres, Unley Early Learning Centre and Daws Road Early Learning Centre in Adelaide. She obtained an Advanced Certificate in Child Care in approximately 1976 from Croydon TAFE in Adelaide and has been involved in child care for the past 45 years. She opened her first child care centre in 1996. In her statement of evidence dated 21 May 2018,[361] she said the Unley centre operates 52 weeks a year between 7.00am and 6.30pm and is licensed for 55 children across three rooms, including a kindergarten room. The centre has 15 employees, including a Director, Assistant Director/ Educational Leader, two early childhood teachers, seven diploma-trained educators and the remainder are Certificate III-qualified. The Daws Road centre operates between 6.30am and 6.30pm and is licensed for 60 children across four rooms, including a kindergarten. The centre has 18 staff, including three early childhood teachers (one has been appointed the employed Director under the award and another the Educational Leader), 10 diploma-trained educators and the remainder are Certificate III-qualified.

[489] Ms Hands said that as a Director for the centres she is responsible for ensuring that the centres meet their obligations in relation to the NQS, developing health and safety policies for the centres, ensuring that the services' physical layout complies with the National Regulations and preparing the rosters, ensuring that the service complies with the necessary ratios required by the NQF, developing centre policies and ensuring that the policies, processes and procedures are implemented and adhered to, and facilitating collaborative partnerships with families and communities to better inform the development of centre policies and achieve first class outcomes for the children in the service.

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[357] Ibid, PN 6122

[358] Ibid, PNs 6129-6135

[359] Ibid, PN 6335

[360] Ibid, PNs 6349-6350

[361] Exhibit 112

[490] Ms Hands stated that the daily duties of an early childhood teacher at her centres include conducting opening procedures and greeting families, supervising meal times, sleep time and indoor and outdoor play and conducting programmed activities in groups. She also said that if a child asks a question about a specific topic, an educator or early childhood teacher might spend some time conducting research on the specific topic or take the time to document a new skill or interest the child is developing to share with the child's parents. Ms Hands also said that there is no difference between what an early childhood teacher and an educator does in terms of daily duties with the exception of an Educational Leader (either an early childhood teacher or an educator) who will have some additional non-contact time to check staff learning outcomes in relation to the children they are responsible for and to ensure staff are on the right path. She also said that the fact an employee holds a teaching qualification does not guarantee any greater involvement in the delivery of an educational program. The degree of involvement or leadership that an educator employed at her centres has will depend on the individual, their experience, their passion and dedication to the children.

[491] In her statement of evidence dated 28 March 2019,[362] Ms Hands said despite the regulatory changes introduced over the last 10 years, the expectations and duties of early childhood teachers in South Australia have not changed. She gave evidence that:

- prior to the recent regulatory changes, the South Australian Curriculum Standards and Accountability Framework (SACSA Framework) had been in place since 2011 [sic, presumably 2001] which also required all educators (early childhood teachers or otherwise) to construct teaching and learning programs, conduct assessments, monitor children's progress and report this progress to children's families;

- regulatory changes had not increased the standards required of early childhood teachers, and the NQF largely replaced a lot of regulations that were already adhered to in South Australia and created consistency across the country;

- the regulatory changes have not caused a demand or increased need for non-teaching time in South Australia due to professional development, curriculum development or registration requirements, as those requirements already existed in some form;

- at her centres, early childhood teachers have always had the same time off the floor (2 hours) to construct and evaluate programs as diploma-qualified educators do, and she has two early childhood teachers who do not construct or evaluate any programs in the centre but still have one hour of non-contact time to compile learning stories or document observations in addition to the programming time provided for in the applicable awards;

- at her centres, early childhood teachers do not have an obligation to create and develop an educational program, as this is the responsibility of Room Leaders. In cases where the early childhood teacher is also a Room Leader, they are responsible for creating and developing their own programs for their particular room which is then implemented by all educators (including Certificate III qualified employees);

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[362] Exhibit 113

- the EYLF has led to community awareness of quality teaching in a positive way, but prior to the introduction of the EYLF, South Australian centres were already programming quality outcomes for children under the SACSA Framework, and the EYLF has not changed the professional expectations of teachers and educators at her centres;

- a Bachelor's degree does not indicate the quality of educators, and some of her diploma-qualified educators offer higher quality outcomes to the children than a degree-qualified early childhood teacher;

- the quality of early childhood teacher graduates have not improved in recent years, and centres have to support graduate teachers with on-the-job learning and help them gain experience;

- while the duties and tasks of an early childhood teacher's role will remain the same, the quality of an early childhood teacher can improve with experience;

- early childhood teachers do not create and review policies or QIPs, rather she prepares these herself as the company Director and Approved Provider;

- the introduction of the APST did not lead to new benchmarks but rather codified what the expectations are and what should be achieved, and in any case, she has not seen any difference in the quality of teachers or their work between now and prior to the APST being implemented;

- her centres have always provided continuing professional development to all educators, including teachers, and pay for the time spent at training and the cost of the training;

- early childhood teachers are not required to guide and mentor more junior early childhood teachers or supervise and direct non-teacher educators at her centres. Lead Educators have this responsibility of guiding educators in their room, and some but not all Lead Educators are early childhood teachers;

- there has been an increase in work on the computer, however this is universal across all industries and staff, and in any case has made their work easier and has streamlined processes;

- all educators deal with parents on a daily basis and this is not occurring more than it ever has in the past, and each early childhood teacher only liaises with parents of children in their room;

- there has not been an increase in additional needs children in the rooms at her centres, and such children have always been included in their service. Where there is an additional needs child who is severely disabled, her service can apply to be assigned a case support person from the Inclusion Support Program and the Inclusion Agency in South Australia who assists the child in joining the centre and provides training of relevant staff, and the cost of any additional staff provided by

the centre can sometimes be partially offset by funding from the Inclusion Support Program;

- the reduction in educator to child ratios has improved working conditions of all educators (including early childhood teachers) and reduced workload; and

- employees at her centres are not contactable after hours aside from herself and the Centre Directors.

[492] In her oral evidence, Ms Hands said that:

- programming in her centres is created over the course of each fortnight, adding to the program depending on whether a child is interested in something to develop this further and also with the consultation of parents;[363]

- early childhood teachers have two hours to program, however this varies depending on whether additional time is needed and whether they are an Educational Leader at the centre;[364]

- the NQF requires critical reflection, which required an engagement with pedagogical theory;[365]

- the perception of their work in the community as childcare is shifting to that of early education, and centres like her play a role in changing that perception;[366]

- the Unley centre employs more early childhood teachers than is required under the National Law in case someone is away, they still have an early childhood teacher on the premises;[367]

- as Approved Provider Representative for the company, it is her responsibility to ensure compliance with the National Law and is liable for any fine related to non-compliance;[368]

- educators and early childhood teachers have individual responsibilities to work in accordance with the NQS and are trained to ensure they are aware of these obligations, however their non-compliance would not have the same impact as what it would on the Approved Provider Representative, such as being fined;[369]

- while degree-trained early childhood teachers have a higher level of knowledge about early childhood education, theory and technique than someone with a

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[363] Transcript, 3 July 2019, PNs 8575-8577

[364] Ibid, PNs 8578-8579

[365] Ibid, PNs 8610-8611

[366] Ibid, PNs 8627-8629

[367] Ibid, PNs 8680-8681

[368] Ibid, PNs 8724-8731

[369] Ibid, PNs 8732-8735

diploma, they perform the same duties as other educators, and may not always have a higher skill level than other educators;[370]

- in her experience, educators with higher qualification levels and standards of training are not better equipped to provide improved learning environments and mentor other educators in quality practices;[371]

- South Australia has been ahead of the curve in terms of quality early childhood, having had ratios prior to 1998, higher ratios than what are required under the NQS and a specific curriculum in place for preschool since 2004;[372]

- the skills of staff are better understood viewed through examples of individual interactions with children rather than looking at the daily routine of educators and early childhood teachers in a centre;[373]

- her employees work a range of different start and finish times and do not get the same holidays as school teachers;[374] and

- she accepted that when people first start working in childcare, they tend to have a period where they get sick frequently, however their immunity builds up over time.[375]

Karthiga Viknarasah

[493] Karthiga Viknarasah is the Director and Educational Leader of Lidcombe Preschool Kindergarten and Choice Preschool Kindergarten and is a committee member of the ACA NSW. She has been a NESA accreditation supervisor for early childhood teachers since 2017. Ms Viknarasah is also the Vice President of the Australia Childcare Alliance NSW. Ms Viknarasah holds a Bachelor of Business (Accounting) from the Australian Catholic University, Certificate III in Children's Services from the Community Childcare Cooperative, a Graduate Diploma in Education from the University of South Australia and a Masters Degree in Educational Leadership from Macquarie University.

[494] In her statement of evidence dated 23 May 2018,[376] Ms Viknarasah described her role at the centres which involves supervising the day-to-day operations and ensuring compliance with various laws, including the National Law, supervising educational programs and inspiring, motivating and affirming the work of educators, including early childhood teachers. She also prepares the rosters across the centres which, she said, must meet the staffing ratio requirements prescribed by the National Law. She takes full responsibility as the Director for all regulatory and compliance matters, and non-compliance could result in significant penalties including the closure of her centres. Ms Viknarasah stated that she has written the

[370] Ibid, PNs 8755-8765

[371] Ibid, PNs 8782-8784

[372] Ibid, PNs 8797-8804

[373] Ibid, PNs 8907-8915

[374] Ibid, PNs 8962, 8965-8966

[375] Ibid, PNs 8972-8974

[376] Exhibit 116

centres' education curriculum in her own time to supplement the EYLF as she considers the EYLF to be insufficient given how broad it is. She has also developed eight health and safety policies for the centres including a child safe environment policy, nutrition, food and beverage and dietary requirements, sun protection and water safety.

[495] Ms Viknarasah gave evidence that the duties of early childhood teachers and educators at her centres include supervising and engaging with the children while they are playing and eating, ensuring the children eat enough food during meal times and talking to them about nutrition or various topics, conducting indoor and outdoor activities in small groups, preparing the children for rest, cleaning duties such as disinfecting toilets and mopping the floor, administrative tasks and discussing the program with other colleagues. Nominated supervisors (one step below the level of Director) are additionally responsible for ensuring educational programs are delivered correctly, children are supervised adequately, health, nutrition and hygiene standards are maintained, medical conditions and medications are managed correctly, staff are managed and mentored and parent demands and complaints are dealt with. Nominated supervisors are also somewhat accountable for breaches and non-compliance. She also said that there are children at the centres with additional needs such as autism spectrum disorder, allergies and anaphylaxis and that she is continually ensuring the centres' compliance with the relevant policies. In respect of children with additional needs, she said it is imperative for teachers to work collaboratively with parents and specialists, such as occupational therapists or psychologists, to ensure the best care for the child.

[496] Ms Viknarasah said that she regularly undertakes reviews of the centres' policies, processes and systems in consultation with the parents and families of children at the centres. She said that this process is as collaborative as possible and often will involve tailoring the policies specifically to the demographics for the centre. For example, she stated that there is a large cohort of children who are from Muslim families at the Choice Centre which has resulted in a change to dietary requirements that do not apply at the Lidcombe Centre. Ms Viknarasah also said she is responsible for organising consultation meetings with parents and ensuring the relationships between parents and the centres remain strong and are maintained. She also said that the amount of regulatory change in the industry requires that she remain ahead of the implementation of regulatory change to ensure the centres are continuously compliant.

[497] Ms Viknarasah also said that the work allocated to educators and early childhood teachers at her centres is the same and that allocation of work is determined by individual preferences, traits and the enthusiasm of her staff. She said that because she pays teachers more than educators, she may allocate early childhood teachers more work than educators and/or assign them writing tasks, such as writing the newsletter or lessons plans based on the written skills developed through their tertiary studies. Ms Viknarasah also said that in the past, it has been frustrating being required to pay early childhood teachers higher rates than educators who are doing a better job and that it is only due to the requirements under the National Law that she is obliged to employ early childhood teachers and pay them the award rate given their qualifications.

[498] She gave evidence in her witness statement dated 29 March 2019[377] that the regulatory changes experienced over the past 10 years in the early childhood education and care industry

[377] Exhibit 117

have put in place more formal guidelines for centres to comply with but have not changed the work of educators or early childhood teachers in the sector. Rather, the regulatory changes have simply codified and regularised the standards always required of early childhood teachers and educators. Her experience of the regulatory changes is that they have made the job easier insofar as required teacher-child and educator-child ratios have increased the number of staff to children. She also referred to the introduction of technology decreasing the amount of manual administration required, and gave as an example that recording the activities of a child in a day can now be completed using an iPad with quick drop down options, whereas previously this would have required taking photos with a camera, downloading the photos to a computer, printing, cutting and sticking them into a portfolio book, writing an observation using child development language and decorating the page before providing this to parents. The introduction of the requirement for other educators to be qualified with a Certificate III or diploma and for 50% of staff to have a diploma or higher educational attainment has also assisted early childhood teachers and all educators to perform their role with a more highly trained and qualified team.

[499] Ms Viknarasah said that there had been no changes in the actual work of caring and educating children as a result of regulatory changes. She said that there had been some minor changes to displays, re-arrangement of materials and the words used to describe the work, but she said this would have happened anyway as they were always evolving based on new research and trends. There had not been any need to increase non-contact time for early childhood teachers or educators for tasks like programming or developing an educational program as a result of regulatory changes, with early childhood teachers and educators always having been allocated two hours per week to carry out these tasks. However Ms Viknarasah also said:

> "However, at many centres it is often the case that in order to attract and retain high quality teachers, centres will offer above award conditions – including significantly increased off the floor time. I know this because I discuss it with other centre owners and committee members of ACA NSW. It is a sad state of affairs because Centres are effectively taking these highly qualified, expensive teachers away from children and replacing them (due to ratio requirements) with either casual staff who cannot teach the children as effectively or replacing them with less qualified staff."

[500] Ms Viknarasah stated that many of the requirements of the regulatory changes are no different between early childhood teachers and other educators, such as who is responsible for the development of an educational program or QIP and who deals with parents or additional needs children. A teaching degree is not a prerequisite for assuming higher duties such as being a Room Leader, Educational Leader or Director within a centre.

[501] In relation to the EYLF, Ms Viknarasah said that it had not affected the work of early childhood teachers and educators, but had just provided more clarity as to what dispositions for learning children should be exposed to before school. She said that the principles described in the EYLF are fluid and open to interpretation, making them difficult to assess, and centres sometimes have to translate the principles into their own curriculum. The EYLF had not raised professional expectations or led to a stronger focus on quality teaching in the early years, since this had always existed and preschool teachers were always expected to care for and educate young children. She said that the EYLF had nothing to do with being taught by an early childhood teacher, and in states such as Queensland and Victoria which have more rigid separate funding connecting the kindergarten program to an early childhood teacher,

they can have their own separate curriculum but these are in essence very similar to the EYLF.

[502] Ms Viknarasah said that she has not found that having a degree is an indicator of the quality of an educator and, in her centres, she would prefer to hire Certificate III graduates who she can train the way she needs them to be without paying the premium for an early childhood teacher or a diploma-qualified worker who cannot work the way she needs them to. She stated that the quality of an educator depends on their personality and passion for working with children and the fact that someone is degree qualified does not necessarily improve their performance in their role. If she has to employ an early childhood teacher, she prefers to hire employees with a 0-5 degree rather than a 0-8 or 0-12 degree as she can be sure that these individuals are passionate about teaching in the early childhood education sector and not simply working there as a placeholder until they are able to secure a job in a primary school setting. She said that degree entry requirements had not changed the quality of degrees in recent years.

[503] As to QIPs, Ms Viknarasah said that in practice it is likely that an early childhood teacher will assist with the development of the plan for a centre as they tend to have more developed writing skills, but there is no legal responsibility for the Educational Leader or the early childhood teacher to create or ensure that this plan is followed or implemented. In relation to the APST, she said that these formalise what was already expected of early childhood teachers but was unwritten, and that the NESA does not say that accreditation improves teachers' work in any way but rather recognises teachers as professionals. The written, uniform APST, she said, had not changed the actual work or duties that any early childhood teacher does. Ms Viknarasah stated that the introduction of mandatory professional development is not a new concept to early childhood teachers as this was offered by centres when and if they could afford it to all employees before registration requirements for teachers were introduced. Funding for this purpose was introduced between 2015 and 2017 in all long day care centres, so almost all educators and teachers would have already engaged in professional development. Payment for professional development varies between services, but Ms Viknarasah said it is paid for by the employer at her centres.

[504] Ms Viknarasah said that early childhood teachers at her centres are not required to guide and mentor more junior early childhood teachers or supervise and direct non-teacher educators, nor are these tasks responsibilities of the job outlined in the classifications in the EST Award. The system whereby the NESA contracts experienced early childhood teachers to mentor graduate early childhood teachers sits outside the modern award system, and is unlikely to involve a teacher in the same service acting as a mentor. In respect of technology, she said that this had generally made the work easier. Apps had been developed to make the duties associated with programming and reporting less manually burdensome and time consuming, and the ELLA language program had also made teaching languages easier, in that educators can sit children down with their iPads and leave them to learn from it while supervising their progress.

[505] Ms Viknarasah stated that early childhood teachers are not required to deal with parents any more than in the past, or any more that other educators; however, some responsibilities associated with parents may attach to the employee who is closing the centre or the Director of the centre. She said that she had not seen an increase in the number of additional needs students at her centres, and early childhood teachers worked with children with additional needs in the same manner as any other educator. There were a range of

support mechanisms in place available for dealing with additional needs children, such as funding to provide an additional educator (non-degree qualified) in the room. She said that a requirement to provide care to severely disabled children was required in very few cases and was not more prevalent than before. It was not a duty specific to early childhood teachers to interpret, for example, a specialist's report, and it would likely be given to the most senior employee due to its complexity.

[506] In a further statement of evidence dated 3 July 2019,[378] Ms Viknarasah gave evidence that at her service, the introduction of the EYLF had not resulted in a change to their approach to the educational program or how they deal with children. She said that it has placed a particular emphasis on some matters, such as inclusion and diversity, but has not brought about any basic change and did not introduce play based learning, the requirement for intentional teaching or the child-led curriculum. In respect of documentation, she stated that her centres have been taking observations and reporting on their progress for as long as she has been involved in the sector, and the NQF has neither increased nor specified a particular number of observations or reports required. In her experience, some centres specify a particular number of observations or reports while others do not. In her centres, the staff take observations on paper and create a portfolio for each child and are guided by principles Ms Viknarasah created, such as "*[o]ur relationships and interactions with children are more important than documenting their experiences*" and "*[t]here are no set number of observations required for each child. Educators should document as they feel is necessary and useful*". Ms Viknarasah stated that there has always been a prohibition on working at home in her centres, and this is formalised in her centre guide.

[507] In her oral evidence, Ms Viknarasah said:

- there is a funding gap between long day care centres and community preschools, in that the former are funded under the federal government childcare subsidy scheme to 85% of the rate cap, or about $8 per hour per child at her centre (and more where higher fees are charged), whereas under community preschool funding, it is about $11 per hour per child, and additional funding for special needs children and regional areas might take this up to $24 per hour;[379]

- her view is that centres should not be required to employ early childhood teachers, and it should be up to centres to decide whether to employ an early childhood teacher or not, and she valued not the qualification of the person but their ability to work with children;[380]

- she had said in a podcast in February 2019 that her position was: "*We will do the minimum that we need to comply with the regulations*";[381]

- of her two centres, one is rated as "meeting" under the NQF and the other is rated as "working towards";[382]

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[378] Exhibit 118

[379] Transcript, 4 July 2019, PNs 9358-9361

[380] Ibid, PNs 9385-9389

[381] Ibid, PNs 9402-9412, 9441

[382] Ibid, PN 9422

- she had obtained a Graduate Certificate at the University of South Australia for the purpose of allowing her to be counted as a degree-qualified teacher for ratio purposes on the basis that she had a previous (non-education related) degree, and she selected this course because it was the shortest one she could find;[383]

- the Graduate Certificate did not teach her anything about teaching, but only about management, even though it entitled her to be treated as a teacher;[384]

- she accepted that university teaching courses provide pedagogical knowledge of the sort that she did not obtain with her Graduate Certificate training;[385]

- she had, as a personal project, developed an education program/curriculum for 2-5-year-olds based on the Australian Curriculum for Early Stage 1 in primary schools as well as the EYLF and other leading early years frameworks from around the world;[386]

- this curriculum is for the purpose of informing staff, who she considered are not getting enough information in their studies, what they should be doing;[387]

- her website stated that her centres had an "*advanced academic program*" arising from the curriculum she had developed for her centres, and even prior to this curriculum she used to teach children to write, which many centres did not;[388]

- she recalled "*a time years ago when we used to hide our teaching materials when the regulatory authority came because they would, you know, didn't like to see that, so we just put it away in a cupboard somewhere and only show[ed] them the documents that they were interested in*";[389]

- in the podcast, she had agreed that she was "*a rogue in the industry*", and she accepted that she was a rogue in the approach she took to academic programs as well;[390]

- she believed in learning through play, but tried to give an academic focus to most of the activities set up in the environment and, unlike many centres, she liked to give colouring-in worksheets, writing pencils, puzzles, number tables and letter charts to children;[391]

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[383] Ibid, PNs 9442-9448

[384] Ibid, PNs 9455-9460

[385] Ibid, PN 9461

[386] Ibid, PNs 9464-9473

[387] Ibid, PNs 9474-9478

[388] Ibid, PNs 9493-9494

[389] Ibid, PN 9494

[390] Ibid, PNs 9495-9498

[391] Ibid, PNs 9499-9505

- under the QIAS system when there was a validation visit, they would put away books children had been writing in and show the things the validators wanted to see;[392]

- the only early childhood teachers her centre currently employs have their degrees but are still working towards their registration;[393]

- in NSW, unlike the rest of the country, there have been requirements to have early childhood teachers in preschools and long day care centres for decades, but they were not required to be accredited until 2016;[394]

- there needs to be a balance between allowing children to do what it interesting on the day and pre-prepared plans, and as an example of the latter, her centres have a Science Week and the children practise speeches and learn songs and dances well in advance so that that "*we can have a really good performance for parents*";[395]

- she did not necessarily accept that teachers are able to plan particular educational activities to obtain learning outcomes based on observation at a higher level than other educators, and it could be "*just somebody who is absolutely really passionate about what they're doing as well*";[396]

- tertiary-educated teachers come out of university with a sound knowledge of theories and pedagogies for teaching but not with a sound knowledge of the regulations and compliance requirements for the industry, unlike non-degree qualified educators;[397]

- she had earlier written that non-degree qualified educators had little knowledge of the key aspects of teaching children, such as numeracy and literacy for 2-year-olds, but she said that they were not all that way;[398]

- she encouraged her staff to upgrade their qualifications, and accepted that it is beneficial for the educational outcomes of children to have better educated staff;[399]

- she would prefer that early childhood teachers only be required to study a 0-5 degree rather than a 0-12 degree because they don't adequately cover the 0-5 age and cannot focus on it in their studies;[400]

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[392] Ibid, PNs 9507-9509

[393] Ibid, PN 9516

[394] Ibid, PNs 9540-9543

[395] Ibid, PNs 9591-9592

[396] Ibid, PNs 9642-9643

[397] Ibid, PNs 9644-9646

[398] Ibid, PNs 9649-9656

[399] Ibid, PNs 9704-9710

[400] Ibid, PN 9723

- there is a problem with early childhood teachers going off to teach in primary school settings and until this supply issue is rectified, the requirement to have early childhood teachers onsite should be removed for smaller centres;[401]

- the introduction of the National Law was the biggest change for many other states, however it was not a big change for NSW because it was already very highly regulated;[402]

- under the National Law, record keeping obligations significantly increased and there was no longer a codified checklist in place for business owners to follow to ensure compliance in order to be accredited, as there was under the QIAS;[403]

- there are no Room Leaders in her centres, and she does not expect more from her early childhood teachers as everyone in her centre shares the work equally;[404]

- her centres are located in areas where there are many parents who are non-English speaking, so she tries to employ staff to reflect the children she has in her centre and who speak different languages. If these language skills are required at another centre, she will do a swap for a day to ensure parents can be communicated with;[405]

- she accepted that the intention of the NQS is to raise the bar on quality and continuous improvement in children's education and care services but does not agree that this happened in practice, as it may have raised the bar in some areas but not others;[406]

- she believed that the number of centres rated "exceeding" under the NQS had significantly declined in the last few years;[407]

- the educational program under the QIAS system was exactly the same as that under the EYLF, except it did not have to link to a specific learning framework and had no requirement to have links to documentation showing individual children's developmental outcomes;[408] and

- in her centres, children are assessed in their progress against the EYLF once a term and parents are provided with a report.[409]

Merran Toth

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[401] Ibid, PNs 9734-9735

[402] Ibid, PNs 9744-9756

[403] Ibid, PNs 9760-9764

[404] Ibid, PNs 9782-9783, 9785-9787

[405] Ibid, PNs 9800-9802

[406] Ibid, PNs 9905-9909

[407] Ibid, PNs 9915-9916

[408] Ibid, PNs 9983-9995

[409] Ibid, PNs 10040-10047

[508] Merran Toth is the Approved Provider and Managing Director of two long day care centres, Sandon Point Children's Centre and Balgownie Early Learning Centre in New South Wales. Prior to owning and operating these centres, Ms Toth worked as a casual teacher in the public education system (1989-1995) before securing a full-time position as an Integration Teacher at Peakhurst High School (1996-2010). Ms Toth holds a Diploma of Teaching in Primary Education, a Bachelor of Education (Primary Education), Masters in Teaching, Graduate Diploma in Integration Studies and a Certificate III in Children's Services.

[509] In her statement of evidence dated 27 March 2019,[410] Ms Toth said that she is responsible for the day to day operational and financial leadership of the two centres, prepares and implements company policies for the centre and ensures work is performance according to those policies. Ms Toth also oversees the development and delivery of educational programs at the centres, guides educators towards a greater understanding of child development and how to deliver an effective educational program. Ms Toth also regularly participates in training and reading research to ensure the centres' programs and practices are sound and assists educators to identify improvements to the programs with a view to reducing documentation and increasing the quality of interactions with children and families.

[510] Ms Toth said that it is critically important for teachers to practise autonomous teaching at the centres which ensures children's interests are brought to the fore and are central to the learning experiences provided to the child. Ms Toth said that all employees are responsible for contributing to educational programs which involves consulting using web-based programming to take photographs of the children throughout the day, making notes based on their interactions and planning programs based on this. The development of programs, she said, may also involve consultation with therapists and family members to meet the individual needs of each child. She also said that staff will reflect on the program every fortnight as a group to evaluate its effectiveness and to ensure it remains useful. She also said that every few months, the staff meet to discuss the centres' WHS policies and procedures or child protection matters and to discuss any incidents that present new hazards. She also said that some early childhood teachers will assist with amending centre policies to comply with changes to the National Law, the National Regulations, the WHS Act and the NQF. She said she is acutely aware of the shortage of qualified early childhood teachers that are experienced and competent in their role and in her experience, there are personal qualities that are critical to being a successful early childhood educator and these are not necessarily present in some of the early childhood teachers she has employed in her centres.

[511] Ms Toth said that the daily duties of an early childhood teacher at her centre include greeting the children and families when they arrive at the centre, completing administration such as receiving messages about children's needs for the day or medication requirements, engaging the children to assist with setting up indoor and outdoor spaces and settling distressed children, marking the roll and directing and supervising children in play areas, taking notes and photos of the children's work as needed and assisting children with morning tea. Ms Toth said that all early childhood teachers and educators participate equally in daily activities.

[512] Ms Toth said that compared to her experience as a teacher in a secondary school, the work in early childhood centres is quite different to the requirements under the NQF. In

[410] Exhibit 99

comparison to schools, the learning in early childhood centres is much less structured, is undertaken by many educators (including early childhood teachers) in a group setting, there is no detailed curriculum or course materials, there are no blackboards, chairs and desks, there is no requirement for the children to demonstrate they have learned particular skills of assessment processes and there is a greater amount of time spent dealing with the care routines of very young children.

[513] In her oral evidence, Ms Toth stated that:

- A day in the life of one of Ms Toth's centres typically involves staff arriving and stocking their belongings, unlocking the centres and opening the centre, greeting children and families when they arrive and getting "information downloaded" to them regarding the children's needs or medications, facilitating and supervising indoor, outdoor group activities and free play, supervising morning tea, lunch and afternoon tea, developing and planning future programs, preparing the children for rest time or, for pre-schoolers who don't sleep and facilitating quiet activities such as guided meditation, yoga and visualisation activities, outdoor or indoor activities after rest or quiet time prior to pick-up.[411]

- There is no difference in the routines or duties between non-bachelor qualified educators and early childhood teachers at the centres, except for the former being unable to administer first aid.[412]

- The education program planning completed by staff and developed from observations from children throughout the day will involve completing developmental checklists and comments, researching news ideas for weekly activities and critically reflecting on their own teaching practice and the program with regards to social justice, gender bias and the community.[413]

- In regard to technology, Ms Toth's centres use Quick Kids Kiosk (an app for parents to sign their children in and out of the centres) and KeptMe (a web-based platform for entering observations of children and developing quality improvement plans) which allows for parental input and feedback.[414]

Shelley Prendergast

[514] Shelley Prendergast is the owner and Approved Provider of three childcare centres located in Western Australia under the brand Sonas Early Learning and Care. She began working as an early childhood educator in 1994. During her career, Ms Prendergast has managed the operations of over 150 childcare centres.

[515] In her statement of evidence dated 25 May 2018,[415] Ms Prendergast described her role as owner and Approved Provider as looking after the operation of the centres at a high level

[411] Transcript, 2 July 2019, PNs 6815-6842

[412] Ibid, PN 6844

[413] Ibid, PNs 6847-6849

[414] Ibid, PNs 6867-6871

[415] Exhibit 106

(including planning, quality of service and human resources) and she said that this was distinct from the role of Centre Directors who look after the day-to-day management of the centres, including managing their teams and the day-to-day care and education of the children. She also commented on the impact of the regulatory change on the centres in 2012 when early childhood teachers were required to be engaged. Ms Prendergast said that early childhood teachers were required to be paid in accordance with the EST Award, which mandated higher rates than the CS Award and wages were often increased to above-award wages in order to attract and retain those early childhood teachers.

[516] Ms Prendergast said that Centre Directors together with Approved Providers are responsible for developing and implementing the NQF or the Australian Curriculum, creating and maintaining a QIP, ensuring workplace policies are implemented, updated or followed, ensuring children's safety and that the needs of children with additional needs are met, managing the development of children and engaging with the EYLF. Ms Prendergast stated that for early childhood teachers, daily duties may differ between centres with an early childhood teacher at her Wattle Grove Centre performing the tasks of both an early childhood teacher and Centre Director. She said this early childhood teacher is not required to be registered by the Teachers Registration Board unless they are delivering an educational program. She also said that all staff at the centres, including educators who are not working towards a teaching degree, are required to participate in programming which involves working as a team to carefully choose activities and develop daily activity programs for the children which are dynamic, responsive to the children and exposing them to new content.

[517] In her statement dated 1 July 2019,[416] Ms Prendergast gave evidence about the differences between the QIAS and its successor, the NQF. She stated that under the QIAS, accreditation was effectively mandatory as it was a requirement to access childcare subsidies. The accreditation process involved registration, self-study and continuing improvement, validation, moderation and an accreditation decision. The NQS stipulates that educators are required to participate in self-assessment and Assessment and Rating Visit. Ms Prendergast stated that in her experience, the Assessment and Rating Visit under the NQS is less stressful than the validation visits under the QIAS because there is less emphasis on the provision of records and documents to demonstrate historical compliance than there was under the previous system.

[518] Ms Prendergast stated that observations are not a new development, as she learned about them in her training in 1991, however the approach taken to observations had changed in the sector and would probably continue to change over time. Her understanding of what is required under the EYLF is that each child be observed and that a learning journey can be demonstrated, which she said was no different to what was required and what was done prior to its introduction. She said that the EYLF does not require a certain number of observations or a certain number of reports. She stated that technology such as the Xplor app makes it easier for educators to take observations, for example, if a photo an educator has taken shows a significant step in a child's learning, the app allows them to create an observation, include a photo and link it to an EYLF outcome. In respect of programming, Ms Prendergast stated that all staff contribute to the program and are allocated at least two hours per week to program, however this can vary depending on the programming or documentation to be completed, the number of children present and the number of staff available. When less children come in,

[416] Exhibit 107

less staff may be required on the floor and there is more time to program and complete documentation. She said that none of her staff are expected to do any work outside of their working hours and as far as she knows, none of them do.

[519] In cross-examination, Ms Prendergast gave the following evidence:

- she believes that childcare centres should be required to employ an early childhood teacher with the relevant qualifications for the 0-3 years old age group, rather than the older age group;[417]

- childcare centres should be required to employ a university qualified early childhood teacher because they are trained to think more deeply and are taught theoretical perspectives of early childhood development compared to diploma qualified educators, especially given this is the most important time of a child's life, the opportunities for learning are not available to those children later on if the foundations aren't built in those first few years;[418]

- in Western Australia, there is a non-compulsory year of pre-kindergarten taught at schools by early childhood teachers applying the EYLF in a format adapted by the WA Education Department, called the Western Australian Kindergarten Curriculum;[419]

- she accepted that parents generally view what occurs in long day care centres as childcare where children are cared for and also receive some socialisation, and parents' demand for formal education commences when they move to school;[420]

- the majority of early childhood teachers in Western Australia are employed by schools rather than long day care centres;[421]

- in her experience, it is difficult to recruit graduate early childhood teachers to work in long day care centres because many students completing a tertiary early childhood qualification would prefer to work in schools once they complete their degree due to better conditions of employment;[422]

- the majority of applicants for vacant positions in her centres are students completing a tertiary early childhood qualification who are at least 50 per cent through their degree;[423]

- she thinks that early childhood teachers are not applying for jobs in the sector because of the remuneration;[424]

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[417] Transcript, 3 July 2019, PN 7903

[418] Ibid, PNs 7904-7905

[419] Ibid, PNs 7956-7966

[420] Ibid, PNs 7996-7998

[421] Ibid, PNs 8006-8007

[422] Ibid, PNs 8008-8010, 8013-8015, 8112-8115

[423] Ibid, PN 8115

[424] Ibid

- she could increase remuneration for early childhood teachers in her centres but she has a whole workforce of people who work just as hard as early childhood teachers and in most cases deliver the same outcomes and wants to keep an even playing field between employees;[425]

- there was no *legal* obligation to have an educational program based on an approved learning framework under the QIAS like there is under the NQS and EYLF, and the obligation under the QIAS was derived from an accreditation program which linked subsidies to parents;[426]

- the EYLF contains learning outcomes which are not prescriptive, for example, it does not say at what age a child should be able to cut paper with scissors or hold a pencil but rather provides a broad guide to assist educators to plan programs of which skills they need to learn based on their developmental progression;[427]

- prior to the regulatory changes in 2012 requiring centres to employ early childhood teachers and pay them in accordance with the EST Award, her centres did not employ many early childhood teachers, and those that were employed at this time were employed as diploma qualified and paid in accordance with the CS Award to adhere to the regulatory scheme in place at the time;[428]

- since 1994, the QIAS was amended several times, each time placing a higher expectation on educators to improve the quality outcomes they were providing to maintain accreditation;[429]

- the QIAS didn't mandate any staff/child ratios, staff qualifications, a curriculum or learning framework in order to achieve the standards, or identify learning outcomes for children attending long day care centres, but she thinks it did specify that children have the opportunity to learn in or be exposed to experiences that would progress them through developmental domains;[430]

- the QIAS did not apply to early childhood teachers teaching a kindergarten or preschool program in school settings in Western Australia;[431]

- the introduction of the NQS didn't change the way educators worked with children; what changed was how the assessment of educators took place, including in respect of the QIP, and she felt that the work created by these changes was something an Approved Provider or manager should be responsible for;[432]

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[425] Ibid, PN 8016

[426] Ibid, PNs 8018-8026

[427] Ibid, PN 8080-8083

[428] Ibid, PNs 8094-8095

[429] Ibid, PNs 8177-8181

[430] Ibid, PNs 8275-8280

[431] Ibid, PN 8211

[432] Ibid, PN 8229

- the obligation to produce documentation for accreditation purposes has not changed with the introduction of the NQS, however instead of requiring centres to produce a certain number of observations per child, assessors now request to see the learning records of only a handful of children;[433]

- under the QIAS, assessors were looking for documentation evidencing what staff were doing to help children reach whatever milestone that they were reaching, whereas now under the NQS, they are looking for how they are working towards EYLF outcomes and what they are doing to provide opportunities for children to become confident learners, not for children to have achieved outcomes in any learning records;[434]

- developmental milestones are not contained in the EYLF as they were prior to its introduction, but have since been re-introduced by the AQECQA albeit on a non-compulsory basis;[435]

- technology has not changed the workload for educators in respect of taking observations, as it is just a different mode and a different mechanism to record children's learning and development;[436]

- the requirement for educators to engage in critical reflection of the outcomes that have been achieved and how they can be altered to achieve better outcomes as prescribed by the NQS is not new, however she accepted that most services may not have been evaluating to that same depth prior to its introduction;[437] and

- educators now have training and support in dealing with children with special needs or from traumatic backgrounds and access to funding and support services, which were not available in the early 1990s.[438]

Gary Carroll

[520] Gary Carroll is the CEO and Managing Director of G8, which provides care and education facilities in Australia and Singapore. G8 holds a market share of approximately 6.8% and owns and operates around 500 centres in Australia under approximately 50 subsidiary companies. The centres are long day care centres and the majority of them also offer kindergarten or preschool services. Mr Carroll holds a Bachelor of Commerce and a Bachelor of Laws, and is a certified practising accountant.

[521] In his statement of evidence dated 22 May 2018,[439] Mr Carroll described the responsibilities of early childhood teachers. He said that like educators, early childhood teachers must exercise a degree of personal responsibility to work in accordance with the

[433] Ibid, PN 8340

[434] Ibid, PN 8361

[435] Ibid, PNs 8391-8393

[436] Ibid, PNs 8426-8437

[437] Ibid, PN 8446

[438] Ibid, PNs 8492, 8498-8502

[439] Exhibit 94

National Law and G8's policies. At his centres, there is no hierarchy in respect of educators and early childhood teachers. Graduate early childhood teachers are not always where he would expect them to be when they join his centres, so they are supported by a more senior member of the team, which can be an educator. Mr Carroll said that G8 pays its employees under the CS Award and the EST Award as a starting point and their rate of pay may be higher as a result of market conditions and their relevant experience.

[522] Mr Carroll's evidence was that the level of regulation in early childhood operations and children's services is comparatively high when set against other industries, and that virtually every aspect of a centre's operations is impacted in some way by the NQF, National Law and National Regulations. He referred to changes to teacher/child ratios scheduled to take place in 2020, in which services with more than 60 licensed places will be required to employ two early childhood teachers, rather than a single early childhood teacher or access to an early childhood teacher 20% of the time. In terms of leaders within a centre, Mr Carroll said he likes to have a mix of personnel in each position, which may be an educator or an early childhood teacher. With respect to Educational Leaders, he stated that the Queensland Government encourage centres to appoint someone other than an early childhood teacher to the role.

[523] In his statement of evidence dated 29 March 2019,[440] Mr Carroll said that, as of 1 October 2018, G8 had increased early childhood teachers' remuneration to a uniform percentage amount above the minimum wage rates provided in the EST Award (the precise amount is confidential). Mr Carroll said that the increase was primarily designed to attract and retain early childhood teachers, which was challenging as the sector had to compete with schools, and that the increase provided was sustainable and allowed G8 to remain competitive in the sector without passing the cost onto families. Mr Carroll said that paying the award rate was causing attraction and retention challenges for G8, and the increase to early childhood teacher wage rates has added to G8's value proposition for early childhood teachers and has assisted with attraction and retention. This had in turn reduced the turnover in early childhood teachers and allowed each G8 centre to provide a more consistent, quality education offering to children and families, which would drive increased occupancy and improved financial performance over time.

[524] In his oral evidence, Mr Carroll said that:

- G8 is the largest for-profit early education provider in Australia, with almost 10,000 employees (with a full-time equivalent basis of approximately 7,700 employees);[441]
- of these, around 550 are early childhood teachers and 9,250 are diploma or Certificate III qualified educators;[442]
- he accepted that the early childhood industry is in the growth phase of its life cycle, due to the supply of new centres increasing and is expected to outperform the wider economy until at least 2023;[443]

[440] Exhibit 95

[441] Transcript, 2 July 2019, PNs 6492-6495

[442] Ibid, PNs 6617-6618

[443] Ibid, PNs 6507-6510

- the focus of the childcare sector has been gradually shifting from being primarily care-based to being a mix of care and education, and the starting point for early learning is being determined by the centre earlier and earlier;[444]

- the NQS and the National Law, in addition to a growing body of research which demonstrates the power of early learning on a child's brain development, has shifted the focus of the childcare sector onto increasing the qualifications of staff providing early learning outcomes;[445]

- in terms of demand and supply for childcare services, he had seen projections that the market is to be more in balance in the next 12-24 months;[446]

- the government's childcare subsidy introduced in 2018 increased demand at his services, both in terms of existing families taking additional days and also new families;[447]

- improving retention in centre managers and early childhood teachers improves parental engagement, as parents like the continuity of the same teacher in the kindergarten room;[448]

- early childhood teachers are recruited from other long day care centres and the school system, as graduates from universities, upskilling existing G8 diploma-educated staff, and students completing an early childhood teacher tertiary qualification who are more than halfway through their studies who may be treated as a teacher for regulatory requirements;[449] and

- the difference between teaching in schools and in an early childhood education and care setting is due to the setting and the framework. The EYLF is a play-based curriculum, whereas the primary school framework is a classroom-based curriculum. In terms of setting, children in his centres play about 4-5 hours a day outside whereas in a primary school, children spend the vast majority of their time in a classroom environment at a desk.[450]

C.7 AFEI submissions

[525] The AFEI submitted that the IEU's work value claim did not meet the threshold requirement of establishing that a variation to the EST Award is justified on work value grounds, and that the rates of pay claimed by the IEU could not be included in the EST Award because they are contrary to, or are not necessary to achieve, the modern awards objective or the minimum wages objective. The AFEI submitted, in respect of the assessment of work

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[444] Ibid, PN 6521

[445] Ibid, PNs 6522-6523

[446] Ibid PN 6539

[447] Ibid, PN 6539, 6553-6554

[448] Ibid, PNs 6575-6577

[449] Ibid, PNs 6625-6629

[450] Ibid, PN 6691

value, that the wage-fixing principles established by the AIRC are directly relevant to any proposal to vary minimum wages under s 157, due to the statutory mandate for awards to include terms only to the extent necessary to achieve the modern awards objective or the minimum wages objective. In particular, it was submitted that the following wage-fixing principles are necessary to ensure a fair and relevant minimum safety net:

- fixing rates that are relative to classifications in other minimum rates awards;
- the avoidance of double-counting of work value reasons; and
- the avoidance of leapfrogging.

[526] The AFEI further submitted that the job evaluation evidence comparing the work value of teachers and professional engineers shows that there is no basis for any increase to teachers' minimum wages on work value grounds, that the variation proposed by the IEU would result in unfair and irrelevant margins in minimum wages between the EST Award and other modern award classifications, and the proposed rates would discourage enterprise bargaining.

[527] In respect of the relativity between teachers and the classification structure in the *Metal, Engineering and Associated Industries Award 1998* (Metal Industry Award 1998), the AFEI submitted that more would be required than simply holding a degree in order for the C1 classification (180% of C10) to be appropriate, and the requirement for minimum degree training for C1 in the Metal Industry Award should not be viewed in isolation from other work value factors likely to be relevant to a C1 classification. However, insofar as there is a differential between a degree-trained C1 (at 180% relativity to C10) and a graduate professional engineer/scientist (potentially 125% relativity to C10), it would be an oversimplification to treat the reason for the differential as being only related to an ability to perform the work unsupervised or with minimum on-the-job training. The AFEI pointed to the classification descriptor for the C2(b) classification in the Manufacturing Award as requiring not only the completion of an advanced diploma or equivalent but also the completion of sufficient training to fulfil the requirements of the role. It also relied upon indications of the nature of the work, level of skill and responsibility, and conditions under which the work is performed, in the C2(b) classification descriptor. The AFEI submitted that the specialist technical nature of the work, complexity of the work, high level of autonomy and responsibility, co-ordination of projects and staff, and expectation of mature knowledge, and originality indicate that more is required to be at C2(b) (or 160% relativity) than simply being able to perform work in a position that requires minimal on-the-job training, and indirect supervision, as a graduate. It further submitted that the Level 3 rate in the PE Award, described as C1(b) or 175% relativity to C10, would inevitably involve a higher work value than C2(b); therefore, to the extent that the IEU claims an appropriate starting point for teachers as being 180% or 175% of C10, the work value of a teacher would need to exceed that of a C2(b), and it does not suffice in that connection to say that teaching requires a degree.

[528] The IEU, it was submitted, had not produced any evidence comparing the work value of graduate teachers to graduate professional engineers or scientists, or comparing the work value of graduate teachers to professional engineers or scientists performing the full professional role, noting that the IEU did not rely on the Mercer Report to support its work value claim. The AFEI, by contrast, relied on the Egan Report which scored the work value of a graduate early childhood teacher as 94% of that of a graduate professional engineer and

scored the work value of a Level 5 Teacher as 88% of the Level 2 Professional Engineer. Accordingly, the AFEI submitted, the relativities sought by the IEU, both internally and as compared to professional engineers, were not justified on work value grounds.

[529] In relation to the now-rescinded NSW *Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award* (NSW School and TAFE Teachers Award), the AFEI submitted that this was irrelevant to the teachers the subject of the IEU application because:

(a) The NSW School and TAFE Teachers Award covered employees of the NSW Department of Education and Training, and did not cover teachers outside of NSW, teachers in independent schools or teachers in the non-government early childhood sector. The findings of the NSW IRC in *Re Crown Employees (Teachers in Schools and TAFE and Related Employees) Salaries and Conditions Award*[451] (*NSW School Teachers decision*) did not include evidence in relation to these categories of teachers.

(b) The NSW Government Schools Teaching Service operated pursuant to the framework established by the *Teaching Services Act 1980* (NSW). That Act conferred broad statutory authority with respect to the transfer, discipline and termination of teachers which are notably different to those applying to teachers in independent schools or early childhood centres.

(c) The NSW IRC rejected parity between early childhood teachers and school teachers in 1990, 2001 and 2009.

[530] The AFEI also submitted that the rates in the NSW School and TAFE Teachers Award do not demonstrate undervaluation of the rates in the EST Award because:

(a) The NSW School and TAFE Teachers Award rates were set pursuant to a statutory mandate to set "*fair and reasonable conditions of employment*" for employees, as distinct from the safety net of fair minimum rates of pay required by the FW Act.

(b) It cannot be inferred that the rates of pay in the NSW School and TAFE Teachers Award were fixed purely on the basis of work value. While the IEU's case referred to a number of NSW IRC decisions to increase rates of pay in the NSW School and TAFE Teachers Award on work value grounds from 1990-2009, it provided no evidence of any total valuation or total scoring of the work value of government-school teachers and the assignment of a rate commensurate to the score, or any other evidence to verify that the rates set in that award were based on work value alone. It was not possible to identify the basis upon which earlier agreed rates, to which later work value increases had been applied, were established.

[451] [2004] NSWIRComm 114, 133 IR 254

(c) The rates in the NSW School and TAFE Teachers Award bore no stated relationship to rates in federal minimum-rate awards, and accordingly there was no meaningful basis for comparison.

[531] In relation to the IEU's evidentiary case, the AFEI submitted that the small number of teacher witnesses providing evidence in support of the IEU's application meant that it would be difficult for such evidence to be informative of the experiences of all teachers in a single workplace, or a State/Territory, let alone all teachers in the entire national system. That evidence had predominantly been from teachers in NSW, with some evidence coming from Queensland, Victoria and the ACT. It did not depict the teaching profession across the whole country.

[532] The AFEI also submitted in relation to the IEU's evidentiary case that:

- certain aspects of change relied upon by the IEU, such as increased reliance on technology, should not be treated as involving a change in work value;
- it is clear from the evidence that the main function of a teacher has been, and continues to be, the creation and delivery of developmentally appropriate learning material to children, and the use of technology had not fundamentally changed this;
- the evidence suggests that the EYLF did not change the way that work is performed, but standardised nationally what was, or should have been, already occurring; and
- a number of the witnesses bore additional responsibilities such as being appointed as a Director, Educational Leader or Nominated Supervisor, and it is necessary to exercise caution in distinguishing between their duties and the minimum requirements of the classifications in the EST Award.

[533] The IEU's claim for the decompression of relativities, it was submitted, should be rejected because the flat dollar increases in previous national minimum wage decisions had the effect of compressing internal relativities across the entire award system, and it would not now be appropriate to unwind this for a single award. The AFEI also submitted that disregard for the internal and external relativities in minimum award rates would inevitably impact on the relevance and fairness of those rates. Further, the rates proposed by the IEU would create an artificially high safety net which could largely, if not entirely, displace enterprise bargaining, particularly in the early childhood sector.

C.8 Submissions of other interested parties

Australian Council of Trade Unions

[534] The Australian Council of Trade Unions (ACTU) supported the IEU's work value application and urged the Full Bench to grant the increases sought. The ACTU submitted that the EST Award contains rates of pay that are manifestly unfair and inadequate and considerably below the rates necessary to achieve the modern awards objective. In respect of work value, it submitted that there have been significant changes in the work of early childhood teachers over the past two decades due to increased professionalism, work complexity and work intensity in the sector and award rates have not shifted to consider work

value changes in the sector since at least 1996. It submitted that most early childhood teachers are paid at or only marginally above the award rate and are therefore paid significantly less than primary or secondary school colleagues who are covered by enterprise agreements, despite the fact industrial tribunals have recognised the value of their work. The ACTU supported the IEU's contention that gender-related factors contribute to the undervaluation of this work, such as gendered assumptions about the role of early childhood teachers as "nurturers" and "carers" of preschool-aged children rather than teachers, early childhood teaching skills being skills that "naturally" occur in women rather than skills that are learned or developed and the discriminatory view that the work of early childhood teachers is not skilful or valuable. The ACTU submitted that the undervaluation of the work of early childhood teachers is unfair and contributes to high turnover and low tenure in the sector, which reduces the quality of educational outcomes for children in their crucial first five years of life.

Australian Education Union

[535] The AEU also supported the IEU's work value claim and urged the Commission to find that there has been substantial work value change in the work of teachers justifying a substantial increase in the rates of pay under the EST Award. It submitted that it has coverage of early childhood teachers in Victoria including those who work in the long day care sector, except where they are employed by independent schools, who would be affected by any order made in respect of the work value claim. The AEU supported the submissions filed by the IEU on 21 August 2019 and noted the following submissions in particular:

- the current award wage rates are wholly inadequate in that they do not reflect the work value of teachers and the EST Award needs to be amended to meet the modern award objective and the minimum wages objective;

- the overwhelming evidence demonstrates that a teacher is a teacher and the work value of an early childhood teacher is no lower than that of other teachers, noting that they have the same qualifications and in most locations a requirement to meet the same national teaching standards; and

- there have been significant changes in work value that have occurred for teachers over the last two decades, including increased professionalism, the work being substantially more complex and more intense and demanding than it was.

United Voice

[536] United Voice supported the IEU's work value application and noted generally that the work of all early childhood teachers and educators is undervalued. It submitted that it represents early childhood educators across Australia and their members hold the qualifications of certificate III, diploma or a bachelor's degree in teaching. It also covers workers in early childhood education and care with no formal education qualifications and there is some variation in coverage across states. United Voice said its position is that there has also been an increased in the value of the work performed by educators holding a certificate III and diploma qualifications who are covered by the CS Award but are not pursuing a work value case of this nature at this stage.

Catholic Commission for Employment Relations

[537] The Catholic Commission for Employment Relations (CCER) is an employer body representing Catholic employers in NSW and the ACT. It said that Catholic employers run Catholic Early Learning Centres (CELCs) on a not-for-profit basis. It made submissions in relation to the IEU's equal remuneration application which appear to us to be equally applicable to the work value application. It submitted that it recognises there is a disparity in the award rates of pay for early childhood teachers compared with those paid to primary and secondary school teachers and acknowledged the legitimate aspirations of early childhood teachers for increased rates of pay. At the same time, it submitted, Catholic employers in NSW have limited means to fund the proposed increases as staffing costs represent approximately 80% of the operational budget of CELCs and are reliant on State or Commonwealth Government contributions and subsidies and fees paid by parents. The CCER submitted that if the Commission determines to increase rates of pay, it would be essential that State and Commonwealth Governments fully adjust funding to provide for such increases in a timely way otherwise CELCs would almost certainly need to increase the fees charged to parents. Failure to fund the transition, it said, may have the unintended consequence of forcing many CELCs to reduce the level of service, the number of employees and/ or withdraw from providing some services. The CCER requested that any decision of the Commission to increase rates of pay be phased in to reflect changes in funding and minimise the adverse impact on the provision of services and the rate of employment in its affiliated CELCs.

C.9 Consideration - whether adjustment to EST Award rates justified by work value reasons

[538] In our earlier discussion concerning the statutory framework and principles applicable to the consideration of the IEU's work value claim, we referred to the Full Bench *Pharmacy Award decision*[452] as establishing that the judgment required under s 157(2) of the FW Act as to whether a variation to minimum award wages is "*justified by work value reasons*" is relatively broad and unconstrained in nature. It may include but is not confined to whether the work value of the relevant class of employees has changed since a past "datum point" in time when there was last a consideration of the work value of the employee, and may extend to a wider consideration of whether the work of the employees in question has been undervalued. Undervaluation in a broader sense may arise because the award rates of pay for the relevant class of employees have never been fixed on the basis of any assessment of their work value or in accordance with the established principles for the proper fixation of minimum rates.

[539] Consideration of what the datum point should be for consideration of whether there have been any changes to work value in respect of teachers covered by the EST Award, and whether there has ever been a proper consideration of the work value of such teachers, requires an examination of the history of federal industrial relations regulation of teachers.

C.9.1 History of federal award regulation of teachers

[540] Federal award coverage of non-tertiary teachers is a comparatively recent phenomenon, since teachers (whether in government schools, Catholic schools, independent schools, pre-schools or childcare) have traditionally been regulated by State industrial

[452] [2018] FWCFB 7621, 284 IR 121

relations systems. The origin of the rates of pay in the EST Award may be traced back to the *Teachers (Victorian Government Schools Interim) Award 1993*[453] (Interim GS Award). The circumstances in which this award was made may briefly be explained. Government school teachers in Victoria had previously been covered by the *Teachers (Government Teaching Service) Award*, an award of the Industrial Relations Commission of Victoria made under the *Industrial Relations Act 1979* (Vic). In addition, there were collective agreements which supplemented this award which dealt with matters such as staffing arrangements, class sizes and teaching hours. However, under the *Employee Relations Act 1992* (Vic), the Industrial Relations Commission of Victoria was abolished, awards of this Commission expired on 1 March 1993, and employees previously covered by such awards were transitioned into individual employment agreements containing the terms and conditions of the previous award (unless a new award or collective agreement was made). The *Teachers (Government Teaching Service) Award* accordingly expired in accordance with this legislation on 1 March 1993 and, in addition, the Victorian Government by orders made pursuant to the *Public Sector Management Act 1992* (Vic) terminated key provisions concerning teaching hours and class sizes in the then applicable collective agreement. This resulted in considerable disputation in the government schools sector in Victoria, and caused the AEU to seek and obtain dispute findings in the AIRC.

[541] On 15 December 1993 the AIRC (Riordan DP) determined to make the Interim GS Award, which simply preserved the terms and conditions of employment of Victorian Government school teachers as they were at 20 October 1993.[454] On appeal, an AIRC Full Bench varied the Interim GS Award to clarify its operation by including specific provisions of the former *Teachers (Government Teaching Service) Award* but declined to include provisions concerning teaching hours and class sizes which would maintain the position which had operated under the collective agreement.[455]

[542] In 1995 the AEU applied to vary the Interim GS Award to increase the rates of salary by 4 percent on work value grounds. In a decision issued on 16 October 1995,[456] a Full Bench of the AIRC dealt on an interim basis with this claim. The Full Bench noted that it had earlier, on 1 September 1995, issued a statement in which it had indicated that it would not proceed to determining the matter until the parties had explored the possible negotiation of a certified agreement. In that statement, which is reproduced in the decision, the Full Bench expressed a number of provisional views, including the following (underlining added):

> "(e) the Commission inclines to the view, but has not decided, that the Teachers (Victorian Government Schools - Interim) Award, 1994 is a safety net award made as a first award. The rates were set in 1991 by the Industrial Relations Commission of Victoria (IRCoV) on an "actual rates" basis after a Special Case component of an industrial arbitration process which adopted a national benchmark for teachers' salary in the IRCoV State Teachers Award and the Australian Industrial Relations Commission's ACT Teaching Service Award. The rates set for the VTS *[Victorian Teaching Service]* have not been independently evaluated by the Commission for changes since 1991, other than by the addition of two safety net adjustments. For the

[453] Print L2535

[454] Decision, Print L0454; Award, Print L0553

[455] 25 March 1994, Print L2535

[456] Print M6311

> purpose of an interim application there is no adequate reason for contending the rates should now be adjusted unless it be accepted that there is a compelling special case, or at least a strong case based on some other available provision of the Statement of Principles. The Commission accepts that changes to teaching arrangements and requirements in Victoria since 1992 are among factors which may relevantly be taken into account for purposes of an enterprise agreement, or under the work value changes principle, or as part of a special case."

[543] Having found that there was no reasonable prospect of the parties reaching agreement, the Full Bench proceeded to determine the AEU's claim on an interim basis, and stated the following conclusions:

> "In relation to the AEU claim for a 4% interim increase we are not satisfied we should make an award in the terms sought. It is not necessary or appropriate at this stage of the proceeding to develop our reasons other than to state that we are not persuaded that the movement of existing classification rates by 4% on an interim basis is compatible with a proper final determination of the matter. However, we are satisfied in all the circumstances that a modest interim increase to the current award classification structure should be made. We consider that the minimal outcome of our arbitration of a final award will be an increase in excess of 1.8% to the existing interim salary rates. Accordingly, we will grant an interim increase to award rates of 1.8%.
>
> We are satisfied that on the material presented to this point, an increase of that dimension to award classification salary points is justifiable by reference to considerations of significant net additions to work value. There is no issue about there having been work changes since October 1992; it is the character and impact of the general changes in application to the work value principle which are challenged by the DSE. We consider that there is a strong case that there have been significant net additions to work of a character which demonstrably have warranted consideration as factors consistent with upgrading within the existing attenuated classification structure for teachers under the Award. The DSE has acknowledged that work value changes are among the factors taken into account in the decision to introduce the new PRP classification structure as an overaward payment available on election by individual teachers. We note that the effect of an increase of about that size will be that the rates of employees at award classification level Sub 12 will have been adjusted by about 4% over the period which has elapsed since the first arbitrated safety net adjustment of the rates in the Award in December 1994. The annual salary of such employees will be just below the current salary Level 2-11 of the PRP classification structure. Two $8.00 safety net adjustments are also reflected in but absorbed in the PRP classification structure rates currently on offer."

[544] The "*PRP*" mentioned in the above passage refers to the Professional Recognition Program, a new career and salary structure for teachers unilaterally introduced by the Victorian Government which was voluntarily accessible by teachers on an individual basis.

[545] As part of a separate series of decision, the AIRC established the *Teachers' (Victorian Government Schools) Conditions of Employment Award 1995* (CoE Award), which initially

was made in resolution of a dispute concerning teachers' working hours and workloads.[457] After this award was made, the AEU applied for its variation in respect of salaries and a new career structure for Victorian Government school teachers. In a decision issued on 1 March 1996,[458] a Full Bench of the AIRC decided to vary the CoE Award to provide for a classification and pay structure which, subject to some modifications, replicated the PRP. Of relevance to the current proceedings, the Full Bench said:

> "With respect to the Commission's wage fixing principles, the AEU submitted their application in this matter came within the provisions of the Commission's Statement of Principles at Attachment A to the Third Safety Net Adjustment and Section 150A Review October 1995 Decision (the October 1995 decision) [Print M5600] concerning special cases and perhaps work value changes. However, the State of Victoria and the Minister for Education (Victoria) submitted the first award provisions of those principles are relevant.
>
> We believe the Teachers (Victorian Government Schools - Interim) Award, 1994 [Print L3637 [T0426]], made by a Full Bench on 1 June 1994 comprising Boulton J, Harrison DP and Frawley C, constitutes the first award of this Commission for teachers in government schools in Victoria.
>
> . . . .
>
> The special case provisions of the Statement of Principles attached to the October 1995 decision are contained in paragraph 3.3 of those principles concerning "Making and Varying an Award Above or Below the Safety Net". Paragraph 3.3 of the Statement of Principles provides as follows:
>
> > 'Generally an application to make or vary a minimum or paid rates award for wages and/or conditions above or below the award safety net shall be referred to the President for consideration as a special case. A party seeking a special case must make an application pursuant to s.107 supported by material justifying the matter being dealt with as a special case. It will then be a matter for the President to decide whether it is to be dealt with by a Full Bench. Exceptions to this process are applications which fall within the provisions in the Statement of Principles dealing with a Consent Award or Award Variation to Give Effect to an Enterprise Agreement and with a First Award and Extension to an Existing Award.'
>
> We are satisfied there is a special case in this matter. It arises out of a combination of circumstances but is constituted particularly by the unilateral implementation of the PRP in response to and as an agent of structural change in teaching work since the current award structure and rates were established through the processes of the Industrial Relations Commission of Victoria (IRCoV) in which there was a significant degree of consensus between the industrial parties. That change is linked with other changes to teaching arrangements and requirements in government schools in Victoria, particularly those associated with the Schools of the Future Program. Further, notwithstanding the changes since 1991 the salaries of the teachers who have not joined the PRP have only moved by the two $8 per week arbitrated safety net

[457] 24 February 1995, Print 23; May 1995, Print M2054

[458] Print M9746

adjustments and the 1.8% interim increase awarded by the Commission while PRP teachers, as earlier indicated, have received and are to further receive salary increases substantially in advance of this.

As we said in our Statement of 1 September 1995:

> '(The State of) Victoria has acknowledged, and the Commission notes, that some changes to (teachers') work and work organisation since 1992 are already assimilated and are of a character properly to be taken into account as productivity enhancing measures contributing to the classification changes and salary increases reflected in the PRP classification structure. ...
>
> ... The Commission accepts that changes to teaching arrangements and requirements in Victoria since 1992 are among factors which may relevantly be taken into account for purposes of an enterprise agreement, or under the work value changes principle, or as part of a special case.'"

[546] In deciding to adopt the PRP as the basis for the new classifications and salary structure, the Full Bench said:

> "The AEU put that we should recognise and be guided by the fact that the existing award career structure for teachers in government schools in Victoria was established by the former IRCoV after much careful consideration. Accordingly, rather than adopt the career structure in the PRP, we should integrate the changes to teaching arrangements and requirements in Victorian government schools into the present award career structure. The AEU submitted that approach would give necessary recognition to:
>
> - the collaborative and collegiate character of teaching work;
> - the need to achieve an appropriate balance between the benefits of individual performance review against the importance of orderly progression through a career path;
> - the fact that the existing structure was a response to a need to encourage teachers to pursue a career path in the classroom; and
> - the increased management and administrative functions now being performed in schools.
>
> These factors, they maintained, demanded that the career structure proposed by the AEU be accepted.
>
> While we accept there is some force in those contentions and considerations, we are satisfied that they have not been excessively discounted in the alternative career structure proposed by the State of Victoria and the Minister for Education (Victoria) and reflected in the PRP. Moreover we are of the view that we should attach weight to the de facto replacement of the existing award career structure by the PRP structure for those not insignificant number of teachers who have signed up for it. Unless there is good reason to adopt a different approach, we consider the appropriate course is to heed the employer's priorities in identifying duties and classification requirements related to work performance. Accordingly we have decided that we should adopt

essentially the career structure in the PRP and its associated classification definitions and other provisions, although the award will provide for some changes to that career structure."

[547] Finally, the Full Bench stated the following about the proper characterisation of the CoE Award:

"As earlier indicated, the application in this matter seeks to vary the Teachers' (Victorian Government Schools) Conditions of Employment Award, 1995. The submissions of the State of Victoria and the Minister for Education (Victoria) were directed towards us prescribing minimum rates. In reply the AEU submitted:

'The character of the Award is that it is not a paid rates award ... the union has had on foot an application with respect to the paid rates status of the Award. That application will be progressed at the appropriate time. The union does not concede that the Award, as it is presently framed, is a minimum rates award. It states that the issue of the Award is yet for determination and will be determined in that case...

... the Commission should not, in my submission in this decision, foreclose the question of the status of the Award as it will have to be determined in the application that stands behind the one presently being determined.'

The form of the Teachers' (Victorian Government Schools) Conditions of Employment Award, 1995 is dealt with in the decisions leading to that award. In light of that and the parties' positions, at this stage we indicate only that we are satisfied the wages and conditions we have decided to adopt in this matter are fair and enforceable safety net provisions."

[548] The Full Bench issued a further decision on 5 July 1996[459] to finalise the form of the variation. The CoE Award that was made provided for a three-level classification structure. Levels 2 and 3 were classifications by appointment only. Level 1 was divided into twelve sub-classifications (described as "sub-divisions"), with annual progression subject to one "hard barrier" after five years' service. The entry level for a four-year trained teacher was Sub-division 3. The annual salary rates for Sub-divisions 1, 3 and 12 were $28,030, $30,135 and $43,677 respectively.

[549] In parallel with the process by which Victorian Government school teachers moved from State to federal industrial relations regulation, independent school teachers in Victoria also moved to the federal system in the same time period. This began with the making of the *Independent Education (Victoria) Interim Award 1994* (Interim IE Award) by the AIRC (Riordan DP) on 8 September 1994.[460] No decision accompanied the making of this award. Similar to the Interim GS Award, the award provided for minimum terms and conditions of employment as per the *Independent Schools Award* and the *Independent Schools Superannuation Award* of the former Industrial Relations Commission of Victoria as at 28 February 1993.

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[459] Print N2940

[460] Print L4880

[550] On 20 *December* 1996, the AIRC (Frawley C) made, by consent, the *Victorian Independent Schools - Teachers - Award 1996*[461] (VIST Award). No decision accompanied the making of this award either. The 1996 VIST Award provided for a 12-level classification structure based on annual progression, with a four-year trained teacher starting at Level 3. The annual salary rates at Levels 1, 3 and 12 on and from 1 February 1997 were $28,400, $30,600 and $44,100 respectively. Thus, the consent VIST Award, presumably by design, achieved pay parity with the CoE Award.

[551] Thereafter, the CoE Award and the VIST Award were varied by the AIRC to provide for the standard wage adjustments allowed by annual safety net review decisions.

[552] The next development of importance was the making of the *Victorian Independent Schools - Early Childhood Teachers - Award 2004* (ECT Award). The AIRC (Watson SDP) made this award, on the application of the IEU and by consent, on 18 June 2004.[462] The award applied to early childhood teachers employed by respondent independent schools in Victoria, and was made pursuant to the "first award" principle of the then-applicable wage-fixing principles.

[553] The classification structure provided for in clause 13.1.1 of the ECT Award contained nine pay levels, based on annual progression. A document provided by the IEU at the hearing before Watson SDP compared the rates of pay for Levels 1 and 9 of the proposed ECT Award with the equivalent classifications in the VIST Award (Levels 3 and 12) and with the Metal Industry classification structure. The annual salary rates for Levels 1 and 9 were $36,838 and $50,301 respectively. The annual salary rates for the VIST Award for Levels 3 and 12 were, at that time, $36,757 and $50,049 respectively, thus making clear the alignment in rates. However, the classifications in the Metal Industry classification structure which the document treated as being equivalent, namely C1(a) and C1(b), had annual rates of $46,388 and $52,916 respectively. The document in fact showed that the Level 1 classification in the proposed ECT Award was aligned in terms of salary with the C4 classification in the Metal Industry classification structure.

[554] Senior Deputy President Watson said in relation to the making of the new award (footnotes omitted):

> "[6] I am satisfied that the minimum wages prescribed in Part 4 of the proposed award are properly fixed minimum wages having regard to relevant minimum wage rates in other awards. The rates are based on and reflect those fixed in the *Victorian Independent Schools - Teachers - Award 1998* in respect of similarly qualified employees performing teaching duties in the schools. There is nothing to suggest that the early childhood context would warrant different rates. Accordingly, the wage relativities are properly based on skill, responsibility and the conditions under which the work is performed. Further, the minimum rates proposed fall within the range of rates for classifications for similarly qualified employees in the *Metal, Engineering and Associated Industries Award, 1998 Part I* [AW789529].

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[461] Print N6751

[462] PR948154

> [7] I am also satisfied that the incremental progression provided for in the award is work value based in the sense required by the *Paid Rates Review* decision, with progression dependent upon the satisfaction of criteria reflective of changed work value. The relevant clause is in the same terms as in the *Victorian Independent Schools - Teachers - Award 1998*, a simplified award of the Commission, and other teaching awards of the Commission."

[555] The conclusion in the extract above that the ECT Award minimum rates "fall within the range of rates for classifications for similarly qualified employees in the *Metal, Engineering and Associated Industries Award, 1998*" does not appear to us to be correct, and indeed the document provided by the IEU at the hearing demonstrated that this proposition was not correct. It cannot be said therefore that the ECT Award rates were properly fixed as minimum rates of pay in accordance with the principles stated in the *ACT Child Care decision*.

[556] When the AIRC conducted the award modernisation process mandated by Part 10A of the *Workplace Relations Act 1996*, the non-tertiary educational services sector was included in Stage 3 of the process. The AIRC published an exposure draft for the EST Award on 22 May 2009.[463] The exposure draft contained the same 12 level classification structure, based on annual progression, as was then contained in the VIST Award. The salary rates proposed were those contained in the VIST Award as produced after the last safety net adjustment by the AIRC and as at 20 August 2005 and then increased in accordance with the decisions of the Australian Fair Pay Commission (AFPC) made pursuant to the WorkChoices manifestation of the *Workplace Relations Act 1996.* The proposed award only covered early childhood education insofar as it was provided by a school.

[557] In submissions in response to the exposure draft, the proposed rates of pay proved not to be controversial, but a number of submissions sought the inclusion of teachers employed in non-school early childhood education. The EST Award was made by the AIRC on 4 September 2009,[464] and retained the same coverage and salary rates as the exposure draft. However, on 25 September 2009 the AIRC published draft amendments to the EST Award which were primarily directed at extending the award's coverage to teachers in the early childhood sector. On 4 December 2009 the AIRC varied the EST Award in accordance with these proposed amendments.[465]

[558] The following conclusions may be drawn from the above industrial history:

(1) The salary rates in the EST Award rate are not the product of any comprehensive assessment of the work value of school teachers or teachers in the early childhood education sector that has ever been carried out.

(2) The VIST Award, from which the EST Award salary rates were derived, was established as a consent award with the inferred objective of achieving pay parity with Victorian Government school teachers covered by the CoE Award.

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[463] Exposure Draft, Educational Services (Teachers) Award 2010, 22 May 2009

[464] [2009] AIRCFB 826 at [7], [56]-[58]

[465] [2009] AIRCFB 945 at [40]

(3) The salary rates in the CoE Award were drawn from the actual salary rates payable in Victoria as at 1993, as adjusted to account for developments specific to Victorian Government school teachers in the period 1993 to 1996. This is the only point in the history where wage increases were awarded outside of national wage adjustment decisions. They were not based on any comprehensive assessment of the work of Victorian Government school teachers.

(4) The awards from which the EST Award salary rates were derived post-dated the structural efficiency process conducted by the AIRC in the 1988-1991 period, and were thus not subject to the requirements of that process. Accordingly, they cannot be taken to incorporate all past work value considerations, as was required in respect of awards that were the subject of the structural efficiency process.[466]

(5) The award modernisation process conducted in 2009 which led to the establishment of the EST Award adopted the rates in the VIST Award and did not involve any consideration as to whether they fairly reflected the work value of teachers to be covered by the EST Award.

[559] As earlier stated, the IEU advanced the work value change aspect of its case on the basis of a datum point in 1996, when the VIST Award was made. The award history set out above supports a datum point of at least 1996 and, accordingly, the IEU case can be assessed by reference to the basis upon which it was advanced. However, the better view is, we consider, that no clear datum point can be identified by reason of the fact that the work value of school teachers and early childhood teachers has never been the subject of a proper work value assessment in the federal industrial relations system. That itself has significance for the question of whether an adjustment to the rates of pay in the EST Award is justified for work value reasons, as discussed later.

C.9.2 Whether EST Award rates are properly fixed minimum rates

[560] The history of wage fixation for teachers in the federal industrial relations system also gives rise to another relevant consideration: whether the wage rates in the EST Award have ever been properly fixed as minimum rates. In the *Pharmacy Award decision*,[467] the Full Bench described in detail the development by the AIRC of an approach whereby the proper fixation of award minimum rates of pay required an alignment between key classifications in the relevant award and classifications with equivalent qualification and skill levels in the classification structure in what was originally the *Metal Industry Award 1984 – Part I* and subsequently became the *Metal, Engineering and Associated Industries Award, 1998* (Metal Industry classification structure). We endorse and adopt that analysis without repeating it. It is sufficient for present purposes to refer to the following passage from the *ACT Child Care decision*:

[466] See *National Wage Case Decision*, 7 August 1989, Print H9100, 30 IR 81 at 99

[467] [2018] FWCFB 7621, 284 IR 121 at [150]-[161]

> "[155] In the context of the matter before us, the principles established in the *Paid Rates Review decision* mandate a three step process for the determination of properly fixed minimum rates:
>
> > 1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA process with particular reference to the current rates for the relevant classifications in the *Metal Industry Award*. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.
> >
> > 2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.
> >
> > 3. If the existing rates are too low they should be increased so that they are properly fixed minima."

[561] The Metal Industry classification structure, as originally formulated, provided for 14 classifications with different qualifications and skill levels. Each classification was assigned a wage relativity, expressed in percentage terms, with the C10 tradesperson classification. However that structure in its current form has been altered in two ways. First, because of flat dollar increases awarded in safety net reviews by the AIRC, in wage decisions of the AFPC and in the initial annual wage reviews of this Commission, the relativities between classifications became compressed. Second, although the full Metal Industry classification structure was incorporated by the AIRC into the modern Manufacturing Award when it was made on 19 December 2008 in the course of the award modernisation process,[468] the highest Level C1 classification was deleted on 30 December 2009.[469] This was done on the basis that degree-qualified professional engineers and scientists previously covered by the classification would now be covered by the PE Award. However, the salary rates provided for in the PE Award were not consistent with the relativities originally provided for in the Metal Industry Award classification, and were generally lower than the Level C1 rates which originally appeared in the Manufacturing Award and were themselves the result of the compression of relativities.

[562] It is clear from the industrial history earlier described that the minimum rates in the EST Award are not the product of any proper fixation of minimum rates in accordance with the principles stated in the *ACT Child Care decision*. The Interim GS Award and the and the Interim IE Award were first awards based on pre-existing actual rates, and all subsequent adjustments were made by reference to those first award rates without any proper minimum rate assessment process. The following table sets out the relativities between the current pay rates in the Metal Industry classification as provided for in the *Manufacturing and Associated Industries and Occupations Award 2020*, with the Level C1 rates in italics extrapolated from those appearing in the award as originally made on 19 December 2008 as adjusted consistent with Annual Wage Review increases since then:

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[468] [2008] AIRCFB 1000, PR985120

[469] [2009] AIRCFB 996, PR992240

Manufacturing Award 2020 classification	Qualification	Original relativity to C10 (%)	Current wage rate ($)	Current relativity to C10 (%)	EST Award Classification – preschools and schools	Current weekly salary rate- preschools and schools ($)[470]	EST Award classification – long day care ($)	Current weekly salary rate -long day care (+ 4%) ($)
Level C1(b)	Degree	210	*1462.80*	*167*				
							Level 12	1445.62
					Level 12	1390.02	Level 11	1406.13
					Level 11	1352.05	Level 10	1366.57
					Level 10	1314.01	Level 9	1327.05
Level C1(a)	Degree	180	*1297.20*	*148*				
					Level 9	1276.01	Level 8	1287.48
					Level 8	1237.96	Level 7	1247.98
					Level 7	1199.98	Level 6	1211.19
Level C2(b)	Advanced Diploma or equivalent + additional training	160	1186.80	135				
					Level 6	1164.60	Level 5	1174.37
Level C2(a)	Advanced Diploma or equivalent + additional training	150	1137.20	130				
					Level 5	1129.21	Level 4	1134.83
Level C3	Advanced Diploma or equivalent	145	1109.50	126				
					Level 4	1091.18	Level 3	1095.33
							Level 2	1066.31
Level C4	80% towards an Advanced Diploma or equivalent	135	1054.20	120	Level 3	1053.20		
							Level 1	1044.78
Level C5	Diploma or equivalent	130	1026.70	117	Level 2	1025.30		
Level C6	C10 (Trade certificate III) + 80% towards Diploma or equivalent OR 50% towards Advanced Diploma or equivalent	125	1006.10	115	Level 1	1004.60		
Level C7	Certificate IV OR C10 (Trade certificate III) + 60% towards Diploma/45%	115	957.60	109				

[470] Current EST Award salary rate in clause 17.1 divided by 52.18 in accordance with clause 17.3

	towards Advanced Diploma or equivalent							
Level C8	C10 (Trade certificate III) + 40% towards Diploma/Advanced Diploma or equivalent	110	932.60	106				
Level C9	C10 (Trade certificate III) + 20% towards Diploma or equivalent	105	905.10	103				
Level C10	Recognised Trade Certificate or Certificate III or equivalent	100	877.60	100				

[563] The above table shows that at no point prior to seven years' service (that is, at Level 10) for a preschool teacher or six years' service in the case of a teacher at a long day care centre (Level 9) do the minimum wages for a 4 four-year trained teacher under the EST Award reach the C1(a) or C1(b) relativities originally intended for a worker requiring an undergraduate degree in the Metal Industry classification structure. A four-year trained teacher in a preschool or school receives a starting salary under the EST Award which is equivalent to that for a C4 worker in the Metal Industry classification structure - that is, someone who is diploma-qualified and working towards an advanced diploma - with an equivalent teacher in a long day care centre receiving slightly more than this. These are consequences of the fact that the EST Award rates are not properly fixed minimum rates.

C.9.3 Work value decisions in New South Wales

[564] As earlier discussed, the IEU places reliance on a number of pre-FW Act decisions of the NSW IRC concerning the work value of teachers employed (or then employed) under State awards. We consider these decisions to be of significance to our consideration below concerning whether there have been changes in the work value of teachers covered by the EST Award, and they require some analysis.

[565] Three of these decisions relate to early childhood teachers. The first of these decisions was that of the Commission (Schmidt J) in *Teachers (Non-Government Pre Schools) (State) Award*[471] issued on 14 December 2001 (2001 decision). The decision concerned claims by the NSW IEU for a new minimum rates award and increases in pay for teachers employed in preschools and long-day care centres. The claims, and their background, were described by Schmidt J in the following terms:

(b) [471] [2001] NSWIRComm 335, 120 IR 3

> "[3] The claims were made in relation to teachers employed in certain preschools and long day care centres. The Union estimated that some 600 teachers were employed in preschools and 2000 in the long day care centres covered by those awards. Some of those were employed in privately owned long day care centres operated for profit. Others were employed in not for profit centres.
>
> [4] The claim for increases in rates seeks to establish rates similar to those provided by awards applying to school teachers in Government and some Catholic schools, with rates for teachers employed in long day care centres, some 4% higher. It is relevant to an understanding of the parties' respective positions as to this aspect of the claim to deal at the outset with the evidence as to the award history. I turn to that matter.
>
> [5] The need to consider the claims here advanced in the context of the relevant award history is an obvious one. Awards do not exist in a vacuum, but are the product of agreements and awards made in the past…
>
> [6] Here, the current awards were made by consent in 1999, with a one year life. A 5% wage increase was then agreed, phased in over the course of the year, together with various alterations in conditions. The agreement was reached on the basis of an acceptance by the employers that the Union remained free to pursue these applications. That agreement reflected a significant departure from a position which had been first agreed in 1970, namely that these teachers should be paid the same as those employed in schools. It was also a departure from the 1990 agreement, that teachers employed in long day care centres should receive 4% more. When the first award for these teachers was made by the Commission, by consent, in 1970, rates for both preschool teachers and those employed in long day care centres were fixed at 80% of those of school teachers, with parity phased in over the period until 1974. That parity was reinstated from time to time over the following years, until 1990, where rates 4% higher than those paid to salaried teachers was agreed for teachers in long day care.
>
> [7] It was not until 1999, when the parties could not agree to a reinstatement of that position, that these proceedings ensued."

[566] Justice Schmidt noted that this was the first time that the NSW IRC had been called upon to arbitrate the rates of pay for early childhood education teachers, and the first time that the work value of such teachers had been considered since 1990.[472] The decision then summarised the position of the employer interests in the case as follows:

> "[20] While the employers opposed the increases in rates sought in the applications, they made no application themselves to vary the awards in question, seemingly content that they continue to operate undisturbed. Despite this, and in order to support its opposition to the claims advanced, evidence was called by the ACCC from witnesses who called into question the appropriateness and relevance of the existing award arrangements.

[472] Ibid at [15]

> [21] Mrs Bardetta, for example, gave evidence that teachers employed in long day care centres were overpaid; that the existing award structure, which like other awards which regulate the employment of teachers in both the Government and non-Government sectors and in both schools and other early childhood centres, requires the payment of increasing salary to teachers holding higher educational qualifications and with greater experience, was inappropriate; that neither such qualifications nor experience warranted additional payment; and that the value of the work that teachers performed in long day care centres was no higher than the value of the work which lesser qualified child care workers employed under the *Miscellaneous Workers' Kindergartens and Child Care Centres (State) Award* performed, they being entitled to significantly lower rates than those paid to teachers."

[567] The position described above was rejected outright,[473] and Schmidt J then proceeded to consider the respective evidentiary cases of the parties. The competing positions of the parties were summarised as follows:

> "[307] The evidence and cases advanced by the parties were difficult to reconcile from a number of perspectives. The Union's case was that teachers' work was seriously undervalued, the employers that they were adequately paid - perhaps overpaid. The Union sought large increases in rates, to reinstate teachers to their former wage parity with teachers employed in schools, but the employers resisted any increases at all being granted, leading to an increasing wage disparity, shortly to be in the order of 26% between the two groups. The Union argued that the undoubted changes, which have occurred in these industries, have impacted upon teachers in a variety of ways, warranting the awarding of higher rates of pay. The employers' position, at some odds with the views of some witnesses called, was that while changes had occurred, they had not affected the value of the work which teachers had performed and thus no increases were warranted, for either teachers or directors.
>
> [308] There was common concern amongst the parties about the difficulty of recruiting teachers in these industries. The Union argued that increasing rates would stop the move of teachers to the school sector, they being attracted to the better pay and conditions which their training permitted them there to earn. The employers argued that such increases would price teachers out of this market and that the answer was to refuse any increases and for Government to amend the regulatory regime which requires the employment of teachers, so that fewer would be required to be employed.
>
> [309] The Union argued that the skills which teachers possessed were increasingly being called upon by their employers, who were faced with more stringent regulation by Government to ensure that better quality education was being delivered to preschool aged children attending these centres. These requirements were reflecting ongoing international research into the importance of high quality education at these early ages, particularly a growing understanding of the way in which the human brain develops. The employers argued that child care centres in this State were at the vanguard of these developments, delivering high quality care to children, but that in reality, the work of teachers added but little to this picture and that no greater calls were now being made upon teachers' skills to ensure that Governmental requirements

[473] Ibid at [22]-[23]

were being met; that centres were acting to reduce their licensed numbers in order to remove the obligation to employ any teachers at all and that teachers' work added nothing to the quality of care being provided at their centres, compared to what was being delivered by lesser qualified child care workers.

[310] One immediate observation which must be made about the parties' starkly competing cases, is that the Union's case sought to emphasise the work performed by teachers in delivering the education which children received in the early childhood sector, the employers' case concentrated upon quality care. The two are obviously interlinked, but not interchangeable aspects of the services which are provided by the centres which employ teachers. On the evidence, teachers, like child care workers, have work to perform in both areas."

[568] The decision then referred to the position advanced by some but not all employer child care witnesses that early childhood teachers were overpaid compared to other child care workers:

"[311] …The ACCC, through witnesses such as Mrs Bardetta and Mrs Skoulogenis, sought to advance a case that teachers were overpaid by way of comparison to child care workers, who were employed to do the same work and were in fact more desirable employees. Witnesses called by the EF, such as Ms Kynaston and Mr Alchin, did not support those views. Union witnesses also disagreed. Apart from Mrs Bardetta and Mrs Skoulogenis expressing such views in the most vehement terms, there was in reality little attempt made to establish a basis for them. There was, for example, no comparison of what the training of the two groups actually involved and no examination of the work actually performed, other than to observe that these employees worked together with the same children in delivering their care and education. That approach was entirely too superficial a basis to make out the startling views here advanced, especially given other evidence that, for example, while some teachers worked with child care workers as members of a team, others were required to supervise their work and others to train them. The overwhelming evidence was that the quality of understanding and knowledge brought to the work by the two groups differed.

. . . .

[313] I was uncomfortably left with the impression that the views advanced, especially in the evidence called by the ACCC, in relation to comparisons drawn with child care workers, had been overstated in a rather unfortunate way. The evidence does not permit a conclusion to be drawn that teachers are presently overpaid or that these comparisons with the qualifications and work of child care workers was valid."

[569] Justice Schmidt then stated her conclusion that the evidence demonstrated that the work of early childhood teachers was significantly undervalued:

"[335] It is convenient to state firmly at this point that the evidence led demonstrated change in work of a kind sufficient to satisfy the requirements of the Work Value Principle. It also demonstrated that the work was significantly undervalued.

[336] The time has long passed since teachers employed in the early childhood services sector were regarded as providing merely a child minding or child care service, rather than an educational one, given the ages of the children attending the

centres at which they are employed and that they are not employed in schools. Indeed, such views are inconsistent with the Regulations which govern the operation of centres in this sector. They are views which in reality have not had currency since the first consent award was made in 1970 for these teachers, when they were immediately brought up to 80% of the rates paid to teachers in schools and parity was phased in over the following 4 years.

[337] Some 30 years later, the position today is that 3 and 4 year trained teachers employed in this sector have the same training as those employed in primary schools, employed to teach children of up to 8 years of age. Others have specialised in early childhood education. On the evidence children of up to 6 years of age attend these preschools and long day care centres and those as young as 4 years of age attend schools, a considerable period of overlap in age groups. There was evidence of considerable movement of staff between employment in these preschools and long day care centres and schools. It is undoubted that the skills with which such teachers are equipped by their training, is available to be called upon, when employed in either sector and that experience in one sector does not exclude them from employment in the other.

[338] As I have already noted, given the recognition which these awards and their predecessors have long given in the incremental salary scales to the holding of various university degrees and years of experience, I doubt the correctness of the view expressed by Mrs Bardetta, that such education does not appropriately prepare such teachers for employment in these early childhood services or that experience does not add to the value of their work. The overwhelming evidence was to the contrary."

[570] The specific findings as to changes in the work of early childhood teachers since 1990 made by Schmidt J identified the following matters:

- changes to the way children in preschools and long day care centres are taught, having regard to research into how children learn and how the brain develops;[474]

- changes to the regulatory environment, including in relation to the licensing scheme which required demonstration of best practice though an onerous self-assessment process and in relation to the Commonwealth Quality Assurance Scheme for pre-schools, and the introduction of child protection legislation and the associated introduction of new policies and work requirements;[475]

- an increased emphasis on school transition, with additional reporting requirements;[476]

- increases in the number of children with special needs, as a result of a removal of the caps on numbers of such children and the integration of children with disabilities;[477]

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[474] Ibid at [368]

[475] Ibid at [370]-[374]

[476] Ibid at [376]

[477] Ibid at [376]

- increases in the number of children needing to be taught, with consequent increases in the number of children who had to be observed and for whom individual programs had to be prepared, implemented and reported to parents;[478] and

- involvement in writing or giving feedback in relation to new policies, implementing such policies and communicating them to parents.[479]

[571] Reference was made to the difficulties experienced by employers in recruiting and retaining staff. In relation to this issue, Schmidt J said:

> "[391] There was also evidence led in relation to difficulty in recruitment of staff by the preschools and long day care centres covered by these two awards. Some witnesses gave evidence about the desirability of salaries being increased, for attraction and retention of staff. Others doubted whether this would have an impact. Wage increases are undoubtedly regarded as a useful device and are often used by employers for this purpose. Consistently with the requirements of the Act, rates in these awards are fixed as minima and there is thus nothing to preclude employers paying higher than award rates of pay, if they chose. There was indeed evidence that higher rates were being paid by some employers.
>
> [392] It might be the case that such agreements were directed in part to retention or attraction of staff. That is not usually an award provision, although there are exceptions. Awards aiming to provide employees with appropriate career paths, is in part to meet concerns such as these. Nevertheless, the Commission's wage fixing principles do not provide for attraction or retention payments being awarded. (See the Full Bench in *Local Courts Anomaly Case* at p643). To the contrary, they are concerned to ensure that award rates of pay have regard to matters such as skill, responsibility and the conditions under which work is performed. As the various Full Bench decisions earlier referred to have observed, attraction and retention can be but a by-product of the proper fixation of rates of pay by the Commission in proceedings such as these."

[572] In terms of the effect that any wage increases awarded might have on the viability of employers' businesses and the employment of employees, Schmidt J said:

> "[404] Labour costs account for a large part of operating costs of these services. Wage increases, whether agreed or awarded by the Commission, are undoubtedly likely to be reflected in fee increases for parents, unless increased funding flows from Governments, other operating costs can be reduced, which seems unlikely on the evidence, or in the case of privately owned centres, proprietors are prepared to accept smaller profit levels.
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> [405] On the evidence, there was no reason to expect that funding increases will emerge, although it seems that there are current discussions underway about the freeze

[478] Ibid at [377]

[479] Ibid at [381]

> on State funding of preschools, which has been in place since 1990. I have been concerned to take these difficulties into proper account in the award made.
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> [406] I also have taken the view that the fixing of fair and reasonable conditions of employment should not result in the employees the subject of that consideration being put out of work. The converse is also true. The employees' rates of pay should not be fixed at such a level that they are required to support what, in reality, would be an unviable business, if fair rates had to be paid for the work in question. Nor should rates be fixed on a basis, which, in reality, had the effect that teachers were required to subsidise the fees which parents should fairly be paying for the service which they are availing themselves of for their children.
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> [407] It follows that there is good reason to adopt the approach advocated by the Union, in its application for the increases awarded, to be phased in. The Union sought initially to have a significant amount of retrospectivity awarded, but accepted in its closing submissions that a proper basis had not been established for a departure from the normal approach, that increases should operate prospectively."

[573] The remedy ultimately granted was for an initial pay increase of 5%, followed by five increases of 3% phased in at six monthly intervals.[480] In relation to the work of directors, Schmidt J found that this had been affected by the changes identified to an even greater degree than teachers, and awarded a total 30% increase to the directors' allowance, to be phased in over six stages, each six months apart.[481]

[574] A Full Bench of the NSW IRC subsequently refused leave to appeal the 2001 decision.[482]

[575] The rates of pay for early childhood teachers were again the subject of proceedings before the NSW IRC (Wright J, President) in 2005-2006. The matter was initiated by an application by the IEU for a new award containing higher rates of pay, but was ultimately resolved by agreement. The decision giving effect to the agreement[483] (2006 decision) relevantly stated:

> "[8] The Commission was advised of the following details of the consent award proposed by the parties: the first aspect was that there was a 13.5 per cent increase in salaries, payable in three stages. The first increase of 4.5 per cent is operative from the first full pay period commencing on or after today; the second increase of 4.5 per cent will be operative 12 months hence, and the third increase of 4.5 per cent will be operative 12 months thereafter. In other words, the last two pay increases will be operative from the first full pay period to commence on or after 23 January 2007 and 23 January 2008 respectively.
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[480] Ibid at [411]

[481] Ibid at [419]

[482] [2002] NSWIRComm 113

[483] [2006] NSWIRComm 4

> [11] The parties are to be congratulated on having reached agreement in these matters. The Commission finds that the proposed awards are consistent with the provisions of the Commission's wage fixing principles and the provisions of the *Industrial Relations Act* 1996.
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> [12] Accordingly, the Commission makes a new Teachers (Non-government Early Childhood Service Centres other than Pre Schools) (State) Award 2006 in terms of Exhibit 6 in these proceedings, and also makes a new Teachers (Non-government Pre Schools) (State) Award 2006 in terms of Exhibit 7. Both awards shall commence from the first pay period to commence on or after today and shall remain in force until 31 December 2008. It is to be noted that each award replaces each respective predecessor award."

[576] The third decision concerned further applications by the NSW IEU for new awards to cover teachers in non-government pre-schools and long day care and to provide for substantial wage increases. The matter was heard by a Full Bench of the NSW IRC and its decision was delivered on 24 November 2009[484] (2009 decision). The NSW IEU's case, which was upheld by the Full Bench, had two aspects. First, the NSW IEU contended, wage increases should be granted on special case grounds because of the shortage of early childhood teachers. In respect of this, the Full Bench said:

> "[76] We find that a special case has been made out by the applicants for increases to rates of pay under the two Awards. There is a critical shortage of early childhood teachers that is almost certainly going to get worse as the Commonwealth's policy agenda on early childhood is implemented. As we have noted, without adequate intervention, a shortfall of at least 7000 early childhood education and care workers by 2013 is estimated.
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> [77] We are satisfied that the very large gap of up to 27 per cent between the pay of early childhood teachers in the non-government sector compared to the government sector, is a significant contributing factor to the teacher shortage. The gap is not justifiable on any test, especially when what is at stake in early childhood education. Ms Press noted in her evidence that the link between poor wages and conditions and the shortage had been identified in numerous reports over recent times. Her unchallenged evidence concluded:
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> > Unless teachers in early childhood programmes achieve wages parity the early childhood sector will continue to be beset with teacher shortages. These shortages seriously erode the quality of children's care and education and undermine polices designed to improve children's educational outcomes.
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> [78] It was submitted for the respondents that the shortage of teachers could not be resolved by industrial means and that a political solution was required. A political solution is not likely to repair the pay gap. Significant extra funds have been made available by governments in relation to early childhood services. We deal with the detail of that funding later in this decision, but part of it is to enable centres to employ

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(c)[484] *Teachers (Non Government Early Childhood Service Centres other than Preschools) (State) Award 2006* [2009] NSWIRComm 198, 191 IR 14

more teachers. The Commission may facilitate the application of that funding to employ more teachers by increasing current award rates of pay and, in doing so, assist in ameliorating a major disincentive to teachers being attracted into and retained in the early childhood sector.

[79] In our opinion, for the reasons we have explained the public interest would be best served by increasing rates of pay in the subject awards…"

[577] The second aspect of the NSW IEU's case was that wage increases were justified on the basis of changes in work value. The Full Bench accepted that, from a datum point of January 2006 (when the 2006 decision was issued), there had been changes in the work of early childhood teachers which had manifested itself in four areas: the teaching regime; administrative responsibilities; client requirements; and regulatory requirements (including the QIAS).[485] This was found to encompass:

- greater complexity of programming and reporting particularly on child development over recent years;[486]
- parents having increasing expectations for structured education and detailed recording and reporting of their child's progress;[487]
- an increase in the proportion of children with special needs, intellectual or physical, which had created a more complex environment in catering to a diverse range of special needs children;[488]
- teachers are now required to develop a greater range of policies and review them more regularly;[489] and
- in relation to regulatory requirements, there were more extensive requirements in relation to accident recording in services, stricter requirements in relation to supervision of children while toileting, changed procedures in how animals are handled within the centre, and new standards in relation to food hygiene.[490]

[578] The Full Bench said in relation to the identified work value changes:

"[179] When regard is had to the combination of all of the work value factors that have been addressed in the IEU's evidence, it is overwhelmingly in support of an increase having occurred in the work value of preschool teachers. However, having regard to the employers' evidence, we accept that whilst changes had occurred during the relevant period, there were elements of the change that did not constitute a significant net addition to work requirements, that in so far as responsibility was concerned a significant proportion of this had to be borne by the licensee or owner and not teachers

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[485] Ibid at [172]

[486] Ibid at [174]-[175]

[487] Ibid at [174]-[175]

[488] Ibid at [176]

[489] Ibid at [177]

[490] Ibid at [178]

or directors, and that some of the changes relied upon by the IEU were more in the nature of evolutionary change to work that had always been undertaken by teachers and directors. These are considerations to be taken into account in assessing the size of any wage increases justifiable on work value grounds."

[579] The Full Bench also found that there had been an increase in the work value of directors and accredited supervisors due to:

- increased workload as a result of the increasing turnover of Management Committee members;
- the involvement of Committee members in running centres on a day-to-day basis had diminished and contact with those members was now often after hours and in evenings;
- increased involvement in family law disputes including custody disputes, discussions with the solicitors of parents, the role of family counselling and support for single mothers;
- significant government funding changes requiring community consultation, meetings with the department, transference of information to Management Committee and the use of on-line system for updating information;
- the new on-line system for funding;
- increased departmental focus on regulatory compliance, including more frequent compliance visits;
- expectations from parents to be provided detailed reports in relation their children's progress;
- dealing with policy requirements for the Children's Services Regulation;
- the requirement to manage the process of indicators required for accreditation;
- the requirement for directors with a dual role as teacher to work with the committee as pedagogical leader; and
- an increase in responsibility of authorised supervisors.[491]

[580] In determining the pay increases it would award, the Commission took into account as "a consideration of the utmost significance in these present proceedings and which was not in 2001 is that both the Commonwealth and State Governments have increased funding of early childhood services very substantially over recent years",[492] and set out the details of this.[493] In

[491] Ibid at [201]

[492] Ibid at [230]

[493] Ibid at [231] – [235]

relation to the comparative value of the work of early childhood teachers and school teachers, the Full Bench said:

> "[260] Similarly, on this occasion we cannot ignore the rates paid to the counterparts of preschool teachers employed in Catholic and Government schools. As we earlier noted, even if we were to award the full extent of the increases sought, that would still leave early childhood teachers approximately six per cent behind the teachers as of 1 January 2011.
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> [261] There was insufficient comparative analysis to allow us to conclude that the work value of preschool teachers is precisely the same as their counterparts in Government schools: it may be less, it may be more, it may be the same. Whatever may be the case in that respect, it is patently apparent that it is not a fair and reasonable state of affairs, nor in the public interest, to have preschool teachers being paid 21 to 27 per cent less in salary. This is especially so in circumstances where there is a critical shortage of university trained preschool teachers at a time when a concerted effort is being made by governments to provide universal access to early childhood education. The evidence strongly suggests that unless salary levels are increased teachers will not be attracted to work in preschools and attempts to achieve an exponential improvement in childhood education standards will fail."

[581] The Full Bench ultimately concluded that it would award three wage increases of 4 percent each, operative respectively from the date of the decision, 1 September 2010 and 1 September 2011.[494] It also increased directors' and supervisors' allowances by 12 percent, in three instalments.[495]

[582] It is useful to compare the salaries outcome of the NSW IRC's comprehensive work value assessments of the work of early childhood teachers in the 2001, 2006 and 2009 decisions compared to salaries in the federal jurisdiction, in which as earlier explained there has never been a proper work value assessment. At the time the EST Award took effect on 1 January 2010, the rates for a 4-year trained teacher under that award working in early childhood education compared to the two awards made by the NSW IRC arising from the 2009 decision were as follows:

EST Award classification	**Salary – Teachers in schools and preschools ($)**	**Salary – Teachers in schools and preschools ($)**	**Teachers (Non-Government Pre-Schools) (State) Award 2009**	**Salary ($)**	**Teachers (Non-Government Early Childhood Service Centres Other Than Pre-Schools) (State) Award 2009**	**Salary ($)**
Level 3	40,201	41,809	Step 1	43,946	Step 1	45,704
Level 4	41,701	43,369	Step 2	46,671	Step 2	48,536
Level 5	43,201	44,929	Step 3	49,294	Step 3	51,265
Level 6	44,597	46,381	Step 4	52,205	Step 4	54,292
Level 7	45,993	47,833	Step 5	54,909	Step 5	57,106

[494] Ibid at [266]

[495] Ibid at [268]

Level 8	47,493	49,393	Step 6	57,210	Step 6	59,498
Level 9	48,993	50,953	Step 7	59,494	Step 7	61,877
Level 10	50,493	52,513	Step 8	62,074	Step 8	64,557
Level 11	51,993	54,073	Step 9	64,558	Step 9	67,139
Level 12	53,493	55,633				

[583] The differential in the above table between the NSW IRC award rates for early childhood teachers and the EST Award rates upon establishment illustrate the difference, we consider, between award minimum rates which have been fixed on the basis of a proper work value assessment and those which have not. It may be noted from the above table that there remained a 4 percent pay differential in the two NSW IRC awards between teachers in long day care centres and teachers in pre-schools. This reflected the fact, as explained by Schmidt J in the 2001 decision, that the former work additional weeks in the year and thus had more face-to-face teaching hours.[496] This is consistent with the wage differential in the EST Award between the same categories of teachers.

[584] The two NSW IRC awards had limited application after incorporated employers were moved into the federal system when the main amendments to the *Workplace Relations Act 1996* effected by the *Workplace Relations Amendment (Work Choices) Act 2005* commenced on 27 March 2006. The terms of the two awards, as they were at that date, became notional federal instruments and were subject to wage adjustments made by the AFPC. The two awards ceased to have any practical application on 1 January 2010 when the *Industrial Relations (Commonwealth Powers) Act 2009* (NSW), under which the State of New South Wales transferred its industrial relations powers in the private sector to the Commonwealth, came into effect. The transitional provisions in Schedule A of the EST Award, in the form it was when it took effect on 1 January 2010, phased down minimum wages for employees in five stages through to 1 July 2014. Thus, NSW early childhood teachers lost the benefit of award minimum wages which had been the subject of a proper work value assessment.

[585] One further NSW decision requires consideration. In the 2004 *NSW School Teachers decision* a Full Bench of the NSW IRC undertook, among other things, a comprehensive work value assessment of the work of government school teachers. The Full Bench concluded, in summary, that the work of school teachers had been the subject of profound change since the datum point of 1991 in the following respects:

- "dramatic" changes in curriculum content, structure and theory,[497] encompassing a requirement for teachers to use and teach information technology;[498]
- the introduction of outcomes-based education, representing a shift in both the philosophy and provision of education services;[499]
- an increase in the pace of curriculum change;[500]

[496] [2001] NSWIRComm 335 at [352]

[497] [2004] NSWIRComm 114, 133 IR 254 at [145]

[498] Ibid at [241]

[499] Ibid at [145]

[500] Ibid at [148]

- the implementation of standards-referenced or outcomes-based assessment practices, requiring the exercise of professional judgement in a far more complex and refined manner;[501]

- the integration of cross-curriculum areas into teaching, including the State Literacy and Numeracy Plan, with changes in the content, philosophy and focus of the curriculum requiring teachers to develop new ways of teaching to accommodate these changes;[502]

- changes in the nature of training available to students under the VET program, and the manner in which the training is provided (albeit affecting a relatively low proportion of teachers);[503]

- qualitative change in the work performed by teachers to manage and discipline deteriorating student behaviour;[504]

- changes in the expectations of students, parents and the community, requiring greater responsibility, transparency and accountability on the part of teachers as to education outcomes and the management of student behaviour;[505]

- significant change in the provision of education services to students with disabilities, relating to both the manner in which those services are provided and the administration of funding and support for the provision of those services, and requiring teachers to learn new teaching techniques and to cope with an increasing range of educational needs;[506] and

- the administration of new child protection legislation (the *Children and Young People (Care and Protection) Act 1998* (NSW)), representing a significant change to the work, skills and responsibilities of teachers.[507]

[586] The NSW IRC determined that these changes in work value warranted a total wage increase of 12 percent (made up of a 6.5 percent increase awarded in addition to a previous interim increase of 5.5 percent).[508]

[587] These decisions of the NSW IRC are useful in two respects. First, in relation to early childhood teachers, they provide additional information about changes in the work value of such teachers in the earlier part of the period commencing from the 1996 datum point, in circumstances where the evidence of most of the teacher witnesses before us did not extend back this far. Second, the decision in respect of NSW government school teachers, which was the subject of fully contested proceedings before the NSW IRC, has utility as a verification

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[501] Ibid at [167]-[169]

[502] Ibid at [202]-[203]

[503] Ibid at [223]-[224]

[504] Ibid at [262]

[505] Ibid at [274]-[275]

[506] Ibid at [296]

[507] Ibid at [314]

[508] Ibid at [501]

source in circumstances where that part of the IEU's case which concerned school teachers did not have a contradictor before us.

C.9.4 Findings re work value change

Datum point

[588] For the reasons earlier explained in connection with the history of the federal award regulation of teachers, we will assess the issue of whether there has been any work value change by reference to a datum point of 1996, consistent with the IEU's primary case.

Matters raised by the ACA

[589] Before we turn directly to the issue of whether there has been work value changes of significance since 1996, it is appropriate that we deal with some matters raised by the ACA that were depreciative in varying ways of the work value of teachers and were said to be relevant to the IEU's work value change case.

[590] The first matter, which was raised squarely in the ACA's case, was specifically directed to the position of early childhood educators. The ACA contended that the responsibilities of early childhood teachers under the NQF were no different to those of non-degree qualified educators, namely to care for and educate children directly in their care. It also advanced a related contention that the "*premiums*" paid to early childhood teachers compared with diploma-qualified educators are, if anything, not justified on work value grounds.

[591] We do not accept those contentions. The ACA's case in this respect was founded primarily on the proposition that the NQF does not impose any distinguishable responsibilities on teachers alone but rather refers to educators generally. Thus, when Associate Professor Irvine gave evidence at length about the "*expectations*" of early childhood teachers under the NQF, the ACA was at pains to point out that the NQF contained no differentiated expectations for degree-qualified teachers and applied equally to all educators and, also, that leadership positions under the NQF including those of Educational Leader, Nominated Supervisor and Director could be held by non-degree qualified educators.

[592] The ACA's characterisation of the NQF is correct to a point but in our view fails to take two fundamental matters into account. The first is that the *capacity* of educators to discharge the educational responsibilities imposed by the NQF will vary depending on the nature of their qualifications. Thus, when it comes to meeting the quality areas established by the NQS, namely *Educational program and practice*, teachers by virtue of their university training will be in a better position to contribute to the achievement of the elements of each standard in that quality area in terms of the exercise of skills such as curriculum decision-making, programming to maximise learning opportunities, the practice of intentional teaching, engagement in the teaching cycle and critical reflection. This is amplified by the EYLF, which emphasises the importance of professional expertise, judgment and pedagogy in the delivery of early childhood education and predicates that educators will draw upon different developmental, socio-behaviourist, critical and post-structuralist theories in discharging their educational functions. Clearly, these are matters which are referable to university training and direct attention to the greater expectations upon teachers in the delivery of educational programs in the way described by Associate Professor Irvine.

[593] The evidence of the early childhood teachers supports the existence of higher expectations upon teachers in the delivery of educational programs in accordance with the NQF. For example, Ms Vane-Tempest described being appointed Educational Leader of her centre within 12 months of her commencement of employment upon graduation, with the expectation that she support all other educators in their programming and planning and with her own sphere of responsibility for pedagogical and educational planning, programming and observations. This role, for which she received no additional pay increment, may be inferred as recognising the value of university training in the delivery of educational programs. Other teachers such as Ms Hilaire and Ms Ames described being appointed as Room Leaders or given charge of educational programs by virtue of their teaching qualifications and given supervisory and mentoring responsibility over non-degree qualified educators. Ms Cullen, a Centre Director, gave evidence concerning her expectation that teachers assume an educational leadership role in respect of other staff almost from the commencement of employment. Ms Connell, also a (former) Centre Director/teacher, described the special educational responsibilities expected of teachers and the expectation that they perform the documentation requirement of the educator role in a "*skilled and complex*" way and at a higher level than non-degree qualified educators. Ms Finlay, another teacher/Director, referred to it being the role of the teacher (as distinct from other educators) to lead rooms and to direct and guide how special needs children are to be dealt with on the basis of their "*deeper knowledge of child development and how to implement different strategies*". This all reflects, in our view, the greater capacity of teachers, by virtue of their university training, to lead the delivery of educational programs to the standard required by the NQS.

[594] The second matter concerning the NQF which the ACA's submissions fail to take into account is the teacher-child ratios required by the NQF. This is not an arbitrary imposition but a recognition that university-trained teachers are necessary for the delivery of the educational policy goals which underpin the NQF. The policy rationale is that stated in the 2008 COAG discussion paper, *A national quality framework for early child education and care*, to which we made reference at the outset of this decision. This discussion paper set out the policy foundations for the subsequent NQF and EYLF, referred to "*staff qualifications*" as one of the "*iron triangle*" of indicators of quality early childhood education and care, and specifically referred to the importance of early childhood teachers in delivering quality services because "*they are skilled in early childhood learning and development*".

[595] The ACA relied on the evidence of some of its witnesses to support the proposition that there was little to distinguish the work value of early childhood teachers and non-degree educators, and thus the pay advantage of teachers was, if anything, excessive. However, we do consider that, on proper analysis, the evidence of those witnesses made out this proposition. Those witnesses fall into three categories, In the first category, Ms Kearney, a Director and Approved Provider Representative of four centres in Victoria, gave evidence that the educational programs at the centres were developed by persons holding roles which did not require them to be teachers, that all staff whether teachers or not had input into the creation of policies and QIPs, that teachers only supervise and direct other employees as a function of being Room Leaders and not because they have a degree, that diploma-qualified Room Leaders also direct and supervise other employees in their rooms, that the Director and Educational Leader roles are not usually held by degree-qualified teachers, and teachers and non-degree educators have the same responsibilities in respect of additional needs children and liaise with parents to the same degree. Although Ms Kearney said that she has found some non-degree educators to be better than some qualified teachers, she also said that she did

not suggest that teachers had the same responsibilities or duties as educators. Ms Hands gave evidence to similar effect about the use of teachers as compared to other educators in the two centres of which she is the Director, and said that teachers generally perform the same duties as other educators and may not always have a higher skill level than such educators. However, she accepted that teachers have a higher level of knowledge about early childhood, theory and technique than someone with a diploma. Ms Toth similarly said that teachers and educators at her centres had, for the most part, the same routines and duties, although at the same time she recognised the critical importance of teachers' practice of autonomous teaching as central to the learning experiences of children and bringing children's interests to the fore. It appears to us that the position described by Ms Kearney, Ms Hands and Ms Toth at their centres is a reflection of how their business chooses to utilise their teachers rather than to be understood as commentary on the work value of teachers vis-à-vis that of non-degree educators. The inspections conducted by us confirm, in our minds, that some centres choose to utilise the professional skills of their employed teachers to a far greater degree than others. Their evidence that, at an individualised level, they find some non-degree educators to have more skill and experience in practice than some degree-qualified teachers is unremarkable, but work value is not assessed by reference to the quality of individual workers.

[596] The evidence of Mr Fraser and Ms Viknarasah fall into a second category of witnesses who expressed opposition to the regulatory regime including the requirement to employ qualified teachers, and their evidence must be seen through that lens. Mr Fraser, as the Managing Director and Approved Provider of a chain of some 14 centres, said that he was unconvinced as to the benefits of teachers being employed in early childhood education and, consistent with that view, he said that in many instances he considered that both teachers and educators could deliver achievement of the outcomes prescribed by the EYLF. At the same time, however, Mr Fraser said that the early education sector was undervalued in terms of wages and that, in an ideal world, he would like to see teachers be paid no less that what they would be paid at a government primary school. Ms Viknarasah, a Director of two centres, went further and said that her view was that centres should not be required to employ early childhood teachers. The weight to be given to her evidence must, in our view, be limited given her apparent resistance to regulation of the sector, her self-description as a "*rogue in the industry*" and her idiosyncratic views concerning early childhood pedagogy. It may also be noted that she accepted that it is better for the educational outcomes of children to have better educated staff.

[597] We note that the position of Mr Fraser and Ms Viknarasah was not dissimilar to that taken by some of the employer witnesses in the proceedings before Schmidt J in the NSW IRC in 2001, who said that teachers in the long day care sector were overpaid, that their qualifications and experience did not merit higher payment, and that their work was not higher in value than the work of lesser-qualified child care workers. That position, as earlier noted, was firmly rejected by Schmidt J, who pointed to the lack of evidence concerning what the training of other workers actually involved and no detailed examination of what work they actually did. We are inclined to adopt, in respect of the evidence of Mr Fraser and Ms Viknarasah, Schmidt J's conclusion that "*...the views advanced...in relation to comparisons drawn with child care workers, ha[s] been overstated in a rather unfortunate way*".

[598] In the third category, Ms Prendergast and Mr Carroll gave evidence which contradicted ACA's position. Ms Prendergast gave the following evidence concerning the fundamental importance of employing university-trained teachers:

> I'll come to the younger age group and older age group issue in a moment, but when you say that you believe that childcare centres should be required to employ a university qualified early childhood teacher what's the reason why you're of the view that that is an appropriate requirement for childcare centres such as the ones that you operate?---I have a fundamental belief that early childhood is the most important time of a child's life, and that the opportunities for learning are not available to those children later on if the foundations aren't there in - aren't built in those first few years. A qualification that is a university level qualification asks students to think more deeply about children, children's development and children's learning so that's why I think that we need to have an early childhood professional, someone with a higher qualification than the Diploma.
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> When you say that an early childhood teacher is trained to have students think more deeply, you might've made this clear at the end of your answer, but just to get clear more deeply than educators; is that the understanding?---More deeply than a VET qualification or a vocational education training qualification, which is very practical and doesn't delve into theoretical perspectives of early childhood development.[509]

[599] Mr Carroll gave similar evidence concerning the change in the focus of the long day care sector from being primarily care-based to providing a mix of care and education, with a consequence of this being to focus on increasing the qualifications of the staff who provide the early learning outcomes. His evidence was that teachers fill critical roles in the G8 business's organisation, and that investment into increasing the wages of its teachers to improve retention would improve financial performance and improve family engagement, team engagement and safety.

[600] The next proposition advanced by the ACA as a matter relevant to the assessment of the work value of teachers generally is that ATAR scores for entry into university teaching courses "*are among the very lowest of all bachelor degrees*". We are not persuaded that there is any relationship between ATAR entry scores and the relative work value of the various professional occupations requiring a bachelor's degree. ATAR scores are not a mark, nor are they a reflection of the academic rigour of particular university courses or the degree of difficulty of the occupation which may follow from obtaining a particular degree. An ATAR score is a ranking which measures a student's position relative to all the students in their age group. The entry-level ATARs for university courses are supply and demand driven – that is, they reflect the number of university places on offer and the number of applicants for those places. A low ATAR would suggest a relatively low proportion of applicants to the number of available university places, but the reasons for this might vary. One possible reason for this might be that the occupation to which the degree leads is relatively low paid and/or lacking in social prestige. However, the evidence before us was not such as to permit any firm finding to be made about the reason why teaching degree courses have relatively low ATARs. There was evidence that there has been some degree of concern about the ATAR levels for teaching degrees, and that steps have been taken to deal with this, and we deal with this later in this decision.

[601] Finally the ACA submitted that early childhood teachers do not have broader responsibility under the NQF or otherwise for the educational and operational management of

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[509] Transcript, 3 July 2019, PNs 7904-7905

a service or its quality control, and that much of the witness evidence adduced by the IEU conflated duties attaching to the roles of Director, Educational Leader, Room Leader, Nominated Supervisor or person in day-to-day charge with that of early childhood teacher *simpliciter*. This submission has a degree of substance, particularly in relation to those IEU witnesses who occupied Director or teacher/Director positions. For example, Ms Connell spent most of her career at the Albury preschool as a teacher/Director, but her evidence did not clearly distinguish between her duties as Director as distinct from her duties as a teacher or make clear the differentiation between her duties as teacher/Director and those of other teachers at the centre. Ms Gleeson's evidence concerning her role at the Keiraville Community Centre was of a similar character. Where a teacher holds the role of Director, as earlier explained, clause 19.2 of the EST Award prescribes an additional allowance to be paid, inferentially in recognition of the separate and additional duties attaching to this position. Thus some care is required in assessing the evidence to ensure that the broader management, operational and leadership duties of Directors are not ascribed to early childhood teachers.

[602] However, the position is less clear when it comes to teachers who hold the positions of Educational Leader, Nominated Supervisor, person in day-to-day charge or Room Leader. The first three of these are positions required under the NQF, but attract no additional remuneration under the EST Award. The position of Educational Leader in particular, as explained at the outset of this decision, has statutory responsibility under the National Law to lead the development and implementation of education programs at the service. Although the position of Educational Leader is not required to be filled by a teacher, it will often be. The evidence did not disclose much about the extent to which teachers fill the NQF positions of Nominated Supervisor or person in day-to-day charge, but in relation to the large majority of centres which operate with Room Leaders (or equivalent), the evidence showed that, except for the most inexperienced, teachers almost always hold the Room Leader position in the rooms in which they teach. This typically means that they have responsibility for the room's educational program and supervise and direct the other staff working in that room. The EST Award provides for no additional compensation for these responsibilities.

[603] In addition, it is important to bear in mind that early childhood education and care services are in nearly all cases small workplaces (whether run by large scale operators or not) in which the strict demarcation of job roles is not practicable and flexibility is at a premium. In that somewhat fluid context, the evidence shows that teachers, as employees with presumed expertise in the education function, are commonly expected to discharge responsibilities beyond those immediately attaching to the children in their care. In this respect, for example:

- Ms Hill said she was involved in the development and review of the QIP and mentored certificate III and trainee educators;

- Ms Vane-Tempest described being expected to take on a leadership role in the first 12 months of her employment;

- Ms Hilaire worked collaboratively with her centre's leadership to create and maintain the QIP and supervised the compliance of other staff with centre policies;

- Ms Ames had responsibility for creating and maintaining the QIP, creating, maintaining and applying centre policies, and was expected to act as a leader for diploma or certificate III qualified staff;

- Ms Cullen said that teachers at her centre are required to assume a leadership role in relation to other staff and in the management of the centre almost from the commencement of employment; and

- Ms Connell said that all teachers are required to contribute to the QIP and policy development.

[604] Accordingly, we consider that the wider duties we have described above, apart from the duties attached to holding a Director's position, are common incidents of the position of an early childhood teacher and may be taken into account for work value purposes.

Main areas of work value change

[605] For the reasons which follow, we are satisfied that there has, since 1996, been a significant net addition to the work value of teachers covered by the EST Award in all classifications. This change has occurred in the following main areas:

(1) Additional training requirements for entry into the profession.

(2) Increased professional accountability associated with registration requirements, standardised testing and greatly increased expectations concerning reporting and being accessible to parents and families.

(3) Greater complexity of work resulting from a shift to outcomes-based education and differentiated teaching, with associated requirements for greater documentation and analysis of individual educational progress.

(4) Teaching and caring for a more diverse student population including, in particular, additional needs children.

[606] We deal with each of these areas of change in greater detail below, but two preliminary points must be made at the outset. First, the changes described above have not occurred uniformly across all areas of teaching, and different changes have impacted upon the work of teachers in early childhood education, primary school teaching and high school teaching in varying ways and to varying degrees. Different school systems and school systems in different areas are not precisely the same in the way that they have implemented change, and important differences can be identified in the work of teachers at community preschools as compared to for-profit long day care centres. Nonetheless we are satisfied that in all areas of the teaching profession covered by the EST Award, a significant change in work value has occurred.

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

does not gainsay the proposition that, since 1996, the degree to which this has been implemented in teaching practice has increased the complexity of teachers' work and contributed to an increase in work value.

Additional training requirements for entry into the profession

[608] It is clear that there has been a change to the training requirements for entry into the teaching profession. The most significant change is that a four-year undergraduate teacher education degree is now universally required, and three-year courses have been abolished. Associated with this is a requirement for two-year post-graduate teaching qualifications, and one-year post-graduate courses have been phased out. These changes were effected by the course accreditation standards introduced nationally by the AITSL in 2011, and are entrenched in the State and Territory teacher registration regimes. In addition, the course accreditation standards and reforms introduced by the Commonwealth Government in 2015 have ensured that courses are more rigorous and must meet strict quality assurance standards. This has meant that graduates must now meet literacy and numeracy standards that place them in the top 30 percent of Australian adults, must have demonstrated "classroom readiness", and have undergone extended and more intensive practical training requirements.

[609] The ACA submitted that, because the classification/pay structure in the EST already recognises that additional value of a 4-year degree by requiring teachers with this qualification to be commenced at the Level 3 pay rate, the move to 4-year degrees did not require further consideration as a work value issue. We do not agree. Under the current classification structure, 5-year, 4-year, 3-year and 2-year trained teachers are paid according to a common pay structure which was developed before a 4-year degree requirement became standard and thus does not take this into account in the pay rates which have been set. Although a person with a 4-year degree has an accelerated progression through the annual increments provided by the existing structure by virtue of starting at Level 3, there is no distinction to be made between the educational qualifications of teachers made once the annual increments have been exhausted and the top of the scale has been reached. The move to a requirement for a 4-year degree is a straightforward and significant change to entry training requirements which is indicative of an increased level of skill, and it is necessary that this be taken into account in the EST Award wage rates.

Increased professional accountability

[610] We find that the level of responsibility on the part of teachers has increased as a result of changes which have made them more accountable for their performance and conduct and has increased transparency in this respect.

[611] The first major change in this area has been the introduction of regimes for the registration of teachers and the associated uniform national standards introduced by the APST. As we have earlier explained, school teachers must now be registered in every State and Territory. Early childhood teachers generally must also be registered in four States (New South Wales, Victoria, South Australia and Western Australia), and the remaining States and Territories are expected to move to full registration of early childhood teachers in the near future in line with the 2018 AITSL recommendation. Registration requires adherence to professional standards and the completion of 100 hours of professional development every five years. In addition, there are requirements concerning English proficiency and personal conduct which attach to registration.

[612] The ACA submitted that the content of the APST, and the concept of professional standards, are not new for either school teachers or early childhood teachers, and that professional development has always been an expectation of teachers. Both propositions may broadly be accepted. At least for school teachers, various forms of professional standards have existed since before 1996 and, in relation to early childhood teachers, the QIAS at least indirectly imposed expectations on the standard of their performance. In respect of professional development, we generally adopt what was said by the Full Bench in the *Pharmacy Award decision*:

> "It is fundamental that any professional must engage in continuing and self-driven education and development in order to stay abreast of new knowledge, technology and other changes in the profession. It is a defining feature of a profession. Accordingly the introduction of CPD requirements merely formalised and systematised something that was (or should have been) already occurring."[510]

[613] However, the fundamental point about the requirement for registration and the associated requirements concerning compliance with professional standards and professional development is that teachers are now accountable for their professional employment. The common national requirement of the registration schemes is that graduate teachers must demonstrate that they meet the requirements for registration within a period of employment of not less than one year and not more than five years, and thereafter must renew their registration at regular intervals (in practice, ranging from every one year to every five years). This means that the continuing employment of any teacher to whom the registration requirements apply is dependent upon demonstration of continued proficiency by reference to the professional standards and undertaking the prescribed amount of professional development activities. This makes teachers accountable to external regulatory authorities for the quality of their work in a way that did not generally exist prior to 1996. Previous decisions have recognised the concept of accountability being an indicator of increased work value on the basis of its relationship with the level of responsibility attaching to a role and the quality of services.[511]

[614] In schools, the introduction in 2008 of external standardised testing for literacy and numeracy in the form of NAPLAN for year 3, 5, 7 and 9 students has also increased the accountability of school teachers. The witnesses highlighted the effects of NAPLAN testing. Ms Hickey's evidence was that, because NAPLAN results for schools are made public, this had increased pressure on schools and in turn on teachers, to lift NAPLAN scores. Mr Donnelly thus referred to NAPLAN as "*high stakes*" testing, Mr Foster said that NAPLAN results affected school enrolments, and Mr Cooper described how, in the private sector, schools compete on the basis of NAPLAN results (amongst other things). Mr Grumley said that parents' expectations concerning school performance had increased as a result of their knowledge of NAPLAN as well as ATAR results. In short, the effect of NAPLAN has been to make publicly transparent the outcomes at individual schools and thereby expose the teachers of the tested students to a degree of scrutiny and pressure to improve performance that did not exist before 1996.

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[510] [2018] FWCFB 7621, 284 IR 121 at [184]

[511] See e.g. *ACT Child Care decision* PR954938, [2005] AIRC 28 at [190]; *NSW School Teachers decision* [2004] NSWIRComm 114, 33 IR 254 at [274]-[275]; *Pharmacy Award decision* [2018] FWCFB 7621, 284 IR 121 at [188]

[615] An analogue of this effect has occurred in early childhood education as a result of the conjunction of the operation of the NQF and the EYLF. As we have earlier explained, the NQF introduced an assessment and quality rating progress which is linked to accreditation. Early childhood services are quality-rated by reference to each of the seven quality areas in the NQS. The first quality area is "*Educational program and practice*", and the three standards and nine elements of which it is comprised are based on the delivery of early childhood education in accordance with the EYLF (as the ACECQA Guide to the NQF makes clear). NQF quality ratings are publicly available and affect parental patronage. The consequence of this is that teacher performance in delivering the EYLF is reflected in the publicly-available ratings of each service in the first quality area of education program and practice.

[616] As Associate Professor Irvine said in her evidence, the operation of the EYLF in conjunction with the NQF rating system has raised professional expectations of teachers. Services which strive to achieve the highest NQF ratings need to maximise the value of the work of their teachers; in this connection we refer to Ms Gleeson's evidence that early childhood teachers will need to engage in significant networking and collaboration with external agencies and community involvement in order for a service to demonstrate satisfaction of the assessment criterion of collaborative partnerships with professional, community and research organisations. By contrast, as the evidence of Ms Viknarasah suggests, services which disregard or eschew the pedagogical methods in the EYLF and do not place value on professional teaching are likely to receive a poor NQF rating. The evidence also suggests that these changes have led, in aggregate, to improved levels of teacher performance. Associate Professor Irvine's evidence that NQS data has shown continuing quality improvement in early childhood education and care since the introduction of the NQF, and that many services have improved their quality rating, is at least indirect evidence in this respect.

[617] Additionally, teachers at both the school and early childhood education levels are more accountable to parents in respect of individual children because of their accessibility via email and other online modes of communication – a phenomenon which had not manifested itself prior to 1996. Ms Hill, Ms Cullen, Dr Heggart, Ms Connell, Ms Connellan, Ms Ames, Mr Margerison, Mr Donnelly, Mr Foster, Mr Huntly, Mr Cooper, Mr Grumley, Mr McKinnon and Ms Pendavingh all described the extent of expectations that they respond to parental emails in a timely manner and the burden this imposes upon them. The increase in the extent to which teachers report to parents concerning their children's outcomes has greatly increased, as we discuss further below, and this in turn has increased the degree to which parents communicate with teachers concerning, as Mr Cooper said, their children's learning performance, behaviour, disciplinary issues and assessments, as well as the teacher's teaching style and the child's relationship with their teacher. In our assessment, the result of this has been a significant enlargement in the scope of parental interaction with teachers and a concomitant addition to the degree of accountability on the part of teachers to parents.

Greater complexity of work – outcomes-based education and differentiated teaching

[618] The evidence before us shows that in the period 1996 to date, there has been a major shift in focus of education towards outcomes-based curricula which are less focused on the delivery of prescribed content and more focused on setting broad benchmarks of student achievement which are observable and assessable. This has required a differentiated teaching

method which is focused on the learning of the individual. As we have earlier stated, this is not to say that this developed only its entirety since 1996; rather, it is a longer-term development which, since 1996, has been implemented to a more intensive degree with the result that there has been a significant change in the work of teachers. The precise way in which this has occurred also differs somewhat as between early childhood, primary and secondary education.

[619] From a national perspective, Professor Aspland identified the national curriculum framework established by the Australian Education Council in 1991 as a starting point of a shift towards learning outcomes taking priority over prescribed curriculum content in schools. Professor Aspland said that this process developed unevenly across Australia, but identified that this new focus meant that teachers have had to reconceptualise their planning and assessment, with a greater freedom as to content and pedagogy. She characterised this process as placing additional demands on teachers that were not previously present before 1998, and placed it within the context of an international trend towards direct forms of teaching for enhance student outcomes. This evidence was not contested.

[620] The practical consequences of this change in approach to school teaching, as described by the witnesses, fall into four main areas. First, the change from a concentration on delivering curriculum content to a class as a group to one whereby the focus was on individual achievement of broadly-described learning outcomes was one which, as Mr Cooper described it in the Queensland context (where an outcomes-based syllabus was introduced in about 2001), required radically different teaching and was cognitively and practically challenging. The different teacher witnesses described this nature of this change in varying ways: Ms Pendavingh referred to her role changing from one whereby students sat at their desks and received a lecture from her, to one whereby she has become "*a facilitator of multiple learnings*"; Mr Huntly referred to teachers becoming "*the problem solver for students*" as part of a more agile, creative and collaborative approach which constantly seeks to tie students' exercises back to learning outcomes; and Mr McKinnon referred to his role changing from that of the "*sage on the stage*" to being "*a motivator of 30 individuals*". In general, all these witnesses were referring to a shift of emphasis away from the block delivery of curriculum content by the teacher to an approach which takes account of learning differences between students and adapts the teaching plan to the needs of individualised students. In a lot of cases, the contemporary approach is facilitated by the use of technology, with online platforms and apps such as Google classroom, Education Perfect, STILE and Moodle used to personalise the learning experience and for teaching targeted at particular students or groups of students at varying stages of learning progress. We do not think the requirement to learn and use this technology itself constitutes an increase in work value; rather, its incorporation into an outcomes-based, differentiated mode of teaching is demonstrative of the greater complexity of this method of teaching.

[621] Second, there has been a substantial increase in the need to obtain data concerning student performance from testing, to analyse this data, and to adjust teaching programs on the basis of this analysis, as a means to achieve prescribed outcomes. We have earlier referred to NAPLAN testing as a means by which teachers have become accountable for the performance of students; of equal importance is the way in which the incorporation of NAPLAN testing into teachers' work has fundamentally changed that work. Teachers are now required not just to prepare students for external NAPLAN testing, but also to analyse each individual students' NAPLAN results and implement teaching programs which are responsive to those results.

[622] The requirement for testing and data analysis has extended far beyond NAPLAN, and modern teaching practice incorporates a quantity of performance testing which was previously unknown. For example, Mr Margerison, a teacher of 21 years' experience, said that at the beginning of his career as a primary school teacher (that is, at a point in time soon after the 1996 datum point), he was required only to produce half-yearly reports and to collect student data for that purpose (Mr Jenkins-Flint's evidence was that a similar position prevailed when he was a graduate teacher, which appears to have been at about 2007). By comparison, Mr Margerison said he has to produce and update student data every three to four weeks, which requires him to test his students in mathematics weekly and to use "writing clusters" to assess where students sit individually within writing standards three or four times per year. In addition, his school has begun to use standardised, online PAT testing for literacy and numeracy. Mr Donnelly gave a similar picture, and referred to the distinction which is now made in primary schooling between diagnostic testing - that is, testing undertaken before teaching is delivered to assess what the student's starting point state of progress is – formative testing, which produces data during the learning process to help direct what should be done next, and summative testing to collect data as to whether the prescribed learning outcomes have been achieved. This, we consider, bespeaks of a degree of sophistication and precision in the delivery of teaching to meet individual students' needs that was not previously required.

[623] In secondary school, although less so in the senior years than in the junior years, a similar change has occurred. Standardised NAPLAN testing, PAT, the Business Intelligence Tool, the Maths Pathways diagnostic tool and other forms of standardised testing and assessment are now likewise used to provide data as to progress towards learning outcomes and to facilitate the planning and delivery of lesson plans which take into account students' test results and other data. Mr Huntly, a secondary school teacher with 28 years' experience, emphasised the need to master the information technology used to deliver standardised testing and to interpret the data produced by such testing as an important element of the change. All the school teacher witnesses, to varying degrees, described the intellectual challenge and the work burden involved in analysing test data and incorporating this into teaching practice. In relation to PAT, Mr Huntly described how the technology now available allowed instantaneous feedback on individual students' performance compared to State and nationwide norms, required the analysis of large amounts of data to identify students' strengths and weaknesses, and then required the use of the data to further differentiate students' learning. Mr Cooper's evidence was that the demands of preparing students for standardised testing, administering the tests, assessing the test papers, analysing the results, discussing data patterns and identifying specific learning strategies for different students constituted an "*escalation of work demands*" in terms of quantum and complexity to the extent that he is now required to accommodate his lesson plans and provide individualisation instruction to all of his 160 students. Mr McKinnon referred to the data produced by standardised testing as being "*complex and difficult to interpret in a meaningful way*" and requiring "*a new set of skills*". This evidence, and evidence to similar effect given by the other school teacher witnesses, persuades us that this aspect of outcomes-based learning in particular has made the work of teachers more complex and demanding and has required the exercise of a greater level of skill. There is also a straightforward workload element to the change, with Ms Pendavingh saying that no additional time in the working week had been allowed for her to perform the task of analysing test data and to incorporate it into planning and assessment.

[624] Third, associated with this is an increased requirement to document the stages of individual student progress, data collection and analysis and any adjustments to lesson planning to accommodate the needs of individual students.

[625] Fourth, a concomitant of the individualised approach is that greater degree of communication and liaison with parents is now required. Mr McKinnon described how, at his school, that if students are assessed during an assignment period as not meeting the required standards, the teacher must inform the parents, resulting in teachers having to make three to four calls to parents each week. Mr Cooper said that, over the course of his career, he had moved from one parent-teacher a night per year to two and, in addition, a "*proliferation*" of other interviews with parents concerning aspects of student performance. Mr Margerison said that if it looks like a student is going to receive a D or an E grade on their report card based on assessments, he is required to ring the student's parents and invite them in for an interview. Other witnesses gave evidence to similar effect. This demonstrates the interlinkage between an outcomes-based, individual-focused approach to learning and greater teacher accountability to parents which we have earlier discussed.

[626] Our findings concerning the importance of the shift to outcomes-based learning in schools is, we consider, fortified to a substantial degree by the findings of the NSW IRC in the *NSW School Teachers decision* in relation to NSW Government schools, albeit at a significantly earlier point in time and by reference to a datum point of 1991. The NSW IRC said:

> "In our view, there is overwhelming and compelling evidence to support a finding that there have been dramatic changes in curriculum content, structure and theory since the datum point. Those changes have fundamentally altered the work performed by teachers. The introduction of outcomes based education represents a shift in both the philosophy and provision of educational services. The systematic overhaul of each syllabus in the K-12 curriculum since the datum point has been phenomenal, and has had significant implications for every aspect of teachers' work. The K-12 curriculum culminates in the HSC, which itself has undergone significant review.
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> The respondents contended that much of the evidence presented to the Commission focused on the increase in workload associated with the introduction of outcomes based education. Our views in relation to increased workload have been stated earlier, but it must be emphasised that this submission profoundly understates the extent of change in the skills and responsibilities of teachers in this area."

[627] The above finding was made at a time before the introduction of standardised testing, and so we consider the position to be *a fortiori* here for the reasons given above.

[628] We consider that the current position is not substantially different in early childhood education. The EYLF is an outcomes-based document which operates as part of a continuum of outcomes extending into the primary school curriculum, and the play-based teaching and assessment methods used in early childhood education extend into the primary school years. The effect of the National Law is that early childhood and care services must deliver an education program that seeks to deliver the outcomes specified in the EYLF (or an equivalent approved framework), in circumstances where there has not previously been any such requirement or framework in place on a national level and a diversity of approaches had been taken. The early childhood teachers who gave evidence consistently described, as best

pedagogical practice under the EYLF, a "*cycle of learning*" involving observation of children's learning and development level, an assessment of how each child's learning has progressed and can be improved with the EYLF outcomes in mind, the design and planning of learning experiences in play and discovery consistent with the assessment, the implementation of planned learning experiences using intentional teaching, the making of further observations, and critical reflection as to achieved progress towards the EYLF outcomes. Such teaching is focused on the needs of individual children in that it is highly responsive and adaptive to the displayed interests and behaviour of individual children. Observations of value concerning each child's learning progress which meet the standards required by the NQS must be regularly recorded and communicated to parents. Various means including the use of online platforms and apps, are used to do this.

[629] We are satisfied that the exercise of professional skills and judgment, and the overall work value, involved in early childhood teaching in accordance with the EYLF and the NQF is the same or equivalent to that of school teachers. Leaving aside the obvious fact that registered early childhood teachers have a tertiary qualification which will allow them to work interchangeably in early childhood education or in primary school education, we have placed weight on those witnesses who have worked in both sectors and are in a position to make a proper comparison. Ms Hilaire, as earlier set out, works simultaneously in both sectors, and her evidence was that essentially the same work is performed albeit at different levels for what is developmentally appropriate for the children in her charge. She pointed out that school teaching was more structured than early childhood education to facilitation programming and planning, and that early childhood teaching required a more comprehensive and detailed knowledge of child development. Mr Donnelly was able to make a detailed comparison, on the basis of his experience, between the work of early childhood teachers and primary school teachers, and emphasised that the shift towards differentiated education and individualised learning in schools was similar to the philosophy and pedagogy in early childhood education. He also regarded the assessment in early childhood education of children's social, emotional and communication skills as comparable to NAPLAN and PAT in schools in term of the "high stakes" for teachers and services. We accept this evidence as demonstrative of equivalence of work value.

[630] Of greater difficulty is assessing the degree to which the work of early childhood teachers has changed over time. The evidence of both the IEU's and the ACA's witnesses tended to a significant to degree to provide high-level opinions about whether the regulatory changes associated with the introduction of the EYLF, the NQF and NQS had or had not changed the value of the work done by early childhood teachers without providing a neutral, fact-based comparison of the work done now as compared to the work done at a time at or close to the 1996 datum point. A bigger difficulty with comparing the position in 1996 to now is that, at least in the long day care sector, early childhood education delivered by teachers was in its comparative infancy in 1996. Only New South Wales had a teacher/child ratio in 1996, and the 2001 decision of the NSW IRC disclosed, as at that time of that decision, there were still only some 2,600 early childhood teachers in that State. There are now over five times that many early childhood teachers in New South Wales. In the other States and Territories, teacher/child ratios were only introduced well after 1996, and the evidence suggests that many long day care services did not employ teachers as such at all or in any significant number until they were required to do so. This, and a generally acknowledged shift in the long day care sector from the provision of simply care to the provision of a mix of education and care, makes a longitudinal work value comparison based on a datum point of 1996 difficult. There also appears to be biases in the respective evidentiary cases of the IEU

and the ACA. The witnesses called by the IEU tended to come predominantly from preschools and the community sector, where the employment of teachers has a longer history; by contrast, the ACA's witnesses all came from the for-profit sector and mostly from long day care, where the employment of teachers in significant numbers appears to be a comparatively recent phenomenon (with the possible exception of New South Wales). Even after the NQF, a much greater proportion of the workforce in preschools (38.3%) are degree-qualified than in long day care (11.5%).[512] There is also the associated difficulty in making a historical work value comparison in that, before the EYLF, the NQF and the NQS, there was considerable diversity between the States and Territories as to the regulatory approach to early childhood education.

[631] There is some evidence which points to a change in the actual work of early childhood teachers over time. Ms Gleeson's evidence referred to a teaching methodology in existence when she started teaching in a preschool in 1999 whereby the day was strictly timetabled and teaching was "*highly regimented*", in comparison with the more flexible, individualised and self-directed teaching methodology now used. Ms Finlay, whose career in early education in Queensland stretches back for a number of decades, said that the complexities and skills required of early childhood teachers had significantly increased, especially over the last decade, and she identified in particular the documentation requirements associated with writing assessments of the learning progress of individual children in accordance with the quality standards of the NQF and the QKFS. Ms James, who had previously worked as an early childhood teacher beginning in the late 1990s, said that the planning and implementation of indoor and outdoor learning programs has become more complex and structured since the introduction of the NQF and teacher accreditation.

[632] This evidence was not rebutted by the evidence of the ACA's witnesses, none of whom (except for Mr Fraser during the period 2001-2004) had worked as an early childhood teacher or was in a position to give a longitudinal analysis of the nature of the work of early childhood teachers over the period since the 1996 datum point. Ms Kearney's evidence that the NQF, the NQS and the EYLF had "*codified and regularised the standards across the industry*", to the extent it suggested that they did not impose any new requirements, cannot be accepted since there was no previous equivalent to the first quality area pertaining to education in the NQF or to the EYLF in each State and Territory. Beyond this proposition, Ms Kearney did not in her evidence undertake any analysis of the "before and after" position of the work of early childhood teachers, although we note in her evidence that her business had put in place a software system to record observations, improvement data and communications with parents and required linkages with EYLF outcomes. Mr Fraser likewise sought to portray the EYLF and the NQF as a streamlining and codification of what went before which did not change the role of a teacher, but at the same time he described the EYLF as "*the childcare version of a school curriculum*" which has ensured educators are focused on outcomes and has encouraged a focus on the individual child and desired outcomes. Ms Hands said that, in South Australia, the expectations and duties of early childhood teachers had not changed as a result of regulatory changes over the last decade, and in this respect she pointed to the SACSA Framework as having likewise required teachers and other educators to construct teaching and learning programs, conduct assessments, monitor children's progress and report this progress to children's families. An examination of the SACSA Framework shows that it did indeed involve the introduction of an outcomes-based learning framework in early

[512] Productivity Commission Inquiry Report, *Childcare and Early Childhood Learning*, 2014, Table 8.3, p.315

childhood education (and was the first in Australia to do so for children aged 0-3), but this occurred in 2001, placing it as an innovation falling well inside the datum point period. Ms Viknarasah's evidence suffers from the difficulties we have earlier identified. Ms Prendergast's centres employed few persons with a teaching qualification before the requirement to employ teachers was introduced in 2012, and such persons were not actually employed or paid as teachers. Accordingly her evidence is not relevant to the work for teachers before that time, although we note that she at least accepted that the preceding QIAS did not specify a curriculum, a learning framework or learning outcomes, that the approach taken to observations had changed in the sector, and that the NQF has resulted in a greater depth of critical reflection in the sector. Mr Carroll's evidence tended to demonstrate the existence of work value change: he emphasised that the for-profit child care sector had been gradually shifting from being primarily concerned with the provision of care to being a mix of care and education, with the NQF having shifted the focus of the sector.

[633] The decisions of the NSW IRC concerning early childhood education teachers to which we have earlier referred provide considerable assistance in making a historical work value comparison – bearing in mind, again, that New South Wales was the state that most early on mandated the employment of teachers in early childhood care services. The 2001 decision of Schmidt J summarises the evidence of teacher and employer witnesses about the work of teachers and, for the most part, that evidence does not describe the cycle of learning under the EYLF using intentional teaching which the witnesses before us gave evidence about, nor does it refer to outcomes-based learning. The closest one gets to this is the evidence of a pre-school teacher, Ms Butler, who described her duties with children as:

> "…including planning and programming for her groups; writing individual programmes for 60 children and performing ongoing observations and evaluations of them and what this involved. Observations were done to keep a track of programs."[513]

[634] As earlier discussed, Schmidt J was able to find that the work value of teachers had changed significantly since 1990, including in respect of changes to the way children in preschools and long day care centres were taught. Reference was also made to changes flowing from the QIAS, with Schmidt J finding that additional work requirements had flowed from the requirement for centre to self-assess in connection with 52 principles and rejecting an employer submission that the QIAS had no consequence for the value of the work performed.[514]

[635] In the NSW IRC's 2009 decision, the Full Bench made a finding that there had been further changes to the work value of early childhood teachers in 2006. We have earlier summarised the key findings made by the Full Bench in this respect, including in relation to a greater complexity of programming and reporting, especially in relation to child development. It is notable that in making its findings about work value, the Full Bench expressly placed reliance on the evidence of a number of teacher witnesses including two witnesses who also gave evidence before us, namely Ms Connell and Ms James. In respect of Ms Connell, the Full Bench set out a "snapshot" of the changes she had identified over the previous three years which, as relevant to pedagogy, were:

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[513] [2001] NSWIRComm 335, 120 IR 3 at [148]

[514] Ibid at [371]

"Programming, Documentation, Accountability

· Digital Documentation – commenced 2006
· Daily Diaries – commenced 2006
· Photostories – commenced 2008
· Portfolios
· Time consuming but expected by the parents. Digital copies and hard copies supplied.

New Philosophies of Education, Research

· High Scope –training, implementation,
· training for new framework"[515]

[636] The Full Bench then said:

"To take just a few of the matters referred to earlier in the applicant's evidence: first, there was evidence of Ms Connell, Ms James, Ms Connors, Ms Fanning and Ms Simon of greater complexity of programming and reporting particularly on child development over recent years. Parents have increasing expectations for structured education and detailed recording and reporting of their child's progress. It was Ms James' evidence that:

> The emergent curriculum means a style and philosophy about teaching in the early childhood sector that includes the child's focus as primary, with the focus of learning from the child's perspective. Teachers are now completing very detailed portfolios of children that include work samples, digital photographs, interactions with peers and staff, emerging skills and interests, and strengths in the Curriculum Framework domains. These domains are language/communication, social-emotional development, creativity, thinking/problem-solving, physical development (skills and activity levels), spirituality and moral development. Teachers are also responsible for daily journals (written and digital), which demonstrate to parents the interactions and learning that have occurred throughout the day. Teachers plan individual activities based on their observations and interactions with children and evaluate these on a daily basis in order to modify their programs to better-assist children to achieve desired outcomes."[516]

[637] The above evidence is indicative of further progress towards the type of teaching which now prevails under the EYLF, with emphasis on the recording and reporting of observations and the adjustment of teaching plans. However, it is reasonably apparent that the pedagogy being described is not yet at the point of development it has reached on the evidence before us, particularly in a context where the New South Wales curriculum framework for early childhood education which was then current and had been introduced in 2002 was only voluntary and meant to serve as a guide.

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[515] [2009] NSWIRComm 198, 191 IR 14 at [173]

[516] Ibid at [174]

[638] It is important to observe that the evidence before the Full Bench anticipated the introduction of the mandatory EYLF and the changes this would bring. The evidence of an academic witness, Ms Sandra Cheeseman, in relation to the anticipated introduction of the EYLF was quoted by the Full Bench and included the following:

> "…This important document will see all early childhood teachers, no matter the setting, having responsibilities for the delivery of educational programs based on agreed national outcomes. This will carry with it responsibilities for teachers in relation to the delivery of curriculum and the assessment and reporting to families of children's progress against the stated outcomes. The educational programs and therefore the expectations on teachers will be consistent across all early childhood settings in Australia both in the school sector and the prior to school sector.
>
> The introduction of the EYLF will bring increased responsibilities and expectations for staff working in prior to school settings. Early childhood teachers will be expected to carry the major responsibility for implementation of the EYLF and ensuring that all Australian children experience high quality teaching and learning in the early childhood years and in particular in the year prior to full-time schooling. The Rudd government's announcement of a Universal preschool year for all four year old children which is to be delivered by four year qualified early childhood teachers is a recognition of the important role that University qualified teachers will play in the introduction of the EYLF and the success of this policy initiative. These changes will see early childhood teachers in prior to school settings required to demonstrate accountability under the EYLF in relation to the stated outcomes for all children and commitment to assessment and reporting against these outcomes. For the first time in history, Australia will have stated outcomes and expectations for all children in prior to school settings for which early childhood teachers will be responsible. This will place teachers in prior to school settings in the same position as teachers in primary schools in relation to their responsibilities for curriculum development, assessment and reporting and as such it will be essential that their pay and working conditions reflect this parity."[517]

[639] The 2009 evidence of Ms Cheeseman above concerning the changes which the EYLF would bring has, we consider, been borne out by the evidence before us. The 2001 and 2009 decisions of the NSW IRC clearly confirm, in our view, that there has been a continuum of change in the pedagogy of early childhood teachers since 1996 towards outcomes-based education and differentiated teaching in which intentional teaching and the cycle of observation, analysis, documentation, planning, implementation and reflection are essential ingredients. We are satisfied that this has made the work of early childhood teachers more complex and involves the exercise of greater levels of skill and responsibility.

Teaching and caring for a more diverse student population

[640] We consider that the evidence before us demonstrates that the work of teachers has become more demanding and requires greater skill and responsibility because of the need for teachers to respond to a more diverse student population in the context of the more individualised approach to teaching which we have earlier identified.

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[517] Ibid at [134]

[641] The principal way in which this has manifested itself is in relation to additional needs students. In relation to schools, the witnesses gave consistent evidence concerning the increase in the proportion of students requiring special adjustments to be made to the teaching program because of disabilities, learning disorders, mental health issues, behavioural problems and other special needs. This is in part a long-term consequence of the policies of State and Territory Governments, implemented at various times, for students with disabilities to be enrolled in mainstream rather than special schools, and also flows from the more effective early diagnosis of students with learning disorders. Mr Donnelly gave evidence which we have earlier summarised concerning the effect on his work of the "mainstreaming" of additional needs students in schools. He said that in his school, there were a total of 98 students out of 401 on PLPs required because of a diagnosed or suspected disability, including four in a class of 16 that he taught. Mr Foster similarly described a class of 20 in which he had 7-8 with special learning needs, and he compared this to the position 20 years ago where it was more typically one or two in a class of 25. Mr McKinnon said that at his school about 74 students are on special learning plans, compared to ten years before when there were about five. Mr Huntly and Mr Grumley gave similar evidence. The evidence is that the management of students on PLPs is difficult and challenging, in that the teacher is required to make an assessment of the capability of the student, create tasks consistent with their capabilities, and modify assessments appropriately. Even where teachers are not directly involved in the preparation of PLPs, the teacher must deliver the plan and report upon its outcomes. Professor Aspland described teaching special needs students as requiring the acquisition of new skills and knowledge. Liaison with external professionals is also required, and teachers must now record all adjustment for learning difficulties according to NCCD reporting requirements. We note that the NSW IRC made equivalent findings in the *NSW School Teachers decision* in respect of the demands of providing educational services to students with disability.

[642] In relation to early childhood education, there was a degree of sample bias in the respective evidentiary cases of the IEU and the ACA. The ACA witnesses generally gave evidence that there has been no increase in additional needs students, but that appears to be a consequence of the fact that they were all from the for-profit sector. A preponderance of special needs students are enrolled in the community/not-for-profit sector, and consequently the evidence of the IEU's witnesses from this sector reflected this. Ms Hill, Ms Hilaire, Ms Cullen, Ms Connell, and Ms Finlay all gave evidence of the demands which teaching additional needs students placed upon early childhood teachers, which generally correspond with those of school teachers: individualised plans, specialised observation and reporting requirements; and intensive liaison with parents and external specialists.

[643] Both Dr Press, Ms Finlay and Associate Professor Irvine gave evidence which we consider to be significant that there has been experienced a much greater diversity in the demographic profile of children attending early childhood education and care as a consequence of the massive increase in the numbers of children attending. Ms Finlay in particular emphasised the introduction of universal access funding as effecting the biggest change in the early childhood sector in the past two decades. This has caused not just an increased proportion of students with disabilities and other additional needs, but has also changed the socio-economic profile of children attending, with there being more children from families dealing with social disadvantage and low incomes, families that speak English as a second language and indigenous families, and also children the subject of non-parental care for child safety reasons. In this connection, Dr Press referred to the need for teachers to

develop and implement an inclusive curriculum that takes into account a wide range of variation in development to help remediate the impact of physical or cognitive impairment or social disadvantage. We accept her evidence, as well as the evidence of the teacher witnesses generally, that this is equally more challenging and demanding work. We also place weight on Associate Professor Irvine's reference to the NQF requirements for inclusive practices and the promotion by the NQS and the EYLF of individualised teaching and learning practices in this respect.

[644] The change in the student profile in schools has been less dramatic. However, Mr Margerison gave evidence concerning the significantly greater portion of the student population speaking English as a second language due to greater ethnic diversity in Australia since 1996 and the challenges this presented. Mr Foster also gave evidence concerning the highly personalised approach required of a student whose family had recently immigrated with very little knowledge of English. We accept however that there will be significant differences in the degree of student ethnic diversity depending upon where a school is located.

C.9.5 Conclusions re work value

[645] We are satisfied that an adjustment to the minimum rates of teachers covered by the EST Award is justified by the following work value reasons:

(1) The rates for teachers under the EST Award and its federal predecessors have never been fixed on the basis of a proper assessment of the work value of teachers nor are they properly fixed minimum rates. In particular, the rates of pay do not recognise that teachers are degree-qualified professionals and accordingly do not have an appropriate relativity with the Metal Industry classification structure.

(2) There have been substantial changes in the nature of the work of teachers and the level of their skills and responsibility since 1996. This constitutes a significant net addition to their work value which has not been taken into account in the rates of pay in the EST Award.

C.10 Consideration – what is the appropriate adjustment to EST Award rates to properly reflect work value

[646] The next step in our consideration of the work value application is to determine what adjustment to the minimum rates in the EST Award is appropriate to ensure that they properly reflect the work value of teachers consistent with our earlier reasons. In this respect, it is first necessary to consider the primary and alternative variations proposed in the IEU's claim. The IEU's primary claim, as earlier stated, seeks to retain the existing classification structure, adjust internal relativities to remove compression at higher rate levels, and then add 17.5 percent. The alternative claim also retains the existing classification structure and adds 25 percent.

[647] We do not consider that either proposed variation would result in a rate structure that properly reflects the work value of teachers. The fundamental problem with both proposed variations is that they retain a classification structure which, we consider, is inappropriately based on years of service rather than the essential elements of qualifications, displayed competence and acquired experience and responsibility. It may be accepted, at a high level of

generalisation, that a certain level of experience in an occupation will usually lead to an incrementally higher level of work value on the part of an employee, even if the nominal role of the employee has not changed. However, as the ACA submitted, there is no evidence before us to suggest that the work value of a teacher increases year by year for (in the case of a four-year qualified teacher) the first seven years of employment. Such a proposition is entirely counter-intuitive. As we have earlier outlined in our discussion of the federal award history of teachers, the current rate structure has its origins in the structure applicable to Victorian Government teachers in the early 1990s. Annual incremental pay scales were long a feature of government service employment conditions, but we consider them to be an anachronism in the context of the current statutory regime for the fixation of minimum wage rates. We note that, even in the context of government school teachers, there is a move away from annual incremental salary scales to more modern classifications structures. For example, in the NSW Teachers Award 2020*,* an award of the NSW IRC, teachers employed after 1 January 2016 are paid in accordance with a new "*Standards Based Remuneration*". We will return to the NSW classification structure in due course.

[648] Insofar as the IEU's primary proposed variation would seek, by adjusting internal compression of relativities, to unwind the effect of flat amount wage increases awarded in Safety Net Reviews and Annual Wage Reviews from 1993 through to 2010, we do not accept that as a matter of policy this should be done. An analogous proposal was rejected by the Full Bench in the *Pharmacy Award decision*[518] as follows:

> "[191] …The compression of relativities was the intended effect of the award of flat dollar increases to awards, in that it was considered appropriate to adopt an approach to improve the relative position of lower-paid award-wage workers and to depress that of higher-paid award-wage workers. This may be illustrated by the following passage in the *2009-10 Annual Wage Review* decision, the last in which a flat-dollar increase was awarded:
>
> > '[336] We consider there is a strong case for a percentage adjustment to all modern award minimum wages. While not all award-reliant employees are low paid, uniform dollar increases reduce the relevance of the safety net at the higher award levels and erode the real value of award wages at most levels. These are particularly important considerations at the commencement of the modern awards system. Nevertheless most of the major parties supported a dollar increase rather than a percentage one.
> >
> > [337] With some hesitation we have decided on a dollar increase. There are two reasons. The first is that to the extent there is a choice between a percentage increase benefiting the higher levels and a dollar amount benefiting the lower levels we think that the current circumstances favour a greater benefit for the lowest paid. We are required in particular to take the needs of the low paid into account. In light of the fact that award-reliant employees have not had an increase in wages since 2008, it is desirable that we increase award rates by the largest amount consistent with the statutory criteria. Secondly, we have very little data concerning the impact of a percentage increase on costs and employment. We have insufficient information to be confident that a

[518] [2018] FWCFB 7621, 284 IR 121

> percentage increase would not have disproportionate effects on employment at the higher award levels…'
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> [192] It may also be noted that this position was one urged by the union movement over a long period of time. Because flat-dollar increases were applied across all awards, the compression of relativities has occurred across the entire award wages system. We do not think that there is any proper basis to attempt to unwind now, in one award only in response to a claim by a single union, a common approach to the adjustment of wages which was taken for deliberate policy reasons with the support of the union movement as a whole. It is obvious, in addition, that if the approach now urged by the APESMA was taken in relation to the *Pharmacy Award*, there would be no logical reason why this would not sought to be flowed on to every other modern award, with ramifications that need not be spelled out."

[649] The IEU submitted that the above reasoning in the *Pharmacy Award decision* was erroneous and should not be followed because:

- the statutory requirement is that fair and relevant minimum rates be set, being rates that are appropriate today, regardless of past history;
- the position put by unions in past wage cases resulting in flat rate increases was in fact regularly for flat increases for some, and percentage increases at the higher classifications, or adjusted flat rate claims to preserve relativities; and
- wage fixing benches, when awarding flat dollar increases, identified on a number of occasions that this was being done to aid a range of policy considerations and that relativity compression, rather than a goal, was an undesirable consequence which would inevitably need to be addressed in the future.

[650] We reject the IEU's submission. The requirement for a fair and relevant safety net embedded in the modern awards objective in s 134(1) does not, we consider, exclude consideration of the basis upon which existing rates of pay in an award which are sought to be varied were arrived at. The proposition that rates of pay which are in part the product of flat rate increases intended to disproportionately benefit lower-paid workers should now be adjusted to restore the original relativities by way of increases which will only benefit higher-paid workers clearly has implications for fairness in respect of both lower-paid employees and for employers. The ACTU, on the part of the union movement, was an active participant in the outcomes that pertained. It is true that, on some occasions early in the relevant period, it sought a combination of flat rate increases for low-paid workers and percentage increases for higher paid workers, but its approach was clearly focused on improving the relative position of lower-paid workers and the AIRC responded accordingly. That the ACTU's approach would narrow earnings distribution was a clearly understood and intended consequence of its approach.[519] For the last four safety net reviews conducted by the AIRC in the period 2002-2005,[520] the ACTU claimed only flat rate increases of the same amount for all award

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[519] See e.g. *Safety Net Review 1998* Print Q1998, [1998] AIRC 544

[520] PR002002, [2002] AIRC 530, 112 IR 411; PR002003, [2003] AIRC 482, 121 IR 367; PR002004, [2004] AIRC 430, 121 IR 389; PR002005, [2005] AIRC 508, 142 IR 1

classifications. This followed the outcome determined in the *Safety Net Review 2001*,[521] in which the AIRC Full Bench said:

> "Since 1994 the adjustments to award rates in safety net review cases have all involved flat dollar amounts. In most cases the increase has been the same at all award levels. On two occasions the amount of the increase has been less in dollar terms at the higher than the lower levels. As a result those employees on award rates at the middle and upper levels have received less in relative terms than those at the lower levels. Although it would be open to the Commission to award an increase only to those persons employed on the federal minimum wage or only to those employed at or below the level of the C10 classification in the Metal Industry Award we are convinced it would be unfair to limit the increase in that way because of the effect on employees at the higher levels. In the May 2000 decision we decided that because of our concern about compression of relativities we would award a uniform increase at all levels rather than one which was lower at the higher levels. On this occasion we think that it is appropriate to recognise the different impact of flat dollar increases at the different award classification levels by awarding higher amounts at the middle and upper levels. At the same time while the increase at the lower level is substantial it is not so great as to put undue pressure on employment. The amount and form of the increases are an appropriate outcome to the ACTU's claim. The form of adjustment is appropriate for reasons of fairness and as a measure towards avoiding the further compression of relativities between job classifications. Furthermore the result is consistent with the obligations upon us to have regard to economic factors, including the desirability of attaining a high level of employment, and to have regard to the needs of the low paid. The adjustment will be the following:
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> 1. a $13.00 per week increase in award rates up to and including $490.00 per week;
>
> 2. a $15.00 per week increase in award rates above $490.00 per week up to and including $590.00 per week; and
>
> 3. a $17.00 per week increase in award rates above $590.00 per week."

[651] In short, compression of wage relativities was understood by the AIRC, the ACTU and other parties to be an undesirable but necessary consequence of an approach designed to benefit the lower paid. Contrary to the IEU's submission, we do not detect any intention on the part of the AIRC to rectify this at some future time. We consider that it would be unconscionable to take an approach whereby wages are to be adjusted in such a way as to reverse what was done in the 1993-2010 period outside of the annual wage review process.

[652] Finally, we consider that the uniform wage increases of 17.5 percent (under the primary proposal) and 25 percent (under the alternative proposal) sought by the IEU would overcompensate for the work value considerations we have earlier identified if simply applied in a uniform way to the existing classification structure.

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[521] PR002001, [2001] AIRC 421, 104 IR 314

[653] We 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. As earlier stated, we consider that the current classification structure with its annual increments is anachronistic and does not properly relate to the work value of teachers. We consider that a new classification structure should be established which is anchored upon the professional career standards established by the APST and is tied to teacher registration (where applicable). The key classification, in our view, would be a Proficient Teacher who has a degree and has obtained registration (or, in the case of an early childhood teacher, if registration is not yet required in their jurisdiction, has met the requirements for registration as if they applied). A teacher at that level is fully qualified and capable of exercising the skills and discharging the responsibilities of the profession in an entirely unsupervised and autonomous way. In reaching this conclusion, we accept the submission made by the AFEI that a graduate teacher will not be the appropriate anchor classification for fixing wage rates because at that level the skills and responsibilities of the profession are not yet being fully exercised, as is recognised in the national registration system requirements.

[654] We consider that the appropriate alignment of this Proficient Teacher classification would be with Level C1(a) in the Metal Industry classification structure. As set out in the table in paragraph [562] above, the notional salary for the classification C1(a) at the compressed relativity of 148 percent compared to C10 is $1297.20 per week (or $67,688 per year). Because the Metal Industry classification structure is implicitly premised on the employee working a normal working year of 48 weeks on average, we consider that the alignment should be with teachers who do not receive the benefit of the "*school hours provision*" in clause 15 of the EST Award – that is, generally speaking, teachers employed in long day care centres. Teachers in preschools and schools who receive the benefit of school hours would therefore have the 4 percent increment currently provided for by the current clause 17.2 of the EST Award deducted. In our assessment this would produce a properly fixed rate of pay for a Proficient Teacher that properly takes into account the work value attaching to the practice of the teaching profession at that level.

[655] The Standards Based Remuneration structure in the NSW Teachers Award 2020 contains the following classifications:

Band 1	Graduate
Band 2.0	Proficient - Upon confirmation of proficient accreditation and after two years' full-time service.
Band 2.1	Proficient - After two years' full-time service at Band 2.0 and maintenance of proficient accreditation and satisfactory performance of duties
Band 2.2	Proficient - After one year's full-time service at Band 2.1 and maintenance of proficient accreditation and satisfactory performance of duties
Band 2.3	Proficient - After one year's full-time service at Band 2.2 and maintenance of proficient accreditation and satisfactory

performance of duties

Band 3 — Highly Accomplished/Lead - upon confirmation of Highly Accomplished/Lead accreditation and after one year's service at Band 2.3 and satisfactory performance of duties

[656] We consider that the above structure, which is built on the APST professional career standards, may with some modifications be adapted for use in the EST Award. We consider that the structure has, to an excessive degree, retained service-based requirements which are unlikely to be related to work value. We do not consider that, once a teacher has been accredited at the Proficient Level, there should be in addition a requirement for two years' full-time service. Further, we think that the further service-based progressions at the Proficient level occur at intervals which are too short to properly relate to the acquisition of additional skills and responsibility through experience. A better approach would be to have two service-based increments at the Proficient level at three-intervals. The rates for these incremental levels, and the higher classification for teachers registered at the Highly Accomplished/Lead levels should, we consider, be fixed at levels which, broadly speaking, maintain the current internal relativities of the EST Award. The Graduate-level pay rate may be fixed by an alignment with Level C2(b) in the Metal Industry classification structure.

[657] This would produce the following classification and pay structure:

Classification	**Criteria**	**Weekly salary - preschools and schools $**	**Annual salary - preschools and schools $**	**Weekly salary - long day care centres $**	**Annual salary - long day care centres $**
Level 1	Graduate teacher with provisional or conditional accreditation where applicable	1,141.20	59,545	1,186.80	61,927
Level 2	Teacher with proficient accreditation or equivalent	1,247.30	65,085	1,297.20	67,688
Level 3	Teacher with proficient accreditation after three years' satisfactory service at Level 2	1,357.90	70,854	1,412.20	73,688
Level 4	Teacher with proficient accreditation after three years' satisfactory service at Level 3	1,468.40	76,623	1,527.20	79,688
Level 5	Teacher with Highly Accomplished/Lead Teacher accreditation	1,579.00	82,392	1,642.20	85,688

[658] In addition, we consider that it is necessary to make provision for additional remuneration for any early childhood teacher appointed to the statutory role of Educational Leader. As earlier noted, clause 19.3 of the EST Award provides for a regime of leadership allowances payable to school teachers only, with the Level 1 allowance being applicable to positions of educational leadership. We consider that the Level 1 allowance for schools in the smallest category (category C) should also be payable to early childhood teachers who are required to discharge the responsibilities of the education leader under reg 118 of the National Regulations. This allowance is currently $3,302.46 per annum.

[659] The ACA submitted, in respect of the IEU's work value application, that the wage increases claimed by the IEU should not be granted because, among other reasons, it would disrupt the wage relativities between the EST Award and other awards which established minimum rates of pay for professional employees required to hold 4-year university degrees. Such a submission would also, presumably, equally be advanced in opposition to the wage structure set out above. The submission is rejected, for two reasons. First, the ACA did not demonstrate that there is any historical nexus or relativity between the EST Award and the other modern awards to which it referred. Second, it is open to question whether the rates for professional employees in a number of modern awards have been properly fixed in accordance with the principles stated in the *ACT Child Care decision*.[522] The AFEI relied upon the Egan Report to submit that the work value of teachers was less than that for professional engineers, and that minimum increases contrary to the relativities established in the Egan Report should not be awarded. We likewise reject this submission because, for the reasons outlined in relation to the equal remuneration application, the methodology used in the Egan Report (and the Mercer Report) does not establish a sound basis for the assessment of comparative work value for award wage-fixing purpose. Nor, we emphasise, is the wage structure above founded on any conclusion about the comparative work value of teachers and professional engineers.

C.11 Consideration - the modern awards objective and the minimum wages objective

[660] We have identified the modifications to the remuneration structure in the EST Award which would, in our view, be justified by work value reasons, would properly reflect the work value of teachers covered by the EST Award and would constitute properly-fixed minimum rates of pay. However, in order to give effect to those modifications by making a determination to vary the EST Award, we must first be satisfied under s 157(2)(b) of the FW Act that making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective. In addition, the modern awards objective in s 284(1) applies. Both objectives require us to take into account a number of specified matters. We must also take into account the rate of the national minimum wage pursuant to s 135(2).

[661] In relation to the matters specified in s 134(1), we are able to make the following findings:

- *Paragraph (a)*: This is not relevant and has no weight in our consideration because employees covered by the EST Award are not low paid.

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[522] See *Pharmacy Award decision* [2018] FWCFB 7621, 284 IR 121 at [194]-[198]; [2019] FWCFB 3949, 287 IR 129 at [1(3)],[15]; [2019] FWC 5934

- *Paragraph (b)*: Nearly all school teachers covered by the EST Award receive rates of pay and conditions of employment pursuant to collective agreements that are significantly more beneficial than those in the award both as it currently stands and under the contemplated modified remuneration structure. The variation of the EST Award will not affect collective bargaining in this area. In respect of early childhood teachers, there is a low incidence of collective bargaining, particularly in the for-profit sector. We do not consider this will change if the EST Award is varied as proposed. Because the variation of the award will not positively "*encourage collective bargaining*", this must be regarded as a matter which weighs against the variation, albeit only to a marginal degree.

- *Paragraph (c)*: We consider that there is a strong possibility that the higher wage rates proposed will, at least in the early childhood sector, attract greater workforce participation by teachers in that sector. We note in this respect Mr Carroll's evidence that, at G8, the decision taken unilaterally to substantially increase the wages of its early childhood teachers has "*added to G8's value proposition*" for such teachers and assisted in attracting teachers to employment with G8 and in retaining them. In circumstances where there is a shortage of teachers in the early childhood sector, and a number of witnesses referred to the difficulty in recruiting suitable persons for teaching roles and retaining them in the face of the superior employment conditions prevailing in the school sector, this consideration weighs significantly in favour of granting the application.

- *Paragraph (d)*: We consider that the variation would likely have a neutral effect on "*flexible modern work practices and the efficient and productive performance of work*". Because we are unable to positively find that the variation would "*promote*", this must be regarded as a marginally neutral consideration.

- *Paragraph (da)*: This is not a relevant consideration.

- *Paragraph (e)*: The variation would significantly improve the remuneration of a female-dominated area of the workforce. However, its purpose would not be to equalise the remuneration of workers in this sector with any group of male workers performing work of equal or comparable value, accordingly this is not a relevant consideration.

- *Paragraph (g)*: The proposed new classification structure, which aligns payment rates to teacher registration, is to some degree simpler and easier to understand than the current structure. This weighs in favour of the variation to a minor degree.

[662] We do not consider we are currently in a position to make findings in respect of paragraphs (f) and (h). In relation to paragraph (f), it is clear that the proposed remuneration structure would have no, or virtually no, effect upon school teachers and their employers, because the actual rates of pay for school teachers are generally already well in excess of the proposed rates of pay. However, in respect of the early childhood sector, there was considerable evidence concerning the cost of the IEU's claim and the effects the grant of claim would have on the viability, profitability and prices of for-profit employers in particular. However, the wage rates claimed by the IEU were significantly in excess of the wage rates contained in our proposed new classification structure and, accordingly, this

evidence is of limited utility in making findings concerning the matter specified in paragraph (f). In relation to paragraph (h) also, it is conceivable that, to the extent that the making of the variation might cause an increase in childcare costs, this could possibly have relevant macro-economic effects. The evidence to this point has not addressed this.

[663] As to the minimum wages objective in s 284(1), the considerations in paragraphs (b), (c) and (d) correspond respectively with paragraphs (c), (a) and (e) of s 134(1), and we make the same findings in respect of these. Paragraph (e) is not relevant. Paragraph (a) is in similar terms to paragraph (h) of s 134(1) and, for the same reasons, we are not in a position at this time to make findings about it.

[664] In accordance with s 135(2), we have taken into account the rate of the national minimum wage and have treated is as a neutral factor in our consideration.

[665] We consider that the appropriate course is to afford interested parties the opportunity to adduce further evidence and make further submissions which respond to the modifications to the remuneration structure in the EST Award which we consider to be justified by work value reasons, and which address s 134(1)(f) and (h) and s 284(1)(a), before we make findings concerning whether the variation of the EST Award to give effect to those modifications is necessary to achieve the modern awards objective and would be consistent with the minimum wages objective. Such further evidence and submissions might, among other things, usefully deal with the following matters:

- what the operative date of the variation should be if it is made;
- whether any phasing-in arrangements should apply; and
- the capacity of the Commonwealth Government and State and Territory Governments to assist in funding the wages of early childhood teachers.

C.12 Next steps

[666] After interested parties have had an opportunity to peruse this decision and consider its contents, we will list a directions hearing in the matter and determine the appropriate procedural course for the final disposition of the proceedings.

VICE PRESIDENT

Appearances:

Mr *I Taylor SC* with Ms *L Saunders* of counsel on behalf of the IEU.
Ms *R Mooney* on behalf of the AEU.
Mr *O Fagir* of counsel on behalf of the ACA.
Mr *R Warren* of counsel on behalf of the AFEI.
Ms *K Eastman SC* with Ms *E Raper SC* of counsel on behalf of the Commonwealth.

Hearing details:

2018.
Sydney:
July 26, 27, 30.

2019.
Sydney (with video-link to Melbourne, Perth, Adelaide and Canberra):
11, 12, 13, 17, 18, 19, 20, 25, 26, 27 June, 1, 2, 3, 4 July and 4, 5 September.

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FAIR WORK COMMISSION

Re Aged Care Award 2010

[2022] FWCFB 200

Ross J, President, Asbury and O'Neill DPP

26, 29 April, 2-6, 9-12, 24 May, 2, 6 June, 24, 25 August, 1 September, 4 November 2022

Awards — Applications to vary three modern awards covering employees in aged care sector — Gender-based undervaluation of work by females — Reasons — Assessment of whether work value changes had occurred — Relevance of past work value cases — Whether variation justified on work value reasons — Meaning of "justified" — Whether statutory definition of "work value reasons" exhaustive — Scope of definition — Need for broad evaluative judgment — Need to consider relativities in and between awards — Effect of work intensification — Whether transitory — Relevance of social utility of work — Work of direct care employees more challenging and dangerous — Relevance of need to attract and retain employees — Relevance of subjective opinions of aged care workers — Subjective nature of judging what was necessary to achieve modern awards objective — Fair and relevant safety net — How achieved — Fair Work Commission's task of assessing if variation justified — How satisfied — Relevance of past fixing of award rates — Impact on business of interim wage increase — Proceedings not inter partes — Effect — Agreed propositions regarding aged care employees — Whether proven — Barriers and limitations to proper assessment of female dominated industries and occupations — Whether "soft skills" merely personality traits or attributes — Valuation of work required all skills to be considered — Interim increase for certain direct care workers justified — Time of implementation of increase — Whether temporal limitation warranted — Whether proposed interim wage increase necessary to achieve modern awards objective and minimum wages objective — Determination of next steps to be taken in applications — Fair Work Act 2009 (Cth), ss 3, 134(1), 135, 138, 156, 157(2), 157(2A), 158, 166, 284(1), 577(a), 578(a).

Words and Phrases — "Justified" — Fair Work Act 2009 (Cth), s 157(2).

Words and Phrases — "Related to" — Fair Work Act 2009 (Cth), s 157(2A).

Words and Phrases — "Nature of the work" — Fair Work Act 2009 (Cth), s 157(2A).

Words and Phrases — "Necessary" — Fair Work Act 2009 (Cth), s 157(2)(b).

Following recommendations by the Royal Commission into Aged Care Quality and Safety made in March 2021 regarding inadequacies in pay for aged care workers, three unions made applications to the Fair Work Commission (the Commission) to vary three modern awards so as to increase the minimum wages of aged care sector workers. They sought, in essence, a 25% increase to the minimum wage rates for all aged care employees covered by the three awards and associated changes to the classification structures in those awards.

The applications were made under s 158(1) of the *Fair Work Act 2009* (Cth) (the Act). Relevantly, under s 135(1)(a) of the Act, modern award minimum wages could not be varied unless the Commission was satisfied that the variation was justified by work value reasons. Under s 157(2A) of the Act, such reasons "related to" the nature of the work, the level of skill or responsibility involved in doing the work and the conditions under which the work was done.

Under s 157(2), the Commission could vary modern award minimum wages if it was satisfied the variation was justified by work value reasons and the variation was "necessary to achieve the modern awards objective" as well as the minimum wages objective. The modern awards objective was defined in s 134(1) of the Act, while the minimum wages objective was defined in s 284(1) of the Act.

Held (granting an interim 15% increase to certain categories of aged care workers and ordering further stages of assessment of the applications) (by the Commission): (1) Social expectations and gender-based assumptions about the role of women as workers influenced the valuation of work and led to gender-based undervaluation of work. Reasons for such undervaluation included the continuation of occupational segregation, the weaknesses in job and work valuation methods and their implementation, social norms, gender stereotypes and historical legacies. Skills of the job occupant were discounted or overlooked because of gender.

(2) It was uncontroversial that a gender pay gap existed in Australia. A driver of that gap was gender undervaluation of work.

(3) In assessing whether there had been any work value changes, it was open to the Commission to have regard, in the exercise of its discretion, to considerations which had been taken into account in previous work value cases under different statutory regimes. It was likely the Commission would usually consider whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which the work had been done had previously been taken into account in a proper way (that is, in a way which was free of gender bias and any other improper considerations) in assessing wages in the relevant modern award or its predecessor in order to ensure there was no "double counting".

Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010 (2018) 284 IR 121 at [168], followed.

(4) Section 157(2) of the Act required a relatively broad and unconstrained judgment as to whether a variation in minimum wages was justified by work value reasons. It was not necessary that there was a significant net addition to work requirements to justify a minimum wages increase under that provision.

Re Independent Education Union of Australia [2021] FWCFB 2051 at [538], followed.

(5) Under s 157(2) of the Act, it was the new rate of minimum wages that had to be justified "by work value reasons", with "justified" being given its ordinary meaning showing something to be just, right or warranted. Hence the provision called for any variation of modern award minimum wages having to be just, right or warranted, or that a satisfactory reason for the variation had to be provided.

R v Naizmand [2016] NSWSC 836 at [29], applied.

(6) Characterising s 157(2A) of the Act as a "code" was not particularly helpful as it suggested that the provision was to be read in isolation from its statutory context, an approach which would be contrary to principle. Accordingly, while s 157(2A) could be said to exhaustively define work value reasons, in the sense that there were no other express provisions which informed the meaning of that subsection, the objects of the Act would still inform the interpretation and application of the concepts within it.

(7) There was nothing to suggest that the expression "related to" in s 157(2A) of the Act was not intended to have a wide operation or that an indirect, but relevant, connection would not be a sufficient relationship. The connection, however, could not be remote or accidental.

Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010 (2018) 284 IR 121 at [165], followed.

Australian Competition and Consumer Commission v Maritime Union of Australia (2001) 114 FCR 472 at [68]; *Joye v Beach Petroleum NL* (1996) 67 FCR 275 at 285, considered.

(8) Moreover, because the jurisdictional prerequisite expressed in s 157(2A) of the Act was expressed (in s 135(1)(a) of the Act) in terms of the Commission's "satisfaction" whether a variation was "justified" by a prescribed number of reasons, an element of subjectivity was involved about which reasonable minds might differ, which again required the formation of a broad evaluative judgment in deciding whether to allow the variation sought.

Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010 (2018) 284 IR 121 at [164], followed.

(9) Section 157(2A) did not incorporate the requirement made in past wage fixing principles that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification. To incorporate such a requirement would be to add words to the text of s 157 where it was not necessary to do so in order to achieve the legislative purpose. However, to ensure there was no "double counting", it was likely the Commission would adopt an appropriate datum point from which to measure work value change, where work had previously been properly valued, that is an assessment free of gender-based undervaluation or other improper considerations.

Kelly v Construction, Forestry, Maritime, Mining and Energy Union [2022] FCAFC 130 at [82], [85]; *Federal Commissioner of Taxation v Warner* (2015) 244 FCR 479 at [43]; *JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297; 218 IR 454 at [30], [33]; *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* (2014) 242 IR 210 at [101]; *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* (2015) 228 FCR 297; 247 IR 55 at [67]-[74], considered.

(10) When dealing with applications to vary modern award minimum wages, it was appropriate and relevant to have regard to relativities within and between awards. Aligning rates of pay in one award with classifications in other modern awards with similar qualification requirements would support a system of fairness, certainty and stability. However there were limitations to such an approach in that alignment with external relativities was not determinative of work value factors other than qualifications which had a bearing on the level of skill involved in doing the work, and such alignment was not a substitute for the Commission's statutory task of determining whether a variation of the relevant modern award rates of pay was justified by work value reasons.

(11) Work intensification could constitute an increase in work value. The more complex issue was the assessment of whether work intensification was a permanent feature of the work in question, or a transitory phenomenon which

would abate when staffing levels increased. An increase in minimum wage rates would assist in attracting and retaining aged care employees, but if that occurred, would work intensification be reduced in the aged care sector so that the work value of those employees now experiencing less work intensity thereby declined? Clearly a cautious approach to the assessment or workload and work value was warranted.

Re Social, Community, Home Care and Disability Services Industry Award 2010 [2020] FWCFB 4961 at [84], considered.

(12) However there was overwhelming evidence that the needs of those living in residential aged care facilities and those being cared for in their homes, had significantly increased in terms of clinical complexity, frailty, and cognitive and mental health. There was no evidence that those factors were transitory or that they could be entirely mitigated by increased staffing levels, particularly where the skills necessary to deal with those needs were not appropriately recognised and valued.

(13) To interpret the expression "the nature of the work" in s 157(2A) of the Act as encompassing some notion of "social utility" was apt to confuse and obfuscate the Commission's statutory task. The notion of "social utility" was itself value-laden and subjective, and no means of measuring "social utility" had been proffered in the proceedings.

(14) In relation to direct care workers, the nature of the work and the conditions under which the work was done had become more challenging and dangerous, and while such dangers were capable of being mitigated to some extent, they could not be entirely removed given the nature of the work performed. It was proper that this consideration be taken into account in the Commission's assessment of the work value reasons justifying the amount such workers should be paid.

Vickers Cockatoo Dockyard Pty Ltd v Federated Engine Drivers' and Firemen's Association of Australasia (1981) 250 CAR 338 at 338; *Re Social, Community, Home Care and Disability Services Industry Award 2010* [2020] FWCFB 4961 at [86], considered.

(15) Wage fixing tribunals, at federal and state level, had consistently refused to set minimum award wages on the basis of attracting and retaining employees, except where a long-term shortage of employees had a consequential effect on the work value of the employees performing the work.

Re Metal Trades Award; Re State Electricity Commission (Vic) (1964) 106 CAR 535 at 566; *Railways Professional Officers Award* (1958) 89 CAR 40; *Re Public Service Board and Public Service Association (NSW)* [1989] AR (NSW) 638 at 645; *Re Equal Remuneration Principle* (2000) 97 IR 177 at 215; *Re Health Employees Pharmacists (State) Award* (2003) 132 IR 244 at [46]-[47]; *Re Public Hospital Nurses (State) Award (No 3)* (2002) 121 IR 28, considered.

(16) It was not necessary that the Commission took account of the subjective opinions of some aged care workers in order to obtain an adequate understanding of the value of their work. The value of the work of the employees who were the subject of the applications was to be ascertained by reference to the evidence relating to the matters in s 157(2A) of the Act.

(17) Evidence as to the impacts of wages on job attraction and retention was not relevant to the identification or assessment of "work value reasons" as defined in s 157(2A) of the Act.

(18) What was "necessary" to achieve the modern awards objective in a particular case was a value judgment, taking into account the considerations set out in s 134 of the Act to the extent that they were relevant having regard to the context, including the circumstances of the particular award, the terms of any proposed variation and the submissions and evidence.

Shop, Distributive and Allied Employees Association v Australian Industry Group (2017) 253 FCR 368; 272 IR 88, considered.

(19) A fair and relevant safety net was one which provided minimum wage rates at a level which bore a proper relationship to the value of the work performed by the workers in receipt of those wages.

Shop, Distributive and Allied Employees Association v Australian Industry Group (2017) 253 FCR 368; 272 IR 88 at [49], [65], considered.

(20) Section 157(2)(b) of the Act, which provided that the Commission had to be satisfied that making a determination outside the system of annual wage reviews was necessary to achieve the modern awards objective, would be satisfied if the Commission was satisfied that making the proposed variation determination in the proceedings was necessary to achieve the modern awards objective.

(21) Where wage rates in a modern award had not previously been the subject of a proper work value consideration, there could be no implicit assumption that at the time the award had been made its wage rates were consistent with the modern awards objective or that they had been properly fixed.

(22) No assessment could be made of the impact on business of the interim increase the Commission proposed until further clarification was provided regarding the extent of Commonwealth funding to support the proposed increase.

(23) The matter before the Commission was not an inter partes proceeding. The parties to civil proceedings had considerable freedom to choose the issues in dispute; but that was not the case with proceedings concerning applications to vary modern awards. The Commission's role then was not to decide a dispute between the parties, but to be satisfied as to the relevant statutory prerequisites relating to the variation of the modern awards, including if the variation was necessary to achieve the modern awards objective. The Commission was not constrained by the terms of the applications, nor was it required to make a decision in the terms applied for.

(24) The agreed propositions regarding aged care employees, listed in [551] of this decision, were general in their character and would not necessarily apply consistently across classifications or universally in every instance to all employees concerned. However, the Commission was satisfied there was a sound evidentiary basis for them all and it adopted them as findings.

(25) Gender-based undervaluation of work in Australia arose from social norms and cultural assumptions that impacted on the assessment of work value. Those assumptions were in turn impacted by women's role as parents and carers and undertaking by women of the majority of primary unpaid caring responsibilities. The disproportionate engagement by women in unpaid labour contributed to the invisibility and the under-recognition of skills described as creative, nurturing, facilitating or caring in paid labour.

(26) There were barriers and limitations to the proper assessment of work value in female dominated industries and occupations, including changes in the regulatory framework for equal pay and equal pay applications, and the interpretation of that framework, procedural requirements such as the direction in wage fixing principles that assessment of work value focused on changes in work value in female-dominated industries and occupations, and conceptual considerations including the subjective notion of skill and the "invisibility" of skills when assessing work value in female-dominated industries and occupations.

(27) Description of "soft skills" such as empathy, people skills and resilience as personality traits or attributes was a mischaracterisation, and that was at the heart of the gendered undervaluation of female dominated industries and occupations.

(28) The Commission's task, namely to determine the actual value of the work in aged care and if a variation of the current rates was justified by "work value reasons", being reasons related to any of the criteria set out in s 157(2A) of the

Act, required that it take into account all the skills exercised by aged care workers, which could include an assessment of skills that had previously not been considered or properly valued.

(29) The Commission was satisfied that in respect of direct care workers in the aged care sector, be it the residential or the in-home aged care sector, the evidence established that existing minimum wage rates did not properly compensate employees for the value of work performed, but as for support and administrative employees, such evidence was not as clear or compelling, varied as between classification, and required further examination after further submissions and potentially, further evidence from the parties.

(30) However, at this point in time, only for direct care workers comprising registered nurses, enrolled nurses and nurse practitioners, and to each level of personal care workers and home care workers, an interim increase of 15% was plainly justified.

(31) While s 166 of the Act created a default rule or presumption that a determination varying modern award minimum wages came into operation on 1 July in the next financial year after it was made, the presumptive operative date could be displaced if the Commission was satisfied it was "appropriate" to specify a different operative date. In doing so, the Commission had to exercise its power in a manner that was fair and just, taking into account the Act's objectives, equity, good conscience and the merits of the matter. Fairness in that context was to be assessed from the perspective of both the employers and employees affected by the variation determination.

Re Australian Workers' Union (2022) 314 IR 337 at [152]-[158], [160]-[171]; *Re Independent Education Union of Australia* [2021] FWCFB 6021 at [19]-[21]; *Re 4 Yearly Review of Modern Awards — Penalty Rates — Transitional Arrangements* (2017) 272 IR 1 at [141]-[155]; *Re 4 Yearly Review of Modern Awards* [2019] FWCFB 7094 at [33]-[41]; *Re 4 Yearly Review of Modern Awards — General Retail Industry Award 2010* (2018) 282 IR 269 at [264], [267], [280]-[285], considered.

(32) The Commission had no in-principle objection to the idea that any increase in nurses' minimum wages arising from these proceedings be contained in an "Aged Care Schedule" to the Nurses Award, save that such a Schedule would cease to operate after four years. There was no warrant for such a temporal limitation and it was not necessary to ensure that the Award achieved the modern awards objective.

Consideration of factors relevant to determining whether the proposed interim variation determination was necessary to achieve the modern awards objective and the minimum wages objective.

Discussion of the next steps to be taken in the hearing of the applications.

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Public Service Board and Public Service Association (NSW) (Local Courts Anomaly Case), Re [1989] AR (NSW) 638.

Quikfund (Aust) Pty Ltd v Airmark Consolidators Pty Ltd (2014) 222 FCR 13.

R v L (1994) 49 FCR 534.

R v Naizmand [2016] NSWSC 836.

R v Ross-Jones; Ex parte Green (1984) 156 CLR 185.

Railways Professional Officers Award (1958) 89 CAR 40.

Safety Net Review — Wages — May 2004, Re (2004) 129 IR 389.

Safety Net Review — Wages June 2005, Re (2005) 142 IR 1.

Shop, Distributive and Allied Employees Association v Australian Industry Group (2017) 253 FCR 368; 272 IR 88.

Shop, Distributive and Allied Employees Association v National Retail Association (No 2) (2012) 205 FCR 227; 219 IR 382.

Smith v Federal Commissioner of Taxation (1987) 164 CLR 513.

Social, Community, Home Care and Disability Services Industry Award 2010, Re [2020] FWCFB 4961.

Taxation, Deputy Commissioner of v Clark (2003) 57 NSWLR 113.

Taxation, Federal Commissioner of v Unit Trend Services Pty Ltd (2013) 250 CLR 523.

Taxation, Federal Commissioner of v Warner (2015) 244 FCR 479.

Taylor v Owners — Strata Plan No 11564 (2014) 253 CLR 531.

Technical Products Pty Ltd v State Government Insurance Office (Qld) (1989) 167 CLR 45.

Tooheys Ltd v Commissioner of Stamp Duties (1961) 105 CLR 602.

Travelex Ltd v Federal Commissioner of Taxation (2010) 241 CLR 510.

Vella v Minister for Immigration and Border Protection (2015) 230 FCR 61.

Vickers Cockatoo Dockyard Pty Ltd v Federated Engine Drivers and Firemen's Association of Australasia (1981) 250 CAR 338.

Wills v Marley (2020) 298 IR 254.

Applications for increases in award minimum wages set by the Aged Care Award 2010, the Nurses Award 2020 and the Social, Community, Home Care and Disability Services Award 2010

M Gibian SC, *L Saunders* and *L Doust*, for the Health Services Union.

J McKenna SC and *J Hartley*, for the Australian Nursing and Midwifery Federation.

B Redford, *S Oski*, *C Barry*, *N Dabarera* and *L Harrison*, for the United Workers Union.

N Ward, *J Lombardelli* and *A Rafter*, for the Aged & Community Services Australia, Leading Aged Services Australia and Australian Business Industrial.

Mr Sharif and *Ms Bulut*, for the Commonwealth.

Cur adv vult

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Attachments

Abbreviations

2019 Aged Care Decision	*Re 4 Yearly Review of Modern Awards — Award Stage — Group 4 — Aged Care Award 2010 — Substantive Claims* [2019] FWCFB 5078
2020 Workforce Report	2020 Aged Care Workforce Census
4 Yearly Review	4 yearly review of modern awards
4 Yearly Review Amending Act	*Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth)
ABS	Australian Bureau of Statistics
ABI	Australian Business Industrial
ACFI	Aged Care Funding Instrument
ACSA	Aged & Community Services Australia
ACQS Commission	Aged Care Quality and Safety Commission
ACQS Commission Act	*Aged Care Quality and Safety Commission Act 2018* (Cth)
ACT Child Care Decision	*Re Australian Liquor, Hospitality and Miscellaneous Workers Union* (unreported, AIRC (FB), PR954938, 13 January 2005)
Aged Care Act	*Aged Care Act 1997* (Cth)
Aged Care Award	*Aged Care Award 2010*
AIN	Assistant in Nursing
AIRC	Australian Industrial Relations Commission
ANMF	Australian Nursing and Midwifery Federation
APESMA	The Association of Professional Engineers, Scientists and Managers, Australia
AQF	Australian Qualifications Framework
Awards	The *Aged Care Award 2010, Nurses Award 2020* and *Social, Community, Home Care and Disability Services Award 2010*
Background Document 1	Background Document 1 — The Applications dated 9 June 2022

Abbreviations

Background Document 2	Background Document 2 — Award Histories dated 9 June 2022
Background Document 3	Background Document 3 — Witness Overview dated 20 June 2022
Background Document 4	Background Document 4 — Royal Commission into Aged Care Quality and Safety dated 20 June 2022
Background Document 5	Background Document 5 — dated 5 August 2022
Background Document 6	Background Document 6 — The Commonwealth dated 22 August 2022
Background Document 7	Background Document 7 — Modern Awards Objective dated 22 August 2022
Background Document 8	Background Document 8 — Summary of Submissions dated 22 August 2022
Background Document 9	Background Document 9 — Procedural History dated 30 August 2022
BaptistCare	BaptistCare NSW & ACT
Buckland	Buckland Aged Care Services
CCIWA	Chamber of Commerce and Industry of Western Australia
Charlesworth Report	Prof Sara Charlesworth, *Report of Sara Charlesworth: Health Services Union of NSW — Regarding work value for aged care members* dated 31 March 2021
Charlesworth Supplementary Report	Prof Sara Charlesworth, *Supplementary Report of Sara Charlesworth* dated 22 October 2021
CHSP	Commonwealth Home Support Programme
CoE Survey	ABS, *Characteristics of Employment, Australia, August 2017*, Catalogue No. 6333.0
Commission	Fair Work Commission
Consensus Statement	Aged Care Sector Stakeholder Consensus Statement dated 17 December 2021
Direct aged care workers	Employees in the aged care sector covered by the Awards in caring roles, including nurse practitioners, RNs, ENs, AINs, PCWs and HCWs.
DoHAC	Commonwealth Department of Health and Aged Care
Eagar Report	Professor Kathleen Eagar, *Report of Dr Kathleen Eagar* dated 29 March 2021
Eagar Supplementary Report	Professor Kathleen Eagar, *Supplementary Report of Dr Kathleen Eagar* dated 20 April 2022
ECA	Extended Care Assistant
EEH	ABS, *Employer Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0
EN	Enrolled Nurse

Abbreviations

Equal Remuneration Decision 2015	*Equal Remuneration Decision 2015* (2015) 256 IR 362
EST Award	*Educational Services (Teachers) Award 2020*
Evergreen	Evergreen Life Care
FW Act	*Fair Work Act 2009* (Cth)
HCP	Home Care Package
HCPP	Home Care Package Program
HCW	Home care worker or Home care employee
HSU	Health Services Union
IEU	Independent Education Union of Australia
Joint Employers	Aged & Community Services Australia, Leading Age Services Australia, Australian Business Industrial
Junor Report	Honorary Assoc Prof Anne Junor, *Fair Work Commission matter AM2021/63, Amendments to the Aged Care Award 2010 and the Nurses Award 2010* dated 28 October 2021, as amended 5 May 2022.
Kurrle Report	Prof Susan Kurrle, *Report of Dr Susan Kurrle regarding work value for aged care members* dated 25 April 2021
LASA	Leading Age Services Australia
Lay Witness Evidence Report	*Report to the Full Bench — Lay Witness Evidence Report* published by Commissioner O'Neill on 20 June 2022.
Manufacturing Award	*Manufacturing and Associated Industries and Occupations Award 2020*
Meagher Report	Prof Gabrielle Meagher, *Changing aged care, changing aged care work: workforce and work value issues in Australian residential aged care* dated 31 March 2021
Meagher Supplementary Report	Prof Gabrielle Meagher, *Supplementary report on workforce and work value issues in Australian home care for older people* dated 27 October 2021, as amended 26 May 2022.
NACWCS	National Aged Care Workforce Census and Survey
NES	National Employment Standards
Nurses Award	*Nurses Award 2020*
PCW	Personal Care Worker
PCA	Personal Care Assistant or Personal Care Attendant
Penalty Rates Decision	*Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1
Penalty Rates Review	*Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88
Pharmacy Award	*Pharmacy Industry Award 2010*
Pharmacy Decision	*Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121
Principal Parties	HSU, ANMF, UWU and the Joint Employers
PSRACS	Public sector residential aged care services

Abbreviations

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

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Fair Work Commission

1. Introduction

1 The Final Report of the Royal Commission into Aged Care Quality and Safety (the Royal Commission) was tabled on 1 March 2021. The Royal Commission received 10,574 public submissions and heard evidence from more than 600 witnesses across 99 days of hearing.[1] Over 1,000 aged care providers were surveyed[2] and some 12 community forums and 13 expert roundtable discussions were conducted.

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

3 The Royal Commission concluded that the aged care workforce faces "systemic" problems:

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

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

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

> *Recommendation 84: Increases in award wages*
>
> Employee organisations entitled to represent the industrial interests of aged care employees covered by the *Aged Care Award 2010*, the *Social, Community, Home Care and Disability Services Industry Award 2010* and the *Nurses Award 2010* should collaborate with the Australian Government and employers and apply to vary wage rates in those awards to:
>
> a. reflect the work value of aged care employees in accordance with section 158 of the *Fair Work Act 2009* (Cth), and/or

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

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

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

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

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

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

b. seek to ensure equal remuneration for men and women workers for work of equal or comparable value in accordance with section 302 of the *Fair Work Act 2009* (Cth).

6 These proceedings arise out of Recommendation 84.

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

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

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

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

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

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

12 The *Aged Care Award* is an industry award that covers employers and their employees in the "aged care industry". The aged care industry is defined as:

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

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

- Personal care, which deals with Personal Care Workers (PCWs)

7 The *Nurses Award 2010* was varied and renamed the *Nurses Award 2020* per *Re 4 Yearly Review of Modern Awards* [2021] FWCFB 4504 on 9 September 2021.

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

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

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

- Food services, which includes cooks and chefs, and
- General and administrative services, which includes cleaners, gardeners, clerks, drivers and maintenance employees.

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

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

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

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

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

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

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

19 Evidentiary hearings were held from 26 April to 2 June 2022 and inspections were conducted by members of the Full Bench on 27 and 28 April at a range of residential aged care facilities in Sydney and Melbourne, agreed by the parties.

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

Closing oral argument took place on 24 to 25 August and 1 September 2022. Transcripts of those hearings have been published on the Commission's website (https://www.fwc.gov.au/hearings-decisions/major-cases/work-value-case-aged-care-industry/transcript-work-value-case).

20 The Commission has published the following Background Documents:

- Background Document 1 — The Applications setting out, amongst other things, a summary of the Applications, the procedural history, the legislative framework relevant to the Applications and the main contentions of the principal parties.
- Background Document 2 — Award Histories setting out the history of wages and classifications in the *Aged Care Award*, the *Nurses Award* and the SCHADS Award.
- Background Document 3 — Witness Overview which contains a brief overview of each of the witness statements (including employers, union official and expert witnesses); the relevant page number of each witness statement in version 2 of the Digital Hearing Book, links to the final witness statements and transcript references; and specific paragraphs of the witnesses' statements that they were taken to in cross-examination as well as links to any other documents referenced in the course of giving oral evidence.
- Background Document 4 — The Royal Commission into Aged Care Quality and Safety sets out links and extracts from the submissions, witness evidence and the *Research Reference List* (the RRL) in these proceedings that are relevant to the findings and recommendations of the Royal Commission.
- Background Document 5 — summarises the parties' closing written submissions and the answers to the questions posed in Background Documents 1 and 2.
- Background Document 6 — The Commonwealth summarises the Commonwealth's submissions and the parties' submissions in reply to the Commonwealth.
- Background Document 7 — Modern Awards Objective sets out the parties' submissions in relation to the modern awards objective.
- Background Document 8 — Summary of Submissions summarises the closing submissions in reply and the answers to the questions posed in Background Document 5.
- Background Document 9 — Procedural History sets out the updated procedural history in these proceedings.

21 The Commission has also published a Digital Hearing Book[12] and Research Reference List.

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

- Decisions and Statements
- Notices of Listing and Directions
- Correspondence
- Submissions

12 *Re Aged Care Award 2010* [2022] FWCFB 58 at [21]-[27]; *Re Aged Care Award 2010* [2022] FWCFB 94 at [8]-[9].

- Transcripts
- Witness Statements
- Documents raised in cross-examination, and
- Tender bundles.

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

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

25 The Research Reference List has been updated throughout these proceedings and was most recently published on 9 June 2022.[13] In a Statement published on 9 June 2022, the President noted that the Research Reference List:

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

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

2. The decision: an overview

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

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

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

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

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

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

33 We deal with the evidence in Chapter 5.

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13 Research Reference List dated 9 June 2022.

14 *Re Aged Care Award 2010* [2022] FWCFB 94 at [10].

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

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

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

37 The lay witness evidence is discussed in Chapter 5.4. We accept that the lay witness evidence is necessarily limited to the personal experience of the particular witness and cannot be extrapolated to encompass the conditions, skills and experience of all persons who work in the aged care sector. We also accept that aspects of the lay witness evidence are hearsay or opinion and as a result subject to the appropriate limitations.

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

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

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

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

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

1. The valuation of work is influenced by social expectations and gendered assumptions about the role of women as workers. In turn these social practices influence institutional and organisational practices.
2. Undervaluation occurs when work value is assessed with gender-biased assumptions. The reasons for gender-based undervaluation in Australia

include the continuation of occupational segregation, the weaknesses in job and work valuation methods and their implementation, and social norms, gender stereotypes and historical legacies.[15]

3. Gender-based undervaluation in the employment context occurs when work value is assessed with gender-biased assumptions[16] which means the skill level of occupations, work or tasks is influenced by subjective notions about gender and gender roles in society. Skills of the job occupant are discounted or overlooked because of gender.[17]
4. Gender-based undervaluation of work in Australia arises from social norms and cultural assumptions that impact the assessment of work value.[18] These assumptions are impacted by women's role as parents and carers and undertaking the majority of primary unpaid caring responsibilities. The disproportionate engagement by women in unpaid labour contributes to the invisibility and the under recognition of skills described as creative, nurturing, facilitating or caring skills in paid labour.[19]
5. The barriers and limitations to the proper assessment of work value in female dominated industries and occupations include:
    - changes in the regulatory framework for equal pay and equal remuneration applications and the interpretation of that framework.
    - procedural requirements such as the direction in wage-fixing principles that assessment of work value focus on changes in work value and tribunal interpretation of this requirement.
    - conceptual considerations including the subjective notion of skill and the "invisibility" of skills when assessing work value in female-dominated industries and occupations.[20]
6. The approach taken to the assessment of work value by Australian industrial tribunals and constraints in historical wage fixing principles have been barriers to the proper assessment of work value in female dominated industries and occupations. In particular:
    (i) The requirement for tribunals to make an adjustment to minimum rates based only on a change in work value has meant that there has been a limited capacity to address what may have been errors and flaws in the setting of minimum

15 Smith/Lyons Report at [62].

16 Smith/Lyons Report at [47] citing A-F Bender and F Pigeyre, "Job evaluation and gender pay equity: a French example" (2016) 34(4) *Equality, Diversity and Inclusion: An International Journal* 267 at 268-270. Assoc Prof Smith and Dr Lyons also note at [52]: "Peetz (D Peetz, 'Regulation distance, labour segmentation and gender gaps' (2015) 39(2) *Cambridge Journal of Economics* 345) examines the impact of stereotypical gender attitudes of skill, and notes they are more subjective than objective. Peetz argues sex-based stereotyping can be a major reason for the undervaluation of jobs and tasks performed primarily by women or work perceived as intrinsically 'feminine' in nature. The tasks performed by, and skills applied in, female-dominated occupations — such as care-giving, manual dexterity, human relations skills, and working with children — are often viewed as being of lesser value than the tasks and work performed in male-dominated occupations".

17 Smith/Lyons Report at [60].

18 Smith/Lyons Report at [59].

19 Smith/Lyons Report at [56].

20 Smith/Lyons Report at [93].

rates for work in female dominated industries and occupations. These limitations in the capacity of tribunals to properly value the work arise because any potential errors in the valuation of the work may have predated the last assessment of the work by the tribunals.

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

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

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

44 The Junor Report is discussed in Chapter 7.3.2.

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

46 We conclude that Assoc Prof Junor's evidence was cogent, probative and relevant to our assessment of whether a variation of modern award minimum wages in the relevant awards is "justified by work value reasons" (s 157(2)(a)).

47 The evidence in respect of the gender pay gap is discussed at Chapter 7.3.3. We note that is uncontroversial that a gender pay gap exists in Australia. We accept the logic of the proposition in the expert evidence that gender undervaluation of work is a driver of the gender pay gap. We also accept as a general proposition that if all work was properly valued there would likely be a reduction in the gender pay gap. But we note that these proceedings are not a

21 Smith/Lyons Report at [90].

22 Smith/Lyons Report at [92].

23 Junor Report at [10], [138]-[140].

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

general inquiry into the drivers of the gender pay gap, and it is not necessary for the purposes of these proceedings that we determine why the relevant minimum rates in the 3 awards before us have not been properly fixed.

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

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

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

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

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

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

52 Stage 3 will include a more detailed consideration of the classification definitions and structures in the relevant Awards. Interested parties may wish to make further submissions and call additional evidence in relation to these

matters in this stage of the proceedings. We would then issue a further decision finalising the classification definitions and structures in the relevant Awards.

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

54 Staging our decision in this way:

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

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

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

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

58 We discuss the Modern Awards Objective in Chapter 8.4.

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

60 At present, we are unable to reach a concluded view on whether the proposed interim variation determination is necessary to achieve the modern awards objective. One of the matters we are required to take into account in forming that evaluative judgment is "the likely impact of any exercise of modern award powers on business, including on … employment costs" (s 134(f)). The likely impact on employers of the interim increase we propose to award will be ameliorated to the extent of Government funding support for that increase. The extent of funding support is unknown at present.

61 Given the funding arrangements in the aged care sector, the Joint Employers and the Commonwealth sought an opportunity to make further submissions regarding the timing of the implementation of any minimum wages increases arising from these proceedings. We conclude that the course proposed is a reasonable one and is comprehended within the staged approach we have adopted. To assist the parties in their submissions regarding the implementation

of the interim increase, this section of our decision sets out the relevant legislative provisions and the approach taken to the phasing-in of Commission decisions in other cases.

62 The Minimum Wages Objective is discussed in Chapter 8.5.

63 It is common ground that the consideration in s 284(1)(e) is not relevant in the context of the Applications,[25] we note that the consideration in s 284(1)(d) is in the same terms as s 134(1)(e) and we propose to invite further submissions on the proper construction and the relevance of the principle and we express some *provisional* views in respect of the remaining s 284(1) considerations.

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

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

3. Legislative framework

3.1. Overview

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

67 Section 135 is titled "Special provisions relating to modern award minimum wages" and provides:

> (1) Modern award minimum wages cannot be varied under this Part except as follows:
>
> (a) modern award minimum wages can be varied if the FWC is satisfied that the variation is justified by work value reasons (see subsection 157(2));
>
> (b) modern award minimum wages can be varied under section 160 (which deals with variation to remove ambiguities or correct errors) or section 161 (which deals with variation on referral by the Australian Human Rights Commission).
>
> Note 1: The main power to vary modern award minimum wages is in annual wage reviews under Part 2-6. Modern award minimum wages can also be set or revoked in annual wage reviews.
>
> Note 2: For the meanings of *modern award minimum wages*, and *setting* and *varying* such wages, see section 284.
>
> (2) In exercising its powers under this Part to set, vary or revoke modern award minimum wages, the FWC must take into account the rate of the national minimum wage as currently set in a national minimum wage order.

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

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

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

> Section 157 FWC *may vary etc. modern awards if necessary to achieve the modern awards objective*
>
> (1) The FWC may:
>
> (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
>
> (b) make a modern award; or
>
> (c) make a determination revoking a modern award;
>
> if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.
>
> …
>
> (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
>
> (a) the variation of modern award minimum wages is justified by work value reasons; and
>
> (b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.
>
> Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).
>
> (2A) *Work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
>
> (a) the nature of the work;
>
> (b) the level of skill or responsibility involved in doing the work;
>
> (c) the conditions under which the work is done.
>
> …

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

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

> 138 Achieving the modern awards objective
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve

the modern awards objective and (to the extent applicable) the minimum wages objective.

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

> 3 Object of this Act
>
> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
>
> (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
>
> …

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

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

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

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

> (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
>
> (a) the variation of modern award minimum wages is justified by work value reasons; and
>
> (b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.
>
> Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

76 The expression "work value reasons" is defined in s 157(2A) which provides:

> (2A) *Work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
>
> (a) the nature of the work;

26 FW Act, ss 577-578.

(b) the level of skill or responsibility involved in doing the work;
(c) the conditions under which the work is done.

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

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

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

- *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 (the *Pharmacy Decision*), and
- *Re Independent Education Union of Australia* [2021] FWCFB 2051 (the *Teachers Decision*).

3.2.1. The *Pharmacy Decision*

80 The *Pharmacy Decision*[28] dealt with a claim by the Association of Professional Engineers, Scientists and Managers Australia[29] (APESMA), in the context of the 4 yearly review of modern awards to increase the minimum wages in the *Pharmacy Industry Award 2010* (the Pharmacy Award) under then s 156 of the FW Act. APESMA's primary claim was for wages to be increased by an amount necessary to restore what was said to be the proper relativity with the C10 classification rate now found in the *Manufacturing and Associated Industries and Occupations Award 2020* (the Manufacturing Award). In the alternative, the APESMA sought a 25 per cent increase to all wage rates in the Pharmacy Award.

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

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

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

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

28 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121.

29 Now known as Professionals Australia.

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

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

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

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

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

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

> (1) The APESMA had demonstrated that there was an increase in work value associated with the introduction of Home Medicine Reviews (HMR) and Residential Medication Management Reviews (RMMR) that justified a discrete adjustment to award remuneration by means of the introduction of a new allowance. We invited further submissions about the form of this allowance (including whether it should be an annual or weekly allowance or an allowance payable each time a HMR or RMMR is performed) and its quantum.
>
> (2) We were satisfied that there had been an increase in the work value of pharmacists since 1998 in respect of the introduction of inoculations, the provisions of emergency contraception, the downscaling of medicines to pharmacy-only status, and a general increase in the level of responsibility and accountability. We invited parties to make further submissions as to how these findings should be reflected in an adjustment to remuneration, noting that not all pharmacists administer inoculations or dispense emergency contraception.
>
> (3) There was a lack of alignment in pay rates and relativities as between pharmacists (who require a four-year undergraduate degree) under the *Pharmacy Award* and those for classifications requiring equivalent

30 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [183].

31 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award* (2019) 287 IR 129 at [1].

> qualifications under the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award), as well as a lack of a consistent relationship with the Australian Qualifications Framework (AQF). We considered that this might potentially constitute a work value consideration relevant to the 4 yearly review of the *Pharmacy Award*. We invited further submissions as to this matter, and foreshadowed the possibility that this aspect of the review might need to be referred back to the President of the Commission for consideration as to the procedural course to be taken pursuant to s 582 of the *Fair Work Act 2009* (FW Act) since it might have implications for other awards of the Commission …

87 The *Pharmacy Decision* traced the genesis and development of the concept of fixing wages based on "work value" from 1921 to the "Work Value Changes" principle established in the *National Wage Case April 1991*.[32]

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

> 6. Work Value Changes
>
> (a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.
>
> In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award structure but also against external classifications to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in relative position.
>
> These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this Principle.
>
> (b) In applying the Work Value Changes Principle, the Commission will have regard to the need for any alterations to wage relativities between awards to be based on skill, responsibility and the conditions under which work is performed (s 88B(3)(a)).
>
> (c) Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification, or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.
>
> (d) The time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the *August 1989 National Wage Case decision* (*August 1989 National Wage Case*) [Print H9100; (1989) 30 IR 81].
>
> (e) Care should be exercised to ensure that changes which were or should

32 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [131]-[162]; *National Wage Case April 1991* (1991) 36 IR 120 at [183]-[184].

33 *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* (unreported, AIRC (FB), PR954938, 13 January 2005) at [186].

have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this Principle.

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

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

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

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

89 When the Australian Industrial Relations Commission (the AIRC) was stripped of its minimum wage-fixing functions by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth), the wage fixing principles became redundant and the concept of work value then played no part in wage fixation until the enactment of the FW Act in 2009.[35]

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

1. The effect of s 156(3) is to establish a jurisdictional prerequisite for the exercise of power to vary minimum wages in a modern award in the conduct of a 4 yearly review of modern awards, namely the reaching of a state of satisfaction on the part of the Commission that the variation is "justified by work value reasons".[36]
2. Because the jurisdictional prerequisite is expressed in terms of the Commission's "satisfaction" concerning whether a variation is "justified" by the prescribed type of reasons — a requirement which involves an element of subjectivity and about which reasonable minds may differ — it requires the formation of a broad evaluative judgment involving the exercise of a discretion.[37]
3. The definition of "work value reasons" in s 156(4) requires only that the reasons justifying the amount to be paid for a particular kind of work be "related to any of the following" matters set out in paras (a)-(c). The expression "related to" is one of broad import that requires a sufficient connection or association between 2 subject matters. The degree of the connection required is a matter for judgment depending on the facts of the case, but the connection must be relevant

34 *Re Safety Net Review — Wages — May 2004* (2004) 129 IR 389; *Re Safety Net Review — Wages, June 2005* (2005) 142 IR 1.

35 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [162].

36 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [163].

37 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [164].

and not remote or accidental.[38] The subject matters between which there must be a sufficient connection are, on the one hand, the reasons for the pay rate and, on the other hand, any of the 3 matters identified in paras (a)-(c) — that is, any one or more of the 3 matters.[39]

4. Although the 3 matters identified — the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done — clearly import the fundamental criteria used to assess work value changes under the wage fixing principles which operated from 1975 to 1981 and 1983 to 2006, the legislature in enacting s 156(4) chose not to import the additional requirements contained in those wage fixing principles. In particular, s 156(4) does not contain any requirement that the work value reasons consist of identified changes in work value measured from a fixed datum point. Likewise, s 156(4) did not incorporate the test in the wage-fixing principles that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification. In substance, ss 156(3) and (4) leave it to the Commission to exercise a broad and relatively unconstrained judgment as to what may constitute work value reasons justifying an adjustment to minimum rates of pay similar to the position which applied prior to the establishment of wage fixing principles in 1975.[40]
5. It would be open to the Commission to have regard, in the exercise of its discretion, to considerations which have been taken into account in previous work value cases under differing past statutory regimes. For example, although s 156(4) contains no requirement for the measurement of work value changes from a fixed datum point, it is likely the Commission would usually take into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way (that is, in a way which is free of gender bias and any other improper considerations) in assessing wages in the relevant modern award or its predecessor in order to ensure that there is no "double counting".[41]
6. The considerations referred to in [190] of *Child Care Industry (Australian Capital Territory) Award 1998*[42] (the *ACT Child Care Decision*) may be of relevance in particular cases, as may considerations in other authoritative past work value cases.[43]
7. Even if the jurisdictional prerequisite in s 156(3) is satisfied, it remains the case that the Commission must, as required by s 138, ensure that

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

39 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [165].

40 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [166]-[167].

41 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [168].

42 *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* (unreported, AIRC (FB), PR954938, 13 January 2005).

43 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [168].

> the inclusion of the varied minimum wages term in the relevant modern award would be necessary to achieve the modern awards objective and the minimum wages objective.

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

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

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

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

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

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

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

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

> The Commonwealth also agrees with the observation made by the Full Bench in the *Pharmacy Decision* that the three limbs of s 157(2A) are sufficiently broad so as to import the fundamental criteria used to assess work value changes under the wage fixing principles which operated from 1975 to 1981 and 1983 to 2006.[47] *There is nothing to indicate that the legislature, in enacting the FW Act, intended to change the meaning of "work value" as a core concept.*

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

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

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

47 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [166].

> Since the earliest days of the federal industrial relations system it has been accepted that an intrinsic part of a work value assessment is that the rates of pay for particular work should be understood and assessed relative to other rates of pay for comparable work.[48]
>
> The Commonwealth submits that *the Commission should continue to have regard to relativities in wage rates within and between awards (internal and external wage relativities), but that such considerations should not be determinative.*
>
> Ultimately, the Commission has discretion as to whether it should vary modern award minimum wages where the criteria in s 157(2) are met.[49]

(Emphasis added)

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

> … Expressed at that level of generality — *i.e.*, some aspects of former approaches *may* be relevant — there is nothing objectionable in the submission. But the Commission would not treat earlier approaches as any kind of "step", whether first, last, or middle.
>
> For reasons set out by the ANMF in its opening submissions at [32]-[38] (which submissions it presses), some of the principles set out in the *ACT Child Care Decision* at [190] can probably be safely applied, but many cannot, and the application of some (*i.e.*, those that call up the "significant net addition" language) will lead into error.
>
> It is undesirable to overlay statutory expressions with a multiplicity of expositions, functioning as "tests", which might carry the consequence that the words of the statute are overlaid and forgotten. The result can be that, as Kitto J put it in *Ballas v Theophilos (No 1)* (1957) 97 CLR 186 at 196, "expressions which have been used in other cases [are carried] to such a length as to desert the language of the statute".
>
> The question — the *only* question at this stage of the analysis — for the Commission is whether work value reasons exist so as to justify an increase in minimum award wages. [T]he statute contains no words of limitation so that only certain kinds of work value reasons (*e.g.*, those demonstrating "significant net addition"), *etc.*, qualify. The Commission would artificially narrow the scope of its broad discretion were it to import *any* limitations on its power.[50]

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

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

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48 A Preston, *The Structure and Determinants of Wage Relativities Evidence from Australia* (Routledge, 2017) at 54 citing *Ex parte McKay* (1907) 2 CAR 1 at 11-12.

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

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

3.2.2. The *Teachers Decision*

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

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

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

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

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

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

1. The rates for teachers under the EST Award and its federal predecessors had never been fixed on the basis of a proper assessment of the work value of teachers nor were they properly fixed minimum rates. In particular, the rates of pay did not recognise that teachers are

51 *Re Independent Education Union of Australia* [2021] FWCFB 2051.

52 *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [218].

53 *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [538].

degree-qualified professionals and accordingly did not have an appropriate relativity with the Metal Industry classification structure.

2. There had been substantial changes in the nature of the work of teachers and the level of their skills and responsibility since 1996, which constituted a significant net addition to their work value which has not been taken into account in the rates of pay in the EST Award.

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

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

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

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

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

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

54 *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [605].

55 *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [607].

56 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [150]-[161].

1998 (Metal Industry classification structure). We endorse and adopt that analysis without repeating it. It is sufficient for present purposes to refer to the following passage from the *ACT Child Care Decision*:

> [155] In the context of the matter before us, the principles established in the *Paid Rates Review decision* mandate a three step process for the determination of properly fixed minimum rates:
>
> 1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA process with particular reference to the current rates for the relevant classifications in the Metal Industry Award. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.
> 2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.
> 3. If the existing rates are too low they should be increased so that they are properly fixed minima. …
>
> It is clear from the industrial history earlier described that the minimum rates in the EST Award are not the product of any proper fixation of minimum rates in accordance with the principles stated in the *ACT Child Care Decision*. The … [*Teachers (Victorian Government Schools Interim) Award 1993* and the *Independent Education (Victoria) Interim Award 1994*] were first awards based on pre-existing actual rates, and all subsequent adjustments were made by reference to those first award rates without any proper minimum rate assessment process.[57]

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

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

3.2.3. "Reconciling" the *Pharmacy* and *Teachers* Decisions

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

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57 *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [560], [562].

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

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

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

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

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

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

117 Similarly, in referring to "a significant net addition to work requirements" the Teachers Full Bench was simply characterising its factual findings on the evidence; it was not suggesting that a significant net addition to work requirements was necessary to justify a minimum wage increase under s 157(2).

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

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

> This outcome [i.e. the outcome reached by the Pharmacy Full Bench] appears to be inconsistent with the principles stated and the approach taken concerning the proper fixation of award minimum rates in the *ACT Child Care Decision*, to which we have earlier made reference. *However we note that the ACT Child Care*

58 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [166].

59 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [167].

60 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [168].

> *Decision was made under a different statutory regime and pursuant to wage-fixing principles which no longer exist.*

(Emphasis added)

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

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

> (a) *First*, the classifications in the relevant award(s) were fixed by reference to the relevant classifications in the Manufacturing Award, specifically, the relationship between the "key classification" to the C10 level as the starting point. The alignment process is informed by reference to the training and qualification levels attached to the classifications between the awards (regard may also be had to the AQF).
>
> (b) *Second*, the other rates in the relevant award(s) are set by applying "the internal award relativities" (which may have been established, agreed or maintained), by reference to the key classification.[63]

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

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

> We don't read that, particularly in the context of the earlier observations about broad and unconstrained discretion, as being anything other than a statement as to how it was appropriate to resolve that case and to set the rates in that case. It could not be said, and cannot be sensibly understood as suggesting that that is the required approach in any particular case. It is an approach which might be appropriate in a particular case, depending upon the nature of the evidence which was disclosed and the outcome that would be produced by the application of the three steps in the *ACT Child Care Decision*.
>
> If understood in that way, it avoids any tension and we think that's how it's properly understood, particularly given the express endorsement of the approach in the pharmacists decision earlier on in the *Teachers Decision*.
>
> In short, in that context, we think that the use of the C10 framework, in the way in which the joint employers, at least on a stricter reading of their submissions, suggest, is something that the Commission may adopt in a particular case. It may be appropriate because the work value reasons that are relied upon, as was the case in the *ACT Child Care Decision*, as justifying increases or variations in Modern Award wages are a disparity on qualification type grounds. That might be an approach that is available in a particular case, if that is the nature of the case which is brought. Or and only if — if work value reasons of another nature are

61 *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [653].

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

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

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

> found to justify a variation of Modern Award wages, only if the outcome of that process were such as to, in the view of the Commission, provide for fair wages which properly reflect the value of the work performed.
>
> That is the extent to which use could be made of it, particularly if, and to some degree, and again there's been a moderation, perhaps, in the joint employers submissions, in this respect, to the extent that there is reliance upon qualification level, as either the only or, at least, the most significant element in identifying relativity between awards.
>
> That approach would, if adopted strictly, or even if requiring close adherence to it, fail to undertake the statutory tasks that the Commission is given, under section 157(2A), in that it would not and could not properly capture matters which fall within the potential of being work value reasons, including the nature of the responsibilities involved and the conditions under which work is performed.[65]

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

3.3. Consideration

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

126 Ascertaining the meaning of ss 157(2) and (2A) necessarily begins with the ordinary and grammatical meaning of the words used.[66] These words must be read in context by reference to the language of the FW Act as a whole and to the legislative purpose.[67] Section 578(a) of the FW Act also directs attention to the objects of the FW Act. Of course it must be borne in mind that the purpose or object of the FW Act is to be gleaned from a consideration of all of the relevant provisions of the FW Act.[68] Section 15AA of the *Acts Interpretation Act 1901* (Cth) requires that a construction that would promote the purpose or object of the FW Act is to be preferred to one that would not promote that purpose or object. The purpose or object of the FW Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the purpose or object of the FW Act, and another does, the latter interpretation is to be preferred. Of course, s 15AA requires us to construe the FW Act in light of its purpose, not to rewrite it.[69]

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

128 Section 157(2) confers a discretion to make a determination varying modern award minimum wages which is enlivened if the Commission is satisfied as to the matters in both s 157(2)(a) and (b). So much is clear from the use of "may" in the prefatory words and the use of the conjunctive "and" between

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65 Transcript, 24 August 2022, PN14464-PN14468.

66 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at [26].

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

68 *Municipal Officers' Association of Australia v Lancaster* (1981) 54 FLR 129 at 152-153; *Bowling v General Motors Holdens Ltd* (1980) 50 FLR 79 at 93-94.

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

paras 157(2)(a) and (b). Further, the matters in respect of which the Commission must be "satisfied" involve a degree of subjectivity and hence, in a broad sense can be described as discretionary.[70]

3.3.1. Section 157(2)(b)

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

> 157 FWC may vary etc. modern awards if necessary to achieve modern awards objective
>
> (1) The FWC may:
>
> (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
>
> (b) make a modern award; or
>
> (c) make a determination revoking a modern award;
>
> if the FWC is satisfied that making the determination or modern award *outside the system of 4 yearly reviews of modern awards* is necessary to achieve the modern awards objective.
>
> …
>
> (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
>
> (a) the variation of modern award minimum wages is justified by work value reasons; and
>
> (b) making the determination outside the system of annual wage reviews *and the system of 4 yearly reviews of modern awards* is necessary to achieve the modern awards objective.
>
> Note: As the FWC is varying modern award minimum wages, the minimum wage objective also applies (see section 284).

(Emphasis added)

130 The italicised words above were removed by the 4 Yearly Review Amending Act. Under s 157(1) as it was, the Commission could make a determination varying a modern award (other than varying minimum wages or a default fund term) if satisfied that making the determination outside the system of 4 yearly reviews was necessary to achieve the modern awards objective. This condition appears intended to support the primacy of 4 yearly reviews of modern awards as the means of maintaining awards as a fair and relevant minimum safety net.[71] Similarly, s 157(2)(b) appears intended to support the primacy of annual wage reviews as the means by which minimum wages are set[72] and the role of 4 yearly reviews.

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

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

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70 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; 99 IR 309 at [20] (Gleeson CJ, Gaudron and Hayne JJ).

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

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

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

132 The Full Bench in *Re Appeal by National Retail Association Ltd and Master Grocers Australia Ltd* (2010) 199 IR 258 suggested that s 157(1) as it then was "permits the tribunal to vary a modern award other than in the 4 yearly review if it is 'satisfied' that the variation 'is necessary to achieve the modern awards objective'".[74] The construction of s 157(1) was also considered by Tracey J in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*:[75]

> The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is "necessary" in order "to achieve the modern awards objective". That objective is very broadly expressed: FWA must "provide a fair and relevant minimum safety net of terms and conditions" which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.
>
> The subsection also introduced a temporal requirement. FWA must be satisfied that it is necessary to vary the award at a time falling between the prescribed periodic reviews.
>
> The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective.[76]

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

3.3.2. Section 157(2)(a)

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

135 The word "justify" has been the subject of some, albeit limited, judicial consideration. In *R v Naizmand*,[77] Harrison J considered s 15AA of the *Crimes*

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

74 *Re Appeal by National Retail Association Ltd and Master Grocers Australia Ltd* (2010) 199 IR 258 at [6].

75 *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382.

76 *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382 at [35]-[37].

77 *R v Naizmand* [2016] NSWSC 836.

Act 1914 (Cth) which provides that bail must not be granted to a person charged with a terrorism offence unless the Court is satisfied that "exceptional circumstances exist to justify bail". As to the meaning of "justify" in that context his Honour held:

> The word "justify" in s 15AA (1) is to be given its ordinary meaning, but subject to the other provisions of s 15AA (1). Whilst the *Oxford English Dictionary* meaning of "justify" includes "make right, proper or reasonable", "give adequate grounds for", "warrant", in the context of s 15AA (1), I consider that to justify a grant of bail, the circumstances must be such as to warrant a grant of bail.[78]

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

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

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

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

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

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

142 The HSU takes a different position and submits it is "not clear" that s 157(2A) is intended to confine the types of reasons the Commission may consider justify the amount employees should be paid for performing particular kinds of work. The HSU submits that the language of the provision

78 *R v Naizmand* [2016] NSWSC 836 at [29].

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

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

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

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

contemplates those reasons will relate to the nature of the work, the skills or responsibility involved or the conditions under which the work is done, but submits:

> the use of the word "being", in context, is better understood as intended to provide an indication of the type of matters which are likely to be relevant to an assessment of work value, rather than as limiting the matters which the Commission might consider justify the amount employees should be paid for doing particular kinds of work.[83]

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

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

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

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

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

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

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

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

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

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

> the objects of the FW Act to guide it in the correct interpretation and application of s 157(2A). The short point is that the objects merely inform the interpretation and application of the concepts contained therein.[87]

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

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

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

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

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

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

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

153 In *Australian Competition and Consumer Commission v Maritime Union of Australia*,[92] Hill J was concerned to interpret s 6(2)(b) of the *Trade Practices*

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

88 Transcript, 24 August 2022, PN14802-PN14803.

89 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [165].

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

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

92 *Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472.

Act 1974 (Cth) which confined the operation of s 60 of that Act to conduct which took place in the course of or in relation to trade or commerce between Australia and places outside Australia. At [487]-[488] his Honour said:

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

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

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

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

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

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

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

(Emphasis added)

158 That submission begs the question of what is meant by the "fundamental criteria used to assess work value changes under the wage fixing principles' and the meaning of 'work value' as a core concept".

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93 *Australian Competition and Consumer Commission v Maritime Union of Australia* (2001) 114 FCR 472 at [68].

94 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [164].

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

159 At [166] of the *Pharmacy Decision*, the Full Bench referred to the "fundamental criteria" from earlier wage fixing systems (footnote omitted):

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

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

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

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

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

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

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

> 82. Of course, context and purpose must also be taken into account. We will come to those matters shortly. But as the Commission observed, if para (c) was intended to be limited … [in the way contended by the CFMMEU], words giving effect to that intention could easily have been included … The express inclusion of limiting words in the related clauses suggests that the omission of these or similar words from para (c) was deliberate.
>
> …
>
> 85. The CFMMEU's construction is not supported by the contextual matters

96 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [166].

97 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [167].

98 *Kelly v Construction, Forestry, Maritime, Mining and Energy Union* [2022] FCAFC 130 at [82], [85].

> either. The whole of the relevant context needs to be considered in order to determine whether the general words in para (c) should be read down: *DCT v Clark* at 143 [127]. See also *Vella v Minister for Immigration and Border Protection* (2015) 230 FCR 61 at 77 [63]. That includes the legislative context, history, and purpose or intention.

165 In *Federal Commissioner of Taxation v Warner*,[99] Perry J said (citations omitted):

> 43. Under established principles of statutory construction, "[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention": *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; (2009) 239 CLR 27 (*Alcan*) at 47 [47] (Hayne, Heydon, Crennan and Kiefel JJ). This does not exclude a "consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy": *Alcan* at 47 [47]; see also *Commissioner of Taxation v Unit Trend Services Pty Ltd* [2013] HCA 16; (2013) 250 CLR 523 at 539-540 [47] (the Court); and *Quickfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd* [2014] FCAFC 70; (2014) 222 FCR 13 at 30 [75] (the Court). Nor does it exclude the possibility that a purposive construction may permit reading a provision as if it contained additional words (or omitted words) with the effect of expanding or contracting its field of operation: *Taylor v The Owners — Strata Plan No 11564* [2014] HCA 9; (2014) 88 ALJR 473 (*Taylor*) at 482-483 [37] (French CJ, Crennan and Bell JJ). However, as French CJ, Crennan and Bell JJ held in in *Taylor* at 483 [38]:
>
> > The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills "gaps disclosed in legislation" or makes an insertion which is "too big, or too much at variance with the language in fact used by the legislature".

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

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

168 Proposition 5 states, relevantly:

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99 *Federal Commissioner of Taxation v Warner* (2015) 244 FCR 479 at [43].

100 See *JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297; 218 IR 454 at [30] (Jessup J) and at [33] (Tracey J); *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* (2014) 242 IR 210 at [101]; *Construction, Forestry, Mining and Energy Union v John Holland Pty Ltd* (2015) 228 FCR 297; 247 IR 55 at [67]-[74] (Buchanan J, with whom Barker J agreed).

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

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

(i) A fixed datum point

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

171 Proposition 5 from the *Pharmacy Decision* states:

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

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

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

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

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

175 We agree that while not mandatory, where work value has previously been

101 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [168].

102 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [168].

103 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [169] citing *Re 4 Yearly Review of Modern Awards — Real Estate Industry Award 2010* [2017] FWCFB 3543 at [80].

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

properly taken into account it is likely the Commission would adopt an appropriate datum point from which to measure work value change, as a means of avoiding double counting. In the present case — where the parties agree that the award rates have not been properly set— the evidence canvasses changes in the aged care sector over the past 20 years and we consider that provides an appropriate evidentiary basis on which to assess "work value reasons" in this matter.

(ii) Relativities

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

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

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

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

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

105 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [150]-[161].

106 *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* (unreported, AIRC (FB), PR954938, 13 January 2005) at [155].

107 *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* (unreported, AIRC (FB), PR954938, 13 January 2005) at [172].

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

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

> [181] A central feature of this case is the alignment of the Child Care Certificate III and Diploma levels in the ACT and Victorian Awards with the appropriate comparators in the Metal Industry Award.
>
> [182] We have considered all of the evidence and submissions in respect of this issue. In our view the rate at the AQF Diploma level in the ACT and Victorian Awards should be linked to the C5 level in the Metal Industry Award. It is also appropriate that there be a nexus between the CCW level 3 on commencement classification in the ACT Award (and the Certificate III level in the Victorian Award) and the C10 level in the Metal Industry Award.
>
> [183] In reaching this conclusion we have considered — as contended by the Employers — the conditions under which work is performed. But contrary to the Employers' submissions this consideration does not lead us to conclude that child care workers with qualifications at the same AQF level as workers under the Metal Industry Award should be paid less. If anything the nature of the work performed by child care workers and the conditions under which that work is performed suggest that they should be paid more, not less, than their Metal Industry Award counterparts.

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

182 The position of the Joint Employers in respect of this issue has evolved somewhat over time. In their submissions of 22 July 2022, the Joint Employers contend that comparing the rates under examination with the C10 Framework "is a *principled starting point* in this case" and "also acts as *a key tool* in undertaking the evaluative exercise underpinning the assessment of the value of work".[109] At 7.8 of those submissions the Joint Employers submit:

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

(Emphasis added)

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

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108 *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* (unreported, AIRC (FB), PR954938, 13 January 2005) at [372].

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

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

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

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

(Emphasis added)

185 The Joint Employers' position was contested by the Unions, with the HSU submitting:

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

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

> The C10 system is not a direct fetter on the Commission's discretion in setting minimum wages. To apply it in this way would be inconsistent with the broad discretion now conferred by section 157(2) and (2A). It is merely one consideration; the relevance of which in any case will depend on the nature of the work to be compared and its translatability. In this respect, it is important to recognise that the relativities between the positions on the C10 scale are not purely referable to AQF qualifications. Instead, the scale cannot be properly understood without reference to the National Metal and Engineering Competency Standards Implementation Guide — particularly in respect of classifying workers above or below the relevant "Certificate III" level.[113]

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

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

> The proper approach to the Metals Framework is that it *may*, in some cases, be relevant in addressing the statutory questions thrown up by section 157 — but it is not the statutory question. The starting point *and* end point in any exercise apportioning value to a classification are the identified work value reasons. Any application of the Metals Framework should not distract from the Commission's statutory task.
>
> … the Metals Framework is inherently situated in an industrial sector context not a health sector context. As such, the utility of the Metals Framework for assessing work values in the health sector is particularly limited.
>
> Likewise, the AQF alone cannot serve as a satisfactory proxy for determining work value. The task of the Commission remains to determine the applications

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

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

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

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

having regard to "work value reasons" and the necessity to achieve the modern awards objective.[115]

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

> the Commission should continue to have regard to relativities in wage rates within and between awards (internal and external wage relativities), but that such considerations should not be determinative.
>
> …
>
> Assessing work value in a manner which continues, as a starting point, to align rates of pay in one modern award with classifications in other modern awards with similar qualification requirements would support a system of fairness, certainty and stability in assessing the relative value of work between awards. However, a strict alignment of award relativities based on qualifications, without proper consideration of the true work value of the cohort of employees in question, would result in award minimum rates of pay which could not be said to be fair or relevant.
>
> While the Commonwealth does not consider that qualifications should be the only determinant of appropriate award relativities, qualifications provide a useful indicator of the level of skill involved in particular work for the purposes of s 157(2A)(b).
>
> The Australian Qualifications Framework (AQF) has the benefit of providing a relatively objective point of comparison that can be drawn upon across industries and occupations.
>
> …
>
> The AQF can be a useful means of assessing the skill involved in work and differentiating between the work at different levels when designing award classification structures. The Commonwealth endorses the HSU's submission (at [71] of its outline of closing submissions) that the AQF is a "useful starting point".
>
> There are likely to be aspects of the skill involved in performing work that are not captured by the AQF. Therefore, the Commonwealth submits that the Commission should not rely on the AQF as the only means to assess these matters.
>
> …
>
> Consistent with the above, the Commonwealth submits that a comparison to rates in the Metal Industry classification structure with equivalent qualification levels may be of some assistance when the Commission is dealing [with] an application under s 157 of the FW Act to vary modern award minimum wages on work value grounds but is not a complete answer. In addition to the level of skill involved in doing the work, s 157 requires the Commission consider whether there are work value reasons related to the nature of the work, the level of responsibility involved in doing the work and the conditions under which the work is done.
>
> It would be open to Commission to align modern award wages rates for employees with equivalent AQF qualification levels in the absence of any countervailing work value reasons. However, there may be reasons justifying different wage rates for employees, despite their having attained equivalent AQF qualifications. For example, employees may have different levels of responsibility,

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

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

> perform work of a different nature or under different conditions. There may also be factors other than qualification that have a bearing on the level of skill involved in doing the work.[117]

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

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

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

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

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

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

(iii) *Pharmacy Decision*: Proposition 6

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

> The considerations referred to in [190] of *Child Care Industry (Australian Capital*

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

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

119 Transcript, 1 September 2022 at PN15523.

Territory) Award 1998[120] (the *ACT Child Care Decision*) may be of relevance in particular cases, as may considerations in other authoritative past work value cases.[121]

194 Paragraph [190] of the *ACT Child Care Decision* states (footnotes omitted):

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

(Emphasis added)

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

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120 *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* (unreported, AIRC (FB), PR954938, 13 January 2005).

121 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [168].

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

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

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

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

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

(Emphasis added)

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

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

> (a) the evolvement of methods and/or modifications over time is not "genuine work value change";
> (b) the mere introduction of a statutory requirement to hold a certificate of competency *does not itself constitute a significant net addition to work requirements*;
> (c) a requirement to exercise care and caution is, of itself, insufficient to warrant a work value increase;
> (d) the fact that the emphasis on some aspects of the work has changed *does not in itself constitute a significant net addition to work requirements*; and
> (e) increased workload generally goes to the issue of manning levels not work value.[124]

(Emphasis added)

122 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [168].

123 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [197].

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

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

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

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

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

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

> Because it is not necessary so to demonstrate, principles stated in terms of whether a particular change in work, "in itself constitute[s] a significant net addition to work requirements" (*e.g.*, principle (f) from the *ACT Child Care Decision* quoted above), are addressed to the wrong question.
>
> And even those principles that do not expressly call up the "significant net addition" test will tend to lead into error. The *only* question that the FWC now needs to consider is whether reasons related to any of the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done, justify payment of a particular amount.[128]

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

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

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

127 Transcript, 1 September 2022 at PN15711-PN15712.

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

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

(a) … But progressive or evolutionary change is insufficient.[130]

(d) A requirement to exercise care and caution is, of itself, insufficient to warrant a work value increase.[131]

(f) The fact that the emphasis on some aspects of the work has changed does not in itself constitute a significant net addition to work requirements.[132]

(h) Increased workload generally goes to the issue of manning levels not work value. But, where an increase in workload leads to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration.[133]

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

(a) Rapidly changing technology, dramatic or unanticipated changes which result in a need for new skills and/or increased responsibility may justify a wage increase on work value grounds.

(b) An increase in the skills, knowledge or other expertise required to adequately undertake the duties concerned demonstrates an increase in work value.

(c) The mere introduction of a statutory requirement to hold a certificate of competency does not of itself constitute a significant net addition to work requirements. It must be demonstrated that there has been some change in the work itself or in the skills and/or responsibility required. However, where additional training is required to become certified and hence to fulfil a statutory requirement a wage increase may be warranted.

(d) … But an increase in the level of responsibility required to be exercised may warrant a wage increase on work value grounds. Such a change may be demonstrated by a requirement to work with less supervision.

(e) The requirement to exercise a quality control function may constitute a significant net addition to work requirements when associated with increased accountability.

(g) The introduction of a new training program or the necessity to undertake additional training is illustrative of the increased level of skill required due to the change in the nature of the work. But keeping abreast of changes and developments in any trade or profession is part of the requirements of that trade or profession and generally only some basic changes in the educational requirements can be regarded, of itself, as constituting a change in work value.

(h) … where an increase in workload leads to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration.

208 Similar submissions are advanced by the HSU.

209 As we have mentioned, a number of the propositions in [190] of the *ACT Child Care Decision* draw a direct link between the asserted statement of principle and the requirement that change constitutes a significant net addition to work requirements. Further, the authorities cited in support of the proposition that "progressive or evolutionary change" is insufficient to justify a wage increase on work value grounds clearly link that proposition to the strict

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

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

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

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

requirement of the then wage fixing principles (namely, the requirement that a change constitute a significant net addition to work requirements). We now briefly turn to those authorities.

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

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

(Emphasis added)

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

> In respect of the evidence and inspections generally the Commission was invited by the respondents to be mindful of the fact that an engineer brings his profession to the employer and rarely will he be called upon to use all of his abilities and knowledge at a given time. Certainly, it was said, *the emphasis on some aspects of the work might change from time to time; however, such a change of emphasis, does not in itself constitute a net addition to work requirements*. What such change does operate to achieve is the bringing into play of an ability which the engineer already possesses but hitherto has not been required to utilize or utilize to the same extent.[137]

(Emphasis added)

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

> In many claims for higher wages on grounds of work value change, evidence is given for example of changes in work methods, of changes involved in the need to give more attention to detail or to work changes entailed in the use of new equipment. In the course of many such cases one feels that the real essence of work value change is lost sight of, as the evidence of mere change unfolds. *In all categories of work except perhaps the most simple, changes become evident with time*. It is in the nature of things that new methods of doing the same thing evolve with time, and that skills which qualify a person for a particular category of work may become fully tested, or in some cases the work may thereby be made easier. *However it is essential that such changes are not mistaken for genuine work value change*. "*The strict test for an alteration in wage rates is that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification*". Principle 4 — (1986) 14 IR 187 at 2918; Print G3600 p 76.[139]

(Emphasis added)

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134 *Printing & Kindred Industries Union v Public Service Commissioner (NT)* (1987) 23 IR 380.

135 *Printing & Kindred Industries Union v Public Service Commissioner (NT)* (1987) 23 IR 380 at 385.

136 *Re Municipal Officers (Glenorchy City Council) Award 1981* (1986) 302 CAR 203 at 207(a).

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

138 *State Electricity Commission (Vic) v Federated Ironworkers' Association of Australia* (unreported, ACAC (FB), G7498, 22 May 1987).

139 *State Electricity Commission (Vic) v Federated Ironworkers' Association of Australia* (unreported, ACAC (FB), G7498, 22 May 1987) at 75.

213 Finally, in *Re Graphic Arts Award 1977*,[140] Justice Alley said:

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

(Emphasis added)

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

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

216 The evidence before us paints a picture of chronic understaffing across the aged care sector which has contributed to increasing workloads and work intensity. The relevance of work intensification to "work value" was given some consideration in *Re Social, Community, Home Care and Disability Services Industry Award 2010*[142] (*SCHADS Award COVID-19 Care Allowance*).

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

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

219 In considering the utilisation of "extra skill and responsibility", the Commission stated:

> [84] We wholly accept the fourth proposition. Although the COVID-19 pandemic has not led to the exercise of any wholly new skills and, as earlier stated, dealing with infectious diseases in the residential context has always formed part of the duties of disability support employees, the evidence of Mr Hyland, Ms Brown and Ms Fata demonstrates that providing support for a client with an actual or suspected COVID-19 has led to existing skills and responsibilities being exercised at an unprecedented level. This includes simultaneous requirements to maintain infection control protocols, rigorous hygiene procedures and physical distancing, to wear and safely dispose of PPE, to impose an isolation

140 *Re Graphic Arts Award 1977* (1978) 213 CAR 146.

141 *Re Graphic Arts Award 1977* (1978) 213 CAR 146 at 151-152.

142 *Re Social, Community, Home Care and Disability Services Industry Award 2010* [2020] FWCFB 4961.

143 *Re Social, Community, Home Care and Disability Services Industry Award 2010* [2020] FWCFB 4961 at [77].

> regime on clients and appropriately communicate the need for this to clients, to create modified systems of care and support in residential settings, and to appropriately manage the behaviour of clients and interaction between clients in response to the significant disruption to normal routines. Work intensification to this degree *may constitute* an increase in work value because it represents an effective change to the nature of the work and the degree of responsibility involved.[144]

220 We accept that work intensification may constitute an increase in work value. The more complex issue is the assessment of whether work intensification is a permanent feature of the work in question; or a transitory phenomenon which will abate when staffing levels increase. In the context of this case, it is common ground that attracting and retaining aged care employees is a significant issue for the sector and that an increase in minimum wage rates would assist in this regard. So, if we decide to increase minimum wages and that action addresses the current understaffing will it also reduce work intensification? And, if that is the consequence can it be said that the work value of those employees now experiencing less work intensity, has declined? A cautious approach to the assessment of workload and work value is warranted. However, we also note the overwhelming evidence that the needs of those living in residential aged care facilities and those being cared for in their homes, have significantly increased in terms of clinical complexity, frailty and cognitive and mental health. There is no evidence that these factors are transitory or that they can be entirely mitigated by increased staffing levels, particularly where the skills necessary to deal with these needs are not appropriately recognised and valued.

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

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

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

> When a tribunal is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised it is a mistake to lay down any rules with a view to

144 *Re Social, Community, Home Care and Disability Services Industry Award 2010* [2020] FWCFB 4961 at [84].

145 *Gardner v Jay* (1885) LR 29 Ch D 50 at 58.

> indicating the particular grooves in which the discretion should run, for if the Act or the Rules do not fetter the discretion of the Judge why should the court so do.[146]

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

3.3.3. Particular issues in contention

(i) The "social utility" of the work

225 The HSU contends that the expression "the nature of the work" in s 157(2A) includes the social context of the work and "the status of the work" which it submits, "is intended to convey the social utility or worth of particular kinds of work has been considered to be relevant to the assessment of work value".[147]

226 A question posed in Background Document 5 invited the HSU to identify the authorities in support of that contention. In response, the HSU referred to a series of cases[148] in the NSW jurisdiction which relied on the concept of the social utility or value of the work performed as a "corrective" to a tendency to undervalue the work because it was performed out of the public eye or perceived in a particular way.[149] The HSU contends that its submission "is directed to achieve the same end".[150]

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

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

228 In our view to interpret the expression "the nature of the work" in

146 Applied in *Evans v Bartlam* [1937] AC 473 at 488 per Lord Wright and cited with approval in *Kostokanellis v Allen* [1974] VR 596 and *Dix v Crimes Compensation Tribunal* [1993] 1 VR 297. Also see *JJ Richards & Sons Pty Ltd v Fair Work Australia* (2012) 201 FCR 297; 218 IR 454 (20 April 2012) at [30] (Jessup J, with whom Tracey J agreed) and at [63] (Flick J, with whom Tracey J agreed); *Esso Australia Pty Ltd v Australian Manufacturing Workers' Union* (2015) 247 IR 5 at [58]-[59].

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

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

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

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

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

s 157(2A)(a) as encompassing some notion of "social utility" is apt to confuse and obfuscate the Commission's statutory task. The notion of "social utility" is itself value-laden and subjective; and no means of measuring "social utility" was proffered in the proceedings.

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

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

230 Our assessment of the work value of the employees who are the subject of the Applications will be a comprehensive assessment informed by the evidence and will take account of the matters identified by the HSU. In such circumstances we see no utility in the adoption of a proxy term for this process.

(ii) Dangerous work

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

> It is … an environment in which workers are routinely exposed to a risk of violence, from both clients and their family members. Carers are witness to acts of violence between family members and clients, are pushed, threatened, and verbally abused, and sexually harassed. They carry on with their work anyway, conscious that clients need care.
>
> This has increased steadily over the decades, as in particular the proportion of patients with dementia and related illnesses has significantly increased.[154]

232 Similarly, the ANMF submits:

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

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

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

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

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

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

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

(1) The increased prevalence of dementia or other altered mental states; and

(2) The reduced use of physical and chemical restraints.

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

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

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

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

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

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

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

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

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

239 Ms Chrisfield also gave evidence that "aged care workers are required to attend to these residents, irrespective of their violence, and are regularly the subject of aggressive outbursts, which manifest in verbal and physical assault".[161] During the course of cross-examination Ms Chrisfield said that at least once per month she or her team would have occasion to call "Safe Work

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

157 Transcript, 3 May 2022, PN3808.

158 Transcript, 3 May 2022, PN4007-PN4050.

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

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

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

Victoria" because of a safety incident in an aged care facility, a majority of which were in relation to occupational violence or aggression risks that were not being managed.[162]

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

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

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

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

243 Dianne Power's evidence was that she would suffer some sort of occupational violence or aggression on most shifts.[166] Another witness, Patricia McLean, gave evidence that she had been assaulted about 150 times while working in residential aged care between 1972 and 2009.[167]

244 AIN Christine Spangler's evidence was that violence and verbal abuse are much more common than when she first started this work. She has personally had her shoulder dislocated which required surgery, and has been scratched, pinched, bitten and slapped, and a colleague has had her wrist broken.[168]

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

> Dementia patients in particular can become violent because they are upset, confused, angry or just don't understand what is happening. Residents have

162 Transcript, 3 May 2022, PN3829-PN3831.

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

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

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

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

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

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

> grabbed me by the hair, pulled me into their laps, refused to let go of me, bitten me, and tried to punch and kick me. It's not their fault, they have dementia. But it is very scary and upsetting.[169]

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

247 For example, Catherine Evans gave the following evidence:

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

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

> Because I provide aged care to people in their private homes, my "workplace" changes sometimes up to 10 times a day. This can create challenges as you never quite know what you're going to be walking into. We deal with anything from clients with dementia to clients needing palliative care to those with poor mobility. Some clients may be having a bad day and exhibit behavioural issues or abusive language or behaviour. As we are, most of the time, alone in the house this means we have to be able to think on our feet and deal on our own with situations as they arise. You have to learn to be able to juggle all sorts of different scenarios in one day.
>
> …
>
> Another client had a lot of aggression due to dementia; because he would sometimes pull knives on his carers, Regis made sure there were always two carers on this job.[173]

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

> The provision of aged care is a service that provides care to vulnerable older people, that can't be stopped when dangerous situations arise. Aged care workers can't walk away from residents and clients in need of assistance. The requirement for care is continuous, regardless of the danger, and so it might be distinguished from other industries where work can simply be stopped until the danger is removed.
>
> Additionally, some of the dangers involved in the provision of direct care can't be eliminated as there will always be some risk in providing direct personal care to persons suffering from cognitive impairment. Whilst it would be possible to mitigate or remove some of the dangers in aged care, legitimate policy reasons

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

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

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

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

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

> have prevented those dangers from being removed, and in some circumstances made the work more dangerous. This is exemplified by the reduced use of physical and chemical restraints …
>
> Navigating dangerous work conditions has involved the development of skills, as has been identified in the lay evidence report. Several witnesses gave evidence that they have learnt how to deal with behaviours and aggression in residents, including developing strategies such as distraction, de-escalation, and some of those having been identified in the Certificate III and Certificate IV training.
>
> Witnesses commonly identified that they had learned strategies including formal training about how to deal with aggressive and dangerous behaviour, such as using de-escalation and distraction strategies. The evidence leaves little doubt that a high level of skill is required to identify, prevent and de-escalate violence and aggression and there is no basis to ignore that skill in assessing work value.
>
> Direct care workers also bear heavily the responsibility to protect other residents from the risk of violence and aggression, and for example, Shelly Clark, an AIN, gave oral evidence about the responsibility she had to a potential victim where a resident was acting aggressively, going towards another vulnerable older person. She described it, you can't just walk away but rather, you've got to do what you can to get the attention back on you and away from the vulnerable person.
>
> As the prevalence of dementia and other cognitive impairment increases in aged care, so too will the danger of the work and the need for direct care staff to have and exercise additional skill and responsibility for their own health and safety, and that of the residents and clients. The nature of the aged care work and conditions under which it is done have become more dangerous, which in various ways relates to work value reasons.[174]

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

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

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

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

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

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174 Transcript, 24 August 2022, PN15000-PN15007.

175 *Vickers Cockatoo Dockyard Pty Ltd v Federated Engine Drivers' and Firemen's Association of Australasia* (1981) 250 CAR 338 at 338.

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

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

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

(iii) Attraction and retention

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

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

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

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

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

258 In particular, the ANMF submits:

> Direct care workers are leaving the aged care industry in droves. A reasonable hypothesis about why this is occurring is that workers have conducted their own assessment of the value of the work they are performing and decided that the amount they are paid is not sufficient, having regard to:
>
> (1) the nature of the work;
>
> (2) the level of skill or responsibility involved in doing the work; and/or
>
> (3) the conditions under which the work is done.
>
> Here, the Commission has evidence from direct care workers about their own assessment of the value of the work they are performing. Witnesses in this proceeding have told the Commission that:
>
> (1) "The work we do is undervalued and people don't realise the amount or complexity of the work and the range of skills involved by all of us in the nursing team".[180]
>
> (2) "I do not think my work is valued. I do not think people know the real circumstances of aged care work, unless they work in it".[181]

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

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

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

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

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

(3) "I think aged care work is undervalued for the amount of care and energy that we put in; people don't see the extra work that AINs put in".[182]

(4) "I do not think that the pay is adequate for the work that is done".[183]

(5) "I love caring for old people, but I don't do it for the money. I think if we want to offer better quality care, people working in aged care need to be better paid".[184] [185]

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

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

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

> As referred to at ANMF CS [531], Suzanne Hewson (EN) said in her statement that she intended to go into a more remunerative field of nursing work, and by the time of her oral evidence she had in fact done so.
>
> Irene McInerney (RN) said at [45] that many staff decided it was too hard on them mentally and physically and left aged care because the pay is not attractive enough for a difficult work environment.
>
> Dianne Power (AIN/PCW) said at [99] that, "Staff are leaving Regis for higher paid work in the disability sector and public sector aged care facilities", and that, "In my view, based on my own experience, if wage rates were higher there would be a better retention of staff at Regis".
>
> Pauline Breen (EN) said at [33] that she is considering retiring but would likely delay this if her pay increased. Christine Spangler (AIN/PCW) said the same thing (at [41]).
>
> Wendy Knights (EN) said at [95] as follows:
>
> > My observations is that level of wages means it is difficult to retain staff. Nurses are often talking about workloads and pay rates. The work is hard and demanding, and sometimes dangerous. You are sometimes abused by residents, or families. You are exposed to bodily fluids and waste. But you could earn as much or more doing a job that did not have any of these difficulties. At the moment, it seems to me that the people that tend to be retained in aged care are people who really have a passion for caring work.
>
> Hazel Bucher (NP) said at [32] that aged care work is often the second choice for graduate nurses if they are unable to obtain a graduate position in an acute hospital, and is also evidenced by the lower pay rate for nurses in this (i.e., the aged care) sector.
>
> Mark Castieau, an HSU witness and chef, said at [20] of his reply statement dated 20 April 2022 that people who were leaving aged care had said to him, "I'm

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

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

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

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

186 Transcript, 26 April 2022, PN570.

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

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

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

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

> It seems that it is difficult for anyone other than an employer of labour to make out a case for an attraction wage. Only the employer is in a position to know whether he wants to attract labour or not. If he does, he either pays higher salaries or wages or offers some other cardinal inducement. It is an inherent part of the inexorable law of supply and demand. To say to an employer that he must have an attraction wage when he does not want an attraction wage is like trying to force food down some one who does not want it.
>
> He is the one who must make the decision as to whether he wants to attract labour and any question of an attraction wage is bound up with his decision.
>
> The Commission is not persuaded that wage margins should be increased herein on this ground.[190]

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

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

> The ANMF's submission is not that the Commission would set "attraction rates" — *i.e.*, wage rates set at a level which are perceived as necessary for an employer to attract and retain sufficient labour. The submission is rather than the

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

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

189 See *Railways Professional Officers Award* (1958) 89 CAR 40; *Re Metal Trades Award; Re State Electricity Commission (Vic)* (1964) 106 CAR 535; *Re Public Service Board and Public Service Association (NSW)* [1989] AR (NSW) 638 at 645; *Re Equal Remuneration Principle* (2000) 97 IR 177 at 215; *Re Health Employees Pharmacists (State) Award* (2003) 132 IR 244 at [46]-[47].

190 *Re Metal Trades Award; Re State Electricity Commission (Vic)* (1964) 106 CAR 535 at 566.

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

> Commission is entitled, in deciding whether particular rates properly reflect the skill involved in doing a work, its nature, and the conditions in which it is done, to look to evidence of workers voting with their feet, or workers' assessments of the comparability of different kinds of work.[192]

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

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

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

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

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

3.4. Modern awards objective

270 The modern awards objective is defined in s 134:

> What is the modern awards objective?
>
> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or

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

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

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the *modern awards objective*.

When does the modern awards objective apply?

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

(a) the FWC's functions or powers under this Part; and

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

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

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

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

273 While the considerations in ss 134(a)-(h) inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the Commission might

194 *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [2000] ATPR 41-742 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154; 244 IR 461 at [56].

195 *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [33].

196 *National Retail Association v Fair Work Commission* (2014) 225 FCR 154; 244 IR 461 at [105]-[106].

197 *National Retail Association v Fair Work Commission* (2014) 225 FCR 154; 244 IR 461 at [105]-[106].

consider to be relevant to the determination of a fair and relevant minimum safety net. The range of relevant matters "must be determined by implication from the subject matter, scope and purpose of the" FW Act.[198]

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

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

Further, in *Re 4 Yearly Review of Modern Awards — Penalty Rates*[200] (the *Penalty Rates Decision*), the Full Bench rejected the proposition that the reference to a "minimum safety net" in s 134(1) means the "least … possible" to create a "minimum floor":

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

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

> Section 138 is entitled "Achieving the Modern Awards Objective" and is as follows:
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.
>
> Terms that "it is permitted to include" are dealt with in subdiv B of Div 3 (ss 139-142), and terms that "it is required to include" are dealt with in subdiv C of Div 3 (ss 143-149D). *The words "only to extent necessary" in s 138 emphasise the fact that it is the minimum safety net and minimum wages objective to which modern awards are directed*. Other terms and conditions beyond a minimum are to be the product of enterprise bargaining, and enterprise agreements under Part 2-4.[203]

(Emphasis added)

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198 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40. See also *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [48].

199 *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [53].

200 *Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1.

201 *Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1 at [128].

202 *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* (2017) 252 FCR 337.

203 *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* (2017) 252 FCR 337 at [22]-[23].

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

> The [4 yearly] review is at large, *to ensure that the modern awards objective is being met*: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. *This is to be achieved by s 138* — terms may and must be included only to the extent necessary to achieve such an objective.
>
> Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern awards objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net.[204]

(Emphasis added)

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

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

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

280 The HSU submits that in the context of minimum wages the phrase "fair and relevant":

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

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204 *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* (2017) 252 FCR 337 at [28]-[29]; cited with approval in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382 at [35].

205 *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382 at [46].

206 See generally *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88.

207 *Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1 at [136], citing *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382 at [46].

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

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

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

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

283 The Joint Employers maintain that:

> the meaning of the word "fair" in relation to establishing a fair and relevant safety net is founded in the *Equal Remuneration Decision 2015* which states:
>
> > We consider, in the context of modern awards establishing minimum rates for various classifications differentiated by occupation, trade, calling, skill and/or experience, that a necessary element of the statutory requirement for "fair minimum wages" is that the level of those wages bears a proper relationship to the value of the work performed by the workers in question.[212]
>
> The Commission then goes onto consider what is meant by "relevant" by stating:
>
> > [120] Second, the word "relevant" is defined in the *Macquarie Dictionary* (6th Edition) to mean "bearing upon or connected with the matter in hand; to the purpose; pertinent". In the context of s 134(1) we think the word "relevant" is intended to convey that a modern award should be suited to contemporary circumstances. As stated in the Explanatory Memorandum to what is now s 138:
> >
> > > 527 … the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net *that accords with community standards and expectations*.[213] [214]

(Emphasis added)

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

285 A "fair and relevant minimum safety net of terms and conditions" is a composite phrase within which "fair and relevant" are adjectives describing the qualities of the minimum safety net to which the Commission's duty relates. This composite phrase requires that modern awards, together with the NES, provide "a fair and relevant minimum safety net of terms and conditions",

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

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

212 *Equal Remuneration Decision 2015* (2015) 256 IR 362 at [272].

213 *Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1 at [120].

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

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

taking into account the s 134 considerations.[216] As the Full Court observed in *Shop, Distributive and Allied Employees Association v Australian Industry Group*:

> Those qualities are broadly conceived and will often involve competing value judgments about broad questions of social and economic policy. As such, the FWC is to perform the required evaluative function taking into account the s 134(1)(a)-(h) matters and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance. It is entitled to conceptualise those criteria by reference to the potential universe of relevant facts, relevance being determined by implication from the subject matter, scope and purpose of the *Fair Work Act* … As discussed "fair and relevant", which are best approached as a composite phrase, are broad concepts to be evaluated by the FWC taking into account the s 134(1)(a)-(h) matters and such other facts, matters and circumstances as are within the subject matter, scope and purpose of the *Fair Work Act*. Contemporary circumstances are called up for consideration in both respects, but do not exhaust the universe of potentially relevant facts, matters and circumstances.[217]

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

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

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

3.5. Minimum wages objective

289 The minimum wages objective is defined in s 284:

> 284 The minimum wages objective
>
> What is the minimum wages objective?
>
> (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:

---

216 *Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [41]-[44].

217 *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [49], [65].

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

(a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
(b) promoting social inclusion through increased workforce participation; and
(c) relative living standards and the needs of the low paid; and
(d) the principle of equal remuneration for work of equal or comparable value; and
(e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the *minimum wages objective.*

When does the minimum wages objective apply?

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

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

Meaning of modern award minimum wages

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

Meaning of *setting* and *varying* modern award minimum wages

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

290 As noted by the Expert Panel in *2019-20 Annual Wage Review*,[219] there is a substantial degree of overlap in the considerations relevant to the minimum wages objective and the modern awards objective, although some are not expressed in the same terms. Both the minimum wages objective and the modern awards objective require the Commission to take into account:

- promoting social inclusion through increased workforce participation[220]
- relative living standards and the needs of the low paid[221]
- the principle of equal remuneration for work of equal or comparable value,[222] and
- various economic considerations.[223]

219 *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [205].

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

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

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

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

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

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

3.6. Summary

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

Section 157(2)

1. Section 157(2) confers a discretion to make a determination varying modern award minimum wages which is enlivened if the Commission is satisfied as to the matters in both ss 157(2)(a) and (b).
2. Section 157(2)(a) provides that the Commission must be satisfied that the new rate of minimum wages provided for under the determination must be "justified by work value reasons". "Justified" is to be given its ordinary meaning and in the context of s 157(2)(a) means that the "work value reasons" show the variation of modern award minimum wages to be just, right or warranted, or provide a satisfactory reason for the variation. Whether a variation is justified by work value reasons requires the formation of a broad evaluative judgment.
3. Section 157(2)(b) provides that the Commission must be satisfied that "making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective". This condition will be met if the Commission is satisfied that making the proposed variation determination in these proceedings is necessary to achieve the modern awards objective.

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

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

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

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

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

Section 157(2A)

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

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

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

230 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [150]-[161].

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

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

Section 157(2A) particular issues

(i) The "social utility" of the work

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

(ii) Dangerous work

2. In relation to direct care workers, we accept that the nature of the work and the conditions under which the work is done has become more challenging and dangerous.

3. As a general proposition, the Commission and its predecessor bodies have approached the issue of "dangerous work" from an occupational health and safety perspective — that is; as far as practicable the risk should be removed or mitigated — rather than seeking to compensate employees for the risk posed from being required to work in dangerous conditions. But this principle has limitations where the danger

cannot be removed and employees are nonetheless required to perform the work as an essential service.

4. We accept that while the dangers encountered by direct care workers in the aged care sector are capable of being mitigated to some extent, they cannot be entirely removed given the nature of the work performed. It is appropriate that this consideration be taken into account in our assessment of the work value reasons justifying the amount direct care workers should be paid.
5. It is also apparent that direct care workers are called upon to exercise considerable skill in order to identify, prevent and de-escalate violence and aggression. This too is a work value consideration to be taken into account.

(iii) Attraction and retention

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

Modern Awards Objective

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

Meeting the requirements of ss 135 and 157

1. The requirements for the Full Bench to make a determination varying modern award minimum wages in these proceedings will be met if:

- the Full Bench takes into account the rate of the national minimum wage as currently set in a national minimum wage order (s 135(2))
- the Full Bench is satisfied that the proposed variation is justified by work value reasons (s 157(2)(a))
- the Full Bench is satisfied that making the proposed variation determination in these proceedings is necessary to achieve the modern awards objective (s 157(2)(b)), and
- making the proposed variation is necessary to achieve the minimum wages objective (together with the previous point, satisfying s 138).

4. Summary of submissions

294 The HSU made the following submissions:

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

295 The ANMF made the following submissions:

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

296 The UWU made the following submissions:

- Outline of submissions and witness statements dated 1 April 2021
- Submission and witness statements dated 29 October 2021
- Submissions in reply and witness statements dated 21 April 2022
- Submissions — objections to evidence dated 21 April 2022
- Closing submissions dated 25 July 2022
- Closing submissions in reply dated 19 August 2022

- Submission — amendment to Background Document 9 dated 31 August 2022.

297 The Joint Employers made the following submissions:

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

298 The Commonwealth made the following submissions:

- Submission dated 8 August 2022
- Submission — response to questions from the Full Bench dated 29 August 2022.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

307 Tandara Lodge is a not-for-profit provider of residential and community aged care within the Kentish Municipal Region of Tasmania. Tandara Lodge employs

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

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

83 staff, who provide services across a 46-bed residential aged care facility, a Commonwealth Home Support Programme (CHSP) adult activity day centre and 48 independent living units.[234]

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

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

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

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

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

311 Uniting NSW.ACT is a not-for-profit provider of aged care services in NSW and the ACT. Uniting NSW.ACT is the largest provider of aged care services in NSW and the ACT, operating 60 residential aged care facilities with 7,200 residents, providing home care for 9,600 people and care for 3,000 people in independent living units.[240] Uniting ACT.NSW employs 6,006 people across its residential, home and community and independent living services.[241]

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

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

314 Uniting NSW.ACT notes that under its Enterprise Agreement it pays "well

234 Tandara Lodge Community Care submission dated 27 August 2021 at [4]-[5].
235 Tandara Lodge Community Care submission dated 27 August 2021 at [14].
236 Tandara Lodge Community Care submission dated 27 August 2021 at [10].
237 Tandara Lodge Community Care submission dated 27 August 2021 at [15].
238 Tandara Lodge Community Care submission dated 27 August 2021 at [10].
239 Tandara Lodge Community Care submission dated 27 August 2021 at [16].
240 Uniting NSW.ACT submission dated 4 March 2022 at 1.
241 Uniting NSW.ACT submission dated 4 March 2022 at 2.
242 Uniting NSW.ACT submission dated 4 March 2022 at 3.
243 Uniting NSW.ACT submission dated 4 March 2022 at 4.
244 Uniting NSW.ACT submission dated 4 March 2022 at 4.

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

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

- increased standards of care (driven in part by community expectations, understanding of best practice and regulation)
- increased focus on cultural, identity, social and linguistic needs
- increased regulatory requirements generally including reporting
- new technologies
- new models of care
- people living longer with more complex health needs, such as dementia and greater need for the administration of prescribed medicines
- growth of home care service provision where workers are inherently required to work independently within people's homes and the community
- most recently, COVID-19.[246]

316 Uniting NSW.ACT submits that there is a "huge shortage" of aged care workers and emphasises that the workforce is fatigued by COVID-19, leading to increased pressures on the available workforce supply.[247] Uniting NSW.ACT further argues the difficulty attracting aged care employees:

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

(iii) UnitingCare Australia submission dated 4 March 2022

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

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

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

- increased rates of acuity

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

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

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

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

249 UnitingCare Australia submission dated 4 March 2022 at 1.

250 UnitingCare Australia submission dated 4 March 2022 at 1.

- declining function
- increased frailty
- increase in dementia
- need for specialist psycho-geriatric care
- the "cultural transformation" towards consumer directed care
- complex comorbidities requiring subspecialist skills and multidisciplinary teams
- uplift across a range of skill sets including administration of prescribed medications, infection prevention and control and information technology systems
- regulatory and policy reform.[251]

(iv) IRT Group submission dated 4 March 2022

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

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

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

- Residents and consumers present with more acute care needs, greater levels of frailty and increased co-morbidities.[254]
- There is a "significant increase" in the incidence of dementia and mental health issues.[255]
- The increase in regulation requires additional documentation and reporting.[256]
- The expectations of resident/customers and their family around "person-centred care" require employees to cater to individual physical, emotional, social and spiritual care needs.[257]
- Employees are required to cater to diverse cultural, social and linguistic needs of residents/customers, including to CALD and LGBTQI residents/customers.[258]
- Employees require additional training in areas such as dementia, mental health, advanced communication, complaint management and conflict resolution.[259]

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251 UnitingCare Australia submission dated 4 March 2022 at 2.

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

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

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

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

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

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

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

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

- The growing prevalence of home care services means more employees are working with minimal supervision while performing a broader range of tasks.[260]
- Due to COVID-19, employees must be proficient in strict infection control procedures on a level not experienced previously. Employees have also been required to provide additional social support for isolating residents.[261]

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

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

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

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

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

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

328 BaptistCare submits that staff recruitment is a "significant challenge" and notes that at the time of its submission it had more than 300 vacant positions, predominantly in frontline care roles.[267] BaptistCare further emphasises that turnover is increasing, from 20 per cent in 2020 to 31 per cent in 2021.[268]

329 BaptistCare maintains that the increase in acuity of aged care consumers (both residential and home care) has increased the work of frontline care workers, who are now required to engage in more clinical practices and documentation, including:[269]

- assisting with medication
- simple wound dressing
- assisting with the implementation of continence programs

260 IRT Group submission dated 4 March 2022 at [10].
261 IRT Group submission dated 4 March 2022 at [11].
262 IRT Group submission dated 4 March 2022 at [12].
263 IRT Group submission dated 4 March 2022 at [13]-[14].
264 BaptistCare NSW & ACT submission dated 3 March 2022 at [3]-[5].
265 BaptistCare NSW & ACT submission dated 3 March 2022 at [24]-[25].
266 BaptistCare NSW & ACT submission dated 3 March 2022 at [23].
267 BaptistCare NSW & ACT submission dated 3 March 2022 at [9].
268 BaptistCare NSW & ACT submission dated 3 March 2022 at [11].
269 BaptistCare NSW & ACT submission dated 3 March 2022 at [16]-[17].

- attending to regular checks, including urinalysis, blood pressure, temperature and pulse checks and blood sugar levels, and
- assisting and supporting diabetic clients in the management of their insulin and diet.

330 BaptistCare submits that the increase in work has extended beyond PCWs and notes the following:

- The increased focus on the wellbeing of residents has meant that lifestyle stream workers are required to be cognisant of providing activities and programs that are tailored to the social and spiritual care needs of residents.[270]
- The work of food preparation staff has "changed significant over time" and they are now required to ensure the provision of nutritious meals in accordance with the Aged Care Quality Standards and the individual resident's care and dietary needs.[271]
- Staffing challenges have increased the complexity of work performed by administrative staff who are principally responsible for rostering, filling vacant shifts and coordinating enquiries.[272]

(vi) Evergreen Life Care submission dated 7 March 2022

331 Evergreen is a not-for-profit residential aged care provider in West Gosford, NSW. Evergreen operates a residential aged care facility that provides high care services to 96 residents and a retirement village with 147 units. Evergreen employees 135 staff.[273]

332 Evergreen supports the increases in minimum rates in line with the HSU's application and submits that any such increase should be supported by an equivalent increase in funding by the Commonwealth.[274]

333 Evergreen submits the increase in level of acuity and complexity of the needs of residents means that employees are required to exercise a higher skill level.

334 Evergreen further emphasises that staff shortages are an "increasing challenge" and notes that in January 2022, 3 out of 21 shifts were staffed at lower than preferred levels as it was not possible to find any staff to fill the shifts. Evergreen submits that an increase in minimum award rates would help address the issues with staff shortages.[275]

(vii) MercyCare submission dated 27 May 2022

335 MercyCare is a not-for-profit provider of aged care services in Western Australia, operating 5 residential aged care homes with 380 residents and providing home care to 2,000 people.[276]

336 MercyCare supports a "significant increase" to the minimum wages in the relevant Awards in line with the HSU's application, provided such an increase is fully funded by the Commonwealth[277] and submits:

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270 BaptistCare NSW & ACT submission dated 3 March 2022 at [18].

271 BaptistCare NSW & ACT submission dated 3 March 2022 at [19].

272 BaptistCare NSW & ACT submission dated 3 March 2022 at [20].

273 Evergreen Life Care submission dated 7 March 2022 at 1.

274 Evergreen Life Care submission dated 7 March 2022 at 1.

275 Evergreen Life Care submission dated 7 March 2022 at 2.

276 MercyCare submission dated 27 May 2022 at 1.

277 MercyCare submission dated 27 May 2022 at 1.

> This increase will help address inequity and the increasing complexity of the work that aged care staff perform, help ease staff shortages severely impacting the industry and provide a platform for a sustainable industry to meet care needs for elderly Australians into the future.[278]

337 The Victorian Government and the Queensland Government also made submissions.

(viii) Victorian Government

338 The Victorian Government notes it is the "largest provider" of public sector residential aged care services (PSRACS) in Australia. The Victorian Government operates 179 PSRACS facilities with 5,620 operational places, representing approximately 10 per cent of residential aged care in Victoria.[279]

339 The Victorian Government submits that an increase to modern award minimum wages in the aged care sector is justified by work value reasons and is necessary to achieve the modern awards objective, and emphasises:

> Beyond the inherent value of the work performed in the aged care sector, more recent changes to the nature of that work have caused the work value to increase, including the level of complexity, the skill, responsibility and judgement involved in performing the work, and the conditions under which the work is performed.[280]

340 The Victorian Government supports an "appropriate increase (or series of increases)" to minimum award wages in the aged care sector, provided such an increase is "appropriately funded by the Commonwealth".[281]

341 The Victorian Government notes that it has considered the Consensus Statement and submits that it "strongly supports" the Consensus Statement's observation that any increase to award minimum wages in the aged care sector "must be matched by increased funding from the Commonwealth, as the primary funder and regulator of aged care services in Australia, and must be linked to transparency and accountability measures as to how funding is used".[282]

342 The Victorian Government submits that if the Commission determines an increase to award minimum wages in the aged care sector is appropriate, it would "welcome the opportunity to provide further submissions as to quantum, or how any proposed increases might be implemented (for example, in a phased manner), should that be of assistance to the Commission".[283]

(ix) Queensland Government

343 The Queensland Government "shares the unions' concern" that the work performed by aged care workers covered by the Aged Care, Nurses and SCHADS Awards has been historically undervalued.[284] The Queensland Government notes that the Applications vary in their particulars and does not favour one application over another, but submits that it generally supports the

278 MercyCare submission dated 27 May 2022 at 1.

279 Victorian Government submission dated 11 April 2022 at [5].

280 Victorian Government submission dated 11 April 2022 at [48].

281 Victorian Government submission dated 11 April 2022 [39].

282 Victorian Government submission dated 11 April 2022 at [60].

283 Victorian Government submission dated 11 April 2022 at [57].

284 Queensland Government submission dated 11 April 2022 at 1.

position that minimum wages in the subject Awards should be increased, along with any other variations necessary to give effect to the recommendations of the Royal Commission.[285]

344 An individual aged care worker also made a submission.

345 On 15 September 2022, the Property Council of Australia made a submission on behalf of the non-government retirement living sector. In its submission the Property Council of Australia raised concerns of the "non-government retirement living sector" about "the potential impact of a significant rise in aged care workers' wages on retirement living residents". The submission was prompted by advice from the Minister for Aged Care to the Retirement Living Council that the Commonwealth was "unable to provide supplementary funding to offset the wages of operational village staff who are employed in a retirement village". The submission goes to the impact of any exercise of modern award powers on business, including on employment costs; a matter which we are required to take into account in our consideration of the modern awards objective (see s 134(1)(f)).

346 As we set out in Chapter 8.1.3 we are not in a position to assess the impact on business of the interim increase we propose, until further clarification is provided regarding the extent of Commonwealth funding to support the proposed increase. This issue will be the subject of the next stage in these proceedings and the Property Council of Australia will have an opportunity to participate in those proceedings.

347 There is a significant amount of agreement between the parties; but the Joint Employers and the Unions disagree on the extent of changes to work in the aged care sector, in particular the classes of workers affected by those changes.

348 Ultimately, the Joint Employers submitted that, based on the evidence, the work undertaken by the following classes of employee in residential aged care had significantly changed over the past 2 decades warranting consideration for work value reasons:

- RNs
- ENs
- Certificate (III) Care Workers, and
- Head Chefs/Cooks.[286]

349 The Joint Employers later confirmed that they contend that an increase in minimum wages is justified on work value grounds in respect of RNs, ENs, Certificate III Care Workers and Head Chefs/Cooks in residential aged care.[287]

350 As to the quantum of such an increase, the Joint Employers do not support a uniform 25 per cent increase in minimum wages for these classifications;[288] but provided no further clarification in relation to the quantum of any increase to be provided.[289] In their closing submissions in reply, the Joint Employers confirmed that their submission is that the minimum rates for RNs "should be aligned to the C10 framework" which would result in an increase of 35 per cent in the minimum award rates for RNs working in aged care.

285 Queensland Government submission dated 11 April 2022 at 2.

286 Joint Employers closing submissions dated 22 July 2022 at [4.47].

287 Joint Employers closing submissions in reply dated 19 August 2022 at [5.20].

288 Joint Employers closing submissions in reply dated 19 August 2022 at [5.23].

289 Transcript, 1 September 2022, PN15556-PN15557.

351 The Joint Employers' concessions regarding these classes of employees for whom an increase in minimum wages is justified on work value grounds are confined to the performance of that work in a residential aged care setting. The Joint Employers submit that PCWs/AINs in home care and residential care have some "fairly distinct features that differentiate them", but the Joint Employers concede that these distinctions ultimately "might not matter" and the Commission might form the view that "while there are differences, on balance you arrive at the same conclusion".[290]

352 The parties also agreed with a range of *provisional* views we expressed during the course of the proceedings.

353 In our Statement dated 9 June 2022[291] we expressed the following *provisional* views based on the material set out in Background Documents 1 and 2:

1. The relevant wages rates in the *Aged Care Award 2010*, the *Nurses Award 2020* and the *Social, Community, Home Care and Disability Services Industry Award 2010* have not been properly fixed.
2. It is not necessary for the Full Bench to form a view about why the rates have not been properly fixed.
3. The task of the Full Bench is to determine whether a variation of the relevant modern award rates of pay is justified by "work value reasons" (and is necessary to achieve the modern awards objective), being reasons related to any of s 157(2A)(a)-(c) the nature of the employees' work, the level of skill or responsibility involved in doing the work and the conditions under which the work is done.

354 The parties broadly agreed with the *provisional* views.[292] In a Statement dated 5 August 2022[293] we confirmed our *provisional* views.

355 It has therefore been accepted that, in these proceedings, we are not required to form a view as to why the rates in the relevant awards have not been properly fixed, including by making a finding as to whether or not the minimum rates are affected by gender undervaluation.

356 That being said, we accept the expert evidence that as a general proposition work in feminised industries, including care work, has been historically undervalued and that the reason for that undervaluation is likely to be gender based. We also accept that the evidence pertaining to gender undervaluation provides a useful context for the assessment of the work value and skills utilised in feminised industries, including in the aged care industry. The proper assessment of the skills utilised in aged care work is considered in detail in Chapter 7.

357 Finally, a number of propositions as to the nature and conditions of the work in aged care were agreed to by the parties. These are discussed in Chapter 7.

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290 Transcript 1 September 2022, PN15688-PN15697.

291 *Re Aged Care Award 2010* [2022] FWCFB 94.

292 ANMF closing submissions dated 22 July at [91]; HSU submissions dated 2 August 2022 at [1]-[3]; Joint Employers closing submissions dated 27 July 2022; Commonwealth submissions dated 8 August 2022 at [79]; Transcript, 25 August 2022, PN15385.

293 *Re Aged Care Award 2010* [2022] FWCFB 150.

5. The evidence

5.1. Overview

358 The Unions relied on the statements of 72 employee lay witnesses. Seven of the employee lay witnesses were not required for cross-examination.[294]

359 A Mention was held on 22 April 2022. The Commission proposed that in order to facilitate the efficient use of Commission resources, the Unions' employee lay witness evidence would be heard by a single member of the Full Bench, Commissioner O'Neill, who would then prepare a report in respect of that evidence and the parties would have the opportunity to comment on the report before it was finalised. The parties did not object to the course proposed. The Full Bench determined these arrangements in a Statement published on 24 April 2022.

360 On 20 June 2022, the Commission published the Lay Witness Evidence Report[295] which provides an overview of the evidence of the employee lay witnesses called by the Union parties, including:

- a summary of the employee lay witnesses who gave evidence (including charts)
- an overview of each witness's evidence
- an overview of the witnesses' evidence about the duties of various roles in the aged care industry, and
- illustrative examples of the witness evidence grouped by theme.

361 The Unions also relied on the statements of 17 union officials:

- Christopher Friend, Industrial Bargaining Officer Aged Care Division, HSU NSW/ACT Branch[296]
- David Eden, Assistant Secretary, HSU Victoria Branch[297]
- Gerard Hayes, President of the HSU & Secretary HSU NSW/ACT Branch[298]
- James Eddington, Legal and Industrial Officer, HACSU Tasmania Branch[299]
- Lauren Hutchins, Divisional Manager of Aged Care and Disabilities, HSU NSW/ACT Branch[300]
- Leigh Svendsen, Senior Industrial and Compliance Officer, HSU[301]

294 Lorri Seifert, Sally Fox, Tracy Roberts, Hazel Bucher, Maree Bernoth, Pauline Breen and Susan Toner.

295 Lay Witness Evidence Report dated 20 June 2022.

296 Amended witness statement of Christopher Friend dated 20 May 2022; Supplementary witness statement of Christopher Friend dated 29 October 2021; Transcript, 26 April 2022, PN873-PN946.

297 Witness statement of David Eden dated 12 October 2021; Transcript, 2 May 2022, PN3020-PN3061.

298 Witness statement of Gerard Hayes dated 31 March 2021; Transcript, 26 April 2022, PN519-PN589.

299 Witness statement of James Eddington dated 5 October 2021; Transcript, 3 May 2022, PN3491-PN3556.

300 Amended witness statement of Lauren Hutchins dated 20 May 2022; Reply witness statement of Lauren Hutchins dated 22 April 2022; Transcript, 26 April 2022, PN598-PN857.

301 Witness statement of Leigh Svendsen dated 22 April 2021.

- Lindy Twyford, Senior Vice President, HSU NSW/ACT Branch[302]
- Marion Jennings, Organiser, HSU[303]
- Andrew Venosta, Industrial Organiser, ANMF[304]
- Annie Butler, Federal Secretary, ANMF[305]
- Julianne Bryce, Senior Federal Professional Officer, ANMF[306]
- Kathryn Chrisfield, Occupational Health and Safety Unit Coordinator, ANMF[307]
- Kevin Crank, Industrial Officer, ANMF[308]
- Kristen Wischer, Senior Federal Industrial Officer, ANMF[309]
- Paul Gilbert, Assistant Secretary, ANMF[310]
- Robert Bonner, Director — Operations and Strategy, ANMF South Australia Branch,[311] and
- Melissa Coad, Coordinator Policy, Stakeholder Engagement and Professional Development, UWU.[312]

362 The evidence of the union official lay witnesses was heard by the Full Bench. Four of the Unions' official witnesses were not required for cross-examination.[313]

363 The Joint Employers relied on the statements of 9 lay witnesses:

- Anna-Maria Wade, National Manager of Employee Relations, State Manager (NSW/ACT), Acting Executive Director of Membership & Services, ACSA.[314]
- Cheyne Woolsey, Chief Human Resources Officer, KinCare[315]
- Craig Smith, Executive Leader Service Integrated Communitieis, Warrigal[316]

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302 Witness statement of Lindy Twyford dated 1 April 2021; Reply witness statement of Lindy Twyford dated 20 April 2022; Transcript, 2 May 2022, PN2913-PN3006.

303 Witness statement of Marion Jennings dated 26 March 2021; Reply witness statement of Marion Jennings dated 15 April 2022; Transcript, 2 May 2022, PN2777-PN2904.

304 Amended witness statement of Andrew Venosta dated 3 May 2022; Transcript, 3 May 2022, PN3855-PN3964.

305 Amended witness statement of Annie Butler dated 2 May 2022; Transcript, 2 May 2022, PN3384-PN3451.

306 Witness statement of Julianne Bryce dated 29 October 2021; Transcript, 3 May 2022, PN3717-PN3749.

307 Amended witness statement of Kathryn Chrisfield dated 3 May 2022; Transcript, 3 May 2022, PN3761-PN3847.

308 Witness statement of Kevin Crank dated 29 October 2021.

309 Witness statement of Kristen Wischer dated 14 September 2021; Amended supplementary witness statement of Kristen Wischer dated 9 May 2022.

310 Amended witness statement of Paul Gilbert dated 3 May 2022; Transcript, 3 May 2022, PN3975-PN4051.

311 Witness statement of Robert Bonner dated 29 October 2021; Transcript, 9 May 2022, PN8959-PN9259.

312 Witness statement of Melissa Coad dated 7 October 2021.

313 Leigh Svendsen, Kevin Crank, Kristen Wischer and Melissa Coad.

314 Amended witness statement of Anna-Maria Wade dated 23 May 2022; Transcript, 11 May 2022, PN12470-PN12573.

315 Witness statement of Cheyne Woolsey dated 4 March 2022.

316 Amended witness statement of Craig Smith dated 23 May 2022; Transcript, 12 May 2022, PN13147-PN13312.

- Emma Brown, Special Care Project Manager, Warrigal[317]
- Johannes Brockhaus, CEO, Buckland Aged Care Services (Buckland)[318]
- Kim Bradshaw, General Manager, Warrigal Stirling Residential Aged Care Facility[319]
- Mark Sewell, CEO and Company Secretary, Warrigal[320]
- Paul Sadler, CEO, ACSA,[321] and
- Sue Cudmore, Chief Operations Officer, Recruitment Solutions Group Australia (Health Solutions).[322]

364 The evidence of the employer lay witnesses was heard by the Full Bench. One of the employer lay witnesses was not required for cross-examination.[323]

365 The ANMF and the HSU also relied on the reports and statements of 6 expert witnesses.

366 The HSU relied on the evidence of the following expert witnesses:

- Prof Sara Charlesworth
- Prof Gabrielle Meagher
- Prof Kathleen Eagar, and
- Prof Susan Kurrle.

367 The ANMF relied on the evidence of the following expert witnesses:

- Assoc Prof Smith and Dr Lyons, and
- Honorary Assoc Prof Anne Junor.

368 As mentioned earlier, the Commission also published a Research Reference List of 665 documents consisting of: 202 published research articles and books; 68 Australian working papers and reports; 9 international working papers and reports; 114 Australian Government reports; 2 international government reports; 22 data sources; 189 cases referred to in submissions and witness evidence; and 59 awards, variations and determinations referred to in submissions and witness evidence.

369 The Research Reference List has been updated throughout the proceedings and was most recently published on 9 June 2022.[324] As mentioned in a Statement published on 9 June 2022 we propose to have regard to the materials set out in the Research Reference List in our consideration of the Applications.

317 Witness statement of Emma Brown dated 2 March 2022; Transcript, 12 May 2022, PN13319-PN12503.

318 Witness statement of Johannes Brockhaus dated 3 March 2022; Transcript, 12 May 2022, PN13755-PN13897.

319 Witness statement of Kim Bradshaw dated 4 March 2022; Transcript, 12 May 2022, PN12953-PN12834.

320 Witness statement of Mark Sewell dated 3 March 2022; Transcript, 12 May 2022, PN12855-PN13139.

321 Witness statement of Paul Sadler dated 1 March 2022; Transcript, 11 May 2022, PN12202-PN12453.

322 Witness statement of Sue Cudmore dated 4 March 2022; Transcript, 12 May 2022, PN13513-PN13749.

323 Cheyne Woolsey.

324 "Research Reference List" dated 9 June 2022.

5.2. The expert evidence

5.2.1. Professor Charlesworth

370 Prof Sara Charlesworth is a Professor of Gender, Work & Regulation at the School of Management at RMIT University and the Director of the Centre of People, Organisation & Work at RMIT's College of Business and Law. Prof Charlesworth prepared 2 expert reports: the *Charlesworth Report* and the *Charlesworth Supplementary Report*.

371 The Charlesworth Report was prepared in response to the HSU's request that Prof Charlesworth provide an expert report addressing the following matters:

> (a) the nature of the industrial history of setting the terms and conditions of workers covered by the [Aged Care] Award and in residential settings in Australia;
> (b) the nature of the workforce in residential aged care including the demographics and whether the workforce is female dominated
> (c) the challenges faced by unions and employees in achieving higher wage rates in residential aged care through industrial arbitration and enterprise bargaining.
> (d) whether you believe there has been an historical undervaluation of work performed in the industry, how that has affected wage rates contained in the Award and, if so, what factors have contributed to any historical undervaluation of work in residential aged care, including any contribution the gender composition of the workforce may have had to the undervaluation of work performed;
> (e) whether there has been a change in the composition of the workforce in residential aged care;
> (f) if you are of the view that there has been a change in the composition of the workforce in residential aged care, the nature of those changes, and the impact (if any) the change in composition has had on the duties, responsibilities and skills required of workers in residential aged care;
> (g) the nature of the work performed (being care work) in the aged care sector (including in the Personal Care worker, General and Administrative Services, and Food Services streams covered by the [Aged Care] Award);
> (h) the skills required to perform work in residential aged care (including in the Personal Care worker, General and Administrative Services, and Food Services streams covered by the [Aged Care] Award);
> (i) whether there has been a change in the nature, level of skill and responsibility involved in doing work in residential aged care over time (including in the Personal Care worker, General and Administrative Services, and Food Services streams covered by the [Aged Care] Award);
> (j) if you are of the view that there has been changes in the nature of work, responsibility and/or skills required in residential aged care over time, please provide a description and explanation of, the reasons for and nature of, those changes;
> (k) the benefits and consequences of improving rates of pay and conditions for employees working in residential aged care; and
> (l) any other information that you consider relevant.[325]

325 Witness statement of Sara Charlesworth dated 31 March 2021 Annexure SC-2.

372 The Charlesworth Supplementary Report was prepared in response to the HSU's request that Prof Charlesworth provide a further report in relation to HCWs.[326]

373 The Charlesworth Report and Charlesworth Supplementary Reports address the following areas:

- the industrial history of setting the terms and conditions of PCWs in residential aged care covered by the *Aged Care Award* and HCWs covered by the SCHADS Award[327]
- the conditions under the Aged Care and SCHADS Awards relating to the scheduling of part-time workers[328]
- the demographics of the aged care workforce[329]
- the role of enterprise bargaining in residential aged care[330]
- Prof Charlesworth's opinions on whether there has been historical undervaluation of work in aged care[331]
- the change in the composition of the workforce in residential aged care and any impact this change has had on the duties, responsibilities and skills of PCWs[332]
- the changing nature of the work performed by home care workers[333]
- the skill required by PCWs and home care workers and the value attached to those skills,[334] and
- Prof Charlesworth's opinions on the benefits associated with improving the rate of pay and conditions for PCWs.[335]

374 A key finding of both the Charlesworth Report and the Charlesworth Supplementary Report is that there "has been an historical as well as an ongoing undervaluation" of work performed by PCWs in residential aged care and by HCWs and that this undervaluation is "profoundly gendered".[336]

375 Prof Charlesworth notes the overwhelming majority of aged care workers are female and observes that as a result the nature of the work performed by aged care workers has historically been "viewed as quintessentially 'women's work' and therefore of little economic value".[337] Prof Charlesworth states:

> The gendered norms that underpin the devaluation of care work are premised on an "ideology of domesticity" that positions the care that women do, both in home and as paid work, as natural and therefore unskilled. In particular, it is the link assumed between unpaid care work in the family and paid care work that means aged care work has been significantly undervalued in government funding, in

326 Supplementary witness statement of Sara Charlesworth dated 22 October 2021 Annexure SC-6.

327 Charlesworth Report at [9]-[15]; Charlesworth Supplementary Report at [1]-[21].

328 Charlesworth Report at [16]-[18]; Charlesworth Supplementary Report at [22]-[26].

329 Charlesworth Report at [19]-[32]; Charlesworth Supplementary Report at [27]-[46].

330 Charlesworth Report at [33]-[41]; Charlesworth Supplementary Report at [47]-[60].

331 Charlesworth Report at [42]-[46]; Charlesworth Supplementary Report at [61]-[65].

332 Charlesworth Report at [47]-[51].

333 Charlesworth Supplementary Report at [66]-[69].

334 Charlesworth Report at [52]-[57]; Charlesworth Supplementary Report at [70]-[73].

335 Charlesworth Report at [58]-[65].

336 Charlesworth Report at [42]; Charlesworth Supplementary Report at [61].

337 Charlesworth Report at [43]; Charlesworth Supplementary Report at [62].

> employment protections and in societal, industrial and organisational recognition of the increasingly complex skills required to undertake the work of aged care, including in residential settings.[338]

376 Prof Charlesworth goes on to identify the skills required by PCWs in residential care and HCWs and argues that these skills "tend to be viewed as somehow 'natural' attributes of the predominantly female workforce, requiring the 'right' attitude or personality rather than demonstrable skill"[339] and contends:

> The capacity to know how to provide care in diverse situations with individual people, whose needs might change on a daily basis, requires the type of specific and demonstrable knowledge and skills as outlined above as well as a high degree of autonomy, responsibility and judgment. I note that these responsibilities and skills are not currently outlined in personal care worker classifications in the *Aged Care Award* and are certainly not reflected in the low pay rates that adhere to those classifications.[340]

5.2.2. Professor Kurrle

377 Prof Susan Kurrle is a Curran Professor in Health Care of Older People at the University of Sydney and a Senior Staff Specialist Geriatrician within the Hornsby Ku-ring-gai and Eurobodalla Health Services NSW. From March 2019 to February 2021, she was the Medical Adviser to the Royal Commission. Prof Kurrle prepared the *Kurrle Report* in response to instructions from the HSU.[341] The Kurrle Report is based on her specialised knowledge and experience in geriatric health care and from her observations gained in her role on the board of not-for-profit aged care provider, HammondCare, from 1998 to 2014.

378 The Kurrle Report largely describes the nature of the work performed, the skills and knowledge required in the aged care sector and discusses how these have changed over time.

379 A key finding of the Kurrle Report is that there has been a significant change in the composition of the residential aged care workforce over time with RNs falling from 21 per cent to 14.5 per cent, ENs falling from 13 per cent to 10 per cent, and PCWs increasing from 58 per cent to 70 per cent of the workforce, resulting in many of the duties traditionally performed by nurses now being performed by PCWs.[342]

380 The Kurrle Report finds that at least 50 per cent of aged care residents are considered to be frail, and as a result have a high level of physical care needs. This can be demonstrated by the increase in high care needs on the ACFI with an increase across activities of daily living, cognition and behaviour, and complex health care from 2009 to 2019.[343]

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338 Charlesworth Report at [43].

339 Charlesworth Report at [54]; Charlesworth Supplementary Report at [72].

340 Charlesworth Report at [55]; see also Charlesworth Supplementary Report at [74].

341 Witness statement of Susan Kurrle dated 25 April 2022 Annexure SK-2.

342 Kurrle Report at 2-3.

343 Kurrle Report at 7.

381 The increase in level of care needs is illustrated below:[344]

Chart 1: Care need ratings of people in permanent residential care for complex health care, 30 June 2009-2019

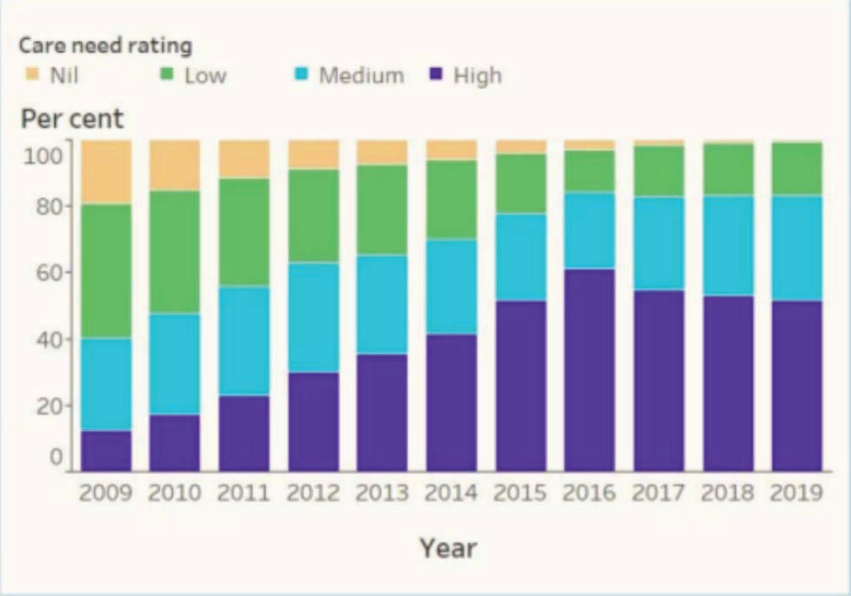

Figure 2: Care need ratings of people in permanent residential care for complex health care, 30 June 2009–2019

Source: Kurrle Report at p 7.

382 The Kurrle Report concludes that the level of care, skills and responsibilities required to perform work in residential aged care has increased and this is driven by the increase in age, acuity and complex health needs of residents,[345] the shift towards the home care model, and the introduction of the National Aged Care Mandatory Quality Indicator Program.[346]

383 The Kurrle Report does not draw any conclusions as to whether the work performed by workers in residential aged care is undervalued.[347]

5.2.3. Professor Eagar

384 Prof Kathleen Eagar is a Professor of Health Services Research and the Director of the Australian Health Services Report Institute of the University of Wollongong. Prof Eagar led a study commissioned by the Royal Commission involving an analysis of national and international staffing profiles in residential aged care facilities.

385 The HSU engaged Prof Eagar to prepare the *Eagar Report*. Prof Eagar was asked to provide her expert opinion on a range of matters including the nature

344 Australian Institute of Health and Welfare, "People's Care Needs in Aged Care" (GEN Fact Sheet 2018-2019, 2020) 1 <https://www.gen-agedcaredata.gov.au/www_aihwgen/media/Factsheets-for-2019%e2%80%932020-GEN-update/Peoples-care-needs-in-aged-care-factsheet.pdf?ext=.pdf>.

345 Kurrle Report at 6.

346 Kurrle Report at 10.

347 Kurrle Report at 11.

and size of residential aged care providers; the regulation of the aged care system; the nature of the work performed; the skill and responsibility involved in the work; whether the work had changed over time; the composition of the workforce; any increases in the acuity of aged care residents and the drivers of any such increase and any other information she considers to be relevant.

386 On 21 April 2022, as part of its reply submissions, the HSU filed the *Eagar Supplementary Report*. Prof Eagar was requested to respond in the Eagar Supplementary Report to the witness statements of employer lay witnesses Paul Sadler (dated 1 March 2022) and Mark Sewell (dated 3 March 2022).

387 The Eagar Report addresses the following matters:

- the changing legislative context governing the provision of residential aged care as set out in the *Aged Care Act 1997* (Cth) (the *Aged Care Act*) and the *Aged Care Quality and Safety Commission Act 2018* (Cth) (the ACQS Commission Act) and the Aged Care Principles[348]
- the changing policy context for residential aged care, including recent changes in response to challenges associated with demographic trends, resource availability and consumer expectations[349]
- the funding context for residential aged care, consisting of a mix of government subsidies (approx. 80 per cent of all funding) and consumer contributions (the remaining approx. 20 per cent)[350]
- the profile of aged care workers in residential aged care, including a breakdown of direct care workers according to professional designation[351]
- an assessment of the needs of people living in residential aged care, including statistics based on the De Morton Mobility Index (DEMMI) and the Rockwood Clinical Frailty Scale (RCFS) and a range of "dependency profiles" detailing the percentage of residents who need help from a carer in performing various tasks,[352] and
- the impact governance and management, staff numbers, staff skill mix and staff continuity have on the quality and safety of aged care.[353]

388 The Eagar Report concludes with Prof Eagar's opinion that there is a 'strong case for improved pay and conditions for aged care workers based on 3 factors:

- that aged care work has been historically undervalued, largely due to a female dominated workforce performing duties seen as low value "women's work"
- aged care residents are more clinically complex and frail, and with more cognitive and mental health issues that in the past, and
- there are less RNs supervising care work, resulting in greater responsibility falling on the remaining aged care workforce.[354]

389 The Eagar Supplementary Report consists of Prof Eagar's comments on aspects of the statements of employer lay witnesses Paul Sadler and Mark Sewell. Prof Eagar agrees with the statement of Paul Sadler at para 29,

348 Eagar Report at 2-3.

349 Eagar Report at 3-4.

350 Eagar Report at 4-6.

351 Eagar Report at 6-8.

352 Eagar Report at 8-11.

353 Eagar Report at 11-12.

354 Eagar Report at 13.

concerning the impact of the Standards on how work is performed.[355] Prof Eagar also agrees with Mr Sadler's statement concerning residential care funding arrangements.[356] Prof Eagar makes a number of comments in respect of not-for-profit aged care providers[357] in response to the witness statement of Mark Sewell.[358]

5.2.4. Professor Meagher

390 Prof Gabrielle Meagher is an Emerita Professor in the School of Social Sciences at Macquarie University. The HSU engaged Prof Meagher to prepare the *Meagher Report*. Prof Meagher was asked to provide her expert opinion on a range of matters including:

- the nature and size of residential aged care providers
- whether and, if so, how the nature of the aged care industry has changed over time
- the nature of the workforce in residential aged care including the demographics and whether is it female dominated
- the nature of the work performed in the aged care sector
- whether the work performed by workers in residential aged care has been historically undervalued. If so, how and in what way has the work performed by workers been historically undervalued and what factors have contributed to undervaluation.
- the skills and responsibility required in aged care work, and whether this has changed over time,
- a description and explanation of the reasons for any changes to the nature of work, level of responsibility, and/or skills required in residential aged care
- whether there has been a change to the composition of the workforce in residential aged care. If so, the nature of the changes and the impact of any such changes on the duties, responsibilities and skills required of workers in residential aged care.
- a description and explanation of the reasons for any changes to the composition of the workforce in residential aged care
- whether there has been an increase in the frailty and acuity of the needs of residents in aged care
- the conditions under which the work is performed in residential aged care, and whether there has been a change to those conditions and the effect this has had on the work performed,
- whether there has been a shift in the model of care in the aged care industry, and if so, the effect of this on the nature of work, responsibilities and skills required in residential aged care

355 Witness statement of Paul Sadler dated 1 March 2022 at [29]: "The 2019 standards require providers to ensure 'the organisation has a workforce that is sufficient, and is skilled and qualified to provide safe, respectful and quality care and services'. As such, the Aged Care Quality Standards do not directly require particular actions be undertaken by care employees and nurses, but they do impact the way the work is performed".

356 Eagar Supplementary Report at [6].

357 Eagar Supplementary Report at [8]-[13].

358 Witness Statement of Mark Sewell dated 3 March 2022.

- whether she [Prof Meagher] is of the view that the wage rates contained in the *Aged Care Award* adequately reflect the value of the work being performed in residential aged care, and
- any other information she [Prof Meagher] considers to be relevant.[359]

391 On 29 October 2021, the HSU filed the Meagher Supplementary Report. Prof Meagher was asked to provide her expert opinion on a range of matters including:

- the history of the evaluation of wages rates for aged care workers
- any challenges faced by unions in securing higher wage rates for workers in home aged care
- whether the work performed in aged care is properly valued by reference to work value reasons set out in s 157(2A) of the FW Act, and
- whether there has been a change in the skills and responsibility required to perform work in the aged home care sector or the conditions under which this work is performed and, if so, what these changes are and including explanations for any changes.

392 On 26 May 2022, the HSU filed an amended version of the *Meagher Supplementary Report* (the Amended Meagher Supplementary Report).

393 The Meagher Report presents research on the nature and valuation of aged care work performed in residential aged care settings, focussing on the work carried out by employees covered by the *Aged Care Award*. The Meagher Report's findings include that:

- There is strong evidence that the needs of those living in residential aged care has increased during the last 10 to 15 years, with residents older, sicker and frailer than before[360]
- The workforce in residential aged care, across direct care, ancillary support and administrative roles, is overwhelming female[361]
- The occupational structure of the residential care workforce has undergone considerable change in recent years, notably through increased proportion of FTE (full-time equivalent) PCWs, a fall in the share of nurses and allied health FTE workers and a reduced proportion of workers involved in the provision of direct care against ancillary and administrative workers, on a headcount measure[362]
- The structure of the residential aged care sector has changed resulting in larger facilities operated by fewer, but larger, providers, more of which operate on a for-profit basis (which has implications on the quality of care offered) and that these trends are linked[363]
- Some residential aged care facilities offer a "household", or "clustered domestic" model of care (as opposed to an institutional "hospital-like" model) which emphasises more "person-centred" care resulting in

359 Witness statement of Gabrielle Meagher dated 31 March 2021 Annexure GM-2 at [5].

360 Meagher Report at 3.

361 Meagher Report at 5.

362 Meagher Report at 6-8.

363 Meagher Report at 8-11.

better quality of life and clinical outcomes for residents, and that facilities organised on this model employ a higher proportion of PCAs relative to RNs and ENs[364]

- Prevailing regulatory and community standards, increased expectations, combined with higher care needs and greater diversity among residents and shorter turnover of stay have significantly increased the skill and judgment demands and level of responsibility required of workers in residential aged care, across the coverage of the *Aged Care Award*,[365] and
- Aged care work is undervalued by the *Aged Care Award*, including by reasons of occupational sex-segregation, gendered undervaluation of care work, worker motivations and preferences, the low social status of recipients of aged care work and the ownership and funding of residential aged care.[366]

394 The Amended Supplementary Meagher Report presents research on the nature and valuation of care work performed in the home care and support sector, that being work performed by employees working for organisations funded by either the CHSP or the Home Care Package (HCP) Program (HCPP) who are covered by the SCHADS Award (HCWs).[367] The findings it makes include that:

- The home care and support system is growing and the profile of the recipients of home care is becoming more diverse and complex, with many frail and suffering from multiple health conditions. In addition, there is evidence those entering the home care system are becoming more frail and less healthy over time.[368]
- Around 830,000 older people receive some form of care, assistance and support through the CHSP, whereas around 167,000 receive a HCP, and around one quarter of those receiving a HCP also receive services through the CHSP.[369]
- The role of home care within the aged care system is growing, with the share between residential and HCPs shifting in favour of HCP's in the last decade, and the HCPP increasingly developing as a viable alternative to residential care.[370]
- A major driver of change in home care and support is the expectation that older people can be maintained longer at home, despite significant ill-health and frailty. Concepts of consumer choice, and the take-up of digital technologies are also driving change.[371]
- The direct care workforce in home care is overwhelming female.[372]
- The trends in home care in respect of increasing skills, responsibilities and judgment required of workers largely mirror those seen in

364 Meagher Report at 17-18.

365 Meagher Report at 19.

366 Meagher Report at 25-31.

367 Meagher Supplementary Report at 1.

368 Meagher Supplementary Report at 2-3.

369 Meagher Supplementary Report at 2, 5.

370 Meagher Supplementary Report at 7.

371 Meagher Supplementary Report at 13, 15.

372 Meagher Supplementary Report at 16.

residential care (detailed in the first Meagher Report). This is occurring as a result of the increasing needs profiles, higher levels of diversity and significant turnover of those receiving home care; as well as the prevailing regulatory and community standards and expectations of care quality and support; new technologies and the impact of the COVID-19 pandemic.[373]

- The delivery of home care and support to meet community standards and government-mandated quality requirements requires that care workers carry out work requiring a variety of technical and interpersonal skills, be responsible for the safety and well-being of vulnerable clients and exercise judgment about a client's condition, priorities in their work and ethical courses of action.[374]
- The problem of undervaluation of care work discussed in the first Meagher Report applies to work in both residential aged care and home care and support.[375]

395 The HSU cite Prof Meagher's reports to support its claim that the wages of aged care workers have been historically undervalued, with past approaches to wage fixation having failed to recognise and remunerate occupations perceived to involve "caring" and "nurturing" skills such as those utilised by aged care workers.[376]

5.2.5. Associate Professor Smith and Dr Lyons

396 Assoc Prof Meg Smith is the Deputy Dean of the School of Business at Western Sydney University. Dr Michael Lyons is a senior lecturer in the School of Business at Western Sydney University. Assoc Prof Smith and Dr Lyons prepared the *Smith/Lyons Report*. Assoc Prof Smith and Dr Lyons were asked to provide their expert opinion on a range of matters including the concept of, and the contributing factors to, the gender pay gap and gender-based undervaluation in Australia, the barriers to proper work value assessment by tribunals in female dominated industries and the impact of these on setting award minimum rates.

397 A key finding of the Smith/Lyons Report is that under the respective awards the work of RNs, ENs and PCWs working in residential aged care is undervalued, and that the gender profile of the workforce and the gendered assumptions about the skill level required in care giving work suggest that this undervaluation is gender based.[377]

398 The Smith/Lyons Report relies on Australian Bureau of Statistics (ABS) data which indicates that, at the time of writing the Report, the average weekly ordinary full time earnings (excluding overtime earnings and part-time employees) for men and women differed by 14.2 per cent, and while the gap varies across states and industries, the data suggests a persistent gender pay gap in Australia.[378] As the data in the Report is from May 2021, Assoc Prof Smith and Dr Lyons produced updated tables on 29 April 2022 so as to incorporate the most recent ABS data. This data indicates the gender pay gap is 13.8 per cent.[379]

373 Meagher Supplementary Report at 19-20.

374 Meagher Supplementary Report at 26.

375 Meagher Supplementary Report at 26.

376 HSU closing submissions dated 22 July 2022 at [52](b) and [369].

377 Smith/Lyons Report at [157].

378 Smith/Lyons Report at [10]-[13].

399 The below tables are current as of November 2021:

Table 1: Measures of pay differentials between females and males from ABS Average Weekly Earnings and Employee Earnings and Hours surveys.[380]

Measure of earnings	Females ($)	Males ($)	Ratio of female to male earnings
Average Weekly Earnings (AWE) survey measure (November 2021) (seasonally adjusted excluding AWOTE)			
Average weekly earnings (AWE) Average weekly total earnings of all employees	1093.80	1577.10	0.69
Average weekly earnings for full-time adults (FTAWE)	1618.00	1934.80	0.84
Average weekly ordinary time earnings (AWOTE) for full-time adults	1591.20	1846.50	0.86
Employee Earnings and Hours Survey measure (May 2021)			
Average weekly ordinary time cash earnings (AWOTCE) for full-time non-managerial employees paid at the adult rate	1617.10	1809.10	0.89
Average hourly ordinary time cash earnings (AHOTCE) for full-time non-managerial employees paid at the adult rate	43.10	47.10	0.92
Average weekly total cash earnings (AWCE) for non-managerial employees	1131.80	1552.40	0.73
Average hourly total cash earnings (AHCE) for non-managerial employees	40.20	44.50	0.90
Average weekly total cash earnings (AWCE) for all full-time non-managerial paid at the adult rate	1639.70	1910.10	0.86
Average hourly total cash earnings (AHCE) for all full-time non-managerial employees paid at the adult rate	43.30	47.50	0.91

Source: Based on Pointon, Wheatley, and Ellis et al (2012), Layton, Smith and Stewart (2013, p 80) and updated to include more recent data from ABS Cat No 6302.0 (Average Weekly Earnings Survey) (ABS 2022a) and from ABS Cat No 6306.0 (Employee Earnings and Hours Survey) (ABS 2022b).

Source: Smith/Lyons Report at 4.

379 ANMF correspondence dated 29 April 2022.

380 Assoc Prof Smith and Dr Lyons, "Updated ABS Data — Tables 1 and 2" dated 29 April 2022, Table 1.

Table 2: Differing measures of the gender pay gap (GPG)[381]

Measure	GPG (%)	Main features and limitations
Average weekly earnings (AWE) Average weekly total earnings of all employees	30.6	Includes all weekly earnings for all employees but makes no adjustment that a much larger proportion of women work part-time than men — and are therefore paid for fewer working hours.
Average weekly earnings for full-time adults (FTAWE)	16.4	Includes all weekly earnings for all full-time adult employees but makes no adjustment for the fact that men are more likely to work and be paid overtime than women.
Average weekly ordinary time earnings (AWOTE) for full-time adults	13.8	Excludes overtime earnings. Part-time employees are also excluded, the majority of whom are women in lower paid occupations.
Average weekly ordinary time cash earnings (AWOTCE) for full-time non-managerial adult employees	10.6	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly ordinary time earnings thus excluding overtime.
Average hourly ordinary time cash earnings (AHOTCE) for full-time non-managerial adult employees	8.5	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on hourly earnings.
Average weekly total cash earnings (AWCE) for all non-managerial adult employees	27	Includes all weekly earnings for all non-managerial employees but makes no adjustment for the fact that a much larger proportion of women work part-time than men — and are therefore paid for fewer working hours
Average hourly total cash earnings (AHCE) for all non-managerial adult employees	9.7	Includes all weekly earnings for all non-managerial employees. Based on hourly earnings thus takes account, to an extent, of the larger proportion of women who work part-time.

381 Assoc Prof Smith and Dr Lyons, "Updated ABS Data — Tables 1 and 2" dated 29 April 2022, Table 2.

Measure	GPG (%)	Main features and limitations
Average weekly total cash earnings (AWCE) for full-time non-managerial adult employees	14.2	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly total earnings thus including overtime.
Average hourly total cash earnings (AHCE) for full-time non-managerial adult employees	8.8	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly total earnings thus including overtime. Based on hourly earnings,

Source: Based on Pointon, Wheatley and Ellis et al (2012), Layton, Smith and Stewart (2013, p 80) and updated to include more recent data from ABS Cat No 6302.0 (Average Weekly Earnings Survey) (ABS 2022a) and from ABS Cat No 6306.0 (Employee Earnings and Hours Survey) (ABS 2022b).

Source: Smith/Lyons Report at 5.

400 Assoc Prof Smith and Dr Lyons describe 2 broad approaches to assessing the contributing factors to the gender pay gap. The first approach is known as the "standard" or "orthodox" economics approach, which assumes that women make a rational choice to work in lower-paying occupations because of their limited investment in human capital. The second is the "institutional" or "sociological" approach which suggests organisational, social and labour-market factors impact women's occupational choices.[382] Their expert opinion is that the gender pay gap cannot be fully explained by the standard economics approach and that research which applies the institutional approach is better able to detect the reasons for the gender pay gap. In their expert opinion, the gender pay gap arises from the intersection of:

- differences in returns received by women compared to men for productivity related characteristics
- occupational segregation, and
- undervaluation of feminised work.[383]

401 The Smith/Lyons Report explores various interpretations of gender-based undervaluation and how this can occur. The Smith/Lyons Report ultimately finds that gender-based undervaluation refers to work value practices that are impacted by gender and which contribute to the failure to recognise work value in assigned wages.[384]

402 Assoc Prof Smith and Dr Lyons conclude that there is evidence of gender-based undervaluation of work, and that this is influenced by social expectations, gendered assumptions and the disproportionate engagement by women in unpaid labour.[385] In their expert opinion, barriers and limitations to the proper assessment of work value in female dominated industries and occupations include:

382 Smith/Lyons Report at [16].

383 Smith/Lyons Report at [41].

384 Smith/Lyons Report at [55].

385 Smith/Lyons Report at [56].

- changes in the regulatory framework for equal pay and equal remuneration applications and the interpretation of that framework
- procedural requirements such as the direction in wage-fixing principles that assessment of work value focus on changes in work value and tribunal interpretation of this requirement, and
- the subjective notion of skill and the "invisibility" of skills when assessing work value in female-dominated industries and occupations.[386]

403 The Smith/Lyons Report summarises the regulatory history of work value and equal pay proceedings and principles in Australia in what they describe as the 4 epochs:[387]

- 1969 and 1972 Equal Pay Principles and the Comparable Worth Proceedings
- Legislative entitlement to equal remuneration (1993-2008)
- Equal remuneration regulation initiatives in state jurisdictions (NSW and Queensland), and
- Equal remuneration under the FW Act.

404 Assoc Prof Smith and Dr Lyons contend that a consequence of these epochs is a binary and gendered comparison of work value which limits the capacity of tribunals to assess the weaknesses in previous work value assessments.[388]

405 The Smith/Lyons Report suggests that the absence of work value assessments or restraints in work value assessments can contribute to limitations in the skills classifications in awards relevant to feminised industries.[389] The classification structures may lack relevant descriptions of what is required in jobs, including the detailed specifications of the skills required at different levels, and these omissions mean that the work undertaken is not properly described, recognised and valued. Weaknesses in classification structures may also mean that there is no mechanism to recognise additional skills.[390]

406 In relation to PCWs covered by the *Aged Care Award*, the Smith/Lyons Report finds that the workers are low paid workers,[391] that low pay cannot be explained by work value reasons,[392] (in particular because the award classification descriptors do not reflect the work and work value of contemporary employees);[393] and that there has been no work value assessment undertaken since the *Aged Care Award* was introduced,[394] despite there being substantial material showing significant changes in the work value of aged care employees.[395] These changes in work value include the soft skills that are traditionally overlooked such as interpersonal skills, emotional labour, patience

386 Smith/Lyons Report at [93].
387 Smith/Lyons Report at [71]-[83].
388 Smith/Lyons Report at [84]-[87].
389 Smith/Lyons Report at [91].
390 Smith/Lyons Report at [91].
391 Smith/Lyons Report at [113]-[118].
392 Smith/Lyons Report at [119]-[123].
393 Smith/Lyons Report at [120].
394 Smith/Lyons Report at [132].
395 Smith/Lyons Report at [135]-[143].

and empathy, the need to regularly undertake training to improve skills and the increased importance of specialised skills such as dementia care and infection control.[396]

407 In relation to RNs, ENs, and AINs covered by the *Nurses Award*, the Smith/Lyons Report concludes that there has been no attempt at a work value assessment in relation to the Award despite work value having changed over that time.[397]

408 Assoc Prof Smith and Dr Lyons consider that the barriers to proper work value assessment include:

- historical wage fixing principles;
- industry funding;
- how tribunals have considered the issue of increased workloads;
- legislative policy shift to have awards as a key part of an employment safety net system; and
- a preference for comparisons to be made between workers performing similar work under similar conditions, which in their view, ignores the realities of occupational gender-segregation.[398]

5.2.6. Associate Professor Junor

409 Assoc Prof Junor provided expert evidence in the form of a Report produced on 28 October 2021 (and amended on 5 May 2022): *Fair Work Commission Matter AM2021/63, Amendments to the Aged Care Award 2010 and the Nurses Award 2010* (the Junor Report). Assoc Prof Junor's main research field is "skill identification, particularly in the growing and feminised service and care sectors".[399]

410 The Spotlight Tool is a job and skills analysis tool designed as an aid in identifying, naming and classifying "invisible skills" used in undertaking service work processes that are not directly observable. "Invisible" in this context means "hidden", "under-defined", "under-specified" or "under-codified".[400] A skill might be hidden because it is diplomatically kept unnoticed or downplayed because it is "behind the scenes".[401] A skill might be under-defined because it is hard to pin down in words, is non-verbal, or is applied in rapidly-changing situations.[402] A skill might be under-specified because it is "soft" or "natural" and is misdescribed as something innate and personal rather than as a skill.[403] A skill might be under-codified because it is integrative, or involves interweaving one's own activities with others' activities.[404]

396 Smith/Lyons Report at [137]-[140].

397 Smith/Lyons Report at [151], [153]-[157].

398 Smith/Lyons Report at [171]-[184].

399 Junor Report at [5].

400 Junor Report at [10], [138]-[140].

401 Junor Report at [33], [140](a).

402 Junor Report at [33], [140](b).

403 Junor Report at [33], [140](c).

404 Junor Report at [33]. Further description of what is meant by each of these kinds of invisibility appears in Annexure 8 at [16]. Examples of each kind of invisibility, separated out into classifications, are also in Annexure 8 at [21]-[40] for RNs, [41]-[59] for ENs, and [60]-[74] for AINs/PCWs.

411 The Spotlight Tool measures skill in 2 dimensions: skill *content* and skill *level*. These terms are set out and defined in Annexure 4 to the Junor Report. The content dimensions are:

- Awareness — of contexts and situations; of reactions and ways of shaping them; and of impacts
- Communication and Interaction — managing boundaries; verbal and non-verbal communication; intercultural communication and inclusion, and
- Coordination — of own work; interweaving one's own line of work with those of others; maintaining and restoring workflow.

412 The Spotlight skill levels are:

- orienting
- fluently performing
- problem-solving
- solution-sharing, and
- expertly system-shaping.

413 The relevance of the Spotlight taxonomy to "work value" is explained by Assoc Prof Junor in these terms:

> If the range and level of skills in the Spotlight taxonomy are not fully *identified* and *recognised*, the results will be failure to assign a full and accurate *value* to a job classification. This is quite likely associated with underestimation of the job's *size*, and its demands for *effort* and *responsibility*.[405]

414 As to the relevance of the Spotlight taxonomy to care work, Assoc Prof Junor states (footnotes omitted):

> I consider that the Spotlight skill identification methodology is particularly relevant to care work. This is work defined by five key criteria: (1) contribution to physical, mental, social, and/or emotional well-being; (2) a primary labour process based on person-to-person relationships; (3) a degree of dependency on the part of care recipients based on age, illness, or disability; (4) contribution to a human infrastructure that cannot be adequately produced through unpaid work or unsubsidised markets and (5) a predominantly female workforce.[406]

415 We discuss the application of the Spotlight Tool to the work performed by RNs, ENs and AINs/PCWs in aged care in detail in Chapter 7.3.2.

5.3. Joint Employers' objections to the expert evidence

416 The Joint Employers submit that the Commission "should be cautious with respect to the weight placed" on the expert evidence regarding the gender pay gap and gender undervaluation; sociological theories for undervaluation (including the notion of "women's work") and the "spotlight tool" and "invisible skills" and argue:

> the Commission needs to be particularly cautious about that evidence because it did not relate to minimum award rates. In such circumstances, without critiquing the substance of the theories explored by the experts, the content is ultimately of minimal assistance in the context of a work value assessment determining how to properly set minimum wages in the awards.[407]

405 Junor Report at [14].

406 Junor Report at [72].

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

417 In relation to the Smith/Lyons Report, the Joint Employers submit that the Commission should take a "cautious" approach to the evidence on the gender pay gap and its connection to undervaluation and argue:

> (a) the utility of the analysis based on *average weekly earnings* is limited on two bases:
>
> (i) the generality of the data can only provide a crude comparison based on gender, it is void of any relevant compositional factors that may impact hours worked because the statistics concern *total earnings* across *all industries*; and
>
> (ii) is not concerned with minimum rates of pay in awards; and
>
> (b) there is no evidence of a gender pay gap within the modern award framework.[408]

418 Further, the Joint Employers submit that the "institutional sociological approach" utilised by Assoc Prof Smith to analyse the gender pay gap presents no more than an "interesting academic exercise" and when "matched with the broad comparisons highlighted in gender pay gap statistics, the imprecision ultimately impacts any weight that can be put on it".[409]

419 In relation to the contention in the Smith/Lyons Report that there have historically been barriers to the proper assessment of work value in female-dominated industries, the Joint Employers submit:

> The aspects of the award modernisation process summarised do not establish that the minimum rates fixed during the modernisation process were infected by improper practices and gender bias. The development of modern awards was an intensely consultative process, marked by reviews and the opportunity for industry stakeholders and peak bodies to be heard.[410]

420 In response to the observation in the Smith/Lyons Report that the low rates of pay in the aged care industry are indicative of undervaluation of work, the Joint Employers submit that the Smith/Lyons Report fails to identify the "low" rates by reference to comparative work and argue:

> By the Smith Report, the authors undertake a connect-the-dots exercise based on a host of generalised observations to connect current minimum award rates to the gender pay gap and gender-based undervaluation. It is *generalised* because the data relied upon to establish undervaluation, as set out above, does not distinguish between industry (for the most part) or minimum award rates.[411]

421 The Joint Employers argue that each of the expert witnesses, with the exception of Prof Kurrle, addressed "sociological theories for undervaluation of wages for work performed by women" and submit that the Commission should be "cautious" in respect of this evidence because:

> (a) absent consideration of minimum award rates, conclusions and analysis built on actual pay rates (or a conflation of both) is of minimal utility to the precise task to be undertaken by the Commission;
>
> (b) comparison of the rates between female and male dominated occupations,

408 Joint Employers closing submissions dated 22 July 2022 Annexure J at [2.2].

409 Joint Employers closing submissions dated 22 July 2022 Annexure J at [2.12].

410 Joint Employers closing submissions dated 22 July 2022 Annexure J at [2.17].

411 Joint Employers closing submissions dated 22 July 2022 Annexure J at [2.23].

without consideration of minimum award rates, does not assist the Commission assess whether minimum award rates should be adjusted based on work value reasons;

(c) the Commission's historical approach to work value assessment has not been informed by gender; to accept "caring work" as inherently undervalued is to find the Commission was biased in previous work value assessments based on gender; and

(d) the conflation of data and/or analysis renders the related conclusions of limited assistance.[412]

422 In respect of Prof Meagher's evidence that "female-dominated occupations tend to be paid less than male-dominated occupations", the Joint Employers submit that Prof Meagher accepted during cross-examination that the supporting research looked at "actual rates" rather than "minimum rates" and as a result the "generality of the data" underpinning Prof Meagher's analysis is of "limited utility" to the Commission.[413]

423 Further, in respect of Prof Meagher's evidence that the *Aged Care Award* does not recognise the range of skills and responsibilities exercised by aged care workers, the Joint Employers submit that Prof Meagher's analysis was undertaken "at a very high level and without close correlation to the existing classifications in the award" and "cannot substantiate a finding that a failure to expressly refer to every skill used in a role mans that skill was not factored into the minimum rates".[414]

424 In respect of the evidence that minimum rates in the aged care industry have been historically undervalued due to gender bias and the value attributed to "women's work", the Joint Employers submit that the evidence should be treated with "caution" as it is not based on an analysis of minimum award rates and would require an acceptance that the Commission has "historically failed" in assessing minimum rates in the awards.[415] The Joint Employers further submit:

> If male dominated and female dominated modern awards are already largely aligned around the C10 Framework but "women's work" is however undervalued, it suggests that all women's work is of greater value than all "men's work" which seems to highlight the problem of transferring concepts of equity into minimum award rates of pay historically based on the gender neutral ground of the C10 scheme and the AQF.[416]

425 At the outset we note that a number of the criticisms raised by the Joint Employers were not put to the expert witnesses in cross-examination and the ANMF submits that the rule in *Browne v Dunn* (1893) 6 R 67 requires the Commission to avoid findings not put to the witnesses.[417]

426 The rule in *Browne v Dunn* was described in *MWJ v The Queen* as follows:

> The rule is essentially that a party is obliged to give appropriate notice to the other

412 Joint Employers closing submissions dated 22 July 2022 Annexure J at [3.3].

413 Joint Employers closing submissions dated 22 July 2022 Annexure J at [3.7].

414 Joint Employers closing submissions dated 22 July 2022 Annexure J at [3.22].

415 Joint Employers closing submissions dated 22 July 2022 Annexure J at [3.17].

416 Joint Employers closing submissions dated 22 July 2022 Annexure J at [3.18].

417 ANMF closing submissions in reply dated 17 August 2022 at [321].

party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit.[418]

427 In response to the *Browne v Dunn* point the Joint Employers did not press the criticisms or ask the Commission to make findings on matters that were not put to the expert witnesses.[419]

428 We note that very little was in fact put to the expert witnesses in cross-examination, and observe that the majority of their evidence remains untouched. The extent of cross-examination was as follows:

- Prof Charlesworth was cross examined on 2 May 2022.[420] Prof Charlesworth was cross examined in relation to her qualifications and expertise and on [40], [42]-[46], [58] and [62] of the Charlesworth Report. Prof Charlesworth was not cross examined in relation to the Supplementary Charlesworth Report.
- Assoc Prof Junor was cross examined on 2 May 2022.[421] Assoc Prof Junor was cross examined generally on the design and implementation of the Spotlight Tool, the meaning of "soft skills", the skill sets identified using the Spotlight methodology, the 5 "levels" in the Spotlight Tool and in relation to Annexure 4 and [223], [257], [259] and [275] of the Junor Report. Assoc Prof Junor was not cross examined in respect of the other 8 Annexures to the Junor Report.
- Prof Meagher was cross examined on 2 May 2022.[422] Prof Meagher was cross examined in relation to the first two paragraphs in section 7 and the final paragraph of the conclusion to the Executive Summary of the Meagher Report. She was then cross examined on the final paragraph of section 6, and on aspects of sections 6.1, 6.2 and 6.4 of the Meagher Report. Prof Meagher was not cross examined in relation to the Supplementary Meagher Report.
- Prof Eagar was cross examined on 9 May 2022.[423] Prof Eagar was cross examined in relation to the following paragraphs of the Eagar Report: [6] of section 2, [1], [4], [6] of section 3, [2] section 4, [6] of section 5, [6] and [7] of section 7.3 and [1] of section 8. Prof Eagar was also cross examined in respect of Figure 1 and Tables 2, 3, 5, 6 and 7. Prof Eagar was not cross examined in relation to the Supplementary Eagar Report.
- Assoc Prof Smith was cross examined on 2 May 2022. Assoc Prof Smith was cross examined in relation to the difference between standard econometric analysis and institutional and sociological analysis and on [34], [60], [105]-[106], [163] and [169] and Tables 1 and 2 of the Smith/Lyons Report.
- Prof Kurrle was cross examined on 3 May 2022.[424] Prof Kurrle was cross examined in relation to her experience working in the aged care

418 *MWJ v The Queen* (2005) 80 ALJR 329 at [38] (Gummow, Kirby and Callinan JJ).

419 Joint Employers submission — response to Background Documents 6, 7 and 8 dated 29 August 2022 at [3.19].

420 Transcript, 2 May 2022, PN2486-PN2566.

421 Transcript, 2 May 2022, PN3111-PN3232.

422 Transcript, 2 May 2022, PN2616-PN2735.

423 Transcript, 9 May 2022, PN8736-PN8929.

424 Transcript, 3 May 2022, PN3582-PN3685.

sector and her specialisation in geriatric medicine and in relation to the following paragraphs of the Kurrle Report: Section (b) [2], Section (e) [2]-[3], Section (i) [5], Section (k) [2], Section (m) [2], Section (n) and Section (r).

429 Of the criticisms of the expert evidence advanced by the Joint Employers, the following were not put to the witnesses:

- It was not put to Prof Charlesworth, Prof Kurle, Prof Eagar or Assoc Prof Junor that their reports did not concern minimum award rates.
- It was not put to any of the expert witnesses that they were incorrect in finding that "women's work" has been historically undervalued.
- It was not put to Assoc Prof Smith that "there is no gender pay gap in the modern awards framework".
- It was not put to Prof Meagher that her analysis of the current award classification structure was undertaken "at a very high level and without close correlation to the existing classifications in the award" nor was it put to her that a failure to expressly refer to a skill in a role does not mean that it was not factored into the minimum rates.
- The proposition that the expert evidence leads to the "troubling" conclusion that "all women's work is of greater value than all men's work" within the modern award system, was not put to any of the expert witnesses.
- It was not put to Assoc Prof Smith that the Smith/Lyons Report undertakes a "connect-the-dots exercise based on a host of generalised observations".
- It was not put to Assoc Prof Junor that the application of the Spotlight Tool is an "academic exercise".
- It was not put to Assoc Prof Junor that the application of the Spotlight Tool is "highly selective and self-serving".

430 Given the limited scope of the cross-examination we find the Joint Employers criticisms of the expert evidence generally unpersuasive. We do not propose to give any weight to the criticisms which were not put to the expert witnesses.

5.4. The lay witness evidence

431 On 6 April 2022, a Statement directed the parties to file any objections to the evidence contained in the witness statements by Thursday 21 April 2022. The parties' responses noted that they considered that parts of the material upon which other parties proposed to rely were objectionable (including on the grounds of relevance and hearsay), but they did not propose to take any formal objection to that material.[425] Each of the parties reserved their right to address such matters in their closing submissions in terms of the weight, if any, to be given to parts of the witness statements. The Commission proceeded on that basis.

432 As mentioned earlier, the Commission published a Lay Witness Evidence Report which provides an overview of the evidence of the employee lay witnesses.

425 Joint Employers submissions — objections to evidence dated 21 April 2022; UWU submissions — hearing plan and evidence dated 21 April 2022; HSU submissions — hearing plan and objections to evidence dated 22 April 2022; ANMF submissions in reply dated 21 April 2022.

433 In their closing submissions, the HSU and the ANMF drew on and emphasised different aspects of the summary of evidence contained in the Lay Witness Evidence Report, but did not depart from the findings of the Report in any material way.

434 The Joint Employers did not comment on the summary of evidence contained in the Lay Witness Evidence Report, but submitted that many aspects of the lay witness evidence should be given little, if any, weight.[426] The Joint Employers challenged elements of the lay witness evidence on the basis of relevance, opinion and hearsay.

435 The Joint Employers submitted that the lay witness evidence regarding the COVID-19 pandemic and staff shortages should attract little to no weight. The Joint Employers also submitted that lay witness evidence in which witnesses described financial pressure they experience or associate with working in the aged care sector should be given little to no weight, on the basis that such statements are not relevant to work value assessment or are not corroborated by objective evidence.[427]

436 We accept that the lay witness evidence is necessarily limited to the personal experience of the particular witness and cannot be extrapolated to encompass the conditions, skills and experience of all persons who work in the aged care sector. We also accept that aspects of the lay witness evidence are hearsay or opinion and as a result subject to the appropriate limitations.

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

6. The Aged Care Sector

6.1. Overview

438 This Chapter of our decision provides an overview of the employees, regulatory framework and funding arrangements in the aged care sector. We have updated the aged care workforce profile set out in the *2019 Aged Care Decision*,[428] based on the most recent ABS data.

439 In a Statement[429] published on 20 June 2022 we requested that the Commonwealth provide data on the composition of the aged care workforce, including a profile of the employees employed in the aged care sector (by classification and qualification, if available);and an overview of the aged care regulatory framework. As requested, Part B (and Annexures A and B) of the Commonwealth's submission of 8 August 2022 addressed the nature of the aged care sector including:

426 Joint Employers closing submissions dated 22 July 2022 Annexures A-G and I.

427 Joint Employers closing submissions dated 22 July 2022 Annexures A-G and I.

428 *Re 4 Yearly Review of Modern Awards — Award Stage — Group 4 — Aged Care Award 2010 — Substantive Claims* [2019] FWCFB 5078 at [19]-[42].

429 *Re Aged Care Award 2010* [2022] FWCFB 102.

- data on the composition of the aged care workforce (set out in Annexure A)
- a profile of the employees employed in the aged care sector (by classification and qualification, where available) (set out in Annexure B)
- the Commonwealth's regulation of the aged care sector, and
- the current funding model (the ACFI and the transition to the new funding model (the Australian National Aged Care Classification)).

440 Any interested party was invited to comment on the Commonwealth's submission, including the material set out in Part B and the annexures to the submission. Background Document 6 summarises the Commonwealth's submission and sets out the parties' submissions in reply. No substantive issues were raised with respect to Part B and Annexures A and B of the Commonwealth's submission; the limitations in the data are acknowledged and noted.

6.2. Data sources

441 In its submission, the Commonwealth (as well as some expert witnesses) referred to the 2020 Aged Care Workforce Census (the 2020 Workforce Report), undertaken by the Commonwealth Department of Health, which provides a "point-in-time snapshot of the size of the workforce, the numbers of each type of worker, additional qualifications of workers, and some key demographic features".[430] We have also drawn on data sources set out in the Research Reference List and from the evidence and submissions filed in the proceedings.

442 The benefit of the 2020 Workforce Report over some data from the ABS is that it can isolate aged care workers from other types of support workers.[431] The Commonwealth submits that the 2020 Workforce Report "provides the best quantitative descriptions of the aged care workforce over time", although it has limitations related to response rates, the exclusion of aged care workers not working for a provider, and the duplication of workers across different types of aged care.[432] These limitations are discussed further below.

443 The Commonwealth referred to data from the 2003, 2007, 2012, 2016 and 2020 Workforce reports.[433] We will focus on the data for 2020 where possible; not only because it is the most recent, but also because of changes to the Workforce report over time which limits any direct comparisons to be made between the 2020 data and earlier data.[434] Changes over time will focus on the period between 2003 and 2016 where data are more comparable.

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430 Commonwealth submissions dated 8 August 2022 at [11].

431 Commonwealth submissions dated 8 August 2022 at [13].

432 Commonwealth submissions dated 8 August 2022 at [12].

433 The earlier Censuses were undertaken by the National Institute of Labour Studies on behalf of the Department.

434 Commonwealth submissions dated 8 August 2022 Annexure A at [4].

444 The 2020 Workforce Report is divided into 3 parts for each of the service care types — residential aged care, HCPP and the CHSP. Because of an overlap between workers in the HCPP and CHSP, these data cannot be added to calculate a "total workforce". For example, a part-time worker at 2 separate residential aged care facilities may work across both the HCPP and CHSP and be counted twice. These programs are collectively referred to as "in-home aged care" in the 2020 Workforce Report.[435]

445 Although it is referred to as a Census, the Workforce Report notes that "[t]he Census was sent to 2,716 RAC [Residential Aged Care] facilities across Australia. Of these, 1,329 (49 per cent) responded".[436] In addition, 834 HCPP providers were asked to complete separate responses for each aged care planning regions they operated in (1,308 responses), of which 616 responses were received, and 630 CHSP providers were also asked to complete separate responses for each aged care planning regions they operated in (for a total of 1340 census requests) of which 505 responses were received.[437] Responses were provided in relation to the workforce current in the month of November 2020.[438] Respondents to the 2020 Workforce Report therefore resemble a survey sample rather than the entire population of aged care providers.

6.3. The Aged Care workforce

446 There are approximately 365,000 aged care workers across residential and in-home care.[439] Of these, approximately 58 per cent are PCWs and 9 per cent are RNs (including nurse practitioners). Around two-thirds of direct care workers are employed on a permanent part-time basis (65 per cent).[440]

447 The direct care workforce for each of residential aged care, HCPP and CHSP is shown in Table 3 by occupation. The vast majority of direct care workers in both residential and in-home aged care services (over 83 per cent) identify as female:[441]

435 Commonwealth submissions dated 8 August 2022 Annexure A at [2]-[3].

436 Department of Health, *2020 Aged Care Workforce Census Report* (Report, 2 September 2021) at 8. The report also notes that responses were weighted to estimate result for all RAC facilities.

437 Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 38.

438 Department of Health, *2020 Aged Care Workforce Census Report* (Report, 2 September 2021) at 4-5. Providers in the scope of the survey included all active registered providers who employed staff involved in direct care services (nurses, personal care workers or allied health staff). CHSP providers who solely provided non-direct care services such as gardening, cleaning, and meals (referred to as ancillary staff) were not in-scope.

439 Commonwealth submissions dated 8 August 2022 at [15].

440 Commonwealth submissions dated 8 August 2022 at [16].

441 Commonwealth submissions dated 8 August 2022 Annexure A at [13], Tables A3 and A4.

Table 3: Size of residential aged care and in-home care workforce, direct care

	Residential Aged Care		HCPP		CHSP	
	Headcount	**FTE**	**Headcount**	**FTE**	**Headcount**	**FTE**
Total	**208 903**	**129 151**	**64 019**	**25 308**	**59 029**	**21 141**
Nurse practitioner	203	163	60	28	184	131
Registered nurse	32 726	20 154	3022	1241	5008	2298
Enrolled nurse	16 000	9919	887	357	1699	813
Personal care worker	146 378	93 115	56 242	23 251	47 861	15 818
Allied health profes-sional	10 604	4081	3376	766	4306	1834
Allied health assistant	2992	1720	432	147	705	249

Note: Direct care employees provide care directly to care recipients as a core component of their work and includes nurses, personal care workers and allied health. Hours worked by staff were converted to full-time equivalent (FTE) based on a standard 35-hour week.

Source: Commonwealth submissions dated 8 August 2022, Annexure A, Tables A1 and A2.

448 Table 3 shows that around 70 per cent of residential aged care direct care workers were PCWs. According to the 2020 Workforce Report, over three-quarters of residential aged care direct care workers (77 per cent) were employed in a permanent position, 19 per cent in a casual/contract position and 4 per cent employed as agency staff or subcontractors. Direct care staff working on a permanent basis were most likely to work part-time (93 per cent), particularly PCWs (96 per cent).[442]

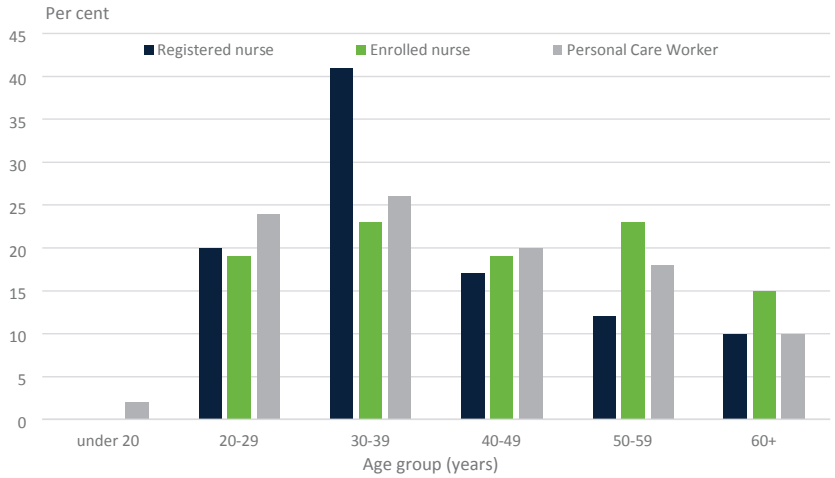
449 Around half of the direct care workforce in residential aged care was aged under 40 years (51 per cent)[443] and the residential aged care workforce became younger between 2016 and 2020:[444]

442 Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) 12-13. Some workers were noted to have several part-time positions which when combined are equivalent to or greater than a single full time employment engagement.

443 Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021), 13-14.

444 Commonwealth submissions dated 8 August 2022 Annexure A at [19].

Chart 2: Age of residential aged care workforce, direct care



Source: Aged Care Workforce Census Report 2020, pp 13-14; Australian Government submission, Appendix A, Table A7.

450 The majority of PCWs (66 per cent) in residential aged care held a Certificate III level qualification or higher in a relevant direct care field.[445]

451 Among direct care workers in the HCPP, around 88 per cent were personal care workers and 6 per cent were nurses.[446] Around half of direct care workers in HCPP worked on a permanent part-time basis, and around one-third were casual/contractors working part-time. Around one-third of direct care workers were aged below 40 years[447] and most were female.[448]

452 Providers reported that 63 per cent of their personal care workers in HCPP held a Certificate III or higher in a relevant direct care field, with a further 4 per cent reported to be studying for a Certificate III or higher.[449]

453 PCWs comprised 80 per cent of direct care roles in the CHSP.[450] The majority (three-quarters) of direct care roles were permanent positions, and more than 90 per cent of these positions were on a part-time basis.[451]

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445 Commonwealth submissions dated 8 August 2022 Annexure B at [16].

446 Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 26-27.

447 Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 29.

448 Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 30.

449 Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 32.

450 Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 41.

451 Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 42. The Census noted that Workers may be employed by multiple providers or service care types and work full-time hours but be counted as part-time at each.

454 Almost three-quarters (71 per cent) of PCWs in the CHSP hold a Certificate III or higher in a relevant direct care field, with a further 2 per cent studying for a Certificate III qualification.[452]

455 Prof Charlesworth highlighted the following findings from the 2020 Workforce Report regarding PCWs:[453]

- 89 per cent of PCWs were women in both the HCPP and CHSP;
- the median age for PCWs was 40-49 years for both the HCPP and the CHSP;
- in the HCPP, 52 per cent of PCWs were permanent part-time, 44 per cent were casual or contractors, 1 per cent were agency or subcontract workers and 3 per cent were permanent full-time; and
- in the CHSP, 73 per cent of PCWs were permanent workers (97 per cent of these were part-time), 25 per cent were employed as a casual or contractor and 2 per cent were employed as an agency/subcontractor.

456 Prof Charlesworth noted limitations of the 2020 Workforce Report, including that workers may be counted more than once across providers as well as across service care types.[454] Prof Meagher also highlighted the overlap in staff across both HCPP and CHSP, with 27 per cent of HCPP community care workers also working in CHSP operations, and 36 per cent of CHSP community care workers also working in HCPP operations.[455]

457 The *2019 Aged Care Decision* noted that the 2016 National Aged Care Workforce Census and Survey (NACWCS data sets) found there were 240,317 PAYG aged care workers in direct care roles with the following characteristics:[456]

- 87 per cent female
- median age 46 years
- 70 per cent are Personal Care Attendants (PCA's)
- 78 per cent are employed on a permanent and part-time basis
- 10 per cent are casual or contract employees (down from 19 per cent in 2012)
- 90 per cent hold post-secondary qualifications. Two thirds of facilities reported that more than 75 per cent of their PCA's hold a Certificate III in Aged Care, and
- a regular daytime shift was the most common work schedule for all direct care occupations. Rotating shift patterns were the norm for a 5th of nurses and PCA's.

458 As explained by Prof Charlesworth, the 2016 NACWCS was the 4th conducted by the National Institute of Labour Studies at Flinders University, on behalf of the Commonwealth Department of Health. All aged care-funded residential facility and home care support providers were invited to participate. Each organisation was sent a package, which included the employer census, a set of surveys for direct care workers, and information about how to distribute

452 Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 45.

453 Charlesworth Supplementary Report at [44].

454 Charlesworth Supplementary Report at [43].

455 Meagher Supplementary Report at 16.

456 *Re 4 Yearly Review of Modern Awards — Award Stage — Group 4 — Aged Care Award 2010 — Substantive Claims* [2019] FWCFB 5078 at [29].

the surveys to obtain a random sample of workers. Responses were received from 7024 workers in community outlets (a response rate of 26 per cent) including 4355 home care workers (HCWs) in community-based outlets. Sampling weights were constructed and applied to the worker survey data based on data on direct care worker numbers and occupational categories and these data were used in the published 2016 report and as the best available workforce data by the Royal Commission.[457]

459 Prof Charlesworth's evidence is that because the 2020 Census did not survey aged care workers (as opposed to providers), it is not comparable with the 2016 NACWCS.[458] Further, the 2016 NACWCS dataset did not cover non-PAYG personal care workers employed in residential facilities, so it includes employees in a direct employment relationship with the facilities, but does not include all workers.[459]

6.3.1. Changes in occupational composition

460 According to several expert witnesses, the occupational composition of the residential aged care workforce has shifted over time. Prof Charlesworth highlighted evidence from the 2016 NACWCS report that between 2003 and 2016 there was a decline in the share of RNs in the direct aged care workforce from 21 per cent in 2003 to 14.6 per cent in 2016, and a decline also in ENs, from 13.1 per cent in 2003 to 10.2 per cent in 2016. Over the same period, PCWs increased from 58.5 per cent in 2003 to 70.3 per cent of the direct care workforce in 2016.[460] By drawing on NACWCS data, the Royal Commission estimated that the proportion of the residential aged care workforce in direct care roles fell significantly: from 74 per cent of residential aged care employees in 2003 to 65 per cent in 2016.[461]

461 Prof Meagher also reported these data in terms of FTE workers. Prof Meagher noted that FTEs capture "the size of the workforce in terms of the available labour time" and that while headcounts and FTEs have different strengths and weaknesses, it is preferable to compare changes in occupations over time using FTE workers where possible. Prof Meagher showed that the share of PCWs in the direct care workforce increased from 57 per cent in 2003 to 72 per cent in 2016.[462]

462 Similarly, Prof Eagar summarised the proportion of FTE direct care employees at Table 2 of the Eagar Report (provided below as Table 4). Prof Eagar noted that there had been a decline in FTE qualified nursing and allied health staff, with a reduction in RNs, ENs and allied health workers over the period from 2003 to 2016:[463]

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457 Charlesworth Supplementary Report at [38].

458 Charlesworth Supplementary Report at [30].

459 Charlesworth Report at [30].

460 Charlesworth Report at [47]. Similarly the Kurrle Report at 2-3 and the Meagher Report at 7.

461 Charlesworth Report at [48].

462 Meagher Report at 6.

463 Eagar Report at 7.

Table 4: Full-time equivalent direct care employees in residential aged care, per cent

Occupation	2003	2007	2012	2016
Nurse practitioner	n/a	n/a	190	293
Registered nurse	16 265	13 247	13 939	14 564
Enrolled nurse	10 945	9856	10 999	9126
Personal care attendant	42 943	50 542	64 669	69 983
Allied health professional	5776	5204	1612	1092
Allied health assistant		3414	2862	
Total number of employees (FTE)	**76 006**	**78 849**	**94 823**	**97 920**
As a share of total employees (per cent)	**2003**	**2007**	**2012**	**2016**
Nurse practitioner	n/a	n/a	0.2	0.3
Registered nurse	21.4	16.8	14.7	14.9
Enrolled nurse	14.4	12.5	11.6	9.3
Personal care attendant	56.5	64.1	68.2	71.5
Allied health professional	7.6	6.6	1.7	1.1
Allied health assistant		3.6	2.9	

Source: Eagar Report at p 7.

463 Prof Charlesworth stated that according to NACWCS 2016 data, HCWs have become a larger share of the home care support workforce as there is a decreasing proportion of both registered and enrolled nurses working in community-based aged care.[464] HCWs were 84 per cent of the home care support workforce in 2016 compared to 81 per cent in 2012.

464 Noting that the ABS Census data is the only data source publicly available that can be used to cross-tabulate industry and occupation classifications at a fine level of detail,[465] Prof Charlesworth found that, based on an analysis of the ABS Census for 2016, there were 211,625 people employed in Aged care residential services (at the 4-digit ANZSIC level), with 46,851 (or 22 per cent) working as Nursing support and PCWs (at the 4-digit ANZSCO level). More detailed data at the 6-digit ANZSCO level showed that there were 28,897 PCAs.[466]

465 Prof Charlesworth's opinion is that "[c]ompared to the 2016 NACWCS estimates of directly employed personal care workers [in the] 2016 Census data would appear to underestimate the numbers of personal care workers in residential aged care even if the more aggregated 4-digit Nursing Support and Personal Carer Workers ANZSCO classification was used".[467]

466 For the PCA occupation category in the 2016 ABS Census, Prof Charlesworth found that:[468]

464 Charlesworth Supplementary Report at [68].

465 Charlesworth Report at [23].

466 Charlesworth Report at [24].

467 Charlesworth Report at [25].

468 Charlesworth Report at [26].

- women make up 85.4 per cent of the PCA workforce compared with 47.5 per cent of the entire Australian workforce
- PCAs tend to be older, with the median age of these workers being 45-49 years, compared with the Australian workforce where the median age is 40-44 years
- half of the PCA workforce were born outside Australia (50 per cent), a substantially higher proportion than the Australian workforce (31 per cent)
- more than half of the PCA workforce arrived in Australia in the 10 years prior to the Census (55.9 per cent)
- two-thirds of the PCA workforce work part-time (less than 35 hours per week) (68.9 per cent), with more women (70.8 per cent) than men (58.1 per cent) working part-time
- PCAs are more likely than the total workforce to work "very short" part-time hours (15 hours or less per week) (19.0 per cent) and much more likely to work "short" part-time hours (16-24 hours) (21.8 per cent), and
- Certificate level qualifications (62.8 per cent) were the most common category of post-school qualifications amongst PCAs. This pattern is the same for both male and female PCAs. Another 15.5 per cent held Advanced Diploma and Diploma Level qualifications, 6.6 per cent held bachelor's degree qualifications, while another 3.9 per cent held post-graduate degree qualifications.

467 According to Prof Charlesworth, the occupation Aged and disabled carers "is inadequately described as people who provide 'general household assistance, emotional support, care and companionship for aged and disabled persons in their own homes' and holding a level of skill commensurate with the AQF Certificate II or III (ANZSCO Skill Level 4)".[469]

468 Prof Charlesworth's analysis of the 2016 ABS Census indicates that HCWs or "aged and disabled carers" in the ANZSCO4231 occupational category have the following characterisation:[470]

- between 2011 and 2016, the number of aged and disabled carers increased from 106,101 to 129,343
- women make up 80.1 per cent of the HCW workforce (and only 47.5 per cent of the entire Australian workforce)
- the median age of these workers is 47 years, older than the Australian workforce (40 years)
- over one-third of the HCW workforce were born outside Australia (36 percent), higher than the Australian workforce (30 per cent)
- more than half of the HCW overseas born workforce arrived in Australia in the 10 years prior to the Census (54 per cent)
- two-thirds (66 per cent) of the HCW workforce work part-time (less than 35 hours per week), with more women (70 per cent) than men (55 per cent) working part-time

469 Charlesworth Supplementary Report at [35].

470 Charlesworth Supplementary Report at [36].

- compared to the total workforce, HCWs are more likely to work very short part-time hours (15 hours or less per week) — 17 per cent of HCWs compared with 12 per cent of the total workforce, and
- three quarters (76 per cent) of HCWs have post school qualifications, with Certificate level qualifications (62 per cent) the most common category of post-school qualifications amongst HCWs. A further 19 per cent held Advanced Diploma and Diploma Level qualifications and 15 per cent held bachelor's degree qualifications.

6.3.2. Estimates of workers covered by modern awards

469 The Commonwealth estimated the number of workers allocated to each award classification and pay point level in 2022-23. The total number of workers for each award is shown below, however, as some job titles may be classified across multiple awards, these estimates likely overstate the number of workers:

Table 5: Estimated number of workers on each classification within the Aged Care Award, Nurses Award and SCHADS Award, 2022-23[471]

Modern award	Classification	Number of workers
Aged Care Award	All	124 226
Nurses Award	Enrolled nurses	13 210
	Registered nurses	67 059
SCHADS Award	All	110 384

Note: Some job titles may be classified across multiple awards.

Source: Commonwealth submissions dated 8 August 2022 Annexure B, Tables B1-B11.

470 The majority of workers covered by the *Aged Care Award* are PCWs (75,100 or 60 per cent). Across the classifications, 30 per cent were classified as Aged Care Employee level 4, 23 per cent as Aged Care Employee level 3 and 19 per cent as Aged Care Employee level 2.[472] However, only 24.2 per cent of in-scope employees covered by the *Aged Care Award* were estimated to be award-reliant, with enterprise agreements applying to the remainder.[473]

471 Almost half of ENs covered by the *Nurses Award* (48 per cent) were classified as Enrolled nurse-pay point 4 or 5, while just over half of RNs were classified as levels 1 and 2.[474] However, only 14.3 per cent of in-scope employees covered by the *Nurses Award* were estimated to be award-reliant.[475]

472 Over half of the workers covered by the SCHADS Award were home care employees (52 per cent). Around one-third of workers covered by the SCHADS

471 Commonwealth submissions dated 8 August 2022 Annexure B, Tables B1-B11.

472 Commonwealth submission, Appendix B, Table B2.

473 Commonwealth submission, Appendix B at [19].

474 Calculations based on Commonwealth submission dated 8 August 2022, Appendix B, Table B4 and B8.

475 Commonwealth submission dated 8 August 2022 Appendix B at [21].

Award were at classification levels 1 and 2 and one-fifth were classified as being level 3.[476] Around two-thirds (68 per cent) of in-scope employees covered by the SCHADS Award were estimated to be award-reliant.[477]

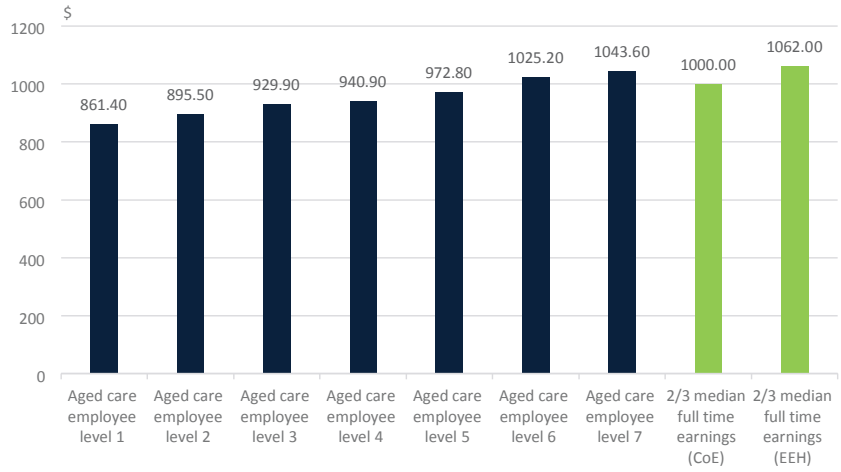
6.3.3. "Low paid" aged care workers

473 The Commission has consistently determined that a threshold of two-thirds of median full-time wages provides "a suitable and operational benchmark for identifying who is low paid",[478] within the meaning of s 134(1)(a) of the FW Act. The classifications for each of the modern awards are compared below with two measures of low pay. As there is no accepted measure of two-thirds of median (adult) ordinary time earnings, we use two main ABS surveys that capture a distribution of earnings. These are the *Characteristics of Employment Survey* (the CoE Survey) and the *Employee Earnings and Hours Survey* (the EEH Survey).[479] The most recent data for median earnings from the CoE Survey is for August 2021 and from the EEH Survey is for May 2021. The classifications for each of the modern Awards are compared below with the 2 measures of low pay.

474 Chart 3 below compares the measures of median earnings from these data sources with the minimum weekly wages in the *Aged Care Award 2010* as at 1 July 2022 following the *Annual Wage Review 2021-22*.

475 The chart shows that the full-time weekly wage for all classifications in the *Aged Care Award* was below the EEH measure of two-thirds of median full-time earnings. Most classifications were also below the CoE measure, other than Aged care employee Levels 5 to 7:

Chart 3: Comparison of minimum full-time weekly wages in the *Aged Care Award 2010* and two-thirds of median full-time earnings



Note: Weekly earnings from the CoE Survey are earnings in the main job for

476 Commonwealth submission dated 8 August 2022 Appendix B, Table B10.

477 Commonwealth submission dated 8 August 2022 Appendix B at [23].

478 *Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1 at [166].

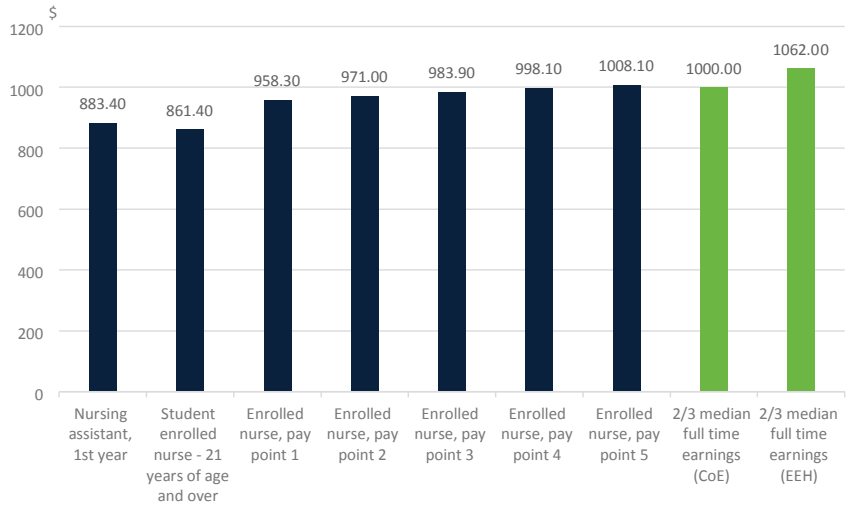
479 ABS, *Characteristics of Employment, Australia*, August 2017 (Cat No 6333.0, 26 February 2018); ABS, *Employee Earnings and Hours, Australia*, May 2016 (Cat No 6306.0, 19 January 2017).

full-time employees. Weekly earnings from the EEH Survey are weekly total cash earnings for full-time non-managerial employees paid at the adult rate.

Source: MA000018; ABS, *Characteristics of Employment, Australia*, August 2021; ABS, *Employee Earnings and Hours, Australia*, May 2021.

476 Classifications in the *Nurses Award* are compared in Chart 4 with two-thirds of median earnings. Like the *Aged Care Award*, all pay points in the *Nurses Award* are below the EEH measure of two-thirds of median earnings and most were also below the CoE measure, except for Enrolled nurse pay point 5:

Chart 4: Comparison of minimum full-time weekly wages in the *Nurses Award 2020* and two-thirds of median full-time earnings, Enrolled nurses

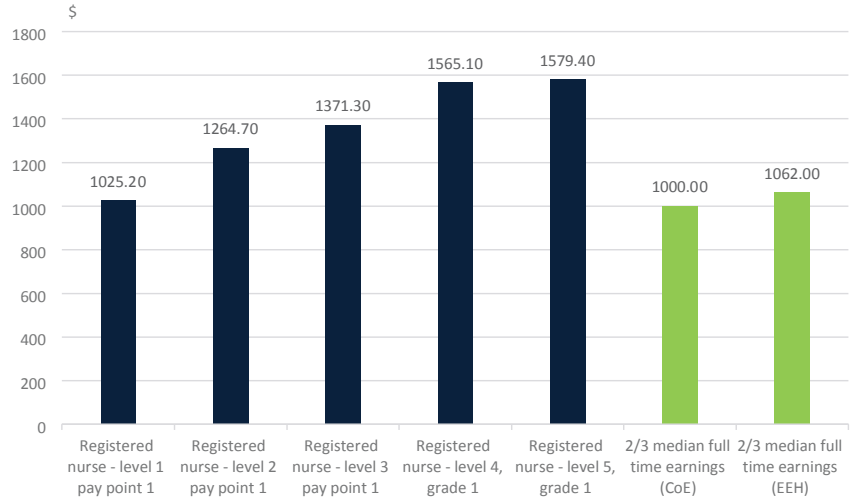


Note: Weekly earnings from the CoE Survey are earnings in the main job for full-time employees. Weekly earnings from the EEH Survey are weekly total cash earnings for full-time non-managerial employees paid at the adult rate.

Source: MA000034; ABS, *Characteristics of Employment, Australia*, August 2021; ABS, *Employee Earnings and Hours, Australia*, May 2021.

477 Chart 5 compares the measures of two-thirds of median earnings with pay point/grade 1 for each level of Registered nurses. Each pay point/grade is above the measure of two-thirds of median earnings based on the CoE measure, and all except pay point 1 for Registered nurse — level 1 are also above the EEH measure:

Chart 5: Comparison of minimum full-time weekly wages in the *Nurses Award 2020* and two-thirds of median full-time earnings, Registered nurses

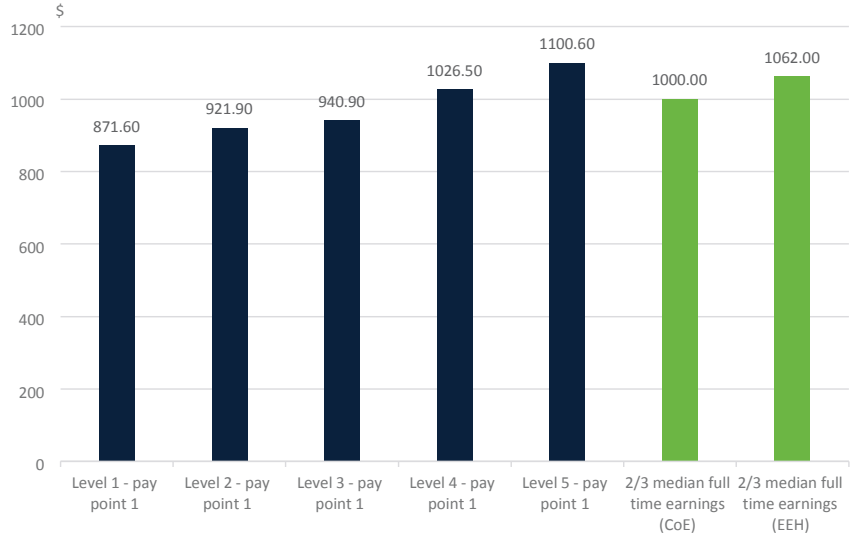


Note: Weekly earnings from the CoE Survey are earnings in the main job for full-time employees. Weekly earnings from the EEH Survey are weekly total cash earnings for full-time non-managerial employees paid at the adult rate.

Source: MA000034; ABS, *Characteristics of Employment, Australia*, August 2021; ABS, *Employee Earnings and Hours, Australia*, May 2021.

478 For Home care employees (HCWs) pay point 1 for levels 1 to 3 are below two-thirds median earnings based on the CoE measure and the EEH measure (Chart 6). Pay point 1 for level 4 is above the CoE measure but below the EEH measure, while pay point 1 for levels 5 and above are higher than both measures:

Chart 6: Comparison of minimum full-time weekly wages in the SCHADS Award 2010 and two-thirds of median full-time earnings, home care employees



Note: Weekly earnings from the CoE Survey are earnings in the main job for full-time employees. Weekly earnings from the EEH are weekly total cash earnings for full-time non-managerial employees paid at the adult rate.

Source: MA000100; ABS, *Characteristics of Employment, Australia*, August 2021; ABS, *Employee Earnings and Hours, Australia*, May 2021.

6.4. Regulation of the Aged Care Sector

479 The Commonwealth plays a key role in the regulation of the aged care sector, with the Department of Health and Aged Care (DoHAC) implementing the Commonwealth's policy settings for the sector and the Aged Care Quality and Safety Commission (ACQS Commission) acting as the regulator of the sector. The ACQS Commission approves for providers to deliver aged care services, subsidised by the Commonwealth, ensures compliance with providers' regulatory obligations and performing an educative role for providers, families and aged care consumers. Approved providers may be subject to some regulation under state and territory legislation, for example, vaccination requirements for aged care workers in residential aged care facilities. However, the vast majority of regulatory obligations in the sector are imposed by the Commonwealth.

6.4.1. The Aged Care Quality Standards (the Standards)

480 The Standards are set out in Sch 2 to the *Quality of Care Principles 2014* (Cth) (the *Quality of Care Principles*), a legislative instrument made under the *Aged Care Act*. The Standards were registered in 2018 and commenced from 1 July 2019.[480]

480 *Quality of Care Amendment (Single Quality Framework) Principles 2018* (Cth), s 2.

481 All approved providers are required to comply with the Standards. Compliance with the Standards is a responsibility of approved providers under Ch 4 of the *Aged Care Act*.

482 Providers delivering services under the National Aboriginal and Torres Strait Islander Flexible Aged Care Program and services under the CHSP, are required to comply with the Standards in accordance with their respective funding agreements.

483 The Standards replaced the former Accreditation Standards, Home Care Standards and Flexible Care Standards (together, the Former Standards).

484 The *Quality of Care Principles* set out the care and services to be provided by an approved provider of residential care, home care and flexible care in the form of short-term restorative care (STRC) provided in a residential care setting. The care and services must be provided by the approved provider in a way that complies with the Standards.

485 The Standards place the consumer at the centre of every decision, focus on the outcomes that each consumer experiences, and give consumers greater control over their care. This is often referred to as "consumer directed care".

486 While there was a requirement under the Former Standards to have a "care plan", which is referred to as a "care and services plan" in the Standards, there is a greater emphasis on the individual needs of consumers under the Standards.[481]

487 The evidence before us indicates that the care and service plans in residential aged care are generally signed off by RNs.[482] This has resulted in aged care workers, including RNs, spending more time with each resident to assess their needs and identify their goals and preferences.[483] With increasing changes in acuity and care needs of residents, the requirement has led to greater complexity in care planning and has led to an increase in workloads on RNs, ENs and PCWs to maintain care plans.[484]

488 The evidence in the proceedings demonstrates that there has been an increase in auditing and reporting required by approved providers to demonstrate compliance with the Standards.[485] In addition, providers are subject to announced or unannounced visits by assessors from the ACQS Commission to ensure compliance with the Standards.

489 The evidence also shows the practical impact of compliance with the Standards on the work conducted by aged care workers to ensure they are providing person-centred care.[486] For example:

- Emma Brown, Special Care Project Manager at Warrigal, explained with the changes to the Standards, PCWs need to ensure they are

481 See for example Witness statement of Paul Sadler dated 1 March 2022 at [25]; Witness statement of Emma Brown dated 2 March 2022 at [24]-[25].

482 Item 3.8 of Pt 3 of Sch 1 of the *Quality of Care Principles* require initial assessment and care planning to be carried out by a nurse practitioner or registered nurse, and ongoing management and evaluation carried out by a nurse practitioner, registered nurse or enrolled nurse acting within their scope of practice. See, for example Transcript, 29 April 2022 at PN1270-PN1273 (XXN of Paul Jones) and PN1663-PN1666 (XXN of Virginia Ellis).

483 Witness statement of Emma Brown dated 2 March 2022 at [26].

484 See the summation of this evidence in the ANMF's closing submissions dated 22 July 2022 at [374]-[380].

485 Witness statement of Johannes Brockhaus dated 3 March 2022 at [26]-[29].

486 See also HSU closing submissions dated 22 July 2022 at [246]-[271].

providing consumers with choices in their daily activities, such as deciding when they would like to be showered. This means that aged care workers need to have an understanding and knowledge of each of their consumers to ensure their choices and preferences are followed.[487]

- Johannes Brockhaus, CEO of Buckland, noted in his evidence that the requirement of placing the person receiving care at the centre of every decision extends to the provision of food, cleaning and other services that the resident receives.[488]
- Craig Smith, Executive Leader Service Integrated Communities at Warrigal, noted that the main impact for PCWs and nurses was moving from a task based and regimented role, to the consumer having greater involvement. This has meant that there is a need for increased communication and to work flexibly, for example; a consumer may advise a worker that they would like to eat in their room instead of the dining room.[489] This impacts on the nature and complexity of the work performed by aged care workers, particularly those in direct care roles.

490 As with the Former Standards, non-compliance with the Standards may trigger a response from the ACQS Commission under Pt 7B of the ACQS Commission Act. The ACQS Commission may take administrative action or enforceable regulatory action to manage non-compliance (see Pt 8A of the ACQS Commission Act).

6.4.2. Requirements relating to the use of physical or chemical restraints

491 The *Aged Care and Other Legislation Amendment (Royal Commission Response No 1) Act 2021* (Cth) and the *Aged Care Legislation Amendment (Royal Commission Response No 1) Principles 2021* (Cth) amended the *Aged Care Act* and the *Quality of Care Principles* which detail the responsibilities of approved providers of residential care and flexible care in the form of STRC provided in a residential care setting relating to restrictive practices. The amendments also limit the circumstances in which a restrictive practice can be used in relation to a care recipient in these settings.

492 These amendments built on earlier amendments to the *Quality of Care Principles* and commenced on 1 July 2019.

493 The reforms introduced stricter requirements for the use of a restrictive practice in relation to care recipients in certain residential aged care settings and expanded on the types of restraints to be regulated to include environmental restraints, mechanical restraints and seclusion.

494 Under the amendments, it is a responsibility of an approved provider under Ch 4 of the *Aged Care Act* to ensure that restrictive practices in relation to care recipients are only used in the circumstances set out in the *Quality of Care Principles*. Approved providers could be subject to regulatory action by the Commissioner under Pts 7B and 8A of the ACQS Commission Act (including sanctions) if they fail to comply with their Chapter 4 responsibilities. Inappropriate use of restrictive practices in relation to a care recipient is also a reportable incident under the Serious Incident Response Scheme (SIRS) discussed below.

495 These amendments also introduced civil penalties for those approved

487 Witness statement of Emma Brown dated 2 March 2022 at [25]-[26].

488 Transcript, 12 May 2022, PN13814-PN13817 (XXN of Johannes Brockhaus).

489 Amended witness statement of Craig Smith dated 23 May 2022 at [31]-[33].

providers who fail to comply with compliance notices given by the ACQS Commissioner in relation to a breach of restrictive practice responsibilities under the *Aged Care Act*.

496 The amendments implemented additional requirements, under s 15FC of the *Quality of Care Principles*, for an approved provider to use chemical restraints, including that a medical practitioner or Nurse Practitioner must have:

- assessed the patient as posing a risk of harm to themselves or others
- assessed that the chemical restraint is necessary, and
- prescribed the medication.

497 Division 3 of Pt 4A of the *Quality of Care Principles* lists other additional requirements an approved provider must satisfy to use chemical restraints, including:

- documenting in the behaviour support plan for the care recipient a number of matters including the practitioner's decision to use the chemical restraint and the reasons the chemical restraint is necessary, and
- ensuring informed consent has been given by the care recipient for the prescribing of the medication in an agreed way.

498 From 1 September 2021, approved providers of residential care and STRC in a residential care setting are also required to assess a care recipient to determine if a restrictive practice is needed and record in the care recipient's behaviour support plan whether this assessment has taken place and whether a restrictive practice is used.[490]

499 These amendments have introduced additional requirements for the use of restrictive practices in residential care settings, which aim to improve the health, safety and well-being of residents. The evidence before us suggests that the increased regulation of the use of restrictive practices has led to a change in the roles performed by aged care workers in residential aged care facilities, and in particular RNs.

500 For example, according to Ms Brown, these amendments have led to increased documentation and assessments by RNs to undertake restrictive practices and supervision of care staff to assist in implementing alternative interventions before any restrictive practice is used.[491]

501 Annie Butler, Federal Secretary of the ANMF states that while these reforms are welcome steps, they have increased work complexity and required changes to the way work is performed.[492] For instance, the amendments include a requirement that a behaviour support plan must set out a number of matters, including alternative strategies for addressing behaviours of concern.[493] The intention of this requirement is to ensure that approved providers take a more preventative approach in relation to the use of restrictive practices by considering alternative strategies in the first instance, while examining and seeking to understand the cause of the behaviours.

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490 *Aged Care Legislation Amendment (Royal Commission Response No 1) Principles 2021* (Cth), Sch 2.

491 Witness statement of Emma Brown dated 2 March 2022 at [17].

492 Witness statement of Annie Butler dated 29 October 2021 at [239].

493 *Quality of Care Principles 2014* (Cth), s 15HB.

6.4.3. The National Aged Care Mandatory Quality Indicator Program (the QI Program)

502 The QI Program has been in development since 2012 following a recommendation in the Productivity Commission's report, *Caring for Older Australians* (2011) and the Australian National Audit Office's report, *Monitoring and Compliance Arrangements Supporting Quality of Care in Residential Aged Care Homes* (2011).

503 The QI Program was launched on a voluntary basis in January 2016 and became mandatory on 1 July 2019. At introduction of the mandatory QI Program, it required approved providers of residential care to report on 3 quality indicators (pressure injuries, physical restraint and unplanned weight loss) every 3 months.

504 As part of the 2019-20 Budget, expansions to the mandatory QI Program were announced to include 2 new quality indicators: falls and fractures, and medication management. These changes also included updates to the 3 existing quality indicators referred to above.

505 As a result, from 1 July 2021, approved providers of residential care have been required, under s 26 of the *Accountability Principles 2014* (Cth) (the *Accountability Principles*), to collect and report information to the Secretary, in accordance with the QI Program Manual,[494] on 5 quality indicators for each care recipient every 3 months. Approved providers must submit quality indicator data no later than the 21st day of the month after the end of each quarter.

506 The information is collected and submitted at a service level, meaning each approved provider must submit data for each residential aged care service it operates.

507 The QI Program involves specific methods for collecting, recording, submitting and interpreting information about the quality indicators. In accordance with the aged care legislation, residential care services must collect data consistently using the methods prescribed in the QI Program Manual. A data recording template is available for each quality indicator to automatically calculate and summarise the quality indicator data to enter and submit. Residential care providers record and submit their quality indicator data for each service into the My Aged Care provider portal.

508 The approved provider is responsible for ensuring that quality indicator data is submitted. This remains the responsibility of the approved provider despite any other organisation or mechanism, such as a commercial benchmarking service, being used in the submission of the data.

509 Under to s 26(a) of the *Accountability Principles*, approved providers must make measurements or other assessments that are relevant to indicating the quality of residential care, exactly as described in the QI Program Manual. Information from existing data sets (eg incident reporting systems) must not be used where information has been collected differently to what is described in the QI Program Manual.

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494 Department of Health, National Aged Care Mandatory Quality Indicator Program (QI Program) (Guideline June 2021).

510 For each quality indicator, an approved provider must keep records relating to measurements and assessments and information compiled for the purposes of ss 26(a), (b) and (c) of the *Accountability Principles*.[495]

511 The impact of the mandatory QI Program on aged care workers was raised in the evidence of a number of witnesses. For example:

- Alison Curry, AIN at Warrigal, stated that RNs are the most impacted by mandatory QI Program reporting, and this flows through to impact on ENs and AINs,[496] and
- Ms Brown, also from Warrigal, gave evidence that managers of the residential aged care facility and RNs now spend more time gathering the required information for mandatory QI Program reporting, which means that the role of RNs has become more administrative.[497]

6.4.4. The Serious Incident Response Scheme

512 The SIRS commenced on 1 April 2021 and introduced new arrangements for approved providers of residential care and flexible care delivered in a residential setting to manage and take reasonable steps to prevent incidents.

513 From 1 December 2022, compliance with the SIRS arrangements will also be extended to providers of in-home care and flexible care delivered in a home or community setting.[498] This commitment formed part of the 2021-22 Budget. The Commonwealth undertook public consultation on the proposed extension, and most stakeholders supported the introduction of SIRS for in-home care services. Most stakeholders also supported an approach that aligned the scheme as much as possible with the existing requirements for residential care providers.[499]

514 The SIRS currently requires providers of residential care to report all reportable incidents to the ACQS Commission via the My Aged Care provider portal and requires reports to be made in accordance with the *Quality of Care Principles*. What is a reportable incident is set out in s 54.3(2) of the *Aged Care Act* and is further defined in s 15NA of the *Quality of Care Principles*, and includes unreasonable use of force, unlawful sexual contact or inappropriate sexual conduct, psychological or emotional abuse of the care recipient, unexpected death, unexplained absence, stealing and financial coercion, use of a restrictive practice other than in accordance with the *Quality of Care Principles*, and neglect.

515 The SIRS was implemented in a staged approach, with Priority 1 incidents being required to be reported to the ACQS Commission from 1 April 2021 and Priority 2 incidents required to be reported to the ACQS Commission from 1 October 2021.

516 A Priority 1 incident is: a reportable incident that has caused or could reasonably have been expected to have caused a care recipient physical or

495 *Records Principles 2014* (Cth), s 7(v).

496 Witness statement in reply of Alison Curry dated 20 April 2022 at [66]-[67].

497 Witness statement of Emma Brown dated 2 March 2022 at [31]-[32].

498 This measure forms part of the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* (Cth) (Sch 4), which received Royal Assent on 5 August 2022.

499 Department of Health, *Serious Incident Response Scheme for Commonwealth funded in-home aged care services: Report on outcomes of consultation* (Report, 24 August 2021) <https://www.health.gov.au/sites/default/files/documents/2021/09/report-on-the-outcome-of-public-consultation-on-sirs-for-in-home-aged-care.pdf>.

psychological injury or discomfort requiring medical or psychological treatment; where there are reasonable grounds to report the incident to police, or is an unexpected death or unexplained absence. It is anticipated that from October 2022, all incidents of unlawful sexual contact or inappropriate sexual conduct will be a Priority 1 incident, with the obligation to report Priority 1 incidents for providers of in-home care and flexible care in a home or community setting commencing from 1 December 2022. Priority 1 incidents are required to be reported to the ACQS Commissioner within 24 hours of the provider becoming aware of the incident.

517 A Priority 2 incident is a reportable incident that has not been reported as a Priority 1 incident and must be reported to the ACQS Commissioner within 30 days of the provider becoming aware of the incident.

518 The SIRS replaced the previous responsibilities of approved providers of residential care in relation to reportable assaults and unexplained absences. The SIRS requires reporting of a wider range of incidents by a wider range of providers.

519 The SIRS also goes further than the previous reporting requirements as it includes both incident management and reportable incident responsibilities for providers, including through implementing and maintaining effective organisation-wide governance systems for the management and reporting of relevant incidents (see, for example, Div 3 of Pt 4B of the *Quality of Care Principles*).

520 The SIRS also removed the exception for reporting assaults where the alleged perpetrator is a residential aged care recipient with a cognitive or mental impairment and the victim is another care recipient. This was in direct response to the findings of the Royal Commission.

521 Compliance with the SIRS arrangements, as set out in the *Quality of Care Principles*, is a responsibility of approved providers under Ch 4 of the *Aged Care Act*. As noted above, this responsibility currently only extends to approved providers of residential care and flexible care delivered in a residential setting but will extend to all approved providers by 1 December 2022.

522 As above, non-compliance with an approved provider's responsibilities may trigger the ACQS Commission's compliance functions under Pt 7B (Sanctions) of the ACQS Commission Act and specified enforcement powers under Pt 8A.

523 Wendy Knights, casual EN, gave evidence that the SIRS has added to the responsibilities of RNs, as they then have to assess whether an incident (referred to by the witness as "emergencies") is a reportable incident or not.[500] The role of RNs in reporting for SIRS was corroborated by the evidence of AIN Linda Hardman, who also states that her responsibilities have also changed as a result of SIRS and that her observation skills have needed to increase.[501]

524 Ms Brown gave evidence that the current SIRS arrangements primarily impact the work performed by PCWs as they have to document the incidents and report to the RNs to investigate, and to the management team to report to the ACQS Commission.[502]

525 This view was reiterated by Virginia Ellis, a Homemaker at Uniting Aged Care Springwood, who gave evidence that a serious incident report would

500 Transcript, 9 May 2022 at PN9178-PN9183.

501 Transcript, 9 May 2022 at PN9821-PN9828.

502 Witness statement of Emma Brown dated 2 March 2022 at [35]-[39].

usually be made by a PCW before reporting it to the RN, and once the incident has been reported, PCWs have an important role to play in ensuring the resident is getting appropriate medical care.[503]

526 Allison Curry, AIN, also gave evidence that it is usually the AIN of the care service who makes the SIRS report as the RN on duty is usually busy completing documentation in an office.[504]

6.5. Commonwealth Funding in the Aged Care Sector

6.5.1. The Aged Care Funding Instrument

527 Until recently the basic subsidy for residential care was determined by the ACFI. The ACFI was completed by facility staff whenever a new resident entered a residential aged care facility. This initial assessment resulted in the resident being classified on each ACFI domain to one of 4 levels of need — nil, low, medium or high need. The ACFI domains were:

- Activities of Daily Living — covering nutrition, personal hygiene, mobility, toileting and continence
- Behavioural Domain — covering cognitive skills, cognition, wandering, verbal and physical behaviour and depression, and
- Complex Health Care — covering medications and complex health care needs.

528 The evidence before us suggests that there were substantial issues with the ACFI funding model.[505] In recognition of these issues the Commonwealth has replaced the ACFI with a new funding model.

6.5.2. New funding model — Australian National Aged Care Classification (AN-ACC) Model

529 The AN-ACC funding model was developed by the Australian Health Services Research Institute within the University of Wollongong as part of work undertaken for the Commonwealth. It was developed to address concerns in relation to the ACFI and comprises:

- a new assessment tool and method for classifying and funding permanent residents
- independent assessments to determine classification levels and care funding, and
- independent analysis each year to inform changes in funding.

530 The Commonwealth expects that implementation of the AN-ACC funding model will address the issues with the ACFI, as noted in Prof Eagar's evidence,[506] and improve funding certainty for Government, approved providers and investors.

531 The AN-ACC funding model replaced the ACFI on 1 October 2022, consolidating the basic subsidy for residential care, the amounts provided through various supplements (including the Basic Daily Fee supplement, the homeless supplement and the viability supplement) and the additional funding for care minutes. Other individual supplements such as the oxygen, enteral

503 Witness statement in reply of Virginia Ellis dated 20 April 2022 at [55].

504 Witness statement in reply of Alison Curry dated 20 April 2022 at [77]-[78].

505 Amended witness statement of Craig Smith dated 23 May 2022 at [74]; Witness statement of Paul Sadler [37]-[41]; Transcript, 9 May 2022, PN8764, PN8939.

506 Transcript, 9 May 2022, PN8939.

feeding, veterans and accommodation supplements continue under the AN-ACC funding model, with some minor rationalisation of the overall structure of supplements.

532 Subsidy payments under the AN-ACC funding model comprise 3 components:

- Fixed — the characteristics of a residential aged care facility, such as location or specialisation, will determine a fixed amount of funding (for example, a facility catering to those at risk of homelessness or in a remote location). This recognises that some facilities, for example, those in rural and remote locations, may require more additional funding than those in metropolitan areas.
- Variable — each aged care resident is assessed by an independent assessment workforce as discussed in Prof Eagar's evidence.[507] The resident's care needs are aligned with one of the AN-ACC case mix classifications, or classes of care. The AN-ACC classification defines the amount of funding allocated for the aged care resident. In contrast to the ACFI, the AN-ACC funding model also covers care recipients who receive respite care in residential aged care facilities, with different classes of care according to need.
- A one-off entry payment — each time an aged care resident enters a residential aged care facility, a one-off payment is made. The payment aims to cover one-off costs related to transitioning into a new care environment. As discussed in Prof Eagar's evidence, this payment recognises that there are additional care needs when someone first enters care.[508]

533 The legislative amendments to the *Aged Care Act* which support the introduction of the AN-ACC funding model are included in the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* (Cth), which received Royal Assent on 5 August 2022. The AN-ACC commenced on 1 October 2022.

7. Our findings

534 This chapter deals with:

- the Aged Care Sector Stakeholder Consensus Statement
- the 16 uncontentious propositions
- the contentious issues:
  - gender undervaluation
  - invisible skills
  - gender pay gap

7.1. The Aged Care Sector Stakeholder Consensus Statement

535 The Unions, ACSA and LASA are signatories to the Aged Care Sector Stakeholder Consensus Statement (the Consensus Statement). The content of the Consensus Statement may be viewed as broadly supportive of the Applications. In the present proceedings the Applicants were directed to file any agreed

507 Transcript, 9 May 2022, PN8943.

508 Transcript, 9 May 2022, PN8869.

position involving Union parties and, relevantly, employer associations.[509] The Consensus Statement was lodged in response to that direction and is at Attachment C.

536 The Consensus Statement was the product of meetings of stakeholders in the period September to December 2021. The meetings were convened by the Aged Care Workforce Industry Council (ACWIC), to consider the Applications in response to the recommendations of the Royal Commission. Recommendation 76(2)(e) recommended that:

> (2) By 30 June 2022, the Aged Care Workforce Industry Council Limited should:
>
> …
>
> (e) *lead the Australian Government and the aged care sector to a consensus to support applications to the Fair Work Commission* to improve wages based on work value and/or equal remuneration, which may include redefining job classifications and job grades in the relevant awards.

(Emphasis added)

537 The Unions contend that some of the content of the submissions made by the Joint Employers may be read as departing from the matters agreed in the Consensus Statement. As mentioned earlier, ACSA and LASA (2 of the 3 parties comprising the Joint Employers) are signatories to the Consensus Statement. The HSU argued that given the status of ACSA and LASA as signatories to the Consensus Statement, it can be taken that where the Joint Employers' submissions are inconsistent with the Consensus Statement they should be taken to be submissions being advanced by ABI alone, rather than putting forward a position on behalf of the actual industry groups,[510] and limited weight should be given to those submissions.[511]

538 The ANMF submits that the Consensus Statement was made "in express contemplation of these proceedings" and that as ACSA and LASA have not expressed an intention to abandon their status as parties to the Consensus Statement or to renounce any part of the Consensus Statement,[512] the position of ACSA and LASA in the proceedings should be understood consistently with the Consensus Statement.[513] In particular, the ANMF submits:

> … the position of ACSA and LASA in these proceedings should be understood consistently with the Consensus Statement. Making inconsistent submissions would be akin to seeking to withdraw an admission. In the absence of clear evidence, parties to litigation and a Court or tribunal are entitled to assume that admissions were properly made, so that where leave to withdraw a submission is sought an explanation should be given.[514] No explanation has been given here.[515]

509 The Consensus Statement notes that the parties would participate in discussions to attempt to reach a Statement of Agreed Facts in relation to the applications in early 2022 but no such statement was lodged with the Commission.

510 ANMF closing submission dated 22 July 2022 at [28].

511 ANMF closing submission dated 22 July 2022 at [28].

512 ANMF closing submission dated 22 July 2022 at [28].

513 ANMF closing submission dated 22 July 2022 at [28].

514 See, e.g., *Celestino v Celestino* [1990] FCA 449 at p 8 (Spender, Miles and von Doussa JJ).

515 ANMF Closing submission 22 July 2022 at [28].

539 In support of its position the ANMF cites *Celestino v Celestino*[516] in which the Full Court made the following observation (at p 8) in respect of withdrawal of admissions (citations omitted):

> in the absence of clear evidence to the contrary, a court is entitled to assume that counsel who makes an admission in the course of the conduct of a trial, has satisfied himself that the admission was, on his client's version of the facts, a proper admission to make. In our opinion a court, and other parties to litigation, are similarly entitled to make that assumption about admissions made by solicitors on their client's behalf in the course of litigation whether in pleadings or in correspondence. For this reason, where leave to withdraw an admission is sought, a court will require an explanation for the making of the admission. The explanation must be a sensible one based on evidence of a solid and substantial character …

540 The Consensus Statement was lodged at the direction of the Commission to file any agreed position and was clearly created in contemplation of these proceedings. But, contrary to the position advanced by the Unions, we are not required to treat the Consensus Statement as a formal admission from ACSA and LASA; nor are we required to treat the Joint Employers' submissions as only the submissions of ABI to the extent that they are inconsistent with the Consensus Statement.

541 The authority relied on by the ANMF in support of its position concerns a judicial *inter partes* proceeding. In that context, s 191 of the *Evidence Act 1995* (Cth) deals with "agreed facts":

> 191 Agreements as to facts
>
> (1) In this section:agreed fact means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.
>
> (2) In a proceeding:
>
> (a) evidence is not required to prove the existence of an agreed fact; and
>
> (b) evidence may not be adduced to contradict or qualify an agreed fact; unless the court gives leave.
>
> (3) Subsection (2) does not apply unless the agreed fact:
>
> (a) is stated in an agreement in writing signed by the parties or by Australian legal practitioners, legal counsel or prosecutors representing the parties and adduced in evidence in the proceeding; or
>
> (b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.

542 In *Damberg v Damberg*[517] (*Damberg*), Heydon JA (with whom Spigelman CJ and Sheller JA agreed) considered how far admissions or agreements between the parties are binding on the Court. His Honour observed that admissions designed to permit concentration only on what is bona fide in dispute can have the effect of restricting the evidence to be tendered and can prevent contrary

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516 *Celestino v Celestino* [1990] FCA 449.

517 *Damberg v Damberg* (2001) 52 NSWLR 492.

evidence being called.[518] His Honour also observed that the court is not bound to act on admissions made by the parties or on a "fact" agreed between the parties,[519] stating:

> In short, the courts are averse to pronouncing judgments on hypotheses which are not correct. To do so is tantamount to giving advisory opinions and to encouraging collusive litigation. On the other hand, the courts will act on admissions of or agreements about matters of fact where there is no reason to doubt their correctness. But they are reluctant to do so where there is reason to question the correctness of the facts admitted or agreed …[520]

543 As noted in *Damberg*, a court is not bound to act on facts agreed by the parties; and, we think, nor is a tribunal like the Commission.

544 The Commission is not bound by rules of evidence and procedure. While such rules may provide guidance, various Full Benches, primarily in the context of 4 yearly review decisions, have expressed doubts about the applicability of rules of evidence in respect of administrative tribunals generally, but particularly proceedings that are not *inter partes*.[521]

545 The matter before us is not an *inter partes* proceeding. The parties to civil proceedings have considerable freedom to choose the issues in dispute; but that is not the case with proceedings concerning applications to vary modern awards. Such proceedings are plainly different in character to *inter partes* proceedings. The Commission's role in the current proceedings is not to determine a dispute between the parties but to be satisfied as to the relevant statutory prerequisites relating to the variation of the modern awards, including whether the variation is necessary to achieve the modern awards objective. The Commission is not constrained by the terms of the Applications and nor is it required to make a decision in the terms applied for.

546 The Consensus Statement is relevant to our determination of the Applications and we propose to take it into account. It represents the views of a number of stakeholders in the aged care sector and was developed in contemplation of these proceedings. No party contends that we are bound to accept as fact the statements made in the Consensus Statement. That said, we propose to accept the factual assertions in the Consensus Statement where there is no reason to doubt the correctness of those assertions; but do not propose to do so where there is reason to doubt their correctness, for example if they are inconsistent with other, probative, evidence.

547 The effort expended in written submissions and in oral argument debating the consequence of any departure from the terms of the Consensus Statement has been disproportionate to the identified issue. In short, none of this debate may amount to much.

548 It seems to us that, save in one respect, the Joint Employers' closing submissions do not depart in any significant way from the Consensus Statement.[522] The contentious part of the Consensus Statement is para 22, which states:

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518 *Damberg v Damberg* (2001) 52 NSWLR 492 at [154].

519 *Damberg v Damberg* (2001) 52 NSWLR 492 at [157].

520 *Damberg v Damberg* (2001) 52 NSWLR 492 at [160].

521 See for example *Re 4 Yearly Review of Modern Awards — Penalty Rates — Transitional Arrangements* (2017) 272 IR 1 at [49]-[53].

522 Transcript, 1 September 2022, PN15611, PN15614-PN15660.

> The changes in the characteristics of aged care consumers (increased acuity, frailty and incidence of dementia) mean the conditions under which work is done are more challenging for employees providing indirect care support services (such as food services, cleaning or general/administrative work). These workers are an important part of the aged care team. Their work necessitates higher levels of skill when compared to similar workers in other sectors, or to aged care in the past.

549 In respect of para 22 Mr Ward, on behalf of the Joint Employers, advanced the following submission in closing oral argument:

> It's paragraph 22 that is probably the issue and we accept that, and I've said that in our opening submissions. We do [not] believe that the evidence in this case supports the view that those people in the support functions should be considered to be on a par with the personal care workers. We think the evidence is, with respect to my friends, very clear on that particularly the evidence from the people who work in the laundry, the gardening, some of the people who were undertaking jobs that I think were colloquially described as sort of handy people. It seems to us to be very clear that, with one exception which I will come to, those people had not been exposed to the great majority of things that all parties seem to have acknowledged about personal care workers. So, we think the evidence does distinguish that group.
>
> To the extent that that submission is at odds with paragraph 22, we accept that. My clients acknowledge that it is at odds.[523]

550 As will become apparent at this stage it is not necessary for us to decide whether a minimum wage increase for indirect or support workers is justified by work value reasons as we have decided to defer consideration of that issue. That aspect of the Applications will be decided in a subsequent stage of these proceedings; see *Chapter 9 — Next steps*.

7.2. The uncontentious propositions

7.2.1. Overview

551 Based on the parties' submissions, Background Document 1 suggested that the following 16 propositions were uncontentious:[524]

1. The workload of nurses and personal care employees in aged care has increased, as has the intensity and complexity of the work.
2. The acuity of residents and clients in aged care has increased. People are living longer and entering aged care later as they are choosing to stay at home for longer and receive in-home care. Residents and clients enter aged care with increased frailty, co-morbidities and acute care needs.
3. There is an increase in the number and complexity of medications prescribed and administered.
4. The proportion of residents and clients in aged care with dementia and dementia-associated conditions has increased.
5. Home care is increasing as a proportion of aged care services.
6. Since 2003, there has been a decrease in the number of Registered Nurses (RN) and Enrolled Nurses (EN) as a proportion of the total aged

523 Transcript, 1 September 2022, PN15661-PN15662.

524 Background Document 1 at [116].

care workforce. Conversely, there has been an increase in the proportion of Personal Care Workers (PCW) and Assistants in Nursing (AIN).

7. Registered Nurses have increased duties and expectations, including more administrative responsibility and managerial duties.
8. PCWs and AINs operate with less direct supervision. PCWs and AINs perform increasingly complex work with greater expectations.
9. There has been an increase in regulatory and administrative oversight of the Aged Care Industry.
10. More residents and clients in aged care require palliative care.
11. Employers in the aged care industry increasingly require that PCWs and AINs hold Certificate III or IV qualifications.
12. The philosophy or model of aged care has shifted to one that is person-centred and based on choice and control, requiring a focus on the individual needs and preferences of each resident or client. This shift has generated a need for additional resources and greater flexibility in staff rostering and requires employees to be responsive and adaptive.
13. Aged care employees have greater engagement with family and next of kin of clients and residents.
14. There is an increased emphasis on diet and nutrition for aged care residents.
15. There is expanded use and implementation of technology in the delivery and administration of care.
16. Aged care employees are required to meet the cultural, social and linguistic needs of diverse communities including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and members of the LGBTQIA+ community.

552 In their closing submissions of 22 July 2022, the HSU, ANMF and the Joint Employers all agreed that these 16 propositions were uncontentious,[525] with the HSU proposing an additional 2 propositions which it contended were also uncontentious:[526]

17. Clustered domestic and household models of care are growing in prevalence in the industry and require greater numbers of staff with a broad range of skills and responsibilities.
18. Home care workers work with minimal supervision, and the increase in acuity and dependency of recipients of aged care services means that these workers are exercising more independent decision-making, problem solving and judgment on a broader range of matters.

553 While the ANMF broadly agreed that the additional propositions proposed by the HSU were uncontentious (although they should not be afforded the same

525 HSU closing submissions dated 22 July 2022 at 49; ANMF closing submission dated 22 July 2022 at [71]; Joint Employers closing submission dated 22 July 2022 Annexure P at [3.32].

526 We note that the first of these additional propositions is similar to para 5 of the Consensus Statement, and the second is identical to para 19.

weight as the other agreed propositions),[527] the Joint Employers did not agree (but later accepted the second proposition in oral submissions when discussing the Consensus Statement).[528]

554 The Joint Employers later sought to qualify their earlier acceptance of the 16 propositions set out in Background Document 1, as summarised below:

- *Contention 1* — accept as a general proposition that *the workload of nurses and personal care employees in aged care has increased, as has the intensity and complexity of the work*, however now add that the evidence does not support that the level of increase is consistent across all classifications
- *Contention 8* — accept as a general proposition that *PCWs and AINs perform increasingly complex work with greater expectations*, however now add that the evidence does not establish this conclusion is available with respect to all PCWs/AINs (only those with Certificate III or IV qualifications or with appropriate experience)
- *Contention 13* — accept as a general proposition that aged care employees have greater engagement with the family and next of kin of clients and residents, however now add that the frequency and intensity of engagement is not consistent across all aged care employees, and
- *Contention 16* — accept as a general proposition that aged care employees are required to meet the cultural, social and linguistic needs of diverse communities including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and members of the LGBTQIA+ community, however now add that aged care employees receive training in the Certificate III regarding this.[529]

555 We note the Joint Employers' qualification that their acceptance of contentions 1, 8, 13 and 16 is confined to the "general proposition". We accept these contentions are general in their character and that they would not necessarily apply consistently across classifications or universally in every instance to all employees concerned.

556 The next section considers whether there is an evidentiary basis to support each of the 16 contentions, as general propositions.

7.2.2. Evidentiary basis for the agreed propositions

Contention 1: The workload of nurses and personal care employees in aged care has increased, as has the intensity and complexity of the work.

557 The expert evidence supports a finding that the workload of nurses and PCW/AINs has increased, as has the intensity and complexity of their work.

558 Prof Meagher identifies 5 trends that have increased work demands in residential aged care:

1. The needs of older people in residential care have increased over the last decade, with residents requiring more complex and varied assistance with their physical, psychological, social and emotional lives.

527 ANMF closing submission in reply dated 17 August 2022 at [5].

528 Joint Employers closing submission in reply dated 19 August 2022 at [5.4]; Transcript, 1 September 2022, PN15609-PN15691.

529 Joint Employers closing submission in reply dated 19 August 2022 at [5.37].

2. Higher turnover of residents in aged care facilities means that care workers meet, care for, and part from more residents than they did a decade ago.
3. Increased diversity among residents in aged care, who are recognised as having special needs.
4. Prevailing regulatory requirements and community standards have increased the expectations of care.
5. New regulatory requirements have increased the amount and quality of assessment and documentation required in the provision of care.

559 Prof Meagher states that these changes have significantly increased the skill demands and level of responsibility required of workers in the residential aged care sector.[530] Prof Meagher also notes that the increased level of need and diversity among aged care recipients has not corresponded with a larger workforce, which means that "the same number of workers is caring for a group of people with much higher needs, and so the amount of care work needed is greater, as well as the content of the work being more skilled, complex and demanding".[531]

560 Prof Meagher also details how the trends evident in residential settings are largely mirrored in home care, and result in a corresponding increase in the skill, judgment and demands required of in-home carers.[532]

561 Prof Meagher's evidence is corroborated by that of Prof Eagar[533] and Prof Charlesworth.[534]

562 Prof Kurrle's evidence was that PCWs are required to be more flexible[535] and switch between everyday tasks such as showering, dressing and grooming[536] and more specialised clinical duties such as management of different types of hearing aids, administration of fluids through a naso-gastric tube and maintaining knowledge and understanding of mental and physical conditions and symptoms.[537]

563 The Royal Commission cited research that the number of residential care places available has *increased* by 44 per cent between 2003 and 2020; while the estimated proportion of the residential aged care workforce in direct care roles *fell* from 74 per cent in 2003 to 65 per cent in 2016.[538] The Royal Commission acknowledged the high workloads placed on aged care workers, and referred to research prepared for the Aged Care Workforce Strategy Taskforce in 2018, which characterised the workload pressures on aged care workers as follows:.

> Inadequate numbers of staffing and the complex care needs of residents within residential settings, and travel time between appointments and a lack of adequate time allocated to tasks in community aged care contributed to workload pressures. High levels of, and inefficiencies in, administrative paperwork were also

530 Meagher Report at 18-19.

531 Meagher Report at 20.

532 Meagher Supplementary Report at 19-26.

533 Eagar Report at 3, 4, and 12.

534 Charlesworth Report at [49] and [51].

535 Kurrle Report at 10.

536 Kurrle Report at 4.

537 Kurrle Report at 4.

538 Royal Commission Final Report Vol 1 at 29.

> frequently reported across both settings. Consequently, workers frequently described a lack of time with clients, being unable to take breaks and undertaking considerable amounts of unpaid work.[539]

564 A large number of nurses and PCW/AIN lay witnesses gave evidence about the high workload and increasing skills required of them, as well as the physical, mental and emotional demands of their roles.[540] Much of this evidence is summarised in the Lay Witness Evidence Report.[541]

565 Maree Bernoth, Assoc Prof in the School of Nursing, Paramedicine and Healthcare Sciences at Charles Sturt University and RN gave the following evidence about the demands of aged care work:

> I know from personal experience and my ongoing observations that work in aged care is very emotionally demanding. It often involves coping with the multiple needs of the residents, especially those that cannot be met. It is very distressing to finish your shift and leave, knowing that you have not been able to provide the best care that you can.
>
> Aged care work is cognitively, physically, emotionally, and spiritually very demanding work. This work is getting more and more stressful as staff are not properly supported with mentors and inadequate staffing generally.[542]

566 The lay witness evidence provides insight into the volume and intensity of aged care work. For example, EN Suzanne Hewson gave evidence about the impact of high workloads:

> The workload is heavy and ever-increasing, and it can become more complicated if we are short-staffed, working with new or inexperienced workers, or working with agency staff. This is often the case.

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539 Royal Commissioner Final Report Vol 2 at 213, citing L Isherwood et al, "Attraction, Retention and Utilisation of the Aged Care Workforce", Working paper prepared for the Aged Care Workforce Strategy Taskforce, 2018, 34.

540 Amended witness statement of Carol Austen dated 20 May 2022 at [14], [16]; Witness statement of Maree Bernoth dated 29 October 2021 at [57]-[62]; Amended witness statement of Pauline Breen dated 9 May 2022 at [30]; Amended witness statement of Hazel Bucher dated 10 May 2022 at [31]; Witness statement of Sherree Clarke dated 29 October 2021 at [71]-[77]; Witness statement of Lyn Cowan dated 31 March 2021 at [124]; Amended witness statement of Susan Digney dated 19 May 2022 at [31]; Witness statement of Virginia Ellis dated 28 March 2021 at [149]-[150]; Witness statement of Catherine Evans dated 26 October 2021 at [76]-[78]; Witness statement of Sally Fox dated 29 March 2021 at [177]-[179]; Amended witness statement of Sanu Ghimire dated 19 May 2022 at [64]-[65]; Witness statement of Jade Gilchrist dated 31 March 2021 at [10]; Witness statement of Theresa Heenan dated 20 October 2021 at [96]; Amended witness statement of Suzanne Hewson, 6 May 2022 at [20]; Witness statement of Ross Heyen, 31 March 2021 at [47]; Witness statement of Jocelyn Hofman dated 29 October 2021 at [8]; Witness statement of Ngari Inglis dated 19 October 2021 at [30]-[34]; Witness statement of Virginia Ellis dated 28 March 2021 at [34]-[37]; Amended witness statement of Wendy Knights dated 23 May 2022 at [84]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [18], [32]; Amended witness statement of Irene McInerney dated 10 May 2022 at [45]; Witness statement of Maria Moffat dated 27 October 2021 at [32]; Amended witness statement of Rose Nasemena dated 6 May 2022 at [16], [47]; Witness statement of Bridget Payton dated 26 October 2021 at [70], [78], [84], [99]; Witness statement of Marea Phillips dated 27 October 2021 at [58]; Amended witness statement of Micheal Purdon dated 19 May 2022 at [59]; Witness statement of Kathy Sweeney dated 1 April 2021 at [49]; Amended witness statement of Veronique Vincent, dated 19 May 2022 at [79]; Witness statement of Susanne Wagner dated 28 October 2021 at [23], [155]-[159]; Amended witness statement of Jennifer Wood dated 19 May 2022 at [76], [101].

541 Lay Witness Report, [385], [512] and [615].

542 Witness statement of Maree Bernoth dated 29 October 2021 at [58], [60].

> My rostered shift starts at 0700, but I try to start at least 30 minutes early. This time is unpaid. But if I do not start early, I am unable to complete my tasks on time.
>
> My job is stressful and very physically and emotionally demanding. We have so much to do and, because of this, I often feel like I am unable to give the residents the quality time that they need.[543]

567 Several lay witnesses gave evidence that due to increases in the complexity and amount of work they have less time to spend with each resident.[544] For example, Sally Fox stated:

> I used to be able to do little, but important things for residents, like put their hair in rollers or paint their nails, so they felt nice and put together. Unfortunately, I simply do not have time to do these things for residents any more, and that makes me sad. It is a drop in the quality of life for the residents as well.[545]

568 The Consensus Statement states that the work demands of aged care workers are "changeable" and are performed to "rigorous time and performance standards".[546]

569 The remaining 15 contentions provide further detail of the nature of the work of direct care workers, including relating to high levels of acuity, frailty and co-morbidities, dementia and palliative care among residents and home care clients, as well as changes in the demographic makeup of the aged care workforce. These factors all contribute to the intensity of work and workload of aged care workers.

Contention 2: The acuity of residents and clients in aged care has increased. People are living longer and entering aged care later as they are choosing to stay at home for longer and receive in-home care. Residents and clients enter aged care with increased frailty, co-morbidities and acute care needs.

570 The expert evidence supports a finding that the level of acuity of residents in aged care has increased.

571 Prof Eagar and her research team assessed the care needs of approximately 5,000 people in residential aged care in 2018 and found that there has been a movement away from nursing homes as a "lifestyle choice" towards residents now entering care when they are very frail, with complex physical, cognitive and social care needs.[547]

572 Using the De Morton Mobility Index, Prof Eagar found that only 15 per cent of aged care residents are independently mobile, while 50 per cent require physical assistance with mobility; 35 per cent of all residents have no mobility.[548]

573 Prof Eagar also measured the frailty profile of residents using the Rockwood Clinical Frailty Scale (see Table 6 below) and found that 38 per cent of residents were severely frail or very severely frail, while a further 38 per cent were mildly frail or moderately frail:[549]

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543 Amended witness statement of Suzanne Hewson dated 6 May 2022 at [18]-[20].

544 Witness statement of Sally Fox dated 29 March 2022 at [174]-[175]; Witness statement of Sheree Clarke dated 29 October 2021 at [75]-[77]; Witness statement of Patricia McLean dated 9 May 2022 at [63]-[64].

545 Witness statement of Sally Fox dated 29 March 2022 at [175].

546 Consensus Statement at [13].

547 Eagar Report at 3-4.

548 Eagar Report at 9.

Table 6: Rockwood Clinical Frailty Scale profile

Rockwood score		Percentage of residents
1 Very fit		2%
2 Well		4%
3 Well with comorbid disease		7%
4 Apparently vulnerable		10%
5 Mildly frail		15%
6 Moderately frail		23%
7 Severely frail		31%
8 Very severely frail		7%
9 Terminally ill		0%
Unknown		1%
All residents		**100%**

574 Using the Australian Modified Functional Independence Measure, Prof Eagar measured the dependency profile of aged care residents in terms of self-care tasks.

575 Prof Eagar found that nearly 90 per cent of residents need assistance showering and dressing, while 64 per cent need assistance eating.[550] Almost three quarters of all residents need assistance due to problems associated with sphincter control.[551] Further, residents need assistance transferring between tasks and more than two thirds of residents need assistance transferring for bathing and toileting and/or moving between a bed and a chair.[552] In cross-examination, Prof Eagar clarified that the definition of "needing help from a carer" is of very broad scope, ranging from supervision and coaxing through to a 2-person physical assist.[553]

576 Prof Eagar also found that residents needed support due to communication, cognitive and social limitations; 65 per cent of residents need help with comprehension and expression, while about three quarters of residents need help with problem solving, memory and social interaction.[554]

549 Eagar Report at 9, Table 4.

550 Eagar Report at 9-10.

551 Eagar Report at 10, Table 6.

552 Eagar Report at 10, Table 7.

553 Transcript, 9 May 2022, PN8874-PN8875.

554 Eagar Report at 10, Table 8 and Table 9.

577 Prof Meagher also provides the following data in relation to the health and care needs of people who live in residential aged care:[555]

- In 2015, most older people living in residential aged care had multiple long-term health conditions; more than three quarters (77 per cent) had at least 5 conditions, and nearly a quarter (23 per cent) had at least 9 conditions.[556]
- In 2019, around half of older people living in residential aged care had a diagnosis of dementia.[557]
- Older people living in residential aged care are at significant risk of malnutrition. A recent research review found that around half of all residents were malnourished,[558] while the Royal Commission Final Report cites prevalence of between 22 and 50 per cent.[559]
- A study published in 2015 found that 40 per cent of older people living in residential aged care had sarcopenia, which is "a progressive loss of skeletal muscle and muscle function, with significant health and disability consequences".[560]
- Nearly a quarter (23 per cent) of older people in residential aged care had diabetes, which was twice the rate for people living in the community, according to a study published in 2018.[561]
- Older people living in residential care are particularly susceptible to infectious diseases, such as gastroenteritis, influenza[562] and other respiratory infections, not least COVID-19, due to their frailty, close living arrangements and contact with staff and other visitors.[563] In 2017, a severe flu season, there were more than 500 influenza outbreaks reported in residential aged care in NSW alone.[564]

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555 Meagher Report at 2.

556 Diane Gibson, "Who uses residential aged care now, how has it changed and what does it mean for the future?" (2020) 44(6) *Australian Health Review* 820, Table 5, based on data from the Australian Bureau of Statistics Survey of Disability, Ageing and Carers; see also Lind et al. (2020), which reports data from 2014-2017.

557 Diane Gibson, "Who uses residential aged care now, how has it changed and what does it mean for the future?" (2020) 44(6) *Australian Health Review* 820, 823.

558 Ekta Agarwal et al, "Optimising nutrition in residential aged care: A narrative review" (2016) 92 *Maturitas* 70.

559 Royal Commission Final Report Vol 2, 115.

560 Hugh Senior et al, "Prevalence and risk factors of sarcopenia among adults living in nursing homes" (2015) 82(4) *Maturitas* 418.

561 Oliver Farrer et al, "Characteristics of older adults with diabetes: What does the current aged care resident look like?" (2018) 75(5) *Nutrition and Dietetics* 494. The authors do not state when they collected the data.

562 Essi Huhtinen et al, "Understanding barriers to effective management of influenza outbreaks by residential aged care facilities" (2019) 38(1) *Australian Jounal on Ageing* 60.

563 Rachel Latta et al, "Outbreak management in residential aged care facilities — prevention and response strategies in regional Australia" (2019) 35(3) *Australian Journal of Advanced Nursing* 6, 7.

564 NSW Government, "Influenza Monthly Epidemiology Report, NSW" (December 2017) <https://www.health.nsw.gov.au/Infectious/Influenza/Publications/2017/december-flu-report.pdf>.

578 Prof Meagher analysed data from the ABS Survey of Disability, Ageing and Carers conducted in 2015 to determine the level of support residents need in relation to activities of daily living and found:[565]

- Only one in twenty (5 per cent) of permanent residents was able to prepare to eat, and to eat, without assistance. Fully three quarters (75 per cent) required physical assistance in eating or preparing to eat, or both.[566]
- Fewer than one in five (17 per cent) permanent residents had no need of daily assistance with managing incontinence; almost three quarters (74 per cent) needed assistance 4 times daily or more.[567]
- More than half of all residents needed to use aids or equipment to get out of a chair or bed (55 per cent), and nearly two thirds needed aids or equipment for toileting (63 per cent). Around three quarters needed aids or equipment for moving about the residential facility (75 per cent), for managing incontinence (70 per cent) and for showering or bathing (76 per cent).[568]
- Overall, nearly three quarters (73 per cent) had at least 5 impairments in relation to these activities; 38 per cent had at least 9.[569]

579 Prof Meagher also found strong evidence to support the proposition that the care and support needs for people living in residential aged care has increased in the last 10-15 years.[570] Citing ACFI data from the period between 2009 and 2019, Prof Meagher found that complex health needs quadrupled, from 13 per cent to 52 per cent while cognition and behaviour needs increased from 36 per cent to 64 per cent. The data also showed that the number of people needing support in carrying out activities of daily living nearly doubled, from 33 per cent to 60 per cent[571] and that overall, the share of people who have high care needs across all three domains of activities of daily living, cognition and behaviour, and complex health care, increased from just 4 per cent to almost one third, 31 per cent.[572]

580 These findings were supported by Prof Kurrle who found that more older people are surviving past their average life expectancy (81 years for men and 85 years for women in 2019) with the average age of aged care residents

565 Meagher Report at 2-3.

566 Data for 2015, the latest year available. Calculated from data in Australian Government, Australian Institute of Health and Welfare, "Residential Aged Care and Home Care 2014-15", supplementary table S1.32, <https://www.gen-agedcaredata.gov.au/www_aihwgen/media/images/Residential-aged-care-2014-15.xls>.

567 Data for 2015, the latest year available. Calculated from data in Australian Government, Australian Institute of Health and Welfare, "Residential Aged Care and Home Care 2014-15", supplementary table S1.31, <https://www.gen-agedcaredata.gov.au/www_aihwgen/media/images/Residential-aged-care-2014-15.xls>.

568 Data from the 2015 ABS Survey of Disability, Ageing and Carers, <https://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/4430.0Main%20Features1022015?opendocument&tabname=Summary&prodno=4430.0&issue=2015&num=&view=>. The most recent SDAC (2018) has not reported data about people living in residential aged care.

569 Diane Gibson, "Who uses residential aged care now, how has it changed and what does it mean for the future?" (2020) 44(6) *Australian Health Review* 820, Table 5, based on data from the Australian Bureau of Statistics Survey of Disability, Ageing and Carers.

570 Meagher Report at 3.

571 Meagher Report at 3.

572 Meagher Report at 3.

increasing from 50 per cent of residents being 85 years and over in 2000, to 59 per cent being 85 years and over in 2018.[573] Prof Kurrle concurred with Prof Meagher that a significant increase in high care needs of residential aged care recipients between 2009 and 2019 is evidenced in ACFI data. Prof Kurrle set out the increase in the level of care needs based on ACFI ratings of low, medium and high, reproduced in this Decision at Chart 1.

581 Assoc Prof Junor gave corroborative evidence, stating that that there are increased numbers of aged care facility residents with "serious co-morbidities or in the late stages of their life journey and moving towards palliative care"[574] and that, "as elderly people now on average enter residential care only in their last 20 months of life, acuity of care need has increased significantly across the residential aged care sector".[575]

582 The expert evidence also supported a finding that as people are choosing to stay at home longer, their care needs in home and community care are increasing.

583 Prof Eager and Assoc Prof Junor gave evidence that policy changes toward home care services, or "ageing in place", and the expectation that older people can delay or avoid entering residential aged care has played a role in the increasing reliance on in-home care, over care provided in a residential facility.[576] Similarly, Prof Meagher found that 64 per cent of recipients of home care packages are 80 years or over and 41 per cent are aged 85 and over, with recipients of aged home care becoming more frail and less healthy, citing the following data in support:

- In 2015, 61 per cent of HCP recipients had at least 5 health conditions, up from 53 per cent in 2006, while one in 14 had 10 or more health conditions, up from one in 17 in 2006.
- Half (51 per cent) had a high frailty score in 2015, up from 15 per cent in 2006.
- More than a third were assessed as having depression in 2015 (36 per cent), up from 32 per cent in 2006, and a third had pain (34 per cent) in 2015, up from a quarter (24 per cent) in 2006.
- The median number of medications prescribed for HCP clients within one year of entering home care was 9; identical to that of older people entering residential care.
- A fifth (20 per cent) had an urgent attendance after hours at a health care service during the first year of services in 2015, up from 15 per cent in 2006.[577]
- Around one in 20 recipients died within 3 months of entering home care services and more than a third (35 per cent) died within 3 years.

584 As discussed in the Lay Witness Evidence Report, the vast majority of lay witnesses gave evidence that recipients of aged care have increased acuity and

573 Kurrle Report at 6.

574 Junor Report at [43].

575 Junor Report Annexure 9 at [11].

576 Eager Report at 3; Junor Report at [110]; Junor Report Annexure 9 at [11]; Supplementary Meagher Report at 13.

577 Supplementary Meagher Report at 3.

more complex needs than in the past.[578] This evidence included that residents in both residential facilities and community care were frailer, had more advanced disease, higher physical needs, reduced mobility including with higher levels of obesity, and exhibited higher instances of dementia, depression and behavioural issues when admitted into residential aged care facilities than in the past. Several in-home carers also gave evidence that their clients had greater acuity.[579]

585 RN Jocelyn Hofman gave evidence of her 20 years in the aged care industry and her experience of the increasing complexity and acuity of residents' conditions on admission. In her experience, residents at the time of admission are more likely to present with and develop the following:[580]

- varying forms of dementia
- complex or chronic wounds
- mental health conditions
- chronic disease and co morbidities

578 Lay Witness Report at [258]. Seeamended reply witness statement of Carol Austen dated 20 May 2022 at [19]; Witness statement of Lisa Bayram dated 29 October 2021 at [42]-[44], [66]; Witness statement of Maree Bernoth dated 29 October 2021 at [31]-[35]; Witness statement of Geronima Bowers dated 1 April 2021 at [22], [35]; Amended witness statement of Kerrie Boxsell dated 19 May 2022 at [58]-[61], [65]; Amended witness statement of Pauline Breen dated 9 May 2022 at [15]; Amended witness statement of Hazel Bucher dated 10 May 2022 at [39]; Witness statement of Donna Cappelluti dated 21 April 2022 at [43]; Witness statement of Mark Castieau dated 29 March 2021 at [88]-[93]; Reply witness statement of Mark Castieau dated 20 April 2022 at [22], [27]; Witness statement of Judeth Clarke dated 29 March 2021 at [16], [24]-[25]; Amended witness statement of Susan Digney dated 19 May 2022 at [27]; Witness statement of Virginia Ellis dated 28 March 2022 at [210]-[213]; Witness statement of Sally Fox dated 29 March 2021 at [150]; Witness statement of Fiona Gauci dated 29 March 2021 at [42], [60]-[62]; Amended witness statement of Sanu Ghimire dated 19 May 2022 at [59]; Witness statement of Jade Gilchrist dated 31 March 2021 at [21]; Witness statement of Catherine Goh dated 13 October 2021 at [20], [28];Witness statement of Lillian Grogan dated 20 October 2021 at [47]; Amended witness statement of Linda Hardman dated 9 May 2022 at [26]-[32]; Witness statement of Ross Heyen dated 31 March 2021 at [19]-[22], [35]-[38]; Witness statement of Jocelyn Hofman dated 29 October 2021 at [31], [37]-[41]; Witness statement of Paul Jones dated 1 April 2022 at [48]; Witness statement of Donna Kelly dated 31 March 2021 at [31]-[32]; Reply witness statement of Donna Kelly dated 20 April 2022 at [21]; Reply witness statement of Darren Kent dated 21 April 2022 at [48]; Amended witness statement of Wendy Knights dated 23 May 2022 at [13], [34]-[38], [50]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [38]; Amended witness statement of Irene McInerney dated 10 May 2022 at [25], [38]; Amended witness statement of Patricia McLean dated 9 May 2022 at [40], [104]; Witness statement of Susan Morton dated 27 October 2021 at [39]-[40]; Amended witness statement of Rose Nasemena dated 6 May 2022 at [51a], [51c], [51e]; Witness statement of Sandra O'Donnell dated 25 March 2022 at [94]-[99], Witness statement of Lyndelle Parke dated 31 March 2021 at [21]-[22]; Witness statement of Josephine Peacock dated 30 March 2022 at [138]-[141]; Witness statement of Marea Phillips dated 27 October 2021 at [33]-[34]; Witness statement of Dianne Power dated 29 October 2021 at [40]-[51];Witness statement of Antoinette Schmidt dated 30 March 2021 at [119]-[120]; Witness statement of Susan Toner dated 28 September 2021 at [39]; Amended witness statement of Stephen Voogt dated 9 May 2022 at [49]-[50], [58];Witness statement of Susanne Wagner dated 28 October 2021 at [110], [112], [117]-[118];Witness statement of Jane Wahl dated 21 April 2022 at [42]; Witness statement of Paula Wheatley dated 27 October 2021 at [50]-[51], [56]-[57]; Witness statement of Kristy Youd dated 24 March 2021 at [41], [45].

579 Witness statement of Catherine Goh dated 13 October 2021 at [28]; Witness statement of Marea Phillips dated 27 October 2021 at [33]; Witness statement of Susan Morton dated 27 October 2021 at [39]-[40].

580 Witness statement of Jocelyn Hofman dated 29 October 2021 at [37].

- increased frailty
- mobility issues and as a consequence the increased prevalence of falls, and
- multiple complex medication regimes.

586 A number of witnesses working in home care settings also reported higher acuity in their clients.[581] For example, Susan Morton, an in-home care worker, gave evidence that:

> Over time, I have witnessed an increase to the age of clients in home care. Clients are now typically older. There is greater incentive to stay at home, rather than go into permanent residential care.
>
> The older age of clients in home care means an increased usage of hoists, shower chairs, commodes etc, which is far more common now compared to the past.[582]

587 The employer lay witnesses also gave evidence that the level of acuity in aged care is increasing.[583] For example, Mark Sewell, CEO and Company Secretary of Warrigal, stated that residents entering care at Warrigal are older, clinically frailer, less mobile and have more complicated health conditions than 2 decades ago, with a "large proportion" having dementia, cognitive conditions or mental health issues.[584]

588 Paul Sadler, CEO of ACSA, pointed to a noticeable shift in the types of consumers accessing aged care in the last 20 years, stating that the trend in the last decade has been for residential aged care recipients to fall into one of 3 categories:[585]

(i) consumers that can no longer live comfortably at home and need daily living assistance/have complex health care needs who will stay between 6 and 18 months

(ii) consumers with dementia/cognitive impairment who stay for between 2 and 5 years, and

(iii) consumers who are considered palliative and will stay for anywhere from days to 12 months.

589 During cross-examination, Mr Sadler clarified that many people fall into more than one of these categories.[586]

590 Mr Sadler also said that a significant increase in the availability of HCPs has contributed to consumers staying in their homes for longer and entering residential aged care facilities when older[587] and during cross-examination confirmed that the age, frailty and acuity of home care clients has increased,[588] with home care clients increasingly accessing the highest funding package,

581 Witness statement of Catherine Goh dated 13 October 2021 at [28]-[29]; Witness statement of Marea Phillips dated 27 October 2021 at [33].

582 Witness statement of Susan Morton dated 27 October 2021 at [39]-[40].

583 See Amended witness statement of Craig Smith dated 23 May 2022 at [60]-[66]; Witness statement of Mark Sewell dated 3 March 2022 at [46]-[57]; Witness statement of Johannes Brockhaus dated 3 March 2022 at [30]-[38]; Witness statement of Emma Brown dated 2 March 2022 at [44]; Witness statement of Paul Sadler dated 1 March 2022 at [53]-[59].

584 Witness statement of Mark Sewell dated 3 March 2022 at [50]-[51].

585 Witness statement of Paul Sadler dated 1 March 2022 at [54].

586 Transcript, 11 May 2022, PN12423-PN12424.

587 Witness statement of Paul Sadler dated 1 March 2022 at [55]-[57]; Transcript, 11 May 2022, PN12346.

588 Transcript, 11 May 2022, PN12345.

Level 4. Mr Sadler's evidence is that generally, those accessing aged care services are less mobile, have more than one co-morbidity and are increasingly experiencing incontinence.[589]

591 Johannes Brockhaus, CEO of Buckland,[590] and Kim Bradshaw, General Manager at Warrigal; Stirling Residential Aged Care Facility,[591] gave similar evidence.

592 The Royal Commission found that the average care needs of older Australians were increasing, owing to longer life expectancies and a preference among older people to receive care in their own home, resulting in people entering residential services later in life.[592] It found that people in residential aged care are frailer and have chronic or complex health conditions, including high levels of dementia:[593]

> With advanced age comes greater frailty. Older people are more likely to have more than one health condition (comorbidity) as their life expectancy increases. As the population of older people increases, more people are expected to have memory and mobility disorders. About 550,000 to 559,000 Australians are expected to be living with dementia by 2030 compared to the estimated 400,000 to 459,000 Australians who were living with dementia in 2020. These changing demographics, together with changes in the patterns of disease and dependency, and in the expectations of older people and society, will affect the future demand for aged care in a number of ways, including: the length of stay in residential aged care; the type of care that will be required; the increase in care needs; the demand for a variety of care choices; and the desire of older people to remain in their own homes for as long as possible.[594]

593 The Consensus Statement stated that there has been an increase in acuity, frailty and co-morbidities amongst aged care consumers:

> Australians are living longer. The proportion of Australians over the age of 65 is set to increase from 15 per cent to 23 per cent by 2066. With advanced age often comes increased frailty which is associated with increased morbidity, declining function and a concurrent need for supports. As a result, aged care consumers are entering aged care with more frailty, co-morbidities and acute care needs. Thus, the acuity of recipients of aged care services has increased and this trend is expected to continue.[595]

594 The Consensus Statement further noted that in both residential and home care, aged care recipients are increasingly requiring and receiving care to meet more complex needs, including acute and sub-acute care.[596]

Contention 3: There is an increase in the number and complexity of medications prescribed and administered.

595 The evidence supports the proposition that there has been an increase in the number and complexity of medications prescribed and administered to recipients of aged care.

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589 Witness statement of Paul Sadler dated 1 March 2022 at [58].

590 Witness statement of Johannes Brockhaus dated 3 March 2022 at [31]-[32].

591 Witness statement of Kim Bradshaw dated 4 March 2022 at [13]-[14].

592 Royal Commission Final Report, Vol 1 at 24, 66.

593 Royal Commission Final Report, Vol 1 at 100.

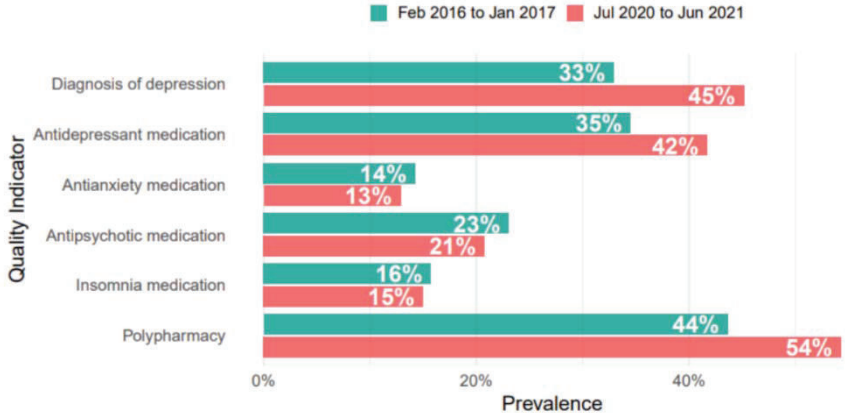
594 Royal Commission Final Report, Vol 2 at 5-6.

595 Consensus Statement at [1].

596 Consensus Statement at [7].

596 A study on the trends in medication use in residential aged care services in Australia between 2016 and 2021,[597] included data demonstrating an increase in the use of depression medication, and a decline in the use of other psychotropic medications such as anti-anxiety medications (see Chart 7 below).[598] The study shows that the proportion of polypharmacy increased from 43.6 per cent in 2016 to 54.3 per cent in 2021;[599] polypharmacy is defined as 9 or more medications:[600]

Chart 7: Prevalence of the studied quality indicators standardised by state and benchmarking group during February 2016 to January 2017 and July 2020 to June 2021



Source: Reierson F, *Trends in Medication Use 2016-2021* (2021), p 2.

597 An increase in the number and complexity of medications prescribed and administered is also supported by lay witness evidence. There was extensive evidence about the administration of medication, the processes involved in both residential care and community care, and the challenges and complexity involved.

598 EN, Wendy Knights gave evidence that there has been a change in the kinds of medications used, and the number of medications prescribed:

> since I did my Diploma things have changed significantly with medications. There are a lot more cancer drugs used. Some residents can be on up to 15 medications at a time. The management of drug administration has also changed. For example, medications used to be in webster packs and then loose PRN medications. There was a drug chart which we had sign on sheets for each drug. Now it is a combination of the webster packs and we also have to use MedSig — a computer program which details every resident and each of their medications, including the time to be given.[601]

599 EN, Suzanne Hewson gave evidence that:

> There are multiple residents who are on 8 or more medications. I have one

597 Filip Reierson, *Trends in Medication Use 2016-2021* (Report, September 2021).
598 Filip Reierson, *Trends in Medication Use 2016-2021* (Report, September 2021), pp 2, 7.
599 Filip Reierson, *Trends in Medication Use 2016-2021* (Report, September 2021), pp 2, 7.
600 Filip Reierson, *Trends in Medication Use 2016-2021* (Report, September 2021), p 1.
601 Amended witness statement of Wendy Knights dated 23 May 2022 at [39].

> resident who takes 13 tablets in the 0800 drug round. All medications react differently with each other, so it is important to be aware of what is being given at all times. This requires a lot of skill, experience and concentration to do it properly and, most importantly, safely.[602]

600 Paul Jones, PCW in a residential care facility, gave detailed evidence in his statement about the medication he is required to administer:

> There is a two-hour window for each medication round (dinnertime round and bedtime round). There are also some residents who have medication at specific times outside of these rounds (known as "out-of-routine"). There are 18 residents I am directly responsible for. Some take more time than others to administer medication to.
>
> It is really important that the medications are administered in this time frame, because if they are not, this can have negative health impacts on the residents. Residents that need medication for Parkinson's disease for example, are particularly impacted if medications are not given within the requisite time frame. They start locking up, which really impacts on their mobility and comfort.
>
> For this reason, during the medication round, I have to manage my time effectively to ensure that time-critical medications are administered at the prescribed time, and the remainder of the medications are administered within the two-hour window.[603]

601 Paul Sadler, CEO of ACSA, gave evidence that until 15 years ago the work undertaken by medication-trained PCWs in residential care facilities would have generally been undertaken by a registered nurse.

Contention 4: The proportion of residents and clients in aged care with dementia and dementia-associated conditions has increased.

602 The expert evidence supports contention 4.

603 Prof Meagher states that the majority of people in residential aged care suffer from multiple forms of ill health, with around half having a diagnosis of dementia.[604] Similarly, Prof Eagar states that while the exact number of aged care residents with dementia is not known, estimates range from between 50 to 80 per cent.[605] Prof Meagher cites research published in 2020 that between 2008 and 2016 mental health disorders amongst older people living permanently in residential care increased from 54 per cent to 68 per cent.[606] Prof Meagher's expert opinion is that these increased needs require aged care staff to exercise judgment, responsibility and assessment skills, along with strong interpersonal skills, in their interactions with residents.[607]

604 The Royal Commission made similar findings, noting that more than half of the people living in residential aged care in 2019 had a diagnosis of one of the

602 Amended witness statement of Suzanne Hewson dated 6 May 2022 at [24a].

603 Witness statement of Paul Jones dated 1 April 2021 at [22]-[24].

604 Meagher Report at 2.

605 Eagar Report at 12.

606 Meagher Report at 3; AT Amare, GE Caughey, C Whitehead, CE Lang, SC Bray, et al, "The prevalence, trends and determinants of mental health disorders in older Australians living in permanent residential aged care: Implications for policy and quality of aged care services" (2020) 54(12) *Australian & New Zealand Journal of Psychiatry* 1200-1211.

607 Meagher Report at 23.

forms of dementia, but that the real figure is likely higher due to the under-diagnosis of dementia,[608] and could be as high as 70 per cent.[609]

605 Prof Eagar emphasises that good communication skills have become increasingly important due to the significant number of people with dementia, particularly as those with dementia are at high risk of developing challenging behaviours.[610]

606 Similarly, Prof Kurrle stated that PCWs require greater knowledge of the health conditions of older people, particularly of dementia and frailty, and that there is a need for good communication skills as well as the ability to provide care to the increasingly frail and cognitively impaired population.[611]

607 In relation to home care, Prof Meagher notes that in 2015 an estimated 22 per cent of home care clients had dementia, with older people with dementia significantly more likely to use a HCP than those without.[612] Prof Meagher described the impact on HCWs of assisting people with dementia:

> Working with older people with dementia in combination with other chronic diseases further increases the skill and responsibility demands of home care and support work. These older people typically have difficulty undertaking aspects of routine self-management of their health, including understanding their condition, taking medication, and following action plans on exacerbation. These limitations make additional demands on community care workers, who observe and make decisions about how to meet the person's needs outside the structured context of a residential aged care facility where disease management would not be delegated to the older person.[613]

608 Several lay witnesses, including Assoc Prof and RN Maree Bernoth, gave evidence of the increasing proportion of residents and clients in aged care with dementia and dementia associated conditions.[614]Assoc Prof Maree Bernoth stated:

> My research and personal observations indicate that dementia in aged care facilities is increasing. Dementia presents many challenges. For example, it can be difficult to distinguish between dementia, delirium and depression. All may present in similar ways. A critical role of an RN and any aged care worker to identify symptoms so that this can be treated.
>
> …
>
> There are more and more issues with dementia because of the reduced use of psychotropic drugs since the Royal Commission. With the reduced use of psychotropic drugs there has also been an increase in resident-on-resident violence, another source of distress for the staff.[615]

608 Royal Commission Final Report Vol 1 at 100.

609 Royal Commission Final Report Vol 1 at 127.

610 Eagar Report at 12.

611 Kurrle Report at 6.

612 Meagher Supplementary Report at 3.

613 Meagher Supplementary Report at 24.

614 See, for example Witness statement of Paul Jones dated 1 April 2022 at [48]; Witness statement of Ngari Inglis dated 19 October 2021 at [28], Witness statement of Susan Toner dated 28 September 2021, [27]-[29]; Witness statement of Maree Bernoth dated 29 October 2021 at [42]-[43]; Witness statement of Linda Hardman dated 9 May 2022 at [32], [46]-[52]; Witness statement of Wendy Knights dated 29 October 2021 at [49]-[54].

615 Witness statement of Maree Bernoth, 29 October 2021 at [42]-[43].

609 Donna Kelly described the skills PCWs/AINs are required to exercise in managing residents with dementia:

> The increased dementia and behaviours in residents means that [personal carers] need to be more observant, and do more assessments of their health and conduct. We need to be warier as dementia residents are unpredictable. We need to prepare for the unknown and consider what type of behaviour we are going to meet when we walk into a resident's room. We then need to manage residents by selecting and using careful communications, distraction and persuasive strategies. This has become an increasing issue in comparison to when I started at Karingal thirteen years ago.[616]

610 Lay witnesses also gave evidence regarding the increasing prevalence of dementia in home care.[617] For example, PCW Ngari Inglis stated that there are more clients living at home with dementia and staying at home for longer. She described aspects of the work involved in assisting a client with dementia in the home:

> The same client always refused to shower. So, you have to use gentle powers of persuasion and get them to do something they don't want to do in the kindest most encouraging way possible. Often people with dementia hate being uncomfortable. An environment conducive for this client to shower had to be created. So, you warm the bathroom up with heat lamps, place bath mats onto the floor so they don't get cold feet, keep him warm, keep encouraging and persuading. You have to have a lot of patience, and you can't stress about the clock because you can't rush dementia. But if you weren't confident and hadn't worked with dementia before, you may have panicked and probably not provided the best care possible. You may have felt pressured to do what you could do and get out in 30 minutes but you can't do that.[618]

611 Cheyne Woolsey, Chief Human Resources Officer at KinCare gave evidence that as a result of customers staying in their homes longer, a higher proportion present with dementia, experience cognitive decline and have multiple health issues which has directly impacted on the time spent by HCWs and additional complexity and challenges in the personal care tasks being performed compared to 5 years ago.[619]

612 The Consensus Statement also states that the proportion of people with dementia and dementia-associated conditions receiving aged care services has increased.[620]

Contention 5: Home care is increasing as a proportion of aged care services.

613 The expert evidence supports a conclusion that home care has increased as a proportion of aged care services.

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616 Reply witness statement of Donna Kelly, 20 April 2022 at [25].

617 See Witness statement of Ngari Inglis dated 19 October 2021 at [25]-[29]; Witness statement of Susan Toner dated 28 September 2021 at [27]-[29].

618 Witness statement of Ngari Inglis dated 19 October 2021 at [27].

619 Witness statement of Cheyne Woolsey dated 4 March 2022 at [25]-[27].

620 Consensus Statement at [2].

614 Prof Meagher states that over a million older people receive care and support in their own home through an Australian Government funded program. In March 2021, more than 167,000 older people were receiving a HCP, while in June 2020 around 830,000 older people received some form of care, assistance and support the CHSP:[621]

Table 7: New entrants, system growth and turnover in the HCP program, 2018-2021

	A **In a HCP at 31 March**	B **Entered a HCP for first time in of year to 31 March**	C **Growth in number of HCP holders since previous year (system growth)**	D **Net new entrants (Total entrants less system growth)**	E **Net new entrants as a share of all HCP holders at year's end**
2021	167,124	63,192	30,215	32,977	20%
2020	136,909	65,638	37,799	27,839	20%
2019	99,110	41,451	14,139	27,312	28%
2018	84,971	-	-	-	-

Source: Meagher Supplementary Report at p 4.

615 Prof Meagher states that home care is playing an increasing role relative to residential care due to Government policy and funding that has shifted the distribution of resources towards home care and away from residential care.[622] She found that the share of people aged 65 and over who lived permanently in residential care during the year fell from 65 per 1,000 in 2011-12 to 56 per 1,000 in 2019-20, while the share receiving a HCP increased from 23 per 1,000 to 41 per 1,000 across the same period.[623] According to Prof Meagher, home care has "increasingly developed as a viable alternative to residential aged care".[624] This is supported by a finding that there has been a "rapid growth" in higher level HCPs, with the number of packages more than doubling from 80,000 in 2016 to nearly 170,000 in 2021 (see Figure 1):

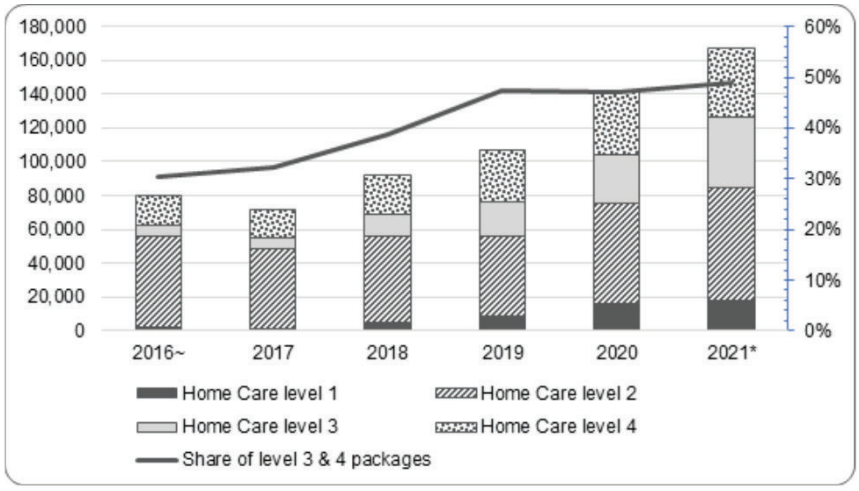
621 Meagher Supplementary Report at 2.

622 Meagher Report at 6.

623 Meagher Supplementary Report at 7.

624 Meagher Supplementary Report at 7.

Chart 8: Number of home care packages at 30 June 2016-2020, and at 31 March 2021 (left axis), and share of level 3 and 4 packages 2016-2020 (right axis)



Notes: In 2016, the reported numbers are operational HCP places. Following the introduction of "consumer-directed care" in 2017, reported numbers are people in packages as at 30 June.

* Data are available only to 31 March for 2021. Source: Meagher

Supplementary Report at p 8.

616 Prof Charlesworth and Prof Eagar also support a finding that there has been an expansion of home care services, as older people are staying at home for longer.[625]

617 A number of lay witnesses working in home care settings reported people are staying in home care longer[626] and experience a higher level of acuity.[627] For example, Susan Morton, an in-home PCW, gave evidence that:

> Over time, I have witnessed an increase to the age of clients in home care. Clients are now typically older. There is greater incentive to stay at home, rather than go into permanent residential care.
>
> The older age of clients in home care means an increased usage of hoists, shower chairs, commodes etc, which is far more common now compared to the past.[628]

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625 Charlesworth Supplementary Report at [67]; Eagar Report at 3.

626 See Witness statement of Theresa Heenan dated 20 October 2021 at [110]-[111]; Witness statement of Catherine Evans dated 26 October 2021 at [84]-[85]; Witness statement of Catherine Goh dated 13 October 2021 at [28].

627 See Amended witness statement of Susan Digney dated 19 May 2022 at [27]; Witness statement of Catherine Goh dated 13 October 2021 at [28]; Witness statement of Marea Phillips dated 27 October 2021 at [33].

628 Witness statement of Susan Morton dated 27 October 2021 at [39]-[40].

618 The Consensus Statement also noted that home care is increasing as a proportion of aged care services,[629] and that the proportion of HCPs at levels 3 and 4 have increased.[630]

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

619 Prof Meagher provides evidence of the change in the occupational structure of the residential aged care workforce, and finds that the share of PCWs in the direct care workforce has increased from 57 per cent to 72 per cent between 2003 and 2016, while the corresponding share of nurses and allied health workers has fallen.[631] Tables reproduced from the Meagher Report below set out the changing occupation structure from 2003 to 2016:

Table 8: Full-time equivalent direct care employees in the residential aged care workforce, by occupation: 2003, 2007, 2012 and 2016[632]

	2003	**2007**	**2012**	**2016**	**% change, 2003-2016**
Registered Nurses	16,265	13,247	14,129	14,857	*-9*
Enrolled Nurses	10,945	9,856	10,999	9,126	*-17*
Allied Health Workers	5,776	5,204	5,026	3,954	*-32*
Personal Care Attendants	**42,943**	**50,542**	**64,669**	**69,983**	**63**
Personal Care Attendants (%)	57%	64%	68%	72%	
All direct care workers (FTE)	*76,006*	*78,849*	*94,823*	*97,920*	*29*

Source: Meagher Report, Table 1, p 6.

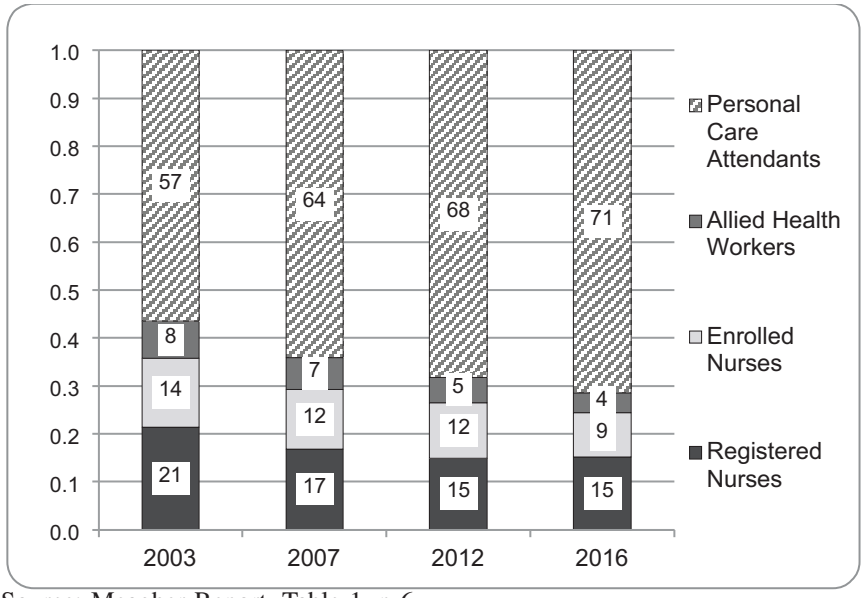
629 Consensus Statement at [4].

630 Consensus Statement at [17].

631 Meagher Report at 6-7.

632 Meagher Report at 6, Table 1. Data reported in K Mavromaras, G Knight, L Isherwood, A Crettenden, J Flavel, et al, "2016 National Aged Care Workforce Census and Survey — The Aged Care Workforce" (2017) (2016 Department of Health).

Chart 9: Occupational structure of the direct care workforce in residential care, 2003, 2007, 2012, 2016, per cent of total full-time equivalent workforce[633]



Source: Meagher Report, Table 1, p 6.

620 Prof Meagher observed a similar change in the occupational structure of the home care workforce, with the share of community care workers (HCWs) increasing from 78 per cent to 83 per cent from 2007 to 2020, with a corresponding 39.2 per cent *decline* in the number of RNs, as shown in Table 4:[634]

633 Meagher Report at 7; K Mavromaras, G Knight, L Isherwood, A Crettenden, J Flavel, et al, "2016 National Aged Care Workforce Census and Survey — The Aged Care Workforce" (2017) (2016 Department of Health) Table 3.3.

634 Meagher Supplementary Report at 17.

Table 9: Full-time equivalent direct care employees in the home care and support workforce, by occupation: 2007, 2012, 2016 and 2020[635]

	2007	2012	2016	2020	% change, 2007-2020
Registered Nurses	6,079	6,599	4,692	3,698	-39.2
Enrolled Nurses	1,197	2,345	1,143	1,170	-2.3
Allied Health Workers	2,948	4,199	3,540	2,995	1.6
Community Care Workers	**35,832**	**41,394**	**34,712**	**39,069**	**9.0**
Community Care Workers (%)	*78%*	*76%*	*79%*	*83%*	
All direct care workers (FTE)	*46,056*	*54,537*	*44,087*	*46,932*	*1.9*

Source: Meagher Supplementary Report, Table 4, p 17.

621 These trends are evident in the 2020 Workforce Report data. The 2020 Workforce Report is divided into parts for each of the 3 service care types — RAC, HCPP and the CHSP.

622 In residential aged care, PCWs accounted for 70 per cent of the workforce, compared with RNs (15.7 per cent) and ENs (7.7 per cent). HCPPs and CHSPs have even higher ratios of HCWs to nursing staff than those found in residential care, with HCWs making up 87.9 per cent and 81.1 per cent of their respective workforces compared with RNs (4.7 per cent HCPP, 8.5 per cent CHSP) and ENs (1.4 per cent HCPP and 2.9 per cent CHSP).[636]

623 Prof Charlesworth, Prof Eagar, Prof Kurrle and Assoc Prof Smith and Dr Lyons similarly find that the composition of the aged care workforce has changed, with the number of RNs and ENs reducing, resulting in an increased reliance on PCWs.[637]

624 In 2019, Prof Eagar undertook a study of the care needs of 1,877 residents in 30 aged care facilities across Queensland, NSW and Victoria to measure the time in minutes each staff member spent with a resident each day.[638] Prof Eagar found PCWs account for 74 per cent of total staff time, compared with just 9 per cent for RNs and 5 per cent for ENs. On average residents receive 188 minutes of direct care per day, equating to 36 minutes by RNs, 8 minutes by allied health and 144 minutes by PCWs/AINS:

635 Sources: K Mavromaras, G Knight, L Isherwood, A Crettenden, J Flavel, et al, "2016 National Aged Care Workforce Census and Survey — The Aged Care Workforce" (2017) (2016 Department of Health) Table 3.3; Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) Tables 3.1 and 4.1.

636 Commonwealth submissions dated 8 August 2022 Annexure A, Tables A1 and A2.

637 Kurrle Report at p 2; Charlesworth Report at [47]; Eagar Report at pp 6-8; Smith/Lyons Report at [109].

638 Eagar, K et al, How Australian Residential Aged Care Staffing Levels Compare with International and National Benchmarks, (Research Study Commissioned by the Royal Commission into Aged Care Quality and Safety, September 2019).

Table 10: Percentage of staff time by professional designation in the RUCS study

Designation	% of total time
Personal Care Assistant	74%
Registered Nurse	9%
Other	7%
Enrolled Nurse	5%
Recreation Officer/ Diversional Therapist	4%
Allied Health	1%
Total	**100%**

Source: Eagar Report, Table 3, p 8.

625 Prof Eagar concluded that in practice, PCWs perform "the significant majority of work in meeting the needs of the older people in their care".[639]

626 The expert evidence is supported by the findings of the Royal Commission.

627 The Royal Commission found that aged care providers engage in costs saving by reducing the number of nursing staff and replacing them with lower paid PCWs:

> For some years there has been a relative decline in the proportion of nurses in the residential aged care workforce and a corresponding increase of personal care workers. The proportion of registered nurses in the workforce dropped from 21% in 2003 to 14.6% in 2016, and enrolled nurses dropped from 13.1% to 10.2%. In the same period, personal care worker representation has increased from 58.5% to 70.3% of the workforce. The 1997 changes resulted in providers replacing nursing staff with personal care workers to reduce costs. There has also been a decline in the proportion of the workforce who are allied health professionals or assistants, from 7.4% in 2003 to 4.6% in 2016.[640]

628 A significant number of lay witnesses gave evidence that the composition, staffing levels and skill mix in the aged care workforce has changed significantly over time,[641] in particular that there are fewer RNs, resulting in an increased reliance on ENs, PCWs and AINs.

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639 Eagar Report at 8.

640 Royal Commission Final Report Vol 2 at [4.10].

641 Amended reply witness statement of Carol Austen dated 20 May 2022 at [14]-[17]; Witness statement of Lisa Bayram dated 29 October 2021 at [27]-[31]; Witness statement of Maree Bernoth dated 29 October 2021 at [45]-[48]; Witness statement of Geronima Bowers dated 1 April 2021 at [17]-[20], [27], [37]; Amended witness statement of Kerrie Boxsell dated 19 May 2022 at [62]; Amended witness statement of Pauline Breen dated 9 May 2022 at [23]; Amended witness statement of Hazel Bucher dated 10 May 2022 [42]-[44]; Witness statement of Donna Cappelluti dated 21 April 2022 [22]; Witness statement of Sherree Clarke dated 29 October 2021 at [54], [63]-[67]; Witness statement of Judeth Clarke dated 29 March 2021 at [15]-[17]; Witness statement of Peter Doherty dated 28 October 2021 at [148]-[149]; Witness statement of Sally Fox dated 29 March 2021 at [149]-[151]; Reply witness statement of Sally Fox dated 14 April 2022 at [39]-[40]; Reply witness statement of Fiona Gauci dated 19 April 2022 at [48]-[57]; Reply witness statement of Michelle Harden dated 13 April 2022 at [22]-[26]; Amended witness statement of Linda Hardman dated 9 May 2021 at [63]-[65], [78];Witness statement of Ross Heyen dated 31 March 2021 at [14]; Witness statement of Jocelyn Hofman dated 29 October 2021 at [24], [28], [33]-[36]; Witness statement of Paul Jones dated 1 April 2021 at [29]; Amended witness statement of Wendy Knight dated

629 Assoc Prof and RN Maree Bernoth, gave the following evidence on the skill mix in aged care facilities:

> The skill mix in aged care facilities has certainly changed over time. Over the past 20 years I have seen a reduction in the ratio of RNs, especially educators and mentors, in aged care. There are generally now no mentors in aged care facilities and so staff and students go into facilities without adequate mentoring and support. Likewise, there are not enough RNs to manage residents and to manage requirements of facilities. There are now not enough staff to work with, supervise or mentor care staff (PCAs and AINs) to show them what is important and what can be left for example, or how to prioritise care. PCAs and AINs are working very hard and very fast doing the best they can but may not be prioritising time to insure they do the most important thing.
>
> As a result of staffing levels there is limited supervision of care workers (AINs and PCAs) by RNs. There is often no supervision of RNs. New RNs going into aged care usually do not have the benefit of a mentor. They are usually rostered on without another RN and so have to find their own way.[642]

630 Lay witnesses who work in the community home care sector also gave evidence that the numbers of RNs have reduced.

631 RN Pauline Breen, who works in the community care sector, gave evidence that she sees fewer RNs working in aged care than when she started, approximately 15 years ago, and when they resign they are not replaced by another RN.[643] Lyndelle Park, a PCW who works in community care, gave evidence that there are fewer nurses available in the community home care sector.[644]

632 The Consensus Statement also agreed that since 2003, there has been a decrease in the number of RNs and ENs as a proportion of the total aged care workforce and an increase in the proportion of PCWs and AINs.[645]

Contention 7: Registered Nurses have increased duties and expectations, including more administrative responsibility and managerial duties.

633 The evidence supports a finding that the role of an RN encompasses increased duties and expectations.

634 Assoc Prof Junor found that RNs hold direct responsibility for supervising the work of ENs, AINs and PCWs which results in a "heavy workload of

(cont)

23 May 2022 at [16], [26]; Witness statement of Julie Kupke dated 28 October 2021 at [109]; Witness statement of Pamela Little dated 30 March 2021 at [39]-[42]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [35], [46]; Amended witness statement of Irene McInerney dated 10 May 2022 at [32], [41], [44]-[46]; Amended witness statement of Patricia McLean dated 9 May 2022 at [81]-[82]; Witness statement of Lyndelle Parke dated 31 March 2021 at [19]-[20]; Witness statement of Josephine Peacock dated 30 March 2021 at [142]; Witness statement of Helen Platt dated 29 March 2021 at [81]-[82], [87], [92]-[93]; Witness statement of Dianne Power dated 29 October 2021 at [15]-[19], [78]; Amended witness statement of Michael Purdon dated 19 May 2022 at [22]; Witness statement of Antoinette Schmidt dated 30 March 2021 at [123]-[128]; Witness statement of Christine Spangler dated 29 October 2021 at [21]-[22], [36]; Amended witness statement of Veronique Vincent dated 19 May 2022 at [108]-[113], Amended witness statement of Stephen Voogt dated 19 May 2022 at [43]; Witness statement of Kristy Youd dated 24 March 2021 at [41]-[42].

642 Witness statement of Maree Bernoth dated 29 October 2021 at [45]-[46].

643 Amended witness statement of Pauline Breen dated 9 May 2022 at [23].

644 Witness statement of Lyndelle Parke dated 31 March 2021 at [20].

645 Consensus Statement at [14]-[15].

consultation and authorisation"[646] and that the introduction of a more complex regulatory environment had created a greater demand for RNs to complete documentation, adding "significantly" to the volume and complexity of their workload.[647]

635 In a report prepared for the Aged Care Workforce Strategy Taskforce, Korn Ferry Hay Group discussed the significant "scope creep" in aged care nursing roles:

> The Nursing roles in aged care are loosely defined, with a wide range of fluid responsibilities that can stretch and pull them in different directions — such as people management, operations/shift supervision and documentation — ironically, away from clinical care and expertise which is the core purpose of their role. Further, these roles operate in highly fluid structural arrangements, with multiple informal reporting relationships and responsibilities. Overall, there is a significant scope creep in Nursing roles — they are treated as a "jack of all trades". This creates significant role clarity issues for Nurses leading to "burnout" and ultimately their exit from the aged care industry.[648]

636 The expert evidence was supported by the lay witness evidence.

637 RN Lisa Bayram emphasised that the scope of her role has changed, and the complexity has increased.[649]Ms Bayram gave evidence of a wide range of administrative and reporting responsibilities she is required to undertake, including those necessary to comply with the Serious Incident Response Scheme (SIRS).[650]

638 Lay witnesses also gave evidence of the high level of accountability and oversight RNs have in a residential aged care facility. For example, RN Irene McInerney stated:

> I remain accountable for the care delivered while I am on duty. This means that I need to work with and rely on the nursing team and the carers. This includes identifying at handover and at the start of the shift those residents with particular issues or needs. The carers need to tell RNs anything that is out of the ordinary with any residents. The RNs then need to assess and address issues. Reporting, things as in bruising, an escalation in behavior, skin changes, changes in presentation or condition so the RN can monitor for health changes and make a plan of care. As the RN I monitor resident condition, additionally watching for changes such as confusion or agitation, possible pain management issues, and swallowing issues at meal times. There is need for trust and support for the full team I work with.[651]

639 Assoc Prof and RN Maree Bernoth emphasised that due to the decrease in the number of RNs in aged care, the workload of the remaining RNs has been intensified:

> Aged care work is also complex. Unlike most work in acute care, a RN in aged care often will not have back up from other RNs or specialists. There is an absence of peer support, managerial support and specialised services like pathology and allied health. As a result, nurses and carers in aged care need to

646 Junor Report Annexure 7 at [34].

647 Junor Report Annexure 7 at [51].

648 Korn Ferry Hay Group, Reimagining the Aged Care Workforce (Report prepared for the Aged Care Workforce Strategy eTaskforce, 2018) at [233].

649 Witness statement of Lisa Bayram dated 29 October 2021 at [66], [68]-[69].

650 Witness statement of Lisa Bayram dated 29 October 2021 at [72].

651 Amended witness statement of Irene McInerney dated 10 May 2022 at [37].

> develop a wide range of skills and broader knowledge. Because of the lack of support, staff working in aged care also have greater responsibility for complex and emotionally demanding situations, including dealing with end of life.[652]

640 Evidence of union officials also supported the proposition that RNs have increased duties and expectations.

641 Julianne Bryce, Senior Federal Professional Officer ANMF, emphasised that nurses operate in "extremely difficult conditions" with changes in the acuity of residents, reduction in nurse numbers and staffing and skill mix impacting the nursing care required:

> There is a greatly increased burden of responsibility and accountability for registered nurses relating to both the provision of direct care and supervising and delegating nursing care provided by others.[653]

642 Paul Gilbert, Assistant Secretary of the Victorian Branch of the ANMF, observed that the roles of RNs have undergone a "seismic shift", and have now "by and large become the delegator of care, the care planner and regulatory compliance/funding system gurus, while also maintaining professional supervision of work".[654]

643 The lay witness evidence also highlighted that RN roles have increased administrative and managerial responsibility.[655] For example, EN Wendy Knights explained how the role of the RN has changed over her time working in the aged care sector:

> RNs used to be on the floor much of the time. Now, they are much more in the office. To my observation, that is because the administrative and paperwork load is much greater for RNs than it used to be.
>
> For example, if a transfer to hospital is required, the RN does the administration side of that. That may involve ringing management, ringing the resident's family, and ringing the resident's doctor, amongst other things. The RN also makes appointments, scans notes, books follow up appointments, arranges changes in medication, and things of this kind. RNs also are involved in producing care plans, reviews, and updates to care plans. I've observed that this work for the RN in Princes Court takes up most of her shift. Though, she is still required on the floor when, for example, ENs or PCWs ask for assistance or evaluation, or if there is a fall.[656]

644 The employer lay witnesses also gave evidence about the changing nature of the RN role, with a greater focus on administrative and managerial, as opposed to clinical, tasks.[657]

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652 Witness statement of Maree Bernoth dated 29 October 2021 at [61].

653 Witness statement of Julianne Bryce dated 29 October 2021 at [50].

654 Amended witness statement of Paul Gilbert dated 3 May 2022 at [25].

655 See Amended witness statement of Virginia Mashford dated 6 May 2022 at [35], [42]; Witness statement of Dianne Power dated 29 October 2022 at [60], [78]; Witness statement of Sally Fox dated 29 March 2021 at [147]; Amended witness statement of Linda Hardman dated 9 May 2022 at [63]; Amended witness statement of Linda Hardman dated 5 September 2022 at [63]; Witness statement of Virginia Ellis dated 28 March 2021 at [76]; Reply witness statement of Alison Curry dated 20 April 2022 at [66]; Witness statement of Donna Kelly dated 31 March 2021; Witness statement of Christine Spangler dated 29 October 2022 at [21], [26].

656 Witness statement of Wendy Knights dated 29 October 2021 at [26]-[27].

657 See Witness statement of Johannes Brockhaus dated 3 March 2022 at [27]-[28]; Witness statement of Paul Sadler dated 1 March 2022.

645 Mark Sewell, CEO and Company Secretary of Warrigal, stated that the role of the RN has "shifted" and become "more administrative in nature" with RNs spending more time compiling reports, conducting audits and completing care plans.[658] Mr Sewell estimated that where previously RNs would have spent half an hour on data entry, they are now spending 1.5 hours per 8-hour shift.[659]

646 Paul Sadler, CEO of ACSA, gave evidence that RNs have been diverted away from direct care into the completion of ACFI assessments, either on admission or re-assessments, particularly impacting RN workloads.[660]

647 The Consensus Statement supports the proposition, asserting that expectations of RNs have "increased markedly":

> RNs are the clinical leaders in residential aged care and have experienced an increase in managerial duties (including co-ordinating and supervising and delegating) and/or administrative responsibilities. Expectations of RNs have increased markedly (along with a shift from residents with lower to higher social and clinical needs). Nurses are required to detect changes in resident health status, identify elder abuse and anticipate medical decision-making. Overall, there are more demands upon nurses due to workforce structures and meeting governance requirements. They develop care plans and oversee their implementation and review.[661]

Contention 8: PCWs and AINs operate with less direct supervision. PCWs and AINs perform increasingly complex work with greater expectations.

648 The evidence of 4 of the expert witnesses supports the contention that PCWs and AINs operate with less direct supervision and perform increasingly complex work with greater expectations.

649 Prof Charlesworth gave evidence that PCWs in residential care are now expected to do more clinical type care, including peg feeding and managing catheters, often with "scant supervision"[662] and that PCWs are required to exercise a high degree of judgment and discretion as to how to care for residents, while balancing the competing needs of other residents.[663]

650 Prof Meagher stated that changes in the occupational profile of the direct care workforce has meant that PCWs are taking on tasks previously carried out by nurses, often without supervision.[664] Prof Meagher points to pain management and palliative care as examples of areas where PCWs now play a major role which requires them to exercise responsibility, judgment and high level assessment skills.

651 Prof Eagar found that as a result of the reduction in the number of RNs supervising day-to-day activities, many more responsibilities now fall on the shoulders of the rest of the aged care workforce.[665]

652 Prof Kurrle gave evidence that the level of skill and knowledge required by PCWs has increased since 1997, as PCWs in residential care now perform duties "traditionally performed by nurses" including medication administration,

658 Witness statement of Mark Sewell dated 3 March 2022 at [112].

659 Witness statement of Mark Sewell dated 3 March 2022 at [41]-[42].

660 Witness statement of Paul Sadler dated 1 March 2022 at [41].

661 Consensus Statement at [15].

662 Charlesworth Report at [51].

663 Charlesworth Report at [51].

664 Meagher Report at 20.

665 Eager Report at 13.

wound dressing, assistance with feeding and performing vital observations.[666] In cross-examination, Prof Kurrle said that in some situations, PCWs will do work that requires a RN, for example where there is an emergency such as a fall, and there is not an RN in the facility at the time.[667]

653 In relation to home care workers, Prof Charlesworth found that HCWs usually work alone and that their work involves a significant degree of responsibility and discretion.[668] Prof Meagher agreed that home care workers "largely work alone" and that this creates particularly demands on the skills, responsibility and judgment that they are required to exercise.[669] Further, Prof Meagher noted that clients receive fewer visits from a service coordinator and as a result care workers are the "face" of the organisation, with more responsibility and autonomy to manage concerns and make ethical judgments about the care provided to the client.[670]

654 Prof Meagher emphasised that due to the growth in the volume and acuity of home care recipients, the skill, responsibility and judgment required by PCWs who work in home care has increased, is more complex and more demanding.[671]

655 PCW/AIN lay witnesses also gave evidence that due to a reduction in nursing staff, their roles and responsibilities have expanded, while their supervision has decreased: RNs do not actively or directly supervise,[672] but must be sought out,[673] or will attend only for a particular purpose such as to check the facility or direct staff to perform a particular task,[674] or to conduct an assessment, administer medication or do observations.[675]

656 The lay witness evidence was consistent with a finding that there is little direct supervision of PCWs/AINs.[676]

657 For example, PCW Sally Fox, gave the following evidence:

> The RN rostered on shift is technically the supervisor of all ECAs [Extended Care Assistants] on shift, however they don't actively supervise us.
>
> If I need assistance, I have to approach the RN. RNs definitely have significantly more paperwork to complete than they used to, so they do have less time to be on the floor these days.
>
> There is also a Facility Manager (Residential) who is based in an office, but frequently comes down to the floor, however she mostly is liaising with the RNs, not ECAs, and she doesn't actively supervise ECAs either. I am working much more autonomously than when I started.[677]

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666 Kurrle Report at 3.

667 Transcript, 3 May 2022, PN3607-PN3611.

668 Charlesworth Report at [73].

669 Meagher Supplementary Report at 20-21.

670 Meagher Supplementary Report at 25.

671 Meagher Supplementary Report at 19.

672 Witness statement of Sally Fox, dated 29 March 2021 at [145]-[148]; Witness statement of Paul Jones dated 1 April 2021 at [49]; Transcript, 29 April 2022, PN1361-PN1363.

673 Witness statement of Sally Fox dated 29 March 2021 at [145]-[148].

674 Witness statement of Antoinette Schmidt dated 30 March 2021 at [112]-[114].

675 Witness statement of Donna Kelly dated 31 March 2021 at [28].

676 See for example Witness statement of Paul Jones dated 1 April 2021 at [49]; Witness statement of Donna Kelly dated 31 March 2021 at [22], [28].

677 Witness statement of Sally Fox dated 29 March 2021 at [145]-[148].

658 Veronique Vincent, Home Support Worker, gave evidence of increasing responsibilities of PCWs in home care settings:

> The tasks we're expected to do have also changed dramatically over time. Whereas in my earlier days as a home care worker the help we provided to clients was more focused in domestic assistance and personal care, these days we are acting as Enrolled Nurses without being Enrolled Nurses.
>
> We handle medications, we tend to wounds, we take blood pressure. Whereas these tasks used to be performed by nurses, now the nurse will only do the initial assessment and then create a care chart (in conjunction with a client's doctor) with instructions for the Home Support Workers to manage from that point on.[678]

659 Several lay witnesses gave evidence in relation to administering medications. Judeth Clarke said that when she started working as a personal carer, PCWs were not involved in administering medications[679] but since the early 2000s, many carers are required to complete a medication competency and administer medications.[680] Paul Jones gave evidence in cross-examination that he frequently administers insulin when an RN is not at the facility, and a second carer with insulin competency will witness it.[681]

660 The employer witnesses also gave evidence that PCWs/AINs work with less direct supervision.

661 Johannes Brockhaus, CEO of Buckland, stated that RNs are occupied with care planning, conducting reviews, audits and assessments and as a result PCWs are undertaking more of the direct care work that was historically undertaken by RNs.[682] Similarly, Mark Sewell, CEO of Warrigal, noted that RNs are no longer undertaking as much "hands on direct care" and as a result PCWs work "under the general supervision of RNs rather than alongside the RN".[683] In relation to home care, Mr Sewell stated that HCWs usually work alone and do not receive direct or in-person supervision.[684]

662 The Consensus Statement supports a finding that PCWs/AINs have increased responsibilities and perform work with less direct supervision:

> PCWs are being required to perform duties that were traditionally undertaken by nurses (such as peg feeding and catheter support) after receiving relevant training and/or instruction. Care workers in both residential care and home care are performing increasingly complex work along with the increasing complexity of the needs of residents entering care. There are more expectations of care workers to detect changes in resident or client condition, identify elder abuse and assist with medications and other treatments.[685]

663 In relation to home care, the Consensus Statement notes that home care workers work with minimum supervision and, due to the increasing acuity and dependency if recipients of care, exercise more independent decision-making, problem solving and judgment on a broader range of matters.[686]

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678 Amended witness statement of Veronique Vincent dated 19 May 2022 at [108]-[109].

679 Witness statement of Judeth Clarke 29 March 2021 at [18].

680 Witness statement of Judeth Clarke 29 March 2021 at [18].

681 Witness statement of Paul Jones dated 1 April 2021 at [28].

682 Witness statement of Johannes Brockhaus dated 3 March 2022 at [28]-[29].

683 Witness statement of Mark Sewell at [114]-[115].

684 Witness statement of Mark Sewell at [120]-[121].

685 Consensus Statement at [16].

686 Consensus Statement at [19].

Contention 9: There has been an increase in regulatory and administrative oversight of the Aged Care Industry.

664 Chapter 6.4 sets out the system of regulation of the aged care sector and we need not repeat that evidence here.

665 The expert witnesses gave evidence regarding the impact of the increase in regulatory and administrative oversight in the aged care sector.

666 Prof Meagher emphasises that there has been "considerable change" in the regulatory environment for residential aged care, and associated with these changes has been the imposition of new standards, policies and procedures creating "considerable demands on both the care staff and the administrative staff, to learn and adapt".[687]

667 In cross-examination Prof Meagher was asked to expand on this evidence and made the following observations:

> MR WARD: I take it that aged care facilities have always had to have quality assurance systems?
>
> PROF MEAGHER: Certainly in the last three decades, yes.
>
> MR WARD: Is what's changed the nature of the quality assurance system, or is it just that it's now more policed?
>
> PROF MEAGHER: I think both — well, certainly the nature of the system has changed sort of in different ways over time. So there's a kind of learning burden on organisations and the people who have to take carriage of this work. There has also been an increased use of information technology. I mean, some of that could make some things easier to do and some of it means it's also learning and new skills as well with new systems. But I think there have also been — there are also more standards are being added, as well as changing standards, yes.[688]

668 Prof Meagher's evidence is that this trend extends to home care where "prevailing regulatory and community standards have increased expectations of the capacity and quality of home care and support".[689]

669 There was considerable lay witness evidence about the impact of changes in the accountabilities of care staff, changes in regulation and residents' expectations. This included evidence about the Aged Care Quality Standards, Aged Care packages, the SIRS, ACFI accreditation, and a reduced use of chemical and physical restraints.

670 Many lay witnesses working in residential facilities and home care settings gave evidence that reporting requirements meant workers were spending more time completing documentation, charting or "paperwork" than in the past.[690]

687 Meagher Report at p 24.

688 Transcript, 2 May 2022, PN2730-PN2731.

689 Meagher Supplementary Report at 20.

690 Witness statement of Maree Bernoth dated 29 October 2021 at [36]; Witness statement of Catherine Goh dated 13 October 2021 at [36]; Amended witness statement of Linda Hardman dated 9 May 2022 at [34]; Amended witness statement of Suzanne Hewson dated 6 May 2022 at [25]; Witness statement of Jocelyn Hofman dated 29 October 2021 at [43]; Amended witness statement of Wendy Knights dated 23 May 2022 at [66]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [42]; Witness statement of Susan Morton dated 27 October 2021 at [32]; Witness statement of Josephine Peacock dated 30 March 2021 at [142]; Witness statement of Marea Phillips dated 27 October 2021 at [44]; Witness statement of Helen Platt dated 29 March 2021 at [84]; Witness statement of Christine Spangler dated 29 October 2021 at [26]; Witness statement of Jane Wahl dated 21 April 2022 at [41].

671 Employer witnesses also gave evidence of the increased regulatory burden on aged care workers. Mark Sewell, CEO of Warrigal, noted that while the aged care industry has always been very highly regulated, the level of regulation has increased with time.[691] Similarly Johannes Brockhaus, CEO of Buckland, emphasised that the amount of auditing and reporting now required is "extensive" and that many compliance-based duties are now undertaken by RNs.[692]

672 The Consensus Statement notes that there has been a change in the regulatory regime of the aged care sector which has meant that nurses and care workers "are required to meet increased quality and safety standards and meet increased documentation requirements".[693]

Contention 10: More residents and clients in aged care require palliative care.

673 The expert evidence supports a finding that there has been an increase in aged care residents and clients who require palliative care.

674 Prof Eagar estimates that in any one year 60,000 aged care residents die and another 60,000 will take their place, resulting in a 1 in 3 turnover and emphasises the impact of these deaths on aged care workers:

> Those 60,000 deaths will be people who have grieving families and friends. The aged care worker will often be the first point of contact for the family. Aged care workers are frequently required to contact family members to inform them of the death of a resident. Aged care workers are also required to pack up a resident's belonging[s] after they die and return belongings to the person's family.
>
> This one in three turnover has broader implications. Aged care workers deal daily with residents who are grieving for their friends who have died while in the same home. At the same time, aged care workers must settle in new residents, deal with anxious families and maintain the usual routine of the home. There is now a level of emotional stress associated with aged care that is significantly higher than in the past when the resident population was less frail.[694]

675 Assoc Prof Junor found that as people are staying at home longer, they are increasingly entering residential aged care at the point of receiving palliative care. As a result, the responsibility for supporting the transition to end of life has increasingly been borne by aged care workers.[695]

676 Assoc Prof Junor emphasised that aged care workers required "significantly increased" knowledge and technical, social and organisation skills to manage the increase in the numbers of residents with serious co-morbidities or receiving end-of-life care.[696] She noted that the responsibility of supporting a resident and their family through end-of-life care is a "heavy one" that involves discussions and updating of the care plan, guiding the family, providing reassurance, managing guilt and providing time to think and make decisions.[697]

677 Similarly, Prof Kurrle noted that the majority of residents die in a residential

691 Witness statement of Mark Sewell dated 3 March 2022 at [30].

692 Witness statement of Johannes Brockhaus dated 3 March 2022 at [26]-[27].

693 Consensus Statement at [23].

694 Eagar Report at 12.

695 Junor Report Annexure 7 at [16].

696 Junor Report at [43].

697 Junor Report Annexure 7 at [19].

aged care facility and as a result managing end-of-life care is a "particularly specialised area of care and requires a degree of skill and knowledge".[698]

678 Prof Meagher noted that the increase in palliative care has also occurred in the home care sector, as people are increasingly remaining at home longer resulting in a "significant majority" of recipients of care dying at home, raising the need for palliative home care.[699] Pro Meagher found that approximately 1 in 20 recipients die within 3 months of entering home care and more than a third die within 3 years.[700]

679 Many lay witnesses gave evidence that there is an increasing need to provide palliative care and for the skills required in the provision of end-of-life care.

680 Assoc Prof and RN Maree Bernoth stated that the need for palliative care by residents has been increasing, with a higher ratio of patients entering aged care facilities at the end of their life, requiring more intensive and specialised care.[701]

681 AIN Alison Curry gave detailed evidence of the role of care staff at end of life, including closely monitoring the resident prior to their passing, comforting family members and other residents, preparing, cleaning and dressing the body, assisting funeral home staff, completing documentation and providing pastoral care to residents and other staff.[702]Ms Curry emphasised the impact palliative care has on the aged care workers involved:

> All this work will often be conducted in circumstances of extreme emotional labour on the parts of the carer. We form close attachments to our residents. It is truly sad when they pass. This process comes with a heavy psychological burden for carers.[703]

682 Nurse Practitioner Hazel Bucher emphasised the skill involved in providing palliative care:

> Palliative care takes time, experience and skill. It requires calm unhurried discussions with families and the residents to work through expectations, fears and desires, so death can be peaceful and grief uncomplicated. Both formal learnt and informal skills and experience are required. In my experience there is a significant increase in palliative care provided in RACFs [residential aged care facilities] compared to ten years ago, when more frequent transfer to hospital occurred for palliative care and pain relief.[704]

683 Employer lay witnesses Kim Bradshaw, General Manager at Warrigal, and Emma Brown, Special Care Project Manager at Warrigal, both gave evidence during cross-examination that the need for palliative care has intensified, as residents are staying at home longer and entering residential facilities at the point of receiving end-of-life care.[705]

684 The Royal Commission found that palliative and end-of-life care was a "necessary component of aged care services":

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698 Kurrle Report at 11.

699 Meagher Supplementary Report at 13.

700 Meagher Supplementary Report at 3.

701 Witness statement of Maree Bernoth dated 29 October 2022 at [39].

702 Witness statement of Alison Curry dated 30 March 2021 at [53]-[75].

703 Witness statement of Alison Curry dated 30 March 2021 at [60].

704 Amended witness statement of Hazel Bucher dated 10 May 2022 at [48].

705 Transcript, 11 May 2022, PN12805-PN12807; Transcript, 12 May 2022, PN13420-PN13434.

> The need for skilled provision of palliative and end-of-life care in aged care services is likely to increase with an ageing population that will experience higher rates of chronic illness, including cognitive impairment. The clear delineation of aged care providers' responsibilities and increased workforce expertise and capability in palliative care is urgent and essential. Older people with complex care needs should also have equitable access to specialist palliative care services.[706]

Contention 11: Employers in the aged care industry increasingly require that PCWs and AINs hold Certificate III or IV qualifications.

685 The 2020 Workforce Report provides data on the proportion of care workers who have Certificate III and IV qualifications.

686 Table 11 below presents the proportion of PCWs in the Residential Aged Care (RAC) and in-home care workforce who have a Certificate III or IV in aged care or a relevant direct care field. This data was submitted by the Commonwealth, citing the National Aged Care Work Census of 2003, 2007, 2012, 2016 and 2020:[707]

Table 11: Proportion of personal care workers in RAC and in-home care workforce with Certificate III or IV

	2003 (%)	2007 (%)	2012 (%)	2016 (%)	2020 (%)
RAC					
A relevant Certificate III or higher	n/a	n/a	n/a	n/a	66
Certificate III in aged care	65.0	65.0	65.7	67.4	54.9
Certificate IV in aged care	8.0	13.0	20.0	22.9	11.1
In-home care					
A relevant Certificate III or higher	n/a	n/a	n/a	n/a	HCPP: 63 CHSP: 71
Certificate III in aged care	n/a	48.3	48.1	50.9	n/a
Certificate IV in aged care	n/a	6.2	13.3	12.2	n/a

Source: Commonwealth submission dated 8 August 2022, Annexure B, Table B12.

687 There was a change in 2020 in how this data was collected. The 2020 data was obtained directly from the providers, while in 2016 the data was self-reported by employees. Further, the data obtained in 2020 included agency/subcontractor roles, while these roles were excluded in the data collected in 2016.[708] Due to these differences, the Commonwealth has cautioned that care must be taken when comparing data between 2016 and 2020.[709]

688 For PCWs in residential aged care, around two-thirds had a Certificate III in

706 Royal Commission Final Report Vol 3A, at 117.

707 Commonwealth submission dated 8 August 2022 Annexure B, Table B12.

708 Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 17, 55.

709 Department of Health, 2020 Aged Care Workforce Census Report (Report, 2 September 2021) at 17.

aged care between 2003 and 2016. However, in 2020, this proportion fell to 54.9 per cent. The proportion that had a Certificate IV in aged care increased from 8 per cent to 22.9 per cent between 2003 and 2016. However, in 2020 this fell to 11.1 per cent. The data in 2020 are significantly different compared to 2016 for both Certificate III and IV, and it is unclear how much of this is due to the change in the data collection methodology.

689 For HCWs in the in-home care workforce, around half had a Certificate III in aged care between 2007 and 2016. The proportion that had a Certificate IV in aged care increased from 6.2 per cent in 2007 to 12.2 per cent in 2016.

690 Data obtained in 2020 did not differentiate between PCWs who held a Certificate III or a higher qualification and instead these workers were grouped together. This data was also presented separately for in-home care employees covered by the HCPP and the CHSP. For the HCPP, 63 per cent of employees had a relevant Certificate III or higher, while this proportion was higher for CHSP employees (71 per cent).

691 Many lay witnesses gave evidence that their employer requires PCWs,[710] AINs,[711] or staff generally,[712] to hold a Certificate III or higher qualification, and many stated that this was a new requirement.[713] For example, AIN Linda Hardman gave evidence of the changing expectations regarding qualifications over her 20 years in the industry:

> There is an increased expectation that staff have a minimum of a Certificate III in Aged Care, or are working towards this qualification. This was not in place when I started working in aged care 20 years ago.
>
> This is the sense I get based on the kinds of people that are hired to work at Estia Figtree. 20 years ago, it was common for people to learn on the job. These days, nearly everybody that is hired has a Certificate III, at least.[714]

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710 Amended witness statement of Kerrie Boxsell dated 19 May 2022 at [5]; Witness statement of Sally Fox dated 29 March 2021 at [16]; Witness statement of Theresa Heenan dated 20 October 2021 at [107]; Witness statement of Sandra Hufnagel dated 30 March 2021 at [16]; Transcript, 11 May 2022 at PN11597; Witness statement of Sandra O'Donnell dated 25 March 2021 at [17]; Transcript, 11 May 2022 at PN11696; Witness statement of Bridget Payton dated 26 October 2021 at [23]; Transcript, 5 May 2022 at PN6409, Witness statement of Tracy Roberts dated 23 March 2021 at [4]; Witness statement of Lorri Seifert dated 10 June 2021 at [122]-[124], Witness statement of Susan Toner dated 28 September 2021 at [2]; Witness statement of Veronique Vincent dated 19 May 2022 at [21].

711 Witness statement of Sherree Clarke dated 29 October 2021 at [44]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [48].

712 Amended witness statement of Carol Austen dated 20 May 2022 at [8]; Amended witness statement of Susan Digney dated 19 May 2022 at [9]; Witness statement of Kristy Youd dated 24 March 2021 at [25].

713 Amended witness statement of Carol Austen dated 20 May 2022 at [8]; Witness statement of Theresa Heenan dated 20 October 2021 at [107]; Witness statement of Sandra Hufnagel dated 30 March 2021 at [16]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [48]; Witness statement of Sandra O'Donnell dated 25 March 2021 at [17]; Witness statement of Lyndelle Park dated 31 March 2021 at [15]; Transcript, 11 May 2022, PN11696; Witness statement of Tracy Roberts dated 23 March 2021 at [4]; Amended witness statement of Veronique Vincent dated 19 May 2022 at [21]; Witness statement of Kristy Youd dated 24 March 2021 at [25].

714 Amended witness statement of Linda Hardman dated 9 May 2022 at [54]-[55].

692 The employer witnesses confirmed that employers increasingly encourage their employees to obtain Certificate III or IV qualifications.[715]

693 This was echoed by the union official lay witnesses who stated that for employees to secure a job as a PCW in both residential and home care it is usually a requirement that they have, at a minimum, a Certificate III qualification.[716]

694 The Royal Commission Final Report noted that there is currently no minimum mandatory qualification for PCWs[717] and recommended the Aged Care Certificate III as the mandatory minimum qualification.[718]

Contention 12: The philosophy or model of aged care has shifted to one that is person-centred and based on choice and control, requiring a focus on the individual needs and preferences of each resident or client. This shift has generated a need for additional resources and greater flexibility in staff rostering and requires employees to be responsive and adaptive.

695 This contention is supported by the expert evidence.

696 Prof Meagher states that community expectations around the character and quality of aged care have increased in the past decades, with contemporary models of care rejecting the "institutionalisation" of older people in favour of person-centred models of care. Person-centred care is "adapted to the needs of each individual older person" and is "grounded in caring relationships in aged care settings" between residents and their carers, and between carers and the families of residents.[719] Prof Meagher states that the standards introduced in 2019, emphasised choice, control and dignity of older people who receive care. Prof Meagher sets out the Standards as they relate to person-centred care:

- Standard 1 of the ACQS establishes the principles of dignity and choice for older people in relation to their care and supports. In recognising older people's dignity and autonomy, their identity, culture and diversity are to be respected, as is their privacy.
- Standard 2 positions older people as partners in ongoing assessment and planning that helps ensure they receive the care and support that they need for their health and well-being. Plans must meet the older person's goals and preferences, and focus on their abilities. Plans should be regularly reviewed and revised as necessary. They should be documented, and documentation should be available to the older person and those who care for them.
- Standard 3 requires organisations to deliver safe and effective personal and clinical care in accordance with the older person's goals and preferences, to optimise their health and well-being. Significantly, in the context of the poor performance of some residential care providers during the COVID-19 pandemic in 2020, Standard 3 includes requirements related to infection control.

715 Witness statement of Mark Sewell dated 3 March 2022 at [92]; Witness statement of Johannes Brockhaus dated 3 March 2022 at [14]; Witness statement of Anna-Maria Wade dated 23 May 2022 at [46].

716 See Supplementary witness statement of Christopher Friend dated 29 October 2021 at [57]; Witness statement of David Eden dated 12 October 2021 at [42]; Witness statement of James Eddington dated 5 October 2021 at [67].

717 Royal Commission Final Report Vol 2 at 215.

718 Royal Commission Final Report Vol 1 at 261, Recommendation 78.

719 Meagher Report at 14.

- Standard 4 relates the ideals of person-centred care to supports for daily living, which explicitly include cleaning, laundry, food service, gardening and maintenance. Under this standard, these supports should respond to individual needs, goals and preferences, and promote each older person's emotional, spiritual and psychological well-being. When older people are less able than before to manage day-to-day activities, providers are expected to take a reablement approach to delay decline.
- Standard 5 requires providers to offer a welcoming, physically and culturally safe and comfortable service environment that promotes older people's independence, sense of belonging, capacities and enjoyment.
- Standard 6 requires organisations to seek feedback and receive complaints, as relevant, from all stakeholders and use these to inform continuous improvements for older people and the organisation, in open and culturally appropriate ways.
- Standard 7 requires organisations to have a workforce of sufficient size, that is skilled and qualified to provide safe, respectful and quality care. This includes the requirement that organisations ensure that workers' interactions with older people are kind, caring, and respectful of each person's identity, culture and diversity.
- Standard 8 requires providers to have a governing body that is accountable for the delivery of safe and high quality care. Older people must be supported to engage in evaluating services and effective organisational and clinical governance need to be in place.[720]

697 Prof Meagher notes the rise of residential aged care facilities arranged in "clustered domestic" or "household" models to enact the person-centred care framed in the Standards. Prof Meagher states that, in the household model, tasks that would be conducted by ancillary staff in traditional facilities are performed by PCWs, such as preparing meals, cleaning and laundry, requiring additional organisational and relational skills of PCWs.[721]

698 Prof Meagher also notes that the work of ancillary staff in residential care, in addition to PCWs, has also become more demanding in response to the changing community and regulatory expectations about care quality, and that the responsibility for delivering person-centred care is a "whole of staff responsibility".[722]

699 Prof Meagher found that the increased expectations of "person-centred care" extended to home care:

> As in residential care, responsibility for realising increased expectations falls to home care and support staff, who are required to care for and support older people in ways that respond to their individual needs, goals and preferences, and promote their emotional, spiritual and psychological well-being in all aspects of their work. Again, as in residential care, to provide person-centred and relationship-based care, a task-oriented approach to aged care work is not appropriate. Instead, home care and support staff need to get to know each older person as an individual, and be enabled with the skills, knowledge and work environment necessary to provide care that meets each person's specific needs.[723]

700 Prof Eagar[724] and Prof Kurrle[725] gave corroborating evidence.

720 Meagher Report at 15-16.

721 Meagher Report at iii.

722 Meagher Report at 23.

723 Supplementary Meagher Report 20.

724 Eagar Report 3-4.

701 The lay witness evidence demonstrates the impact of the transition towards person-centred care on the work and responsibility of aged care workers.[726] Witnesses spoke of the difficulty in balancing individual choice with what they consider to be in the best interests of the person and with establishing efficient routines to ensure the completion of necessary tasks.[727]

702 Lay witnesses also gave evidence of the need for additional resources and greater flexibility in providing person-centred care. Wendy Knights, EN in a residential facility, describes the additional flexibility required in adapting to individual preferences:

> … there is now a lot more consumer choice, especially under the new Aged Care Standards introduced in 2018. For example, some residents want to sleep until 10 am or 11 am each day. This means their morning medication is actually given at lunchtime. Then their lunchtime medication is given at 5 pm.
>
> That makes medications (as well as other care needs like toilets like personal care or meals) more complex. It used to be that you were able to structure your work or establish routines around the kinds of work that you would be doing at particular times. Now, you cannot do that — different work is required for different residents at different times, based on their preferences.
>
> Again, that is a good thing for residents, and I support it. But it is less efficient for aged-care workers, and so involves more work.[728]

703 Alison Curry, AIN in a residential care facility, also gave evidence of the shift to person-centred care disrupting aged care workers' routines, making work more challenging and time consuming:

> Before person-centred care was introduced, the structure of our shift was more regimented. We would do our rounds and every resident would shower, get dressed and eat at roughly the same time every day.
>
> The shift to person-centred care has had a major impact on the way we structure our shift. We have increased our quality of care to be more person-centred to accommodate the resident's choice. Whenever a resident wants to do something, we are expected to be there to provide assistance to them. We are to treat them as if they are effectively in their own home and making their own decisions about when they want to do something. For example, if a resident's care plan states that they prefer to shower in the morning but on a particular day they say they want to shower after lunch, we then have to change our schedule to make this happen. We have to remember to come back to that resident and find time in our day to make sure they are showered at a different time to when we had set aside time for this task. This means we have to use time management skills and be easily adaptable to residents' needs and wants. We need to be adaptable, able to prioritise and also manage resident's expectations. This requires strong interpersonal and communication skills.[729]

704 The employer lay witnesses also emphasised the shift in focus towards person-centred care.[730]

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725 Kurrle Report p 10.

726 See Lay Witness Report at [291].

727 Amended witness statement of Wendy Knights dated 23 May 2022 at [42]-[44], [48]. Witness statement of Linda Hardman, 9 May 2022 at [43]-[45].

728 Amended witness statement of Werndy Knights, 23 May 2022 at [42]-[44].

729 Reply witness statement of Alison Curry, 20 April 2022 [71]-[72].

730 See Witness statement of Emma Brown dated 2 March 2022 a [23]-[25]; Amended witness statement of Craig Smith dated 23 May 2022 at [28]-[40].

705 Emma Brown, Special Care Project Manager at Warrigal stated that the focus on consumer dignity and choice has impacted the work performed by PCWs as it may no longer be as routine:

> By offering choice this also places the emphasis on the care workers having to have understanding and knowledge of each of their customers to ensure that their choices and preferences are followed. For example, rather than starting from room one and showering the resident then moving onto room two, the personal care worker may need to perform these tasks at different times.[731]

706 The philosophy of person-centred care was strongly reflected in the findings and recommendations of the Royal Commission. The Royal Commission recommended that the new system for aged care should be based on the protection and promotion of the rights of the people who require support and care. The rights-based approach to aged care provides older people with agency, choice and control over their care.[732] It also recognises that aged care providers and employees have a duty to provide the highest quality care while respecting the dignity and choices of those receiving care.[733]

707 The Consensus Statement also notes that the philosophy of person-centred care is "based on choice and control" and requires a focus on the individual needs of each resident and client.[734] In relation to home care, the Consensus Statement states that consumer-directed HCPs mean that home care workers engage in a "less structured stream of duties" and must "plan and adapt to different duties and levels of expectations from client to client".[735]

Contention 13: Aged care employees have greater engagement with family and next of kin of clients and residents.

708 The expert evidence supports a finding that aged care employees have greater engagement with family and next of kin.

709 Prof Charlesworth found that aged care employees "are the main conduit for communication with residents' families" and may be required to manage disputes between family members about their relative's care.[736] Similarly, Prof Meagher stated that families often look to PCWs "as the first line of communication" regarding the care of their relative, with PCWs required to carefully manage family expectations:

> Here, personal care assistants are called upon to exercise careful judgement about the kind and extent of information they provide to families, along with sensitivity and compassion during what can be very difficult times.[737]

710 Prof Meagher also highlighted the expectations placed on aged care workers to engage with family members in delivering the high quality, person-centred care mandated by the Standards. Prof Meagher noted the interactions and collaborations workers are expected to engage in including the expectation that workers will engage sensitively and professionally with families, "engaging

731 Witness statement of Emma Brown dated 2 March 2022 at [24]-[25].

732 Royal Commission, Final Report, Vol 1 at 14.

733 Royal Commission, Final Report, Vol 1 at 15.

734 Consensus Statement at [9].

735 Consensus Statement at [17].

736 Charlesworth Report at [51]; Supplementary Charlesworth Report at [73].

737 Meagher Report at 30.

them in care planning according to the older person's wishes", and to make "aged care facilities welcoming to families and friends, and to connect older people to their communities".[738]

711 Many lay witnesses gave evidence about having regular interactions with residents' and community care clients' families,[739] with several giving evidence that family expectations and the level of engagement with families required of care staff have increased.[740]

712 For example, Nurse Practitioner Hazel Bucher stated that over time interactions with families have become more frequent, with family expectations about feedback and consultation increasing.[741] Similarly, Wendy Knights, an EN in a residential care facility said carers and nurses now interact more with families and this carries an additional documentation burden:

> I think there is now a lot more interaction between the care staff and the family members of residents. I think several decades ago the input from families was relatively minimal and the requirement to consult families was less. Over the last decade, and especially as care standards have been under question, many families are increasingly active in requesting or advocating for their loved ones. This is great and was sorely needed. However, each interaction has to be responded to and documented. Sometimes there are conflicts between the family expectations and what we see as the care needs of the resident. Also, sometimes family don't understand the constraints we work under in terms of resources. I think that dealing with these issues requires skills that are relatively new — for both ENs and carers.[742]

713 Lay witnesses also gave evidence of the emotional toll on care workers from their engagement with residents' families. For example, PCW Donna Kelly provided the following evidence about family interactions involving end of life care:

> The more frail and high needs a resident is the more family engagement that ECAs have with their families and the resident. The families need a lot of support. Their mum or dad is deteriorating and they are upset and scared. We provide end of life care for most residents (as few choose to go to hospital now). This requires ECAs to comfort the resident and their family. I am in tears frequently. After they

738 Meagher Report at 16.

739 See Witness statement of Eugene Basciuk dated 28 May 2022 at [50]; Witness statement of Catherine Evans dated 26 October 2021 at [53]; Witness statement of Michelle Harden dated 30 March 2021 at [42]-[43]; Amended witness statement of Suzanne Hewson dated 6 May 2022 at [28]; Amended witness statement of Hazel Bucher dated 10 May 2022 at [43d]; Reply witness statement of Mark Castieau dated 20 April 2022 at [17]-[18]; Reply witness statement of Alison Curry dated 20 April 2022 at [47]-[52]; Reply witness statement of Fiona Gauci dated 19 April 2022 at [63]-[69]; Reply witness statement of Donna Kelly dated 20 April 2022 at [18]-[20]; Amended witness statement of Wendy Knights dated 23 May 2022 at [78]; Witness statement of Pamela Little dated 30 March 2021 at [28e]; Witness statement of Helen Platt dated 29 March 2021 at [37]; Reply witness statement of Antoinette Schmidt dated 20 April 2022 at [28]-[29]; Witness statement of Susan Toner dated 28 September 2021 at [30]-[31]; Witness statement of Jane Wahl dated 21 April 2022 at [39].

740 Amended witness statement of Hazel Bucher dated 10 May 2022 at [43(d)]; Reply witness statement of Mark Castieau dated 20 April 2022 at [17]-[18]; Reply witness statement of Alison Curry dated 20 April 2022 at [47]-[48]; Reply witness statement of Fiona Gauci dated 19 April 2022 at [63]-[69]; Amended witness statement of Wendy Knights dated 23 May 2022 at [78].

741 Amended witness statement of Hazel Bucher dated 10 May 2022 at [41].

742 Amended witness statement of Wendy Knights dated 23 May 2022 at [78].

> pass, I tell families that their loved ones are finally at peace. This is one of the hardest things I do. I associate with them as I think about my mum. I really empathise.[743]

714 Witnesses also gave evidence of the difficulty navigating family conflict about the care being given to a relative. For example, AIN Alison Curry gave the following evidence:

> We also have to be aware of family dynamics and what we communicate to each family member. For example, one member of a family has told me they want us to take every intervention possible to assist a resident who is unwell, while another has told me they want us to just make the resident as comfortable as possible. We must try not to get caught up in these conflicting views and deliver the care the resident requires as per their care plan.[744]

715 Employer lay witnesses also gave evidence about increased interaction between aged care workers and residents' families. This evidence was somewhat nuanced stating that engagement with families has always been an expectation of care workers, that the content of the engagement is limited and within the scope of their role, while acknowledging that families have become more demanding and the frequency of engagement has increased.[745]

Contention 14: There is an increased emphasis on diet and nutrition for aged care residents.

716 Prof Meagher found that aged care residents have diverse and specialised food needs, including due to a high prevalence of diabetes, gastrointestinal disorders and cardiovascular disorders that require special diets. Prof Meagher stated that these special diets are accompanied by an emphasis on choice of meals and high-quality mealtime experiences as part of the delivery of "person-centred care":

> ensuring that older people living in residential aged care are well-nourished requires a holistic approach, which engages food service and care staff along with older people and their families, and which takes into account factors related to food (texture, appearance, nutritional value) and to the social organisation of eating and mealtimes (enabling autonomy and dignity, and including assistance as required).[746]

717 During cross-examination Prof Meagher expanded on her evidence, emphasising that diet and nutrition is both a "nutritional activity" and a "psycho-social activity":

> [older people] have complex food needs because of their health conditions and various needs in the areas of activities of daily living, and feeding and swallowing and things like that, on the one hand, and on the other hand the importance of meal-times in providing a kind of — the kind of person-centred high-quality care where the daily life has got some moments of pleasure in it and food can be part of that. It's a kind of a psycho-social activity as well as just a nutritional activity.[747]

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743 Reply witness statement of Donna Kelly dated 20 April 2022 at [22].

744 Reply witness statement of Alison Curry dated 20 April 2022 at [55].

745 Witness statement of Johannes Brockhaus dated 3 March 2022 at [43]-[44]; Witness statement of Emma Brown dated 2 March 2022 at [80]; Witness statement of Paul Sadler dated 1 March 2022 at [90]; Witness statement of Mark Sewell dated 3 March 2022 at [111].

746 Meagher Report at 22.

747 Transcript, 2 May 2022, PN2692.

718 The Royal Commission emphasised that diet, nutrition and food are critical to the health and wellbeing of older people:

> Food must meet the body's needs to maintain organs and body systems, to repair injury, to fight off or recover from illness or infection and to maximise physical and cognitive capacity. People with higher levels of frailty require greater levels of protein and other nutrients to reduce the rate of decline. Food is also important to provide enjoyment through taste and smell. It stimulates memories.[748]

719 The Royal Commission also emphasised that the failure to ensure good nutrition for older people can have significant, and often irreversible, consequences:

> malnutrition is associated with an increased incidence of falls and fractures and increased time for pressure injuries to heal. Weight loss in older people can increase the risk of infection, impair the body's ability to repair wounds, decrease muscle mass and affect the ability to sit and to eat, as well as increase the risk of pneumonia. In extreme cases, it can result in multiple organ failure.[749]

720 The lay witness evidence also supports a finding that there is an increased emphasis on diet and nutrition.

721 Donna Cappelluti, Food Services Assistant, gave evidence that more food is being prepared now than in the past as the diet requests of residents have changed:

> When I first started residents only needed vitamised foods or minced/moist food or soft or normal food. Now, we still have all of those foods plus lactose and gluten free foods, vegan, vegetarian and high protein diets. Essentially very specialised diets.
>
> These changes occurred because the residents are arriving at an older age and living longer. They have more health conditions. Also, SCC provides more client centred care and try to cater for individual resident's and their family's needs and requests.[750]

722 Chef Mark Castieau gave evidence that the number of residents requiring specialised diets is increasing, with approximately 50 per cent of residents at St Vincent's now requiring modification to their diet.[751]

723 Care Services Employee Paul Jones emphasised the importance of care workers having knowledge of each resident's nutrition and dietary needs:

> Some residents who have difficulty swallowing have a modified diet. In order to make sure all residents are able to safety [sic] ingest their food, I am required to be familiar with the dietary needs of each resident, including whether they have allergies, and their ability to swallow different consistencies of food. Whether or not residents are able to eat their food properly and therefore have adequate nutrition is obviously fundamental to their health and wellbeing.
>
> …
>
> Each resident's feeding and dietary needs are documented in their individualised care plan. However, it is part of my job to monitor each resident for changes in how they are eating, and make sure this is reflected in their care plan.

748 Royal Commission Final Report Vol 2 at 115.

749 Royal Commission Final Report Vol 2 at 115.

750 Reply witness statement of Donna Cappelluti dated 21 April 2022 at [12]-[13].

751 Witness statement of Mark Castieau dated 29 March 2021 at [50].

> Changes can occur very swiftly in aged care residents. For instance, if a resident's ability to swallow deteriorates, this will impact on what food they are to be given, and so this needs to be observed and updated.[752]

724 HCWs also gave evidence of the need to focus on a client's nutrition and diet. For example, in-home support worker Susanne Wagner gave the following evidence:

> Malnutrition and dehydration is a common problem among [the] elderly, and I need to be aware of signs such as unexplained weight loss reduced appetite, lack of interest in food and drink, feeling tired all the time, feeling weaker, getting ill often and taking a long time to recover, wounds taking a long time to heal, poor concentration, feeling cold most of the time etc … and dehydration: fatigue or lethargy, muscle weakness and cramps, cracked lips, headaches, dizziness, nausea, forgetfulness and confusion, deep rapid breathing or an increased heart rate or low blood pressure.[753]

Contention 15: There is expanded use and implementation of technology in the delivery and administration of care.

725 Prof Charlesworth identified technological and digital capabilities as being one of the types of skills increasingly required in personal care in both residential[754] and home settings.[755]

726 In relation to residential care, Prof Meagher noted that increasing use of, and changes in, information technology used in relation to resident care and health status documentation, business record keeping, business administration and regulatory compliance activities requires care and administrative staff to learn and adapt.[756]

727 In relation to home care, Prof Meagher identifies the take-up of digital technologies as a driver of change noting that some aspects and challenges of the digital transformation of care are distinctive to home care because home care and support clients are dispersed in the community and live in private homes, and HCWs are mobile, not stationed in a workplace.[757] In cross-examination, Prof Meagher stated that while some of the increased use of technology could make some things easier to do, it also means learning new skills and systems.[758]

728 Prof Kurrle noted that residential care involved a high level of documentation, and that the electronic systems now in use require further training.[759]

729 The lay witness evidence broadly identified an increase in the use of technology in the delivery of care.[760] Lay witnesses frequently referred to

752 Witness statement of Paul Jones dated 1 April 2021 at [32], [34].

753 Witness statement of Susanne Wagner dated 28 October 2022 at [64].

754 Charlesworth Report at [52].

755 Supplementary Charlesworth Report at [71d].

756 Meagher Report at 8, 24.

757 Meagher Supplementary Report at 14-15.

758 Transcript, 2 May 2022, PN2731.

759 Kurrle Report at 5.

760 Witness statement of Maree Bernoth dated 29 October 2021 at [56]; Witness statement of Geronima Bowers dated 1 April 2021 at [31]; Witness statement of Sheree Clarke dated 29 October 2021 at [61]-[62]; Witness statement of Fiona Gauci dated 29 March 2021 at [47]-[48], [57]; Witness statement of Paul Jones dated 1 April 2021 at [42]; Reply witness

computerised record keeping systems and mechanical aids such as lifters as examples of new technologies. The evidence as to the impact of the increasing reliance on technology was inconsistent. Lay witnesses varyingly reported:

- the increasing use of technologies assisted them in their work[761]
- it had not necessarily made their work easier[762]
- the new technologies required them to learn new skills[763]
- training is now often delivered online, creating difficulty for less computer literate staff,[764] and
- they are expected to or do assist residents or clients with using technology.[765]

730 Employer lay witnesses also gave evidence about technological changes that have been introduced.

731 Paul Sadler, CEO of ACSA, gave evidence that over the last two decades and particularly in the last decade there have been technological changes in the industry:

> There have been advancements in monitoring equipment, case management systems, medication charts, assistive technology and rostering systems. For example, rosters are now generally given to employees through an app. Through this app, it can also send out an alert to available employees to pick up shifts, put in their leave and communicate the rostering team.

(cont)

statement of Donna Kelly dated 20 April 2022 at [31]-[33]; Amended statement of Wendy Knights dated 23 May 2022 at [46]; Witness statement of Pamela Little dated 30 March 2021 at [61]; Witness statement of Tracy Roberts dated 23 March 2021 at [148]-[149]; Witness statement of Paul Sadler dated 1 March 2022 at [94]-[96], Witness statement of Mark Sewell dated 3 March 2022 at [60].

761 Amended witness statement of Kerrie Boxsell dated 19 May 2022 at [47]-[48]; Witness statement of Judeth Clarke dated 29 March 2021 at [34]; Amended witness statement of Virginia Mashford dated 6 May 2022 at [50]; Witness statement of Paul Sadler dated 1 March 2022 at [95]-[98].

762 Witness statement of Judeth Clarke dated 29 March 2021 at [27]; Amended witness statement of Susan Digney dated 19 May 2022 at [5]-[53]; Reply witness statement of Virginia Ellis dated 20 April 2022 at [43]-[48]; Reply witness statement of Lynette Flegg dated 14 April 2022 at [25]-[33]; Reply witness statement of Fiona Gauci dated 19 April 2022 at [58]-[62]; Amended reply witness statement of Jade Gilchrist dated 20 May 2022 at [8]; Reply witness statement of Paul Jones dated 20 April 2022 at [19]-[22]; Reply witness statement of Darren Kent dated 21 April 2022 at [31]; Reply witness statement of Sandra O'Donnell dated 13 April 2022 at [60]-[66]; Reply witness statement of Kathy Sweeney dated 14 April 2022 at [50]-[55]; Reply witness statement of Kristy Youd dated 19 April 2022 at [73]-[76].

763 Witness statement of Sheree Clarke dated 29 October 2021 at [61]-[62]; Amended reply witness statement of Jade Gilchrist dated 20 May 2022 at [8]; Reply witness statement of Donna Kelly dated 20 April 2022 at [33]; Amended witness statement of Patricia McLean dated 9 May 2022 at [77]; Witness statement of Paul Sadler dated 1 March 2022 at [98]; Reply witness statement of Antoinette Schmidt dated 20 April 2022 at [25]; Witness statement of Mark Sewell dated 3 March 2022 at [86].

764 Witness statement of Geronima Bowers dated 1 April 2022 at [31]; Amended witness statement of Pauline Breen dated 9 May 2022 at [21]; Witness statement of Judeth Clarke dated 29 March 2021 at [26]; Reply witness statement of Lynette Flegg dated 14 April 2022 at [31].

765 Reply witness statement of Virginia Ellis dated 20 April 2022 at [53]; Reply witness statement of Sally Fox dated 14 April 2021 at [28]; Amended reply witness statement of Jade Gilchrist dated 20 May 2022 at [10]-[13], [16]; Transcript, 11 May 2022, PN11624; Amended witness statement of Wendy Knights, 23 May 2022 at [45]; Witness statement of Pamela Little dated 30 March 2021 at [61].

> The assistive technology is smarter, designed to relieve the physical nature of the work. It is common practice and has been for some time, and there is an increasing prevalence of assistive technologies in residential aged care facilities.
>
> The case management, monitoring and medication technologies are all designed to make the work more targeted and streamlined.[766]

Contention 16: Aged care employees are required to meet the cultural, social and linguistic needs of diverse communities including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and members of the LGBTQIA+ community.

732 Prof Meagher's evidence is that those living in residential aged care and receiving home care and support come from a diverse range of backgrounds including Aboriginal and Torres Strait Islanders, those from culturally and linguistically diverse backgrounds, those living in rural or remote areas, people who are financially or socially disadvantaged, veterans, those experiencing homelessness, care leavers, parents separated from their children by forced adoption or removal as well as lesbian, gay, bisexual, transgender or intersex people.[767]

733 Prof Meagher notes that the diversity of aged care residents has been "explicitly recognised in the concept of special needs groups in aged care policy", with the *Aged Care Act* amended in 2013 to include all special needs groups within the Act itself and to broaden the concept of "special needs" to recognise, for example, gender and sexual expression differences or the specific challenges faced by people who have been in state care and that the Aged Care Quality Standards "require that staff have and exercise skills and knowledge about a wide range of social groups so they can meet their individual needs".[768]

734 Prof Meagher notes that meeting the needs of these groups requires care workers to recognise and respond to the root causes of these special needs:

> For example, meeting the needs of Aboriginal and Torres Strait Islander older people requires recognising historical legacies of discrimination and exclusion, as well as sensitive engagement to focus on people's strengths. Another special needs group is care leavers, which includes the "Forgotten Australians", who are child migrants and non-Indigenous Australian-born children raised in institutions. Research with Forgotten Australians has found that they "suffer lifelong health and well-being impacts, have lower educational attainment, lower paid employment, are less likely to own their home, and have difficulty forming relationships" and that members of this group "are unlikely to access care when needed due to high levels of mistrust and fear of reliance on others and authorities". Other groups are not formally recognised in policy also have special needs related to trauma, such as Holocaust survivors.[769]

735 Assoc Prof Junor similarly finds that there are an increasing number of residents and staff from culturally and linguistically diverse backgrounds, which has created extra demands on aged care workers, in the form of both extra effort

766 Witness statement of Paul Sadler dated 1 March 2022 at [95]-[97].

767 Meagher Report at 4; Meagher Supplementary Report at 5.

768 Meagher Report at 19.

769 Meagher Supplementary Report at 15.

and responsibility.[770] Aged care workers are now required to demonstrate a "strong focus in work practice of creative solutions to working with a culturally and linguistically diverse resident base and workforce".[771]

736 Assoc Prof Smith and Dr Lyons gave evidence that many aged care employees communicate with older persons in a language other than English.[772]

737 The lay witness evidence pointed to an increase in residents from diverse backgrounds and describes the communication challenges of working with culturally and linguistically diverse residents.[773]

738 The Consensus Statement states that aged care "caters for the diverse Australian community and needs to meet the cultural, social and linguistic needs of communities such as Aboriginal and Torres Strait Islander people, CALD, LGBTQI+ and other diverse communities".[774] The Consensus Statement further notes that the proportion of older people who are from culturally and linguistically diverse backgrounds is increasing, and estimates at as of June 2019 at least 1 in 4 home care consumers and 1 in 5 residential care and home support consumers were culturally and linguistically diverse.[775]

Conclusion

739 As we have mentioned, we consider these contentions to be general in their character and that they would not necessarily apply consistently across classifications or universally in every instance to all employees concerned. That said, we are satisfied there is a sound evidentiary basis for the 16 agreed contentions and we adopt them as findings.

7.3. The contentious issues

7.3.1. Gender undervaluation

740 The proposition that work in feminised industries is undervalued is addressed in the expert evidence of Assoc Prof Smith and Dr Lyons; Assoc Prof Junor; Prof Charlesworth and Prof Meagher.

741 The Smith/Lyons Report contains the most comprehensive analysis of the gender undervaluation in their responses to the following questions:

- Question 3: How is the concept of gender-based undervaluation in Australia addressed in scholarly literature and available research studies, and what is your opinion in relation to whether there is such gender-based undervaluation? At paras 42-64 of the Smith/Lyons Report.
- Question 4: If your opinion is that there is such gender-based undervaluation, what are the contributing factors to gender-based undervaluation in Australia? At paras 57-64 of the Smith/Lyons Report.

770 Junor Report Annexure 7 at [32].

771 Junor Report Annexure 6 at [73].

772 Smith/Lyons Report at [138].

773 See Witness statement of Maree Bernoth dated 29 October 2021 at [54], Amended witness statement of Wendy Knights dated 23 May 2022 at [76], Witness statement of Jane Wahl dated 21 April 2022 at [40].

774 Consensus Statement at [10].

775 Consensus Statement at [11].

- Question 5: What, if any, have been the barriers and limitations to the proper assessment of work values in female dominated industries and occupations by industrial tribunals in Australia? At paras 65-106 of the Smith/Lyons Report.
- Question 6: If your opinion is that there have been barriers and limitations to the proper assessment of work values in female dominated industries and occupations by industrial tribunals in Australia, how have these impacted upon the setting of award minimum rates. At paras 94-107 of the Smith/Lyons Report.

742 Assoc Prof Smith and Dr Lyons define gender undervaluation as "work value practices that are impacted by gender and which contribute to a failure to recognise work value in assigned wages".[776] A consequence of gender undervaluation is that the skills of the occupation, including the proficiency, complexity, responsibilities and the conditions under which the work is performed are discounted, overlooked and influenced by subjective notions about gender and gender roles. As the Smith/Lyons Report puts it:

> Skills are devalued or overlooked because of norms, ascribed gender roles, and gendered stereotypes that prevail in the wider social environment. Work becomes "sex typed" when a job or occupation is viewed as being socially appropriate for women to perform, often because of the similarity of the work and tasks of the job to the activities women historically undertake in the domestic (unpaid) environment. Consequently, the work is perceived as "women's work". Therefore, the work undertaken by women in such jobs or occupations is considered to be less valuable and can be paid less than work undertaken by men that has no obvious similarity to the activities men historically undertake in the domestic (unpaid) environment.[777]

743 Assoc Prof Smith and Dr Lyons conclude that there is evidence of gender-based undervaluation of work in Australia which reflects the "influence of gender stereotypes, social norms, and historical legacies" and state:

> The valuation of work is influenced by social expectations and gendered assumptions about the role of women as workers. In turn these social practices influence institutional and organisational practices. These assumptions are impacted by women's role as parents and carers and undertaking the majority of primary unpaid caring responsibilities. The disproportionate engagement by women in unpaid labour contributes to the invisibility and the under recognition of skills described as creative, nurturing, facilitating or caring skills in paid labour.[778]

744 Assoc Prof Smith and Dr Lyons consider that these social norms have shaped and been shaped by regulation, arguing that Australian industrial tribunals determining pay have reflected and reinforced these norms about women and paid work dating back to the Harvester decision.[779] The Smith/Lyons Report includes a review of industrial wage setting exercises in Australia, which discusses the "barriers and limitations" to the proper assessment of work value in female dominated industries and occupations.[780]

776 Smith/Lyons Report at [55].

777 Smith/Lyons Report at [60].

778 Smith/Lyons Report at [56].

779 Smith/Lyons Report at [61]; *Ex parte McKay* (1907) 2 CAR 1.

780 Smith/Lyons Report [65]-[107].

745 Assoc Prof Smith and Dr Lyons ultimately find that the main reasons for gender-based undervaluation are:

- social norms and cultural assumptions that impact the assessment of work value[781]
- occupational segregation[782]
- skill level of occupation, work or tasks being discounted or overlooked because of gender[783]
- weaknesses in job and work valuation methods and their implementation,[784] and
- social norms, gender stereotypes and historical legacies.[785]

746 The link between gender and the undervaluation of care work is further developed in the Junor Report.

747 Drawing on secondary sources consisting of 116 items listed in a bibliography in Annexure 9 to her Report, Assoc Prof Junor reasons that gender segregation or concentration results in a lack of *visibility* and under-recognition of some skills, as a result of lingering perceptions of care work as an altruistic *vocation* and opines:

> I consider that a legacy of gendered perceptions of care work skills, based on skill/care, hard/soft, abstract knowledge/body knowledge distinctions has impeded full skill recognition.[786]

748 The "Secondary Material" relied on by Assoc Prof Junor consists of:

- Background industry data and reports; occupational change analyses;
- Academic literature on skills, care work, nursing, gender processes, and skill recognition and valuation;
- Practitioner and policy literature, e.g. on aged care, nursing, skill, gender and diversity.

749 Using academic, policy and practitioner literature, Annexure 9 to the Junor Report presents an analysis that draws links among skill invisibility, skill under-recognition, sources of under-valuation, and the gender bases of each of these processes and practices. As summarised in the Secondary Material in paras 16-38 of Annexure 9, the concept of skill "invisibility" is well-established in the academic and practitioner literature. We discuss this further in Chapter 7.3.2.

750 In Table A9-1 in the Junor Report (reproduced at Table 12 below), Assoc Prof Junor "borrows" the "Five Vs" concept used by Burchell et al.[787] in a report to the European Commission Directorate of Justice, linking lack of skill visibility to under-valuation and gender segregation. The model brings together the concepts of gender, care, skill visibility, recognition and valuation and provides a link through from skill invisibility to gender-based under-valuation:[788]

781 Smith/Lyons Report at [59].

782 Smith/Lyons Report at [59].

783 Smith/Lyons Report at [60].

784 Smith/Lyons Report at [62].

785 Smith/Lyons Report at [62].

786 Junor Report at [48].

787 B Burchell, et al, *A New Method to Understand Occupational Segregation in European Labour Markets* (European Commission, Directorate of Justice, 2014) at 30.

788 Junor Report Annexure 9 at [56].

Table 12: Gender Segregation: Adapted from Burchell et al., 2014[789]

The five Vs	Relationship to under-valuation	Relationship to segregation
Visibility	Women's skills may not be visible	Care-related skills are intangible; occupations may have limited industrial history of work value investigations
Valuation	Women's skills [are] often not valued	Female-dominated occupations may be based on skill hierarchies developed outside the service sector.
Vocation	Women's skills are often treated as "natural", deriving from women's "essence" as mothers and carers, and do not require rewards due to the high job satisfaction derived from the work.	Segregation may be explained by vocation; also, segregation allows employers not to reward skills in caring jobs.
Value added	Women are more likely than men to be found in labour intensive occupations; there may be a tension between "quality" and "productivity".	If segregation facilitates low wages, employers have less incentive to raise productivity in ways compatible with service quality and instead seek to keep wages low.
Variance	Jobs that do not comply with a male norm of full-time work may be less valued.	Segregation into non-standard jobs may allow for differences in pay by type of employment contract, rather than by skills, experience etc.

Adapted, with a new and altered column 3, from: Burchell B, Hardy V, Rubery J and Smith M, *New Method to Understand Occupational Segregation in European Labour Markets* (2014) Luxembourg: European Commission, Directorate of Justice: 30.

Source: Junor Report, Annexure 9 Table 9-1

751 Prof Meagher deals with work value issues in residential aged care in section 7 of the Meagher Report and states:

> Research has shown that jobs involving interacting with other people, which tend to be female-dominated, are generally paid lower wages than comparable jobs, especially where caring or nurturing activities are performed.[790] In other

789 Junor Report Annexure 9 Table A9-1.

790 DN Barron, E West, "The financial costs of caring in the British labour market: is there a wage penalty for workers in caring occupations?" (2013) 51(1) *British Journal of Industrial Relations* 104-123; P England, M Budig, N Folbre, "Wages of virtue: The relative pay of care work" (2002) 49(4) *Social Problems* 455-473; BS Kilbourne, P England, G Farkas, K Beron, D Weir, "Returns to skill, compensating differentials, and gender bias: Effects of occupational characteristics on the wages of white women and men" (1994) 100(3) *American Journal of Sociology* 689-719.

> words, the gendered undervaluation of care work means that care occupations attract a wage penalty.
>
> These studies establish that care work faces a wage penalty, but it is also important to understand why this penalty exists. One reason for the undervaluation of caring occupations arises is the pervasive cultural association between care work and the traditional roles of women. Because work, such as that in residential aged care, involves care and because the workforce is female-dominated, it is often thought about as an extension of women's traditional roles and dispositions, involving "body work"[791] and grounded in relationships.
>
> As these female roles are not accorded economic or monetary value in society more broadly, the skills associated with them are also devalued or rendered invisible. Instead of being recognised as skills that some have or have learnt, they are assumed to be natural, feminine capacities — that is, they are associated with *love* rather than with *skill*. These cultural assumptions are grounded in the division of labour in society. Paid care work is associated with, or replaces care tasks that are also offered, unpaid, by women within the family (or by volunteers within religious or voluntary organisations), on the basis of love, altruism or duty rather than money. This means that the tasks and skills are consequently valued and paid less than skills associated with male roles.[792]

752 Professor Meagher deals with work value issues in home care and support in section 5 of her Supplementary Report of 27 October 2021.

753 Prof Meagher provides 2 explanations for the undervaluation of care work:

1. The cultural association of care work with women and the domestic sphere shapes how the work in care occupations (such as aged care) is to be seen, evaluated and remunerated.
2. It is deemed acceptable for certain types of work to be paid less because workers choose to trade off pay and conditions (extrinsic rewards) to perform work because it gives them personal satisfaction (intrinsic rewards).

754 In respect of the first explanation, Prof Meagher sets out evidence regarding occupational sex-segregation and finds that female-dominated occupations tend to be paid less than male-dominated occupations, with pay rates declining as women increase their share of employment in occupations[793] and she applies the concept of occupational sex-segregation to care work, concluding that occupations involving caring or nurturing activities tend to be female-dominated and associated with lower pay than comparable jobs. Prof Meagher analyses a number of international studies that looked at wage rates in care work[794] and she concludes that the studies demonstrate that "care work faces a wage penalty" and that one reason for this is the "pervasive cultural association between care work and the traditional roles of women" (citations omitted):

> Because work, such as that in residential aged care, involves care and because the workforce is female-dominated, it is often thought about as an extension of

791 J Twigg, C Wolkowitz, R L Cohen, S Nettleton, "Conceptualising body work in health and social care" (2011) 33(2) *Sociology of Health & Illness* 171-188.

792 Meagher Report at 27-28.

793 Meagher Report at 26.

794 See England et al, "Wages of Virtue: The Relative Pay of Care Work" (2002) 49(4) *Social Problems* 455; RE Dwyer, "The care economy? Gender, economic restructuring, and job polarisation in the US Labor Market" (2013) 78(3) *American Sociological Review* 390; DN Barron, E West, "The Financial Costs of Caring in the British Labour Market: Is there a Wage Penalty for Workers in Caring Occupations?" (2013) 51(1) *British Journal of Industrial Relations* 104.

> women's traditional roles and dispositions, involving "body work" and grounded in relationships … As these female roles are not accorded economic or monetary value in society more broadly, the skills associated with them are also devalued or rendered invisible. Instead of being recognised as skills that some have or have learnt, they are assumed to be natural, feminine capacities — that is, they are associated with *love* rather than with *skill*. These cultural assumptions are grounded in the division of labour in society. Paid care work is associated with, or replaces care tasks that are also offered, unpaid, by women within the family (or by volunteers within religious or voluntary organisations), on the basis of love, altruism or duty rather than money. This means that the tasks and skills are consequently valued and paid less than skills associated with male roles.[795]

755 Turning to the second explanation, Prof Meagher finds that while there is "ample evidence" that aged care workers derive intrinsic rewards from their work, "arguments that justify lower pay for these workers on the basis of a trade-off between pay and the satisfaction derived from caring are not convincing" (footnotes omitted):

> The main reason is that they are one-sided: that is, they are applied to women's caring occupations, but not to men's jobs. The argument that workers' altruistic motivations and care work's intrinsic rewards offset wages could be applied to any job, on the basis that in all occupations and industries are "self-selected" by workers who derive some fulfilment from that field of work. Yet a male engineer who is good at mathematics and enjoys problem-solving is not expected to take low pay because he has this aptitude and likes these aspects of his job.[796]

756 Prof Meagher also considers arguments that lower pay in care industries is justified because women choose care work because of the organisation of the work, including easy entry and the availability of part-time employment, arrangements which is compatible with unpaid caring responsibilities. Prof Meagher rejects this justification, noting that women's responsibilities for unpaid care work "are also a product of the social division of labour, and are affected at least as much by policy settings as by women's preferences"[797] and she further emphasises that motivations and job preferences "are shaped by social learning and social experience" with women accepting poor-quality aspects of care work due to the combined force of economic, family and labour market circumstances.[798]

757 Prof Charlesworth concludes that "there has been an historical as well as an ongoing undervaluation of work performed by PCWs in residential aged care" and that this "undervaluation is profoundly gendered":

> The workers who undertake frontline residential aged care work are overwhelmingly female and the nature of work they perform is highly gendered, historically viewed as quintessentially "women's work" and therefore of little economic value … The gendered norms that underpin the devaluation of care work are premised on an "ideology of domesticity" that positions the care that women do, both in home and as paid work, as natural and therefore unskilled. In particular, it is the link assumed between unpaid care work in the family and paid care work that means aged care work has been significantly undervalued in

795 Meagher Report at 28.

796 Meagher Report at 29.

797 Meagher Report at 29.

798 Meagher Report at 29-30.

government funding, in employment protections and in societal, industrial and organisational recognition of the increasingly complex skills required to undertake the work of aged care, including in residential settings.[799]

758 Based on the expert evidence we accept the followings propositions:

1. The valuation of work is influenced by social expectations and gendered assumptions about the role of women as workers. In turn these social practices influence institutional and organisational practices.
2. Undervaluation occurs when work value is assessed with gender-biased assumptions. The reasons for gender-based undervaluation in Australia include the continuation of occupational segregation, the weaknesses in job and work valuation methods and their implementation, and social norms, gender stereotypes and historical legacies.[800]
3. Gender-based undervaluation in the employment context occurs when work value is assessed with gender-biased assumptions[801] which means the skill level of occupations, work or tasks is influenced by subjective notions about gender and gender roles in society. Skills of the job occupant are discounted or overlooked because of gender.[802]
4. Gender-based undervaluation of work in Australia arises from social norms and cultural assumptions that impact the assessment of work value.[803] These assumptions are impacted by women's role as parents and carers and undertaking the majority of primary unpaid caring responsibilities. The disproportionate engagement by women in unpaid labour contributes to the invisibility and the under recognition of skills described as creative, nurturing, facilitating or caring skills in paid labour.[804]
5. The barriers and limitations to the proper assessment of work value in female dominated industries and occupations include:
    - changes in the regulatory framework for equal pay and equal remuneration applications and the interpretation of that framework.
    - procedural requirements such as the direction in wage-fixing principles that assessment of work value focus on changes in work value and tribunal interpretation of this requirement.
    - conceptual considerations including the subjective notion of

799 Charlesworth Report at [43].

800 Smith/Lyons Report at [62].

801 Smith/Lyons Report at [47] citing A-F Bender and F Pigeyre, "Job evaluation and gender pay equity: a French example" (2016) 34(4) *Equality, Diversity and Inclusion: An International Journal* 267 at 268-270. Assoc Prof Smith and Dr Lyons also note at [52]: "Peetz (D Peetz, 'Regulation distance, labour segmentation and gender gaps' (2015) 39(2) *Cambridge Journal of Economics* 345) examines the impact of stereotypical gender attitudes of skill, and notes they are more subjective than objective. Peetz argues sex-based stereotyping can be a major reason for the undervaluation of jobs and tasks performed primarily by women or work perceived as intrinsically 'feminine' in nature. The tasks performed by, and skills applied in, female-dominated occupations — such as care-giving, manual dexterity, human relations skills, and working with children — are often viewed as being of lesser value than the tasks and work performed in male-dominated occupations".

802 Smith/Lyons Report at [60].

803 Smith/Lyons Report at [59].

804 Smith/Lyons Report at [56].

skill and the "invisibility" of skills when assessing work value in female-dominated industries and occupations.[805]

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

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

(ii) Errors in the valuation of work may have arisen from the female characterisation of the work, or the lack of a detailed assessment of the work. The time frame or datum point for the measurement of work value which limit assessment of work value to changes of work value, or changes measured from a specific point in time mitigated against a proper, full-scale assessment of the work free of assumptions based on gender.[806]

(iii) The capacity to address the valuation of feminised work has also been limited by the requirement to position that valuation against masculinised benchmarks. Work value comparisons continued to be grounded by a male standard, that being primarily the classification structure of the metal industry awards and to a lesser extent a suite of building and construction awards.[807]

805 Smith/Lyons Report at [93].

806 Smith/Lyons Report at [90].

807 Smith/Lyons Report at [92].

7.3.2. Invisible skills — The Junor Report

759 In this section we address the proposition, principally advanced by the ANMF, that direct care workers (RNs, ENs and AIN/PCWs) utilise "invisible" skills that have not been recognised in the current modern award minimum rates applicable to their roles. The ANMF submissions in this regard relies heavily on the expert evidence of Assoc Prof Junor.

760 As mentioned earlier, a central feature of the Junor Report is the application of the Spotlight Tool to the work performed by RNs, ENs and AINS/PCWs working in aged care. The genesis, development and use of the Spotlight Tool is described at [73]-[77] of the Junor Report.

761 The methodology for generating Spotlight Skill profiles for the RN, EN and AIN/PCW classifications is set out at [82]-[93] of the Junor Report. In brief, the work activity descriptors prepared by the aged care workers were analysed; those workers were interviewed; and the data was coded and analysed for the purpose of expressing the opinions in the Junor Report.

762 Assoc Prof Junor and Hon Prof Hampson independently and separately coded each and every interview transcript and compared findings for validation purposes. Each person independently coded all the material several times, and each cross-checked and validated the other's work. The final coding was used to produce Spotlight Skill Profiles for the classifications RN, EN and AIN/PCW.

763 On the basis of the coded data, Assoc Prof Junor produced "skill profiles". The skill profiles were visualised in the form of "heatmaps".[808] The "heatmaps" show the relative incidence, importance, and contribution to work value of activities utilising each Spotlight skill performed by the aged-care workers.[809]

764 The skills that are "invisible" are identified in Annexure 8A to the Junor Report. Assoc Prof Junor's annexures also show collaboration across classifications and clustering of skills,[810] and evidence of increasing responsibility and effort, compared with decreasing conditions of work.[811]

765 Annexure 5 provides examples of varying uses of each Spotlight skill predominantly at levels of proficiency described in the Spotlight taxonomy as Problem-solving and Solution-sharing. As shown in Table 13 below, coding of the interview transcripts provided "*a very high count of instances of the use of all nine Spotlight skills*, by interview participants *in each classification — RNs, ENs and AINs/PCWS*"[812] (emphasis added):

808 Junor Report at [20].

809 Junor Report at [23].

810 Junor Report at [23], Annexure 6.

811 Junor Report at [23], Annexure 7.

812 Junor Report at [101].

Table 13: Average incidence of use of Spotlight skills reported per person[813]

Spotlight skill elements	RNs	ENs	AINs/ PCWs
A1. Sensing contexts or situations	38.0	29.7	26.0
A2. Monitoring and guiding reactions	37.5	33.0	28.7
A3. Judging impacts	39.5	31.0	27.7
Total A: Contextualising: Building and shaping awareness	115.0	93.7	82.3
B1. Negotiating boundaries	32.0	25.7	27.3
B2. Communicating verbally and non-verbally	38.0	28.0	23.3
B3. Working with diverse people and communities	22.0	22.7	20.7
Total B: Connecting — Interacting and relating	92.0	76.3	71.3
C1. Sequencing and combining activities	33.0	32.0	24.3
C2. Interweaving your activities smoothly with those of others	24.0	30.7	20.3
C3. Maintaining and/or restoring workflow	36.5	31.7	25.3
Total C: Coordinating	93.5	94.3	70.3
Overall incidence	300.5	264.33	224.00
Main skill level	**Level 4 (97.5)**	**Level 4 (75.67)**	**Level 3 (70.67)**

Source: Junor Report, Table MR-2, p 22.

766 On average, the transcript and workbook of each RN provided 300 countable examples per individual of the use of Spotlight-defined skills. In the case of RNs, the heaviest concentration of Spotlight skill use was in the maintenance of contextual awareness, with awareness of situations and awareness of impacts being of equally high importance. As Assoc Prof Junor observes: "[t]his might be expected, given RNs' role in overseeing work processes on the floor each shift, as well as having overall responsibility for the facility. The dominant skill level was high — that of sharing solutions and expertise (Spotlight Level 4)".[814]

813 Junor Report at 22.

814 Junor Report at [97].

767 In the Spotlight workbooks provided by ENs and in follow-up interviews with ENs working in residential and community settings, an average of 264 examples per person of the use of Spotlight-identified skills was identified. The skills most frequently mentioned by ENs were coordinating skills. As with RNs, the main skill level reflected in the activities described by ENs was again level 4 — expert solution-sharing. Assoc Prof Junor notes "[t]his is not surprising, given the complexity of the safety-critical task of completing and following up each medication round or wound care round in a short timeframe, whilst attending to interruptions and keeping track for record-keeping purposes".[815]

768 Assoc Prof Junor concludes that:

> The cumulative impact of reading the examples provided by Ens and cited in paragraphs 55-81 of Annexure 5, is again one of an occupation whose skills, complexity and job size have been under-recognised.[816]

769 The workbooks and interview transcripts from AINs/ PCWs provided an average of 224 instances per person of the use of Spotlight skills which Assoc Prof Junor notes "indicate an extensive and intensive deployment of all nine skills coded in the Spotlight framework":

> The dominant skill level was level 3 (problem-solving). This finding challenges any perception of the work as somehow "routine". The examples cited in Annexure 5, paragraphs 89-122 demonstrate the range of skills required, and the sophistication of their use, in order to sustain safe, well-ordered and person-centred care in time-and-resource-constrained settings. Examples were provided of the skills used to de-escalate aggression, provide reassurance and gain acceptance of activities of daily living. These skills included use of just the right turn of phrase, and choice of the right pace and tone of voice to provide reassurance for each resident each day. They included the use of distracting or cueing.[817]

770 Examples of the use of the Spotlight skills identified are set out in Tables MR-3 to MR-5 (reproduced below as tables 14-16). These table are draw from Annexure 5 and contain selected illustrative examples of activities using each of the 9 skills, indicating the skill level, according to the Spotlight taxonomy. The parenthetical abbreviations in these tables are "UC": "under-codified"; "UD": "under-defined"; "US" for "under-specified"; and "H" for "hidden":

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815 Junor Report at [103].

816 Junor Report at [103].

817 Junor Report at [104].

Table 14: Selected activities illustrating use of Spotlight skills — Registered Nurses[818]

Skill element	1. Orienting	2. Fluently perform-ing	3. Solving new problems	4. Sharing solutions/ Applying expertise	5. Expertly creating a system
A1. Sensing contexts or situations	5.5	7.5	12.5	9.0	3.5
L3 Piece together information from many sources to solve problems, sifting information for key details (UC) L4 Exchange rapid situational updates with colleagues, using codes or signals (UD) L4 Take stock and make contingency plans for impending critical palliative or pain management needs during weekends/after hours when no doctor available (UC)					
A2. Monitoring and guiding reactions	4.0	8.0	10.5	12.5	2.5
L3 Lead a daily reassessment of residents' preferences and wishes, prioritising them over routines (US, UC) L4 Be alert to co-workers' strengths and needs; including stress, emotional fatigue and burnout (US) L4 Anticipate family reactions and guide family decision-making. Providing advance warning of end of life (US, UC)					
A3. Judging impacts	3.5	7.5	10.5	14.5	3.5
L3 Make safe decisions in a context of uncertainty and information gaps (H) L4 Constantly lead reflection on practice: How did we come to that decision? What do you think the impact will be?' 'What did we say to the doctor? (H, UC, UR) L5 Identify flow-on impacts of decisions on the organisation & beyond (UC)					
B1. Negotiating boundaries	3.5	4.0	8.0	12.5	4.0
L4 Consistently advocate for staff and residents in a way that retains goodwill (H, US) L4 Constructively provide upward and downward feedback in unequal power situations (H, US) L4 Gently manage unrealistic family expectations (US)					

818 Junor Report at 28.

Skill element	1. Orienting	2. Fluently perform-ing	3. Solving new problems	4. Sharing solutions/ Applying expertise	5. Expertly creating a system
B2. Communicat-ing verbally and non-verbally	5.0	7.0	8.5	14.0	3.5
L4 Use a quietly authoritative and caring communication style that gains trust and cooperation (US) L4 Help staff reflect on language use, adapting to resident & family understanding & sensitivities (H, US) L5 Help build a consistent, respectful, aesthetic and ethical communication style for the organization (UD)					
B3. Working with diverse people and communities	4.0	3.0	7.5	7.0	0.5
L3 Anticipate and act to minimise problems created by intercultural and disability barriers (H, US) L4 Appropriately incorporate elements of the cultures of staff, residents & families into work practices					
C1. Sequencing and combining activities	5.0	7.0	10.5	8.5	2.0
L3 Simultaneously manage acute-care & high-focus activities involving people, technology, ideas (UC) L4 Systematically follow up all non-routine events across the facility several times in a shift (UC)					
C2. Interweaving your activities smoothly with those of others	3.0	4.0	8.0	8.0	1.0
L4 Develop shared system for updating shift status and re-allocating tasks in the course of the shift (US) L4 Have in place and be able to activate unobtrusively the shared support networks needed to maintain workflow (US, UC)					
C3. Maintaining and/or restoring workflow	3.5	5.5	10.0	11.5	6.0
L4 Adeptly lead calm response to emergencies such as falls, escalations, fire alarms, infection (US, UC) L4 Restore work after an emergency, recognising the importance of emotional repair (UC, US) L5 Build & maintain backup systems to ensure against crises or to meet a critical service gap (UC)					

Table 15: Selected activities illustrating use of Spotlight skills — Enrolled Nurses[819]

Incidence of reported activities reflecting Spotlight skills (R= Residential, C= Community)	**1. Orienting**	**2. Fluently perform-ing**	**3. Solving new problems during normal work**	**4. Sharing solution/ Applying expertise**	**5. Expertly creating a system**
A1. Sensing contexts or situations	4.0	7.0	9.3	8.0	1.3
L3 Monitor and manage home safety risks to clients and safety risks to self in travel, navigating sites (C) (UD) L4 Devise flip tab guide for carers to use in recognising incipient pressure injuries, preventing falls, etc (R) (UC) L5 In an EN friendship group, exchange information on training programs, new developments, techniques (R)					
A2. Monitoring and guiding reactions	4.0	7.3	9.7	10.0	2.0
L4 Respond to the grief and sadness of residents at loss of independence and possessions (R) (US) L4 Maintain concentration, manage safety, manage own stress in the midst of many interruptions (R) (UC) L4 Manage own and client's responses when managing "horrendous" effects of neglected wounds (C) (H, US)					
A3. Judging impacts	4.0	5.7	11.0	9.0	1.3
L3 Understand the profound impact on a client of advising transition to residential care (C) (US) L3 In community settings, solve problematic safety risks for client and next service deliverer (C) (UC) L4 Manage adverse impacts on resident's well being of inappropriate wishes of family who are in denial (R)					
B1. Negotiating boundaries	3.3	4.0	6.3	3.0	
L3 Initiate service acceptance, navigating intense fear and shame, lest "door slammed in face" (C) (H, US) L4 Prioritise advocacy for residents' rights, dignity and pain relief in interactions with doctors (R) (H) L4 Work with RN & doctor on approaches to resident's pain management, addressing regulatory issues (R) (H)					
B2. Communicat-ing verbally and non-verbally	3.0	6.3	9.0	1.0	

819 Junor Report at 29.

Incidence of reported activities reflecting Spotlight skills (R= Residential, C= Community)	**1. Orienting**	**2. Fluently perform-ing**	**3. Solving new problems during normal work**	**4. Sharing solution/ Applying expertise**	**5. Expertly creating a system**
L2 "The power of touch is very important so I make sure that I touch everyone and I ask them how they're going [in the] so limited time to do my job" (R) (UD, UC) L3 Perceive resident's pain level using a scale based on facial expression (R)H L4 Combine professionalism, humour, empathy, projecting confident to establish trust and lighten mood (C) (US)					
B3. Working with diverse people and communities	3.0	4.3	9.7	4.0	1.7
L3 Use key phrases in resident's many mother tongues, establishing a phrase book for staff use (R) (US) L3 Devise effective communication with residents who remember only their mother tongue, e.g. pictorial (C, R) (UD)					
C1. Sequencing and combining activities	4.3	8.7	9.0	8.0	2.0
L3 "So I'm very time conscious. I do all the time sensitive medications first" (R) (UC) L3 Use time management within shift to incorporate extra demands, e.g. regular observations after a fall (R) (UC) L4 Frequently adapt daily schedule to client needs & travel times, multi-tasking during wound treatment to deliver holistic care (C) (UC)					
C2. Interweaving your activities smoothly with those of others	3.3	5.3	8.7	11.7	1.7
L4 Annotate handover sheet with key reminders for later accurate completion before handover (R) (UD) L4 Gauge your own & individual co-workers' strengths & weaknesses when scheduling each shift (R) (US, UC) L4 Compare notes with other client service providers to develop a common approach and avoid mix-ups (C) (UC)					
C3. Maintaining and/or restoring workflow	3.0	6.7	13.3	7.7	1.0
L3 Step in to help carers and RN in managing escalations and accidents, and in restoring order (R) (UC) L4 Finding a home visit emergency, reschedule the day's roster, negotiate with other clients & notify office (C), UC)					

Table 16: Selected activities illustrating use of Spotlight skills — AINs/PCWs[820]

Incidence of reported activities reflecting Spotlight skills	1. Orienting	2. Fluently perform-ing	3. Solving new problems as they arise	4. Sharing solutions expertise	5. Expertly creating a system
A1. Sensing contexts or situations	3.3	8.7	8.3	4.3	1.3
L3 Piece together resident information — eg past trauma, to better understand present behaviour (H, US) L4/5 Participate in a Care Support Team to discuss ways of addressing challenges on the floor (H)					
A2. Monitoring and guiding reactions	3.7	8.7	11.0	5.0	0.3
L2 Through a fine-tuned knowledge of each resident's idiosyncrasies and preferences, support smooth patterns of hygiene, meals and sleeping (US, UC) L3 Use cues, redirection/distraction in order to overcome residents' fear and resistance eg in showering, lifting (H, UD) L4 Be alert to and help manage co-workers' emotional pressures, strengths and needs (US)					
A3. Judging impacts	3.7	7.3	8.0	8.0	0.7
L3 Quickly pick up early warning signs of an impending disturbance or an approach that's not working (UD) L3 Suspend judgment of a resident despite knowledge of unsavoury past history (H, US) L3 Observe, respond to and report even slight changes in residents, e.g. swallowing difficulties indicating need to change blend consistency (UD)					
B1. Negotiating boundaries	5.3	7.0	6.0	7.7	1.3
L2 "Use PR face" in politely but firmly refusing to be diverted from a safety-critical activity e.g. showering (US) L3 Advocate for residents to gain safe staff lifting ratios, or obtain comfort equipment, meal improvements etc (H)					
B2. Communicat-ing verbally and non-verbally	4.0	6.7	8.7	3.3	0.7
L2 Adapt voice tone, body language to knowledge of how residents will best respond (UD, US) L3 Use singing, stories, residents' loved old TV comedies etc to provide enjoyable interactions and also distractions to gain compliance with showering (UD, US)					

820 Junor Report at 30.

Incidence of reported activities reflecting Spotlight skills	1. Orienting	2. Fluently perform-ing	3. Solving new problems as they arise	4. Sharing solutions expertise	5. Expertly creating a system
B3. Working with diverse people and communities	3.7	3.0	7.3	5.0	1.7
L3 Use behaviour modelling and informal swap arrangements to protect co-workers from resident racism, while explaining dementia resident inhabit a past world (UD, US) L3 Ensure residents from the same language groups can interact; use multilingual cues (UD, US) L4 Facilitate initiatives in which linguistically diverse staff share their culture with residents (UC)					
C1. Sequencing and combining activities	5.7	5.3	7.3	5.7	0.3
L3 Assess urgency and importance of simultaneous calls on attention, any of which could become a crisis (UC) L3 Use and adapt routines in order to accommodate flexible resident-focused care (UC) L4 Clearly and briefly flag changes to work patterns (or the need for them) to team members as they arise (UC)					
C2. Interweaving your activities ı smoothly with those of others	4.3	5.3	5.0	5.3	0.3
L2 Smoothly switch back and forth between individual and paired or team work in managing resident lifts and mobility (UC) L3 Notice when a colleague needs support and step in to help avert an escalating conflict (UD)					
C3. Maintaining and/or restoring workflow	4.3	6.0	9.0	6.0	0.3
L3 Make time for caring listening and interactions amidst intense work pressures (US, UC) L4 Unobtrusively activate and participate in team support networks if a critical incident arises (UD, UC) L4 Provide support for a colleague in a major emergency or first experience managing a resident death (US)					

771 Assoc Prof Junor's conclusion from the tables extracted above is that:

> in each classification, RN, EN and AIN/PCW, effective work performance requires the use, in a range of work activities, of a significant number of skills that are not documented in classification descriptions. To varying degrees in the three classifications but in all cases to a degree that was either considerable or significant, the use of these skills required, in addition to fluent performance, the capacity to solve novel problems as they arose, or the independent application of the skill in question at a considerable depth of expertise.[821]

772 In sections 3.3. to 3.5,[822] Assoc Prof Junor documents by example how the RN, EN and AIN/PWC classifications involve work activities that "make intensive and extensive use of *invisible skills* (in the sense that these skills are hidden, under-defined, under-specified, under-codified and therefore under-recognised)".

773 The "heatmaps" in Annexure 5 Tables A5-1, A5-3 and A5-5 gauge the intensity of deployment of Spotlight framework skills by all 3 classifications. On the basis of this data, Assoc Prof Junor states:

> Particularly impressive are the accounts, at all three classification levels, of the range of skills used in averting or de-escalating aggression, of thinking into the world of residents disoriented by dementia, particularly those re-living trauma or returning to another cultural and language background; and the skills used to bring a resident and family to a good death. The cumulative impression, on reading Annexure 5, is that residential and community aged care work is founded on the fluent and practised deployment of all nine "Spotlight" skill elements, and their intensive application in problem-solving and collaborative solution-sharing activities requiring a very substantial depth and range of skills. These skills can be brought to light through analysis such as that provided by the Spotlight framework. From the examples amassed in Annexure 5, I consider that there is substantial evidence of intensive depth, and extensive breadth of expertise, in the use by RNs, ENs and AINs of all nine skills in the Spotlight framework.[823]

774 The Primary Material contains examples of work performed by RNs, ENs and AINS/PCWs, in which they not only use single Spotlight skills but deploy "clusters" of Spotlight skills simultaneously. Annexure 6 provides examples of the clustered use of Spotlight skills. The incidence of activities involving the intensive, extensive or clustered usage of Spotlight skills increases job size, in terms of effort and responsibility, including under demanding conditions.[824]

775 Assoc Prof Junor found that the Spotlight skills identified were exercised intensively, extensively, and at a high level of proficiency — predominantly at the level of solution-sharing in the case of RNs and at the level of problem-solving for ENs and AINs/PCWs.[825] Particular clustered applications of skills were in relation to the particular challenges of morning, evening, night and community shifts, working with culturally and linguistically diverse residents and colleagues, and in working with dementia, co-morbidities and palliative care.[826]

776 Assoc Prof Junor's overall conclusion in respect of this material is that:

821 Junor Report at [124].

822 Junor Report at [144]-[186].

823 Junor Report at [105].

824 Junor Report at [106].

825 Junor Report at [28], [97]-[100].

826 Junor Report at [29], [106]-[108].

there is overwhelming evidence of heavy use of high-level problem-solving and solution-sharing skills, across all nine Spotlight skill content areas.

The effort required to undertake the work is very great and is increasing: Annexure 7 documents the reasons why workloads have increased over the past 16-22 years, and the consequences in terms of the need to maintain a calm, respectful and happy environment for residents while being oneself constantly rushed by the pace of work.

These skills are used under conditions of heavy responsibility for quality of life and death.[827]

777 Assoc Prof Junor observes that the "Spotlight taxonomy has brought to light, in a systematic way, a significant concentration of skills that are not reflected in the Award."[828] With the exception of "communicating" none of the other Spotlight skills are explicitly referenced in the skill indicators in the relevant classification descriptors.[829] Table MR-7 (reproduced as table 17 below) contains a list of skills that are brought to bear by aged care workers but which are not reflected in existing classification descriptions:[830]

Table 17: Spotlight skills assumed but not identified in the Award classification role/skill descriptions

Registered Nurse

Level	Spotlight skills assumed but not identified
RN1	Level 3/4 (Orienting to Solution-sharing, depending on experience) A1 Sensing contexts/situations; A2 Monitoring/guiding reactions; A3 Judging impacts; B1 Managing boundaries; B2 Communicating verbally & non-verbally; C2 Interweaving workflows
RN2	Level 4 (Solution sharing) A2 Monitoring/guiding reactions; A3 Judging impacts; B1 Managing boundaries; B2 Communicating verbally & non-verbally; C2 Interweaving workflows
RN3	Level 4 (Solution sharing) A1 Sensing contexts/situations; A3 Judging impacts; B1 Managing boundaries; B2 Communicating verbally & non-verbally; C2 Interweaving workflows
RN4	Level 4/Level 5 (Solution sharing/Expert system creation) All A Awareness-shaping; B1 Managing boundaries; B2 Communicating verbally & non-verbally; C1 Coordinating own work; C2 Interweaving
RN5	Level 5 (System shaping) All A: Awareness-shaping; B1 Managing boundaries; B2 Communicating verbally & non-verbally; C2 Interweaving

827 Junor Report at [98]-[100].

828 Junor Report at [128].

829 Junor Report at [31] and [267].

830 Junor Report at [132].

Enrolled Nurse

Level	Spotlight skills not identified
EN ppt1	Level 1/2 (Orienting/Fluently performing) A1 Sensing contexts/situations; A3 Monitoring and guiding reactions; C1 Coordinating own work; C2 Interweaving
EN ppt2	Level 2 (Fluently performing) A1 Contextual awareness; A3 Judging impacts; All C Coordinating
EN ppt3	Level 2/Level 3 (Fluently performing/Problem solving) A2 Guiding reactions; A3 Judging impacts
EN ppt4	Level 3 (Problem solving/Solution sharing) A2 Monitoring/guiding reactions; A3 Judging impacts; B2 Communicating verbally & non-verbally; C1 Coordinating own work
EN ppt5	Level3/Level 4 (Problem solving/Solution sharing; contribution to system shaping All C: Coordinating; A1 Sensing situations; A3 Judging impacts; B1 Managing boundaries

Assistant in Nursing/Personal Care Worker

Level	Spotlight skills not identified
AIN/PCW Grade 1	Level1/Level 2 (Orienting/fluently performing) A1 Sensing contexts/situations; A3 Judging impacts; B1 Managing boundaries; C1 Coordinating own work
AIN/PCW Grade 2	Level 2 (Fluently performing) A1 Sensing contexts/situations; A3 Judging impacts; B2 Communicating; C1 Coordinating own work; C2 Interweaving
AIN/PCW Grade 3	L2/L3 Fluently performing/(some) problem-solving A1 Sensing contexts/situations; A3 Judging impacts; B2 Communicating; C1 Coordinating own work; C2 Interweaving
AIN/PCW Grade 4	L3/L4 (Problem-solving/solution sharing) A1 Sensing contexts/situations; A3 Judging impacts; B2 Monitoring/guiding reactions; C1 Coordinating own work; C2 Interweaving
AIN/PCW Grade 5	L4 (Solution sharing) A1 Sensing contexts/situations; A2 Monitoring/guiding reactions A3 Judging impacts; B2 Communicating; C1 Coordinating own work; C2 Interweaving

778 Assoc Prof Junor expresses the opinion the Table MR-7 "highlights areas where job 'size' and hence demands placed on staff will be understated, unless the Spotlight skills identified in Annexures 5 to 8 as underpinning existing skill descriptors, are taken into account".[831]

779 Assoc Prof Junor goes on to consider whether this is simply a question of omission, to be remedied by inserting a number of additional skill descriptors or activities into the relevant awards, or whether there is an underlying work value issue which needs to be taken into account.

780 Assoc Prof Junor's overall conclusion is that:

> … [T]he work of RNs, ENs and AINs/PCWs is of very high impact and social value. It requires the substantial depth and range of skills that have been brought to light using the Spotlight framework. I consider that the Primary Material, analysed through the evidence set out in Annexures 5-8, contains evidence of the pervasive, intensive, and extensive use of complex skills that are incompletely visible, as well as evidence of under-recognised and undervalued skill, effort and responsibility.
>
> Sections 3-3 to 3-5 above have documented a significant number and wide range of invisible skills utilised by RNs, ENs and AINs/PCWs. These skills have been classified as invisible for one or more of four reasons. Some are hidden, "behind screens" or "behind the scenes", because their visible use would be ineffective, undermining the purpose of their use — respect for others' dignity or diplomacy. Some are under-defined because they are hard to put into words: they aid responses to fleeting but important contexts or refer to non-verbal experiences. Some are under-specified, because the concept of "emotional labour" has become a near-ubiquitous term to cover a range of skilled activities that have not been further analysed, the term "soft" skills is imprecise and carries a value judgment with gender overtones, and the skills in question may be seen as innate personality traits, rather than learned capabilities. Some are under-codified, because of inadequate analysis of work processes, their interactive nature, and the interweaving of action and reflection.
>
> All three classifications of aged care work (RN, EN, AIN/PCW) involve, with some variation based on scope of practice, the *intensive and extensive* utilisation of *invisible skills* at *high Spotlight skill levels*, namely "solving new problems as they arise in the course of work" and "solution-sharing/applying expertise". There is also evidence of the use of Spotlight skills at system-creating level, constrained by limits resulting from poor skill recognition and restricted career development opportunities.
>
> Annexures 5 and 6 establish that the invisible skills utilised by all three classifications within aged care work (RN, EN, AIN/PCW) *underpin and pervade all aspects of the work* described in the Primary Material. There is strong evidence that aged care work requires the simultaneous deployment of *complex clusters* of skills of awareness, communication and coordination.
>
> As a result of the invisibility of the skills documented in Section 3, I conclude that the degree of *skill, responsibility and effort* required in each classification is *under-recognised*.[832]

781 At [191] Assoc Prof Junor expresses the following opinion:

> I consider that the invisibility of the skills documented in Sections 3.3 to 3.5 above, taken together with the evidence in Annexures 5 to 7, implies that these skills are unrecognised. In general, skills need to have been named and made visible before they can be recognised, whether in qualifications, classification skill

831 Junor Report at [132].

832 Junor Report at [186]-[190].

descriptors, job analysis data, position descriptions or work value assessments. On the other hand, qualifications, workplace learning records, and recognition of prior learning mechanisms, are forms of skill recognition that can help make skill requirements explicit and allow individuals to claim skills. I consider that the relationship between skill visibility and skill recognition is an interactive one. So from this point in the analysis I shall discuss visibility and recognition in tandem, indicating how each reinforces the other.

782 And, at [213] to [215] Assoc Prof Junor states:

> It is my opinion that the current rates of pay for RNs, ENs and AINs/PCWs, both as set out in the Award and as agreed through enterprise bargaining, are significantly below underlying work value.
>
> I am also of the opinion that current rates do not reflect changes in work value since 2005 or 1997.
>
> I am understanding "work value" to embrace "skill, responsibility, effort and conditions of work".

783 As to the reasons why the current pay rates in aged care do not reflect underlying work value, Assoc Prof Junor's opinion is as follows:

> I am of the opinion that the primary reason for the low pay rates of aged care work in Australia is that they are a function of the fact that the work is performed overwhelmingly by females. I refer to this circumstance as "gender segregation". By this term I mean both "gender concentration" and the following social processes:
>
> - aged care work is part of a feminised care economy ("the labour market is structured on gender lines") (a)
> - care work jobs and skills have, or are seen to have, characteristics such as care-giving that have historically been associated with women ("the job is gendered and its skills are seen as gender-linked") (b)
> - skill recognition and valuation processes are affected by gender ("recognition and valuation have been gender-biased") (c)
>
> The steps in my reasoning are as follows:
>
> - Part 6.1 draws a model from the Secondary Material, adapting it to Australian conditions. This "5Vs" model explains how gender segregation or concentration — the predominantly female nature of an occupation — generates the invisibility and under-recognition of some skills (a combination of effects a, b, c in paragraph 246)
> - Part 6.2 also draws on the Secondary Material to describe the historical legacy of gendered perceptions of care work, including nursing, as well as an unfortunate "care" versus "skill" dichotomy that misrepresents the nature of the skills of nursing and aged care work (effects a, b in paragraph 246)
> - Part 6.3 returns to the Primary Material. It reasons that in this study, the Spotlight tool has accomplished the purpose for which it was designed, of making visible skills that were hitherto invisible on gender grounds. Applied to aged care and nursing jobs, the Spotlight tool has identified a range of skills that were previously hidden, under-defined, under-specified or under-codified, specifically on gender grounds. Establishing that gender was the basis of the invisibility of these skills, and that the result of invisibility was under-recognition and undervaluation, part 6.3 draws the link between gender and undervaluation (effect c in paragraph 246)
> - Part 6.4 draws on statements from the Primary Material in which interview participants reported their experience that gender was a factor in the undervaluation of their own work.

- Part 6.5 focuses on the labour market structures and factors that are commonly used as indicators of the likelihood that historical undervaluation processes have been in play, and finds them all present in the case of aged care work (effects a, c in paragraph 246).[833]

784 In concluding her Report, Assoc Prof Junor provided an additional summary of her answers to each of the questions posed in the instructions provided by the ANMF's solicitors and observes that the "present work value assessment is timely".[834]

Consideration

785 As mentioned earlier, the ANMF relies on the Junor Report in support of its contention that direct aged care workers utilise Spotlight skills that are not compensated by the modern award minimum rates of pay applicable to their roles.

786 The Joint Employers contend that the Commission should be "cautious in readily accepting the data and analysis prepared using the Spotlight Tool to support a finding of gender-based undervaluation".[835] The Joint Employers advance 3 broad propositions in support of this contention:

- The application of the Spotlight Tool is an "academic exercise" designed to identify particular skills against a set criteria, by design it is intentionally selective and can be applied to numerous industries to achieve similar results.
- Application of the Spotlight Tool cannot demonstrate all skills identified are "invisible" based on gender reasons.
- The absence of express inclusion of "Spotlight Skills" in the Aged Care and Nurses Awards is not determinative. Both modern awards were substantially based upon pre-reform federal awards, with the work performed by nurses being subject to extensive work value assessment. The extent of the Spotlight Tool's "assistance", in this respect, is limited to possible phasing and/or re-drafting of classifications.[836]

787 We also propose to deal here with the Joint Employers' characterisation of some aspects of the work of direct aged care employees as attributes, as opposed to skills.

788 As mentioned in Chapter 5, a number of the criticisms advanced by the Joint Employers in respect of the Junor Report were not put to Assoc Prof Junor in cross-examination. Indeed, the cross-examination of Assoc Prof Junor was limited to the following topics:

- the design and implementation of the Spotlight Tool[837]
- the meaning of "soft skills"[838]
- the skill sets identified using the Spotlight methodology[839]
- the 5 "levels" in the Spotlight Tool[840]

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833 Junor Report at [246]-[247].

834 Junor Report at [289].

835 Joint Employer closing submissions dated 22 July 2022 Annexure J at [4.3].

836 Joint Employer closing submissions dated 22 July 2022 Annexure J at [4.3]-[4.4].

837 Transcript, 2 May 2022, PN3114-PN3126.

838 Transcript, 2 May 2022, PN3127-PN3133.

839 Transcript, 2 May 2022, PN3134-PN3148.

840 Transcript, 2 May 2022, PN3149-PN3154.

- Annexure 4,[841] and
- Paragraphs [223], [257], [259] and [275] of the Junor Report.[842]

789 Importantly, Assoc Prof Junor was *not* cross-examined in respect of the methodology used and the results obtained from the application of the Spotlight Tool to RNs, ENs and AIN/PCWs. Nor was Assoc Prof Junor cross-examined in respect of Annexures 1, 2, 3, 5, 6, 7, 8 and 9 or in respect of her opinion that the skill, responsibility and effort required in each direct aged care classification is under-recognised.

790 As mentioned earlier, the Joint Employers do not press the criticisms made in their written submissions in respect of matters that were not put to the expert witnesses nor do they ask that we make findings in respect of those matters.[843]

791 We now turn to deal with the 3 propositions advanced by the Joint Employers in support of their contention that we should be "cautious" in respect of the conclusions in the Junor Report.

(i) A highly selective academic exercise, applicable to all industries

792 The Joint Employers emphasise that the "Spotlight Tool" is designed for broad application to identify 'hidden skills in an array of work processes:

> the existence of "spotlight skills" is not unique to any one industry. Nor does it promote comprehensive analysis of the skills involved in performance of work. It is an academic exercise used to consider or analyse recognised activities and work processes by re-classifying them using language that targets categories on the taxonomy. The weight placed on this exercise — and upon the quantity of skills identified using the tool — should be limited, given that the exercise is *highly selective and self-serving*.[844]

(Emphasis added)

793 In response to the criticism that Assoc Prof Junor's application of the Spotlight Tool to direct aged care workers was a "self-serving" "academic" exercise the ANMF submits:

> the employer parties have somewhat ill temperedly used adjectives in their submission that should not have been used. It was not put to Hon Assoc Prof Junor that her work was of "academic" interest only (JCS Ann J [4.9]). If it had been, she may well have drawn attention to (inter alia) the fact that Employment New Zealand (an instrumentality of the New Zealand Government) uses the tool to accompany an "Equitable Job Evaluation system" — which presumably that nation-state does not do because of the academic interest involved in pointlessly applying a tool to a particular job. She may well have given other explanations as to why it would not be accepted that she was engaged in a purely "academic" exercise. One cannot know, because it was not put.
>
> It was not put to Hon Assoc Prof Junor that her exercise was "self-serving". It is difficult to know what benign interpretation can be given to those words. It is also difficult to know what kind of motivation the employer parties are ascribing to Hon Assoc Prof Junor in describing her sworn evidence as "self serving". At least often, that kind of epithet is used in relation to a witness who has an interest in the outcome of the matter, and gives evidence that serves that witness's interest. It is impossible to see how that could be said about Hon Assoc Prof Junor. It does not

841 Transcript, 2 May 2022, PN3154-PN3189.

842 Transcript, 2 May 2022, PN3190-PN3232.

843 Joint Employers submission — response to Background Documents 6, 7 and 8 dated 29 August 2022 at [3.19].

844 Joint Employers closing submissions dated 22 July 2022 at [4.9].

> really suffice to say that this phrase should not have been used about Hon Assoc Prof Junor; the employer parties should formally withdraw the submission, or at the very least explain how it does not mean what, on its face, it means — and draw attention to where, in fairness, they put it to Hon Assoc Prof Junor for her response.[845]

794 The Joint Employers did not respond to this aspect of the ANMF's submissions; other than to clarify that they did not rely on matters not put in cross-examination.

795 We agree with the ANMF's submission. The pejorative characterisation of Assoc Prof Junor's evidence as "self-serving" is wholly without foundation and, further, the criticism was never put to Assoc Prof Junor.

796 We do not know what to make of the submission that Assoc Prof Junor's application of the Spotlight Tool to RNs, ENs and AIN/PCWs was an "academic" exercise. We accept that it was conducted by an academic and, moreover, an academic whose expertise was unchallenged. But, one might say, so what? If the Joint Employer submission is intended to convey that the Junor Report is of no assistance in these proceedings, we deal with that proposition in our conclusion.

797 As to the criticism that the Spotlight Tool can be used in industries other than aged care, we accept that is so. But that fact does not mean that the tool is of no utility in the aged care sector or that Assoc Prof Junor was wrong to have applied it in the way that she did. Further, we accept that the Spotlight Tool may not identify *all* skills in a work process, but that does not mean that Assoc Prof Junor has incorrectly identified the "invisible" skills identified in the Junor Report. As mentioned earlier, Assoc Prof Junor was not cross examined in respect of the methodology used or the results obtained from the application of the Spotlight Tool to RNs, ENs and AINs/PCWs.

798 Further, as acknowledged by the ANMF, if it were true that application of the Spotlight Tool to a female-dominated industry like aged care revealed the same quantity and quality of invisible skills as application of the Tool to a male-dominated industry like construction, then that may undermine use of the Spotlight Tool to demonstrate undervaluation of aged care work. But there is simply no basis for assuming that that is (or would be) true. Assoc Prof Junor was simply asked whether one could apply the Spotlight Tool to the construction industry,[846] importantly she was not asked whether, if one did apply the tool to the construction industry it would reveal the same quantity and quality of invisible skills. Further, as the ANMF submits:

> It is highly unlikely that, if she were so asked, she would have answered "yes". That is because the tenor of her report (and those of at least five other experts) was to the effect that it was precisely "women's work" that was likely to bring to bear skills that were "invisible", for reasons Hon Assoc Prof Junor identified — see in particular at [191]-[212], and [246]-[261] of the main body of her report, and annexures 8 and 9 to her report (these are considered in detail hereunder).[847]

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845 ANMF closing submission in reply dated 17 August 2022 at [402]-[403].

846 Transcript, 2 May 2022, PN3122.

847 ANMF closing submissions in reply dated 17 August 2022 at [400].

(ii) The Spotlight Tool cannot prove or substantiate the reason for "invisibility"

799 The Joint Employers submit that during cross-examination, Assoc Prof Junor accepted that:

- skills identified using the Spotlight Tool may be hidden or unrecognised for a variety of reasons (for example, reasons connected to tact, tactility and tacitness — with gender being included as one of several reasons), and
- the Spotlight Tool cannot provide the reason why a skill is unrecognised. This is because "it's a skill identification tool".[848]

800 On this basis the Joint Employers submit that the Spotlight Tool is limited to skills identification:

> No aspect of the Spotlight Tool refers to gender. Just as it may be applied equally to different industries, it may be applied equally to work performed by men or women. It should be noted that Professor Junor did not address the 30% of men working in the aged care industry or the fact that the same "invisible skills" identified using the Spotlight Tool would apply to men working as RNs, ENs or AINs — noting they are performing the same work.[849]

801 Further, the Joint Employers point to what is said to be some inconsistency in Assoc Prof Junor's evidence regarding the purpose of the Spotlight Tool:

> When questioned about how the Spotlight Tool connects skills identification to gender, Professor Junor referred to the "original" purpose upon which the Spotlight Tool was developed, namely, "in order to identify skills that were under-recognised on gender grounds". Despite accepting the final version of the tool — which she applied for the purposes of her report — has broad application and the inability of the tool to provide an explanation as to "why" a Spotlight Skill is unrecognised, Professor Junor advocated for the position that "[t]he purpose is to identify skills that have not been identified on gender grounds". Both answers suggesting that the primary focus of the Spotlight Tool is related to gender.
>
> When the inconsistency of her position was identified, Professor Junor conceded that the Spotlight Tool could equally help identify skills unrecognised for reasons other than gender.
>
> Whilst it is possible that skills identified using the Spotlight Tool are "hidden" due to gender issues, the mere identification of skills cannot establish the reason for a skill not being expressly mentioned in an industrial instrument. As such, the Spotlight Tool and its related analysis does not assist with determining undervaluation based on gender (or other reasons).[850]

802 At [405]-[414] of the ANMF's closing submissions in reply, the ANMF convincingly rebuts the suggested inconsistency between the Junor Report and the evidence given by Assoc Prof Junor in cross-examination. We accept the ANMF's submission in this regard.

803 Further, as the ANMF correctly observes, it was not suggested to Assoc Prof Junor that there was any inconsistency in her evidence, and that should have been done as a matter of fairness if it was going to be the subject of a submission.[851]

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848 Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.10]-[4.11].

849 Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.13].

850 Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.14]-[4.16].

851 ANMF closing submissions in reply dated 17 August 2022 at [404].

804 We accept that the Spotlight Tool itself just identifies skills that have not been recognised and that the question of *why* they have not been recognised is a separate question. It is, however, a question that Assoc Prof Junor addressed. At [246] of her Report Assoc Prof Junor sets out her expert opinion as to the reasons why the current minimum award rates in the aged care sector do not reflect underlying work value. Assoc Prof Junor was not cross-examined on this aspect of her evidence.

805 Further, it is apparent that Assoc Prof Junor's opinion in respect of *why* the invisible skills of direct care workers have not been recognised is based on her specialised knowledge and the Secondary Material, in particular the literature review at Annexure 9.

806 Starting from [248], Assoc Prof Junor sets out a table in relation to the linkage between gender concentration and undervaluation. This table is set out at Table 12 in this Decision.

807 At [249], Assoc Prof Junor develops her analysis as follows:

> The term "vocation" used by Burchell et al. refers to the historical legacy of perceptions of care work as a vocation of care, performed for "love" not "money"— the lingering so-called "virtue script" of service and altruism.[852] Tendencies to under-recognise and undervalue the work are also partly driven by pressures to "value-add" by containing the costs of necessarily labour intensive care work through wages that do not properly reflect value. As aged care is not a standardised or uniform product, particularly in the context of dementia and palliation, measures of productivity place pressure on both work intensity and wage share, with implications for work value measurement and gender pay outcomes. Further, variance from the male-normed standard full-time employment, justified as "family-friendly", also helps keep wages low and make bargaining difficult.[853]

808 Assoc Prof Junor was not cross-examined on this and her evidence in this regard is in substantially the same terms as what Assoc Prof Smith says at [60] of the Smith/Lyons Report, upon which Assoc Prof Smith was also not cross-examined. Assoc Prof Junor explains, at [250], further factors leading to skill invisibility in sectors that have historically been (or are) female-dominated as being that the work involved is "female" in some way and as being analogous to unpaid housework and volunteer work, as well as, "gender segregation based on role demarcations, informal recruitment, small workplaces, lack of career paths, part-time work and (in the case of AINs/PCWs but not in the case of nurses) lack of formal qualifications".[854]

809 Assoc Prof Junor notes that this reflects the historical legacy of "care work", which includes that:

> The growth of care work reflects social trends that have contributed to the creation of low-status but skilled service jobs, mostly performed by women who have been recruited on the basis of skills acquired outside the labour market or formal training system. As a result, the skills in question have tended not to be defined as such, but to be "naturalised" to women, perhaps on the basis of earlier gender-specialised education and life and prior work experience.[855]

852 V Adams, JA Nelson, "The Economics of nursing: Articulating care" (2009) 15(4) *Feminist Economics* 3-29.

853 Junor Report at [249].

854 Junor Report at [250].

855 Junor Report at [251].

810 This has been, as Assoc Prof Junor explains, the subject of study and theorisation over the last several decades:

> Thus, definitions of the skills of care-work were still being thrashed out as recently as 10-15 years ago. I think this helps explain the lag in defining, recognising and valuing care skills. I believe that a belated start is now under way to address the issue of recognising and valuing the invisible skills of care.[856]

811 Assoc Prof Junor was not cross-examined on any of this.

812 The summary set out above is developed, in greater detail, in Annexure 8 to the Junor Report. Further, as Assoc Prof Junor makes plain in Annexure 9, her evidence was based on a literature review designed to "set out the wider research basis of the typology of invisible skills discussed in the main report and applied in Annexures 5-8 to the work of [RNs], [ENs] and [AINs/PCWs]".[857]

813 The Joint Employers' criticism of Assoc Prof Junor's evidence as to *why* the current award minimum pay rates in the aged care sector do not reflect underlying work value are unpersuasive.

(iii) Spotlight skills and Award descriptors

814 The Joint Employers submit that the absence of the express inclusion of "Spotlight Skills" in the *Aged Care Award* and the *Nurses Award* (i.e. using descriptions that expressly incorporate the taxonomy) is not determinative of the question of whether those skills have been factored into the current modern award minimum rates of pay. They submit that the following factors are also relevant when considering the significance of the wording in award classifications:

> (a) both modern awards were substantially based upon pre-reform federal awards, with the work performed by nurses, in particular, being subject to extensive work value assessment;
> (b) classifications in modern awards are not drafted as exhaustive position descriptions;
> (c) the Spotlight Tool is a relatively new skills identification tool that primarily assists with the drafting of descriptors.
>
> To the extent the Spotlight Tool is of assistance to the Commission, it should be limited to the re-wording of classifications, if deemed necessary and appropriate.[858]

815 The Joint Employers also note that Assoc Prof Junor accepts that Spotlight skills may be "assumed or implied" in the relevant award descriptors.[859]

816 The notion that existing minimum award rates already reflect Spotlight skills is developed by the Joint Employers in their reply submissions where they present a comparison of the benchmark comparator C10 (Certificate III) classification from the Manufacturing Award against the Nursing Assistant (Certificate III) classification found in the *Nurses Award*.[860]

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856 Junor Report at [252]-[255].

857 Junor Report Annexure 9 at [2].

858 Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.18]-[4.19].

859 Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.17]; Junor Report at [118]-[119].

860 Joint Employers closing submissions in reply dated 19 August 2022 at [3.24].

817 The Joint Employers highlight several skills in the C10 classification definition that they submit expressly "recognise" (or correlate to) Spotlight skill "levels" defined in the Junor Report.[861] It is submitted that since these skills are recognised, such skills have been taken into account in the wage setting exercise for the Manufacturing Award. Given the Nursing Assistant classification aligns with the C10 level benchmark, the Joint Employers submit it is difficult to accept that the minimum award rate for that classification does not also factor in the relevant "interpersonal skills" simply by virtue of failing to expressly reference them and the fact that nursing is a female-dominated occupation.[862]

818 Contrary to the Joint Employers' submission, there is no reason to think that the Spotlight skills identified by Assoc Prof Junor have been taken into account in skill descriptors and there is a reason to think that they have *not* been. Indeed the purpose of the Spotlight Tool — the efficacy of which was not effectively challenged in cross-examination — is to identify skills that are not generally recognised. As the ANMF puts it:

> If they are not recognised, they cannot be valued. If they are not valued, then they are not brought to bear in assessing the work value of given work. There is every reason to think, then, that these skills have not been taken into account in previous work value assessments, and the employer parties point to no reason for thinking that they have been taken into account.[863]

819 The fact that Assoc Prof Junor agreed that it was possible that Spotlight skills might be implied in skill descriptors is of little consequence. Just because a thing is possible does not mean it is a fact. The Joint Employers offer no analysis in support of the proposition that, despite that the skill descriptors in the *Aged Care Award* and the *Nurses Award* making no reference to Spotlight-type skills, these skills have been implied. Further, as noted earlier, Assoc Prof Junor's evidence in respect of this issue was unchallenged in cross-examination.

820 Assoc Prof Junor's opinion that the existing classification structures do not encompass the Spotlight skills is supported by other expert evidence. Prof Charlesworth states:

> As in other feminised awards, skill classifications in the *Aged Care Award* are rudimentary and compressed. They not only fail to provide meaningful progression in terms of pay rates but also lack any relevant description and specification of the skills actually required in PCW jobs, including at different skill levels (Charlesworth & Smith 2018).[864]

821 Prof Meagher concluded that the *Aged Care Award* "does not recognise the range of skills and responsibilities aged care workers exercise in providing high quality care to older people."[865] During cross-examination, the Joint Employers' representative asked Prof Meagher to clarify what she meant by "does not recognise":

> MR WARD: When you say it doesn't recognise, are you saying there it doesn't explain the skills or are you saying — is that your way of saying they don't get paid for them?

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861 Joint Employers closing submissions in reply dated 19 August 2022 at [3.25], see table.

862 Joint Employers closing submissions in reply dated 19 August 2022 at [3.27].

863 ANMF closing submissions in reply dated 17 August 2022 at [441].

864 Charlesworth Report at [13].

865 Meagher Report at v.

> PROFESSOR MEAGHER: It's my way of saying they don't get paid for them. And it's to do with this kind of problem to do with understanding the sorts of things that care workers do are skilled, and they do — they exercise responsibility and judgement even in sort of low level occupations that are *sort of not grasped by the industrial instrument …*
>
> MR WARD: … I'm just trying to understand what that means in the context of a classification structure. Is what you're saying that the structure might very well understand the physical task but it's not properly understanding the intensity of what's involved in actually engaging with the resident in any given moment, in any given circumstance, which could be determined by their acuity, it could be determined by their personality or it could be determined by their mood on the day.
>
> PROFESSOR MEAGHER: That's certainly the latter about the sort of interpersonal demands are not recognised …
>
> MR WARD: … When you use the word responsibility in that paragraph, are you — are you talking about the fact that when as a care worker I'm alone with a resident I hold a responsibility for providing the personal care in that situation? I'm just trying to understand what you mean by responsibility?
>
> PROFESSOR MEAGHER: I do mean that but I guess there are other responsibilities that come up in the day's work. I mean if we're just talking about residential care or also about home care, about sort of decision making and around prioritising tasks and clients and so on. I think they also could be categorised as responsibilities. I think there's just a range of things that need to be negotiated in the moment with the person and you need to — you need to take responsibility for what you're doing in that moment and for that person's welfare in the moment. It can be — yes, that are quite significant. Even if people are doing them all day every day I think they're quite significant for the welfare of the person that you're responsible for.[866]

822 Assoc Prof Smith and Dr Lyons express the opinion that limitations in the capacity of industrial tribunals to properly value work has meant that there has been a "limited capacity to address what may have been errors and flaws in the setting of minimum rates for work in female dominated industries and occupations".[867] The Smith/Lyons Report notes that an absence of, or restraint upon, proper work value assessments means that the skills classifications in awards relating to feminised industries are deficient:

> The classification structures may lack relevant description and information of what is required in jobs, including the detailed specifications of the skills required at different skill levels. These omissions are critical as it means that the work undertaken is not properly described, recognised and valued. Weaknesses in classification structures may also mean that there is no mechanism to recognise additional skills.[868]

823 Assoc Prof Smith and Dr Lyons also note that the capacity of industrial tribunals to assess the value of work in feminised industries and occupations has been limited by the requirement to position that valuation against "masculinised benchmarks":

> This requirement for a comparator has been a feature of equal remuneration proceedings has been noted but the pivotal role of the metal industry tradesperson in wage fixing is also well documented. As an example the award restructuring

866 Transcript, 2 May 2022, PN2665-PN2668.

867 Smith/Lyons Report at [90].

868 Smith/Lyons Report at [91].

> requirements of wage fixing principles from 1988 was ultimately designed around a set of masculinised classifications and credentials and thus offered a limited capacity to properly describe, delineate and reward work in feminised industries and occupations. Work value comparisons continued to be grounded by a male standard, that being primarily the classification structure of the metal industry awards and to a lesser extent a suite of building and construction awards. This template rested on the relativity of masculinist classifications to the position of metal industry or building industry tradesperson.[869]

824 At [111]-[131] of the Smith/Lyons Report Assoc Prof Smith and Dr Lyons conduct an analysis of the classification definitions in the *Aged Care Award* and identify the following:

> The classification structure does not contain skill based or task-based descriptions. The "indicative tasks" only lists job positions or job titles. The classification descriptions of Schedule B, and reproduced in Table 4, are generic competency descriptions. These classification descriptions have not been varied since 2009 (except for the minor change to the final dot point of aged care employee level 4 made in 2019) … We do not think the *Aged Care Award* classification descriptions are useful in assessing or identifying the work value of aged care employees.[870]

825 The ANMF rejects the Joint Employers' comparison of the descriptors concerning interpersonal and communication skills in the C10 classification, applicable to manufacturing workers, to the kind of skills identified by the Spotlight Tool. In closing oral argument, Mr Hartley for the ANMF put it this way:

> One of the spotlight skills is spotlight skill level A2, "monitoring and guiding reactions", and the employers say, well, that's similar to, quote, "exercises discretion within the scope of this classification level", and we say, not it's not.
>
> Or spotlight skill level B1, negotiating boundaries, and the employers say, well that's similar that it performs non trade tests incidental to their work. We say, no it's not.
>
> …
>
> So the point is this, that the reason why we emphasise that these are skills that have to be taken into account, is that it happens, and the employer submissions are an example of this, but the skills are wrongly discounted. They are characterised in a way that doesn't reflect the true character of the skill.[871]

826 And later:

> The idea that it can be said in some undifferentiated way that the skill of, on the one hand, speaking with your boss in a metal fabrication worksite and the skill of speaking with a person who is in the course of dying and bringing that person to a good death, or dealing with that person's family in the stages of grief or seeking to comfort or re-centre or redirect a person who's lost some or all of their grip on reality and is in immense distress or is scared or is angry or is violent, or someone desperately trying to maintain independence in the context of a diminished capacity for being independent, the idea that there's a comparison between those two skills in terms of their level and their content really only needs to be stated to be rejected.[872]

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869 Smith/Lyons Report at [92].

870 Smith/Lyons Report at [131].

871 Transcript, 24 August 2022, PN15030-PN1533.

872 Transcript, 1 September 2022, PN15924.

827 The HSU also address this issue:

> Obviously, in our submission to say that the nature of the communication or interpersonal skills that a tradesperson is expected to demonstrate, presumably interacting with colleagues or a supervisor or the like, is very different and not in any sense, comparable with the nature of skills required to provide care to an elderly person with dementia, and bathe that person and deal with difficult behaviours and the like and develop a relationship which allows all of that to occur.[873]

828 These submissions highlight that the ability to apply a skill in the context of a particular workplace is inherent to that skill and that the context in which a skill is applied can increase or decrease the weight given to a particular skill in a work value assessment. For the reasons advanced by the ANMF and HSU we find the Joint Employers' submission based on the comparison between the C10 (Certificate III) classification in the Manufacturing Award and the Nursing Assistant (Certificate III) in the *Nurses Award* entirely unpersuasive.

829 We accept Assoc Prof Junor's evidence that the skill, responsibility and effort required in the RN, EN and AIN/PCW classifications is under-recognised in the current applicable award rates of pay.

(iv) Skills or attributes?

830 Among the submissions put by the Joint Employers challenging, or at least qualifying, the expert evidence is that they challenge the ANMF's contention that the Spotlight skills identified by Assoc Prof Junor are assessable skills for the purposes of work value under s 157(2A) that are not recognised in the current minimum rates in the relevant modern awards for RNs, ENs and AINs/PCWs. The Joint Employers submit that these skills are used in all industries,[874] are not rightly regarded as skills[875] and the relevant interpersonal skills may be, or are, already recognised in at least one of the relevant minimum rates.[876]

831 During the course of closing oral argument the Joint Employers' representative clarified that the Joint Employers were "entirely comfortable" with the proposition that the requirement for direct care employees to exercise empathy and communication skills should be taken into account in assessing the work value of the work performed.[877] However, there is a degree of tension between that concession and what follows:

> Some of those skills clearly emanate from the Certificate III … four of the modules in the Certificate III were working with diverse people, supporting independence, communicating health or community services and recognise healthy body systems. There's no doubt that some of that some of those competencies to be applied around the caring nature of the work emanate from the Certificate III …
>
> … the other thing that needs to be borne in mind are skills like communication, interpersonal skills and the like, they're not unique to the aged care sector. But they're relevant to a variety of sectors that involve consumers, although we accept

873 Transcript, 24 August 2022, PN14363.

874 Joint Employers closing submissions in reply dated 19 August 2022 at [3.22] (a)-(b).

875 Transcript, 1 September 2022, PN15751-PN15753.

876 Joint Employers closing submissions dated 22 July 2022 Annexure J at [4.17]; Joint Employers closing submissions in reply dated 19 August 2022 at [3.25]-[3.27].

877 Transcript, 1 September 2022, PN15745-PN15749.

> that they are clearly relevant to the aged care sector and we think that you need to be a little cautious about where you draw the line on them.
>
> What I mean by that is this … some of those so-called skills appear to us to be examples of simple cognitive activity by adults, and so one needs to be a little bit careful as to where one goes.
>
> I mean, holding conversations is something that is a capacity that people evolve through childhood, into adolescence and so forth.
>
> Others that were identified, and I'm thinking of empathy, in particular here, we'd ask the Commission to be a little careful. It would appear to us that empathy is a personality disposition, it's a personality trait, and I don't want to get into a debate about whether or not you can learn empathy …
>
> … all we would say to the Commission is, yes, embrace an examination of the caring nature of the work, understand that there are the requirement to exercise skills, such as communication and personal skills, be conscious that some of those come out of the Certificate III (indistinct) program, et cetera, and I think it would be reasonable to say, out of the education that is undertaken by the nursing group, as well.
>
> But just be a little cautious that some of those things seem to be more about the simple cognitive activity of adults, or personality disposition and I'm not able to help the Commission as to how one draws a line in that but I think there has to be some element of care with it.[878]

832 In short, the Joint Employers concede that regard should be had to "soft skills" such as empathy or communication skills when assessing work value,[879] but note that communication skills are not unique to the aged care sector[880] and that some of these skills "clearly emanate" from the Certificate III, including modules of "working with diverse people, supporting independence, communicating health or community services and recognise healthy body systems".[881]

833 The Joint Employers also characterise empathy as "a personality disposition" or "a personality trait"[882] and urged caution regarding interpersonal and communication skills that seem to be "more about the simple cognitive activity of adults", such as holding conversations.[883]

834 The ANMF addresses the characterisation of interpersonal skills, such as empathy, as "traits" or "attributes" in its closing oral submissions, where it described this as "precisely the misunderstanding addressed by every expert witness" that has led to undervaluation.[884] Noting that the Joint Employers did not take up the opportunity to cross-examine the expert witnesses on the theoretical underpinnings for the proposition that care skills have been falsely described as attributes, the ANMF refers to the Junor Report where it incorporates into the typology of skill invisibility that described by terms such empathy and emotional intelligence, as "under-specified" skills:

> *Under-specified skills* — These skills are wrongly defined as "soft", "'natural" or innate personal traits. Concepts such as "emotional intelligence", "empathy", "good communication skills", "people skills", "resilience", "sense of humour" and

878 Transcript, 1 September 2022, PN15748-PN15755.

879 Transcript, 1 September 2022, PN15746.

880 Transcript, 1 September 2022, PN15750.

881 Transcript, 1 September 2022, PN15748.

882 Transcript, 1 September 2022, PN15751-PN15753.

883 Transcript, 1 September 2022, PN15755.

884 Transcript, 1 September 2022, PN15914-PN15922.

> "flexibility" need to be "unpacked", in order to identify the skills involved. The term "emotional labour" is less precise than the term "skilled emotion management".[885]

835 The ANMF also refers to various descriptors of Spotlight skills, taken from table MR-4 of the Junor Report that may be used instead of saying a person has empathy, submitting that each were valuable, legitimate factors in the assessment of work value, and not to be "written off" as personality traits:

> Responding to the grief and sadness of residents at the loss of independence and possessions; managing one's own stress in the midst of many interruptions; managing one's own and a client's responses when dealing with the horrendous effects of neglected wounds, managing adverse impacts on a resident's wellbeing of inappropriate wishes of family who are in denial, initiating service acceptance, navigating intense fear and shame, prioritising advocacy for residents' rights, dignity and pain relief, interactions with doctors, perceiving a resident's pain level based on facial expression, combining professionalism, humour, empathy, projecting confidence to establish trust and lighten mood.[886]

836 A similar point concerning natural "aptitude" was also made in the oral submissions of the HSU:

> so far as empathy was concerned, it appeared to be suggested that that's something that people have or they hadn't. That is, it's an aptitude issue. I don't know, that's quite a philosophical question, perhaps, but leaving that to one side, all jobs have aptitude. Mechanical skills are — some people have a greater aptitude to mechanical skills and, no doubt, some people have a greater aptitude to be a brain surgeon. That doesn't downplay the significance and importance of the complexities of the skills involved and the way in which they ought be recognised in the pay that — in the setting of appropriate pay.[887]

837 In respect of the Joint Employers submission that certain skills identified in the Junor Report seem "more about the simple cognitive activity of adults", the ANMF submits that this misunderstands what Spotlight skills are, being skills that are "peculiarly prevalent in feminised work and in particular care work".[888]

838 The HSU also address this point in its closing oral submissions, stating that the notion that such skills were merely the "cognitive activity of adults" downplays the types and complexity of skills involved, adding that "[p]roviding care to a resident with advanced dementia and endeavouring to bathe and feed and dress that individual is not like striking up a conversation with a stranger at a bus stop about the weather".[889]

839 In respect of the Joint Employers submission that certain skills identified in the Junor Report seem "more about the simple cognitive activity of adults", the ANMF submits that this misunderstands what Spotlight skills are, being skills that are "peculiarly prevalent in feminised work and in particular care work".[890]

840 As Assoc Prof Junor puts it:

> The Spotlight taxonomy is designed to bring to light work process skills that may otherwise be overlooked, or whose full dimensions have not been understood.

885 Junor Report at [140].

886 Transcript, 1 September 2022, PN15918.

887 Transcript, 1 September 2022, PN15861.

888 Transcript, 25 August 2022, PN15126.

889 Transcript, 1 September 2022, PN15860.

890 Transcript, 25 August 2022, PN15126.

> I consider that, if the range and level of skills in the Spotlight taxonomy are not fully *identified* and *recognised*, the results will be failure to assign a full and accurate *value* to a job classification.
>
> Under-recognition of the full range of Spotlight skill demands in a job or classification, and/or of the actual level of Spotlight-identified skill at which they are required to be exercised, may also result in, or be linked to, an under-estimation of the effort and/or responsibility required in job performance.[891]

841 The ANMF also relies on the evidence of an employer lay witness, Mark Sewell, in support of its submissions regarding the correct characterisation of Spotlight skills. Mr Sewell is the CEO and Company Secretary of Warrigal, an aged care provider described as operating 11 residential aged care facilities as well as home care services over several regions in NSW.[892]

842 At [93] of his witness statement Mr Sewell gave the following evidence in relation to the Certificate III qualification:

> What a Certificate III cannot teach is the attitude and maturity required of this role that we are looking for [in] personal carers. From my experience, the required time to be a experienced carer is around 3 years.[893]

843 During the course of cross-examination by the HSU, counsel for the HSU took Mr Sewell to the above paragraph and asked him to clarify whether his view is 'that there are additional skills and knowledge obtained through experience beyond the baseline knowledge required in a Certificate III? The relevant extract of the transcript follows:

> MR SEWELL: Certificate III is a terrific training course to give the background and teach technical skills but it requires personal attributes of customer service and resilience and kindness that can't be taught so much but they're attributes and often they develop in people through a long-term commitment to older people and their needs and we estimate that about three years people become very, very good at explaining why they do what they do and love what they do and we use them to talk to other people, new incoming staff who are considering a career in aged care.
>
> MR GIBIAN: Just two aspects of that. One is you referred to matters of perhaps relationship — relational skills, that is, how to relate to the residents, communicate effectively with the residents as matters which are improved over time?
>
> MR SEWELL: Yes.
>
> MR GIBIAN: I understood that correctly?
>
> MR SEWELL: Yes.
>
> MR GIBIAN: I take it you also — that the skills in terms of conducting particular activities, whether it be showering or toileting or the kind of medication processes and the like that care workers are involved in also improve over time in dealing with frail and residents with complex needs?
>
> MR SEWELL: Yes, I think so. Any technical skill would improve over time definitely.[894]

844 Later in Mr Sewell's cross-examination, counsel for the ANMF asked Mr Sewell to clarify whether the "personal attributes" he was referring to included the following:

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891 Junor Report at [71].

892 Witness statement of Mark Sewell dated 3 March 2022 at [2], [8].

893 Witness statement of Mark Sewell dated 3 March 2022 at [93].

894 Transcript, 12 May 2022, PN12997-PN13000.

- The ability to piece together resident information, past traumas, for example, to better understand present behaviour
- Developing a fine-tuned knowledge of a resident's idiosyncrasies and preferences to support smooth patterns of hygiene, meals, sleeping
- Being alert to co-workers' emotional pressures, strengths and needs
- Quickly picking up early warning signs of impending disturbances or an approach that isn't working
- Observing, responding to, reporting even very slight changes in residents
- Adapting one's voice, tone, body language to knowledge of how it is that residents would best respond
- Dealing increasingly with residents from different language groups and ensuring that residents either within the same language group or between language groups are able to interact
- Assessing the urgency and importance of simultaneous pause on the worker's attention, and
- Smoothly switching back and forth between work that is individualised to one particular resident and then work within a team.

845 Mr Sewell accepted that each of the above "characteristics" fell within what he had described as "personal attributes".[895] He further agreed that he could think of "many other attributes that care workers and nurses would have which might fall into the category of characteristics or descriptors of the work that they perform which improve over time".[896]

846 The ANMF drew our attention to the fact that the characteristics put to Mr Sewell were descriptors of work procedures, taken from Table MR-5 of the Junor Report where they are used to describe the "invisible" skills that are often undervalued on the basis that they are mischaracterised as an "attribute".[897] The ANMF submitted:

> Mr Sewell has more familiarity with aged-care work than most or many; Mr Sewell clearly did not intend to deprecate the skills brought to bear by aged-care workers in describing them as "personal attributes … that can't be taught"; he freely, when he was asked to, accepted descriptions of the kinds of attributes of which he spoke in terms that were clearly descriptors of skills.[898]

847 We accept the evidence of Assoc Prof Junor that the Spotlight skills identified in the Junor Report in respect of RNs, ENs and AINs/PCWs working in aged care are correctly characterised as skills (as opposed to personality traits or dispositions) and should be taken into account in the assessment of work value.

848 Indeed it seems to us the mischaracterisation of the so called "soft skills" as personality traits or "the simple cognitive activity of adults" is at the heart of the gendered undervaluation of work.

849 Before expressing our conclusions in respect of Assoc Prof Junor's evidence more generally we note the ANMF's contention that the skills identified in the Junor Report are supported by the lay witness evidence.

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895 Transcript, 12 May 2022, PN13100-PN13110.

896 Transcript, 12 May 2022, PN13109.

897 ANMF closing submissions dated 22 July 2022 at [829]; Transcript, 25 August 2022, PN1522.

898 ANMF closing submissions dated 22 July 2022 at [830].

850 In Annexure 1 to its closing submissions, the ANMF engages in its own "hidden skills analysis" of the employee lay witness evidence.

851 Annexure 1 sets out both written and oral evidence given by the employee lay witnesses about the nature of their work and compares this to the Spotlight descriptors in order to identify tasks performed by aged care workers that involve the application of Spotlight skills. Annexure 1 contains tables, separated by each employee lay witness, in which extracts of their evidence are set out against the hidden skill elements from the Junor Report. For example, the evidence of AIN Linda Hardman is presented as follows:

LINDA HARDMAN **AIN, Estia Health facility in Figtree.** **Statement of 29 October 2021, tab 263 at page 13265**		
A2. Monitoring and guiding reactions	52	Dementia and mental health issues also leads to wandering. Some residents wander into other residents' rooms, which can lead to conflict. Even if it does not, we spend time finding wandering residents and persuading them go back to their own room or in any event leave another resident's room. Sometimes we use strategies such as making a cup of tea, or finding an activity for the resident to undertake. At times I just have to make time to have a chat with the resident to reassure them or orientate them in time and place. This takes time, but it can prevent a resident becoming aggressive or intrusive into other residents' rooms.
A3. Judging impacts	22(a)	… AINs have and exercise the following skills in carrying out their work: … Observational skills. You have to know your residents very well, so that you know when they are off or something is up. I may not know all of the medical terminology, but by careful observation you can get a sense of when things are wrong and alert the ENs or RNs.
	22(b)	… AINs have and exercise the following skills in carrying out their work: … Recognising behaviours. Often, before a resident has problematic behaviours associated with mental illness or dementia, you can notice triggers or little changes in behaviour. It is important to recognise these sorts of things and report them to the RN.
	38	There is so much as an AIN that I need to be aware of when caring for a resident. For example, if I am showering someone I need see if there any change in their condition, they could be grimacing and therefore in pain. When residents are meant to [be] eating, I need to see if they are eating. I need to make sure they're drinking water.

LINDA HARDMAN **AIN, Estia Health facility in Figtree.** **Statement of 29 October 2021, tab 263 at page 13265**		
	51	With my experience, I am pretty good at recognising the kinds of triggers that will lead to behaviours, aggression, or abuse. But, despite all of my training and experience sometimes I do not see the warning signs. Sometimes, you just have to leave a resident's room because you can see that the resident is about to get aggressive. I always make sure the resident is safe before I leave. I then re-approach several times. I use strategies such as changing staff, to see if that makes a difference.
B3. Working with diverse people and communities	24	The diversity of residents has changed over time. There is an increase in residents from various cultural backgrounds. It can make it more difficult to communicate with the residents and rely on non-verbal cues and try to learn some of their language to understand their needs.
C1. Sequencing and combining activities	23	I also think that our ability to be adaptable and diplomatic has increased over the years I've worked in aged care. I think AINs have excellent time management and team skills because there are so many tasks that need to be finished in a shift.
C2. Interweaving your activities smoothly with those of others	36	Re documentation: There are a limited number of computer terminals. That means that you are competing with other workers for use of the terminal and you have to try to fit in when there is a chance to use it. If something happens when you're trying to complete your paperwork, which it often does (whether it is attending to a buzzer, assisting a resident with toileting, or something else), often someone else is using the terminal when you return, and even if not you have to log in again, and remember where you were up to.
C3. Maintaining and/or restoring workflow	74	For me to provide proper care means that I spend an extra five or ten minutes with residents. Sometimes they cry, and need a bit of TLC. That has to be done, but then it is harder to fit in all the other work.

852 The ANMF submits that the analysis demonstrates that when the lay witnesses are describing their work, they frequently describe it in ways that fall within the categorisation of Spotlight skills, and thus supports a conclusion that Assoc Prof Junor's categorisation of skills draws out the kinds of skills utilised by aged care workers:

> If [no Spotlight skills] had been identified, that might have called into question the validity of Hon Assoc Prof Junor's analysis of the primary material that she analysed. But the reverse is true: the evidence of the lay witnesses in this proceeding provides ample further examples of each of the spotlight skills being brought to bear, in each classification (RN, EN, AIN/PCW) and within each skill

element (A1-A3, B1-B3, C1-C3). This, then, provides further support for the proposition that aged-care workers *do*, in fact, bring to bear the skills identified by Hon Assoc Prof Junor in the Junor Report.[899]

853 We accept that the ANMF's analysis of the lay witness evidence broadly corroborates the results of the application of the Spotlight Tool in the Junor Report. That said, we also acknowledge that there are limitations in the lay witness evidence, as discussed previously in Chapter 5.4.

854 For the reasons given we reject the Joint Employers' critique of Assoc Prof Junor's evidence. We also reject the Joint Employers' characterisation of certain Spotlight skills as personality traits or dispositions. In doing so we note that such characterisation has led to the undervaluation of these skills. Further, we reiterate that the application of a skill in the context of a particular workplace, is an integral and essential aspect of assessing the value of that skill.

855 We acknowledge that *some*, but clearly not all, of the Spotlight skills identified by Assoc Prof Junor may be comprehended within the relevant Certificate III syllabus. But, as we have said, we reject the Joint Employers' characterisation of the Spotlight skills as personality traits or dispositions; for the reasons articulated by Mr Hartley in the ANMF's closing oral submissions.

856 Assoc Prof Junor's evidence was cogent, probative and relevant to our assessment of whether a variation of modern award minimum wages in the relevant awards is "justified by work value reasons" (s 157(2)(a)). The force of Assoc Prof Junor's evidence was undiminished during cross-examination which, as we have mentioned, was somewhat perfunctory.

857 The Junor Report supports the ANMF's contention that RNs, ENs and AINs/PCWs in the aged care sector exercise Spotlight skills which are not compensated by the modern award minimum rates of pay applicable to their roles.

858 We turn now to the issue of the gender pay gap.

7.3.3. Gender pay gap

859 The gender pay gap was the subject of considerable debate in both written and oral submissions, in particular the relevance of the gender pay gap to the consideration of work value under s 157(2A).

860 The gender pay gap refers to the difference between average wages earned by men and women. It may be expressed as a ratio which converts average female earnings into a proportion of average male earnings on either a weekly or an hourly basis.

861 The drivers of the gender pay gap are complex and are influenced by numerous interrelated factors. The Smith/Lyons Report suggests the following are key drivers of the gender pay gap:

- occupational segregation
- differences in the types of jobs held by men and women and the method of setting pay for those jobs
- structures and workplace practices which restrict the employment prospects of workers with family responsibilities, and
- the historical undervaluation of female work and "feminised" occupations.

899 ANMF closing submissions dated 22 July 2022 at [825].

862 The ANMF acknowledged that it is not necessary that the Commission form a view as to why the minimum rates in the Awards have not been properly fixed, however submits that it may "assist the Commission" to understand why the rates in the Awards "dramatically undervalue the relevant work".[900] It is submitted that the relevance of the gender pay gap to this task is that the "persistent existence" of the gap enables the Commission to conclude that work has been undervalued in female-dominated industries, such as aged care.[901] The ANMF relied on the Smith/Lyons Report in support of this proposition.

863 During the course of oral hearing, counsel for the ANMF was asked to clarify the relevance of the gender pay gap to our statutory task under s 157(2A) and submitted:

> I think at a very high level and the way we put the submission … is as follows. We ask your Honours to award a 25 per cent pay increase. And your Honours might look at the evidence about work value and say, we're happy that this evidence provides all the explanatory force we need to satisfy us that there is a 25 per cent higher value on this work than what the wages currently reflect.
>
> Or the Commission might say, it's higher than the current wages but it may not be 25 per cent. Why is it that the ANMF says that the work has been so drastically undervalued if it isn't only the changes in work value? And our answer to that is, the other mechanism by which explanatory force is provided is that the wages [are] a manifestation of, or a contributor to, the gender pay gap.[902]

864 Counsel for the ANMF later conceded that the extent to which the Commission needs to consider the gender pay gap in these proceedings may be "limited"[903] and submitted its relevance is that it "gives the Commission comfort by reference to real world data that feminised work is undervalued".[904]

865 It is uncontroversial that a gender pay gap exists in Australia. We accept the logic of the proposition in the expert evidence that gender undervaluation of work is a driver of the gender pay gap. We also accept as a general proposition that if all work was properly valued there would likely be a reduction in the gender pay gap.

866 However, these proceedings are not a general inquiry into the drivers of the gender pay gap. As we have outlined above, it is not necessary, for the purposes of these proceedings, that we determine why the minimum rates in the relevant Awards before us have not been properly fixed. Our task is to determine the actual value of the work in aged care and whether a variation of the current rates in the relevant awards is justified by "work value reasons" being reasons related to any of the s 157(2A)(a)-(c) criteria. That task requires that we take into account *all* the skills exercised by aged care workers, which may include an assessment of skills that have previously not been considered or properly valued.

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900 ANMF closing submissions in reply dated 17 August 2022 at [327].

901 ANMF closing submissions in reply dated 17 August 2022 at [329].

902 Transcript, 24 August 2022, PN15046-PN15047.

903 Transcript, 25 August 2022, PN15132.

904 Transcript, 25 August 2022, PN15134.

8. Consideration

8.1. The context

8.1.1. The parties' position

867 It is common ground between the parties that in order to vary modern award minimum wages we must be satisfied that the variation is "justified by work value reasons"; "necessary to achieve the modern awards objective"; "necessary to achieve the minimum wages objective", and that we must take into account the rate of the national minimum wage as currently set in a national minimum wage order.

868 At the heart of these proceedings is the Applicants' contention that the variations they seek to modern award minimum wages are "justified by work value reasons". While there is a significant amount of agreement between the parties, the Joint Employers and the Unions disagree on the extent of changes to work in the aged care sector, in particular the classes of workers affected by those changes.

869 The HSU application argues for a 25 per cent increase for *all* workers covered by the *Aged Care Award*, including general, administrative, maintenance and food services workers. The HSU submits that the "provision of care is the central role and purpose of *all* workers covered by the Award, regardless of stream".[905]

870 The Joint Employers submit that in assessing the change in the value of work performed by aged care employees, a distinction is to be drawn between aged care employees in direct care roles and work performed by general and administrative employees.[906] In particular, they submit that the work of administration, maintenance, gardening, laundry and cleaning employees in aged care has not changed significantly in the past 2 decades. The Joint Employers argue that while there has been a shift for *all* aged care employees, to integrate consumer focused thinking into their work,[907] this has not resulted in a change to the work performed.[908]

871 Further, while the Joint Employers oppose an increase in minimum award wages for general and administrative employees, on the basis that an increase is *not* justified by work value reasons, the position taken in respect of "direct care" workers is more nuanced. While reluctant to support a particular level of increase for "direct care" workers, the Joint Employers accept that the current modern award minimum rates do not properly value the work performed by such employees.

872 Despite the obvious differences between the parties' positions, it is also apparent that there is extensive common ground.

873 These proceedings have been characterised by the evolving positions of the parties in respect of the issues in contention. We do not propose to go through each and every shift in their respective positions, but rather seek to capture where they have ended up.

874 The Joint Employers' position crystallised in their final written submissions, as supplemented in closing oral argument. In their closing submissions, the

905 HSU submissions dated 1 April 2021 at [49].

906 Joint Employers submissions dated 4 March 2022 at [19.35].

907 Joint Employers submissions dated 4 March 2022 at [19.18].

908 Joint Employers submissions dated 4 March 2022 at [19.19].

Joint Employers submitted that "based on the evidence given during the hearing, the work undertaken by the following classes of employee in residential aged care has significantly changed over the past two decades warranting consideration for work value reasons":

- RNs
- ENs
- Certificate (III) Care Workers, and
- Head Chefs/Cooks.[909]

875 In Background Paper 5, the Joint Employers were asked to clarify whether their submission was to the effect that they were supporting an increase to minimum wages on work value grounds in respect of the above classifications of employees and, if so, what quantum of increase was proposed. The Joint Employers' response is set out in their closing submissions in reply, in which they confirm that they contend that an increase in minimum wages is justified on work value grounds in respect of RNs, ENs, Certificate III Care Workers and Head Chefs/Cooks in residential aged care.[910]

876 As to the quantum of such an increase, the Joint Employers noted that "while [their] submission may seem less than helpful", with the exception of RNs, they "have not proposed a monetary outcome" but submit that the C10 framework should provide guidance on this exercise.[911] Contrary to the Unions' claim, the Joint Employers do not support a uniform 25 per cent increase in minimum wages for these classifications.[912] No further clarification in relation to the quantum of any increase was provided during the course of closing oral argument.[913]

877 As to RNs, the Joint Employers contend that there has been a "material change" in the work performed and that the "shift in emphasis with respect to administrative/management duties" and the "increase in accountability" are clear work value reasons to be taken into account. In their closing submissions, the Joint Employers submit:

> In any exercise apportioning value to a classification, clearly, the C10 Framework will be an effective starting point (and for some an end point). However, whether any marginal departure is then warranted will be determined by the Commission based upon its satisfaction that the variation is justified by work value reasons and a consideration of modern awards objective and minimum wages objective.[914]

878 Further, at [19.7] of their closing submissions, the Joint Employers compare the approach taken by the Commission in the *Teachers Decision* in respect of degree qualified teachers with the assessment of the work value of degree qualified RNs.

879 In Background Document 5, the Joint Employers were asked the following question:

> A comparison with the C10 framework suggests if the Joint Employer submission is accepted, that the minimum rates for RNs should be increased by 35 per cent, is that what is being proposed by the Joint Employers?

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909 Joint Employers closing submissions dated 22 July 2022 at [4.47].

910 Joint Employers closing submissions in reply dated 19 August 2022 at [5.20].

911 Joint Employers closing submissions in reply dated 19 August 2022 at [5.21]-[5.22].

912 Joint Employers closing submissions in reply dated 19 August 2022 at [5.23].

913 Transcript, 1 September 2022, PN15556-PN15557.

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

880 In their closing submissions in reply, the Joint Employers confirmed that their submission is that the minimum rates for RNs "should be aligned to the C10 framework" in order to "rectify a material anomaly with the award":

> Being a degree-qualified classification, the minimum rates for RNs are currently not consistent with the minimum rates of other degree-qualified classifications within the modern award system. As such, this alignment should be rectified as part of the work value exercise.[915]

881 In closing oral argument, the representative for the Joint Employers clarified that it is "not just a reflection of the C10 framework" that leads to a wage rise of 35 per cent for RNs and submitted:

> It's also the fact that when one compares the role and nature of the work performed by the registered nurse by comparison to the teacher in the *Teachers Decision*, we actually in our submissions indicate that we saw very clear parallels between those two occupations, and so we thought there was a broader reason to support that other than just the mechanics of the framework.[916]

882 In respect of ENs the Joint Employers note that the evidence reveals "an increase in the level of support that ENs provide to PCWs and the increased supervisory role they play":[917]

> The EN is more frequently placed as the conduit between the PCW and RN and will make some decisions about when issues about nursing care should be escalated to the RN. This is a change that represents clear "work value reason" to be taken into account by the Commission in its deliberative exercise.[918]

883 In relation to PCWs/AINs the Joint Employers submit the evidence gives rise to the following "work value reasons":

> (a) the change in the nature of the work in providing personal care to consumers with predominantly high care needs;
> (b) the change in the nature of the work providing personal care to consumers with complex needs (for example, advanced dementia and palliative care); and
> (c) assisting the RN with some "clinical" activities (for example, Schedule 4 medication if trained, catheter care, blood glucose level monitoring, etc) (this appears to be recognised as an "experienced" AIN in the *Nurses Award*, however, the parallel in the *Aged Care Award* is less clear).[919]

884 In relation to (a), the Joint Employers argue that "it is clear" that the majority of aged care recipients have higher care needs, which has universally "increased the overall intensity of the work" for PCWs and AINs. In respect of (b) and (c), the Joint Employers submit that these considerations will impact some members of the workforce more than others, particularly those employees who work exclusively in dementia or palliative care units.[920]

885 The Joint Employers also note that the majority of PCWs/AINs who gave evidence in the proceedings had a Certificate III qualification but observe that "there are still a large number of PCWs without a Certificate III who qualify as

915 Joint Employers closing submissions in reply dated 19 August 2022 at [5.26].

916 Transcript, 1 September 2022, PN15561.

917 Joint Employers closing submissions dated 22 July 2022 at [20.4].

918 Joint Employers closing submissions dated 22 July 2022 at [20.5].

919 Joint Employers closing submissions dated 22 July 2022 at [9.23].

920 Joint Employers closing submissions dated 22 July 2022 at [9.24]-[9.25].

equivalent based on their depth and length of experience in the industry".[921] In final oral submissions, the representative for the Joint Employers clarified that they were "entirely comfortable" with the proposition that "there is a person who doesn't hold a Certificate III formally but has been assessed as being equivalent based on experience".[922]

886 The Joint Employers' concessions regarding the classes of employees set out above are confined to the performance of that work in a residential aged care setting. The Joint Employers submit there are "important subtleties" that distinguish PCWs/AINs who work in home care from those in residential care, including:

> (a) working alone versus working as part of a team;
> (b) the nature of indirect supervision; and
> (c) the work can focus on domestic residential duties, as opposed to solely personal care per se.[923]

887 In closing oral argument, the representative for the Joint Employers emphasised that PCWs/AINs in home care and residential care have some "fairly distinct features that differentiate them":

> The process of supervision is different. The requirement for one group, the home care worker, to, for want of a way of putting it, sort of phone home for assistance and guidance versus the residential person simply finding a colleague or the registered nurse at the facility. That actually does create a different work process and the things associated with it.[924]

888 However, the Joint Employers' representative conceded that these distinctions ultimately "might not matter" and submitted:

> At the end of the day, why we say that might not mean very much is the Bench might sort of weigh all of that up and come to the view that, well, okay, one's got a slightly different supervision, one's doing a slightly different array of activities, but on balance, they're still certificate III care workers, on balance they're still discharging the general competencies that a certificate III provides, and in that sense, on balance, the Commission might form the view that while there are some differences, on balance you arrive at the same conclusion. All we're simply saying is it would be wrong to say they are the same job. They're not. They're not.[925]

889 In relation to RNs and ENs in home care, the Joint Employers submit that the evidence indicates that there are some distinctions between residential and home care work.[926] In respect of RNs, the Joint Employers submit that where in residential care the RN performs a "quasi managerial administrative role", this does not appear to be the case in home care where the RN performs the "traditional role" of providing clinical care. Similar observations were made[927] in respect of ENs.[928] The Joint Employers then conclude:

> we don't believe the evidence supports the view that the EN and RN, in home

921 Joint Employers closing submissions dated 22 July 2022 at [9.8].

922 Transcript, 1 September 2022, PN15670.

923 Joint Employers closing submissions dated 22 July 2022 at [22.9].

924 Transcript, 1 September 2022, PN15689.

925 Transcript, 1 September 2022, PN15697.

926 Transcript, 1 September 2022, PN15702.

927 Transcript, 1 September 2022, PN15701.

928 Transcript, 1 September 2022, PN15703-PN15705.

> care, is on all fours with what's occurring in the residential setting, although there will be many similarities, in terms of dealing with people with higher acuity, et cetera. We do accept, without any reservation, that the registered nurse, in all settings, is executing their competence within their scope of practice, as registered, and we accept that, in all settings, the enrolled nurse is exercising their competence within their scope of practice as well.[929]

8.1.2. The evidentiary findings

890 There is considerable common ground between the parties in respect of the relevant factual matrix. Some 16 broad contentions are agreed between the parties. In Chapter 7 we conclude that there is a sound evidentiary basis for the 16 agreed contentions and we adopt them as findings. These evidentiary findings are as follows:

1. The workload of nurses and personal care employees in aged care has increased, as has the intensity and complexity of the work.
2. The acuity of residents and clients in aged care has increased. People are living longer and entering aged care later as they are choosing to stay at home for longer and receive in-home care. Residents and clients enter aged care with increased frailty, co-morbidities and acute care needs.
3. There is an increase in the number and complexity of medications prescribed and administered.
4. The proportion of residents and clients in aged care with dementia and dementia-associated conditions has increased.
5. Home care is increasing as a proportion of aged care services.
6. Since 2003, there has been a decrease in the number of Registered Nurses (RN) and Enrolled Nurses (EN) as a proportion of the total aged care workforce. Conversely, there has been an increase in the proportion of Personal Care Workers (PCW) and Assistants in Nursing (AIN).
7. Registered Nurses have increased duties and expectations, including more administrative responsibility and managerial duties.
8. PCWs and AINs operate with less direct supervision. PCWs and AINs perform increasingly complex work with greater expectations.
9. There has been an increase in regulatory and administrative oversight of the Aged Care Industry.
10. More residents and clients in aged care require palliative care.
11. Employers in the aged care industry increasingly require that PCWs and AINs hold Certificate III or IV qualifications.
12. The philosophy or model of aged care has shifted to one that is person-centred and based on choice and control, requiring a focus on the individual needs and preferences of each resident or client. This shift has generated a need for additional resources and greater flexibility in staff rostering and requires employees to be responsive and adaptive.
13. Aged care employees have greater engagement with family and next of kin of clients and residents.

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929 Transcript, 1 September 2022, PN15706.

14. There is an increased emphasis on diet and nutrition for aged care residents.
15. There is expanded use and implementation of technology in the delivery and administration of care.
16. Aged care employees are required to meet the cultural, social and linguistic needs of diverse communities including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and members of the LGBTQIA+ community.

891 As we have mentioned, we consider these contentions to be general in their character and that they would not necessarily apply consistently across classifications or universally in every instance to all employees concerned.

892 The Consensus Statement is also relevant to our assessment of whether an increase in modern award minimum wages is justified by work value reasons and, as mentioned in Chapter 7, we propose to take it into account. It represents the views of a number of stakeholders in the aged care sector and was developed in contemplation of these proceedings. The assertions in the Consensus Statement are also broadly consistent with the findings we have made in respect of the 16 agreed contentions. The Consensus Statement is set out at Attachment C.

893 In Chapter 7 we address the proposition, principally advanced by the ANMF, that RNs, ENs and AIN/PCWs utilise "invisible" skills that have not been recognised in the current modern award minimum rates applicable to their roles. The ANMF submissions in this regard rely heavily on the expert evidence of Assoc Prof Junor.

894 The Joint Employers concede that regard should be had to "soft skills" such as empathy and communication when assessing work value,[930] but submit that communication skills are not unique to the aged care sector[931] and that some of these skills "clearly emanate" from the Certificate III, including modules of "working with diverse people, supporting independence, communicating health or community services and recognise healthy body systems".[932]

895 We acknowledge that *some*, but clearly not all, of the Spotlight skills identified by Assoc Prof Junor may be comprehended within the relevant Certificate III syllabus.

896 As set out in Chapter 7.3.2, we accept the evidence of Assoc Prof Junor that the Spotlight skills identified in the Junor Report in respect of RNs, ENs and AINs/PCWs working in aged care are correctly characterised as skills (as opposed to personality traits or dispositions) and should be brought to account in the assessment of work value. Further, we have found Assoc Prof Junor's evidence to be cogent, probative and relevant to our assessment of whether a variation of modern award minimum wages in the relevant awards is "justified by work value reasons" (s 157(2)(a)).

897 In order to vary modern award minimum wages we must be satisfied, among other things, that the variation is justified by "work value reasons".

898 The expression "work value reasons" is defined in s 157(2A) which provides:

930 Transcript, 1 September 2022, PN15746.

931 Transcript, 1 September 2022, PN15750.

932 Transcript, 1 September 2022, PN15748.

(2A) *work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.

899 We are satisfied in respect of direct care workers in the aged care sector that the evidence establishes existing minimum wage rates do not properly compensate employees for the value of the work performed.

900 The evidence in respect of support and administrative employees is not as clear or compelling and varies as between classification.

901 We would also observe that unlike the position in respect of RNs, ENs and AINs/PCWs, no "Spotlight skills" analysis was undertaken in respect of the support and administrative employees employed in the aged care sector.

8.1.3. Complexity and unresolved issues

902 These proceedings have raised a number of complex issues for determination relating to the appropriate classification structures in the relevant Awards such as:

- the appropriate classification and minimum rates of pay for Personal Care Workers (PCWs) and Nursing Assistants (AINs), noting the differing rates of pay in the Aged Care and the Nurses Awards and noting the Joint Employers' suggestion that rewarding administering Schedule 4 medications in a residential facility and working in dedicated dementia and/or palliative care facilities may be dealt with by way of an allowance rather than the classification structure[933]
- the appropriateness of separating out the PCWs from other employees in the *Aged Care Award* and creating a new PCW classification stream
- the appropriateness of inserting in the *Aged Care Award* the nursing classifications from the *Nurses Award*
- the application of the C10 framework to the relevant Awards, especially in relation to the fixation of wage rates for RNs
- the application of appropriate internal relativities within each Award, and
- in relation to the SCHADS Award, the impact on disability support workers of the increase sought for aged care workers covered by the SCHADS Award.

903 In our view these issues require close examination and we would benefit from further submissions and, potentially, further evidence, from the parties.

904 Further, as mentioned earlier, the Commonwealth is the principal funder in the aged care sector. Absent additional Commonwealth funding, the cost to business of increasing aged care sector minimum wages is likely to be substantial, depending on the quantum and phasing of wage increases. The Government has committed to ensuring the outcome of these proceedings is funded, but the extent of that funding is unknown at present.

905 In its submission of 8 August 2022, the Commonwealth addressed this issue in the following terms:

933 Joint Employers submission in reply dated 17 August 2022 at [5.8]-[5.9].

> The Commonwealth will provide funding to support any increases to award wages made by the Commission in this matter and that will help deliver a higher standard of care for older Australians. The Commonwealth would also welcome an opportunity to work with the Commission and the parties regarding the timing of implementation of any increases, taking into account the different funding mechanisms that support the payment of aged care workers' wages …
>
> With regard to fairness for employers, the Commonwealth submits that the particular contemporary context of Government funding for the aged care sector means employers are unlikely to experience significant detrimental impacts as a result of increases to modern award minimum wages in the sector. Such wage increases could therefore not be considered to be unfair to aged care employers …
>
> The cost to business of increasing aged care sector wages would likely be substantial, depending on the quantum and phasing of wage increases.
>
> However, as the primary funder of aged care services, the Government has committed to ensuring that the outcome of the aged care work value case is funded. The Commonwealth submits that the Commission can therefore proceed on the basis that the impact on business of significant increases to award minimum rates in the case will not be material.[934]

906 In reply to the Commonwealth's submission, the Joint Employers submitted "it is encouraging" that the Commonwealth is prepared to fund any increase to award minimum wages, but "it is unclear whether this support will extend to the on-costs associated with any increase to minimum award rates", and argue there will be increased costs associated with:

- superannuation
- payroll tax
- workers' compensation
- allowances and entitlements which are based on a percentage of the standard rate and may be subject to an increase, and
- any possible new entitlements arising out of this matter.[935]

907 The Joint Employers contend that the above factors are relevant to the consideration under s 134(1)(f) of the modern awards objective and invited the Commonwealth to "provide its position regarding whether its support extends to funding the associated on-costs of any minimum rate increase".[936]

908 Background Document 7 summarised the Commonwealth's submissions and the reply submissions of the other parties in relation to the modern awards objective, and posed the following question:

> Does the Commonwealth's funding support extend to the associated on-costs of any increase in minimum wage rates?[937]

909 The Commonwealth responded to this question as follows:

> The Commonwealth reiterates it will provide funding to support any increases to award wages made by the Commission in this matter.
>
> *The government is considering the most appropriate approach to funding to ensure any wage increases are appropriately supported*, which would be the

934 Commonwealth submissions dated 8 August 2022 at [5], [165], [200]-[201].

935 Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 at [3.13]-[3.14].

936 Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 at [3.15].

937 Background Document 7 at 38.

> subject of a future decision of government. As such, the Commonwealth is not in a position at the present time to state with certainty the precise quantum or the extent of the funding it will provide to:
>
> - support the wage increases; and
> - fund associated on-costs.
>
> Despite what is in [the paragraph] above, the Commonwealth affirms its commitment to provide funding to support any increases to award wages made by the Commission. It is further anticipated that the Commonwealth's funding response will necessarily take into account associated on-costs.
>
> The Commonwealth would welcome an opportunity to work with the Commission and the parties regarding the timing of implementation of any increases.
>
> The Commonwealth submits that the details of its funding response is a matter which the Commission should take into account at the stage of determining commencement date, implementation and any phasing in arrangements.[938]

(Emphasis added)

910 It is also apparent from counsel's oral submissions that it is envisaged the Commonwealth would make a decision about the extent of the funding support it will provide *after* we have determined, in a preliminary or final sense, the extent of any increase to modern award minimum wages.[939]

911 The extent to which the Commonwealth funds any outcome from these proceedings is plainly relevant to our consideration of the impact of any increase in employment costs on the employers in the aged care sector. But, as discussed in *Re 4 Yearly Review of Modern Awards — SCHADS — Substantive Claims* decision[940] (the *SCHADS 2019 Decision*), the modern awards objective requires that we take into account the s 134(1) considerations. The obligation to take the s 134(1) considerations into account means that *each of these matters*, insofar as they are relevant, must be treated as a matter of significance in the decision-making process. And, as mentioned in Chapter 3, no particular primacy is attached to any of the s 134 considerations.

912 In the *SCHADS 2019 Decision*, the Ai Group opposed the Union's claims on the basis that if the Award were varied as sought by the Unions, employers would face substantial additional costs for which there was no funding and no scope to recover from those who need and access their services.[941]

913 The Ai Group's submission in respect of this issue is encapsulated in this extract from its written submission:

> *The operation of the NDIS and the constraints it places on employers* covered by the Award *should*, in our respectful submission, *form the cornerstone of the Commission's consideration of the impact of the Unions claims on employers. Such a consideration* necessarily *leads to the inevitable conclusion that employers cannot and should not be saddled with the additional employee entitlements* sought by the Unions in these proceedings.[942]

(Emphasis added)

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938 Commonwealth submission — response to questions from the Full Bench dated 29 August 2022 at [13]-[17].

939 Transcript, 1 September 2022, PN15802.

940 *Re 4 Yearly Review of Modern Awards* [2019] FWCFB 6067.

941 Ai Group written submission of 8 April 2019 at [162].

942 Ai Group written submission of 8 April 2019 at [163].

914 The Full Bench rejected the proposition advanced by the Ai Group on the basis that it sought to elevate one set of considerations — the impact on business and employment costs — above all others, and went on to state:

> We accept that the impact of granting the claims on business and on employment costs is a relevant consideration and weighs against making the variations proposed by the Unions. But we reject the notion that the constraints placed on employers by the NDIS funding arrangements should be given determinative weight.
>
> In the context of the provision of social services where employers are largely dependent on government funding, or, in the case of the NDIS, a fixed price, we are cognisant of the fact that significant unfunded employment cost increases may result in a reduction in services to vulnerable members of the community — a point made by the NDS. But such outcomes are a consequence of current funding arrangements, which are a matter for Government. Further, as we have mentioned earlier … the evidence as to the impact of the recent budgetary increase to the NDIS is somewhat unsatisfactory. Nor was there much consideration given to the extent to which the impact of an increase in casual overtime work and work on weekends and public holidays may be ameliorated by the utilisation of part-time and full time employees.[943]

915 It follows from the foregoing that the extent to which the Commonwealth provides funding to support increased employment costs which arise from any variation determination in these proceedings is plainly relevant to our assessment of whether such a variation is necessary to achieve the modern awards objective. The extent of Commonwealth funding directly affects the economic impact of any variation determination on the aged care sector employers and bears on the question of whether such a variation provides a "fair and relevant … safety net" and upon the considerations in s 134(1)(f):

> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

916 During the course of closing oral argument, counsel for the Commonwealth stated that the funding support it provided would mitigate the impact on employers of any determination arising from these proceedings, but the extent of that mitigation will depend on decisions taken by the Australian Government after the Commission has come to a concluded or preliminary view about the Applications. Counsel was not in a position to comment upon whether the funding provided would cover *all* of the employment costs flowing from any variation determination made in these proceedings.[944]

917 In the next section we consider what is the appropriate way forward in light of the extent of agreement between the parties, the evidentiary findings and the range of complex issues that arise for determination.

8.2. The way forward — an interim decision

918 During the course of closing oral argument, a number of parties, and the Commission, canvassed a range of options regarding the process for determining the Applications, including dealing with the Application in stages and determining an initial interim increase for some or all relevant award

943 *Re 4 Yearly Review of Modern Awards* [2019] FWCFB 6067 at [136]-[137].

944 Transcript, 1 September 2022, PN15426-PN15436.

classifications. In response to a submission by counsel for the HSU (which flagged the Commission's possible consideration of some interim outcomes), the presiding Member said:

> there would be a range of options, as you indicated, some form of interim increase position. I think, plainly, the classification structure issue has a degree of complexity about it and the benefit of some form of interim increase to some or all of the classifications, where that lands, would be — that would also involve determination of — there is still some issue between you about s 157 and how that operates.[945]

919 Section 589(2) provides that the Commission may make an "interim decision" in relation to "a matter" before it, either on its own initiative or on application. The word "decision" in this context is to be given a broad meaning and an interim decision may be made by order.[946] An interim decision must be in writing.

920 The "matter" before us consists of the Applications which seek to vary 3 awards by, among other things, increasing modern award minimum wages. A determination varying modern award minimum wages, including such a determination made pursuant to an interim decision, must be an order under s 157(2) and the requirements of that section must be satisfied.[947]

921 In short, we can issue an interim decision (and variation determination) provided we have reached the required state of satisfaction as to the matters the FW Act requires. Of course, the wide scope given to the Commission in determining the relief it will give does not absolve it from an obligation to act judicially and afford interested parties procedural fairness.[948] In our view that obligation has been satisfied in this case, as evidenced by the options canvassed during the course of closing oral argument.

922 Three broad considerations weigh in favour of an interim decision providing an increase in minimum wages for discrete categories of aged care workers:

1. It is common ground between the parties that the work undertaken by RNs, ENs and Certificate III PCWs in residential aged care has changed significantly in the past 2 decades such as to justify an increase in minimum wages for these classifications. We also recognise that there is ample evidence that the needs of those being cared for in their homes have significantly increased in terms of clinical complexity, frailty and cognitive and mental health.
2. Accordingly, in respect of direct care workers (including RNs, ENs, AIN/PCW/HCWs) the evidence establishes that the existing minimum rates do not properly compensate employees for the value of the work performed by these classifications of employees. The evidence in respect of support and administrative employees is not as clear or compelling and varies as between classification.

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945 Transcript, 1 September 2022, PN15865.

946 See FW Act, ss 598(1) and (4) and *Maughan Thiem Auto Sales Pty Ltd v Cooper* (2013) 216 FCR 197 at [26] (Katzmann J, with whom Greenwood and Besanko JJ agreed).

947 *Wills v Marley* (2020) 298 IR 254.

948 *Re Australian Bank Employees' Union; Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513 at 519; 29 IR 148 at 151-152; *Re Australian Railways Union; Ex parte Public Transport Corp* (1993) 67 ALJR 904; 51 IR 22 at [23].

3. A number of complex issues require further submissions (and potentially further evidence) before they can be determined and we see no reason to delay an increase in minimum wages for direct care workers while that process takes place.

923 In these circumstances, we have decided to address and dispose of the Applications in 3 stages. This decision constitutes the first stage in the process. In this decision we have determined the relevant legal principles and the conceptual issues that have been canvassed by the parties in relation to the Applications and we have decided that an interim increase in the modern award minimum wages applicable to direct care workers is justified by work value reasons.

924 In Stage 2 the parties will have the opportunity to make submissions and address evidence in relation to the timing and phasing-in of wage increases. The timing of any initial increase will be the subject of a subsequent decision in Stage 2.

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

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

927 Staging our decision in this way:

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

928 We now turn to the form of the interim variation.

8.3. The interim decision

8.3.1. Coverage and quantum

(i) Coverage

929 As we have mentioned, it is common ground between the parties that the work undertaken by RNs, ENs and Certificate III PCWs in residential aged care has changed significantly in the past 2 decades such that an increase in minimum wages for these classifications is justified by work value reasons.

930 We note that the Joint Employers' agreement is confined to work in a residential aged care setting, and they submit that there are features that distinguish residential and home care. We accept that the 2 sectors have different features but, as acknowledged by the Joint Employers, "at the end of

the day … that might not mean very much … the Bench might … weigh all that up and come to the view that … on balance, while there are some differences … to arrive at the same conclusion".[949]

931 We are satisfied in respect of direct care workers in the residential and in-home aged care sector that the evidence establishes existing minimum wage rates do not properly compensate employees for the value of the work performed. Accordingly, we do not propose to distinguish between residential aged care and home care in terms of the application of an interim increase.[950]

932 There are 3 further points in relation to the coverage of the interim wage increase.

933 First, in respect of PCW/HCWs we do not propose to confine the interim increase to Certificate III PCW/HCWs. We are satisfied that the appropriate course is to apply the interim increase to each level of PCW/HCWs (ie at and below the Certificate III level). We are satisfied that the extent of the changes in the work of the employees in the lower classifications is such as to warrant an increase of at least the magnitude we propose to grant as an interim increase. Adopting such an approach also maintains internal relativities, at least until the classification structure is determined in Stage 3 of the proceedings. We deal with this issue in more detail later in this chapter.

934 We are also satisfied that the interim increase should apply to each of the relevant classifications in the *Nurses Award*, including Nurse Practitioners, in a separate "Aged Care" Schedule. We note that the Joint Employers observed that the role of the Nurse Practitioner is "very niche". The Joint Employers also submitted that while the cross-examination provided "additional insight" into the role, the evidence does not have the same "clarity" as that pertaining to the RNs.[951] But, in relation to the evidence that was available, the Joint Employers clarified that a Nurse Practitioner's scope of practice and competence sits somewhere above a RN and below a general practitioner, and noted that "it's clear that some of their activities are unashamedly of a much higher order than those undertaken by the registered nurse".[952] We agree and are satisfied that an interim increase is warranted for these employees.

935 Second, we note the submission by the Joint Employers that an increase in minimum wages for Head Chefs/Cooks is justified by work value reasons. We do not propose to provide an interim increase in respect of this classification, at this time. The parties are directed to confer in respect of this issue and if they are able to agree upon the quantum of an interim increase and the classification(s) to which it applies, we will give further consideration to determining an interim increase for these employees. Absent an agreement between the parties, any increase applicable to these employees will be determined in Stage 3, together with whether an increase is to be provided to other administrative/support aged care workers and the extent of such increase.

936 Third, the extent of agreement about whether work value considerations justify an increase in the minimum wages of Recreational Activities Officers/Lifestyle Officers (RAOs) requires further clarification. Whilst they are not expressly identified as direct care workers (RNs, ENs and Cert III PCWs),

949 Transcript, 1 September 2022, PN15697.

950 See generally Meagher Supplementary Report.

951 Joint Employers closing submissions dated 22 July 2022 at [21.4].

952 Transcript, 1 September 2022, PN15675.

they are identified by the Joint Employers as "care workers" who along with PCWs, should be in a separate "care" stream from "general services" employees in the classification structure in the *Aged Care Award*.[953] Further, the Joint Employers acknowledge that an RAO "works within the broader environment of the aged care setting and as such interacts with consumers who have high care needs as the PCW does" which "has increased the degree of difficulty and intensity of work for RAOs".[954]

937 We do not propose to provide an interim increase in respect of RAOs (that are not classified as PCWs), at this time. The parties are directed to confer in respect of this issue and if they are able to agree upon the quantum of an interim increase and the classification(s) to which it applies, we will give further consideration to determining an interim increase for these employees. Absent an agreement between the parties any increase applicable to these employees will be determined in Stage 3, together with whether an increase is to be provided to other administrative/support employees and the extent of any such increase.

(ii) Quantum

938 As to the quantum of the increase, we are also conscious that we are, at this stage, determining an *interim* increase for certain classifications only (ie direct care workers). As an interim increase, we must be satisfied that the quantum sits comfortably below the level of increase we may determine on a final basis.

939 As we concluded in Chapter 3, when dealing with applications to vary modern award minimum wages it is appropriate and relevant to have regard to relativities within and between awards. We agree with the Commonwealth that aligning rates of pay in one modern award with classifications in other modern awards with similar qualification requirements will support a system of fairness, certainty and stability. The C10 Metals Framework Alignment Approach and the AQF are useful tools in this regard. That said, we acknowledge that such an approach has limitations, in particular:

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

940 In respect of the application of the C10 Metals Framework Alignment Approach, the *ACT Child Care Decision* set out a 3 step process for the determination of properly fixed minimum rates:

> 1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA process with particular reference to the current rates for the relevant classifications in the Metal Industry Award. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.

953 Joint Employers closing submissions dated 22 July 2022 at [4.38].

954 Joint Employers closing submissions dated 22 July 2022 at [10.5]-[10.6].

2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.
3. If the existing rates are too low they should be increased so that they are properly fixed minima.[955]

941 In Annexure O of their closing submissions, the Joint Employers set out their assessment of the application of the C10 Metals Framework Alignment Approach to the 3 Awards which are the subject of the Applications.

942 The Joint Employers identify what they characterise as a "significant anomaly" when the existing rates in the *Nurses Award* are compared to the C10 Metals Framework, in that the minimum rates in the *Nurses Award* do not correspond to the minimum qualifications of the position when compared to the AQF and the C10 Metals Framework.[956]

943 At [7.5] of their closing submissions, the Joint Employers identify the extent of the non-alignment of the RN classification to the Metals Framework, including that:

- the minimum rates for ENs currently align at 102 per cent relativity, which sits between C10 and C9, despite the fact that an EN is required to obtain a Diploma of Nursing, which is the qualification requirement at the C5 rate in the Metals Framework
- the minimum rates for a RN currently align just below a C8, but the standard qualification for a RN is an accredited tertiary degree — which is an AQF Level 7 qualification that aligns with C1 in the Metals Framework, and
- the minimum rates for a Nurse Practitioner currently align with a C2(b) with a qualification requirement of an Advanced Diploma, yet the qualification for Nurse Practitioner is a post-graduate degree.

944 The weekly rate for an RN at Level 1, pay point 1 under the *Nurses Award* is currently $1,025.20. The Joint Employers accept that the role of RN corresponds to AQF Level 7 and aligns with level C1 in the Metals Framework. Both levels — RN Level 1 in the *Nurses Award* and C1(a) in the Manufacturing Award — have a degree as a minimum qualification. If existing relativities were then to be retained (as contemplated by step 2 from the *ACT Child Care Decision*), the ANMF submitted that the result would be the following (based on the rates of pay applicable as at 21 April 2022:

955 *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* (unreported, AIRC (FB), PR954938, 13 January 2005) at [155].

956 Joint Employers closing submissions dated 22 July 2022 Annexure O at [3.10].

Table 18: Alignment of existing Nurses Award classification structure with the Metals Framework rate C1(a)[957]

	Existing rate	Existing relativity against RN L1 G1	New rates	Relativity after alignment
Nurse Practitioner				
1st year	$1,508.60	154%	$2049.12	154%
Registered Nurse				
RN Level 5 Grade 1	$1,509.90	154%	$2050.88	154%
RN Level 4 Grade 1	$1,496.30	153%	$2,032.41	153%
RN Level 3 Pay point 1	$1,311.00	134%	$1,780.72	134%
RN Level 2 Pay point 1	$1,209.10	123%	$1,642.31	123%
RN Level 1 Pay point 1	$980.10	100%	$1,331.26	100%
Enrolled Nurse				
EN pay point 1	$916.20	93%	$1,244.47	93%
Student EN, >21 yrs	$821.40	84%	$1,115.70	84%
Nursing Assistant				
Experienced	$899.50	92%	$1,221.78	92%
3rd year	$871.50	89%	$1,183.75	89%
2nd year	$857.20	87%	$1,164.33	87%
1st year	$843.40	86%	$1,145.58	86%

945 The application of the C10 Metals Framework Alignment Approach in accordance with the 3 step process set out in *ACT Child Care Decision* would result in a 35 per cent pay increase across all levels.

946 Despite the Joint Employers' support for a 35 per cent pay increase, at least at the RN level, the ANMF position is markedly ambivalent to such an outcome. In reply to the Joint Employers' proposal (including the posited 35 per cent increase), the ANMF submits:

> That is not the case that the ANMF is advancing. Rather, its submission is that the preferable approach to section 157(2) of the FW Act is to take a work value approach, and look at changes in work and historical undervaluation as justifying increases in wages, rather than by selecting a pay level (be it RN level 1 grade 1 or any other level), adjusting it to fit a qualifications framework, and then mechanically adjusting all other rates.[958]

947 Later the ANMF submitted:

> In truth, the Metals Framework is a blunt instrument. Any use of it in this proceeding would be heavily reliant on the third step described in the *ACT Child Care Decision* …

957 ANMF submissions dated 21 April 2022 at [58]. We note that this table does not include all of the relevant rates in the *Nurses Award*.

958 ANMF submissions dated 21 April 2022 at [59].

> The ANMF's primary submissions is that it is not necessary or appropriate for the Commission to identify a "key classification" and apply the Metals Framework in order to determine its application to vary the *Aged Care Award* or the *Nurses Award*.
>
> If that submission is not accepted and the Commission considers that it is necessary to start by fixing a "key classification" to the comparable classification in the Manufacturing Award, then the ANMF's submission is that the key classification for the *Nurses Award* is, in fact, RN Level 1 Pay point 1. Nursing care is provided under the *Nurses Award* under the supervision of Registered Nurses. And, it would not make sense to view a Nursing Assistant, who is not a nurse, and whose employment is "solely to assist an RN or [EN] in the provision of nursing care to persons," as being the key classification in a *Nurses Award*.[959]

948 It was only during the course of closing oral argument that counsel for the ANMF appeared to warm somewhat to the idea of a 35 per cent increase:

> The Commission can and should increase minimum rates for registered nurses in aged care by 35 per cent, if, having a regard to the evidence, the Commission determines that a 35 per cent increase for registered nurses is justified and is necessary to achieve modern awards objective. However, the ANMF is not asking the Commission to apply a 35 per cent increase based upon an application of the minimum framework in a way that is divorced from work value reasons.[960]

949 In essence the ANMF submits that if we think a 35 per cent increase in the minimum rates for RNs in aged care is justified by work value reasons and is necessary to achieve the modern awards objective then we should vary the *Nurses Award* accordingly. A difficulty with this proposition is that it is inconsistent with the case put by the ANMF.

950 Earlier in the course of closing oral argument counsel for the ANMF submitted:

> The position of the ANMF is that both changes to the work by direct care workers and the historical undervaluation of this work justifies an increase in the minimum wags for direct care work workers in aged care and an increase in the amount of 25 per cent …
>
> *The ANMF seeks a 25 per cent increase in wages* because, in our submissions, such an *increase is justified by the work value reasons and necessary to achieve the modern awards objective and the minimum wages objective. That 25 per cent is not put as an ambit claim, it is put on the basis that that is in fact what the work is worth.*[961]

(Emphasis added)

951 So the ANMF is contending that the value of the work of an RN in aged care is 25 per cent above the current minimum rates, but, invites us — without any elaboration or argument — to grant a 35 per cent increase if we think that meets the relevant statutory tests. To that we would simply say that it's the ANMF's application and while we are not bound by the relief sought we do not think it appropriate, in these proceedings, to contemplate an increase beyond that in the union's claim; and certainly not without providing all interested parties with an opportunity to be heard.

952 We would also note that the last sentence in the above quote appears to proceed on a false premise. The qualifications required for a particular role will

959 ANMF closing submissions in reply dated 17 August 2022 at [131], [145]-[146].

960 Transcript, 24 August 2022, PN14840.

961 Transcript, 24 August 2022, PN14644-PN14645.

usually be relevant to the task of assessing the level of skill exercised by an employee. And, "work value reasons" justifying the amount that employees should be paid for doing a particular kind of work are "reasons related to", among other things: "the level of skill … involved in doing the work" (s 157(2A)(a)). We also accept, as is evident from our discussion of "invisible skills" in Chapter 7.3.2 that the relevant qualification is, plainly, not exhaustive of the level of skill exercised in doing a particular kind of work.

953 The Commonwealth was somewhat more fulsome in its response to the Joint Employers' proposal, submitting:

> The Joint Employers observed that the minimum rates in the *Nurses Award* do not correspond to the minimum qualifications of the positions when compared against the AQF and note that the *Nurses Award* was one of the awards identified by the President for review. They also submitted that the classification of Registered Nurse should align with C1.
>
> Consistent with the above, the Commonwealth submits that a comparison to rates in the Metal Industry classification structure with equivalent qualification levels may be of some assistance when the Commission is dealing an application under s 157 of the FW Act to vary modern award minimum wages on work value grounds but is not a complete answer. In addition to the level of skill involved in doing the work, s 157 requires the Commission consider whether there are work value reasons related to the nature of the work, the level of responsibility involved in doing the work and the conditions under which the work is done.
>
> It would be open to [the] Commission to align modern award wages rates for employees with equivalent AQF qualification levels in the absence of any countervailing work value reasons. However, there may be reasons justifying different wage rates for employees, despite their having attained equivalent AQF qualifications. For example, employees may have different levels of responsibility, perform work of a different nature or under different conditions. There may also be factors other than qualification that have a bearing on the level of skill involved in doing the work.[962]

954 We accept that in determining this matter we are not confined to the terms sought in the Applications and may determine the claims other than in the terms sought by the ANMF but that if we were to contemplate such a course, we would be obliged to provide interested parties procedural fairness.

955 We agree with the Joint Employers' assessment that the comparison between the C10 Metals Framework and the *Nurses Award* discloses an anomaly. The realignment of the classification rates in the *Nurses Award* would also be consistent with the approach taken in the *Teachers Decision*. In our *provisional* view, there is considerable merit in such an approach. But that is not what we propose to do in this decision.

956 The realignment of the rates for nurses in the aged care sector would have implications for nurses employed in other sectors and for the employers in those sectors. Given the position taken by the ANMF in these proceedings and the fact that other parties likely to have an interest in the matter are entitled to be heard on the matter, we have not taken this particular issue any further in these proceedings. As we mention later in this chapter, it is open to the ANMF to simply make an application to vary the *Nurses Award*.

957 However, having regard to the evidence canvassed earlier in this chapter we

962 Commonwealth submissions dated 8 August 2022 at [150]-[152].

are satisfied that an interim increase of 15 per cent for nurses working in aged care in each of the relevant classifications is plainly justified by work value reasons, as required by s 157(2).

958 In respect of the *Aged Care Award*, the Joint Employers submit that "Aged Care Level 4" is the key classification level. PCW grade 3 (with a minimum qualification requirement of a Certificate III) sits within this level. The minimum rate for an Aged Care Level 4 employee is $940.90 per week, which is aligned with the current minimum rate for a C10 level under the Manufacturing Award (as does the minimum qualification of Certificate III).

959 In respect of the SCHADS Award, the Joint Employers submit that Home Care Employee level 3 is the key classification. That classification requires the employee to either be the holder of a relevant Certificate III qualification or to have knowledge and skills gained through on-the-job training commensurate with the requirements of the work at that level. The minimum rate for that classification is also $940.90, which is consistent with the minimum rate for a C10 level under the Manufacturing Award.

960 It follows that in terms of step 1 in the 3-step process set out in the *ACT Child Care Decision*, the key classifications in the Aged Care and SCHADS Awards are properly aligned with the C10 Metals Framework, insofar as the requisite qualifications are concerned. But, of course, that is not the end of the story. It is notable that the Joint Employer submissions quote the 3 steps from the *ACT Child Care Decision*, but essentially ignore the third step in that process. Insofar as the Joint Employers are to be taken to suggest that it would be enough for the Commission to simply align existing rates with the C10 Metals Framework, we reject that proposition. Plainly, it is necessary for the Commission to consider whether there have been changes in work value, or a historic undervaluation of the work, which constitute work value reasons which justify an increase in minimum rates.

961 Step 3 calls for a consideration of whether the existing rates for these classifications are too low based on the value of the work performed by these employees. Having regard to the evidence canvassed earlier in this chapter, we are satisfied that an interim increase of 15 per cent at the Aged Care Level 4 for PCW grade 3 is plainly justified by work value reasons, as required by s 157(2). We are likewise satisfied that an interim increase of 15 per cent at the Home care employee level 3 in the SCHADS Award is justified by work value reasons for the purposes of s 157(2).

962 We now turn to the rates *below* Aged Care Level 4 (in respect of the lower level PCW classifications) and Home care employee level 3. As mentioned earlier we are satisfied that the appropriate course is to apply the interim increase to each level of PCW (ie at and below the Certificate III level).

963 During the course of oral submissions, counsel for the HSU pointed out that a strict application of the C10 framework to the lower levels of PCWs in the *Aged Care Award* (that is those below a Certificate III) would appear to result in a reduction in the current minimum rates in the Award.[963]

964 In closing oral argument, the representative for the Joint Employers clarified that the Joint Employers are *not* contending that the wage rates of any employee should be reduced and submitted:

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963 Transcript, 24 August 2022, PN14472.

> MR WARD: If the Commission formed the view that it was appropriate, by way of example only, that you grant a 4 per cent increase to the Certificate III classification, there would obviously be a consideration then as to what should happen with the classifications below.
>
> It might ordinarily follow that you want to maintain the current internal relativities, unless there's some particular reason why they might cause you some anxiety and, in that case then, the classification below would obviously have an increase as well commensurate to maintain the relativity. That's certainly one approach that would be available to the Commission and, in that sense, it wouldn't go down.
>
> I don't think there's enough evidence before the Commission — in fact, I don't think there's any evidence before the Commission — of any employee who operates currently in the classification below the Certificate III or equivalent classification …
>
> … Our presumption in this case was largely the one I put, which was we had assumed that you most likely would grant an increase of some magnitude to the Certificate III classification and then there would be some obvious movement of the classification below commensurate with that. We have made that assumption. There's not enough evidence before the Commission to independently form a view as to the value of the work for that classification.[964]

965 The process set out in the *ACT Child Care Decision* clearly envisages the proper fixation of a key classification followed by the adjustment of other rates by applying established internal relativities. We think that is a sensible and appropriate approach to adopt in the circumstances of this case. Further, our evidentiary findings clearly establish a significant increase in the work value of all employees engaged in direct care work. In relation to direct care employees classified below Aged Care Level 4, the following findings are particularly relevant:

- the complexity of the work has increased
- the acuity of residents in aged care has increase; they enter aged care with increased frailty, co-morbidities and acute care needs
- the proportion of residents and clients in aged care with dementia and dementia associated conditions has increased
- more residents and clients in aged care require palliative care
- employees have greater engagement with family and next of kin of clients and residents
- the model of aged care has shifted to person-centred care; requiring employees to be responsive and adaptive, and
- aged care employees are required to meet the cultural, social and linguistic needs of diverse communities.

966 We are satisfied that an interim increase of 15 per cent for direct care classifications below Aged Care Level 4 are plainly justified by work value reasons, as required by s 157(2). We do not wish to be taken to be suggesting that the existing internal relativities are immutable; simply that we propose to maintain them at present. We also recognise that there is ample evidence that the needs of those being cared for in their homes have significantly increased in terms of clinical complexity, frailty and cognitive and mental health.

964 Transcript, 1 September 2022, PN15543-PN15546, PN15553.

Accordingly, we are also satisfied that an interim increase of 15 per cent for direct aged care classifications below Home care employee level 3 is justified by work value reasons.

967 Having regard to all of the matters canvassed earlier in this chapter, we are satisfied that the variation of the minimum wages of the direct care aged care classifications in the Aged Care and SCHADS Awards to provide for an interim increase of 15 per cent is plainly justified by work value reasons. Section 157(2)(a) is so satisfied.

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

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

970 As noted in the Lay Witness Evidence Report, the lay witnesses gave a great deal of detailed evidence regarding the impact of the COVID-19 pandemic. Many witnesses also gave evidence regarding staffing levels; in particular, the challenges associated with understaffing.[965]

971 The Joint Employers address the issue of whether the COVID-19 pandemic and staffing shortages within the aged care sector are the proper subject of work value assessment in Section 5 of their closing submissions.[966] The Joint Employers there acknowledge the change in the work demanded by the pandemic, but argue, citing *Re Social, Community, Home Care and Disability Services Industry Award 2010*[967] that this change does not alter level of skill or responsibility exercised by employees. They also submit it is not clear whether the changes to work resulting from the pandemic are temporary or not.[968]

972 In respect of staffing shortages, the Joint Employers submit that while it is an open question whether this issue is relevant to work value assessment, staffing shortages affecting the aged care sector are a matter for industry and government to respond to, and not the Commission through a work value case.[969] We address the relevance of increased workload and work intensification in Chapter 3.

973 We have not taken the impact of the COVID-19 pandemic or the issues arising from understaffing into account in arriving at the interim increase we have determined to be justified by work value reasons. These matters can be the subject of further submissions in the next stage of the proceedings; in particular, we invite submissions on the extent to which the changes to work resulting from the pandemic have become permanent.

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965 Lay Witness Evidence Report at [3].

966 Joint Employers closing submissions dated 22 July 2022 at Section 5.

967 *Re Social, Community, Home Care and Disability Services Industry Award 2010* [2020] FWCFB 4961.

968 Joint Employers closing submissions dated 22 July 2022 at [5.17].

969 Joint Employer closing submissions dated 22 July 2022 at [5.23].

8.3.2. Timing and implementation

974 Given the funding arrangements in the aged care sector, the Joint Employers and the Commonwealth sought an opportunity to make further submissions regarding the timing of the implementation of any minimum wages increases arising from these proceedings. As the Commonwealth put it:

> The Commonwealth would also welcome an opportunity to work with the Commission and the parties regarding the timing of implementation of any increases, taking into account the different funding mechanisms that support the payment of aged care workers' wages.[970]

975 We think the course proposed is a reasonable one and is comprehended within the staged approach discussed in Chapter 8.2. We deal with the next steps in this process in Chapter 9.

976 To assist the parties in their submissions regarding the implementation of the interim increase, this section of our decision sets out the relevant legislative provisions and the approach taken to the phasing-in of Commission decisions in other cases.

977 Section 166 of the FW Act sets out when a determination under Pt 2-3 setting, varying or revoking modern award minimum wages comes into operation[971] and creates a default rule that a determination under Pt 2-3 comes into operation on 1 July in the next financial year after it is made (or on the day it is made if made on 1 July), unless the Commission is satisfied that it is appropriate to specify another day in the determination as the day on which it comes into operation. The Commission may also specify that changes take effect in stages, if it is satisfied that it is appropriate to do so.

978 The Explanatory Memorandum for the *Fair Work Bill 2008* (Cth) states:

> Clause 166 — When variation determinations setting, varying or revoking modern award minimum wages come into operation
>
> 631. Clause 166 provides for when determinations setting, varying or revoking modern award minimum wages come into operation. (These rules apply to determinations made under this Part. Wage variations flowing from annual wage reviews commence in accordance with rules in Part 2-6).
>
> 632. A determination affecting modern award minimum wages will generally come into operation on 1 July in the next financial year, or on the day it is made if made on 1 July (clause 166(1)). This is consistent with the commencement of wage variations from annual wage reviews, and is designed to ensure certainty and predictability for employers and employees (see clause 286).
>
> 633. However, if FWA is satisfied that it is appropriate to do so it may specify another day on which the determination comes into operation (clause 166(2)).
>
> 634. This day will almost always be on or after the day that the determination is made. FWA may only vary an award retrospectively in very limited circumstances, where:
>
> • the determination relates to a variation to remove an ambiguity or uncertainty, or to correct an error; and

970 Commonwealth submissions dated 8 August 2022 at [5].

971 Section 165 deals with when variation determinations (other than those setting, varying or revoking modern award minimum wages) come into operation, and s 167 sets out special rules relating to retrospective variations of awards.

- FWA is satisfied that there are exceptional circumstances that justify doing so (subclause 166(3)).

635. FWA may provide that changes to modern award minimum wages take effect in stages if it is satisfied that it is appropriate to do so (subclause 166(4)).

636. A determination setting, varying or revoking modern award minimum wages will generally take effect in relation to a particular employee at the start of the employee's next full pay period on or after the day that the determination comes into operation. However, where a determination is to take effect in stages, it will not take effect in relation to a particular employee until the start of the employee's next full pay period on or after the day that the change to modern award minimum wages is specified to take effect (subclause 166(5)).

979 There is limited *express* consideration of s 166 in Commission decisions. Two recent examples which have considered s 166 are the decisions of *Re Australian Workers' Union*[972] (to vary minimum wages in the *Horticulture Award 2020*) and *Re Independent Education Union of Australia*.[973]

980 In *Re Australian Workers' Union*,[974] the Full Bench was considering the operation of s 166 in the context of when the variation determination should come into effect — rather than the appropriateness of transitional or staged increases — but the decision does provide some commentary on the statutory requirements in s 166 and the types of considerations that may be relevant to considering the appropriateness of commencement arrangements, as follows (footnotes omitted):

> [152] The NFF and the Ai Group are correct in their views that s 166 will apply to the determination, on the basis of our earlier conclusion that the Application seeks to set modern award minimum wages for pieceworkers.
>
> [153] Pursuant to s 166(1)(a) (and assuming the determination is made before 1 July 2022), the determination will come into operation on 1 July 2022 unless we specify another day of operation. Subsection 166(2) provides that we must not specify another day unless "satisfied it is appropriate to do so".
>
> [154] To the extent that s 166(1)(a) can be said to create "a presumption" that the variation determination arising from these proceedings takes effect from 1 July 2022 it is not a difficult presumption to displace. We need only be satisfied it is "appropriate" to specify a different day of operation.
>
> [155] A number of Full Bench decisions have considered the implementation arrangements in respect of variations to modern awards.
>
> [156] The *Penalty Rates (Transitional Arrangements) Decision* dealt with the implementation of the Commission's decision to reduce Sunday and public holiday penalty rates in certain Hospitality and Retail sector awards. In particular, the Full Bench concluded that "any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective". These observations have been adopted by subsequent Full Benches, including in relation to variations which advantaged the employees covered by the relevant modern award.
>
> [157] In relation to the s 134 considerations, the *Penalty Rates Full Bench* stated that the setting of transitional arrangements required a particular focus on:

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972 *Re Australian Workers' Union* (2022) 314 IR 337.

973 *Re Independent Education Union of Australia* [2021] FWCFB 6021.

974 *Re Australian Workers' Union* (2022) 314 IR 337.

- relative living standards and the needs of the low paid (s 134(1)(a));
- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s 134(1)(f)); and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s 134(1)(g)).

[158] Further, as the proposed variation sets modern award minimum wages for pieceworkers, it enlivens ss 157(2) and 284 of the Act …

[160] The matters in s 284(1)(d) and (e) are not relevant in the present context. As to s 284(1)(a), in the *November 2021 Decision* we concluded that "no probative evidence has been advanced to suggest, much less demonstrate, that the introduction of a minimum wage floor in clause 15.2 would have any appreciable impact on the performance and competitiveness of the national economy". It follows that this consideration has no bearing on the determination of the operative date of the variation. The matters in s 284(1)(b) and (c) are in the same terms as s 134(1)(c) and (a) respectively.

[161] The *Penalty Rates Full Bench* also said:

> We must also perform our functions and exercise our powers in a manner which is "fair and just" (as required by s 577(a)) and must take into account the objects of the Act and "equity, good conscience and the merits of the matter" (s 578).
>
> …
>
> Finally, fairness is a relevant consideration, given that the modern awards objective speaks of a "fair and relevant minimum safety net". Fairness in this context is to be assessed from the perspective of both the employee and employers covered by the modern award in question.

[162] We apply the above observations to our consideration of the operative date of the variation we propose to make.

[163] As to the s 134 considerations, the following conclusions from the *November 2021 Decision* are particularly relevant:

- "Relative living standards and the needs of the low paid" weighs in favour of inserting a minimum wage floor from an early operative date. There is widespread underpayment of pieceworkers in the horticulture industry and, further, a significant proportion of pieceworkers earn less than the National Minimum Wage. The proposed variation will assist in rectifying this situation.
- The "need to encourage collective bargaining" and "the promotion of social inclusion through increased workforce participation" weigh against varying the *Horticulture Award* to insert a minimum wage floor. It follows that these considerations favour a later operative date.
- The insertion of a minimum wage floor and consequential time recording provisions in the piecework clause in the *Horticulture Award* are likely to have a negative impact on business, by increasing employment costs and regulatory burden for those businesses that engage pieceworkers. These considerations favour a later operate date.
- The introduction of a minimum wage floor will increase compliance by providing an easily calculated minimum payment. The proposed variation is simple and easy to understand. These

considerations weigh in favour of the insertion of a minimum wage floor, although not strongly so, and similarly lend some support to an earlier operative date.

[164] We now turn to the AWU's submission that delaying the operative date until 1 July 2022 may lead to an influx prior to this date of applications for approval of enterprise agreements that "seek to 'lock-in' piecework rates through enterprise agreements on the basis of a point-in-time BOOT assessment".

[165] We agree with the NFF's characterisation of the submission advanced by the AWU; it is speculative. Further, it is not clear what capacity employers would actually have to "lock-in" piece rates through enterprise agreements before the determination comes into operation. For example, this may not be feasible in operations where employers find a need to change piece rates frequently. Also, it may be difficult to establish that any fixed piece rates satisfy the BOOT against the Award as it is, when under the approach in *Hu (No 2)* the minimum amount of the piece rate could vary depending upon factors such as crop and environmental conditions and the characteristics of the workforce available to the employer at a particular time.

[166] The capacity for an enterprise agreement to exclude the effect of the amendments to the *Horticulture Award*, may also be limited by s 206 of the Act. As discussed in section 3.7 of this decision, s 206 is to the effect that the base rate of pay under such an enterprise agreement could not be less than the base rate of pay under the Award as it is from time to time. In particular, the base rate of pay under the agreement could not be less than the "minimum wage floor" for piecework under draft cl 15.2(f).

[167] *Other contextual issues also bear on the operative date issue*. One such matter is our previous finding that the "totality of evidence presents a picture of significant underpayment of pieceworkers in the horticulture industry when compared to the minimum award hourly rate":

> A significant proportion of pieceworkers, and WHM's in particular, earn less per hour than the NMW ($20.33 per hour; which is also the minimum hourly rate for a level 1 employee in the *Horticulture Award*) and a substantial proportion earn less than the "target rate" for the "average competent pieceworker" prescribed in clause 15.2.

[168] Such a consideration weighs in favour of an early operative date. We have taken into account the matters set out above and the specific issues identified in the submissions. Ultimately a balance needs to be struck between the interests of employers and the interests of employees.

[169] Finally, we accept that employers will require a reasonable time to adjust to the imposition of a minimum wage floor for pieceworkers. Payroll systems, recruitment practices and supervision arrangements may need to be changed to adapt to the new award requirements. These considerations weigh in favour of a later operative date.

[170] In our view an operative date of 28 April 2022 is "appropriate", within the meaning of s 166(2). Such an operative date is about 3 months from the date of this decision and almost 6 months from the November 2021 Decision. We have taken into account the ss 134 and 284 considerations to the extent they are relevant, and are satisfied that a 28 April 2022 operative date is fair, when assessed from the perspective of both the employers and employees covered by the *Horticulture Award*.

[171] A variation determination will be published shortly.

981 In *Re Independent Education Union of Australia*,[975] the Full Bench held that it was appropriate to set 1 January 2022 as the operative date and that there should be no phasing-in of wage increases:

> [19] *We consider that the variation to the EST Award to give effect to the April decision should have an operative date of 1 January 2022, and that there should be no phasing-in of the increases. In reaching this conclusion, we have taken into account the following matters*:
>
> (1) Employers covered by the EST Award, including the early childhood sector employers who will principally be affected, have been on notice since the date of the April decision (19 April 2021) as to the wage increases which will be made to the minimum wage rates in the EST Award. This will mean that, by 1 January 2022, they will have had over 8 months to make the necessary adjustments to accommodate the impact (if any) of the increases.
>
> (2) The increases to minimum rates which will be made are, while not insignificant, not of such a quantum or scope as to require a phasing-in period. For employers currently paying only minimum award rates, the increases involved range from approximately 3.3% to 13.6%, depending on the level at which the employee is currently graded. Further, in respect of the early childhood sector, the EST Award will likely only be applicable to a small minority of the employer's workforce.
>
> (3) The funding changes identified in CCSA's submissions, and its analysis of the impact on the charged cost of early childhood education and care, support the conclusion that an operative date of 1 January 2022 without phasing-in is appropriate.
>
> (4) Considerable weight must be placed on the adherence of the ACA/ABI to the consent position, albeit that those organisations would undoubtedly have preferred a later operative date. The ACA was the principal employer participant in the main proceedings, and adduced extensive evidence from a wide range of businesses in the for-profit early childhood sector in response to the original claims advanced by the IEU, including detailed evidence concerning the affordability (or otherwise) of those claims. In that context, we have confidence that the ACA/ABI is representative of a wide range of employers in that sector and that its assessment that an operative date of 1 January 2022 is viable may be relied upon.
>
> (5) By contrast, the AFEI called no evidence from any employer in the sector in the main proceedings, nor has it adduced any evidence from any employer in the post-April decision phase of the proceedings in support of its position concerning operative date and phasing-in. In that context, its submissions concerning affordability cannot be weighed as rising above the level of mere assertion. The same may be said in relation to the position of the CER, which did not participate in any meaningful way in the main proceedings.
>
> (6) 1 January 2022 appears to us to be the most convenient operative date since it will allow employers to set their charges for the 2022 calendar year on the basis that the wage increases have become payable.
>
> [20] Section 166(1) of the FW Act establishes a default position that, relevantly,

975 *Re Independent Education Union of Australia* [2021] FWCFB 6021.

> determinations that set or vary modern award minimum wages outside of the annual wage review are to come into operation on 1 July in the next financial year after the determination is made. However, s 166(2) empowers the Commission to specify another day in the determination as the operative date "… if it is satisfied that it is appropriate to do so". In this case, we consider that it is appropriate to set 1 January 2022 as the operative date having regard to the six matters stated above.
>
> [21] We see no reason to give an earlier operative date in respect of the Educational Leader's allowance, as submitted by the Arrabaldes.

(Emphasis added)

982 In summary, s 166 creates a default rule or presumption that a determination varying modern award minimum wages comes into operation on 1 July in the next financial year after it is made. To displace the presumptive operative date the Commission need only be satisfied that it is "appropriate" to specify a different operative date.

983 In determining the operative date of a determination under Pt 2-3, the Commission must exercise its power in a manner which is "fair and just" (as required by s 577(a)) and must take into the objectives of the FW Act and "equity, good conscience and the merits of the matter" (s 578).

984 Fairness is plainly a relevant consideration, given that the modern awards objective speaks of a "fair and relevant safety net" and the minimum wages objective is the establishment and maintenance of a "safety net of fair minimum wages". Fairness in this context is to be assessed from the perspective of both the employees and employers affected by the variation determination.

985 A number of Commission decisions have considered the principles to be applied when phasing-in variations to modern awards.

986 In the context of a *reduction* in penalty rates, the Penalty Rates Full Bench summarised the matters which were relevant to the determination of the transitional arrangements to implement the *Penalty Rates* decision, as follows (references omitted):

> [141] The relevant considerations may be conveniently grouped into three broad categories:
>
> - the statutory framework;
> - the *Penalty Rates* decision; and
> - fairness.
>
> [142] Before turning to each of these matters we would observe at the outset that the range of relevant considerations — and the tension between some of the matters we must take into account — means that the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgment, rather than a formulaic or mechanistic approach involving the quantification of the weight accorded to each particular consideration.
>
> [143] As to the statutory framework, any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective. Further, as to the s 134 considerations (set out in s 134(1)(a)-(h)), the setting of transitional arrangements will require a particular focus on:
>
> - relative living standards and the needs of the low paid (s 134(1)(a));

- the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s 134(1)(f)); and
- the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards (s 134(1)(g)).

[144] We must also perform our functions and exercise our powers in a manner which is "fair and just" (as required by s 577(a)) and must take into account the objects of the Act and "equity, good conscience and the merits of the matter" (s 578).

[145] As to the second category, the evidence and our findings and conclusions in the *Penalty Rates* decision are relevant.

[146] The finding that the relative disutility of Sunday work (as opposed to Saturday work) is "much less than in times past" informed our conclusion that the existing Sunday penalty rates in the Hospitality, Fast Food, Retail and Pharmacy Awards do *not* provide a fair and relevant safety net. That finding, that the existing Sunday penalty rates in the Hospitality, Fast Food, Retail and Pharmacy Awards do *not* achieve the modern awards objective (because they do not provide a fair and relevant safety net), is a consideration which plainly supports the timely implementation of the reduction in Sunday penalty rates in these awards.

[147] A number of the submissions advanced by employer organisations in these proceedings contend that a shorter transition period will result in positive employment affects materialising earlier. While this may be so, it needs to be borne in mind that the views expressed in the *Penalty Rates* decision about the potential for positive employment affects consequent upon a reduction in Sunday penalty rates, were somewhat muted and cautious. As such, the force of the various employer submissions which rely on positive employment effects to support a shorter transition period are somewhat diminished. We note however that the various employer submissions also rely on other effective effects resulting from the reduction in Sunday penalty rates … These positive effects favour a shorter transition period.

[148] Finally, fairness is a relevant consideration, given that the modern awards objective speaks of a "*fair* and relevant minimum safety net". Fairness in this context is to be assessed from the perspective of both the employees *and* employers covered by the modern award in question. While the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, it is not appropriate to "totally subjugate" the interests of the employers to those of the employees.

[149] In assessing the fairness of transitional arrangements it is relevant to consider the extent of the reduction in penalty rates and the number of employees affected. In this regard we note that the reductions in Sunday penalty rates are more significant in the Retail and Pharmacy Awards than in the Hospitality and Fast Food Awards. This is a factor which favours a longer transition period in respect of the Retail and Pharmacy Awards.

[150] As to the number of employees affected by the penalty rate reductions, one of the questions on notice put to all parties in the present proceedings was in the following terms:

> Each party is asked to provide an estimate of the number of employees affected by the penalty rate reductions determined in the [*Penalty Rates* decision], by award, and the basis of that assessment.

[151] The revised background document published on 26 May 2017 summarises

the submissions filed in response to the above question, it is not necessary to repeat that material here. Suffice to say that there was a significant variation in the estimates provided, depending on the range of assumptions adopted.

[152] For example, in respect of the Retail Award the Retail Employers submit that 'between 79,833 and 108,831 employees will be affected by the penalty rate reductions under the Retail Award. ABI's estimate is between 71,62 and 164,002 employees. Whereas the SDA contends that the 412,171 persons employed in the ANZSIC industry classification "Retail Trade" (which includes employees covered by the Retail, Fast Food and Pharmacy Awards), whose pay is determined by award only, are affected by the penalty rate reductions "irrespective of whether or not they presently perform any hours of work on a Sunday".

[153] The available data does not allow us to determine the number of employees affected by the penalty rate reductions with any precision. Nor is it necessary that we do so. It suffices to observe that the number will be significant, in respect of each of the awards before us, both in terms of absolute numbers and as a proportion of the employees covered by the relevant awards.

[154] We make the same observation about the monetary impact of the penalty rate reductions on particular employees. The extent of the impact on an individual employee will depend on a number of factors, including:

- whether the employee is paid in accordance with the relevant award or is covered by an enterprise agreement or over award arrangement;
- the frequency with which they work on Sundays and public holidays;
- the number of hours they work on Sundays and public holidays;
- their classification level and employment status (full-time, part-time or casual); and
- the applicable award.

[155] A range of potential adverse impacts were advanced in the proceedings. As a general proposition, the union submissions advance examples which tended to overstate the impact, while the employer submissions understate it. For our part, we accept that the reductions in penalty rates we have determined will have an adverse impact on the award-reliant employees who work at these times and are likely to reduce their earnings and have a negative impact on their relative living standards and on their capacity to meet their needs.[976]

987 In *Re 4 Yearly Review of Modern Awards — Award Stage — Group 4 — Aged Care Award 2010 — Substantive Claims*,[977] a Full Bench of the Commission considered submissions in response to its provisional view to phase in pay increases for casual employees working on weekends and public holidays (references omitted):

> [33] In the *Penalty Rates — Transitional Arrangements* decision the Full Bench made the following observation about the determination of transitional arrangements:

976 *Re 4 Yearly Review of Modern Awards — Penalty Rates — Transitional Arrangements* (2017) 272 IR 1 (5 June 2017, Justice Ross, President, Catanzariti VP, Asbury DP, Hampton C, Lee C). This extract was cited with approval in *Re General Retail Industry Award 2010* (2020) 298 IR 112 (1 July 2020, Justice Ross, President, Catanzariti VP and Asbury DP) at [7].

977 *Re 4 Yearly Review of Modern Awards* [2019] FWCFB 7094.

> the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgment, rather than a formulaic or mechanistic approach involving the quantification of the weight accorded to each particular consideration.

[34] The Full Bench went on to observe that the following matters were relevant to its determination of transitional arrangements in relation to the *reduction* of penalty rates:

(i) The statutory framework: any transitional arrangements must meet the modern awards objective and must only be included in a modern award to the extent necessary to meet that objective. The Full Bench also noted that it must perform its functions and exercise its powers in a manner which is "fair and just" (as required by s 577(a)) and must take into account the objects of the Act and "equity, good conscience and the merits of the matter" (s 578).

(ii) Fairness is a relevant consideration, given that the modern awards objective speaks of a "*fair* and relevant minimum safety net". Fairness in this context is to be assessed from the perspective of both the employees *and* employers covered by the modern award in question. The Full Bench said "while the impact of the reductions in penalty rates on the employees affected is a plainly relevant and important consideration in our determination of appropriate transitional arrangements, it is not appropriate to 'totally subjugate' the interests of the employers to those of the employees".

[35] We adopt the above observations and propose to apply them to the matter before us. In the *August 2019 Decision* we expressed the *provisional* view that the increase in the weekend and public holiday penalty rates for casuals should be phased in as follows:

	Saturday	**Sunday**	**Public holidays**
	(% of ordinary rate, inclusive of casual loading)		
1 December 2019	160	185	260
1 July 2020	175	200	275

[36] As mentioned in the *August 2019 Decision* we accept that these variations will increase employment costs and to the extent that fulltime or part-time permanent employees are substituted for casuals, the variations may reduce flexibility. We also acknowledge that many employers covered by the *Aged Care Award* are not-for-profit organisations who rely on funding from a range of sources to provide their services. An increase in employment costs *within* a budget cycle may place such organisations under financial pressure.

[37] The assertion by ABI that "many businesses will not be able to sustain the increase in monetary costs" for the time period from 1 December 2019 to 30 June 2020 as they are often required to adhere to "very tight budgets for each financial year", was uncontested.

[38] Against these considerations is the fact that the low utilisation of casual employees in the sector (likely to be less than 10 per cent) suggests that the cost impact of the variations is not likely to be substantial, at least not in an aggregate sense. We accept, as put by ABI, that employers who utilise casual employees in greater numbers will be impacted more significantly.

> [39] The fact that most of the classifications covered by the *Aged Care Award* are "low paid" within the meaning of s 134(1)(a) is a consideration in favour of *not* deferring or phasing-in these variations.
>
> [40] Further, in the *August 2019 Decision* we accepted that the existing rates for casuals working on Saturdays, Sundays and public holidays are not fair and proportionate to the disability experienced by casual employees working at these times. This too is a consideration which tells against the deferral or phasing in of the variations.
>
> [41] In our view, an appropriate fair and just balance between these considerations is to provide that the increases in weekend and public holiday rates for casuals will commence operation, in full, from 1 July 2020.

(Emphasis added)

988 A similar approach was taken by the Full Bench in the *Re 4 Yearly Review of Modern Awards — Group 4 — Social, Community, Home Care and Disability Services Industry Award 2010 — Substantive Claim*.[978]

989 In the *Re 4 Yearly Review of Modern Awards — General Retail Industry Award 2010*, the Commission determined to increase the penalty rates under the for casual employees working on Saturdays and Monday to Friday evenings.[979] The Full Bench concluded that there was a need for appropriate transitional arrangements as follows (references omitted):

> 7 Transitional Arrangements
>
> [264] In the *Penalty Rates — Transitional Arrangements* decision the Full Bench confirmed the views expressed in the *Penalty Rates Decision* — that there is a need for appropriate transitional arrangements to mitigate hardship — and was satisfied that it had the power to make appropriate transitional arrangements. The Full Bench also observed that "the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgement, rather than a formulaic or mechanistic approach involving the qualification of the weight accorded to each particular consideration".
>
> …
>
> [267] We propose to adopt and apply the observations in the *Transitional Arrangements* decision regarding the matters which are relevant to our determination of the transitional arrangements in the matters before us, with one modification. Instead of the matter at (ii) in [265] above, we will have regard to the evidence, findings and conclusions in this decision.
>
> …
>
> [280] In its reply submission of 6 September 2018 the SDA opposes the phasing schedule proposed by the Retail Employers, submitting that:
>
> > The SDA opposes any proposal to delay corrective increases until July 2019 and beyond. This is inappropriate. This simply affords yet another 9 months and more of anomalous financial advantage (at the expense of a workforce already identified as low paid) which the employers have profited from Critically, in the after 6 pm Saturday period, no penalty would continue to be the accepted norm.
> >
> > …

978 *Re 4 Yearly Review of Modern Awards* [2019] FWCFB 7096.

979 *Re 4 Yearly Review of Modern Awards — General Retail Industry Award 2010* (2018) 282 IR 269 at [263].

Further having this increase linked to a 1st July timetable would mean that employers would face both a possible National Wage Increase and the Casual increase at the same time. If this casual increase is so demanding then it seems illogical to compound the potential change in wages.

[281] Contrary to the SDA's submission, there is a need for appropriate transitional arrangements in respect of these increases in order to ameliorate any adverse impact upon employers. The arguments advanced by the SDA in support of immediate implementation are unconvincing. While we accept — based on Professor Borland's evidence — that the aggregate impact on labour costs of the increases will be "relatively small", they are not properly characterised as "marginal". Further, the quantum of the increase (an *additional* 25 per cent on week day evenings and on Saturdays before 7.00 am and after 6 pm for casual employees) is not a more significant quantum than the decrease in Sunday penalty rates for casuals arising from the *Penalty Rates Decision*, it too was 25 per cent.

[282] Nor does the fact of the SDA's March 2015 application warrant the immediate implementation of the increases. Even if it is accepted that employers were put on notice as to the possibility of an increase one might ask, so what? Until such a possibility becomes a reality it is highly unlikely that any proactive steps would be taken by employers to ameliorate the effect of such increases. Indeed if accepted the same argument could be applied to the reduction in Sunday penalty rates for shiftworkers as the ARA filed submissions and a draft determination in respect of that issue in February 2015.

[283] We do think there is merit in the points raised in the SDA's reply submission, in particular:

- a phase in period of almost 5 years is simply too long;
- the existing anomaly in respect of the Saturday penalty rates for casuals should be addressed as quickly as practicable (though we think the SDA overstates the extent of the anomaly, see [233] to [243] above); and
- contrary to the Retail Employers' proposal, the operative date of the phased increases should not be 1 July. The timetable proposed by the Retail employers would mean that employers may face an Annual Wage Review increase and an increase in casuals' penalty rates simultaneously. As the SDA submits "it seems illogical to compound the potential change in wages".

[284] In respect of the adjustment to the Saturday rate for casuals and the extension of the evening work Monday to Friday penalty we have decided that the transitional arrangements below are necessary to ensure that the Retail Award achieves the modern awards objective:

Saturday work — casuals

1 November 2018: A casual employee must be paid an *additional* 15 per cent for *all* work performed on a Saturday

1 October 2019: A casual employee must be paid an *additional* 20 per cent for *all* work performed on a Saturday

1 March 2020: A casual employee must be paid an *additional* 25 per cent for *all* work performed on a Saturday

Evening work: Monday to Friday

1 November 2018: An additional 5 per cent will be paid to casuals for hours worked after 6 pm

> 1 October 2019: An additional 10 per cent will be paid to casuals for hours worked after 6 pm
>
> 1 March 2020: An additional 15 per cent will be paid to casuals for hours worked after 6 pm.
>
> 1 October 2020: An additional 20 per cent will be paid to casual for hours worked after 6 pm
>
> 1 March 2021: An additional 25 per cent will be paid to casuals for hours worked after 6 pm
>
> [285] Variation determinations will be published shortly.

(Emphasis added)

990 It is apparent that the observations by the Full Bench in the *Penalty Rates — Transitional Arrangements* decision have been applied in a number of subsequent Full Bench decisions. In the next stage of these proceedings the parties will be invited to comment on the appropriateness of those principles and their application in this matter.

8.3.3. Other matters

991 As mentioned in Annexure A, the ANMF application seeks the creation of a new schedule to the *Nurses Award* for aged care employees to enable an increase in minimum wages in respect of those employees. The ANMF has foreshadowed an application to vary the *Nurses Award* more generally on the basis that increases in nurses' minimum wages are justified by work value reasons. It is in this context that the ANMF seek a temporal limitation in respect of the proposed aged care schedule, as the ANMF submits:

> The ANMF have applied for new Schedule to the *Nurses Award* to apply for a period of 4 years from the date of commencement. This is specifically intended to put a temporal limitation on the situation … whereby minimum rates for aged care nurses are properly set, whilst rates for other nurses are not.[980]

992 In short, the ANMF proposes that the increased rates in the schedule operate for 4 years and at the end of that period they cease to operate.

993 In Background Document 5 we posed the following question to the ANMF: Why is it necessary, in the sense contemplated by s 138, that the schedule expire after 4 years?

994 The ANMF responded as follows:

> The ANMF seeks a new Schedule to the *Nurses Award* for employees otherwise covered by the award, where those employees are engaged in the provision of services for aged persons. Clause G.1.1 of the new schedule would provide that the schedule will apply until a date, 4 years after commencement. The expiry of the proposed schedule after 4 years is not a matter beyond the minimum terms and conditions that would properly be the product of enterprise bargaining, and enterprise agreements.
>
> It has also been recognised that what is "necessary" to achieve the modern awards objective in a particular case is a value judgment, taking into account the section 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[981]

980 ANMF submissions in reply dated 21 April 2022 at [71].

981 See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227; 219 IR 382; and *Re 4 Yearly Review of Modern Awards — Plain Language Re-drafting — Standard Clauses* [2018] FWCFB 4177 at [12].

> It is submitted that variations to the *Nurses Award* sought by the ANMF are necessary to provide a fair and relevant minimum safety net of terms and conditions and achieve the modern awards objective. The creation of a new Schedule applying to persons engaged in the provision of services for aged persons might give rise to some additional complexity.
>
> The clause providing for the expiry of the proposed schedule after 4 years is a clause which contributes to ensuring a fair and relevant minimum safety net of terms and conditions, having regard to the need to ensure a simple, easy to understand, stable modern award system for Australia. That is, increases to the wages payable to aged-care workers but not other nurses is, in the ANMF's submission, appropriate as a medium-term solution. The longer-term solution will follow a subsequent application in regard to award wages of non-aged care workers covered by the *Nurses Award*. Inclusion of the 4-year period minimises any adverse impact on the simplicity of the modern award system for the purpose of section 134(1)(g) by placing a temporal limitation on the operation of the new Schedule.[982]

995 This issue was also the subject of an extended exchange between the Commission and counsel for the ANMF during closing oral argument.[983] The essence of the argument put in support of the proposed 4 year term is that "it puts a proposed temporal limitation on a situation which is less than ideal, whereby some of the workers covered by the *Nurses Award* have had their rates assessed under s 157 and some have not … [and] the intent and purpose of the 4 year sunset clause was in part directed to objective 134(g) under the modern awards objective".[984]

996 For our part we have no in-principle objection to the idea that any increases in nurses' minimum wages arising from these proceedings be contained in an "Aged Care Schedule" to the *Nurses Award*. The objectionable aspect of the ANMF's proposal is that such a schedule cease to operate after 4 years. We see no warrant for such a temporal limitation, and we are not satisfied that it is necessary to ensure that the *Nurses Award* achieves the modern awards objective.

997 The arguments advanced by the ANMF in support of a self-executing temporal limit are wholly unpersuasive. Contrary to the ANMF's submission, a temporal limitation would not promote "a stable … modern award system" (s 134(1)(g)). Nor is it clear to us how we can, on the one hand, vary modern award minimum wages on the basis that an increase is justified by work value reasons and then 4 years later effectively reduce those wages by the same amount without any consideration of work value.

998 We acknowledge that it is, as the ANMF put it, "less than ideal" that some workers covered by the *Nurses Award*, ie those working in aged care, will have had their wages properly assessed under s 157, and others will not be in that position. But that situation can be remedied by the ANMF simply making an application to vary the *Nurses Award*.

999 The proposed temporal limitation is devoid of merit and we reject it.

1000 We now turn to consider the modern awards objective and the minimum wages objective.

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982 ANMF closing submissions in reply dated 17 August 2022 at [57]-[60], also see section C.3.1 of that submission.

983 Transcript, 24 August 2022, PN14739-PN14771.

984 Transcript, 24 August 2022, PN14760 and PN14767.

8.4. The modern awards objective

1001 In giving effect to the modern awards objective, the Commission performs an evaluative function taking into account the s 134(1) considerations and assessing the adequacy of the safety net by reference to the statutory criteria of fairness and relevance.

1002 Some observations about the modern awards objective are made in Chapter 3 and in Background Documents 1 and 5. In addition, Background Document 7 summarises the parties' submissions on the modern awards objective and the various s 134(1) considerations. These submissions were also the subject of further elaboration during the course of closing oral argument. We have taken these submissions into account but need not repeat all of them here.

1003 As mentioned in Chapter 3, we accept that a fair and relevant safety net is one which provides minimum wage rates at a level which bears a proper relationship to the value of the work performed by the workers in receipt of those wages.

1004 We have determined that the minimum modern award rates applicable to NPs, RNs, ENs, AINS/PCWs and Home Care Employees significantly undervalue the work performed by these employees; it follows that increasing these rates, commensurate with the value of the work performed, is necessary to achieve a fair and relevant safety net.

1005 Fairness, in the context of providing a "fair and relevant safety net", is to be assessed from the perspective of *both* the employees *and* employers covered by the modern award in question.

1006 At present, we are unable to reach a concluded view on whether the proposed interim variation determination is necessary to achieve the modern awards objective. One of the matters we are required to take into account in forming that evaluative judgment is "the likely impact of any exercise of modern award powers on business, including on … employment costs" (s 134(f)). As is evident from the discussion earlier in this chapter, the likely impact on employers of the interim increase we propose to award will be ameliorated to the extent of Government funding support for that increase. The extent of funding support is not yet known.

1007 In these circumstances, we propose to express some *provisional* views in respect of the other s 134(1) considerations. Parties will be provided an opportunity to comment on those provisional views in Stage 2 of the proceedings and to make submissions in respect of the impact on employers once the extent of Commonwealth funding support is known.

Provisional views

1008 We note at the outset that we are not persuaded that s 134(1)(d), (da) and (g) are relevant to the interim increase we propose to award.

1009 We express the following *provisional* views in respect of the remaining s 134(1) considerations.

Section 134(1)(a): relative living standards and the needs of the low paid

1010 The Unions and the Commonwealth submit that relative living standards and the needs of the low paid weigh in favour of increasing the modern award minimum wages for aged care workers.

1011 The Joint Employers acknowledge that it is self-evident that any employee who is considered low paid will benefit from an increase in pay, but submit that this does not justify doing so in an "unfettered manner".[985]

1012 As set out in Chapter 6, most of the award classifications which are the subject of the interim increase are "low paid" within the meaning of s 134(1)(a). The evidence before us also demonstrates that many of these workers face challenges in meeting financial obligations due to their low rates of pay.[986] This consideration weighs in favour of the variation of the relevant Awards to give effect to the interim increase determined to be justified by work value reasons.

Section 134(1)(b): the need to encourage collective bargaining

1013 Section 134(1)(b) requires that the Commission takes into account "the need to encourage collective bargaining".

1014 The ANMF relies on the lay witness evidence of Kevin Crank,[987] Paul Gilbert,[988] Paul Bonner,[989] Christopher Friend[990] and Sue Cudmore[991] as evidence of the difficulties associated with bargaining for higher wages in the aged care sector,[992] and submits that the common themes emerging from the lay witness evidence include:

- that employers claimed during bargaining to be constrained by an absence of funding[993]
- the difficulty organising aged-care workforces or in actually negotiating (*e.g.*, due to perceived power imbalance, reticence of workers from a culturally and linguistically diverse background to make waves),[994] and

985 Joint Employers closing submissions dated 22 July 2022 at [23.9].

986 See Witness statement of Sheree Clarke dated 29 October 2021 at [14]-[16]; Amended witness statement of Carol Austen dated 20 May March 2022 at [39]; Witness statement of Charlene Glass dated 29 March 2021 at [92]; Witness statement of Sandra O'Donnell dated 25 March 2021 at [107]-[112]; Witness statement of Tracey Roberts dated 23 March 2021 at [162]-[166]; Amended witness statement of Michael Purdon dated 19 May 2022 at [87]-[92]; Witness statement of Suzanne Wagner dated 28 October 2021 at [160]-[161], Witness statement of Julie Kupke dated 28 October 2021 at [127]-[128], Witness statement of Catherine Evans dated 26 October 2021 at [104]-[105]. Also see *Australian Aged Care Collaboration, Cost Of Living Pressure Pushing Aged Care Workers To The Brink Of Poverty Line, Fuelling Workforce Shortage: New Analysis* 22 March 2022; HSU closing submissions dated 22 July 2022 at [400].

987 Witness statement of Kevin Crank dated 29 October 2021 at [11]-[21].

988 Witness statement of Paul Gilbert dated 29 October 2021 at [36]-[51].

989 Witness statement of Robert Bonner dated 29 October 2021 at [36]-[38].

990 Transcript, 26 April 2022, PN928.

991 Transcript, 12 May 2022, PN13559-PN13565.

992 ANMF closing submissions dated 22 July 2022 at [857].

993 Witness statement of Christine Spangler dated 29 October 2021 at [42]; Witness statement of Kevin Crank dated 29 October 2021 at [14].

994 Witness statement of Jocelyn Hofman dated 29 October 2021 at [47]-[49]; see also witness statement of Linda Hardman dated 20 October 2021 at [82]; Witness statement of Wendy Knights dated 29 October 2021 at [98]-[99]; Witness statement of Dianne Power dated 29 October 2021 at [100]-[103]; Witness statement of Patricia McLean dated 29 October 2021 at [125].

- the actual or perceived unwillingness of aged care workers to take industrial action.[995]

1015 The ANMF submits that increasing the minimum rates of pay for aged care workers would encourage collective bargaining, because:

- it would increase the incentive or necessity to negotiate enterprise-specific trade-offs and productivity benefits, and
- it removes any disincentive to continue collective bargaining for employees who have negotiated rates at or higher than the correct work value of the work they perform, by removing the gap between these rates and the award minima.[996]

1016 Similarly, the HSU submits there are "significant and widespread difficulties associated with collective bargaining in the aged care sector" and relies on the expert evidence of Prof Charlesworth that:

> A particular constraint with enterprise bargaining relevant to residential aged care is that options to address low remuneration in aged care, both in awards and enterprise bargaining, are entirely dependent on federal government commitment and action. The federal government is effectively almost the sole purchaser and lead employer in an aged care supply chain of contracted out residential aged care services.[997]

1017 The HSU also relies on Prof Charlesworth's opinion that the challenges facing bargaining in residential care are "amplified" in home care.[998] The HSU submits that Prof Charlesworth's evidence "aligns with the experience of the HSU" and relies on the evidence of Mr Friend, including his evidence that the "primary obstacle" to achieving higher pay through bargaining in the aged care sector is that "employers indicate they do not have the necessary funding to increase pay rates above the Award".[999]

1018 The HSU submits that while, in other industries, the need to encourage enterprise bargaining might be regarded as warranting a limitation on increases to wages, there is "neither purpose nor justice" in adopting that approach in respect of these awards as "[e]nterprise bargaining has simply not provided an effective mechanism for addressing low pay and poor conditions for aged care or home care workers".[1000]

1019 The HSU submits that, in any event, the variations sought would to some extent encourage employers to engage in collective bargaining by:

- increasing the relevance of the minimum rates applicable to the work performed

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995 Amended witness statement of Linda Hardman dated 9 May 2022 [82]; Amended witness statement of Wendy Knights, dated 23 May 2022, [98]-[99]; see also the XXN of Christopher Friend, Transcript, 26 April 2022, PN923-PN928, and the XXN of James Eddington, Transcript, 3 May 2022, PN3513-PN3514.

996 ANMF Form F46 Application to vary a modern award (AM2021/63) dated 17 May 2021 at [27].

997 HSU closing submissions dated 22 July 2022 at [405] citing Charlesworth Report at [39].

998 HSU closing submissions dated 22 July 2022 at [406] citing Charlesworth Supplementary Report at [48], [58].

999 HSU closing submissions dated 22 July 2022 at [407] citing amended witness statement of Christopher Friend dated 20 May 2022 at [22].

1000 HSU closing submissions dated 22 July 2022 at [409].

- encouraging industrial parties to bargain for particular arrangements in workplaces to improve productivity and properly utilise a skilled workforce, and
- increasing the competitiveness of enterprises that currently engage in enterprise bargaining.[1001]

1020 The HSU relies on Mr Friend's evidence to contend that increasing award minimum rates of pay may enable employers and employees to focus collective bargaining on issues other than pay, including innovative classification structures, greater support for training and development and career pathways.[1002]

1021 The Joint Employers reject the proposition that increasing minimum wages will create incentives for employers to engage in collective bargaining and submit:

> On any logical basis, increasing minimum award rates in a price constrained sector must reduce the likelihood, or create a disincentive of collective bargaining, not increase it.[1003]

1022 The Joint Employers submit that the evidence demonstrates that a "significant proportion" of aged care workers are covered by enterprise agreements and that it therefore follows "as a matter of logic" that raising the minimum award rates will "diminish the capacity of employers to bargain for further wage increases above those higher minimum rates".[1004]

1023 The Joint Employers submit that increasing minimum rates in the aged care sector under the current Government funding model "will do more than dampen bargaining, it will likely lead to its end".[1005]

1024 The Commonwealth submits that "collective bargaining in the aged care sector is already widespread" and notes that while modelling from DoHAC indicates that the majority of aged care workers are covered by enterprise agreements, in most cases they have a "low bargaining premium".[1006]

1025 The Commonwealth notes the observation from Prof Charlesworth that low remuneration in the aged care sector, both in modern awards and enterprise bargaining, is "entirely dependent on Commonwealth Government commitment and action". The Commonwealth also notes the Unions' evidence that increasing modern award minimum wages would create incentives for employers to engage in collective bargaining and provide industrial parties with a realistic basis from which to engage in collective bargaining.[1007]

1026 The Commonwealth submits that it is "very difficult to anticipate what effect increases to modern award minimum wages in the aged care sector would have on collective bargaining" and that, at best, it anticipates that if the increases sought were granted it would have a "neutral effect" on bargaining.[1008]

1001 HSU closing submissions dated 22 July 2022 at [411].

1002 HSU closing submissions dated 22 July 2022 at [412] citing amended witness statement of Christopher Friend dated 20 May 2022 at [18].

1003 Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 at [3.4].

1004 Joint Employers submissions dated 22 July 2022 at [23.11]-[23.12].

1005 Joint Employers closing submissions dated 22 July 2022 at [23.15].

1006 Commonwealth submissions dated 8 August 2022 at [170].

1007 Commonwealth submissions dated 8 August 2022 at [171]-[172] citing Charlesworth Report at [39]; UWU submissions dated 29 October 2021 at 12.

1008 Commonwealth submissions dated 8 August 2022 at [167].

1027 During the course of closing oral argument, counsel for the Commonwealth submitted that an increase in minimum award rates of pay "may encourage collective bargaining … on terms and conditions outside of wages. But given the state of the evidence I can't take it any further than that".[1009]

1028 In a number of annual wage reviews, the Expert Panel has pointed to the "complexity of factors which may contribute to decision making about whether or not to bargain" and that complexity has led the Expert Panel to conclude that it is "unable to predict the precise impact [of its decisions] on collective bargaining with any confidence".[1010] We agree with those observations and with the Commonwealth's submission that it is very difficult to predict the effect increasing minimum wages will have on collective bargaining in the aged care sector.

1029 The proposition that increasing minimum wages may encourage collective bargaining on matters other than pay seems to us to be somewhat optimistic and speculative. Indeed, if correct, we would have expected to have seen it manifest already, given that Government funding arrangements presently constrain wage bargaining.

1030 We are not persuaded that varying the relevant awards to increase minimum wages will *encourage* collective bargaining. It follows that this consideration weighs against the variation of the relevant Awards to give effect to the interim increase determined to be justified by work value reasons.

Section 134(1)(c): the need to promote social inclusion through increase workforce participation

1031 Obtaining employment is the focus of s 134(1)(c)[1011] and "social inclusion may also be promoted by assisting employees to *remain in employment*".[1012] Further, in the Annual Wage Review 2015-2016 decision, the Expert Panel observed that "social inclusion" requires more than simply having a job. The Expert Panel endorsed the proposition that a job with inadequate pay can create social exclusion if the income level limits the employee's capacity to engage in social, cultural, economic and political life.[1013]

1032 The Unions contend that increasing minimum award wages would promote social inclusion through increased workforce participation by contributing to the attraction and retention of employees.

1033 The Commonwealth submits that increasing modern award minimum wages in the aged care sector "could significantly improve workforce participation and social inclusion" as higher wages make jobs "more attractive" and would encourage those currently unemployed, underemployed or not in the labour force to join the workforce.[1014]

1034 The Commonwealth notes that areas of high unemployment are often areas of social exclusion and submits that encouraging employees from this pool to join

1009 Transcript, 1 September 2022 at PN15503.

1010 *Re Annual Wage Review 2015-16* (2016) 258 IR 201 at [540].

1011 *Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1 at [179].

1012 *Re 4 Yearly Review of Modern Awards — Family and Domestic Violence Leave* (2018) 276 IR 1 at [282].

1013 *Re Annual Wage Review 2015-16* (2016) 258 IR 201 at [467].

1014 Commonwealth submissions dated 8 August 2022 at [175].

the aged care industry will promote social inclusion by "improving participation, increasing their income and enhancing their opportunities, in meaningful aged care work".[1015]

1035 The Commonwealth submits jobs in the aged care sector are accessible to those who are unemployed or not in the labour force, and points to the following:

- Many positions available in the aged care sector require only entry level or relatively low skill levels (Certificate II or III).[1016]
- Approximately 51.5 per cent of residential care services industry workers have a skill level commensurate with a Certificate II or III qualification, while a further 9.5 per have a skill level commensurate with having completed secondary education.[1017]
- In February 2022, 294,500 people who were not employed said that caring for an ill or elderly person affected their workforce participation.[1018] Many jobs in the aged care sector offer "significant flexibility" — almost 80 per cent of current aged care workers work part-time — offering opportunities for those with caring responsibilities.

1036 The Commonwealth further submits that higher wages in the aged care sector may assist in addressing rural and regional unemployment rates. The Commonwealth maintains that regional unemployment rates tend to be higher than those in capital cities — in May 2020 the unemployment rate in state capital city areas averaged 3.7 per cent compared with 4.1 per cent across the rest of the states.[1019] The Commonwealth submits that encouraging the unemployed to take up higher paid jobs in the aged care sector may reduce the disparity between regional and capital city unemployment rates, thereby improving social inclusion in rural and regional areas.[1020]

1037 In their reply submissions to the Commonwealth, the Joint Employers concede that "the notion of attraction and retention may be a relevant consideration to the modern awards objective".[1021]

1038 As noted by the Commonwealth, the aged care sector is facing "a projected shortfall in workers" and DoHAC modelling estimates the aged care workforce will have to expand by an average of 6.6 per cent each year over the next

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1015 Commonwealth submissions dated 8 August 2022 at [176].

1016 Commonwealth submissions dated 8 August 2022 at [179].

1017 Commonwealth submissions dated 8 August 2022 at [179] citing ABS, *Characteristics of Employment, Australia, August 2021* (Catalogue No 6333.0, 14 Dec 2021).

1018 Commonwealth submissions dated 8 August 2022 at [180] citing ABS, *Participation, Job Search and Mobility, Australia* (Catalogue No 6226.0, 25 June 2022).

1019 Commonwealth submissions dated 8 August 2022 at [181] citing ABS, *Labour Force, Australia, Detailed May 2022* (Catalogue No 6291.0, 23 June 2022).

1020 Commonwealth submissions dated 8 August 2022 at [181].

1021 Joint Employers submissions in reply submissions to the Commonwealth dated 17 August 2022 at [6.5].

5 years to support quality of care and growing demand.[1022] The Commonwealth submits that in 2020, the ACWC estimated that there were 22,000 vacancies in direct care roles across the aged care sector.[1023]

1039 In our view, increasing minimum wages will assist in attracting and retaining employees in the age care sector, thereby promoting social inclusion through increased workforce participation.

1040 This consideration weighs in favour of the variation of the relevant Awards to give effect to the interim increase determined to be justified by work value reasons.

Section 134(1)(e): the principle of equal remuneration for work of equal or comparable value

1041 The Commonwealth submits that the principle of equal remuneration for work of equal or comparable value is of particular relevance to these proceedings given the high proportion of women working in the aged care sector compared with other sectors of the economy.[1024]

1042 Citing the *Equal Remuneration Decision 2015*,[1025] the Commonwealth observes that "there is no reason why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s 157",[1026] and that in dealing with a s 157 application, the Commission does not need to identify a male comparator.[1027]

1043 The Commonwealth submits that ss 134(1)(e) and 284(1)(d) enable the Commission to take into account gender-related issues and whether or not a determination to vary an award would contribute to closing the gender pay gap.[1028]

1044 The Commonwealth submits that the evidence supports a finding that the current award rates significantly undervalue the work performed by aged care workers, for reasons related to gender.[1029] Increasing minimum award wages in care classifications in the Awards would contribute to narrowing the gender pay gap by increasing the relative earnings of a female-dominated sector.[1030]

1045 Accordingly, the Commonwealth is of the view that s 134(1)(e) weighs in favour of increasing the award rates for aged care workers.[1031]

1046 The Unions also contend that s 134(1)(e) weighs in favour of an increase in minimum award wages. For example, the ANMF submits that a correction of the historical undervaluation of the work values of aged care employees would promote the principle of equal remuneration for work of equal or comparable

1022 Commonwealth submissions dated 8 August 2022 at [178], see Tables B2, B4, B8 and B11 of Annexure B.

1023 Commonwealth submissions dated 8 August 2022 at [178], see Tables B2, B4, B8 and B11 of Annexure B.

1024 Commonwealth submissions dated 8 August 2022 at [187].

1025 *Equal Remuneration Decision 2015* (2015) 256 IR 362.

1026 Commonwealth submissions dated 8 August 2022 at [188].

1027 Commonwealth submissions dated 8 August 2022 at [189].

1028 Commonwealth submissions dated 8 August 2022 at [190]-[191].

1029 Commonwealth submissions dated 8 August 2022 at [190] and [195]-[196]; see also Transcript, 1 September 2022, PN15419.

1030 Commonwealth submissions dated 8 August 2022 at [192].

1031 Commonwealth submissions dated 8 August 2022 at [199].

value.[1032] The ANMF describes this as "one of many, non-exhaustive, matters that the Commission will take into account in determining whether the proposed award variation is necessary to provide a fair and relevant minimum safety net of terms and conditions".[1033]

1047 The Joint Employers submit that ss 134(1)(e) and 284(1)(d) "are of minimal relevance save to say that the Commission should it stray too far from the C10 scheme could provoke a question of whether this principle is being met".[1034]

1048 As discussed earlier, we accept that the aged care workforce is predominantly female and the expert evidence is that, as a general proposition, work in feminised industries including care work has historically been undervalued and the reason for that undervaluation is likely to be gender-based. We also accept the logic of the proposition in the expert evidence that gender-based undervaluation of work is a driver of the gender pay gap and if all work was properly valued there would likely be a reduction in the gender pay gap. While it has not been necessary for the purposes of these proceedings for us to determine why the relevant minimum rates in the Awards have not been properly fixed we accept that varying the relevant awards to give effect to the interim increase we propose would be likely to have a beneficial effect on the gender pay gap and promote pay equity. The more contentious issue concerns the proper construction and application of ss 134(1)(e) and 284(1)(d).

1049 The notion of "equal remuneration for work of equal or comparable value" appears in 3 parts of the FW Act: the modern awards objective (s 134(1)(e)); the minimum wages objective (s 284(1)(d)), and the equal remuneration provisions found in Pt 2-7. The objects of the FW Act and other parts of the FW Act make no specific mention of pay equity or the gender-based undervaluation of work.

1050 Consistent with authority, the definition of "equal remuneration for work of equal or comparable value" in s 302(2) is to be read into ss 134(1)(e) and 284(1)(d), such that the relevant consideration is "the principle of equal remuneration for men and women workers for work of equal or comparable value". For example, the Expert Panel's approach to ss 134(1)(e) and 284(1)(d) is set out in the *Annual Wage Review 2017-18* as follows (footnotes omitted):

> [33] The modern awards objective and the minimum wages objective both provide that in a Review we must take into account "the principle of equal remuneration for work of equal or comparable value" (s 134(1)€ and s 284(1)(d)). The Dictionary section of the Act … directs attention to s 302(2) for the definition of the expression "equal remuneration for work of equal or comparable value". Section 302(2) is in Part 2-7 "Equal Remuneration" and defines this expression to mean "equal remuneration for men and women workers for work of equal or comparable value". It seems highly unlikely that Parliament intended this expression to mean something different in ss 134 and 284. *Hence, the appropriate approach to the construction of ss 134(1)(e) and 284(1)(d) is to read the definition into the substantive provision. Accordingly, the relevant consideration is to be read as follows:*

1032 ANMF submissions dated 29 October 2021 at [200(4)]; ANMF closing submissions dated 22 July 2022 at [832(4)].

1033 ANMF closing submissions in reply dated 17 August 2022 at [160].

1034 Joint Employers closing submissions dated 22 July 2022 at [23.19] and [24.5].

> *the principle of equal remuneration for men and women workers for work of equal or comparable value*.[1035]

[34] In the *Equal Remuneration Decision 2015* the Full Bench concluded that the expression "work of equal or comparable value" in s 302(1) refers to equality or comparability in "work value". We agree and, further, the same meaning should be attributed to this expression in ss 134(1)(e) and 284(1)(d). *As explained in the Equal Remuneration Decision 2015 , the principle of equal remuneration for work of equal or comparable value is enlivened when an employee or group of employees of one gender do not enjoy remuneration equal to that of another employee or group of employees of the other gender who perform work of equal or comparable value*. Further, as the Full Bench observed:

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

[35] *The application of the principle of equal remuneration for work of equal or comparable value is such that it is likely to be of only limited relevance in the context of a Review. Indeed it would only be likely to arise if it were contended that particular modern award minimum wage rates were inconsistent with the principle of equal remuneration for work of equal or comparable value; or, if the form of a proposed increase enlivened the principle. We agree with the observations of a number of parties that Review proceedings are of limited utility in addressing any systemic gender undervaluation of work. It seems to us that proceedings under Part 2-7 and applications to vary modern award minimum wages for "work value reasons" pursuant to ss 156(3) and 157(2) provide more appropriate mechanisms for addressing such issues*.

[36] *But the broader issue of gender pay equity, and in particular the gender pay gap, is relevant to the Review. This is so because it is an element of the requirement to establish a safety net that is "fair". It may also arise for consideration in respect of s 284(1)(b) ("promoting social inclusion through workforce participation"), because it may have effects on female participation in the workforce*.

[37] The gender pay gap refers to the difference between the average wages earned by men and women. It may be expressed as a ratio which converts average female earnings into a proportion of average male earnings on either a weekly or an hourly basis. The *Statistical Report — Annual Wage Review 2017-18* (Statistical report) sets out three measures of the gender pay gap, ranging from 11.0 per cent to 15.3 per cent (see Table 4.1).

[38] As noted in the *Annual Wage Review 2015-16* decision (2015-16 Review decision), the causes of the gender pay gap are complex and influenced by factors such as: differences in the types of jobs performed by men and women; discretionary payments; workplace structures and practices; and the historical undervaluation of female work and female-dominated occupations. *We accept that moderate increases in the NMW and modern award minimum wages would be likely to have a relatively small, but nonetheless beneficial, effect on the gender pay gap*.[1036]

(Emphasis added)

1035 See also *Re 4 Yearly Review of Modern Awards — Penalty Rates* (2017) 265 IR 1 at [207].

1036 *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [33]-[38].

1051 This approach was endorsed in the *Annual Wage Review 2021-22*.[1037]

1052 In the *Teachers Decision*, the Full Bench held that even where an award variation would significantly improve the remuneration of a female-dominated area of the workforce, unless its purpose was to equalise the remuneration of workers in the sector with a group of male workers performing work of equal or comparable value, the principle in s 134(1)(e) and 284(1)(d) is not a relevant consideration.

1053 We observe that this approach essentially imports the statutory test for satisfying the jurisdictional prerequisite for the making of an equal remuneration order — that the Commission is satisfied that, for the employees to whom the order will apply, there is not equal remuneration for men and women workers for work of equal or comparable value — into *the principle* of equal remuneration. On reflection, it may not be necessary to do this.

1054 Reading the FW Act harmoniously requires that the relevant consideration in ss 134(1)(e) and 284(1)(d) be read as "the principle of equal remuneration for men and women workers for work of equal or comparable value". The question is then what that means, in applying the modern awards and minimum wages objectives.

1055 First, it can be observed that "equal remuneration for work of equal or comparable value" in ss 134(1)(e) and 284(1)(d) is expressed as a *principle* that the Commission must take into account as part of an evaluative exercise; it is not a matter about which the Commission must be satisfied in terms of meeting a particular statutory standard or test.[1038]

1056 Second, the principle is one of the several broad social and economic considerations in ss 134(1) and 284(1). The modern awards objective, including s 134(1)(e), is applied on a case-by-case basis in circumstances where the Commission proposes to vary a modern award. As the Full Court of the Federal Court observed in *National Retail Association v Fair Work Commission*:

> It is apparent from the terms of s 134(1) that the factors listed in (a)-(h) are *broad considerations* which the FWC must take into account in considering whether a modern award meets the objective set by s 134(1), that is to say, whether it provides a fair and relevant minimum safety net of terms and conditions. *The listed factors do not, in themselves, however, pose any questions or set any standard against which a modern award could be evaluated. Many of them are broad social objectives*.

1057 If the principle in ss 134(1)(e) and 284(1)(d) were to be confined to the circumstance suggested in the *Teachers Decision*, it would seem to have very little work to do. Those sections have no application to Pt 2-7. If so limited, the principle would only appear to be relevant if it could be shown, through a comparator group of the opposite gender, that work covered by the award was undervalued or that the variation would otherwise address the discriminatory effect of an award term on the male or female-dominant workforce covered by the award. This restrictive reading seems inconsistent with the nature of the considerations in ss 134(1) and 284(1), which comprise broad social and economic objectives.

1037 *Re Annual Wage Review 2021-22* (2022) 315 IR 367.

1038 Compared to s 302, which does not rely on the expression of any such "principle". In s 302, "equal remuneration for men and women workers for work of equal or comparable value" is used in the context of the statutory precondition for the exercise of the Commission's discretion to make an equal remuneration order.

1058 In the context of the equal remuneration provisions in Pt 2-7, the Commission has observed that these are remedial or beneficial provisions[1039] and that the:

> '*general purpose of the provisions is to remedy gender wage inequality and promote pay equity*. It follows that in exercising its discretion [under s 302(1)] it would be open for the Commission to take into account the reasons for any difference in remuneration between different gendered employees performing work of equal or comparable value.[1040]

(Emphasis added)

1059 Noting the above, if increasing minimum wages in an award would be likely to remedy historical gender based undervaluation of the subject work or have a beneficial effect on the gender pay gap or gender pay equity, then it might be said to be consistent with, or "promote" or "further" "*the principle of* equal remuneration for men and women workers for work of equal or comparable value" and be a factor weighing in favour of the award variation.

1060 If this were correct, then the principle's relevance would not be confined to where an award variation would equalise wage rates for men and women workers performing work of equal or comparable value.

1061 However, we note this construction would seem to run counter to the weight of Commission decisions that touch upon the relevance of the principle in ss 134(1)(e) and 284(1)(d).

1062 We also observe that pay equity concerns arise for our consideration under ss 134(1) and 284(1), in deciding whether an award variation is necessary to achieve "a fair and relevant minimum safety net of terms and conditions" and "a safety net of fair minimum wages". As has been held in annual wage review decisions:

> the broader issue of gender pay equity, and in particular the gender pay gap, is relevant to the Review. This is so because it is an element of the requirement to establish a safety net that is "fair". It may also arise for consideration in respect of s 284(1)(b) ("promoting social inclusion through workforce participation"), because it may have effects on female participation in the workforce.[1041]

1063 In view of the above matters, we propose to invite further submissions from the parties on the proper construction of ss 134(1)(e) and 284(1)(d) and their relevance to the proposed interim increase.

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

1064 Section 134(1)(f) is expressed in very broad terms and requires the Commission to take into account the likely impact of any exercise of modern award powers "on business, including" (but not confined to) the specific matters mentioned, that is; "productivity, employment costs and the regulatory burden".

1065 Productivity' is not defined in the FW Act but given the context in which the word appears, it is apparent that it is used to signify an economic concept. The conventional economic meaning of productivity is the number of units of output

1039 *Equal Remuneration Decision 2015* (2015) 256 IR 362 at [177].

1040 *Equal Remuneration Decision 2015* (2015) 256 IR 362 at [17] of the Summary following [367]. See also [178], [183], [210] and [212].

1041 *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [36].

per unit of input. It is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated.

1066 The Joint Employers submit that there is a direct correlation between employment cost and funding:

- the funding is not sufficient to support the provision of necessary care services and sufficient staff numbers to provide those services
- the regulations dictating the provision of consumer centred care require the provider to meet the gap, and
- the gap being met by providers to ensure that compliant and quality care services are provided to consumers has left major providers within the aged care sector to operate at a deficit.[1042]

1067 As we have mentioned, the extent of Commonwealth funding to support the increase in minimum wages arising from these proceedings is unknown at present. It follows that we are unable to reach a concluded view on our consideration of s 134(1)(f) at this time.

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

1068 The requirement to take into account the likely impact of any exercise of modern award powers on "the sustainability, performance and competitiveness of the national economy" focuses on the aggregate (as opposed to sectorial) impact of an exercise of modern award powers.

1069 The UWU contends that the aged care sector is critical to the sustainability and performance of the national economy and that increasing minimum wages will assist in attracting and retaining workers in the sector.[1043] On this basis, it is put that s 134(1)(h) weighs in favour of varying the relevant Awards to increase minimum wages.

1070 The Commonwealth submits that the considerations in s 134(1)(h) "do not militate against award minimum wage rises in this matter".[1044]

1071 The Commonwealth submits that a 25 per cent increase in award minimum wages "would not be material, due to the relatively small size of the aged care sector relative to the economy as a whole" and notes that modelling by Treasury estimates that such a wage rise would increase economy-wide wages by less than one per cent. The Commonwealth notes that "in the current economic environment of above-target inflation and persistent global price shocks, there would be risks to inflation expectations if similar wage rises are demanded in associated industries".[1045] Further, given the small size of the aged care sector, the effect on GDP is expected to be modest.[1046]

1072 We are not persuaded that varying the relevant Awards to give effect to the interim increase we have determined to be justified by work value reasons will have any material effect on the national economy. This consideration is neutral in the present context.

1042 Joint Employers closing submissions dated 22 July 2022 at [23.20].

1043 UWU closing submissions in reply dated 19 August 2022 at [18](d).

1044 Commonwealth submissions dated 8 August 2022 at [205].

1045 Commonwealth submissions dated 8 August 2022 at [208].

1046 Commonwealth submissions dated 8 August 2022 at [209].

8.5. The minimum wages objective

1073 The minimum wages objective is considered in Chapter 3.

1074 As noted by the Expert Panel in the *2019-20 Annual Wage Review decision*,[1047] there is a substantial degree of overlap in the considerations relevant to the minimum wages objective and the modern awards objective, although some are not expressed in the same terms. Both the minimum wages objective and the modern awards objective require the Commission to take into account:

- promoting social inclusion through increased workforce participation[1048]
- relative living standards and the needs of the low paid[1049]
- the principle of equal remuneration for work of equal or comparable value,[1050] and
- various economic considerations.[1051]

1075 Similarly to the modern awards objective, the Commission's task in s 284 involves an "evaluative exercise" which is informed by the considerations in ss 284(1)(a)-(e).[1052] No particular primacy attaches to any of the s 284(1) considerations, and a degree of tension exists between some of these considerations.[1053]

1076 A safety net of "*fair* minimum wages" includes the perspective of employers and employees, and the Commission is required to take into account all of the relevant statutory considerations,[1054] but those expressly listed in s 284(1) do not necessarily exhaust the matters which the Commission might properly consider to be relevant.[1055]

1077 It is common ground that the consideration in s 284(1)(e) is not relevant in the context of the Applications.[1056]

1078 We express the following *provisional* views in respect of the remaining s 284(1) considerations.

1047 *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [205].

1048 FW Act, ss 284(1)(b) and 134(1)(c).

1049 FW Act, ss 284(1)(c) and 134(1)(a).

1050 FW Act, ss 284(1)(d) and 134(1)(e).

1051 FW Act, ss 284(1)(a) and 134(1)(d), (f) and (h).

1052 *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [208]; *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [221], citing *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [14].

1053 *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [210].

1054 *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [208]; *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [221], citing *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [17].

1055 *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [209]; *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [221], citing *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [14].

1056 HSU closing submissions dated 22 July 2022 at [64]; Joint Employers closing submissions dated 22 July 2022 Annexure P at [3.28]; ANMF closing submissions dated 22 July 2022 at [70].

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

1079 Similarly to s 134(1)(h), this consideration is directed at the likely impact of a variation to modern award minimum wages on the national economy and focuses on the aggregate (as opposed to sectoral) impact of such a variation.

1080 We adopt the same *provisional* view as that adopted in respect of s 134(1)(h). This consideration is neutral in the present context.

Section 284(1)(b): promoting social inclusion through increased workforce participation

1081 This consideration is in the same terms as s 134(1)(c) and we express the same *provisional* view.

Section 284(1)(c): relative living standards and the needs of the low paid

1082 This consideration is in the same terms as s 134(1)(a) and we express the same *provisional* view.

Section 284(1)(d): the principle of equal remuneration for work of equal or comparable value

1083 This consideration is in the same terms as s 134(1)(e) and we propose to invite further submissions on the proper construction and the relevance of the principle, having regard to the discussion about s 134(1)(e) above.

9. Next steps

1084 We may vary modern award minimum wages if we are satisfied that the variation is "justified by work value reasons", "necessary to achieve the modern awards objective" and "necessary to achieve the minimum wages objective", and we take into account the rate of the national minimum wage as currently set in a national minimum wage order.

1085 In Chapter 8 we conclude that the variation of the minimum wages of the direct aged care classifications in the 3 Awards to provide an interim increase of 15 per cent is plainly justified by work value reasons and that s 157(2)(a) is so satisfied.

1086 At present, we are unable to reach a concluded view on whether making the proposed interim variation determination in these proceedings is necessary to achieve the modern awards objective. One of the matters we are required to take into account in forming that evaluative judgment is "the likely impact of any exercise of modern award powers on business, including on … employment costs" (s 134(1)(f)). The likely impact on employers of the interim increase we propose to award will be ameliorated to the extent of Government funding support for that increase. The extent of funding support is not yet known.

1087 In addition, the proceedings have raised a number of complex issues for determination which require close examination. We would benefit from further submissions and, potentially, further evidence, from the parties, in respect of some of them.

1088 These considerations led us to determine the Applications in 3 stages.

Stage 1

1089 In this decision we have determined the relevant legal principles and the conceptual issues that have been canvassed by the parties in relation to

the Applications. We have also decided that an interim increase of 15 per cent in the modern award minimum wages applicable to direct care workers in the 3 Awards is justified by work value reasons. This decision constitutes the first stage in the process.

Stage 2

1090 Stage 2 will commence shortly. To assist the parties in their submissions regarding the implementation of the interim increase, Chapter 8 sets out the relevant legislative provisions and the approach taken to the phasing-in of Commission decisions in other cases.

1091 In Stage 2 the parties will have the opportunity to make submissions and adduce evidence in relation to:

1. The timing and phasing-in of the interim increase in the modern award minimum wages applicable to direct care aged care employees, including the appropriateness and application of the principles canvassed at [974]-[990] above.
2. Whether making the interim increases to the modern award minimum wages applicable to direct care aged care employees in these proceedings is necessary to achieve the modern awards objective; and our *provisional* views in respect of the s 134(1) considerations (at [1001]-[1072] above).
3. Whether the interim increases in the modern award minimum wages applicable to direct care employees are necessary to achieve the minimum wages objective and our *provisional* views in respect of the s 284(1) considerations (at [1073]-[1083] above).

1092 Stage 2 will conclude our consideration of the interim increase in modern award minimum wages applicable to direct care employees.

1093 As noted in Chapter 8, the Joint Employers submit an increase in minimum wages for Head Chefs/Cooks is justified by work value reasons. We have not provided an interim increase in respect of this classification, at this time. The parties are directed to confer in respect of this issue and if they are able to agree upon the quantum of an interim increase and the classification(s) to which it applies, we will give consideration in Stage 2 to determining an interim increase for these employees. Absent an agreement between the parties, any increase applicable to these employees will be determined in Stage 3 (together with whether an increase is to be provided to other administrative/support aged care employees and the extent of such an increase).

1094 Similarly, we do not propose to provide an interim increase in respect of RAOs (that are not classified as PCWs) at this time. The parties are directed to confer in respect of this issue and if they are able to agree on the quantum of an interim increase, we will give consideration in Stage 2 to determining an interim increase for these employees.

Stage 3

1095 As we point out in Chapter 8, our determination of an interim increase in the modern award minimum wages applicable to direct care workers does not conclude our consideration of the Unions' claim for a 25 per cent increase for other employees, namely administrative and support aged care employees. Nor does the 15 per cent interim increase necessarily exhaust the extent of the increase justified by work value reasons in respect of direct care workers.

1096 In Chapter 8, we also point out that in determining the quantum of the interim increase we have *not* taken into account *all* of the material before us. In particular, we have not taken into account the impact of the COVID-19 pandemic or the issues arising from understaffing. These matters can be the subject of further submissions in the next stage of the proceedings; in particular we invite submissions on the extent to which the changes to work resulting from the pandemic have become permanent.

1097 Stage 3 will also involve a detailed consideration of the classification definitions and structures in the Awards, including the issues outlined in Chapter 8 and the issues raised by the Commonwealth in its submissions of 8 August 2022 at [210]-[229]. Interested parties may wish to make further submissions and call additional evidence in relation to one or more of these matters in this stage of the proceedings. We will then issue a further decision finalising the classification definitions and structures in the Awards.

1098 Stage 3 will also determine wage adjustments that are justified on work value grounds for employees not dealt with in Stage 1 and determine any further wage adjustments that are justified on work value grounds for direct care workers granted initial wage increases in Stages 1 and 2 (in the context of our decision on classification definitions and structures).

1099 A Mention will be listed for *9:30 am* on *Tuesday 22 November 2022* for the purpose of issuing directions in respect of Stage 2 of these proceedings.

Applications granted in part

DR RJ DESIATNIK

Attachment A — Procedural history, applications and submissions

[1] Three applications to vary modern awards in the aged care sector are before the Full Bench:

1. AM2020/99 — an application by the Health Services Union (HSU) and a number of individuals to vary the minimum wages and classifications in the *Aged Care Award 2010* (*Aged Care Award*).
2. AM2021/63 — an application by the Australian Nursing and Midwifery Federation (ANMF) to vary the *Aged Care Award* and the *Nurses Award 2010*, now the *Nurses Award 2020* (*Nurses Award*).[1057]
3. AM2021/65 — an application by the HSU to vary the *Social, Community, Home Care and Disability Services Award 2010* (SCHADS Award) (the Applications).

[2] On 12 November 2020, a number of individuals made an application to vary the minimum wages and classifications in the *Aged Care Award*. An amended application was made on 17 November 2020 adding the HSU as an applicant (AM2020/99). The application seeks to vary the *Aged Care Award* by:

(a) Increasing wages for *all* classification levels in the *Aged Care Award* by 25 per cent by replacing subclause 14.1 of the Award with the following:[1058]

14.1 Minimum wages — Aged Care Employee	
Classification	**Per week** **$**
Aged care employee — level 1	~~861.40~~ 1076.80
Aged care employee — level 2	~~895.50~~ 1119.40
Aged care employee — level 3	~~929.90~~ 1162.40
Aged care employee — level 4	~~940.90~~ 1176.10
Aged care employee — level 5	~~972.80~~ 1216.00
Aged care employee — level 6	~~1025.20~~ $1281.50
Aged care employee — level 7	~~1043.60~~ $1304.50

1057 The *Nurses Award 2010* was varied and renamed the *Nurses Award 2020* on 9 September 2021 (*Re 4 Yearly Review of Modern Awards* [2021] FWCFB 4504).

1058 An updated version of the HSU's proposed cl 14.1 was included in its closing submissions dated 22 July 2022 to reflect the *Re Annual Wage Review 2020-21* (2021) 307 IR 203 and the *Re Annual Wage Review 2021-22* (2022) 315 IR 367.

(b) Varying the classification structure in Schedule B to provide for an additional pay level for Personal Care Workers (PCW) who have undertaken specialised training in a specific area of care and who use those skills, clarifying progression from Aged Care Employee Level 1 to Level 3, clarifying the role descriptions within the personal care stream, referring to the administration of medication as a task for a Senior Personal Care Worker and providing for a new role description for qualified and senior Recreational/Lifestyle Officers. The proposed replacement Scheduled B is outlined at *Annexure B*.

[3] A mention in respect of Application AM2020/99 was held on 23 November 2022.

[4] On 24 November 2022, a Statement and Directions were issued requiring the HSU to file an outline of its evidentiary case and proposed draft directions by 14 December 2020.

[5] A further mention was held on 18 December 2020, following which the Commission issued the following directions:

1. The Applicants and other union parties to file evidence and submissions by 4 pm on Thursday 1 April 2021.
2. Employers and Employer Associations to file evidence and submissions by 4 pm on Monday 16 August 2021.
3. The matter will be listed for Mention at 9:30 am on Monday 23 August 2021. The purpose of the Mention is to discuss witness scheduling and which witnesses will be called for cross-examination.
4. The Applicants and other union parties to file evidence and submissions in reply by 4 pm on Monday 18 October 2021.
5. Submissions to be filed in both Word and PDF formats to amod@fwc.gov.au.
6. The parties are granted liberty to apply to vary the above directions.

[6] On 14 December 2020, the HSU filed an outline of evidence.

[7] On 13 January 2021, the Commission notified parties that 10 to 26 October 2021 had been provisionally reserved for hearings of the evidence.

[8] On 1 March 2021, the final report of the Royal Commission into Aged Care Quality and Safety was tabled in Parliament.

[9] On 16 March 2021, the ANMF wrote to the Commission foreshadowing that it would be making an application to vary the minimum wages and classifications in the *Nurses Award*. The ANMF also sought to vary the directions issued on 18 December 2020.

[10] On 18 March 2021, the Commission issued a Statement and listed the matter for a Directions Hearing on 26 March 2021. The ANMF was directed to file the variation sought to the directions by 24 March 2021.

[11] On 24 March 2021, the UWU wrote to the Commission foreshadowing the filing of an application to vary the SCHADS Award and supporting the ANMF's proposed amendment to the directions issued on 18 December 2020.

[12] At a directions hearing on 26 March 2021, the President indicated that he was not minded to amend the Directions until the proposed variation applications and directions had been filed by the ANMF and UWU.

[13] On the 1 April 2021, submissions were received from the following parties:

- HSU
- ANMF
- UWU (collectively the Unions)

[14] Evidence was filed by the HSU and UWU on 1, 23 and 26 April 2021.

[15] On 17 May 2021, the ANMF made an application to vary the *Aged Care Award* and the *Nurses Award* (AM2021/63) by:

1. inserting a new Aged Care Employees Schedule into the *Nurses Award*, which would increase rates of pay by 25 per cent and expire after 4 years; and
2. creating a new classification structure for PCWs in the *Aged Care Award* (and consequentially removing them from the main "aged care employee" classification structure in Schedule B) and increasing PCW rates of pay by 25 per cent.

[16] The ANMF's proposed Aged Care Employees Schedule in the *Nurses Award* would create a new set of minimum rates for employees who are engaged in the provision of:

(a) Services for aged persons in a hostel, nursing home, aged care independent living units, aged care services apartments, garden settlement, retirement village or any other residential accommodation facility; and or

(b) Services for an aged person in a private residence.[1059]

[17] The proposed schedule applies an increased minimum wage for employees working in the aged care industry in the following classifications:

- Nursing assistant
- Enrolled nurses (including student enrolled nurse) (EN)
- Registered nurses (RN) (levels 1-5); and
- Nurse practitioner.[1060]

[18] The ANMF's application seeks a 25 per cent wage increase for all employees covered by the *Nurses Award* who provide services for aged persons. The ANMF's initial application was dated 17 May 2021 and there have been 2 developments since that application was made:

1. The ANMF's initial application included a proposal to insert a new Aged Care Employees Schedule into the *Nurses Award* which reflected the structure of clause 14 of the *Nurses Award 2010*. The *Nurses Award 2020* came into operation on 9 September 2021. Clause 15 of the *Nurses Award 2020* differs from clause 14 in the 2010 award in two significant

1059 ANMF Application (AM2021/63) dated 17 May 2021 Annexure 1 at [1].

1060 The proposed schedule does not include the classification Occupational health nurse as set out at cl A.6 of the *Nurses Award*.

respects: it contains a minimum hourly rate for each classification and minimum entry rates for employees with a 4-year degree or a Masters degree.

2. The minimum wages in the *Nurses Award* and the *Aged Care Award* have increased as a result of the *Annual Wage Review 2020-21* and the *Annual Wage Review 2021-22*.

[19] In its closing submissions,[1061] the ANMF amended its proposed schedule to the *Nurses Award* to reflect the developments since its initial application as follows:

Nurses Award 2020 — Proposed Schedule G — (note Schedule F under the Nurses Award 2020 is now Part-day Public holidays)		
Classification	**Minimum weekly rate (Full-time employee)**	**Minimum hourly rate**
	$	**$**
G.1 General		
G.1.1 The provisions of this schedule apply until [insert date 4 years after commencement].		
G.1.2 The provisions of this schedule are to be applied to employees in the classifications listed in Schedule B, engaged in the provision of:		
(a) Services for aged persons in a hostel, nursing home, aged care independent living units, aged care serviced apartments garden settlement, retirement village or any other residential accommodation facility; and/or		
(b) Services for an aged person in a private residence.		
G.2 Nursing assistant		
1st year	1104.30	29.06
2nd year	1121.50	29.51
3rd year and thereafter	1139.50	29.99
Experienced (the holder of a relevant certificate III qualification)	1176.10	30.95
G.3 Enrolled Nurses		
(a) Student enrolled nurse		
Less than 21 years of age	1025.90	27.00
21 years of age and over	1076.80	28.34

1061 ANMF closing submissions dated 22 July 2022 Annexure 2.

Nurses Award 2020 — Proposed Schedule G — (note Schedule F under the Nurses Award 2020 is now Part-day Public holidays)		
Classification	**Minimum weekly rate (Full-time employee)**	**Minimum hourly rate**
	$	**$**
(b) Enrolled nurses		
Pay point 1	1197.90	31.52
Pay point 2	1213.80	31.94
Pay point 3	1229.90	32.36
Pay point 4	1247.60	32.83
Pay point 5	1260.10	33.16
G.4 Registered Nurses		
Minimum entry rate for a:		
4-year degree[1]	1338.10	35.21
Masters degree[1]	1384.30	36.43
[1] Progression from these entry rates will be to level 1 — Registered nurse pay point 4 and 5 respectively		
Registered nurse — level 1		
Pay point 1	1281.50	33.72
Pay point 2	1307.80	34.41
Pay point 3	1339.90	35.26
Pay point 4	1375.50	36.20
Pay point 5	1417.80	37.31
Pay point 6	1458.80	38.39
Pay point 7	1501.00	39.50
Pay point 8 and thereafter	1540.00	40.53
Registered nurse — level 2		
Pay point 1	1580.90	41.60
Pay point 2	1606.00	42.26
Pay point 3	1633.90	43.00
Pay point 4 and thereafter	1660.60	43.70
Registered nurse — level 3		
Pay point 1	1714.10	45.11
Pay point 2	1745.60	45.94
Pay point 3	1775.80	46.73
Pay point 4 and thereafter	1807.60	47.57
Registered nurse — level 4		
Grade 1	1956.40	51.48
Grade 2	2096.60	55.17
Grade 3	2218.90	58.39

Nurses Award 2020 — Proposed Schedule G — (note Schedule F under the Nurses Award 2020 is now Part-day Public holidays)		
Classification	**Minimum weekly rate (Full-time employee)**	**Minimum hourly rate**
	$	**$**
Registered nurse — level 5		
Grade 1	1974.30	51.95
Grade 2	2079.00	54.71
Grade 3	2218.90	58.39
Grade 4	2357.30	62.03
Grade 5	2599.90	68.42
Grade 6	2844.60	74.86
G.5 Nurse practitioner		
1st year	1972.50	51.91
2nd year	2031.10	53.45

[20] The ANMF proposes to vary the *Aged Care Award* by deleting "personal care worker" from the definitions of aged care employee levels 2, 3, 4, 5 and 7 in Schedule B and inserting a new separate classification structure for PCWs.[1062] The application also seeks to insert clause 14.1A, which increases the minimum wages of PCWs by 25 per cent as follows:[1063]

14.1A Minimum wages — Personal Care Workers	
Classification	**Rate of pay**
	$
Grade 1 — Personal Care Worker (entry up to 6 months)	1119.40
Grade 2 — Personal Care Worker (from 6 months) & Recreational/Lifestyle activities officer (unqualified)	1162.40
Grade 3 — Personal Care Worker (qualified)	1176.10
Grade 4 — Senior Personal Care Worker	1216.00
Grade 5 — Specialist Personal Care Worker	1304.50

[21] On 31 May 2021, the HSU made an application to vary the SCHADS Award (AM2021/65) by:

(1) Inserting the following new definition into clause 3.1:

> ***Home aged care employee*** *means a home care employee providing personal care, domestic assistance or home maintenance to an aged person in a private residence*; and

1062 The ANMF's proposed Schedule B is set out at Annexure C.

1063 An updated version of the ANMF's proposed cl 14A was included in its closing submissions dated 22 July 2022 to reflect the *Re Annual Wage Review 2020-21* (2021) 307 IR 203 and the *Re Annual Wage Review 2021-22* (2022) 315 IR 367.

(2) Inserting a new clause 17A — Minimum weekly ages for home aged care employees to provide a 25 per cent increase in wages for home aged care employees at all classification levels as follows:[1064]

17A.1 Home aged care employee Level 1	
	Per week
	$
Pay point 1	1089.50
17A.2 Home aged care employee Level 2	
	Per week
	$
Pay point 1	1152.40
Pay point 2	1160.30
17A.3 Home aged care employee Level 3	
	Per week
	$
Pay point 1 (certificate III)	1176.10
Pay point 2	1212.40
17A.4 Home aged care employee Level 4	
	Per week
	$
Pay point 1 (certificate IV)	1283.10
Pay point 2	1308.80
17A.5 Home aged care employee Level 5	
	Per week
	$
Pay point 1 (degree or diploma)	1375.80
Pay point 2	1430.00

(3) To make such further or other amendments to the SCHADS Award as appear appropriate to the Commission in light of the evidence in the proceeding.

[22] In essence, together, the Applications seek a 25 per cent rise to the minimum wage for all aged care employees covered by the Aged Care, Nurses and SCHADS awards. The ANMF supports the wage increases sought in the HSU applications for PCWs consistent with its own application.[1065] While the ANMF application does not seek a wage increase for employees other than nurses and PCWs, it supports the wage increases sought by the HSU for other employees affected by those applications.[1066]

1064 An updated version of the HSU's proposed cl 17A was included in its closing submissions dated 22 July 2022 to reflect the *Re Annual Wage Review 2020-21* (2021) 307 IR 203 and the *Re Annual Wage Review 2021-22* (2022) 315 IR 367.

1065 ANMF submissions dated 29 October 2021 at [5].

1066 ANMF submissions dated 29 October 2021 at [5].

[23] The HSU and ANMF differ on their approach to Schedule B in the *Aged Care Award*.

[24] The ANMF submits that the work performed by Assistants in Nursing (AIN) and PCWs differs qualitatively from the work done by general and administrative services and food services workers and as a result their rates of pay should be treated separately.[1067] It relies on 2 propositions:

1. If the Commission is satisfied that there should be an increase in award rates for AINs and PCWs, but is *not* so satisfied in relation to general and administrative services worker and food services workers, then a separate classification structure for AINs/PCWs is an "obvious drafting technique or structure to give effect to those conclusions".[1068]

2. Even if the Commission *is* satisfied that there should be an increase in award rates for general and administrative services workers and food services workers, a separate classification structure is appropriate because AINs/PCWs work as part of the "nursing team" and engage in care work that is not analogous to the work performed by other aged care employees, such as gardeners.[1069] The current classification, which places varieties of workers who perform very different work into a single classification "carries with it the risk of stultification of development of particular terms and conditions … which take account of those qualitative differences between work".[1070]

[25] On 1 June 2021, the UWU wrote to the Commission confirming that, in the circumstances, it would not be making a separate application to vary the SCHADS Award.

[26] On 22 June 2021, the ANMF and the HSU made separate applications to set aside the Directions of 18 December 2020 in respect of matter AM2020/99 and proposed new Directions for the handling of matters AM2020/99, AM2021/63 and AM2021/65.[1071]

[27] On 24 June 2021, a conference in respect of the applications was held before Commissioner O'Neill.

[28] On 1 July 2021, a Statement and Directions were issued confirming that the Applications (AM2020/99, AM2021/63 and AM2021/65) would be dealt with jointly by one Full Bench and any evidence given in the matters would be admissible in relation to all of them. The following Directions were issued:

1. AM2020/99, AM2021/63 and AM2021/65 will be dealt with jointly by one Full Bench and any evidence given in the matters will be admissible in relation to all of them.

1067 ANMF submissions dated 29 October 2021 at [205].

1068 ANMF submissions dated 29 October 2021 at [209].

1069 ANMF submissions dated 29 October 2021 at [210].

1070 ANMF submissions dated 29 October 2021 at [211].

1071 ANMF submission dated 22 June 2021; HSU submission dated 22 June 2021.

2. The directions dated 18 December 2020 in relation to application in AM2020/99 are set aside.
3. The Australian Government is to confer with the Applicants in relation to the requests for information and data in Schedule 1.
4. The Australian Government is to file its response to the request for information and data, specifying what information and data it can provide and by when, by 4 pm on *16 July 2021*.
5. The Australian Government is to file the information and data then available by *23 July 2021*, and any additional information and data as soon as it is available.
6. The Applicants will file any agreed position involving union parties, employers, employer associations and/or the Australian Government in relation to the matters by 4 pm on *Friday 20 August 2021*.
7. The Applicants and other union parties will file evidence and submissions by 4 pm on *Friday 8 October 2021*. This includes any updated submission or evidence already filed in matter AM2020/99 in accordance with the directions dated 18 December 2020.
8. Employers and employer organisations will file evidence and submissions by 4 pm on *Friday 18 February 2022*.
9. The Applicants and other union parties will file evidence and submissions in reply by 4 pm on *Thursday 14 April 2022*.
10. The matters will be listed for Mention at 9.30 am on *Tuesday 19 April 2022*. The purpose of the Mention is to discuss witness scheduling and which witnesses will be called for cross-examination.
11. The matters will be listed for the hearing of evidence from *26 April to 11 May 2022* (inclusive), with 12 and 13 May reserved.
12. The parties will file closing written submissions regarding the evidence by 4 pm *on 3 June 2022*.
13. The parties will file submissions in reply regarding the evidence by 4 pm *on 24 June 2022*.
14. The matters will be listed for oral hearing on *6 and 7 July 2022*.
15. Submissions to be filed in both word and PDF formats to amod@fwc.gov.au.
16. The parties are granted liberty to apply to vary the above directions.

[29] Schedule 1 to the Directions contained requests from the ANMF and the HSU for information and data from the Australian Government. The Directions provided:

4. The Australian Government is to file its response to the request for information and data, specifying what information and data it can provide and by when, by 4 pm on *16 July 2021*.

5. The Australian Government is to file the information and data then available by *23 July 2021*, and any additional information and data as soon as it is available.

[30] On 16 July 2021, the Australian Government filed a submission in response to Direction 4, setting out the information it could provide and the timeframe for providing it. On 23 July 2021, the Australian Government provided a further submission in response to Direction 5 that contained the information and data requested. This submission was accompanied by an information and data spreadsheet.

[31] On 30 July 2021, the ANMF applied to vary the directions regarding the filing of an agreed position, noting its intention to engage in discussions being facilitated by the Aged Care Workforce Industry Council (ACWIC) about increasing wages in the aged care sector.

[32] On 2 August 2021, the Full Bench issued a Statement varying the Directions as sought by the ANMF, noting that the ANMF application was not opposed by any party. The deadline for the Applicants to file any agreed position was extended from 20 August 2021 to 19 November 2021.

[33] On 31 August 2021, the Australian Government provided a submission in response to questions 1-3 of the HSU's schedule of requested information.

[34] On 15 September 2021, the HSU responded to the Australian Government's submissions and requested clarification and additional information. The Australian Government provided a response on 24 September 2021.

[35] On 5 October 2021, the HSU informed the Commission that it was not able to file 2 supplementary reports by the deadline and sought an extension of time to file the reports and its outline of submissions. The Commission extended the deadline for the Applicants and other union parties to file submissions from 8 October 2021 to 29 October 2021.

[36] On 29 October 2021, further submissions and witness statements were filed by the UWU, ANMF and HSU.

[37] On 12 November 2021, the ANMF lodged an application to vary the Directions regarding the filing of any agreed position, noting that parties to the discussions being facilitated by the ACWIC had agreed that further time was required to complete the discussions.[1072]

[38] On 15 November 2021, the Commission asked parties to advise if the application was opposed and noted that otherwise, the application would be granted. No comments were received.

[39] On 18 November 2021, as requested by the ANMF, the Commission extended the deadline for Applicants to file any agreed position from 19 November 2021 to 17 December 2021.

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

- ACSA
- Aged Care Industry Association (ACIA)
- Aged Care Reform Network

1072 ANMF Form F48 dated 12 November 2021.

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

[41] The Consensus Statement emerged from meetings convened by the Aged Care Workforce Industrial Council (ACWIC) of stakeholders from the aged care sector to consider the HSU and ANMF's applications. The Consensus Statement "reflects the matters over which the parties have reached agreement but does not represent the entirety of the views of each of the stakeholders".[1073]

[42] The stakeholders agree that wages in the aged care sector need to be "significantly increased" because the work of aged care workers has been historically undervalued and has not been properly assessed.[1074]

[43] On 22 December 2021, ACSA, LASA and ABI applied to vary the directions regarding the filing of submissions and evidence by employers and employer organisations, noting the impacts of a shift in government policy and the emergence of the Omicron variant in the COVID-19 pandemic. It requested an extension from 18 February 2022 until 11 March 2022.[1075]

[44] The ANMF opposed the application. It made an alternative proposal to extend the due date for submissions by employers and employer organisations until 4 March 2022 and to extend the due date for submissions in reply by Applicants and other union parties until 21 April 2022.[1076] The HSU and UWU supported the ANMF's position.[1077] ACSA, LASA and ABI did not oppose the ANMF's proposal. On 4 January 2022, the Commission varied the Directions in the terms proposed by the ANMF.

[45] The employer interests in these proceedings are being represented by ACSA, LASA and Australian Business Industrial (ABI) (collectively the Joint Employers). On 4 March 2022, the Joint Employers made the following submissions:

- Submission
- Witness statements and evidence
- Reference Material Document

[46] The Joint Employers submit that although some decisions allude to the C10 framework, the classification structures in the awards were not

1073 Consensus Statement dated 17 December 2021 at 1.

1074 Consensus Statement dated 17 December 2021 at 2.

1075 Joint Employers correspondence dated 22 December 2021.

1076 ANMF correspondence dated 23 December 2021.

1077 HSU correspondence dated 23 December 2021; UWU correspondence dated 23 December 2021.

based on a pre-reform award classification structure that was expressly mapped to the C10 framework and therefore that "it does not appear that the minimum rates in [the Aged Care, Nurses and SCHADS awards] were properly set as part of the award modernisation process".[1078] Further, the Joint Employers submit that the concept of properly set rates should not be divided from work value assessment. The Joint Employers submit any increase to minimum rates in the *Aged Care Award*, *Nurses Award* and SCHADS Award should be preceded by a consideration of the C10 framework and work value principles. The Joint Employers do not support an arbitrary increase of 25%.[1079]

[47] The Chamber of Commerce and Industry of Western Australia (CCIWA) also made a submission. CCIWA opposes the HSU and ANMF applications.

[48] Submissions were also received from the following aged care providers:

- Uniting NSW.ACT
- Uniting Care Australia
- IRT Group
- Evergreen Life Care
- Tandara Lodge Community Care
- BaptistCare NSW & ACT
- MercyCare

[49] The following state governments made submissions:

- Queensland Government
- Victorian Government

[50] A submission from an individual aged care worker was also received.

[51] On 21 April 2022, submissions in reply were received from the following parties:

- HSU
- ANMF
- UWU

[52] In total, the Unions relied on 6 expert witness reports and statements and 89 lay witness statements. The Unions lay witness evidence falls into 2 broad categories:

- 17 union officials
- 72 employee lay witnesses

[53] The Joint Employers relied on the statements of 9 lay witnesses.

[54] On 6 April 2022, a Statement directed the parties to file any objections to the evidence contained in the witness statements by Thursday 21 April 2022. The parties' responses noted that they considered that parts of the material upon which other parties proposed to rely were objectionable (including on the grounds of relevance and hearsay), but

1078 Joint Employers submissions dated 4 March 2022 at [3.10].

1079 Joint Employers submissions dated 4 March 2022 at [3.20]; Joint Employers closing submissions dated 22 July 2022 Annexure P at [3.2].

they did not propose to take any formal objection to that material.[1080] Each of the parties reserved their right to address such matters in their closing submissions in terms of the weight, if any, to be given to parts of the witness statements. The Commission proceeded on that basis.

[55] A Mention was held on 22 April 2022. The Commission proposed that in order to facilitate the efficient use of Commission resources, the Unions' employee lay witness evidence would be heard by a single member of the Full Bench, Commissioner O'Neill. Commissioner O'Neill would then prepare a report in respect of the evidence for the Full Bench, and the parties would have the opportunity to comment on the report before it was finalised. The remaining witnesses (the union officials, experts and employer lay witnesses) would be heard by the Full Bench. The parties did not object to the course proposed. The Full Bench determined these arrangements in a Statement published on 24 April 2022.

[56] On 28 April 2022, the ANMF wrote to the Commission proposing that, for abundant caution, the President formalise the position determined by the Full Bench by way of a written direction, under section 616(3D)(b), section 582(2) and/or section 590. The correspondence reflected a joint position of the HSU, UWU and the Joint Employers. The President issued a Direction in the proposed terms on 29 April 2022.

[57] On 3 May 2022, a Mention was held to discuss amendments to the existing directions. The Directions were amended as follows:

- The due date for closing written submissions was extended from 3 June 2022 to 8 July 2022
- The due data for submissions in reply regarding the evidence was extended from 24 June 2022 to 25 July 2022
- Oral hearings were rescheduled from 6 and 7 July 2022 to 2 and 3 August 2022

[58] In a Statement issued on 12 May 2022, the Commission advised that it would prepare the following material and provide it to the parties on 7 June 2022:

- A draft agreed issues document (including the approach to work value cases). The document will also seek to identify the disputed matters.
- A document summarising the major contentions of the parties.
- A background paper on the relevant award(s) history.
- A background document on the residential and home aged care sector.

[59] On 20 May 2022, the HSU wrote to the Commission to request that the statements of five lay witnesses be accepted as evidence despite the witnesses not being available for cross-examination.

1080 Joint Employers submission — objections to evidence dated 21 April 2022; UWU submission — hearing plan and evidence dated 21 April 2022; HSU submissions — hearing plan and objections to evidence dated 22 April 2022; ANMF submissions in reply dated 21 April 2022.

[60] On 24 May 2022, a Hearing was held before the Full Bench to determine the HSU's request. The Full Bench issued the following decision in respect of the HSU's request:

> The decision we've arrived at is we do not propose to accept the statements of the five witnesses who are not available for cross-examination. We will permit the HSU to withdraw the statement of Adrianne White. We will allow the HSU to file one further witness statement from a maintenance staff employee and that statement should be filed by no later than 4 pm on 30 May. That witness should be available for cross-examination on the morning of 2 June. Commissioner O'Neill will liaise with the parties in respect of that matter.[1081]

[61] Hearings of evidence were held from 26 April to 2 June 2022. Transcripts of those hearings may be found *here* [https://www.fwc.gov.au/hearings-decisions/major-cases/work-value-case-aged-care-industry/transcript-work-value-case]. 12 of the lay witnesses were not required for cross-examination.[1082]

[62] The Unions also proposed that the Commission conduct site visits at a number of aged care facilities. Site visits were undertaken by Deputy President Asbury in Sydney on 27 April 2022 and by Commissioner O'Neill on 28 April 2022.

[63] On 2 June 2022, the Commonwealth wrote to the Commission to advise that it wished to be heard in the proceedings and anticipated that it would require additional time in order to file its submissions.

[64] On 3 June 2022, a draft lay witness evidence report was circulated to the parties and the Commonwealth for comment.

[65] At a Mention on Monday 6 June 2022, the Directions were varied as follows:[1083]

1. The parties will file closing written submissions regarding the evidence by *4 pm* on *Friday 22 July 2022*.
2. The parties will file submissions in reply regarding the evidence by *4 pm* on *Monday 8 August 2022.*
3. The Commonwealth will file written submissions by *4 pm* on *Monday 8 August 2022*.
4. The parties will file submissions in reply to the Commonwealth's written submissions by *4 pm* on *Wednesday 17 August 2022*.
5. The matter will be listed for oral hearing on:
    a. *24 and 25 August 2022* for submissions by the Applicants and the Commonwealth to be held *in person* in at the Commission's Melbourne office.
    b. *1 September 2022* (with 2 September reserved) for submissions by ABI, ACSA and LASA and reply submissions to be held *in person* at the Commission's Sydney office.

1081 Transcript, 24 May 2022, PN13990.

1082 Leigh Svendsen, Kevin Crank, Kristen Wischer, Melissa Coad, Lorri Seifert, Sally Fox, Tracy Roberts, Hazel Bucher, Maree Bernoth, Pauline Breen, Susan Toner and Cheyne Woolsey.

1083 *Re Aged Care Award 2010* [2022] FWCFB 89.

[66] On 8 June 2022, the Commonwealth, ANMF and the Joint Employers provided feedback on the draft lay witness report. Pursuant to an extension granted by the Commission, the HSU provided feedback on the draft law witness report on 10 June 2022.

[67] On 9 June 2022, the Commission published the following documents:[1084]

- *Background Document 1 — The Applications* setting out, amongst other things, a summary of the applications, the procedural history, the legislative framework relevant to the applications and the main contentions of the principal parties.
- *Background Document 2 — Award Histories* setting out the history of wages and classifications in the *Aged Care Award*, the *Nurses Award* and the SCHADS Award.
- *Amended Digital Hearing Book* combining and indexing all material filed up to 7 June 2022, including amended witness statements.
- *Research Reference List* setting out all of the research materials and data sources referred to in the parties' submissions and a list of cases referred to by the parties in their submissions.

[68] Background Document 1 and Background Document 2 posed a series of questions to parties with an interest in the proceedings. The answers to those questions were to be filed with the submissions due on Friday 22 July 2022.

[69] On 20 June 2022,[1085] the Commission published the *Report to the Full Bench — Lay Witness Evidence* (Lay witness evidence report) which provides an overview of the evidence of lay witnesses called by the union parties, including:

- A summary of the lay witnesses who gave evidence (including charts);
- An overview of each witness's evidence;
- An overview of the witnesses' evidence about the duties of various roles in the aged care industry; and
- Illustrative examples of the witness evidence grouped by theme.

[70] The Commission also published the following additional Background Documents:[1086]

- *Background Document 3 — Witness Overview* which contains a brief overview of each of the witness' statements (including employers, union officials and expert witnesses); the relevant page number of each witness statement in version 2 of the Digital Hearing Book, links to the final witness statements and transcript reference; and specific paragraphs of the witnesses' statements that they were taken

1084 *Re Aged Care Award 2010* [2022] FWCFB 94.

1085 *Re Aged Care Award 2010* [2022] FWCFB 102.

1086 *Re Aged Care Award 2010* [2022] FWCFB 102.

to in cross-examination as well as links to any other documents referenced in the course of giving oral evidence.

- *Background Document 4 — The Royal Commission* sets out links and extracts from the submissions, witness evidence and the Research Reference List that are relevant to the findings and recommendations of the Royal Commission reports.

[71] On 22 July 2022, the parties filed closing written submissions regarding the evidence and answers to the questions posed in Background Documents 1 and 2. Submissions were received from:

- HSU dated 22 July 2022 and 2 August 2022
- ANMF dated 22 July 2022
- UWU dated 25 July 2022
- ACSA, LASA and ABI dated 22 July 2022 and 27 July 2022

[72] On 5 August 2022, the Commission published *Background Document 5* which summarises the closing written submissions received and the answers to the questions posed in Background Documents 1 and 2. Background Document 5 posed a number of additional questions to the parties.

[73] In view of the range of issues canvassed in the parties' closing written submissions and the questions posed in Background Document 5, the Directions were amended as follows:

1. The Commonwealth will file written submissions by *4 pm* on *Monday 8 August 2022.*
2. The parties will file submissions in reply to the Commonwealth's written submissions by *4 pm* on *Wednesday 17 August 2022*.
3. By no later than *4 pm* 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.

[74] On 8 August 2022, the Commonwealth filed a submission.

[75] On 17 August 2022, submissions in reply to the Commonwealth's submission were filed by:

- Health Services Union (HSU)

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

[76] The Australian Nursing and Midwifery Federation (ANMF) filed both its submissions in reply to the Commonwealth, closing submissions in reply and responses to the questions posed in Background Document 5, on 17 August 2022.

[77] The UWU advised that it did not intend to file a submission in reply to the Commonwealth.

[78] On 19 August 2022, parties filed submissions in reply to the closing submissions and responses to the questions posed in Background Document 5. Submissions were received from the following:

- HSU
- UWU
- Joint Employers

[79] On 22 August 2022, the Commission published 3 further Background Documents:

- *Background Document 6* summarises the Commonwealth's submissions and the parties' submissions in reply to the Commonwealth.
- *Background Document 7* sets out the parties' submissions in relation to the modern awards objective.
- *Background Document 8* summarises the closing submissions in reply and the answers to the questions posed in Background Document 5.

[80] Background Documents 6, 7 and 8 posed a number of additional questions for the parties. The Applicants were invited to respond to these questions at the oral hearing on *24 and 25 August 2022*. The Commonwealth and the Joint Employers were to respond to the additional questions, in writing, by no later than *4 pm* on *Monday 29 August 2022*.

[81] A Full Bench Hearing was held in Melbourne on 24 and 25 August 2022 for submissions by the Unions.[1087] During the Hearing, the Full Bench posed a number of questions. The parties provided the following written responses:

- ANMF — response to question 8 in Background Document 8 and AIN/PCW rates comparison dated 25 August 2022
- ANMF — evidence of workers having left aged care for work value reasons dated 25 August 2022
- HSU — response to question on supervision dated 26 August 2022
- ANMF — removing aged care workers from the *Nurses Award 2020* dated 30 August 2022

[82] On 29 August 2022, the Joint Employers and the Commonwealth provided their responses to the questions posed in Background Documents 6, 7 and 8.

1087 Transcript, 24 August 2022; Transcript, 25 August 2022.

[83] On 30 August 2022, the Commission published *Background Document 9* setting out the updated procedural history.

[84] A Full Bench Hearing was held in Sydney on 1 September 2022 for submissions by the Joint Employers, the Commonwealth and reply submissions.[1088]

[85] Parties were invited to provide any corrections or additions to Background Document 9 at the hearing on 1 September 2022. The following additional written submissions were received:

- UWU — amendment to Background Document 9 dated 31 August 2022
- HSU — additions to Background Document 9 dated 1 September 2022

1088 Transcript, 1 September 2022.

Attachment B — Witnesses

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
Health Services Union					
HSU 1	26 April 2022	HSU	Witness statement of Gerard Hayes	DHB11231	PN519 XN: PN533-PN578 RXN: PN580-589
HSU 2	26 April 2022	HSU	Amended witness statement of Lauren Hutchins	DHB11476	PN598 XN: PN618-841 RXN: PN844-857
HSU 3	26 April 2022	HSU	Reply witness statement of Lauren Hutchins	DHB11581	PN598 XN: PN618-841 RXN: PN844-857
HSU 4	26 April 2022	HSU	Amended witness statement of Christopher Friend	DHB11773	PN873 XN: PN883-PN946
HSU 5	26 April 2022	HSU	Supplementary witness statement of Christopher Friend	DHB1802	PN873 XN: PN883-PN946
HSU 6	29 April 2022	HSU	Witness statement of Mark Castieau	DHB14750	PN974 XN:PN992-1178 RXN: PN1180-12111
HSU 7	29 April 2022	HSU	Reply witness statement of Mark Castieau	DHB14813	PN974 XN:PN992-1178 RXN: PN1180-12111
HSU 8	29 April 2022	HSU	Witness statement of Paul Jones	DHB13019	PN1244 XN: PN1256-1371 RXN: PN1374-1391

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
HSU 9	29 April 2022	HSU	Reply witness statement of Paul Jones	DHB15030	PN1244 XN: PN1256-1371 RXN: PN1374-1391
HSU 10	29 April 2022	HSU	Witness statement of Virginia Ellis	DHB14231	PN1405 XN: PN1421-1704 RXN: PN1709-1740
HSU 11	29 April 2022	HSU	Reply witness statement of Virginia Ellis	DHB14266	PN1405 XN: PN1421-1704 RXN: PN1709-1740
HSU 12	29 April 2022	HSU	Witness statement of Donna Kelly	DHB14567	PN1749 XN: PN1768-1851
HSU 13	29 April 2022	HSU	Reply witness statement of Donna Kelly	DHB14578	PN1749 XN: PN1768-1851
HSU 14	29 April 2022	HSU	Witness statement of Jade Gilchrist	DHB14722	PN1886 XN:PN1897-1955 RXN: PN1957-1963
HSU 15	29 April 2022	HSU	Amended reply witness statement of Jade Gilchrist	DHB14728	PN1886 XN:PN1897-1955 RXN: PN1957-1963
HSU 16	29 April 2022	HSU	Amended witness statement of Kerrie Boxsell	DHB15046	PN1969 XN:PN1987-2114 RXN: PN2117-2121
HSU 17	29 April 2022	HSU	Reply witness statement of Kerrie Boxsell	DHB15060	PN1969 XN:PN1987-2114 RXN: PN2117-2121

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
HSU 18	29 April 2022	HSU	Witness statement of Fiona Gauci	DHB14657	PN2139 XN: PN2153-2270
HSU 19	29 April 2022	HSU	Reply witness statement of Fiona Gauci	DHB14667	PN2139 XN: PN2153-2270
HSU 20	29 April 2022	HSU	Witness statement of Pamela Little	DHB14537	PN2284 XN: PN2297-2342
HSU 21	29 April 2022	HSU	Reply witness statement of Pamela Little	DHB14555	PN2284 XN: PN2297-2342
HSU 22	29 April 2022	HSU	Amended witness statement of Carol Austen	DHB14336	PN2349 XN: PN2363-2445
HSU 23	29 April 2022	HSU	Amended reply witness statement of Carol Austen	DHB14345	PN2349 XN: PN2363-2445
HSU 24	2 May 2022	HSU	Witness statement and report of Dr Sara Charlesworth	DHB7159	PN2472 XN: PN2486-2566 RXN: PN2577-2586
HSU 25	2 May 2022	HSU	Supplementary witness statement and report of Dr Sara Charlesworth	DHB7230	PN2472 XN: PN2486-2566 RXN: PN2577-2586
HSU 26	2 May 2022	HSU	Witness statement and report of Dr Gabrielle Meagher	DHB7295	PN2594 XN: PN2616-2735 RXN: PN2737-2757

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
HSU 27	2 May 2022	HSU	Amended supplementary witness statement and report of Dr Gabrielle Meagher	DHB7457	PN2594 XN: PN2616-2735 RXN: PN2737-2757
HSU 28	2 May 2022	HSU	Witness statement of Marion Jennings	DHB11880	PN2777 XN: PN2796-2897 RXN: PN2899-2904
HSU 29	2 May 2022	HSU	Reply witness statement of Marion Jennings	DHB11904	PN2777 XN: PN2796-2897 RXN: PN2899-2904
HSU 30	2 May 2022	HSU	Witness statement of Lindy Twyford	DHB11835	PN2913 XN: PN2925-2997 RXN: PN2998-3006
HSU 31	2 May 2022	HSU	Reply witness statement of Lindy Twyford	DHB11868	PN2913 XN: PN2925-2997 RXN: PN2998-3006
HSU 32	2 May 2022	HSU	Witness statement of David Eden	DHB11731	PN3020 XN: PN3032-3061
HSU 33	3 May 2022	HSU	Witness statement of James Eddington	DHB11909	PN3491 XN: PN3503-3552 RXN: PN3554-3556
HSU 34	3 May 2022	HSU	Witness statement and report of Professor Susan Kurrle	DHB7926	PN3567 XN: PN3582-3684 RXN: PN3686-3709

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
HSU 35	3 May 2022	HSU	Witness statement of Lyn Cowan	DHB14817	PN4087 XN: PN4102-4301
HSU 36	3 May 2022	HSU	Reply witness statement of Lyn Cowan	DHB14956	PN4087 XN: PN4102-4301
HSU 37	3 May 2022	HSU	Witness statement of Alison Curry	DHB14367	PN4316 XN: PN4340-4431 RXN: PN4435-4443
HSU 38	3 May 2022	HSU	Reply witness statement of Alison Curry	DHB14388	PN4316 XN: PN4340-4431 RXN: PN4435-4443
HSU 39	3 May 2022	HSU	Amended witness statement of Susan Digney	DHB15143	PN4456 XN: PN4480-4605
HSU 40	4 May 2022	HSU	Witness statement of Josephine Peacock	DHB14734	PN4643 XN: PN4658-4722 RXN: PN4725-4733
HSU 41	4 May 2022	HSU	Witness statement of Helen Platt	DHB14307	PN4744 XN: PN4753-4841 RXN: PN4843-4853
HSU 42	4 May 2022	HSU	Witness statement of Michelle Harden	DHB14992	PN4859 XN: PN4875-4916 RXN: PN4919-4922
HSU 43	4 May 2022	HSU	Reply witness statement of Michelle Harden	DHB15015	PN4859 XN: PN4875-4916 RXN: PN4919-4922

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
HSU 44	4 May 2022	HSU	Witness statement of Antoinette Schmidt	DHB14411	PN4937 XN:PN4963-5114 RXN: PN5117-5128
HSU 45	4 May 2022	HSU	Reply witness statement of Antoinette Schmidt	DHB14531	PN4937 XN:PN4963-5114 RXN: PN5117-5128
HSU 46	4 May 2022	HSU	Witness statement of Camilla Sedgman	DHB15-66	PN5146 XN: PN5159-5234
HSU 47	4 May 2022	HSU	Amended witness statement of Sanu Ghimire	DHB14295	PN5256 XN: PN5274-5334 RXN: PN5337-5341
HSU 48	4 May 2022	HSU	Witness statement of Kristy Youd	DHB14679	PN5350 XN: PN5366-5424 RXN: PN5426-5432
HSU 49	4 May 2022	HSU	Reply witness statement of Kristy Youd	DHB14688	PN5350 XN: PN5366-5424 RXN: PN5426-5432
HSU 50	4 May 2022	HSU	Julie Kupke	DHB15611	PN5445 XN: PN5457-5526
HSU 51	4 May 2022	HSU	Amended witness statement of Jennifer Wood	DHB15084	PN5540 XN: PN5554-5824 RXN: PN5627-5634
HSU 52	4 May 2022	HSU	Amended witness statement of Veronique Vincent	DHB15662	PN5646 XN: PN5667-5736 RXN:PN5739-5751

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
HSU 53	5 May 2022	HSU	Witness statement of Lynette Flegg	DHB14964	PN5765 XN: PN5778-5974 RXN: PN5976-5994
HSU 54	5 May 2022	HSU	Reply witness statement of Lynette Flegg	DHB14987	PN5765 XN: PN5778-5974 RXN: PN5976-5994
HSU 55	5 May 2022	HSU	Witness statement of Peter Doherty	DHB15122	PN6012 XN: PN6038-6098; PN6258-6343 RXN: PN6346-6349
HSU 56	5 May 2022	HSU	Witness statement of Catherine Evans	DHB 15545	PN6106 XN:PN6116-6237 RXN: PN6240-6250
HSU 57	5 May 2022	HSU	Reply witness statement of Catherine Evans	DHB15573	PN6106 XN:PN6116-6237 RXN: PN6240-6250
HSU 58	5 May 2022	HSU	Witness statement of Bridget Payton	DHB15636	PN6371 XN: PN6386-6460 RXN: PN6463-6471
HSU 59	5 May 2022	HSU	Reply witness statement of Bridget Payton	DHB15657	PN6371 XN: PN6386-6460 RXN: PN6463-6471
HSU 60	5 May 2022	HSU	Witness statement of Sandra O'Donnell	DHB 14349	PN6481 XN: PN6504-6881 RXN: PN6684-6887

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
HSU 61	5 May 2022	HSU	Reply witness statement of Sandra O'Donnell	DHB14359	PN6481 XN: PN6504-6881 RXN: PN6684-6887
HSU 62	5 May 2022	HSU	Witness statement of Charlene Glass	DHB14316	PN6699 XN: PN6715-6880
HSU 63	5 May 2022	HSU	Reply witness statement of Charlene Glass	DHB14326	PN6699 XN: PN6715-6880
HSU 64	5 May 2022	HSU	Witness statement of Marea Phillips	DHB15341	PN6912 PN6927-6987
HSU 65	5 May 2022	HSU	Witness statement of Kathleen Sweeney	DHB14704	PN7002 XN: PN6504-6681 RXN: PN6884-6887
HSU 66	5 May 2022	HSU	Reply witness statement of Kathleen Sweeney	DHB14712	PN7002 XN: PN6504-6681 RXN: PN6884-6887
HSU 67	6 May 2022	HSU	Witness statement of Darren Kent	DHB14583	PN7312 XN:PN7332-7516 RXN: PN7518-7530
HSU 68	6 May 2022	HSU	Reply witness statement of Darren Kent	DHB14648	PN7312 XN:PN7332-7516 RXN: PN7518-7530
HSU 69	6 May 2022	HSU	Amended witness statement of Michael Purdon	DHB15415	PN7539 XN: PN7561-7612 RXN: PN7613-7627

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
HSU 70	6 May 2022	HSU	Witness statement of Anita Field	DHB15037	PN7636 XN:PN7651-7838 RXN: PN7841-7844
HSU 71	6 May 2022	HSU	Witness statement of Theresa Heenan	DHB15578	PN7866 XN: PN7877-8019
HSU 72	6 May 2022	HSU	Reply witness statement of Theresa Heenan	DHB15606	PN7866 XN: PN7877-8019
HSU 73	9 May 2022	HSU	Witness statement and report of Professor Kathleen Eagar	DHB7457	PN8723 XN: PN8736-8929 RXN: PN8931-8949
HSU 74	9 May 2022	HSU	Supplementary witness statement and report of Professor Kathleen Eagar	DHB7548	PN8723 XN: PN8736-8929 RXN: PN8931-8949
HSU 75	9 May 2022	HSU	Witness statement of Kevin Mills	DHB14698	PN10083 XN: PN10097-10194 RXN: PN10196-10207
HSU 76	10 May 2022	HSU	Witness statement of Susanne Wagner	DHB15428	PN10219 XN: PN10233-10333 RXN: PN10334-10375
HSU 77	2 June 2022	HSU	Witness statement of Eugene Basciuk	DHB15693	PN14000 XN: PN14015-14192 RXN:PN14196-14204

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
HSU 78	22 April 2021	HSU	Witness statement of Leigh Svendsen	DHB7990	-
HSU 79	6 October 2021	HSU	Witness statement of Lorri Seifert	DHB15203	-
HSU 80	29 March 2021	HSU	Witness statement of Sally Fox	DHB15227	-
HSU 81	28 October 2021	HSU	Supplementary witness statement of Sally Fox	DHB15245	-
HSU 82	23 March 2021	HSU	Witness statement of Tracy Roberts	DHB14278	-
HSU 83	31 March 2022	HSU	Reply witness statement of Tracy Roberts	DHB14294	-
Australian Nursing and Midwifery Federation					
ANMF 1	2 May 2022	ANMF	Amended witness statement and report of Associate Professor Anne Junor	DHB7656	PN3087 XN:PN3111-3232 RXN: PN3235-3241
ANMF 2	2 May 2022	ANMF	Amended witness statement and report of Associate Professor Smith and Dr Lyons	DHB7553	PN3250 XN: PN3267-3334

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
ANMF 3	2 May 2022	ANMF	Amended witness statement of Annie Butler	DHB11942	PN3348 XN: PN3373-3444 RXN:PN3447-3451
ANMF 4	3 May 2022	ANMF	Witness statement of Julianne Bryce	DHB13853	PN3717 XN: PN3727-3749
ANMF 5	3 May 2022	ANMF	Amended witness statement of Kathryn Chrisfield	DHB13442	PN3761 XN: PN3780-3838 RXN: PN3841-3847
ANMF 6	3 May 2022	ANMF	Amended witness statement of Andrew Venosta	DHB13830	PN3855 XN: PN3874-3964
ANMF 7	3 May 2022	ANMF	Amended witness statement of Paul Gilbert	DHB13478	PN3975 XN: PN4007-4051
ANMF 8	6 May 2022	ANMF	Witness statement of Lisa Bayram	DHB15929	PN8031 XN: PN8059-8243 RXN: PN8248-8256
ANMF 9	6 May 2022	ANMF	Amended witness statement of Suzanne Hewson	DHB16120	PN8267 XN: PN8285-8322 RXN: PN8324-8330
ANMF 10	6 May 2022	ANMF	Amended witness statement of Virginia Mashford	DHB16128	PN8348 XN: PN8403-8464
ANMF 11	6 May 2022	ANMF	Amended witness statement of Rose Nasemena	DHB16057	PN8479 XN: PN8509-8595 RXN: PN8598-8602

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
ANMF 12	6 May 2022	ANMF	Witness statement of Christine Spangler	DHB15712	PN8620 XN: PN8634-8694 RXN: PN8697-8703
ANMF 13	9 May 2022	ANMF	Witness statement of Robert Bonner	DHB13500	PN8959 XN: PN8979-9043
ANMF 14	9 May 2022	ANMF	Amended witness statement of Wendy Knights	DHB16141	PN9116 XN: PN9133-9259
ANMF 15	9 May 2022	ANMF	Amended witness statement of Stephen Voogt	DHB16094	PN9272 XN: PN9288-9373 RXN: PN9376-9378
ANMF 16	9 May 2022	ANMF	Witness statement of Dianne Power	DHB15805	PN9397 XN:PN9411-9556 RXN: PN9559-9567
ANMF 17	9 May 2022	ANMF	Witness statement of Jocelyn Hofman	DHB15854	PN9584 XN: PN9607
ANMF 18	9 May 2022	ANMF	Amended witness statement of Patricia McLean	DHB16006	PN9665 XN: PN9694-9764
ANMF 19	9 May 2022	ANMF	Amended witness statement of Linda Hardman	DHB15968	PN9780 XN: PN9797-9873 RXN: PN9875-9880
ANMF 20	9 May 2022	ANMF	Witness statement of Sherree Clarke	DHB16068	PN9899 XN: PN9917-10054 RXN: PN10057-10065

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
ANMF 21	10 May 2022	ANMF	Witness statement of Irene McInerney	DHB15842	PN10976 XN: PN11000-11096 RXN: PN11099-11105
ANMF 22	29 October 2021	ANMF	Witness statement of Kevin Crank	DHB13456	-
ANMF 23	14 September 2021	ANMF	Witness statement of Kristen Wischer	DHB12031	-
ANMF 24	9 May 2022	ANMF	Amended further witness statement of Kristen Wischer	DHB13355	-
ANMF 25	10 May 2022	ANMF	Amended witness statement of Hazel Bucher	DHB15820	-
ANMF 26	29 October 2021	ANMF	Witness statement of Maree Bernoth	DHB15979	-
ANMF 27	9 May 2022	ANMF	Amended witness statement of Pauline Breen	DHB16050	-
United Workers Union					
UWU 1	10 May 2022	UWU	Amended witness statement of Paula Wheatley	DHB16236	PN10386 XN: PN10400-10457
UWU 2	10 May 2022	UWU	Witness statement of Ngari Inglis	DHB16227	PN10475 XN: 10485-10527
UWU 3	10 May 2022	UWU	Witness statement of Teresa Hetherington	DHB16260	PN10544 XN: PN10552-10620

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
UWU 4	10 May 2022	UWU	Witness statement of Catherine Goh	DHB16186	PN10638 XN: PN10648-10736
UWU 5	10 May 2022	UWU	Witness statement of Susan Morton	DHB16242	PN10768 XN: PN10778-10855
UWU 6	10 May 2022	UWU	Witness statement of Maria Moffat	DHB16222	PN10882 XN: PN10892-10961
UWU 7	10 May 2022	UWU	Witness statement of Jane Wahl	DHB16277	PN11130 XN: PN11141-11224
UWU 8	10 May 2022	UWU	Witness statement of Lillian Grogan	DHB16217	PN11237 XN:PN11248-11330
UWU 9	11 May 2022	UWU	Witness statement of Karen Roe	DHB16211	PN11371 XN:PN11395-11505
UWU 10	11 May 2022	UWU	Witness statement of Ross Heyen	DHB16183	PN11517 XN:PN11527-11573
UWU 11	11 May 2022	UWU	Witness statement of Sandra Hufnagel	DHB16169	PN11586 XN:PN11595-11663
UWU 12	11 May 2022	UWU	Witness statement of Lyndelle Parke	DHB16178	PN11681 XN:PN11691-11791
UWU 13	11 May 2022	UWU	Witness statement of Geronima Bowers	DHB16190	PN11803 XN:PN11811-11961
UWU 14	11 May 2022	UWU	Witness statement of Judeth Clarke	DHB16068	PN11970 XN:PN11982-12074

Exhibit No.	Date Tendered	Tendered By	Description	Court Book Ref.	Transcript Reference
UWU 15	11 May 2022	UWU	Witness statement of Donna Cappeluti	DHB16271	PN12086 XN: PN12096-12178
UWU 16	7 October 2021	UWU	Witness statement of Melissa Coad	DHB13861	-
UWU 17	28 September 2021	UWU	Witness statement of Susan Toner	DHB16248	-
Joint Employers					
JE 1	11 May 2022	Joint Employers	Witness statement of Paul Sadler	DHB16283	PN12202 XN:PN12211-12439 RXN: PN12442-12453
JE 2	11 May 2022	Joint Employers	Amended witness statement of Anna-Maria Wade	DHB17896	PN12470 XN: PN12543-12568 RXN: PN12570-12573
JE 3	12 May 2022	Joint Employers	Witness statement of Mark Sewell	DHB17297	PN12855 XN: PN12885-13129 RXN: PN13132-13139
JE 4	12 May 2022	Joint Employers	Witness statement of Kim Bradshaw	DHB17640	PN12953 XN: PN12604-12827 RXN: PN12830-12834
JE 5	12 May 2022	Joint Employers	Amended witness statement of Craig Smith	DHB16823	PN13147 XN: PN13162-13299 RXN: PN13302-13312
JE 6	12 May 2022	Joint Employers	Witness statement of Emma Brown	DHB16683	PN13319 XN:PN13328-13488 RXN: 13492-13503

Exhibit No.	Date Tendered	Tendered By	Descrip-tion	Court Book Ref.	Transcript Reference
JE 7	12 May 2022	Joint Employers	Witness statement of Sue Cudmore	DHB17769	PN13513 XN: PN13525-13743 RXN: PN13747-13749
JE 8	12 May 2022	Joint Employers	Witness statement of Johannes Brockhaus	DHB17530	PN13755 XN: PN13765
JE 9	12 May 2022	Joint Employers	Witness statement of Cheyne Woolsey	DHB18415	PN13901

Attachment C — The Consensus Statement

This Statement has been prepared by stakeholders from the aged care sector. The Aged Care Workforce Industry Council is not party to this Statement. The Council engaged an independent facilitator to support the stakeholders to develop this Statement.

Introduction

Throughout the period September to December 2021 the Aged Care Workforce Industry Council (ACWIC) convened meetings of stakeholders from the aged care sector to consider the applications made by the Health Services Union (HSU) and the Australian Nursing and Midwifery Federation (ANMF) to the Fair Work Commission (FWC) to increase the wage rates of aged care sector workers by 25% (the applications).

ACWIC convened these meetings in response to the recommendations of the Royal Commission into Aged Care, Quality and Safety. Recommendation 76(2)(e) recommended that:

> (2) By 30 June 2022, the Aged Care Workforce Industry Council Limited should:
>
> …
>
> (e) *lead the Australian Government and the aged care sector to a consensus to support applications to the Fair Work Commission* to improve wages based on work value and/or equal remuneration, which may include redefining job classifications and job grades in the relevant awards.

(Emphasis added)

Participants at the meetings came from stakeholder organisations that represent the aged care workforce, aged care providers, and consumers — older Australians and their families. The Federal Government via the Department of Health was invited to attend and participate but declined.

Arising from these meetings and pursuant to the Recommendation, this Statement has been prepared by stakeholders from the aged care sector. This Statement reflects the matters over which the parties have reached agreement but does not represent the entirety of the views of each of the stakeholders.

The organisations supporting the Statement are listed in Attachment A.

The parties to the work value case will participate in discussions to attempt to reach a Statement of Agreed Facts in relation to the applications in early 2022.

Statement

Value of the work

The stakeholders agree that wages in the aged care sector need to be significantly increased because the work of aged care workers has been historically undervalued for a range of reasons[1089] and has not been properly assessed by the Fair Work Commission or any other industrial tribunal.

Minimum wages in awards need to be set according to the value of the work done by workers in aged care, recognising increases in the complexity of the nature of the work and skills and responsibility involved in doing the work and changes to the conditions under which work is done.

1089 For example, see the *Royal Commission into Aged Care Quality and Safety*, Final Report, Summary and Recommendations, p 41.

The stakeholders believe that in properly valuing the work of aged care workers and setting minimum wages in awards, the Fair Work Commission should take into account the following:

1. Australians are living longer. The proportion of Australians over the age of 65 is set to increase from 15 per cent to 23 per cent by 2066.[1090] With advanced age often comes increased frailty which is associated with increased morbidity, declining function and a concurrent need for supports. As a result, aged care consumers are entering aged care with more frailty, co-morbidities and acute care needs. Thus, the acuity of recipients of aged care services has increased and this trend is expected to continue.
2. The proportion of people with dementia and dementia-associated conditions receiving aged care services has increased.
3. With an increase in the ageing population, the need for embedded and effective palliative care is now more prevalent than historically was the case.
4. Aged care services are provided to consumers in residential aged care facilities (residential care), clients' own homes (home care) and in clustered domestic and household models of care. Home care is increasing as a proportion of aged care services.
5. Clustered domestic and household models of care are growing in prevalence. These models of care require greater numbers of staff with a broad range of capabilities.
6. The academic discipline of gerontology has evolved considerably in the last 20 years and informs options for the provision of care.
7. In each of the settings, consumers are increasingly requiring and receiving care to meet more complex needs including acute and sub-acute care. The need for socio-emotional skills in addition to clinical and care skills is more apparent.
8. There is an increase in the number and complexity of medications prescribed and administered.[1091]
9. The expectations of aged care consumers and their families, and the community, about the provision of aged care services has risen over time.[1092] The philosophy of care is person-centred based on choice and control, and this requires a focus on the individual needs of each resident and client.
10. Aged care caters for the diverse Australian community and needs to meet the cultural, social and linguistic needs of communities such as Aboriginal and Torres Strait Islander people, CALD, LGBTQI+ and other diverse communities.

1090 https://www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/demographics-of-older-australians/australia-s-changing-age-and-gender-profile.

1091 ANMF 110 Trends in Medication Use 2016-2021 (fwc.gov.au) at 2 and 8, Reierson F, *Trends in Medication Use 2016-2021 September 2021* and https://onlinelibrary.wiley.com/doi/full/10.1111/imj.14871, MC Inacio, C Lang, SCE Bray, R Visvanathan, C Whitehead, EC Griffith, K Evans, M Corlis, S Wesselingh, *Health status and healthcare trends of individuals accessing Australian aged care programmes over a decade: the Registry of Senior Australians historical cohort*, 2 May 2020.

1092 https://agedcare.royalcommission.gov.au/sites/default/files/2020-09/research-paper-11-aged-care-reform-projecting-future-impacts.pdf.

11. Older people of CALD backgrounds are an increasingly significant proportion of the population, making up approximately a third of people aged 65 and over. Cultural diversity among older people seeking care is changing and increasing. As of June 2019, at least 1 in 4 home care consumers were CALD older people and 1 in 5 among residential care and home support consumers.

12. Communication with consumers and their families requires skills in interpersonal communication and cross-cultural awareness.

13. The work demand of aged care workers is changeable and work is done to rigorous time and performance standards.

14. Changes in staffing levels, skills mix and, consequently, workloads, have a significant impact on the changing nature of the work and therefore work value.

15. Since 2003, there has been a decrease in the number of nurses, both Registered Nurses (RNs) and Enrolled Nurses (ENs), as a proportion of the total workforce employed in aged care.[1093] RNs are the clinical leaders in residential aged care and have experienced an increase in managerial duties (including co-ordinating and supervising and delegating) and/or administrative responsibilities. Expectations of RNs have increased markedly (along with a shift from residents with lower to higher social and clinical needs). Nurses are required to detect changes in resident health status, identify elder abuse and anticipate medical decision-making. Overall, there are more demands upon nurses due to workforce structures and meeting governance requirements. They develop care plans and oversee their implementation and review.

16. Again since 2003, there has been an increase in the proportion of PCWs and AINs (care workers) in aged care with less direct supervision. PCWs are being required to perform duties that were traditionally undertaken by nurses (such as peg feeding and catheter support) after receiving relevant training and/or instruction. Care workers in both residential care and home care are performing increasingly complex work along with the increasing complexity of the needs of residents entering care. There are more expectations of care workers to detect changes in resident or client condition, identify elder abuse and assist with medications and other treatments.

17. Consumer-directed Home Care Packages have resulted in a less structured stream of duties for home care workers, who must now perform a broader range of duties. Home care workers must plan and adapt to different duties and levels of expectations from client to client. The proportion of home care packages at levels 3 and 4 have increased.

18. Funding for Home Care Packages going directly to clients means that providers have less discretion about how to allocate funding among perceived areas of need.

1093 The 2016 Aged Care Workforce census and survey report undertaken by the National Institute of Labour Studies (NILS) research team shows in 2003 RNs were 21.4% of the direct care workforce; this decreased to 16.8% in 2007, and to 14.7% in 2012, and that it increased to 14.9% in 2016. The latest census and survey, the *2020 Aged Care Workforce Census Report*, indicates RNs make up 15.6% of direct care workers.

19. Home care workers work with minimal supervision, and the increase in acuity and dependency of recipients of aged care services means that these workers are exercising more independent decision-making, problem solving and judgment on a broader range of matters.
20. Labour turnover and the use of lower hours, part-time, casual and agency staff in home and residential care results in longer-serving and permanent staff having more responsibility for continuity of care. These staff then need to mentor new starters and irregularly employed employees as well. Casual and agency staff face the added pressure of dealing with changing settings and consumers.
21. Care work requires workers to engage with a range of people, many of whom are vulnerable people. The work consistently requires significant degrees of discretion and judgement to be exercised, and strong interpersonal and communication skills. The changes in, and changes sought to, the qualifications and training of direct care workers reflect changing care needs.

    For example:

    (a) The addition of a reference to the care of older people to the Registered Nurses Accreditation Standards 2019
    (b) The skills considered necessary to be added to current training for the Certificate III in Care Support, as follows:
        (i) Person-centred behaviour supports
        (ii) Providing loss and grief supports
        (iii) End of life and palliative care
        (iv) Dementia care
        (v) Management of anxiety and adjustment to change
        (vi) Supporting relationships with carers and families
        (vii) Falls-prevention strategy
        (viii) Assisting with monitoring and modification of meals
        (ix) Working with people with mental health issues
        (x) Providing or assisting with oral hygiene and recognising and responding to oral health issues
        (xi) Effective care for members of diverse population groups including aboriginal and Torres Strait Islander people
        (xii) Use of information technology.
22. The changes in the characteristics of aged care consumers (increased acuity, frailty and incidence of dementia) mean the conditions under which work is done are more challenging for employees providing indirect care support services (such as food services, cleaning or general/administrative work). These workers are an important part of the aged care team. Their work necessitates higher levels of skill when compared to similar workers in other sectors, or to aged care in the past.
23. There has been a change in the regulatory regime applying to aged care. Changes to the Aged Care Funding Instrument (ACFI) requirements

and a new funding instrument is soon to be introduced. There have also been changes to regulations concerning the use of physical and chemical restraint and to incident reporting arrangements. These changes mean nurses and care workers are required to meet increased quality and safety standards and meet increased documentation requirements.

Attraction and retention of workers

Wages in aged care need to be competitive to attract and retain the number of skilled workers needed to deliver safe and quality care.

Minimum award wages of nurses are significantly lower than in the acute health sector, making aged care a less attractive choice for nurses. Minimum award wages of PCWs are significantly lower than for disability support workers.

Providers of both aged care and disability support would benefit from alignment of wage levels to support the mobility and the aggregate supply of staff in both sectors.

Similar challenges are faced in the attraction and retention of support staff, who are an integral part of aged care functional teams.

Funding

A decision of the Fair Work Commission to increase minimum wages in the aged care sector must be fully funded by the Federal Government and linked to transparency and accountability measures as to how funding is used.

Attachment A

Aged & Community Services Australia (ACSA) Aged Care Industry Association (ACIA)
Aged Care Reform Network
Australian Nursing and Midwifery Federation (ANMF) Carers Australia
Council on the Ageing (COTA)
Federation of Ethnic Communities' Councils of Australia (FECCA)
Health Services Union (HSU)
Leading Age Services Australia (LASA)
National Seniors Australia
Older Persons Advocacy Network (OPAN)
United Workers Union (UWU)

REASONS FOR DECISION

Fair Work Act 2009
s.158—Application to vary or revoke a modern award

Aged Care Award 2010
(AM2020/99 and AM2021/63)

Nurses Award 2020
(AM2021/63)

Social, Community, Home Care and Disability Services Industry Award 2010
(AM2021/65)

VICE PRESIDENT ASBURY
DEPUTY PRESIDENT O'NEILL
COMMISSIONER BISSETT BRISBANE, 18 MAY 2023

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

INDEX

1. Introduction

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

- AM2020/99 – an application by the Health Services Union (HSU) and a number of individuals to vary the *Aged Care Award 2010* (Aged Care Award)

- AM2021/63 – an application by the Australian Nursing and Midwifery Federation (ANMF) to vary the Aged Care Award and the *Nurses Award 2010*, now the *Nurses Award 2020* (Nurses Award), and

- AM2021/65 – an application by the HSU to vary the *Social, Community, Home Care and Disability Services Award 2010* (SCHADS Award) (the Applications).

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

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

- direct care workers under the Awards and;

- Head Chefs/Cooks under the Aged Care Award (Aged care employee levels 4-7 provided the employee is the most senior chef or cook engaged in a facility); and

- Recreational Activities Officers/Lifestyle Officers under the Aged Care Award.

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

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

2. Background

2.1 The Stage 1 Decision

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

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

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

> "1. It is common ground between the parties that the work undertaken by RNs, ENs and Certificate III PCWs in residential aged care has changed significantly in the past 2 decades such as to justify an increase in minimum wages for these classifications. We also recognise that there is ample evidence that the needs of those being cared for in their homes have significantly increased in terms of clinical complexity, frailty and cognitive and mental health.
>
> 2. Accordingly, in respect of direct care workers (including RNs, ENs, AIN/PCW/HCWs) the evidence establishes that the existing minimum rates do not properly compensate employees for the value of the work performed by these classifications of employees. The evidence in respect of support and administrative employees is not as clear or compelling and varies as between classification.
>
> 3. A number of complex issues require further submissions (and potentially further evidence) before they can be determined and we see no reason to delay an increase in minimum wages for direct care workers while that process takes place."[5]

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

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

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

[12] The Full Bench concluded that an interim increase of 15 per cent to modern award minimum wages applying to direct aged care workers was 'plainly justified by work value reasons'.[9] The Full Bench clarified that the interim increase did not conclude its consideration

of the Unions' claim for a 25 per cent increase for other employees, namely administrative and support aged care employees, nor did it necessarily exhaust the extent of the increase justified by work value reasons in respect of direct care workers.[10]

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

1. The timing and phasing of the interim increase to modern award minimum wages applicable to direct care workers, including the appropriateness and application of the principles canvassed at paragraphs [974]–[990] in the *Stage 1 decision;*

2. Whether making the interim increases to modern award minimum wages applicable to direct care aged care employees in these proceedings is necessary to achieve the modern awards objective and the *provisional views* outlined at [1001]–[1072] in the *Stage 1 decision;* and

3. Whether the interim increases to modern award minimum wages applicable to direct care aged care employees are necessary to achieve the minimum wages objective and the *provisional views* outlined at [1073]–[1083] in the *Stage 1 decision.*[11]

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

2.2 Stage 2 proceedings

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

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

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

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

2. Amendment to s.134(1) to repeal s.134(1)(e) of the modern awards objective and replace it with new s.134(1)(ab): the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation[15]

3. Amendment to s.134(1) to introduce new s.134(1)(aa): the need to improve access to secure work across the economy[16]

4. Amendment to s.284(1) to repeal s.284(1)(d) of the minimum wages objective and replace it with new s.284(1)(aa): the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps[17]

5. Amendment to s.157 to insert new subsection 157(2B) which provides that the Commission's consideration of work value reasons must be free of assumptions based on gender and must include consideration of whether historically the work being assessed has been undervalued because of such assumptions.[18]

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

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

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

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

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

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

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

2.3 Submissions overview

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

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

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

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

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

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

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

- HSU
- Joint Employers
- ANMF
- The Commonwealth

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

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

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

2.4 The Joint Statement

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

1. The interim increase should be fully funded by the Commonwealth, including on costs, and the increase should extend to both award-reliant employees and those covered by enterprise agreements.

2. The interim increase should commence operation as soon as possible, should not be phased in over time and should instead occur from the first full pay period on or after a single specific date. Funding from the Commonwealth should be provided in full as soon as possible. ACCPA, Anglicare Australia, Baptist Care Australia, Catholic Health Australia and UnitingCare Australia maintain that the funding must be provided to aged care employers by the Commonwealth on and from the operative date of any increase.

3. RAOs and Head Chefs/Cooks (the latter being Aged care employees levels 4 to 7 in the food services stream of the Aged Care Award) should receive a 15 per cent interim increase at the same time as direct care workers.

4. Measures to ensure transparency and accountability with respect to payment of the interim increase and any future payments should be put in place within 3 months of the first payment. Implementation of transparency measures should not delay

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

5. Stage 3 of the proceedings should commence as soon as possible at the Commission's earliest convenience.

6. The interim increase be implemented based on the principle that services to older Australians are not to be negatively impacted as a result of the increase in costs. The Commonwealth should explore all options to operationalise the funding of the increase in order to fulfil this principle.

3. Scope of the interim increase

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

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

3. Whether the interim increase should be applied to all employees in Schedule E of the SCHADS Award, or whether it should exclude Home Care Employee Level 4 and/or Level 5, noting the implications for internal relativities in the Award if increases are not applied to supervisory workers who are not providing direct care.

4. In relation to the interim increase for 'Head Chef/Cooks' how are the positions eligible for the increase identified within the Aged Care Award given the range of classification levels applicable to the roles?

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

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

3.1 Submissions

Commonwealth submissions

[36] The Commonwealth submitted that further consideration should be given to 'clearly defining the scope of who is a 'direct care worker' and noted that the *Stage 1 decision* defined 'direct care worker' as 'employees in the aged care sector covered by the Awards in caring roles, including nurse practitioners, RNs, ENs, AINs, PCWs and HCWs.'[25]

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

Commonwealth submissions in response to questions 3, 4 and 5

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

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

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

HSU submissions

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

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

HSU submissions in response to questions 3 and 4

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

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

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

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

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

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

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

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

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

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

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

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

ANMF submissions

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

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

ANMF submissions in response to questions 3 and 4

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

UWU submissions

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

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

UWU submissions in response to questions 3 and 4

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

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

Joint Employer submissions

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

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

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

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

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

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

Joint Employer note on Home care employee evidence

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

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

[67] The Joint Employers observed that:

- 15 of the Home care employees provide personal care, with the majority also providing additional services.[65]

- 6 of the Home care employees exclusively provide domestic assistance and/or social support.[66]

- Some of the Home care employees that did not provide personal care, received training to provide a medication prompt.[67]

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

3.2 Consideration

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

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

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

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

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

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

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

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

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

4. The Secure Jobs, Better Pay Act

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

- Amendments to the object of the FW Act to include reference to the promotion of job security and gender equality (s.3)

- Amendments to the modern awards objective to include secure work and gender equality considerations, including ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation, (ss.134(1)(aa), (ab))

- Amendments to the minimum wages objective to include gender equality considerations including ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps (s.284(1)(aa))

- The addition of a provision specifying that the Commission's consideration of work value must be free of assumptions based on gender and include consideration of whether historically the work has been undervalued because of assumptions based on gender (s.157(2B)).

[77] The Secure Jobs, Better Pay Act amended the modern awards objective to include 2 new considerations, ss.134(1)(aa) and 134(1)(ab) referring to improving access to secure work and to the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation.

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

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

> "we accept that the aged care workforce is predominantly female and the expert evidence is that, as a general proposition, work in feminised industries including care work has historically been undervalued and the reason for that undervaluation is likely to be gender-based. We also accept the logic of the proposition in the expert evidence that gender-based undervaluation of work is a driver of the gender pay gap and if all work was properly valued there would likely be a reduction in the gender pay gap. While it has not been necessary for the purposes of these proceedings for us to determine why the relevant minimum rates in the Awards have not been properly fixed we accept that

varying the relevant awards to give effect to the interim increase we propose would be likely to have a beneficial effect on the gender pay gap and promote pay equity."[70]

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

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

> "This is essentially a comparative exercise in which the remuneration and the value of the work of a female employee or group of female employees is required to be compared to that of a male employee or group of male employees.""[73]

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

[82] The Full Bench went on to state:

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

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

"1. Equal remuneration for work of equal or comparable value' is expressed as a principle that the Commission must take into account as part of an evaluative exercise; it is not a matter about which the Commission must be satisfied in order to meet a statutory test.76

2. The principle is one of several broad social and economic considerations in s.134(1) and 284(1), which are applied on a case-by-case basis. The ss.134(1) and 284(1) considerations do not, in themselves, set a standard against which a modern award could be evaluated.77

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

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

4. In the context of the equal remuneration provisions in Part 2-7, the Commission has observed that these provisions are remedial or beneficial, with the general purpose being 'to remedy gender wage inequality and promote pay equity.'"[79]

[84] The Full Bench went on to observe:

> "if increasing minimum wages in an award would be likely to remedy historical gender based undervaluation of the subject work or have a beneficial effect on the gender pay gap or gender pay equity, then it might be said to be consistent with, or 'promote' or 'further' 'the principle of equal remuneration for men and women workers for work of equal or comparable value' and be a factor weighing in favour of the award variation.
>
> If this were correct, then the principle's relevance would not be confined to where an award variation would equalise wage rates for men and women workers performing work of equal or comparable value."[80]

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

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

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

> (3A) For the purposes of this Act, in deciding whether there is equal remuneration for work of equal or comparable value, the FWC may take into account:
>
> (a) comparisons within and between occupations and industries to establish whether the work has been undervalued on the basis of gender; or
> (b) whether historically the work has been undervalued on the basis of gender; or
> (c) any fair work instrument or State industrial instrument.

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

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

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

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

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

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

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

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

[91] The Secure Jobs, Better Pay Act inserted s.157(2B) into the FW Act which provides:

(2B) The FWC's consideration of work value reasons must:

(a) be free of assumptions based on gender; and

(b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.

[92] The Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 describes s.157(2B) as follows:

> "346. This item would introduce subclause 157(2B) to clarify that the FWC's consideration of work value reasons must be free of assumptions based on gender and must include consideration of whether historically the work being assessed has been undervalued because of such assumptions. This item is modelled after subsection 248(3) and paragraph 248(4)(c) of the *Industrial Relations Act 2016* (Qld) and would ensure that the FWC's consideration of work value applications cannot be affected by gender-based assumptions about the value of work.
>
> 347. In the *Equal Remuneration Decision 2015*, the Full Bench of the FWC expressed a view that the definition of work value reasons would be sufficiently broad to allow a party to advance a claim that minimum rates of pay in a modern award undervalue work due to historical gender-related reasons [(2015) 256 IR 362, [292]]. This item would have the effect of confirming the Full Bench's view in the FW Act."[84]

4.1 Submissions

Commonwealth submissions

[93] The Commonwealth submitted that the reference to 'secure work' in s.134(1)(aa) is directed to a similar purpose as the reference to 'job security' in the object of the Act, is not defined and takes its ordinary meaning. The Commonwealth offered that indicators of secure work may include, but are not limited to, the degree of certainty an employee has about the duration of their employment, the predictability of their pay and the circumstances in which their employment may end. The Commonwealth submitted that as a result, s.134(1)(aa) is 'most likely to be engaged in relation to award terms that relate to matters such as the type of employment, arrangements for when work is performed, and notice of termination and redundancy rather than terms that relate only to hourly rates of pay.'[85]

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

[95] The Commonwealth submitted that the introduction of s.134(1)(ab) means that the issue as to the proper construction and application of s.134(1)(e) falls away. The Commonwealth noted that 'gender equality', 'gender-based undervaluation of work' and 'gender pay gaps' are not defined in the FW Act and so take on their ordinary meaning. The Commonwealth submitted that the breadth and depth of these terms means the Commission need not engage in the comparative exercise contemplated at [1057] of the *Stage 1 decision*, nor limit the application of the objectives to situations where an award variation would equalise wages for

men and women workers performing work of equal or comparable value as contemplated at [1060] of the *Stage 1 decision*.[86]

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

- the Commission must take into account the object of the FW Act in amended s.3(a) to promote gender equality (s.578(a))

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

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

[98] The Commonwealth maintained that s.157(2B)(a) imposes a negative standard or requirement on how the Commission considers work value reasons within the existing meaning in s.157(2A), that is, in considering work value reasons, the Commission must not make assumptions based on gender.[88]

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

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

> "If minimum rates that have been set based on historical assumptions about gender are used as a reference point for future wage rises, gender-based undervaluation will be perpetuated, even if later assessments of changes in work value do not themselves make such assumptions. Section 157(2B)(b) requires the Commission considers whether this is a factor in each case."[90]

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

[102] The Commonwealth noted that in the *Stage 1 decision* the Commission observed that 'while not mandatory, where work value has previously been properly taken into account it is likely the Commission would adopt an appropriate datum point from which to measure work value change, as a means of avoiding double counting' but that 'a past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.'[93]

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

> "This means there is no risk of past undervaluations being carried forward into the minimum rates that the Commission will finally determine at Stage 3 of these proceedings. This will have the effect of addressing the issue of any historical undervaluation because of assumptions based on gender, which is the mischief to which new s 157(2B)(b) is directed."[94]

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

1. The expert evidence before the Commission and the submissions addressed historical gender-based undervaluation. The *Stage 1 decision* 'comprehensively summarises this evidence and argument.'[96]

2. The Commission accepted key propositions from the expert evidence that there is historical undervaluation of care work for gendered reasons.[97]

3. After giving close consideration to expert evidence on gender undervaluation in the aged care sector, the Commission accepted key propositions on gender-based undervaluation, including accepting that there were 'barriers and limitations to the proper assessment of work value in female dominated industries and occupations' and that the 'approach taken to the assessment of work value by Australian industrial tribunals and constraints in historical wage fixing principles have been barriers to the proper assessment of work value in female dominated industries and occupations.'[98]

4. The Commission drew on expert evidence to ensure that its assessment of work value was free of assumptions based on gender, including accepting the evidence of Associate Professor Junor that Spotlight skills identified in the Junor Report in respect of RNs, ENs and AINs/PCWs working in aged care are correctly

> characterised as skills, and should be brought to account in the assessment of work value.[99]

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

HSU submissions

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

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

> (a) equal remuneration for work of equal or comparable value, which arguably contemplates a comparator-based exercise;
>
> (b) *separately,* the elimination of gender-based undervaluation, that is, an obligation to, where undervaluation is detected, increase wages to correct it; and
>
> (c) the need to provide workplace conditions that facilitate women's full economic participation which does not appear to be directly relevant here.[102]

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

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

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

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

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

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

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

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

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

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

ANMF submissions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Assoc Prof Junor's application of the Spotlight Tool;

3. The additional evidence of Assoc Prof Junor, Assoc Prof Smith and Dr Lyons and Prof Charlesworth;

4. The evidence of Kristen Wischer (ANMF Senior Federal Industrial Officer) as to the industrial history of the Nurses Award, and the evidence of Leigh Svendsen (HSU Senior Industrial and Compliance Officer) in relation to the industrial history of the Aged Care Award;

5. The gendered nature of the aged care workforce.[124]

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

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

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

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

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

1. The gender pay gap manifests in the gender-based undervaluation of the work of direct aged care workers; and

2. Eliminating that gender-based undervaluation would address the gender pay gap and facilitate achieving gender equality and a safety net of fair minimum wages.[129]

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

also assist to allow considerations of work value reasons that are free of assumptions based on gender.[132]

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

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

UWU submissions

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

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

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

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

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

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

[141] The UWU submitted that the new ss.134(1)(ab) and 284(1)(aa) support this approach as they require the Full Bench to consider 'the need to achieve gender equity in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation'.[145]

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

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

Joint Employer submissions

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

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

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

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

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

Commonwealth submissions in reply

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

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

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

HSU submissions in reply

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

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

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

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

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

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

ANMF submissions in reply

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

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

> "decline to substitute other words ("*fairness between the genders*") for the words in fact used ("*gender equality*"). Minds may very well differ about what "*fairness*" requires, as between the genders; "*equality*" is a less woolly concept, and it is the word chosen by the legislature."[162]

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

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

gender pay gaps' relates to material action, not reasoning and is in service of the achievement of gender equality.[166]

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

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

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

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

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

Joint Employer submissions in reply

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

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

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

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

4.2 Consideration

Amendments to the modern awards objective

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

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

[173] The new s.134(1)(ab) requires consideration of the principle of the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation. In the *Stage 1 decision* the Full Bench found that the aged care workforce is predominantly female and that work in feminised industries has historically been undervalued, likely for gender-based reasons.[177] The Full Bench also accepted the proposition that gender undervaluation of work is a driver of the gender pay gap and Assoc Prof Junor's evidence that the skill, responsibility and effort required in the RN, EN and AIN/PCW classifications is under-recognised in the current award rates.[178]

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

Amendments to the minimum wages objective

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

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

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

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

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

Section 157(2B)

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

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

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

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

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

5. Timing and phasing-in of the interim increase

5.1 Submissions

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

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

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

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

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

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

Commonwealth submissions

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

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

- An increase in funding corresponding with a 10 per cent increase in wages (including on-costs) from 1 July 2023; and

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

[190] The Commonwealth submitted that its proposed timing will allow it to implement the interim increase appropriately through its various funding mechanisms, while commencement from 1 July 2023 will allow implementation of the interim increase to align with the annual

indexation of aged care programs, scheduled funding changes to aged care program arrangements and the minimum wage uplift flowing from the annual wage review.[184]

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

- **Residential Aged Care –** the Australian National Aged Care Classification (AN-ACC) price will be determined on an annual basis from 1 July 2023, based on advice from the Independent Health and Aged Care Pricing Authority (IHACPA). IHACPA's advice will include advice in relation to the cost (including the cost of any increase in wages) of providing specified care and services to care recipients. As such, the future AN-ACC price can incorporate the pricing impact of the proposed interim increase from 1 July 2023 onwards.

- **Home Care Packages Program** (HCPP) — annual subsidy indexation on 1 July 2023 to also factor in the additional cost of wages incurred by providers to deliver wage increases to home care workers and nurses. Indexation from 1 July 2023 will allow the necessary subordinate legislation to be drafted and registered.

- **Commonwealth Home Support Programme** (CHSP) — development and negotiation of a large volume of grant agreements ahead of a commencement date of 1 July 2023.

- A number of other small aged care and related programs funded by grant agreements or contractual arrangements that involve direct care workers will need to be adjusted.

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

- the Commonwealth does not provide funding to directly fund wages and associated on-costs in the aged care sector;

- given that the proposed interim increase applies only to direct care workers, it is difficult to calculate and apply a standard indexation uplift to funding across the various aged care programs, which is the usual method of implementing wage increases in this sector; and

- it is necessary to ensure that increased funding is distributed accurately and that there are appropriate accountability mechanisms in relation to the expenditure of additional funding, which takes time given the diverse Program arrangements.[186]

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

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

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

[195] The Commonwealth proposed a 2-stage approach to funding on-costs:[189]

1. Initially, funding increases may be determined by using sector average labour costs by Program (including both wages and on-costs) and making the corresponding upwards adjustment to the subsidy or grant relevant to that program to account for the proposed interim increase.

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

[196] The Commonwealth submitted that its proposed 2-stage approach is appropriate because:[190]

- The Commonwealth does not fund aged care wage costs directly, so it is not possible to calculate the precise level of Commonwealth funding needed according to a specified list of on-costs;

- Historically, Commonwealth funding has not been calculated 'from the ground up' so there is not a prescribed list of labour input costs that can be separated and adjusted for the purposes of Commonwealth funding;

- Expenditure on wages varies in and across aged care programs, due to the diversity of roles, business and employment models, the number of awards and higher wages paid by some employers under Enterprise Agreements. Examples of variability across aged care programs include:

    - On-costs associated with the Aged Care and Nurses Award are higher than those for the SCHADS Award, mainly due to higher shift allowances and overtime in residential aged care due to the 24/7 nature of residential aged care service delivery;

    - In the HCPP, the care recipient may spend their subsidy on a range of services, equipment, aids and home modifications and as a result expenditure on labour-related costs is variable and, to an extent, dependent on the preferences of the care recipient, and

- In the CHSP, services are delivered under grant-based funding, only a proportion of which are delivered by HCWs employed under Schedule E in the SCHADS Award who are eligible for the interim increase.

- Using sector by sector average labour costs by aged care program as the basis for determining the funding necessary to fund on-costs is an equitable approach across providers that factors in existing labour costs, including on-costs.

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

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

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

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

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

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

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

[204] Regarding the impact on business and employment costs, the Commonwealth agreed with the Commission that the 'extent to which the Commonwealth funds any outcome from

these proceedings is plainly relevant to [the Commission's] consideration of the impact of any increase in employment costs on the employers in the aged care sector'.[199]

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

[206] In the event the Commission decides to grant the interim increase earlier, or without the phase-in reflected in the Commonwealth's funding commitment, the Commonwealth conceded that this could have an impact on business. The Commonwealth recognised and accepted the observations from [911]–[916] of the *Stage 1 decision*, including that there is no primacy to any of the s.134(1) considerations and so s.134(1)(f) should not be given 'determinative weight'.[201]

HSU submissions

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

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

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

- 2018 Aged Care Workforce Strategy Taskforce - *A Matter of Care – Australia's Aged Care Workforce Strategy* proposed that the sector develop a strategy to support the transition of personal care workers and nurses to pay rates that better reflect their value and contribution to delivering care outcomes;

- the Royal Commission into Aged Care Quality and Safety (Royal Commission) Interim Report issued on 31 October 2019 and its Final Report, issued on 1 March 2021[205]which recommended that the industry unions, Commonwealth and employers collaborate to vary the award rates;

- general community consensus that urgent action is required and has been for some time, which is reflected in the factual findings made by the *Stage 1 decision*; and

- that the relevant employers and the Commonwealth would have appreciated the likely prospect of a substantial increase following the Royal Commission's Final Report, and have been on notice since the interim increase was proposed by the *Stage 1 decision* in November 2022.

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

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

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

(a) Applying ss.134(1) and 284(1), any delay will result in direct care workers continuing to receive wages significantly below the true value of wok they perform;

(b) the Full Bench set the interim increase 'comfortably below' the increase the Full Bench may determine on a final basis, meaning even after the commencement of the interim increase, direct care employees will continue to receive wages less than the true value of their work;

(c) it is inherent in the interim nature of the increase determined by the Full Bench that it was intended to commence operation within a short period and, the reasoning of the Full Bench (at [922]) was that there is no reason to delay an increase in minimum wages at least for direct care employees whilst further complex issues are being determined;[209]

(d) most of the classifications to which the interim increase will apply are 'low paid' for the purposes of s 134(1)(a). The interests of employees on low rates of pay receiving the increase determined by the Commission to be warranted are strong and the consideration in s.134(1)(a) favours a conclusion that the interim increase should commence at the earliest possible date;[210]

(e) for the purposes of s.134(1)(f) any delay in the implementation of the interim increase is likely to perpetuate the industry's attraction and retention difficulties and, in turn, have a negative impact on business and the standard of care able to be provided to elderly persons;

(f) for the purposes of s.134(1)(g) there is no reason to conclude that any period of adjustment is needed to permit employers to give effect to the interim increase which has been determined by the Full Bench, and no evidence has been provided demonstrating any particular difficulty in carrying out such an adjustment.[211]

(g) the new considerations in ss.134(1)(ab) and 284(1)(aa) and, in particular, the requirement to take into account the need to eliminate gender-based undervaluation of work and address gender pay gaps further supports the early commencement of the interim increase. As the Full Bench found, the interim increase will go some way towards addressing the gender-based undervaluation of work ; and

(h) There are no other reasons which warrant any delay. The HSU notes the finding of the Full Bench that the increase is not likely to have any relevant impact on the national economy for the purposes of ss.134(1)(h) and 284(1)(a).

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

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

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

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

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

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

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

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

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

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

[219] Additionally, the HSU submitted the approach proposed by the Commonwealth 'gives no weight to the needs of the employees who have, as the Commission has found, been unfairly renumerated since the inception of the relevant awards.'[222]

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

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

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

Second Supplementary Report of Prof Eagar

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

[223] The report addressed the following issues:

- the nature of funding mechanisms for aged care including for residential aged care, Home Care and the Commonwealth Home Support Programme (including pricing methodology, how current prices have been set and what entity set those prices; transitional arrangements; payment distribution methods and frequency of payments);

- the role (if any) of IHACPA in setting pricing and funding amounts in the aged care industry;

- what changes to legislation and subordinate legislation would be required in order to change pricing and/or funding in aged care;

- whether, having regard to the current funding mechanisms, it is feasible for the Commonwealth to fund any increase awarded by Commission prior to 1 July 2023;

- any examples of any prior occasions in which the Commonwealth has changed funding or payments to providers before the end of a financial year and what mechanisms were used for enacting the funding changes;

- whether there any administrative or procedural funding impediment that would prevent a full 15 per cent increase being paid prior to 1 July 2023;

- whether it would be administratively or procedurally simpler to administer funding of a one off 15 per cent increase, or to administer funding of two instalments of 10 per cent and 5 per cent as proposed by the Commonwealth in the submissions;

- whether the Commonwealth has access to data on the mix of staff and staffing profile of employees in the aged care industry and whether this is relied upon to conduct budget forecasts and budgeting; and

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

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

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

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

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

(a) In relation to residential care, one option available to Government is to incorporate award increases into the 'AN-ACC starting price' and include these in an updated schedule of subsidies and supplements as well as into their automated payment systems. The IHACPA need have no role in this as IHACPA has an advisory role only.

(b) In relation to Home Care Packages, one option available to Government is to incorporate award increases into the subsidy paid for each of the Home Care Subsidy Rates and include these in an updated schedule of subsidies and supplements as well as into their automated payment systems.

(c) This same option is not available for CHSP as the Government grant is awarded to each organisation individually. Thus any increase for changes in award payments would need to be calculated for each organisation individually.[231]

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

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

(b) Aged care providers apply for reimbursement and provide the necessary documentation.

(c) Aged care providers are reimbursed for eligible costs.[232]

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

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

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

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

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

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

ANMF submissions

[235] The ANMF submitted that the principles canvassed by the Full Bench at paragraphs [974]–[990] of the *Stage 1 decision* are ‘generally appropriate’. The ANMF however stated that aspects of the decisions extracted by the Full Bench relate to the specific facts and evidence of their respective matters, and the principles identified are not necessarily applicable ‘in the same way or to the same end’ in these proceedings. [237]

[236] In respect of *Australian Workers Union* [2022] FWCFB 4 at [163] and [169], extracted in the *Stage 1 decision* at [980], the ANMF submitted that the variation concerned in that matter was substantially different to a percentage increase to minimum award rates. Further, the ANMF submitted that unlike that decision, there is no material before the Full Bench in these proceedings establishing that the regulatory burden of an interim increase is such that employers would require any particular time to adjust after a determination is made. If such material were adduced it would be open to the Commission to order the that the interim increase come into effect from the date of determination, but that implementation be deferred for a period. Following this, the increase could be payable to employees retrospectively. Such an approach, the ANMF submitted, would prevent further delays in awarding the increase to direct care workers and allow their employers a reasonable period to make arrangements for the increase.[238]

[237] The ANMF submitted the principles canvassed by the Full Bench at [974]–[990] predate the amendments to ss.3(a), 134(1)(ab) and 284(1)(aa) and must therefore be revised. In particular, the ANMF submitted that regard must be had to the amendment to the object of the FW Act in the proper interpretation of s.166 and the need to achieve gender equality in respect of matters relevant to phasing-in variations, as set out in the *Penalty Rates Decision* and others.[239]

[238] The ANMF noted that the Full Bench has recognised that the interim increase is justified by work value reasons and current award minimum rates, 'significantly undervalue' the work of direct care workers.[240] The ANMF submitted the relevant awards do not provide a safety net of fair minimum wages or a fair and relevant minimum safety net of terms and conditions.

[239] Given this, the ANMF claimed the phasing-in proposed by the Commonwealth fails to meet the statutory objectives[241] and that direct care workers in aged care should receive the interim increase without further delay. It highlighted also that the initial applications have been on foot since November 2020, in respect of the initial application to vary the Aged Care Award, and May 2021 and June 2021 in respect of the further applications.[242]

[240] The ANMF submitted direct care workers should not have to wait until 1 July 2024 to receive the full interim increase that was plainly justified by work value reasons. It submitted that it would be appropriate for the Full Bench to order the interim increase was to come into operation immediately and that would be consistent with the revised object of the FW Act in putting gender equity at the 'heart' of Commission's decision making.[243]

[241] The ANMF submitted the Full Bench may find a transitional arrangement that applies the increase retrospectively may be appropriate if it is satisfied the regulatory burden of the interim increase was such that employers would require a reasonable time to adjust after a determination was made.[244] However at present, the ANMF submitted there is no such evidence before the Commission. Upon being satisfied such an arrangement is appropriate, the ANMF submitted the Full Bench may specify the interim increase is deferred for a period of a number of weeks but must apply retrospectively from the date of the Stage 1 determination.[245] Such an arrangement would satisfy the requirements of s.157(2).[246]

[242] Regarding s.134(1)(f), the ANMF submitted that the interim increases would not have any negative effect on productivity. The ANMF accepts granting the interim increase prior to those increases being fully funded by the Commonwealth may have some impact on business, given the increased employment costs. However, even having regard to this, the ANMF submitted that the application of the interim increase in its entirety upon the making of the determination is necessary to ensure that the modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account all of the factors in s.134(1).[247]

[243] The ANMF noted the only material currently before the Full Bench regarding the likely impact on business of any increase to award minimum wages are analyses conducted by StewartBrown. The ANMF reiterated its submissions of 22 July 2022 that this analysis has not been adequately proven or verified and therefore the report should not carry any significant weight.[248]

[244] The ANMF contested that the 'accountability mechanisms' referred to by the Commonwealth would be a relevant consideration in respect of the regulatory burden on business, as they relate to funding arrangements and are not a consequence of the proposed award variations. Accordingly, the ANMF submitted the regulatory burden of varying the award rates would be a neutral consideration, and the additional regulatory burden associated with the variation would be limited to ensuring employees are paid the increased minimum award rates.[249]

UWU submissions

[245] The UWU submitted that the interim increase in the Aged Care Award and SCHADS Award should be implemented as soon as possible. The UWU opposes the Commonwealth's proposal that the interim increase be phased in over two instalments and instead submitted that the variations to the relevant awards should be made effective from the first pay period on or after the date of the determination.[250]

[246] If the Full Bench were of the view that there are practical difficulties with immediate implementation, then the UWU would support the HSU's proposal for a back payment mechanism from the date of the determinations.[251]

[247] The UWU claimed the Commonwealth has not explained the need to phase in the interim increase, and why remaining 5 per cent should not be paid until 1 July 2024.The UWU submitted the Full Bench should not be satisfied there is a need to phase in the interim increase, especially factoring in both the modern award and the minimum wages objectives.[252]

[248] The UWU submitted that s.166 of the Act provides that determinations varying modern awards generally come into operation on 1 July in the next financial year, unless Commission considers it appropriate to specify another day.[253] If considering the appropriateness of another day, 'fairness' is a key factor.[254] UWU submitted particular focus should be had to the considerations at s.134(1)(a) – the needs of the low paid; s.134(1)(f) – the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and s.134(1)(g) – the need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern

awards.[255]Consideration should also be given to the new provisions, s.134(1)(aa) – the need to improve access to secure work – and s.134(1)(ab) the need to achieve gender equity.[256]

[249] The UWU acknowledged that the determination of transitional arrangements is a broad judgement, but claimed that, in relation to the consideration of whether it is appropriate to deviate from the presumption in s.166, the Commonwealth appears to give no weight to the needs of the low paid, to job security or to gender equity.[257]

[250] In respect to the objectives of gender equity, UWU submitted it is appropriate to deviate from the presumption of s.166 to implement the interim increase as soon as possible.[258]

[251] In respect of the needs of the low paid and the need to improve access to secure work across the economy, UWU submitted the Full Bench should have regard to the considerable evidence before it demonstrating retention and workforce issues in the industry.[259] and cited in particular a report by the Committee for Economic Development of Australia[260] and the Royal Commission's Final Report.[261]

[252] The UWU submitted that applying the interim increase no earlier than 1 July 2023 gives no weight to the needs of the low paid, job security and pay equity and is not consistent with fairness.[262]

[253] The UWU submitted the approach in *ALHMWU re Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998 - re Wage rates 5 (the ACT Child Care Decision)* is apposite, as there is significant material before the Full Bench demonstrating a significant workforce crisis in the sector caused in part by low wages.[263]

[254] The UWU further submitted the approach in the *Penalty Rates Transitional Decision* is apposite, where the Full Bench has determined that the evidence establishes existing minimum wage rates do not properly compensate employees for the value of the work performed.[264] If the variation to the awards is not made until 1 July 2023, the UWU submitted that direct care workers in the aged care sector will continue to perform work for compensation less than the value of the work performed for a period of more than six months.[265]

[255] In relation to s.134(1)(f) – the impact of any exercise of modern award powers on businesses, including productivity, employment costs and regulatory burden the UWU submitted this impact is negligible given the Commonwealth's commitment to funding the interim increase.[266] The UWU therefore concluded s.134(1)(f) is a neutral consideration.[267]

UWU submissions in response to question 2

[256] In response to question 2, the UWU endorsed the submissions of HSU, ANMF and AWU in respect of the interim increase being implemented as soon as possible, but did not raise any concerns in respect of a 30 June 2023 implementation date.[268]

AWU submissions

[257] The AWU did not support the timing and phasing-in arrangements proposed by the Commonwealth.[269]

[258] The AWU submitted that enterprise bargaining in the industry has already stalled whilst employers wait for the Commission to confirm the quantum and timing of the wage increases.[270]

[259] The AWU submitted a number of considerations of the modern awards objective will be undermined by unnecessarily delaying the wage increase. In particular, the need to take into account relative living standards and the needs of the low paid, the need to promote social inclusion through increased workplace participation, the need to achieve gender quality in the workplace and the need to encourage collective bargaining.[271]

[260] The AWU submitted that the object of promoting collective bargaining has already been significantly undermined by the Commonwealth's proposed timing of the wage increases, with the last of the increases proposed to be implemented nearly 18 months from the date of these submissions. The AWU provided correspondence indicating an employer is delaying bargaining pending further details of these proceedings being known, including government funding arrangements.[272] The AWU submitted that stalled collective bargaining in the aged care industry, an industry where bargaining is already extremely difficult, means the need to encourage collective bargaining should be given significant weight, and on this basis the Commonwealth's suggested timing and phasing-in should be rejected.[273]

[261] The AWU submitted that the need to encourage collective bargaining would be best satisfied by a single interim increase of 15 per cent, earlier than that proposed by the Commonwealth.[274]

[262] The AWU claimed the Commonwealth's submissions of 16 December 2022 modifies the position set out in their submissions of 29 August 2022, whereby the Commonwealth committed 'to provide funding to support any increase to award wages made by the Commission.' The AWU supports this earlier position and submitted the Commonwealth's 16 December 2022 submission regarding the proposed timing and phasing-in of the increases should be given no weight.[275]

[263] The AWU further submitted that given the Commonwealth's earlier commitment to fund any increase awarded by the Commission, it is difficult to see how its concern about the impact to business were the interim increase to be implemented earlier than it proposes, can be sustained. The AWU submitted that the consideration of the likely impact of the exercise of modern award powers on business (s.134(1)(h)) is a neutral consideration in respect of the timing and phasing-in of the interim increase.[276]

[264] The AWU submitted that the principles arising from the *Penalty Rates Transitional Decision* do not lead to a conclusion that the phasing-in of the proposed interim increase is appropriate, instead submitting that the statutory framework and modern awards objective supports awarding the interim increased without any phasing-in arrangements.[277]

[265] Regarding 'fairness', the AWU submitted that regard should be had to both employers and employees, and pointed to the Joint Statement, where representatives of employers and employees concurred that there should not be phasing-in of the proposed interim increase.[278] The AWU submitted that awarding the proposed increase in full without phasing-in would result in fairness to both employers and employees.[279]

[266] The AWU submitted that the Commonwealth's submissions in respect of *Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory (130N-NSW),*[280] do not establish that the phasing-in proposed by the Commonwealth is warranted.[281] The AWU submitted that the Commonwealth has had ample time to prepare for the outcome of these proceedings, and further, the extent of the proposed increase is less than the 25 per cent utilised in the economic modelling undertaken by Treasury, contained in the Commonwealth's submissions of 29 August 2022.[282]

[267] The AWU submitted the Commonwealth has not provided cogent evidence as to why its proposed phasing-in of the increase is manageable, but awarding the full increase without phasing-in is not.[283]

AWU submissions in response to question 2

[268] In response to question 2, the AWU submit there are difficulties associated with 2 pay increases applying closely together and consideration should be had toward ss.134(1)(f) and 134(1)(g) of the modern awards objective in this regard.[284]

Joint Employer submissions

[269] In concurring with the Full Bench,[285]the Joint Employers submitted that a 'careful balance' must be established in the exercise of Commission's discretion regarding the timing and implementation of the increases.[286] In particular, this balance is conditioned by the following:

1. It should be uncontroversial that as the Sector is reliant on government funding to operate, the capacity of the Sector to 'fund' the interim increases (absent Commonwealth funding) is negligible.

2. The interim increases for direct care workers will apply to the majority of employees in the Sector.

3. The interim increases are sizable.

4. Elements of the Commonwealth's funding are yet to be finalised (on-cost calculations, etc).

5. The approach to funding for Home Care will require home care package recipients to consent to new pricing before the funding can flow to employers to fund the interim increases.[287]

[270] The Joint Employer's noted that the Commission's discretion to depart the default operative date set by s.166(1)(a).[288]

[271] The Joint Employers submitted the sector has little capacity to pay the interim increases in the absence of Commonwealth funding. It is therefore fair and necessary for the operation of the interim increases to be aligned to the Commonwealth's funding commitment timetable.[289]

[272] The Joint Employers submitted phasing-in is an accepted approach to introducing increases to wages where appropriate to carefully balance the application of the modern awards objective.[290]

[273] The Joint Employers cited *Penalty Rates Transitional Decision*[291] in which the Commission identified 3 categories of considerations relevant to deciding on transitional arrangements, being, the statutory a framework provided (in particular ss.134(1)(a), 134(1)(f) and 134(1)(g)), the substantive decision itself as to the proposed variation, and fairness.[292] The Joint Employers submitted that aligning the operation of the interim increases to the Commonwealth's funding fairly and reasonably balances the tension within these considerations.[293]

[274] The Joint Employers submitted de-linking operation and funding would disturb the careful balance the Full Bench should seek as it would materially weigh against s.134(1)(f) by materially and detrimentally impacting business in the sector.[294]

[275] Further, the Joint Employers submitted that, although it will disappoint employers and employees, they 'cannot oppose' the Commonwealth's phasing-in approach, and such an approach would be appropriate and consistent with the summary of the relevant principles set out at [976]–[990] of the *Stage 1 decision*.[295] Whilst an earlier single stage funding commitment would have been welcome, the contribution of the Commonwealth must be acknowledged especially in the current economic and budgetary environment.[296]

[276] In respect of s.134(1)(f) the Joint Employers submitted the 'likely' impact on business is fundamentally conditioned by Commonwealth funding.

[277] The Joint Employers restated their position, as summarised by the Full Bench at paragraph [1066] of the *Stage 1 decision*:

> "…there is a direct correlation between employment cost and funding:
>
> - the funding is not sufficient to support the provision of necessary care services and sufficient staff numbers to provide those services
> - the regulations dictating the provision of consumer centred care require the provider to meet the gap, and
> - the gap being met by providers to ensure that compliant and quality care services are provided to consumers has left major providers within the aged care sector to operate at a deficit."[297]

[278] The Joint Employers submitted that, with full (direct costs and <u>*all*</u> 'on-costs') and on-going funding, the consideration of s 134(1)(f) becomes neutralised. They submitted that the following on-costs need to be funded by the Commonwealth:

- the increased hourly wage rates plus any applicable penalty rates;
- the increased hourly rate of overtime;
- the increased rate applicable when various types of leave is taken;

- the increased rate applicable with accrued leave is paid out on termination;
- increased superannuation;
- increased payroll tax; and
- increased workers' compensation contributions.[298]

[279] The Joint Employers submitted that this accords with the Commission's observations that the extent of Commonwealth funding is plainly relevant to the impact of any increase in employment costs on the employers.[299]

[280] The Joint Employers submitted that this issue 'looms large' in the context of the operation of the interim increase and that if the increases are introduced without funding, the impact on business will be materially negative and would weigh heavily against them.[300]

[281] As such the Joint Employers submitted s.134(1)(f) 'weighs heavily in favour of aligning the operation of the interim increase with the Commonwealth's funding timetable.'[301]

[282] Regarding regulatory burden, the Joint Employers submitted the funding approach may introduce additional regulatory burden even with full and on-going funding, at least initially in home care settings, as any change in service pricing will require the client to agree to the change. This may result in significant risk of operators being unable to recover the increased costs arising from the rise in wages.[302]

[283] The Joint Employers noted that security of tenure provisions in the User Rights Principles 2014 mean home care operators cannot simply bring their home care package agreement to an end if the client does not agree to a change in prices under the package. The Joint Employers submitted that these circumstances result in significant risk of operators being unable to recover the increased costs arising from the rise in wages and stress the importance of communication and lead-up time should the Commonwealth remain with the approach of paying the additional funding into home care packages rather than directly to operators.[303]

[284] Assuming a 1 July 2023 operative date, the Joint Employers submitted that operators would require information regarding the actual increase in funding to home care packages and the new pay rates for employees by 1 April 2023.[304]

[285] Were the Commonwealth to commence communications to operators by this date, the Joint Employers submitted the financial risks for operators relating to clients not agreeing to changes would be mitigated, but not removed.[305]

Commonwealth submissions in reply

[286] The Commonwealth reiterated its commitment to provide funding for any increases to award wages made by the Full Bench in this matter.[306]

[287] The Commonwealth submitted that the timing of the Commonwealth's funding commitment is the result of a decision of the Commonwealth Government and that rationale and merits of the Commonwealth's proposed funding commitment are not relevant to the issues

before the Full Bench. The Commonwealth submitted that the Full Bench does not need to consider whether it would theoretically be possible for the Commonwealth to fund the full interim increase sooner than proposed, but instead needs to consider what, if any, timing and phasing arrangements are appropriate, given Commonwealth's decision and the statutory considerations.[307]

[288] The Commonwealth submitted that the timing of its funding is not determinative of the Full Bench's decision as to the timing or phasing of the interim increase but does affect the Full Bench's assessment of s.134(1)(f) considering the impact on business.[308]

[289] The Commonwealth reiterated its overall position that it remains committed to providing funding to support any increases to award wages made by the Commission in this matter, including in Stage 3. The details of the Commonwealth's funding commitments in respect of final wage increases determined in Stage 3 would be subject of a further decision of Government.[309]

[290] The Commonwealth reiterated its funding commitment of the interim increase extends to on-costs. The extent to which the specific costs will be covered will be determined through the approach taken.[310]

[291] The Commonwealth confirmed that its funding commitment extends to any decision of the Full Bench regarding increases for Head Chefs/Cooks and RAOs. However, given no decision has yet been made by the Full Bench, the timing of the Commonwealth's funding commitment and any applicable phasing is subject to a future decision of Government.[311]

[292] In response to a proposal from the union parties[312], the Commonwealth reiterated its funding proposal commences on 1 July 2023 and would not extend to funding any backpay.[313]

[293] In an Annexure to the Commonwealth's reply submissions of 10 February 2023, the Commonwealth responded to issues raised regarding Commonwealth's funding decision, in particular those by Prof Eagar in her second supplementary report.[314]

[294] The Commonwealth agreed that, in theory, it may be possible to provide additional funding to the sector relatively quickly.[315] However, the Commonwealth reiterated that it has a responsibility to ensure funding is distributed accurately and appropriately.[316]

[295] The Commonwealth agreed with Prof Eagar that it would be possible to incorporate award increases into the AN-ACC price and states this option is being considered by the Department of Health and Aged Care in consultation with the IHACPA.[317] However, the Commonwealth submitted that it does not follow that this can or should be done immediately.[318]

[296] The Commonwealth agreed with Prof Eagar that, if a change to the AN-ACC set price is used as a funding mechanism, updating the set price would only involve changes to subordinate legislation. However, the Commonwealth submitted there is a significant amount of work required to ensure accuracy if the Commonwealth were to use this funding mechanism.[319]

[297] The Commonwealth made reference to the recently implemented AN-ACC casemix funding model for residential aged care in response to recommendation 120 of the Royal Commission. The Commonwealth submitted this funding model is underpinned by independent pricing and costing advice developed for the Commonwealth Government by IHACPA.[320]

[298] The Commonwealth submitted the IHACPA advice on the interim increase may take several months following a final decision by the Commission in respect of the interim increase. The Commonwealth does not intend to implement an AN-ACC price increase without independent pricing advice from the IHACPA and to do so would be contrary to the design of the new funding model implemented in response to the Royal Commission's Final Report.[321]

[299] The Commonwealth does not agree with Prof Eagar's statement that a reimbursement funding model would be a feasible option for all providers.[322] The Commonwealth submitted that under a reimbursement model residential aged care providers would be required to pay increased wages in advance of receiving the additional funding which may threaten their viability.[323]

[300] The Commonwealth noted Prof Eagar's reference to the COVID-19 Aged Care Support Program as an example of a current reimbursement model being used to deliver aged care funding.[324] The Commonwealth submitted there would be greater administrative complexity for the Commonwealth and providers in operating a similar reimbursement model in the context of increasing wages for existing direct care workers, where additional costs are not easily identifiable and verifiable through receipts and other evidence such as test results, and where the increased wages will be an ongoing cost for an indefinite period of time.[325]

[301] In respect to Prof Eagar's statement regarding timing and other issues for funding wage increase in the home care sector the Commonwealth submitted:

- subsidy payments for approved providers of home care packages are authorised by or under relevant provisions in the Aged Care Act. Commencement on 1 July 2023 should allow for appropriate indexation to occur and the necessary changes to subordinate legislation after a final decision of the Commission on Stage 2.[326]

- the Commonwealth Home Support Programme (CHSP) is largely governed and operated through funding agreements between the Commonwealth and providers, rather than under the Aged Care Act and associated subordinate legislation. Changes to funding provided under the CHSP would need to be facilitated through changes to a large volume of grant agreements.[327] Commencement of 1 July 2023 would allow for these agreements to be re-negotiated.[328]

Commonwealth submissions in response to questions 1 and 2

[302] The Commonwealth addressed questions 1 and 2 in its oral submissions during the Hearing on 13 February 2023.

[303] In response to question 1, the basis and/or rationale for splitting the 15 per cent interim increase into two instalments of 10 per cent from 1 July 2023 and 5 per cent from 1 July 2024,

the Commonwealth stated that it cannot add more than already stated in its written submissions.[329]

[304] In response to question 2, the Commonwealth stated that this issue is a matter for the Commission.[330]

HSU submissions in reply

[305] The HSU referred to the Joint Employers position that the factor in s.134(1)(f)- the likely impact of any exercise of modern award powers on business could be negative, neutral or positive.[331] The HSU submitted that s.134(1)(f) itself, in providing a non-exhaustive list of possible impacts, acknowledges that employment costs are not the only type of impact that the Commission must take into account.[332]

[306] In respect of the Joint Employers submission that, without full and ongoing funding, there will be a materially negative impact on the capacity of operators to viably operate and provide critical services, the HSU submitted that while the suggestion that operators will be unable to provide critical services is a serious one, no evidence has been provided supporting these allegations.[333]

[307] The HSU further submitted there is no suggestion that the interim increase will be unfunded, noting the Commonwealth affirmed its commitment to provide funding for any increases determined by the Full Bench and expressed support for timing and phasing-in the increases.[334]

[308] The HSU submitted that given the commitment from the Commonwealth, the Full Bench should not be persuaded the Commonwealth will refrain from providing funding support for any determination of the Commission.[335]

[309] The HSU submitted that, in the event the Commonwealth were to decline to provide funding in advance of the timeframe it identifies (being that corresponding with a 10 per cent increase from 1 July 2023 and the remaining 5 per cent from 1 July 2024),[336] it does not follow that the impact on business of implementing the interim increases will be *materially* negative and certainly not universally so. In that event, employers would be required to meet increased costs for about a 3-month period before receiving substantial funding support from the Commonwealth. Thereafter, they would have to accommodate for a gap between the level of funding and wage increase for a 12-month period.[337] As a result, the HSU submitted the Full Bench would not conclude any gap between the interim increase and funding support from the Commonwealth would be materially negative for employers and the Joint Employers have filed no evidence analysing this impact.[338]

[310] Given the absence of such evidence, the HSU submitted the Full Bench should not accept the submission that s.134(1)(f) weighs *heavily* against an immediate implementation of the interim increase. The HSU further submitted that in any event this consideration does not outweigh the other considerations supporting the immediate implementation of the interim increase, adding that any possible impact of funding decisions upon providers or service provision is a political consideration and not the exercise of the arbitral functions of the Commission.[339]

[311] The HSU notes also the Commonwealth has, in its submissions of 16 December 2022, explained its funding commitment includes funding on-costs[340] and submitted that on the material available, no additional issue arises with respect to the adequacy of the Commonwealth's commitment to fund on-costs.[341]

[312] The HSU submitted that the Joint Employers' apparent suggestion that the HSU, in contending an increase be effective immediately, 'might catch it by surprise' ought not be accepted. The HSU submitted that throughout the proceedings the union parties have advanced their position to have increases implemented in full as soon as possible.[342] The HSU noted this position was also reflected in the Joint Statement, in which both union and employer parties agreed.[343]

[313] The HSU submitted that although various employers have made clear their position is that the Commonwealth must provide funding to aged care employers from the operative date of any increase, all relevant parties agree the interim increase should commence as soon as possible and should not be phased in over time.[344]

[314] In respect of the Joint Employers' submission that the interim increase may introduce additional regulatory burden in the home care sector,[345] the HSU submitted there is no evidence before the Full Bench that demonstrates that any increase in award wages will require a change to the pricing of services to home care clients.[346] The HSU submitted that the Joint Employer's description of a circumstance where clients would be unwilling to agree to price increases despite an increase in funding to packages is speculative and unsupported by evidence as to the terms of existing packages.[347]

[315] The HSU submitted home care operators would have some experience in managing the implementation of increases to award wages, given it ordinarily occurs annually. Furthermore, the HSU submitted it is unclear what 'regulatory burden' is said to arise which would be relevant to s.134(1)(f).[348]

[316] The HSU referred to the second supplementary Eagar report, filed by the HSU on 20 January 2023. The HSU noted that Prof Eagar expresses her expert opinion that it is feasible to fund any increases prior to 1 July 2023,[349] explains the mechanisms by which such funding may be distributed[350] and provides a description of previous Commonwealth experience implementing additional payments before the end of financial year.[351]

[317] The HSU submitted that the Full Bench should accept Prof Eagar's evidence and should not accept the Joint Employers' submissions in this respect. The HSU submitted that implementing the reimbursement approach described by Prof Eagar does not necessarily require an increase in the price paid by consumers, nor would employers incur an additional regulatory burden.[352]

[318] The HSU submitted a variation to award rates of pay would not, in and of itself, give rise to the regulatory burden foreseen by the Joint Employers. Any burden imposed is as a result of any separate funding arrangements, contractual arrangements and accountability measures that might exist. The HSU submitted that the regulatory burdens to which s.134(1)(f) is directed are those which are a consequence of the exercise of modern award powers, rather than

regulatory burdens that arise from the implementation of government funding or regulatory arrangements.[353]

[319] The HSU submitted that the Joint Employers do not bring any evidence in relation to the proportion of service prices that wages represent, or the profitability of home care employers, that illustrates the degree to which the interim increase would impact upon the employers were it to be unfunded for a short period, then partially funded for a period, and therefore the Full Bench should give little weight to this submission.

[320] The HSU submitted that the Joint Employers' submission that without Commonwealth funding the aged care sector would have very little capacity to pay the interim increase is not supported by cogent evidence and should not be accepted.[354] The HSU noted that the Commonwealth has committed to provide funding support, that any period where there is a gap between that support and the level of increase will be finite, and that without evidence there is no basis to understanding the extent to which such a period would impact the operations of employees across the entire industry.[355]

[321] The HSU submitted that there is little evidence before the Full Bench in relation to the adequacy of funding beyond general statements to the effect that the industry relies on Government funding.[356] With reference to the StewartBrown's *Aged Care Financial Performance Survey Industry Report* (StewartBrown Survey Report) the HSU noted the data in the report is drawn from aged care providers who nominate themselves as participants in the survey and the report does not purport be a comprehensive or representative survey of providers.[357] The HSU submitted that the StewartBrown Survey Report should be given little weight, particularly in the absence of evidence from its authors as to the methodology and purposes of the report or method of verifying its information.[358]

[322] The HSU referred to the suggestion from ANMF that the Full Bench might order that the interim increase come into effect at the date of determination, but order that the operation of the variation be deferred for a period of weeks, after which the variation would apply retrospectively.[359] The HSU submitted its primary position is that such a deferral is not necessary or appropriate and that the interim increase can be applied from the date of the determination.[360] Presently, it is unclear why a period of adjustment would be required in the case of a variation providing for a simple increase of pay. The HSU distinguished the present matter to that in *Re Australian Workers' Union*[361] in which a period of adjustment of three months (6 months from the original decision) was found to be appropriate. The HSU noted that that decision concerned the imposition of a floor of minimum earnings for piece rates workers. The effect of that variation required changes to work practices and working arrangements for some employers at least who did not have appropriate processes in place for recording hours of work and supervising pieceworkers.[362]

[323] The HSU agreed with the submissions of ANMF,[363] that the regulatory burden referred to by the Commonwealth, which is said to arise from accountability mechanisms it proposes to implement in association with the additional funding, is not relevant for the purposes of s.134(1)(f). The HSU submitted that if the Commonwealth proposes to change or enhance accountability processes in association with the provision of additional funding, that is a matter which arises from those funding mechanisms not the interim increase, and any such burden is

not therefore an impact of the exercise of modern award powers by the Commission for the purposes of s.134(1)(f).[364]

HSU submissions during the Hearing of 13 February 2023

[324] During the course of oral submissions, the HSU made further submissions in respect of the timing and phasing-in of the interim increase.

[325] The HSU submitted that the Commonwealth adduces no evidence as to why there is a practical difficulty in providing funds earlier than 1 July 2023. The HSU further submitted that no challenge was raised against Prof Eagar's evidence regarding the mechanisms available to the Commonwealth to provide the funding earlier, should it choose to.[365]

[326] In response to the Commonwealth's proposition, stated in its submissions in reply, that the Commission should not or is not required to review the Commonwealth's rationale for the timing of its funding commitment, the HSU submitted that the Commission can and should accept the evidence of Prof Eagar that the Commonwealth could provide the funding for at least a 15 per cent increase earlier that 1 July 2023.[366]

[327] The HSU accepted that if the Commission decides to implement the increase earlier than the Commonwealth's funding proposal as it stands is applied, there will be some impact on employers, but submitted that this impact will be a consequence of a policy decision that the government has taken.[367] The HSU further submitted that the impact on employers as a factor of a policy decision taken by government should not be significant, much less determinative, of the timing of the interim increase the Commission has found is justified by work value reasons. The HSU submitted that this approach is consistent with that taken by the Full Bench in *Social, Community, Home Care and Disability Services Industry Award 2010* ([2019] FWCFB 6067).[368]

[328] The HSU submitted that the consequence of any delay is that employees would continue to perform work at rates of pay significantly below that which reflect the value of their work, as they have been doing for a very significant period of time.[369]

HSU submissions in response to question 2

[329] The HSU addressed question 2 of our Statement and Directions[370] of 10 February 2023 in its oral submissions during the hearing of 13 February 2023.

[330] The HSU submitted that it is the common-sense view, to avoid any potential issues resulting from the interim increase coinciding the Annual Wage Review, that the interim increase should occur first, although in its submission the interim increase should occur before 30 June 2023.[371]

ANMF submissions in reply

[331] The ANMF reiterated its previous position that, in the absence of probative evidential support, the Full Bench cannot be satisfied that increases sought by the Unions would have a 'detrimental impact on the viability of aged care providers'.[372]

[332] The ANMF noted the Joint Employers say it is 'speculative' whether any party would seek to have the interim increase apply prior to Commonwealth funding. Should the Joint Employers seek to rely on additional evidence concerning capacity to pay, the ANMF submitted it would object for the following reasons:

1. It was not 'speculative' that the Unions sought to have the increases implemented as early as possible. The ANMF has reiterated the Full Bench has no probative evidence to make findings regarding business impact.

2. The Joint Employers are seemingly calling for findings about capacity to pay. They should have submitted evidence about this on 20 January 2023.

3. The Commission directed 'evidence in reply' be filed by 09 February 2023. Evidence from the Joint Employers regarding capacity to pay does not constitute evidence in reply, as it is not replying to any evidence.

4. If Joint Employers filed evidence on capacity to pay on the appropriate date of 20 January 2023, that would have allowed the Unions to contemplate whether to call their own responsive evidence, by 09 February 2023. Currently, there is no provision in the timetable for such evidence. This unfairly prejudices the ANMF as it will not be able to fairly consider whether it needs to call for responsive evidence.[373]

[333] In response to the Joint Employers' position that the 'likely impact on business is…conditioned by Commonwealth funding',[374] the ANMF reiterated there has been no probative evidence demonstrating the extent of the impact on business.[375] The Full Bench would not find that varying the award before Commonwealth funding commences would be 'materially negative',[376] and would 'weigh heavily'[377] against that outcome, or 'weighs heavily'[378] in favour of aligning the interim increase with Commonwealth funding.[379]

[334] In reply to the Joint Employer's position that any approach to funding may introduce a regulatory burden in home care settings,[380] the ANMF submitted this depends on the terms of contracts with consumers and there are none in evidence.[381]

[335] With respect to the 'security of tenure' issue identified by the Joint Employers[382] the ANMF submitted it is not clear how delaying the wage increase will impact this.[383]

[336] The ANMF submitted there is no evidence supporting the Joint Employer's submission with respect to how much 'lead time'[384] is required. The ANMF submit that operators have known since 17 November 2020 that a 25 per cent wage increase was sought and in that time they have had the opportunity to engage in planning and modelling.*[385]*

[337] With respect to timing and implementation, the ANMF submitted that the Joint Employers[386] and the HSU[387] provided statements of principles with little difference. The ANMF adopts the position of the HSU rather than that of the Joint Employers.[388]

[338] Contrary to the Joint Employers, the ANMF submitted that aligning the increases with the Commonwealth's funding proposal, would not be the preferable application of these principles. The ANMF submitted that this because the current wage settings currently and historically very significantly undercompensated aged care employees for the work that they do, having regard to work value. Further, given the interim nature of the wage increase, even after it is implemented, employees will be undercompensated having regard to work value.[389]

[339] The ANMF submitted that aged-care employees have been subsidising employers, the Commonwealth and subsidising the taxpayer, or some combination of these three, and that this subsidy will continue, given the increase proposed is interim.[390]

[340] The ANMF submitted that the Joint Employers' submissions are to the effect that employees should continue to be undercompensated and continue to subsidise the profit margins for the employers, until the proper compensation for aged care employees will not determinately affect aged care employers at all. The ANMF submitted this approach is inconsistent with equity, good conscience and the merits of the matter and would not 'reasonably balance' the interests of both employers and employees, but subordinate the interests of aged-care employees to those of their employers.[391]

[341] In response to the Joint Employers[392], the ANMF submitted that:

1. The employers have had adequate time to prepare, given they have known about these applications for more than two years;

2. The increase is moderate, in the context of the extent of historical undervaluation. The fact of it being an 'interim increase' phases the increase necessary to eliminate under-compensation and there is no need for any further phasing;

3. The employers have not provided evidence as to which date is manageable.[393]

[342] The ANMF submitted the existing arrangements cannot be described as a 'careful balance'[394] and that the *Stage 1 decision* attests that the balance has resulted in aged-care employees being very significantly undercompensated for their work.[395]

[343] Further the ANMF accepted and adopted the positions of the HSU in answer to the Joint Employers' submissions in regard to capacity to pay and phasing.[396]

[344] The ANMF agreed with and adopts the proposition that the material identified by the UWU is relevant to phasing.[397] The ANMF submitted that these submissions weigh in favour of immediate adoption of the interim increase and the ANMF agreed with and adopted the AWU's submissions regarding enterprise bargaining.[398]

[345] The ANMF submitted with the HSU, UWU, and AWU that the position adopted by the Commonwealth[399] amounts to a departure from its previous commitments. The ANMF submitted there is no evidence that the Commonwealth cannot move more quickly, and this is

further reason why the Full Bench should reject the Joint Employers' submission that phasing-in should align with Commonwealth 'commitments'.[400]

ANMF submissions during the Hearing of 13 February 2023

[346] It its oral submissions, the ANMF stated that the Commission should treat with caution the suggestion made by the Joint Employers that ''delinking' the implementation of the interim increase from the Commonwealth's funding proposal will materially negatively impact the ability of aged care providers to provide critical services to vulnerable members of the community.[401]

[347] The ANMF also submitted that the impact of any increase on business, particularly with respect to the phasing will be only one consideration to be taken into account and this cannot be determinative.[402]

ANMF submissions in response to question 2

[348] In response to question 2, the ANMF submitted that if the interim increase does not commence operation as soon as possible, a departure from the Commonwealth's proposal would be appropriate whereby the increase is effective from 30 June 2023.[403]

Joint Employer submissions in reply

[349] The Joint Employers noted that all of the union parties, via various formulations, have asked for the Full Bench to divert from the Commonwealth's proposed funding timetable and instead sought for the 15 per cent interim wage increase to come into effect immediately.[404]

[350] The Joint Employers submitted that if the timing and phasing of the interim increase aligns with the Commonwealth's funding proposal, this would satisfy s.134.[405] The Joint Employers further contended that should the Full Bench depart from the Commonwealth's funding proposal and require industry to pay unfunded wage increases, careful consideration of the balance of s.134 is required. [406]

[351] The Joint Employers submitted that absent Commonwealth funding 'the outcome for many employers will be the imposition of further losses and deficits and the undermining of normal and prudent financial operations; introducing further erosion to already challenged financial stability.'[407] The Joint Employers added that the relevance of this is amplified by industry's role in providing services to a vulnerable group within the community.[408]

[352] The Joint Employers submitted that the Commission should take into consideration a variety of factors when determining whether to depart from the Commonwealth's funding proposal, including the:

(a) extent of over award payments paid whether at common law or through enterprise agreements;

(b) extent to which employers absorb increases to minimum wages in the relevant awards into these over award payments;

(c) diverse financial position of various operators; and

(d) general financial state of the age care industry.[409]

[353] In relation to these factors, the Joint Employers relied on the evidence of witnesses Grant Corderoy of StewartBrown, Johannes Brockhaus of Buckland Aged Care Services, Michelle Jenkins of Community Vision Australia and James Shaw of Royal Freemasons' Benevolent Institution, filed with their submissions in reply of 9 February 2023.[410]

[354] The Joint Employers submitted that it should be uncontroversial that the aged care industry is only sustainable on the basis of government funding and that the primary provider of this funding is the Commonwealth government. The Joint Employers noted that operators in the industry do run a business in the normal sense but acknowledge the purpose rather than profit motivated nature of the industry.[411]

[355] The Joint Employers relied on the evidence of Grant Corderoy wherein he states that 'the aged care sector is experiencing significant financial and sustainability and viability concerns,'[412] and submitted that the findings of the StewartBrown *Aged Care Financial Performance Survey Industry Report* of September 2022 ('StewartBrown Survey Report (September 2022)') should raise concerns in regards to s. 134(1)(f) and the setting of fair and reasonable minimum safety net for both employees *and* employers.[413] In particular, the Joint Employers relied on the following excerpt of the report:[414]

> "The Survey for the 3 months ending September 2022 continues to highlight the declining financial sustainability of the industry, with residential aged care now remaining at a **critical financial sustainability position** for many providers.
>
> The average operating results for residential aged care homes in all geographic sectors was an operating loss of $21.29 per bed day (Sep-21 $7.30 pbd loss) This represents a loss of $7,092 per bed per annum which is extrapolated to a **residential industry loss in excess of $345 million** for the three month period.
>
> The alarming statistic is that 70% of aged care homes operated at a loss (56% at Sep-21) and 51% operated at a EBITDA (cash loss) (32% at Sep21)."[415]
>
> …
>
> "Home Care financial performance has stagnated over the last four financial years with the average operating result for Sep-22 being $3.56 per care recipient (client) per day. This is not an adequate return based on the investment required and business risk to provide these essential services to the elderly in a domestic home setting."[416]

[356] The Joint Employers referred to the StewartBrown Survey Report (September 2022) to demonstrate the 'material proportionality' of direct care labour costs to revenue [417] and submitted that increasing direct care labour costs increases the major cost component of providing care generally.[418] In support of this, the Joint Employers referred to Mr Corderoy's

estimates of the total costs to the aged care industry of the 15 per cent interim increase being paid but underfunded:

(a) $639 million for the period 1 March 2023 to 1 July 2023; and

(b) $575 million for the 2024 financial year.[419]

[357] The Joint Employers submitted that the Commission's consideration of the timing and phasing of the interim wage increase must commence with the understanding that without funding, operating costs will be materially impacted in an already challenged financial context.[420]

[358] The Joint Employers noted that it is unknown what proportion of the interim wage increase will be passed on to employees receiving above award wages and what will be absorbed into existing enterprise agreements, citing s.206 of the FW Act.[421]

[359] The Joint Employers submitted that the Commonwealth's funding proposal 'at least implicitly' operates on the basis that all direct aged care employees will receive the 15 per cent interim wage increase on award rates. The Joint Employers submitted it is unclear if there will be additional funding for an increase above this based on the use of average labour costs and individual circumstances of operators.[422]

[360] The Joint Employers submitted that actual amounts of additional funding to cover on-costs of the increase will impact on the outcome and is a significant concern of operators. The Joint Employers submitted that although there is no certainty, the evidence filed demonstrates that all operators will pay the 15 per cent increase on award rates from the from the additional funding. However, some operators are concerned that they may not be able to afford much of an increase for those on above award rates, whilst others will have a preference, if the funding is available, to pass on the entire 15 per cent increase even if there may not be a legal requirement to do so.[423]

[361] The Joint Employers noted that there does not appear to be evidence available on how many employees are covered by enterprise agreements, not covered by enterprise agreements but otherwise receiving over award payments or are only paid minimum award rates.[424] Nonetheless, the Joint Employers submitted that the industry is seen as being award reliant despite the majority of the lay witness evidence being provided in the enterprise agreement coverage context.[425] Appendix A to the Joint Employers' submissions in reply provided an analysis of award vs enterprise agreement coverage of the lay witnesses heard in these proceedings.

[362] The Joint Employers referred to the evidence of Ms Anna-Marie Wade as it relates to the *NSWNMA and HSU NSW Enterprise Agreement 2017-2020*.[426] The Joint Employers submitted Ms Wade's evidence aligns with the witness evidence filed with their reply submissions and that:

(a) Nurses are likely to be paid well above minimum award rates in an enterprise agreement such that many employers covered by those agreements could legally absorb the whole 15 per cent increase; and

(b) Aged care workers are likely to be paid marginally above minimum award rates in enterprise agreements thus requiring an employer to pass on most of the interim wage increase.[427]

[363] The Joint Employers submitted that it would be reasonable for the Commission to conclude that some employers will have a legal right to absorb some or potentially all of the interim increase on award rates for nurses and some, but unlikely all of that increase, for care workers into enterprise agreement payments. Although some employers may want to be able to pay more to these employees.

[364] The Joint Employers submitted that it should be taken from the lay evidence filed with its reply submissions that some operators will be financially compelled to absorb the interim increase where they can, some, while facing increased deficits will try to pass on the entire increase despite no legal obligation to do so and some may pass on the full increase only when it is fully funded.

[365] The Joint Employers submitted that the evidence shows that if compelled to pay all or a portion of the 15 per cent interim increase without funding, operators will incur losses. Pointing to the financial position of specific operators, the Joint Employers submitted that some operators will experience increased deficits and a further denuding of limited historical reserves while others may be able to cover the losses by surpluses from other business operations outside of residential aged care or home care, but will nevertheless suffer impairments to their overall financial stability.[428]

[366] The Joint Employers submitted that employers will respond in a variety of ways in the absence of funding for the interim wage increase with some operators opting to absorb the costs and reducing the losses they suffer, while others that may not have this capacity may be tipped over the edge in terms of financial stability.[429]

[367] The Joint Employers concluded that they support the interim wage increase on the basis that its operation is aligned with the additional Commonwealth funding as proposed by the Commonwealth.[430] The Joint Employers submitted that only this approach ensures employers do not face unfunded losses in so doing renders the considerations of s.134(1)(f) to be neutral. The Joint Employers submitted that any other approach would drive the consideration of s.134(1)(f) to be materially against the Unions and be sufficient to persuade the Full Bench against it.

Joint Employer submissions during the Hearing of 13 February 2023

[368] In their oral submissions, Joint Employers cited a number of cases[431] they submitted support the proposition that fairness in terms of the Commission's task of 'setting a fair and relevant safety net' is to be assessed from the perspective of both employees and employers.[432]

[369] The Joint Employers also submitted that the aged care industry lacks the economic framework of other industries in that it cannot respond to major costs pressures by increasing prices or issuing redundancies to save costs.[433]

[370] The Joint Employers submitted the evidence clearly demonstrates that to introduce the wage increases without funding has the consequence for aged care employers that their business is financially weakened and that this is proper matter for the Commission to contemplate in considering the union's claim.[434]

[371] The Joint Employer's further submitted that the aged care sector is a distressed industry, and that granting the union's claim in respect of the timing of the interim increases will drive deficits and weaken businesses, and that the Commission should instead adopt the Commonwealth's timetable, particularly in light of the aged care industry's role in supporting and caring for a vulnerable community.[435]

Joint Employers' submissions in response to question 2

[372] The Joint Employers submitted that an effective date of 30 June 2023 for the interim increase to avoid coincidence with the Annual Wage Review is acceptable.[436]

5.2 Witness evidence submitted by the Joint Employers

[373] Together with their reply submissions of 9 February 2023, the Joint Employers also filed witness evidence from Grant Corderoy, Johannes Brockhaus, James Shaw and Michelle Jenkins.[437] Mr Corderoy was cross-examined by the HSU during the Hearing held before us on 13 February 2023.[438] This evidence is summarised below.

Evidence of Grant Corderoy

[374] Grant Corderoy gave evidence about his role as Senior Partner with StewartBrown, Chartered Accountants[439]and his experience and involvement in the aged care sector in particular.[440] He outlined the establishment of the StewartBrown *Aged Care Financial Performance Survey* (StewartBrown Survey Report) which is published quarterly.[441] The StewartBrown Survey Report is designed for each participant organisation to compare and benchmark their operating performance through a number of financial and non-financial measures.[442] Mr Corderoy outlined the operation of the StewartBrown Survey Report.[443]

[375] Using the data from the StewartBrown Survey Report (September 2022), Mr Corderoy made projections regarding the financial sustainability and viability of the aged care sector.[444] Mr Corderoy stated that, should the interim increase be adopted in line with the timeline of the Commonwealth's funding commitment, there should be no economic impact on the sector.[445] If the interim increase is adopted earlier and without Commonwealth funding, Mr Corderoy predicts there will be a significant economic impact on the aged care sector.[446]

[376] Mr Corderoy's cross examination covered the operation and purpose of the StewartBrown Survey Reports and the 2020, 2021 and 2022 Financial Year Reports.[447] He responded to questions about the September 2022 and September 2021 Survey Reports, as well as home care across the 2020, 2021 and 2022 Survey Reports.[448]

[377] He confirmed the purpose of the StewartBrown Survey Report is for operators to use expense-based metrics to compare their performance to that of other operators.[449] Mr Corderoy stated StewartBrown does not advise operators of potential changes that could be made, but

only presents the data and responds to questions about data.[450] Mr Corderoy responded to questions about the revenue and expenditure measures for direct care across 2020, 2021 and 2022.[451] He confirmed in 2021 and 2020 with respect to direct care there was a surplus of $13.63 per bed per day.[452] The revenue being received in direct care was in part subsiding the losses that were derived from indirect care and accommodation costs.[453] In 2022, the outcome on a per bed per day basis with respect to direct care also delivered a surplus, albeit a smaller one than results in 2021 and 2022.[454] Mr Corderoy attributes this to a variance in government grants provided due to the COVID-19 pandemic.[455]

[378] Mr Corderoy addressed the StewartBrown Survey Report (September 2022).[456] He confirmed his position that issues relating to attraction and retention of staff are critically important and should be addressed as a matter of urgency.[457] He stated he believed the interim increase would assist in retention, but doubted it would assist in attraction.[458] He stated the interim increase was but one component required to address staffing issues in the sector.[459]

[379] Mr Corderoy addressed the September 2021 and September 2022 reports,[460] confirming that with respect to direct care the overall operating result went down from $6.76 to 11 cents per bed per day as a surplus.[461] Further, there was an increase in revenue during this period, which was offset by an increase in costs.[462]

[380] Mr Corderoy responded to questions about home care across the 2020, 2021 and 2022 Survey Reports.[463] Mr Corderoy confirmed home care operators continue to derive a surplus on a per client per day basis.[464] Further, Mr Corderoy answered questions about 'Home Care Revenue Utilisation'.[465] He confirmed that revenue utilisation, that is the services actually provided, as a percentage of funding received from the Commonwealth, remains less than 90 per cent.[466]

[381] During re-examination by the Joint Employers, Mr Corderoy was taken to his oral evidence regarding attraction and retention of staff and arrangements regarding unspent home care funds.[467]

Statement of Johannes Brockhaus

[382] Johannes Brockhaus gave evidence about his role as the CEO of Buckland Aged Care Services.[468] Mr Brockhaus' witness statement covered the various positions he has held within the aged care sector, some background on the Buckland facility, the financial position of the Buckland facility, the impact of awarding the interim increase on direct care workers and the possible impact of awarding the interim increase without Commonwealth funding.[469] Mr Brockhaus was not called for cross-examination.

Statement of James Alexander Lachlan McLean Shaw

[383] James Shaw gave evidence about his roles as the Deputy CEO and Chief Financial Officer of the Royal Freemasons' Benevolent Institution.[470] Mr Shaw's witness statement covered some background and the financial position of the Royal Freemasons' Benevolent Institution, the impact of awarding the interim increase on direct care workers and the possible impact of awarding the interim increase without Commonwealth funding.[471] Mr Shaw was not called for cross-examination.

Statement of Michelle Jenkins

[384] Michelle Jenkins gave evidence about her role as the CEO of Community Vision Australia Limited (Community Vision).[472] Ms Jenkins' statement covered the background, employee breakdown and financial position of Community Vision.[473] Ms Jenkins outlined the impact of an interim increase on wages, flagging that Community Vision will likely make the decision to absorb part of the interim increase into the Enterprise Agreement over award payments.[474] Ms Jenkins also addressed the possible impact of the interim increase without Commonwealth funding.[475] Ms Jenkins was not called for cross-examination.

Submissions on the weight of the witness evidence

[385] During the Hearing on 13 February, we dealt with an objection by the ANMF and HSU to the witness evidence filed by the Joint Employers on 9 February 2023, summarised above.[476] We ruled to admit the evidence on the basis that the parties may make submissions as to its weight, and that the HSU would be cross-examining Mr Corderoy.[477]

HSU submissions on weight of witness evidence

[386] The HSU submitted that the Joint Employers' witness evidence filed on 9 February 2023 should be given little weight.[478]

[387] The HSU submitted that the Joint Employer evidence was not responsive to any submissions filed by other parties and dealt with issues addressed by the Joint Employers' submissions of 20 January 2023. This contravenes the directions of the Full Bench. Further, the HSU submitted the evidence was filed one business day before the hearing of the matter on 13 February 2023. The HSU submitted this provided insufficient time for the union parties to deal with what was a substantial amount of evidence. As a consequence, the union parties were denied a reasonable opportunity to properly test and challenge this evidence.[479]

[388] The HSU submitted in any event the evidence would be given little weight as it does not set out the basis for the opinions it contains. For example, the assertion at paragraph 34 of Mr Corderoy's statement, relating to the alleged overall costs of the interim increase across the sector, does not provide the basis of the calculation or make apparent the method of calculation. The HSU submitted that the assertions provided by Mr Shaw, Mr Brockhaus and Ms Jenkins regarding the financial circumstances of the providers for which they work were given without any documentary support or proper capacity for union parties or the Commission to interrogate.[480]

ANMF submissions on weight of witness evidence

[389] The ANMF submitted that Mr Coderoy's evidence does not meet the standards of evidence.[481]The Full Bench can accept Mr Corderoy has 'specialised knowledge' in accountancy.[482] However, Mr Corderoy's evidence goes beyond accountancy in his attempt to provide expertise of a statistician and an economist.[483] The Full Bench cannot accept that the views Mr Corderoy expresses are representative, nor can the Full Bench accept his prognostications of what effect funding changes will be on the industry. [484]

[390] The ANMF submitted that the StewartBrown Survey Report (Sept 2022) proleptically deals with this criticism. The authors of the survey accept that there are differences between their survey group and the sector as a whole,[485] and the ANMF submitted that the survey should not be accepted as representative of the sector.[486]

[391] The ANMF submitted that the Full Bench has insufficient information regarding the background work undertaken prior to the reporting of the survey results.[487] For example, the survey excludes 'outliers' but does not provide a clear indication of what constitutes an 'outlier'.[488]

[392] The ANMF submitted the purpose of the StewartBrown Survey Reports is to produce a set of results participating providers can use to benchmark their facility against a similar comparator.[489] The survey deliberately excludes providers whose results may not be useful for benchmarking, for example recently acquired facilities.[490] Accordingly, the results do not amount to a representative, sector-wide survey.[491]

[393] The ANMF submitted there is insufficient information provided about the reasoning behind the 'data cleaning' process involved in the StewartBrown Survey Reports.[492] The ANMF submitted the Full Bench would need further detail to be satisfied the report meets the rules for expert evidence.[493]

[394] The ANMF submitted the bottom-line figures given by Mr Corderoy of the impact of any unfunded wage increases were not supported by any calculations.[494] These figures are unproven and should not be accepted. [495]

[395] The Full Bench should afford little weight to the analyses of StewartBrown and the statement of Mr Corderoy.[496]

[396] The ANMF also submitted the Full Bench should give very little weight to the statements of Mr Brockhaus, Mr Shaw and Ms Jenkins.[497]

[397] The ANMF submitted that:

1. Their statements are not supported by financial records;

2. There is insufficient evidence to rely on the calculations provided in the statements; and

3. Mr Brockhaus proports to give opinion about various matters, however he does not have 'specialised knowledge' upon which to base his opinions.[498]

Joint Employer submissions on weight of witness evidence

[398] The Joint Employers submitted the Full Bench should not accept the arguments of the ANMF and the HSU that the weight of the reply evidence should be adversely impacted by the purported non-compliance with the directions of the Commission.[499] The Joint Employers rejected this and/or any resulting prejudice to the Unions.[500]

[399] The Joint Employers submitted their submissions dated 9 February 2023 complied with directions and that their reply evidence fits within the nature of 'reply', being that it goes to the context and consequence of the Unions' position that the 15 per cent interim increase should be paid immediately.[501]

[400] The Joint Employers rejected the position of the ANMF that they were prejudiced by not being able to challenge the reply evidence.[502] The Unions had equal opportunity to file reply evidence and, had they done so, the Joint Employers would have been impacted by the same 3-day timetable between the filing of evidence and the hearing. The Joint Employers noted the ANMF declined the opportunity to cross examine the witnesses. [503]

[401] The Joint Employers submitted any assertion that Mr Corderoy does not have sufficient 'specialised knowledge' should be rejected.[504] The Commission has previously recognised that Mr Corderoy has specialised knowledge within the context of the aged care Sector.[505]

[402] The Joint Employers submitted that given the HSU contended little weight should be put on the $1.2 billion quoted by Mr Corderoy, they should have taken the opportunity to put this to Mr Corderoy during cross examination.[506]

[403] In response to the Unions' challenge of the weight attached to the lay witness evidence, the Joint Employers submitted that the Unions declined the opportunity to cross examine Mr Brockhaus, Ms Jenkins and Mr Shaw. It is improper to seek to discredit the evidence in a submission, especially when all were available for cross-examination.[507]

[404] The Joint Employers submitted that each witness gave evidence based on their specific experience as CEOs or CFOs and were well placed to provide evidence to the Full Bench about the financial status of their businesses, the evidence was filed in compliance with the directions and the Commissions should have full regard to it.[508]

5.3 Consideration

Timing and implementation

[405] Paragraphs [976]–[990] of the *Stage 1 decision* set out the relevant legislative provisions and the approach taken to the phasing-in of Commission decisions in other cases.

[406] The Full Bench stated that s.166 of the FW Act creates a presumption that a determination varying modern award minimum wages comes into operation on 1 July in the next financial year after it is made but to displace this presumption the Commission need only be satisfied that it is 'appropriate' to specify a different operative date.[509]

[407] The Full Bench considered that in determining the operative date of a determination under Part 2-3, the Commission must exercise its power in a manner which is 'fair and just' (as required by s.577(a)) and must take into account the objectives of the FW Act and 'equity, good conscience and the merits of the matter' (s.578).[510]

[408] The Full Bench held that fairness is 'plainly a relevant consideration', given that the modern awards objective speaks of a 'fair and relevant safety net' and the minimum wages

objective is the establishment and maintenance of a 'safety net of fair minimum wages'. The Full Bench considered that fairness is to be assessed from the perspective of both employees and employers affected by the variation determination.[511]

[409] Paragraphs [986]–[989] set out the observations by the Full Bench in the *Penalty Rates – Transitional Decision* about matters relevant to the determination of the transitional arrangements to implement the *Penalty Rates Decision* and the application of these observations in a number of subsequent Full Bench decisions. Parties were invited to comment on the appropriateness of those principles and their application to the current proceedings.[512]

[410] In our Statement and Directions of 10 February 2023 we expressed our *provisional* view that the interim increase established by the *Stage 1 decision* should apply from 30 June 2023.

[411] The Commonwealth supported the interim increase applying no earlier than 1 July 2023 in order to make the necessary and proper adjustments to funding mechanisms, the Joint Employers say timing should be dependent on funding and each of the Unions seeks the increase apply in full as soon as possible.

[412] In the *Stage 1 decision* the Full Bench said:

> "[922] Three broad considerations weigh in favour of an interim decision providing an increase in minimum wages for discrete categories of aged care workers:
>
> 1. It is common ground between the parties that the work undertaken by RNs, ENs and Certificate III PCWs in residential aged care has changed significantly in the past 2 decades such as to justify an increase in minimum wages for these classifications. We also recognise that there is ample evidence that the needs of those being cared for in their homes have significantly increased in terms of clinical complexity, frailty and cognitive and mental health.
>
> 2. Accordingly, in respect of direct care workers (including RNs, ENs, AIN/PCW/HCWs) the evidence establishes that the existing minimum rates do not properly compensate employees for the value of the work performed by these classifications of employees. The evidence in respect of support and administrative employees is not as clear or compelling and varies as between classification.
>
> 3. A number of complex issues require further submissions (and potentially further evidence) before they can be determined and we see no reason to delay an increase in wages for direct care workers while that process takes place."[513]

[413] We have decided that the interim increase should be paid, in full, from 30 June 2023 and should not be subject to any phasing-in and issued a Decision to that effect on 21 February 2023.

[414] We acknowledge the submissions made by the Joint Employers in relation to capacity to pay outside Commonwealth funding increases and the related evidence of various employers. We have also considered their submissions in relation to phasing-in as an approach to balancing the modern awards objective. While we acknowledge that phasing-in may be a valid approach to increases in particular circumstances, there is no decision rule that this is the approach to be utilised in all cases. Whether phasing-in is appropriate is a matter to be determined based on the particular circumstances before the Commission.

[415] We have considered the advice of the Commonwealth as to how it intends to fund the increase – with a 10 per cent increase in funding provided from 1 July 2023 and a further 5 per cent from 1 July 2024. While we acknowledge that the impact of the interim increase on employers will be ameliorated by the Commonwealth decision with respect to funding, we are not convinced that the Commonwealth proposal as to phasing-in of the funding of the increase should be determinative of our decision with respect to the timing of the interim increase. Further, we note the Commonwealth's acceptance of this.

[416] We acknowledge the evidence of the Joint Employers in relation to the impact of the increase if it is not phased-in. While we accept that there may be some impact if the Commonwealth maintains its position in relation to funding the interim increase, the evidence before us does not allow us to conclude that the employers cannot support 5 per cent of the increase for a period of 12 months (beyond which, on the Commonwealth proposal, the second part of its funding will come into effect).

[417] Balanced against these considerations are the clear findings that existing minimum wages in the Awards do not properly compensate direct care workers in residential or in-home aged care settings, for the value of the work performed. We have also had regard to the Commonwealth submission in these proceedings, pointing to the findings in the *Stage 1 decision*, that work in the aged care sector has been undervalued because of gender-based assumptions and that there have been historical barriers to the assessment of work value in female dominated industries. We consider that the skills of direct care workers in the aged care sector have been "hidden" for the predominant reason that the vast majority of workers are women and that there are compelling reasons to recognise this by flowing an interim wage increase to direct care workers from the earliest possible date, having regard to the need to give notice to employers of the increases.

[418] This is also consistent with the recent amendments to the FW Act relating to matters relevant to this case, including the promotion of job security and gender equality, eliminating gender-based undervaluation of work, promoting the full economic participation of women and addressing gender-based pay gaps. To delay the interim increases would be inconsistent with these objectives.

[419] We reiterate what the Full Bench said in the *Stage 1 decision*, that the 15 per cent increase is interim in nature with the extent of any final increase in rates of pay not yet determined and not to be determined until Stage 3. It may be that an increase beyond this interim increase is justified following the finalisation of Stage 3. To phase-in the interim increase of 15 per cent over a period of up to 1 year as proposed by the Joint Employers could result either in multiple increases being necessitated in the second year as a result of the Stage 3 decision or a

more extensive delay beyond the 12 months from the first of the interim increases to the final increase in satisfaction of the claims.

[420] In all of the circumstances, we consider that it is fair and reasonable that the interim increase should come into effect on 30 June 2023. This date will ensure no confusion in relation to increases from the Annual Wage Review, which will, in all likelihood, take effect from 1 July 2023. We are also satisfied that it is appropriate that the interim increase not apply until 30 June 2023. While it is correct that, should we consider it reasonable to do so, we could apply the interim increase from an earlier date, we consider it prudent to ensure fair notice to employers of the date of effect of the increase to enable employers to make the necessary arrangements for the payment of the increase.

Section 134(1)(f): the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

[421] In the *Stage 1 decision*, the Full Bench held that it was 'unable to reach a concluded view on whether the proposed interim determination is necessary to achieve the modern awards objective'. The Full Bench noted:

> "One of the matters we are required to take into account in forming that evaluative judgment is 'the likely impact of any exercise of modern award powers on business, including on … employment costs' (s.134(f)). As is evident from the discussion earlier in this chapter, the likely impact on employers of the interim increase we propose to award will be ameliorated to the extent of Government funding support for that increase. The extent of funding support is not yet known."[514]

[422] In the *Stage 1 decision*, the Full Bench noted that as the Commonwealth is the principal funder in the aged care sector, absent additional Commonwealth funding the cost to business of increasing aged care sector minimum wages is likely to be substantial, depending on the quantum and the phasing.

[423] During the course of closing oral argument, counsel for the Commonwealth stated the funding support it provided would mitigate the impact on employers of any determination arising from these proceedings, but the extent of that mitigation will depend on decisions made by the Australian Government after the Commission has come to a concluded or preliminary view about the Applications. Counsel for the Commonwealth was not in a position to comment upon whether the funding provided would cover *all* of the employment costs flowing from any increase awarded.[515]

[424] The Full Bench considered that the extent to which the Commonwealth provides funding was plainly relevant to its assessment of whether a variation to minimum wages in the Awards is necessary to achieve the modern awards objective, in particular the extent of funding bears on the question of whether such a variation provides a 'fair and relevant…safety net' and upon the considerations in s.134(1)(f). The Full Bench determined that as the extent of Commonwealth funding was unknown, it was unable to reach a concluded view on its consideration of s.134(1)(f).[516]

[425] Our determination that the interim increase should come into effect on 30 June 2023, does not fully align with the Commonwealth's proposed funding commitment. Consequently, many employers will likely be responsible for 5% of the increase until the Commonwealth provides full funding. We consider that this increase in employment costs weighs against the interim increase. However, we do not consider there to be sufficient evidence to ascertain the extent and impact of these increased costs and to conclude there is a material negative impact on business. While we accept the Joint Employers' submission that there will likely be some initial transitional impact in the Home Care sector, we are not satisfied there is sufficient evidence to conclude that the regulatory burden on employers will be increased by the interim increase. As indicated in the *Stage 1 decision*, we do not consider the interim increase itself to affect productivity.

6. The modern awards objective

[426] The remaining considerations in the modern awards objective, being, ss.134(1)(a), 134(1)(b), 134(1)(c), 134(1)(d), 134(1)(da), 134(1)(g) and 134(1)(h), will be dealt with in this section.

[427] The Full Bench expressed some *provisional* views in respect of the s.134(1) considerations and provided the parties with an opportunity in Stage 2 of the proceedings to comment on these and make submissions in respect of the impact on employers once the extent of Commonwealth funding support is known.

[428] Overall, the HSU, ANMF, and Joint Employers all submit that the interim increases proposed are necessary to achieve the modern awards objective.[517]

s.134(1)(a): relative living standards and the needs of the low paid

[429] In the *Stage 1 decision*, the Full Bench determined that most of the award classifications subject to the interim increase are 'low paid' within the meaning of s.134(1)(a), with the evidence in the proceedings demonstrating that many of these workers face challenges in meeting financial obligations due to their low rates of pay.[518]

[430] The Full Bench expressed the *provisional* view that s.134(1)(a) weighs in favour of the variation of the Awards to give effect to the interim increase determined to be justified by work value reasons.[519]

[431] The Commonwealth accepts the *provisional* view and did not make any further submissions in respect of s.134(1)(a).[520]

[432] The HSU accepts the *provisional* view[521] and additionally submitted that consideration of s. 134(1)(a) favours a conclusion that the interim increase should commence as soon as possible.[522]

[433] The ANMF agreed with the view of the Full Bench that s.134(1)(a) weighs in favour of the variation of the relevant awards to give effect to the interim increase determined to be justified by work value reasons.[523]

[434] The UWU submitted that the interim increases proposed in the *Stage 1 decision* are necessary to achieve the modern awards objective.[524] The UWU concurs with the Full Bench that s.134(1)(a) weighs in favour of awarding the interim increase.[525] Additionally, the UWU submitted that consideration of s.134(1)(a) is required to determine the 'fairness' of specifying an operation date other than 1 July, in respect of s.166.

[435] The Joint Employers submitted that the interim increases proposed are necessary to achieve the modern awards objective but did not directly comment on the *provisional* views concerning s.134(1)(a).[526]

[436] No party has put forward any basis for the Full Bench to depart from the provisional views expressed in the *Stage 1 decision*, and we confirm that we consider relative living standards and the needs of the low paid weighs in favour of the interim increase.

s.134(1)(b): the need to encourage collective bargaining

[437] In the *Stage 1 decision*, the Full Bench referred to observations made in previous annual wage review decisions wherein the Expert Panel pointed to the 'complexity of factors which may contribute to decision making about whether or not to bargain' and concluded that it is 'unable to predict the precise impact [of its decisions] on collective bargaining with any confidence.'[527] The Full Bench agreed with the Expert Panel's observations and considered that it is 'very difficult' to predict the effect increasing minimum wages will have on collective bargaining in the aged care sector:

> "The proposition that increasing minimum wages may encourage collective bargaining on matters other than pay seems to be somewhat optimistic and speculative. Indeed, if correct, we would have expected to have seen it manifest already, given that Government funding arrangements presently constrain wage bargaining."[528]

[438] The Full Bench expressed the *provisional* view that s.134(1)(b) weighs against the variation of the relevant Awards to give effect to the interim increase.[529]

[439] The Commonwealth accepts the *provisional* view and does not make any further submissions in respect of s.134(1)(b).[530]

[440] The HSU submitted it does not follow from a finding that the variations would not encourage collective bargaining, that the factor necessarily weighs against variations being made.[531] If the Full Bench had found that the variations would create a disincentive to collective bargaining, this would weigh against the variations being made. However, in circumstances where the finding is that the variations will have no real impact on bargaining, the HSU submitted this is more correctly considered a neutral consideration.[532]

[441] With respect to s.134(1)(b) the ANMF accepts that there is a complexity of factors which may contribute to decision making about whether or not to bargain and that it is difficult to predict the effect of increasing minimum wages on collective bargaining but disagrees with the Full Bench.[533] Even where amending the award would not positively encourage bargaining, the ANMF submitted that this consideration would be neutral and would not weigh against an increase.[534]

[442] The UWU disagrees with the Full Bench's provisional view that consideration of the need to promote collective bargaining weighs against awarding the increase.[535] The UWU submitted that the Commission does not specifically address the ANMF's submission that the increase in minimum wage rates would increase incentives or the necessity to negotiate enterprise-specific trade-offs and productivity benefits.[536]

[443] The UWU submitted that although considerations of s.134(1)(b) must be finely balanced, the Full Bench gives 'too short shrift' to the ANMF's submission.[537] The UWU submits that a finding that improvement in minimum rates of pay with concomitant improvements in funding will provide more scope for industrial parties operating in the sector to engage in collective bargaining is not speculative and is entirely consistent with the evidence before the Full Bench.[538] The UWU submits this finding should be made and that this tips the balance in respect to the s.134(1)(b) in support of awarding the interim increase.[539]

[444] The Joint Employers did not make specific submissions regarding s.134(1)(b).

[445] We are not persuaded to alter the provisional view that increasing minimum wages will *encourage* collective bargaining. The observations of the Expert Panel with which the Full Bench in the *Stage 1 decision* agreed, that it is very difficult to predict the effect increasing minimum wages will have on collective bargaining in the aged care sector, were acknowledged by the ANMF. We confirm our agreement with these observations. We are, however, persuaded that the need to encourage collective bargaining is more appropriately treated as a neutral consideration, rather than as a consideration weighing against the interim increase.

s.134(1)(c): the need to promote social inclusion through increased workforce participation

[446] In the *Stage 1 decision,* the Full Bench noted evidence provided by the Commonwealth that the aged care sector is facing 'a projected shortfall in workers' with modelling by the Commonwealth Department of Health and Aged Care estimating that the workforce will need to expand by an average of 6.6 per cent each year over the next 5 years to support quality of care and growing demand.[540]

[447] The Full Bench considered that increasing minimum wages will assist in attracting and retaining employees in the aged care sector, thereby promoting social inclusion through increased workforce participation and expressed the *provisional* view that s.134(1)(c) weighs in favour of the variation of the Awards to give effect to the interim increase.[541]

[448] The Commonwealth accepts the *provisional* view and does not make any further submissions in respect of s.134(1)(c).[542]

[449] The HSU accepts the *provisional* view and does not make any further comments in respect of s.134(1)(c).[543]

[450] With respect to s.134(1)(c) the ANMF agreed with the view of the Full Bench that increasing minimum wages will assist in attracting and retaining employees and thereby promote social inclusion through increased workforce participation.[544]

[451] The UWU agreed that consideration of s.134(1)(c) weighs in favour of the decision to award the interim increase.[545]

[452] The Joint Employers did not make specific submissions regarding s.134(1)(c).

[453] No party put forward any basis for the Full Bench to depart from the *provisional* views expressed in the *Stage 1 decision*, and we confirm that we consider that the need to promote social inclusion through increased workforce participation weighs in favour of the interim increase.

s.134(1)(d): the need to promote flexible modern work practices and the efficient and productive performance of work

[454] In the *Stage 1 decision*, the Full Bench expressed the *provisional* view that s.134(1)(d) was not a relevant consideration in respect of the interim increase.[546]

[455] The Commonwealth accepts the *provisional* view and did not make any further submissions in respect of s.134(1)(d).[547]

[456] The HSU accepts the *provisional* view and did not make any further comments in respect of s.134(1)(d).[548]

[457] The ANMF accepts that s.134(1)(d) is not relevant to the determination of the proposed interim increase.[549]

[458] The Joint Employers did not make specific submissions regarding s.134(1)(d).

[459] We confirm the *provisional* view expressed in the *Stage 1 decision* in respect of s.134(1)(d).

s.134(1)(da): the need to provide additional remuneration for employees working overtime; or employees working unsocial, irregular or unpredictable hours; or employees working on weekends or public holidays; or employees working shifts

[460] In the *Stage 1 decision*, the Full Bench expressed the *provisional* view that s.134(1)(da) was not a relevant consideration in respect of the interim increase.[550]

[461] The Commonwealth accepts the *provisional* view and did not make any further submissions in respect of s.134(1)(da).[551]

[462] The HSU accepts the *provisional* view and did not make any further comments in respect of s.134(1)(da).[552]

[463] The ANMF accepts that s.134(1)(da) is not relevant to the determination of the proposed interim increase.[553]

[464] The Joint Employers did not make specific submissions regarding s.134(1)(da).

[465] We confirm the *provisional* view expressed in the *Stage 1 decision* in respect of s.134(1)(da).

s.134(1)(g): the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

[466] In the *Stage 1 decision,* the Full Bench expressed the *provisional* view that s.134(1)(g) was not a relevant consideration in respect of the interim increase.[554]

[467] The Commonwealth accepts the *provisional* view and did not make any further submissions in respect of s.134(1)(g).[555]

[468] The HSU accepts the *provisional* view in respect of s.134(1)(g).[556] In relation to the timing of the increase, the HSU stated that it considers the factor in s.134(1)(g) to be of limited significance.[557] The HSU submitted that the interim increase involves a straightforward percentage increase. It asks of employers, a similar undertaking as what is required as a result of the annual wage review.[558] Accordingly, no finding can be made that any period of adjustment is needed to allow employers to give effect to the interim increase determined by the Full Bench.[559]

[469] The ANMF accepts that s.134(1)(g) is not relevant to the determination of the proposed interim increase.[560]

[470] The UWU submitted that consideration of s.134(1)(g) is required to determine the 'fairness' of specifying an operation date other than 1 July, in respect of s.166.[561]

[471] The Joint Employers did not make specific submissions regarding s.134(1)(g).

[472] We confirm the *provisional* view expressed in the *Stage 1 decision* in respect of s.134(1)(g).

s.134(1)(h): the likely impact of any increase of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

[473] In the *Stage 1 decision,* the Full Bench was not persuaded that varying the Awards to give effect to the interim increase would have any material effect on the national economy. The Full Bench expressed the *provisional* view that s.134(1)(h) was a neutral consideration.[562]

[474] The Commonwealth accepts the *provisional* view and did not make any further submissions in respect of s.134(1)(h).[563]

[475] The HSU accepts the *provisional* view in respect of s.134(1)(h).[564] The HSU submitted that the finding of the Full Bench that the interim increase is not likely to have any relevant impact on the national economy, weighs against a delayed implementation of the interim increase.[565]

[476] The ANMF agreed with the Full Bench that s.134(1)(h) is a neutral consideration.[566]

[477] UWU noted it previously made submissions in relation to s.134(1)(h)[567] but did not seek to press this position, noting the *provisional* views expressed.[568]

[478] The Joint Employers agreed with the Full Bench that s.134(1)(h) is a neutral consideration.[569]

[479] We confirm the provisional view expressed in the *Stage 1 decision* in respect of s.134(1)(h).

Conclusion on Modern Awards Objective

[480] With the exception of s.134(1)(f), the other factors that must be taken into account in ensuring that the relevant awards provide a fair and relevant minimum safety net of terms and conditions, are either positive or neutral. The impact on business is a matter of significance, however as the Full Bench in the *Stage 1 decision* reiterated, the modern awards objective requires that we take into account each of the s.134(1) considerations, with no particular primary attached to any single consideration.[570]

[481] We are satisfied that the interim increase is necessary to achieve the modern awards objective, as amended by the Secure Jobs, Better Pay Act.

7. The minimum wages objective

[482] This section deals with the relevant considerations of the minimum wages objective other than s.284(1)(aa), dealt with above.

[483] In the *Stage 1 decision*, the Full Bench noted that there is a substantial degree of overlap in the considerations relevant to the minimum wages objective and the modern awards objective, although some are not expressed in the same terms.[571] The Full Bench expressed a number of *provisional* views in respect of the s.284(1) considerations, noting that it was common ground between the parties that the consideration in s.284(1)(e) is not relevant in the context of the Applications.

[484] In respect to the minimum wages objective, the HSU repeated its submissions relating to ss.134(1)(e) and 284(1)(d) and otherwise agrees with the *provisional* views.[572]

[485] The ANMF agreed with the *provisional* view of the Full Bench that s.284(1)(a) is a neutral consideration. With respect to ss.284(1)(b) and 284(1)(c), which are in substantially the same terms as ss.134(1)(c) and 134(1)(a) respectively, the ANMF also agreed with Full Bench's *provisional* views and submitted that the interim increases are necessary to achieve the minimum wages objective.[573]

[486] The Joint Employers accept the *provisional* views of the Full Bench in respect of the minimum wages objective set out at paragraphs [1073]-[1083] of the *Stage 1 decision*. The

Joint Employers submitted that the interim increase is necessary to achieve the minimum wages objective.[574]

s.284(1)(a): the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth

[487] In the *Stage 1 decision*, the Full Bench determined that similarly to s.134(1)(h), the consideration in s.284(1)(a) is directed at the likely impact of a variation to modern award minimum wages on the national economy and focuses on the aggregate (as opposed to sectoral) impact of such variation. The Full Bench adopted the same *provisional* view as that adopted in respect of s.134(1)(h) that the consideration in s.284(1)(a) is neutral in the context of the Applications.[575]

[488] We confirm the provisional view expressed in the *Stage 1 decision* in respect of s.284(1)(a).

s.284(1)(b): promoting social inclusion through increased workforce participation

[489] The Full Bench in the *Stage 1 decision* noted that s.284(1)(b) is in the same terms as s.134(1)(c) and expressed the same *provisional* view that the consideration weighs in favour of a variation of the Awards to give effect to the interim increase.[576]

[490] We confirm the provisional view expressed in the *Stage 1 decision* in respect of s.284(1)(b).

s.284(1)(c): relative living standards and the needs of the low paid

[491] The Full Bench in the *Stage 1 decision* noted that s.284(1)(c) is expressed in the same terms as s.134(1)(a) and expressed the same *provisional* view that the consideration weighs in favour of a variation of the Awards to give effect to the interim increase.[577]

[492] We confirm the *provisional* view expressed in the *Stage 1 decision* in respect of s.284(1)(c).

Conclusion on Minimum Wages Objective s.284(1)

[493] We are satisfied that the interim increase is necessary to achieve the minimum wages objective, as amended by the Secure Jobs, Better Pay Act.

Conclusion on s.157(2)

[494] For the reasons we set out above, we are satisfied that the interim increase to the modern award minimum wages of direct care workers and the employees identified in paragraphs [69]-[75] is necessary to achieve the modern awards objective and minimum wages objective, pursuant to s.157(2)(b). As we are also satisfied that the increase is justified by work value reasons pursuant to s.157(2)(a), the requirements of s.157(2) of the FW Act are met. In making the variation to modern award minimum wages for these employees, we have taken into account

the national minimum wage as currently set in a national minimum wage order, pursuant to s.135(2) of the FW Act.

[495] Accordingly, we decide to grant the interim increase of 15 per cent to modern award minimum wages in accordance with our Decision of 21 February 2023.

VICE PRESIDENT

Appearances:

Mr M Gibian SC and Mr L Saunders (of counsel) on behalf of the Health Services Union

Mr J McKenna and Mr J Hartley (of counsel) on behalf of the Australian Nursing and Midwifery Federation

Ms L Harrison on behalf of the United Workers Union

Mr G Taylor on behalf of the Australian Workers Union

Mr N Ward on behalf of Aged & Community Care Providers Association Limited and Australian Business Industrial

Mr Y Shariff SC and Mr D Fuller (of counsel) on behalf of the Commonwealth

Hearing details:

Melbourne

2023

13 February.

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Abbreviations

ABI	Australian Business Industrial
ACSA	Aged & Community Services Australia
Aged Care Act	*Aged Care Act 1997* (Cth)
Aged Care Award	*Aged Care Award 2010*
ACCPA	Aged & Community Care Providers Association Ltd
AIN	Assistant in Nursing
AN-ACC	Australian National Aged Care Classification
ANMF	Australian Nursing and Midwifery Federation
Awards	The *Aged Care Award 2010, Nurses Award 2020* and *Social, Community, Home Care and Disability Services Award 2010*
AWU	Australian Workers Union
CHSP	Commonwealth Home Support Programme
Commission	Fair Work Commission
Direct aged care workers	Employees in the aged care sector covered by the Awards in caring roles, including nurse practitioners, RNs, ENs, AINs, PCWs and HCWs.
Eagar Second Supplementary Report	Prof Kathleen Eagar, *Second Supplementary Report of Prof Kathleen Eagar* dated 20 January 2023
EN	Enrolled Nurse
FW Act	*Fair Work Act 2009* (Cth)
Secure Jobs, Better Pay Act	*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)
HCPP	Home Care Package Program
HCW	Home care worker or Home care employee
HSU	Health Services Union
IHACPA	Independent Health and Aged Care Pricing Authority
Joint Employers	The Aged & Community Care Providers Association Ltd and Australian Business Industrial
Junor Report	Honorary Assoc Prof Anne Junor, *Fair Work Commission matter AM2021/63, Amendments to the Aged Care Award 2010 and the Nurses Award 2010* dated 28 October 2021, as amended 5 May 2022
Joint Statement	*Joint statement regarding Stages 2 and 3 of the Work Value Case* dated 16 December 2022
LASA	Leading Age Services Australia
Nurses Award	*Nurses Award 2020*

PCW	Personal Care Worker
Penalty Rates Decision	*4 yearly review of Modern Awards – Penalty Rates* [2017] FWCFB 1001
Penalty Rates Transitional Decision	*4 yearly review of Modern Awards – Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001
RAO	Recreational Activities Officer/Lifestyle Officer
RN	Registered Nurse
Royal Commission	*Royal Commission into Aged Care Quality and Safety*
SCHADS Award	*Social, Community, Home Care and Disability Services Award 2010*
Secure Jobs, Better Pay Act	*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth)
Teachers Decision	*Independent Education Union of Australia* [2021] FWCFB 2051
Unions	The Australian Nursing and Midwifery Federation, the Health Services Union and the United Workers' Union
UWU	United Workers' Union

[1] [2023] FWCFB 40.

[2] [2022] FWCFB 200.

[3] *Stage 1 decision* at [931].

[4] *Stage 1 decision* at [902]–[903].

[5] *Stage 1 decision* at [922].

[6] *Stage 1 decision* at [933]–[934].

[7] *Stage 1 decision* at [935].

[8] *Stage 1 decision* at [936]–[937].

[9] *Stage 1 decision* at [957], [961], [966]–[967].

[10] *Stage 1 decision* at [968].

[11] *Stage 1 decision* at [51].

[12] Statement [2022] FWCFB 208.

[13] Statement [2022] FWCFB 214.

[14] Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, item 346.

[15] Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, items 347 and 348.

[16] Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, item 347.

[17] Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, items 349 and 350.

[18] Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, item 352.

[19] [2023] FWCFB 32.

[20] Transcript, 13 February 2023 at PN90.

[21] Transcript, 13 February 2023 at PN397.

[22] [2023] FWCFB 45.

[23] Joint Statement dated 16 December 2022 at [1]–[6].

[24] [2023] FWCFB 32.

[25] Commonwealth submissions dated 16 December 2022 at [33]–[34].

[26] Commonwealth submissions dated 16 December 2022 at [35].

[27] [2023] FWCFB 32.

[28] Transcript, 13 February 2023 at PN438-PN439.

[29] Transcript, 13 February 2023 at PN440; Commonwealth submissions in reply, dated 9 February 2023 at [10].

[30] HSU submissions dated 20 January 2023 at [5] citing the Joint Statement dated 16 December 2022 at [1]–[6].

[31] HSU submissions dated 17 February 2023 at [8]–[9].

[32] HSU submissions dated 17 February 2023 at [10].

[33] HSU submissions dated 17 February 2023 at [11].

[34] HSU submissions dated 17 February 2023 at [26] citing Joint Employer closing submissions in reply dated 19 August 2022 at [5.19]-[5.20].

[35] Citing the Joint Statement dated 16 December 2022 at [3].

[36] HSU submissions dated 17 February 2023 at [28] citing Joint Employer submissions dated 15 February 2023 at [2.8].

[37] HSU submissions dated 17 February 2023 at [28].

[38] HSU submissions dated 17 February 2023 at [29] citing *Stage 1 decision* at [935].

[39] HSU submissions dated 17 February 2023 at [29].

[40] HSU submissions dated 17 February 2023 at [30].

[41] HSU submissions dated 17 February 2023 at [31].

[42] Transcript, 13 February 2023 2023 at PN397.

[43] HSU submissions dated 17 February 2023 at [17]-[20] citing Report to the Full Bench – Lay Witness Evidence Report dated 20 June 2022 at [128].

[44] HSU submissions dated 17 February 2023 at [21] citing Witness statement of Theresa Heenan dated 20 October 2021 at [72]-[80].

[45] ANMF submissions dated 20 January 2023 at [112]-[113].

[46] ANMF submissions dated 20 January 2023 at [114].

[47] ANMF submissions in reply dated 9 February 2023 at [1] citing the Joint Employers submission dated 20 January at [6] and [95].

[48] ANMF submissions in reply dated 9 February 2023 at [4] citing the Joint Employers submission dated 20 January at [6] and [95].

[49] ANMF submissions in reply dated 9 February 2023 at [3].

[50] Transcript, 13 February 2023 at PN446.

[51] Joint Statement dated 16 December 2022 at [3].

[52] UWU submissions dated 20 January 2023 at [53].

[53] UWU submissions dated 20 January 2023 at [54]; see *Stage 1 decision* at [1093]-[1094].

[54] UWU submissions dated 20 January 2023 at [54].

[55] Transcript, 13 February 2023 at PN502-PN503.

[56] Transcript, 13 February 2023 at PN504.

[57] Joint Employers submissions dated 20 January 2023 at [95].

[58] Joint Employers submissions: Response to Questions from the Full Bench dated 15 February 2023 at [1.2].

[59] Joint Employers submissions: Response to Questions from the Full Bench dated 15 February 2023 at [2.1].

[60] Joint Employers submissions: Response to Questions from the Full Bench dated 15 February 2023 at [2.8].

[61] Joint Employers submissions: Response to Questions from the Full Bench dated 15 February 2023 at 2023 at [3.1].

[62] Joint Employers note on Home care employee evidence dated 17 February 2023 at [4].

[63] Joint Employers note on Home care employee evidence dated 17 February 2023 at [5] Citing the Joint Employers submissions dated 22 July 2022 at Annexure G.

[64] Joint Employers note on Home care employee evidence dated 17 February 2023 at [6].

[65] Joint Employers note on Home care employee evidence dated 17 February 2023 at [7(a)].

[66] Joint Employers note on Home care employee evidence dated 17 February 2023 at [7(b)].

[67] Joint Employers note on Home care employee evidence dated 17 February 2023 at [7(c)].

[68] Joint Employers note on Home care employee evidence dated 17 February 2023 at [8].

[69] *Stage 1 decision* at [935].

[70] *Stage 1 decision* at [1048].

[71] *Stage 1 decision* at [1048].

[72] *Stage 1 decision* at [1050].

[73] *Annual Wage Review 2017–18* [2017] FWCFB 3500 at [34].

[74] *Stage 1 decision* at [1052].

[75] *Stage 1 decision* at [1053].

[76] *Stage 1 decision* at [1055].

[77] *Stage 1 decision* at [1056].

[78] *Stage 1 decision* at [1057].

[79] *Stage 1 decision* at [1058] citing *Equal Remuneration Decision 2015* [2015] FWCFB 8200 at [17] of the summary following [367].

[80] *Stage 1 decision* at [1059]–[1060].

[81] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 at [354].

[82] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 at [355].

[83] *Stage 1 decision* at [1083].

[84] Explanatory Memorandum, Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022.

[85] Commonwealth submissions dated 16 December 2022 at [48].

[86] Commonwealth submissions dated 16 December 2022 at [45].

[87] Commonwealth submissions dated 16 December 2022 at [46].

[88] Commonwealth submissions dated 16 December 2022 at [54].

[89] Commonwealth submissions dated 16 December 2022 at [55].

[90] Commonwealth submissions dated 16 December 2022 at [58].

[91] Commonwealth submissions dated 16 December 2022 at [59].

[92] Commonwealth submissions dated 16 December 2022 at [60].

[93] Commonwealth submissions dated 16 December 2022 at [61]–[62].

[94] Commonwealth submissions dated 16 December 2022 at [63].

[95] Commonwealth submissions dated 16 December 2022 at [64].

[96] Commonwealth submissions dated 16 December 2022 at [65].

[97] Commonwealth submissions dated 16 December 2022 at [66] citing the *Stage 1 decision* at [356] and [1048].

[98] Commonwealth submissions dated 16 December 2022 at [67] citing the *Stage 1 decision* at [758].

[99] Commonwealth submissions dated 16 December 2022 at [68].

[100] Commonwealth submissions dated 16 December 2022 at [69].

[101] HSU submissions dated 20 January 2023 at [8].

[102] HSU submissions dated 20 January 2023 at [8].

[103] HSU submissions dated 20 January 2023 at [9].

[104] HSU submissions dated 20 January 2023 at [10].

[105] *Stage 1 decision* at [355].

[106] HSU submissions dated 20 January 2023 at [11].

[107] HSU submissions dated 20 January 2023 at [11].

[108] HSU submissions dated 20 January 2023 at [11].

[109] HSU submissions dated 20 January 2023 at [31].

[110] HSU submissions dated 20 January 2023 at [42].

[111] HSU submissions dated 20 January 2023 at [42].

[112] ANMF submissions dated 20 January 2023 at [14].

[113] ANMF submissions dated 20 January 2023 at [15].

[114] ANMF submissions dated 20 January 2023 at [20].

[115] ANMF submissions dated 20 January 2023 at [24].

[116] ANMF submissions dated 20 January 2023 at [25].

[117] ANMF submissions dated 20 January 2023 at [26].

[118] ANMF submissions dated 20 January 2023 at [27].

[119] ANMF submissions dated 20 January 2023 at [30]-[32].

[120] ANMF submissions dated 20 January 2023 at [33]-[34] citing the *Stage 1 decision at [866]*.

[121] ANMF submissions dated 20 January 2023 at [35].

[122] ANMF submissions dated 20 January 2023 at [37]-[38] citing the *Stage 1 decision* at [356].

[123] ANMF submissions dated 20 January 2023 at [39]-[47] citing the *Stage 1 decision* at [856].

[124] ANMF submissions dated 20 January 2023 at [47].

[125] ANMF submissions dated 20 January 2023 at [49].

[126] ANMF submissions dated 20 January 2023 at [52].

[127] ANMF submissions dated 20 January 2023 at [53].

[128] ANMF submissions dated 20 January 2023 at [54]-[58].

[129] ANMF submissions dated 20 January 2023 at [62].

[130] At [345]-[347].

[131] ANMF submissions dated 20 January 2023 at [65] citing the *Secure Jobs Better Pay Explanatory Memorandum* [345]-[347].

[132] ANMF submissions dated 20 January 2023 at [66].

[133] ANMF submissions dated 20 January 2023 at [67]

[134] ANMF submissions dated 20 January 2023 at [68]-[69]. See also evidence from Assoc Prof Smith and Dr Lyons summarised ANMF closing submissions dated 22 July 2022 at [780]–[783] and ANMF closing submissions in reply dated 17 August 2022 at [339]–[357].

[135] UWU submissions dated 20 January 2023 at [2(c)].

[136] UWU submissions dated 20 January 2023 at [8]; Commonwealth Submissions dated 16 December at [37]-[69].

[137] UWU submissions dated 20 January 2023 at [17] citing [2022] FWCFB 200 at [1053]-[1063].

[138] UWU submissions dated 20 January 2023 at [18].

[139] UWU submissions dated 20 January 2023 at [18].

[140] [2015] FWCFB 8200.

[141] UWU submissions dated 20 January 2023 at [19] citing *Equal Renumeration Decision 2015* [2015] FWCFB 820010.

[142] UWU submissions dated 20 January 2023 at [19].

[143] UWU submissions dated 20 January 2023 at [20] citing *Stage 1 decision* at [1059].

[144] UWU submissions dated 20 January 2023 at [21].

[145] UWU submissions dated 20 January 2023 at [22].

[146] UWU submissions dated 20 January 2023 at [23] citing HSU submissions dated 20 January 2023 at [7]-[11], [38]-42].

[147] UWU submissions dated 20 January 2023 at [29]-[30].

[148] Joint Employers submissions dated 20 January 2023 at [24]-[25].

[149] Joint Employers submissions dated 20 January 2023 at [69]-[71].

[150] *Stage 1 decision* at [1072].

[151] Joint Employers submissions dated 20 January 2023 at [72]-[73].

[152] Commonwealth submissions in reply dated 10 February 2023 at [13].

[153] Commonwealth submissions in reply dated 10 February 2023 at [14] citing Explanatory Memorandum Secure Jobs, Better Pay.

[154] Commonwealth submissions in reply dated 10 February 2023 at [15] citing the ANMF submissions dated 20 January 2023 at [83]-[85]; and HSU submissions dated 20 January 2023 at [18].

[155] Commonwealth submissions in reply dated 10 February 2023 at [15],

[156] HSU submissions in reply dated 9 February 2023 at [2]-[3].

[157] HSU submissions in reply dated 9 February 2023 at [4].

[158] HSU submissions in reply dated 9 February 2023 at [5] citing the Joint Employers submission dated 20 January 2023.

[159] HSU submissions in reply dated 9 February 2023 at [6]-[7].

[160] HSU submissions in reply dated 9 February 2023 at [35]-[36].

[161] ANMF submission in reply dated 9 February 2023 at [6] citing the Joint Employers submission dated 20 January at [12].

[162] ANMF submission in reply dated 9 February 2023 at [7] citing the Joint Employers submission dated 20 January at [20].

[163] ANMF submission in reply dated 9 February 2023 at [8].

[164] ANMF submission in reply dated 9 February 2023 at [8].

[165] ANMF submission in reply dated 9 February 2023 at [9] citing the Joint Employers submission dated 20 January at [24]-[26].

[166] ANMF submission in reply dated 9 February 2023 at [9].

[167] ANMF submission in reply dated 9 February 2023 at [11].

[168] ANMF submission in reply dated 9 February 2023 at [12] citing the Joint Employers submissions dated 20 January at [39]; [17]-[28].

[169] ANMF submission in reply dated 9 February 2023 at [16].

[170] ANMF submission in reply dated 9 February 2023 at [18] citing ANMF submission dated 20 January 2023 at [22]-[26].

[171] ANMF submission in reply dated 9 February 2023 at [37] citing the HSU submissions dated 20 January 2023 at [8].

[172] ANMF submission in reply dated 9 February 2023 at [38] citing the HSU submissions dated 20 January 2023 at [42]. [14]-[16], [19], [27]-[28] and [43]-[48].

[173] Joint Employers submissions in reply dated 9 February 2023 at [46].

[174] Joint Employers submissions in reply dated 9 February 2023 at [47].

[175] Joint Employers submissions in reply dated 9 February 2023 at [48].

[176] Joint Employers submissions in reply dated 9 February 2023 at [50].

[177] *Stage 1 decision* at [758], [1048].

[178] *Stage 1 decision* at [829], [865].

[179] *Stage 1 decision* at [1095].

[180] *Stage 1 decision* at [1083].

[181] [2023] FWCFB 32.

[182] Commonwealth submissions dated 16 December 2022 at [8].

[183] Commonwealth submissions dated 16 December 2022 at [9].

[184] Commonwealth submissions dated 16 December 2022 at [10].

[185] Commonwealth submissions dated 16 December 2022 at [11].

[186] Commonwealth submissions dated 16 December 2022 at [12].

[187] Commonwealth submissions dated 16 December 2022 at [13].

[188] Commonwealth submissions dated 16 December 2022 at [14]–[16].

[189] Commonwealth submissions dated 16 December 2022 at [17].

[190] Commonwealth submissions dated 16 December 2022 at [18].

[191] Commonwealth submissions dated 16 December 2022 at [26] citing *Australian Workers' Union* [2022] FWCFB 4 at[154].

[192] Commonwealth submissions dated 16 December 2022 at [27].

[193] [2021] FWCFB 6021.

[194] Commonwealth submissions dated 16 December 2022 at [28]–[30].

[195] Commonwealth submissions dated 16 December 2022 at [31].

[196] Commonwealth submissions dated 16 December 2022 at [32].

[197] Commonwealth submissions dated 16 December 2022 at [20].

[198] Commonwealth submissions dated 16 December 2022 at [21].

[199] Commonwealth submissions dated 16 December 2022 at [22] citing *Stage 1 decision* at [904].

[200] Commonwealth submissions dated 16 December 2022 at [23].

[201] Commonwealth submissions dated 16 December 2022 at [24].

[202] HSU submissions dated 20 January 2023 at [12].

[203] HSU submissions dated 20 January 2023 at [13] citing *Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001; *Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch (130N-NSW)* [2021] FWCFB 6021; *Re Australian Workers' Union* [2022] FWCFB 4; *Stage 1 decision* at [976]-[990].

[204] HSU submissions dated 20 January 2023 at [14].

[205] Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect*, dated 1 March 2021.

[206] HSU submissions dated 20 January 2023 [15] citing *Stage 1 decision* at [890] and [899]; [922] and [1004]; [938] and [967]-[968]; [1010]-[1012]; 1039; 1048; 1072 and 1084.

[207] HSU submissions dated 20 January 2023 at [16(a)-(g)].

[208] HSU submissions dated 20 January 2023 at [16].

[209] *Stage 1 decision* at [922].

[210] 4 yearly review of modern awards – Award stage – Group 4 – Aged Care Award 2010 – Substantive claims [2019] FWCFB 7094 at [39].

[211] HSU submissions dated 20 January 2023 at [14].

[212] HSU submissions dated 20 January 2023 at [17].

[213] HSU submissions dated 20 January 2023 at [18].

[214] HSU submissions dated 20 January 2023 at [19].

[215] HSU submissions dated 20 January 2023 at [21].

[216] HSU submissions dated 20 January 2023 at [22]-[23].

[217] HSU submissions dated 20 January 2023 at [25].

[218] HSU submissions dated 20 January 2023 at [26] citing Commonwealth Submissions dated 8 August 2022.

[219] HSU submissions dated 20 January 2023 at [27].

[220] HSU submissions dated 20 January 2023 at [28] citing the *Stage 1 decision* at [911].

[221] HSU submissions dated 20 January 2023 at [28].

[222] HSU submissions dated 20 January 2023 at [29].

[223] HSU submissions dated 20 January 2023 at [43]-[45].

[224] HSU submissions dated 20 January 2023 at [48] citing *SCHADS 4 yearly review Substantive Claims decision* [2019] FWCFB 6067.

[225] HSU submissions dated 20 January 2023 at [48]; *Stage 1 decision* at [1039].

[226] HSU submissions dated 20 January 2023 at [48].

[227] Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023.

[228] Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [17]-[19].

[229] Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [27]-[28].

[230] Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [29]-[32].

[231] Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [31].

[232] Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [32].

[233] Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [33]-[34].

[234] Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [35]-[36].

[235] Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [40]-[41].

[236] Professor Kathleen Eagar, *Second supplementary report of Dr Kathleen Eagar* dated 20 January 2023 at [42]-[44].

[237] ANMF submissions dated 20 January 2023 at [72]-[74].

[238] ANMF submissions dated 20 January 2023 at [77].

[239] ANMF submissions dated 20 January 2023 at [78]-[79] citing *Stage 1 decision* at [974]-[990].

[240] ANMF submissions dated 20 January 2023 at [81] citing *Stage 1 decision* at [1004].

[241] ANMF submissions dated 20 January 2023 at [83].

[242] ANMF submissions dated 20 January 2023 at [82]-[83].

[243] ANMF submissions dated 20 January 2023 at [84]-[85].

[244] ANMF submissions dated 20 January 2023 at [87] citing s 166(4) FW Act.

[245] ANMF submissions dated 20 January 2023 at [87].

[246] ANMF submissions dated 20 January 2023 at [89].

[247] ANMF submissions dated 20 January 2023 at [97].

[248] ANMF submissions dated 20 January 2023 at [100].

[249] ANMF submissions dated 20 January 2023 at [96] citing Commonwealth Submissions dated 16 December 2023 at [12.3].

[250] UWU submissions dated 20 January 2023 at [31] citing Commonwealth submissions dated 16 December at [5], [27] & [31].

[251] UWU submissions dated 20 January 2023 at [32] HSU submissions dated 20 January 2023 at [19].

[252] UWU submissions dated 20 January 2023 at [33].

[253] UWU submissions dated 20 January 2023 at [34].

[254] UWU submissions dated 20 January 2023 at [35] citing the *Stage 1 Decision* at [984]; *4 yearly review of modern awards – Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001 at [69] (the Penalty Rates Transitional Decision).

[255] UWU submissions dated 20 January 2023 at [35].

[256] UWU submissions dated 20 January 2023 at [35].

[257] UWU submissions dated 20 January 2023 at [39].

[258] UWU submissions dated 20 January 2023 at [40].

[259] UWU submissions dated 20 January 2023 at [41].

[260] Reply Witness statement of Lauren Elizabeth Beamer Hutchins, LH-12, "Introduction".

[261] Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect*, dated 1 March 2021, Volume 2, section 4.10, at p.213.

[262] UWU submissions dated 20 January 2023 at [46(1)].

[263] UWU submissions dated 20 January 2023 at [46] citing [2005] AIRC 28, PR954938 at [368] – [374].

[264] UWU submissions dated 20 January 2023 at [46] citing *Penalty Rates Transitional Decision* at [138].

[265] UWU submissions dated 20 January 2023 at [46].

[266] UWU submissions dated 20 January 2023 at [26] citing Commonwealth Submissions dated 16 December at [8].

[267] UWU submissions dated 20 January 2023 at [26].

[268] Transcript, 13 February 2023 at PN501.

[269] AWU submissions dated 20 January 2023 at [3].

[270] AWU submissions dated 20 January 2023 at [4].

[271] AWU submissions dated 20 January 2023 at [6].

[272] AWU submissions dated 20 January 2023 at [7] and Attachment AWU1.

[273] AWU submissions dated 20 January 2023 at [8].

[274] AWU submissions dated 20 January 2023 at [9].

[275] AWU submissions dated 20 January 2023 at [10]-[13].

[276] AWU submissions dated 20 January 2023 at [15].

[277] AWU submissions dated 20 January 2023 at [16]-[17].

[278] AWU submissions dated 20 January 2023 at [8] citing the Joint Statement dated 16 December 2022 at [1]–[6].

[279] AWU submissions dated 20 January 2023 at [18].

[280] AWU submissions dated 20 January 2023 at [19] citing *Application by Independent Education Union of Australia New South Wales/Australian Capital Territory (130N-NSW)* [2021] FWCFB 6021.

[281] AWU submissions dated 20 January 2023 at [20].

[282] AWU submissions dated 20 January 2023 at [22].

[283] AWU submissions dated 20 January 2023 at [23].

[284] Transcript, 13 February 2023 at PN512.

[285] Joint Employers submissions dated 20 January 2023 at [57]. citing *Stage 1 decision* at [976]–[990].

[286] Joint Employers submissions dated 20 January 2023 at [80]-[81].

[287] Joint Employers submissions dated 20 January 2023 at [82].

[288] Joint Employers submissions dated 20 January 2023 at [84] citing *Australian Workers' Union* [2022] FWCFB 4, [154], quoted at [980] of the *Stage 1 decision;* see FW Act s 166(1)(a).

[289] Joint Employers submissions dated 20 January 2023 at [83]-[86]; see Commonwealth submissions dated 16 December 2022.

[290] Joint Employers submissions dated 20 January 2023 at [87].

[291] [2017] FWCFB 3011.

[292] *Penalty Rates – Transitional Arrangements* [2017] FWCFB 3001 as cited in *Stage 1 decision* at [980].

[293] Joint Employers submissions dated 20 January 2023 at [90].

[294] Joint Employers submissions dated 20 January 2023 at [91].

[295] Joint Employers submissions dated 20 January 2023 at [92]-[93] citing *Stage 1 decision;* see FW Act s 166(1)(a).See also *Application by Independent Education Union of Australia-New South Wales/Australian Capital Territory Branch* [2021] FWCFB 6021.

[296] Joint Employers submissions dated 20 January 2023 at [46].

[297] Joint Employers submissions dated 20 January 2023 at [45] citing *Stage 1 decision* at [1066], summarising the Joint Employers closing submissions dated 22 July 2022 at [23.20].

[298] Joint Employers submissions dated 20 January 2023 at [48].

[299] Joint Employers submissions dated 20 January 2023 at [49] citing the *Stage 1 decision* at [904].

[300] Joint Employers submissions dated 20 January 2023 at [49]-[51].

[301] Joint Employers submissions dated 20 January 2023 at [53]; see also *Stage 1 decision* at [1065].

[302] Joint Employers submissions dated 20 January 2023 at [55]-[57].

[303] Joint Employers submissions dated 20 January 2023 at [55]-[59].

[304] Joint Employers submissions dated 20 January 2023 at [60].

[305] Joint Employers submissions dated 20 January 2023 at [62].

[306] Commonwealth submissions in reply dated 10 February 2023 at [2] citing Commonwealth submissions dated 8 August 2022.

[307] Commonwealth submissions in reply dated 10 February 2023 at [4].

[308] Commonwealth submissions in reply dated 10 February 2023 at [5] citing Commonwealth submissions dated 16 December 2022.

[309] Commonwealth submissions in reply dated 10 February 2023 at [8] citing the HSU submissions dated 20 January 2023 at [21].

[310] Commonwealth submissions in reply dated 10 February 2023 at [9] citing the Joint Employer Submission dated 20 January 2023 at [48]; and Commonwealth submissions dated 16 December 2022 at [14]-[18].

[311] Commonwealth submissions in reply dated 10 February 2023 at [10].

[312] Commonwealth submissions in reply dated 10 February 2023 at [11] citing HSU submissions dated 20 January 2023 at [19]; ANMF submissions dated 20 January 2023 at [77] and [86]–[87]; UWU submissions dated 20 January 2023 at [2](b).

[313] Commonwealth submissions in reply dated 10 February 2023 at [12].

[314] Commonwealth submissions in reply dated 10 February 2023.

[315] Commonwealth submissions in reply dated 10 February 2023 Annexure at [2] citing the Eagar second supplementary report.

[316] Commonwealth submissions in reply dated 10 February 2023 Annexure at [2] citing The Commonwealth's submissions dated 16 December 2022 at [12.3].

[317] Commonwealth submissions in reply dated 10 February 2023 Annexure at [3] citing the Eagar second supplementary report at [3].

[318] Commonwealth submissions in reply dated 10 February 2023 Annexure at [3].

[319] Commonwealth submissions in reply dated 10 February 2023 Annexure at [4].

[320] Commonwealth submissions in reply dated 10 February 2023 Annexure at [6].

[321] Commonwealth submissions in reply dated 10 February 2023 Annexure at [7].

[322] Commonwealth submissions in reply dated 10 February 2023 Annexure at [8] citing the Eagar second supplementary report at [32]-[34].

[323] Commonwealth submissions in reply dated 10 February 2023 Annexure at [8].

[324] Commonwealth submissions in reply dated 10 February 2023 Annexure at [9] citing the Eagar second supplementary report at [34].

[325] Commonwealth submissions in reply dated 10 February 2023 Annexure at [9].

[326] Commonwealth submissions in reply dated 10 February 2023 Annexure at [10.2] citing Commonwealth Submissions dated 16 December 2022 at [11.2].

[327] Commonwealth submissions in reply dated 10 February 2023 Annexure at [10.2] citing Commonwealth Submissions dated 16 December 2022 at [11.3].

[328] Commonwealth submissions in reply dated 10 February 2023 Annexure at [10].

[329] Transcript, 13 February 2023 at PN436.

[330] Transcript, 13 February 2023 at PN437.

[331] HSU submissions in reply dated 9 February 2023 at [11] citing the Joint Employers submissions dated 20 January 2023 at [51]-[52].

[332] HSU submissions in reply dated 9 February 2023 at [11] citing HSU submissions dated 20 January 2023 at [47]-[48].

[333] HSU submissions in reply dated 9 February 2023 at [12]-[14] citing the Joint Employers submissions dated 20 January 2023 at [42].

[334] HSU submissions in reply dated 9 February 2023 at [15]-[16] citing the Commonwealth submissions dated 29 August 2022 at [5]-[6], [16].

[335] HSU submissions in reply dated 9 February 2023 at [17].

[336] HSU submissions in reply dated 9 February 2023 at [18] citing Commonwealth Submissions dated 16 December 202 at [5.1]–[5.2].

[337] HSU submissions in reply dated 9 February 2023 at [18].

[338] HSU submissions in reply dated 9 February 2023 at [19].

[339] HSU submissions in reply dated 9 February 2023 at [20].

[340] Commonwealth submissions dated 16 December 2022 at [14]-[18].

[341] HSU submissions in reply dated 9 February 2023 at [21] citing the Joint Employers submissions dated 20 January 2023 at [48].

[342] HSU submissions in reply dated 9 February 2023 at [22] citing the e Joint Employers submissions dated 20 January 2023 at [52].

[343] HSU submissions in reply dated 9 February 2023 at [22] citing The Joint Statement dated 16 December 2022 at [2].

[344] HSU submissions in reply dated 9 February 2023 at [23].

[345] HSU submissions in reply dated 9 February 2023 at [24] citing the Joint Employer submissions dated 20 January 2023 at [55].

[346] HSU submissions in reply dated 9 February 2023 at [24].

[347] HSU submissions in reply dated 9 February 2023 at [25].

[348] HSU submissions in reply dated 9 February 2023 at [26].

[349] HSU submissions in reply dated 9 February 2023 at [27] citing the Second Supplementary Eagar Report at [28].

[350] HSU submissions in reply dated 9 February 2023 at [27] citing the Second Supplementary Eagar Report at [31(b)]-[32].

[351] HSU submissions in reply dated 9 February 2023 at [27] citing the Second Supplementary Eagar Report at [233]-[34].

[352] HSU submissions in reply dated 9 February 2023 at [28].

[353] HSU submissions in reply dated 9 February 2023 at [29].

[354] HSU submissions in reply dated 9 February 2023 at [31] citing the Joint Employer submissions dated 20 January 2023 at [86].

[355] HSU submissions in reply dated 9 February 2023 at [32].

[356] HSU submissions in reply dated 9 February 2023 at [33] see statement of Paul Sadler dated 1 March 2022 at [48]-[52]; Statement of Anna-Marie Wade dated 23 May 2022 at [26]-[45].

[357] HSU submissions in reply dated 9 February 2023 at [33] citing reply witness statement of Lauren Hutchins dated 22 April 2022 at [43]-[44].

[358] HSU submissions in reply dated 9 February 2023 at [33].

[359] HSU submissions in reply dated 9 February 2023 at [37] citing ANMF submissions dated 20 January 2023 at [77] and [86]-[89].

[360] HSU submissions in reply dated 9 February 2023 at [37].

[361] [2022] FWCFB 4.

[362] HSU submissions in reply dated 9 February 2023 at [38].

[363] HSU submissions in reply dated 9 February 2023 at [39] citing ANMF submissions dated 20 January 2023 at [96].

[364] HSU submissions in reply dated 9 February 2023 at [39].

[365] Transcript, 13 February 2023 at PN336-PN337.

[366] Transcript, 13 February 2023 at PN338-PN342.

[367] Transcript, 13 February 2023 at PN344-PN347.

[368] Transcript, 13 February 2023 at PN344-PN348; citing *Social, Community, Home Care and Disability Services Industry Award 2010*, [2019] FWCFB 6067 at [136]-[138].

[369] Transcript, 13 February 2023 at PN360.

[370] [2023] FWCFB 32.

[371] Transcript, 13 February 2023 at PN386.

[372] ANMF submissions in reply dated 9 February 2023 at [19] citing ANMF submissions dated 22 April 2022 at [148]-[155]; ANMF closing submissions dated 22 July 2022 at [849]-[855]; ANMF closing submissions in reply dated 17 August 2022 at [200].

[373] ANMF submissions in reply dated 9 February 2023 at [20]-[24].

[374] Joint Employers submissions dated 20 January at [44] and [82(a)].

[375] ANMF submissions in reply dated 9 February 2023 at [25].

[376] ANMF submissions in reply dated 9 February 2023 at [26] citing Joint Employers submission dated 20 January at [47].

[377] ANMF submissions in reply dated 9 February 2023 at [26] citing Joint Employers submission dated 20 January at [51].

[378] ANMF submissions in reply dated 9 February 2023 at [26] citing Joint Employers submission dated 20 January at [53].

[379] ANMF submissions in reply dated 9 February 2023 at [26].

[380] Joint Employers submissions dated 20 January at [55]-[61] and [82(e)].

[381] ANMF submissions in reply dated 9 February 2023 at [27].

[382] Joint Employers submissions dated 20 January at [58].

[383] The ANMF submissions in reply dated 9 February 2023 at [28].

[384] Joint Employers submissions dated 20 January at [59]-[61].

[385] ANMF submissions in reply dated 9 February 2023 at [29].

[386] Joint Employers submissions dated 20 January at [88]-[89].

[387] HSU submissions dated 20 January 2023 at [13].

[388] ANMF submissions in reply dated 9 February 2023 at [30].

[389] ANMF submissions in reply dated 9 February 2023 at [31] citing the Joint Employers submission dated 20 January at [90].

[390] ANMF submissions in reply dated 9 February 2023 at [32].

[391] ANMF submissions in reply dated 9 February 2023 at [34].

[392] ANMF submissions in reply dated 9 February 2023 at [35] citing Joint Employers submission dated 20 January at [92].

[393] ANMF submissions in reply dated 9 February 2023 at [35] citing Joint Employers submission dated 20 January at [92].

[394] ANMF submissions in reply dated 9 February 2023 at [36] citing Joint Employers submission dated 20 January at [91].

[395] ANMF submissions in reply dated 9 February 2023 at [36].

[396] ANMF submissions in reply dated 9 February 2023 at [38] citing HSU submissions dated 20 January 2023 at [42], [14]-[16], [19], [27]-[28] and [43]-[48].

[397] ANMF submissions in reply dated 9 February 2023 at [39] citing UWU submissions dated 20 January 2023 at [41]. [43]-[46].

[398] ANMF submissions in reply dated 9 February 2023 at [39] citing AWU submissions dated 20 January 2023.

[399] ANMF submissions in reply dated 9 February 2023 at [40] citing the Commonwealth submissions dated 16 December 2023.

[400] ANMF submissions in reply dated 9 February 2023 at [40].

[401] Transcript, 13 February 2023 at PN468.

[402] Transcript, 13 February 2023 at PN473; PN487.

[403] Transcript, 13 February 2023 at PN444.

[404] Joint Employers submissions in reply dated 9 February 2023 at [4].

[405] Joint Employers submissions in reply dated 9 February 2023 at [6].

[406] Joint Employers submissions in reply dated 9 February 2023 at [7]

[407] Joint Employers submissions in reply dated 9 February 2023 at [8].

[408] Joint Employers submissions in reply dated 9 February 2023 at [9].

[409] Joint Employers submissions in reply dated 9 February 2023 at [11].

[410] Joint Employers submissions in reply dated 9 February 2023 at [12]-[13].

[411] Joint Employers submissions in reply dated 9 February 2023 at [14]-[15].

[412] Joint Employers submissions in reply dated 9 February 2023 at [16] citing statement of Grant Corderoy, 8 February 2023 at [32].

[413] Joint Employers submissions in reply dated 9 February 2023 at [17] and [19].

[414] Joint Employers submissions in reply dated 9 February 2023 at [18].

[415] Joint Employers submissions in reply dated 9 February 2023 at [18] citing statement of Grant Corderoy dated 8 February 2023 and Stuart Brown Report p 1.

[416] Joint Employers submissions in reply dated 9 February 2023 at [8] Corderoy and StuartBrown Report p 3.

[417] Joint Employers submissions in reply dated 9 February 2023 at [20] citing StuartBrown Report Table 1 p 9.

[418] Joint Employers submissions in reply dated 9 February 2023 at [21].

[419] Joint Employers submissions in reply dated 9 February 2023 at [22] citing Witness Statement of Grant Corderoy dated February 2023, [34].

[420] Joint Employers submissions in reply dated 9 February 2023 at [23].

[421] Joint Employers submissions in reply dated 9 February 2023 at [24].

[422] Joint Employers submissions in reply dated 9 February 2023 at [25].

[423] Joint Employers submissions in reply dated 9 February 2023 at [26].

[424] Joint Employers submissions in reply dated 9 February 2023 at [27].

[425] Joint Employers submissions in reply dated 9 February 2023 at [27]-[28].

[426] Joint Employers submissions in reply dated 9 February 2023 at [30], citing Amended statement of Anna-Marie Wade dated 23 May 2022 at [15]-[19].

[427] Joint Employers submissions in reply dated 9 February 2023 at [31].

[428] Joint Employers submissions in reply dated 9 February 2023 at [35-36].

[429] Joint Employers submissions in reply dated 9 February 2023 at [37]-[40].

[430] Joint Employers submissions in reply dated 9 February 2023 at [41] citing Commonwealth submission dated 16 December 2022 at [8]-[18]

[431] *Re 4 yearly review of modern awards – Penalty Rates* [2019] FWCFB 1001; *Re Annual Wage Review 2017-18* [2018] FWCFB 3500; *Re 4 yearly review of modern awards - Pharmacy Industry Award 2010* [2018] FWCFB 7621; *Re Independent Education Union of Australia* [2021] FWCFB 2051; *Re Alpine Resorts Award 2010* [2018] FWCFB 4984.

[432] Transcript, 13 February at PN541.

[433] Transcript, 13 February 2023 at PN547.

[434] Transcript, 13 February 2023 at PN561-PN564.

[435] Transcript, 13 February 2023 at PN570.

[436] Transcript 13 February 2023 at PN523.

[437] Joint Employers submissions in reply dated 9 February 2023 at [12].

[438] Transcript, 13 February 2023, PN214-PN312.

[439] Witness Statement of Grant Corderoy, dated 9 February 2023 at [1].

[440] Witness Statement of Grant Corderoy, dated 9 February 2023 at [5]-[6].

[441] Witness Statement of Grant Corderoy, dated 9 February 2023 at [14]-[21]

[442] Witness Statement of Grant Corderoy, dated 9 February 2023 at [15].

[443] Witness Statement of Grant Corderoy, dated 9 February 2023 at [14]-[31].

[444] Witness Statement of Grant Corderoy, dated 9 February 2023 at [32]-[40].

[445] Witness Statement of Grant Corderoy, dated 9 February 2023 at [33].

[446] Witness Statement of Grant Corderoy, dated 9 February 2023 at [34].

[447] Transcript, 13 February 2023, PN216-PN269.

[448] Transcript, 13 February 2023, PN270-PN312.

[449] Transcript, 13 February 2023, PN227-PN229.

[450] Transcript, 13 February 2023, PN231.

[451] Transcript, 13 February 2023, PN233-PN257.

[452] Transcript, 13 February 2023, PN251, PN254.

[453] Transcript, 13 February 2023, PN253-PN254.

[454] Transcript, 13 February 2023, PN255.

[455] Transcript, 13 February 2023, PN260.

[456] Transcript, 13 February 2023, PN270-PN294.

[457] Transcript, 13 February 2023, PN276 and PN277.

[458] Transcript, 13 February 2023, PN279.

[459] Transcript, 13 February 2023, PN281.

[460] Transcript, 13 February 2023, PN290-PN295.

[461] Transcript, 13 February 2023, PN291.

[462] Transcript, 13 February 2023, PN292.

[463] Transcript, 13 February 2023, PN295-PN312.

[464] Transcript, 13 February 2023, PN301.

[465] Transcript, 13 February 2023, PN302-313.

[466] Transcript, 13 February 2023, PN303.

[467] Transcript, 13 February 2023, PN315-324.

[468] Witness Statement of Johannes Brockhaus, dated 9 February 2023 at [2]

[469] Witness Statement of Johannes Brockhaus, dated 9 February 2023 at [2]-[5], [7]-[14], [15]-[19], [20]-[26] and [27]-[34].

[470] Witness Statement of James Alexander Lachlan McLean Shaw, dated 9 February 2023 at [2].

[471] Witness Statement of James Alexander Lachlan McLean Shaw, dated 9 February 2023 at [5]-[15], [6]-[21] and [22]-[28].

[472] Witness Statement of Michelle Jenkins, dated 9 February 2023 at [2].

[473] Witness Statement of Michelle Jenkins, dated 9 February 2023 at [5]-[30].

[474] Witness Statement of Michelle Jenkins, dated 9 February 2023 at [31]-[34].

[475] Witness Statement of Michelle Jenkins, dated 9 February 2023 at [35]-[43].

[476] ANMF submissions dated 9 February 2023 at [20]; Transcript 13 February 2023 at PN123.

[477] Transcript 13 February 2023 at PN171.

[478] HSU submissions dated 17 February 2023 at [3].

[479] HSU submissions dated 17 February 2023 at [3]-[4].

[480] HSU submissions dated 17 February 2023 at [6].

[481] ANMF submissions dated 16 February 2023 at [2]-[3] citing the *Evidence Act 1995 (Cth)* s 79; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 604 [37] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[482] ANMF submissions dated 16 February 2023 at [5].

[483] ANMF submissions dated 16 February 2023 at [6].

[484] ANMF submissions dated 16 February 2023 at [7].

[485] ANMF submissions dated 16 February 2023 at [7] citing StewartBrown Aged Care Financial Performance Survey Sector Report (FY22) p 3.

[486] ANMF submissions dated 16 February 2023 at [7]-[10].

[487] ANMF submissions dated 16 February 2023 at [11].

[488] ANMF submissions dated 16 February 2023 at [12]-[13].

[489] ANMF submissions dated 16 February 2023 at [14].

[490] ANMF submissions dated 16 February 2023 at [15].

[491] ANMF submissions dated 16 February 2023 at [18].

[492] ANMF submissions dated 16 February 2023 at [19]-[23].

[493] ANMF submissions dated 16 February 2023 at [21]-[23].

[494] ANMF submissions dated 16 February 2023 at [24].

[495] ANMF submissions dated 16 February 2023 at [25].

[496] ANMF submissions dated 16 February 2023 at [25].

[497] ANMF submissions dated 16 February 2023 at [27].

[498] ANMF submissions dated 16 February 2023 at [26] citing Statement of Johannes Brockhaus dated 9 February 2023 at [2]-[6] and [31]-[33].

[499] Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [3].

[500] Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [3(a)].

[501] Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [3(b)].

[502] Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [3(d)].

[503] Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [3](c)(iv).

[504] Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [5].

[505] Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [5] citing *Health Sector Awards - Pandemic Leave* [2020] FWCFB 3561 (8 July 2020) at [99]

[506] Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [6].

[507] Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [7].

[508] Joint Employers submissions: Weight to be given to Reply Evidence, dated 17 February 2023 at [8].

[509] *Stage 1 decision* at [982].

[510] *Stage 1 decision* at [983].

[511] *Stage 1 decision* at [984].

[512] *Stage 1 decision* at [990].

[513] *Stage 1 decision* at [922].

[514] *Stage 1 decision* at [1006].

[515] *Stage 1 decision* at [916].

[516] *Stage 1 decision* at [915].

[517] HSU submissions dated 20 January 2023 at [31]; ANMF submissions dated 20 January 2023 at [104]; Joint Employers submissions dated 20 January 2023 at [74]-[79].

[518] *Stage 1 decision* at [1012].

[519] *Stage 1 decision* at [1012].

[520] Commonwealth submissions dated 16 December 2022 at [3.1].

[521] HSU submissions dated 20 January 2023 at [35].

[522] HSU submissions dated 20 January 2023 at [16](d).

[523] ANMF submissions dated 20 January 2023 at [90] citing Stage 1 decision at [1008].

[524] UWU submissions dated 20 January 2023 at [2(a)].

[525] UWU submissions dated 20 January 2023 at [10].

[526] Joint Employers submissions dated 20 January 2023 at [74]-[79].

[527] *Stage 1 decision* at [1028].

[528] *Stage 1 decision* at [1029].

[529] *Stage 1 decision* at [1030].

[530] Commonwealth submissions dated 16 December 2022 at [3.1].

[531] HSU submissions dated 20 January 2023 at [36].

[532] HSU submissions dated 20 January 2023 at [37].

[533] ANMF submissions dated 22 July 2022, at [857]-[869].

[534] ANMF submissions dated 20 January 2023 at [92] citing Stage 1 decision at [1028].

[535] UWU submissions dated 20 January 2023 at [11].

[536] UWU submissions dated 20 January 2023 at [12] citing ANMF Form 46 Application to vary a modern award (AM2021/63) dated 17 May 2021 at [27]; 4 November December at [1015].

[537] UWU submissions dated 20 January 2023 at [13].

[538] UWU submissions dated 20 January 2023 at [13].

[539] UWU submissions dated 20 January 2023 at [13].

[540] *Stage 1 decision* at [1038].

[541] *Stage 1 decision* at [1039]–[1040].

[542] Commonwealth submissions dated 16 December 2022 at [3.1].

[543] HSU submissions dated 20 January 2023 at [35].

[544] ANMF submissions dated 20 January 2023 at [93] citing *Stage 1 decision* at [1039].

[545] UWU submissions dated 20 January 2023 at [14].

[546] *Stage 1 decision* at [1008].

[547] Commonwealth submissions dated 16 December 2022 at [3.1].

[548] HSU submissions dated 20 January 2023 at [35].

[549] ANMF submissions dated 20 January 2023 at [90].

[550] *Stage 1 decision* at [1008].

[551] Commonwealth submissions dated 16 December 2022 at [3.1].

[552] HSU submissions dated 20 January 2023 at [35].

[553] ANMF submissions dated 20 January 2023 at [90].

[554] *Stage 1 decision* at [1008].

[555] Commonwealth submissions dated 16 December 2022 at [3.1].

[556] HSU submissions dated 20 January 2023 at [35].

[557] HSU submissions dated 20 January 2023 at [16(f)].

[558] HSU submissions dated 20 January 2023 at [16(f)].

[559] HSU submissions dated 20 January 2023 at [16(f)].

[560] ANMF submissions dated 20 January 2023 at [90].

[561] UWU submissions dated 20 January 2023 at [35].

[562] *Stage 1 decision* at [1072].

[563] Commonwealth submissions dated 16 December 2022 at [3(a)].

[564] HSU submissions dated 20 January 2023 at [35].

[565] HSU submissions dated 20 January 2023 at [16(h)].

[566] ANMF submissions dated 20 January 2023 at [102] citing *Stage 1 decision* at [1072].

[567] UWU submissions in reply dated 19 August 2022 at [18].

[568] UWU submissions dated 20 January 2023 at [27].

[569] Joint Employers submissions dated 20 January 2023 at [71].

[570] *Stage 1 decision* at [1075].

[571] *Stage 1 decision* at [1074].

[572] HSU submissions dated 20 January 2023 at [49].

[573] ANMF submissions dated 20 January 2023 at [105]-[110].

[574] Joint Employers submissions dated 20 January 2023 at [32].

[575] *Stage 1 decision* at [1079]–[1080].

[576] *Stage 1 decision* at [1081].

[577] *Stage 1 decision* at [1082].

FAIR WORK COMMISSION

Re Annual Wage Review 2022-23

[2023] FWCFB 3500

Hatcher J, President, Catanzariti and Asbury VPP, Hampton DP, Ms Labine-Romain, Professor Baird, Mr Cully

13 April, 17 May, 2 June 2023

Awards — Annual wage review of national minimum wage and modern award minimum wages — Characteristics of relevant part of workforce — New requirements on Fair Work Commission in conduct of Annual Wage Review — Cessation of alignment of reviewable wages with C14 classification wage rate — Interim alignment with C13 classification — Increase in modern award minimum wage — Effect on female workers — Elements of job security directive to Commission — Gender equality directive — Requirements — Definition of "low paid" — Improvement in gender pay gap — Ways of narrowing gap — Relevant research — Whether wage increase through Review would affect workers' employability or enterprise bargaining or general wages growth — Effect of inflation — Percentage increase in national minimum wage, modern award minimum wage and copied State awards — Time of implementation of increases — Fair Work Act 2009 (Cth), ss 3, 134, 284, 285, 302, 578.

Pursuant to s 285 of the *Fair Work Act 2009* (Cth) (the Act), the Fair Work Commission (the Commission) conducted its Annual Wage Review (the Review) of the national industrial relations system outside modern awards or enterprise agreements in order to make a national minimum wage (the NMW) order, as well as considering any necessary variation to modern award minimum wages. Its decision operated upon the wages of about 25% of the Australian employee workforce.

Held (increasing the NMW and the modern award minimum wage by 5.75%): (1) The characteristics of that part of the workforce which relied on modern award minimum wage rates, and was therefore directly affected by the Review decision of the Commission, were significantly different to the workforce as a whole. Such part of the workforce predominantly worked part-time hours, was highly casualised and predominantly female. Compared to the general workforce, they were also much more likely to be low paid, paid junior rates, or work for a small business.

(2) Under the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), the Commission was required to give greater emphasis than previously to the issues of gender equality and job security.

(3) The existing alignment between the NMW and the lowest modern award minimum wage rate (the C14 classification wage rate in modern awards) should end. As an interim step, the NMW should be aligned with the current C13 classification wage rate.

(4) Increases to modern award minimum wage rates would provide a disproportionate benefit to female workers and might contribute to narrowing the aggregate gender pay gap across the entire employee workforce.

(5) Since the 2022 amendments to the Act, the Commission was bound to take job security into account in its annual wage review, particularly the capacity of employees to enter into work characterised as secure. "Job security" in the award context was relevant to award terms which promoted regularity and predictability in hours of work and income and restricted the capacity of employers to terminate employment at will. The most pertinent of award provisions to job security were those dealing with rostering arrangements, minimum hours of work per day and per week, the payment of weekly or monthly rather than hourly wages, notice of termination of employment and redundancy pay.

(6) The previous directive in the Act to the Commission to consider "equal remuneration for work of equal or comparable value" had been subsumed, following amendments to the Act, into a broader mandate to take into account "the need to achieve gender equality", with "equal remuneration" being only one of a number of ways specified by which "gender equality" might be achieved.

(7) This new directive necessarily required the Commission to consider whether the existing NMW and modern award minimum wage rates constituted a properly valued and non-gender biased foundation upon which to make any wages adjustment.

(8) Because women were disproportionately award-reliant, and the Commission was now directed to take the gender pay gap into account in the context of the consideration of gender equality, this directive remained not only a factor weighing in favour of an increase in the NMW and modern award minimum wages, but a factor in ordering an increase in excess of labour market produced wage increases, as only an increase of that nature would operate to reduce the gender pay gap.

(9) The Commission would continue to define "low paid" as persons whose ordinary-time earnings were below two-thirds of median (adult) ordinary-time earnings of all full-time employees.

Re Annual Wage Review 2015-16 (2016) 258 IR 201 at [359], followed.

(10) The position whereby the NMW was simply set by reference to the C14 rate should not continue, particularly when almost all modern awards which contained a classification with a C14 rate prescribed a limit on the period employees could be classified and paid at that level, after which they would move automatically to a higher classification and pay rate. Furthermore, an employee classified at the C14 rate under a modern award might be entitled to a range of additional earnings-enhancing benefits such as weekend penalty rates, to which an employee on the NMW would not be entitled.

(11) The gender pay gap across all modern award-reliant employees was 1.8%, but it varied markedly by industry. Further research was required to gain a better understanding of how to compare male and female award-reliant earnings. It was unlikely that this pay gap, however measured, could be addressed by uniform percentage wage increases to modern award minimum wages, since that would not improve the position of female modern award-reliant employees relative to their male counterparts. The pay gap might better be addressed by considering whether wage rates in female-dominated industries were undervalued relative to male-dominated industries.

(12) The Commission was undertaking a research project to identify occupations and industries in which there was gender pay inequality and potential

undervaluation of work and qualifications. That research would inform future Reviews.

(13) It was unlikely that any uniform percentage increase to the NMW and modern award minimum wages, at least within a reasonable range, would negatively impact the capacity of individual employers to employ, or to continue to employ, workers on a permanent rather than casual basis.

(14) The requirement for the Commission to take into account the need to encourage collective bargaining focused attention on the consequential relationship, if any, between the exercise of modern award powers and the extent to which enterprise bargaining was occurring or might occur. It was not concerned with the outcome of enterprise bargaining.

(15) There was no sound basis to consider that, within a reasonable range, any increase the Commission ordered to the NMW and modern award minimum wage rates would either encourage or discourage enterprise bargaining.

(16) Since labour market conditions appeared to be softening, the Commission did not foresee any broader consequences for nominal wages growth arising from its decision, since wages of modern award-reliant employees constituted just 11.2% of the aggregate Australian wage bill.

(17) However, because of the make-up of the modern award-reliant cohort, the adverse effects of the high rate of inflation would have a disproportionate effect on female employees and employees in less secure employment.

(18) The NMW and modern award minimum wage rates would increase by 5.75% as from 1 July 2023.

(19) The Act did not authorise the termination of transitional instruments in the course of conduct of the Review.

Re Annual Wage Review 2016-17 (2017) 267 IR 241 at [697], followed.

(20) The same orders as to minimum rates in modern awards should be made for copied State awards, namely federal instruments which came into existence and applied when employees of non-national State public sector employers transferred employment to a national system employer. However in the case of two companies, Busways and Transdev, the increases in the NSW Bus copied State awards should be deferred to 1 January 2024.

Consideration of the statutory requirements on, and the functions and objectives of, the Commission in its conduct of an annual wage review.

Discussion of economic circumstances during 2022-2023.

Cases Cited

4 Yearly Review of Modern Awards — Miscellaneous Award 2010, Re [2020] FWCFB 1589.

4 Yearly Review of Modern Awards — Miscellaneous Award 2010, Re (2020) 292 IR 373.

4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010, Re (2018) 284 IR 121.

4 Yearly Review of Modern Awards — Preliminary Jurisdictional Issues, Re (2014) 241 IR 189.

Aboriginal Affairs, Minister for v Peko-Wallsend Ltd (1986) 162 CLR 24.

Aged Care Award 2010, Re (2022) 319 IR 127.

Annual Wage Review 2009-10, Re (2010) 193 IR 380.

Annual Wage Review 2014-15, Re (2015) 252 IR 119.

Annual Wage Review 2015-16, Re (2016) 258 IR 201.

Annual Wage Review 2016-17, Re (2017) 267 IR 241.

Annual Wage Review 2016-17, Re [2017] FWCFB 1931.
Annual Wage Review 2017-18, Re (2018) 279 IR 215.
Annual Wage Review 2018-19, Re (2019) 289 IR 316.
Annual Wage Review 2019-20, Re (2020) 297 IR 1.
Annual Wage Review 2020-21, Re (2021) 307 IR 203.
Annual Wage Review 2021-22, Re [2022] FWCFB 78.
Annual Wage Review 2021-22, Re [2022] FWCFB 113.
Annual Wage Review 2021-22, Re (2022) 315 IR 367.
Australian Liquor, Hospitality and Miscellaneous Workers Union, Re (unreported, AIRC (FB), PR954938, 13 January 2005).
Award Modernisation [2010] FWAFB 9916, Re (2010) 202 IR 150.
Declaration of General Ruling (State Wage Case 2022) [2022] QIRC 340.
Equal Remuneration Decision 2015 (2015) 256 IR 362.
Independent Education Union of Australia, Re [2021] FWCFB 2051.
National Wage Case 1983 (1983) 4 IR 429.
National Wage Case April 1991 (1991) 36 IR 120.
National Wage Case August 1988 (1988) 25 IR 170.
National Wage Case August 1989 (1989) 30 IR 81.
National Wage Case February 1989 Review (1989) 27 IR 196.
Paid Rates Review, Re (1998) 123 IR 240.
Review of certain C14 rates in modern awards [2023] FWC 716.
Safety Net Review — Wages — April 1997 (1997) 71 IR 1.
Section 157 proceeding, Re [2019] FWC 5934.
Shop, Distributive and Allied Employees Association v Australian Industry Group (2017) 253 FCR 368; 272 IR 88.
Titles (WA), Registrar of v Franzon (1975) 132 CLR 611.

Annual Wage Review 2022-23

G Manning, *J Wettinger*, *S Still*, *I Redmond* and *B McKenna*, for the Australian Government.

T Clarke and *S Peldova-McClelland*, for the Australian Council of Trade Unions.

B Ferguson, *R Bhatt*, *J Wilson* and *P Burn*, for the Australian Industry Group.

P Grist, *J Tinsley* and *S Farrow*, for the Australian Chamber of Commerce and Industry.

P Zahra and *N Tindley*, for the Australian Retailers Association.

S Manickam and *B Zhu*, for the Restaurant and Catering Industry Association of Australia.

C Massy, of counsel, *T Barnes*, *C Collman* and *M Kavanagh*, for the Australian Catholic Council for Employment Relations (on behalf of the Australian Catholic Bishops' Conference).

M Dunstan and *A Rodriguez*, for the Australian Nursing and Midwifery Federation (NSW Branch).

L Izzo and *T Lawrence*, for Australian Business Industrial, the NSW Business Chamber and Busways North West Pty Ltd.

R Bhatt, for Transdev Australasia Pty Ltd.

Cur adv vult

Table of Contents

Abbreviations and defined terms

Term	Abbreviation/defined term
2023-24 Budget	Budget
Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010 (2018) 284 IR 121	*Pharmacy Decision*
Characteristics of Employment	COE
Employee Earnings and Hours	EEH
Aged Care Award 2010	Aged Care Award
Re Aged Care Award 2010 (2022) 319 IR 127	*Aged Care Decision*
Annual Wage Review	Review
Australian Bureau of Statistics	ABS
Australian Business Industrial and the NSW Business Chamber	ABI
Australian Chamber of Commerce and Industry	ACCI
Australian Council of Trade Unions	ACTU
Australian Industrial Relations Commission	AIRC
Australian Industry Group	Ai Group
Re Australian Liquor, Hospitality and Miscellaneous Workers Union (unreported, AIRC (FB), PR954938, 13 January 2005)	*ACT Child Care Decision*
Average annualised wage increase	AAWI
Average weekly ordinary time earnings	AWOTE
Busways North West Pty Ltd	Busways

Term	Abbreviation/defined term
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia	CEPU
Construction, Forestry, Maritime, Mining and Energy Union	CFMMEU
Consumer Price Index	CPI
Convention on the Elimination of All Forms of Discrimination against Women	UN Convention
Convention concerning Discrimination in Respect of Employment and Occupation (No 111)	ILO Convention
Copied State awards	CSAs
Expert Panel	Panel
Fair Work Commission	Commission
Fair Work Act 2009 (Cth)	FW Act
Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth)	Transitional Act
Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth)	Amending Act
Federal Minimum Wage	FMW
Gross domestic product	GDP
JobSeeker Payment	JSP
Living Cost Index	LCI
Manufacturing and Associated Industries and Occupations Award 2020	Manufacturing Award
Metal Industry Award 1984 — Part I	Metal Industry Award
Minimum Income for Healthy Living	MIHL
Minimum Rates Adjustment	MRA
National minimum wage	NMW
National Employment Standards	NES
New South Wales	NSW
Newstart allowance	NSA
Organisation for Economic Co-operation and Development	OECD
President's statement: Occupational segregation and gender undervaluation	Gender undervaluation statement
Producer Price Index	PPI
Reserve Bank of Australia	RBA
Revised explanatory memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth)	REM
Social, Community, Home Care and Disability Services Award 2010	SCHADS Award
Transdev Australasia Pty Ltd	Transdev

Term	Abbreviation/defined term
Wage Price Index	WPI

Fair Work Commission

1. Overview of the decision

1 In the annual wage review (the Review) conducted pursuant to s 285 of the *Fair Work Act 2009* (Cth) (the FW Act), the Fair Work Commission is required to:

- review, and make, the national minimum wage (the NMW) order; and
- review modern award minimum wages, and may vary modern awards to change or revoke modern award minimum wages.

2 The statutory framework is described in more detail in section 2 of this decision. In summary, the NMW order applies only to persons in the national industrial relations system who are not covered by a modern award or an enterprise agreement. The NMW order sets the NMW, special NMWs applying to employees who are juniors, to whom training arrangements apply and persons with disability, and the casual loading for employees who are award/agreement free. The NMW order does not apply to employees covered by a modern award or enterprise agreement and the NMW does not set a floor for minimum wage rates in modern awards.

3 There are 121 modern awards which apply to employees in the national industrial relations system in various industries and occupations. There are also a small number of modern enterprise awards which apply to specific business enterprises. Each modern award sets minimum wage rates for employees working in the industry, occupations or enterprise covered by the award. These are usually expressed as yearly, weekly and/or hourly rates for specific work classifications.

4 The direct effect of the Review upon the Australian employee workforce is limited, as we explain in section 3 of this decision. The NMW only applies to a very small proportion of that workforce: only 0.7 per cent of employees are paid the NMW. As for modern awards, approximately 20.5 per cent of employees are paid in accordance with minimum wage rates in modern awards. There are some additional categories of employees who are also affected by the Review in a less direct way because, for example, they work under an enterprise agreement which provides for wage increases in line with Review outcomes or they work under State awards to which Review outcomes are "flowed on". However, these categories of employees are small. Our Review decision will therefore operate upon the wages of about a quarter of the Australian employee workforce.

5 It is also important to note that the characteristics of that part of the workforce which relies on modern award minimum wage rates, and are thus directly affected by our Review decision, are significantly different to the workforce as a whole. They predominantly work part-time hours, are predominantly female, and almost half are casual employees. Compared to the general workforce, they are also much more likely to be low paid, paid junior rates, and work for a small business. The characteristics of part-time hours and low (or lower) pay further restrict the broader economic effect of Review decisions: the total wages cost of the modern award-reliant workforce constitutes about 11 per cent of the national "wage bill", and the wage increases

awarded in the 2021-22 Review decision, for example, directly contributed less than 10 per cent of the total wages growth for calendar year 2022.[1] Furthermore, the modern award-reliant workforce is predominantly employed under a relatively small number of modern awards covering specific industries or occupations, so that the effect of the Review decision differs markedly between industry sectors.

6 The FW Act requires us to take into account specific considerations in conducting our review functions in respect of the NMW. These are set out in s 284(1) of the FW Act and, in relation to modern award minimum wages, also in s 134(1) of the FW Act. We deal specifically with these considerations in sections 3-8 of this decision. We are also required to take into account the object of the FW Act in s 3. Important amendments have been made to ss 3, 134(1) and 284(1) by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (the Amending Act) requiring us to give greater emphasis to the issues of gender equality and job security. We discuss those amendments and how these issues are to be taken into account in section 2.2 of this decision.

7 In discharging our Review functions, we have consulted with a range of stakeholders, including peak councils (the Australian Chamber of Commerce and Industry (ACCI), the Australian Council of Trade Unions (ACTU) and the Australian Industry Group (Ai Group)), registered employer and employee organisations, other employment groups, individual employers and employees, the Australian Government and State governments. Each of these have been given the opportunity to make written submissions and submissions in reply in accordance with s 289 of the FW Act, and to make oral submissions at a hearing before us conducted on 17 May 2023. A number of parties have advanced specific proposals for wage adjustments. These proposals are summarised in the Appendix to this decision. However, we emphasise that the Review process is not one of adjudication between competing proposals. While we have taken the submissions made into account, ultimately the statutory task is for us to make our own assessment of what constitutes a safety net of fair minimum wages having regard to the prescribed considerations.

8 We have decided to take two steps in relation to the NMW. *First*, for the reasons set out in section 5 of this decision, we have decided to end the alignment between the NMW and the C14 classification wage rate in modern awards — an alignment which has existed since 1997. The C14 rate is the lowest modern award minimum wage rate but was only ever intended to constitute a transitional entry rate for new employees. As such, it does not constitute a proper minimum wage safety net for award/agreement free employees in ongoing employment. A wider review, including supporting research, concerning the needs and circumstances of low-paid award/agreement free employees is required, but the interim step we have decided to take in this Review is to align the NMW with the current C13 classification wage rate, which in nearly all relevant awards is the lowest modern award classification rate applicable to ongoing employment. *Second*, we have decided to further increase the rate of the NMW by 5.75 per cent having regard to current circumstances relevant to the considerations in s 284(1). These increases will take effect from 1 July 2023. Having regard to the negligible proportion of the workforce to which the NMW applies, this outcome will not have discernible macro-economic effects.

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1 As measured by the Wage Price Index: see section 4.4 of this decision.

9 All modern award minimum wage rates will be increased by 5.75 per cent effective from 1 July 2023. In determining this amount, we have placed significant weight on the impact of the current rate of inflation on the ability of modern award-reliant employees to meet their basic financial needs. Inflation is reducing the real value of these employees' incomes and causing households financial stress. We have also taken into account the recent robustness of the labour market, and the fact that increases to modern award minimum wage rates will provide a disproportionate benefit to female workers and may contribute to narrowing the aggregate gender pay gap across the entire employee workforce. Moderating factors we have taken into account include the forthcoming increase to the Superannuation Guarantee contributions rate, the effect that an expected weakening in the labour market may have on casual employees and particular industries which have a higher proportion of modern award-reliant employees, the need to avoid entrenching high inflation expectations by taking a perceived wage indexation approach, and the recent weak performance in productivity growth.

10 The level of wage increase we have determined is, we consider, the most that can reasonably be justified in the current economic circumstances. We acknowledge that this increase will not maintain the real value of modern award minimum wages nor reverse the reduction in real value which has occurred over the last two years. In the medium to long term, it is desirable that modern award minimum wages maintain their real value and increase in line with the trend rate of national productivity growth. A return to that path is likely to be possible in future Reviews when there is a reversion to a lower inflationary environment and trend productivity growth.

11 We have identified in section 6 of this decision that there are significant issues concerning the potential undervaluation of work in modern award minimum wage rates applying to female-dominated industries and occupations. The scope of the present Review has prevented these gender equality issues being addressed to finality. However, the imperative of the amendments to the FW Act concerning gender equality made by the Amending Act is that these issues must be resolved in future Reviews or other Commission proceedings. The Commission will soon commence a research project to identify occupations and industries in which there is gender pay inequity and potential undervaluation of work and qualifications, and once completed this will underpin the consideration and determination of the identified issues. The finalisation of these matters may, depending upon the timing, occur as part of or in association with the 2023-24 Review.

2. The statutory framework

2.1. General principles

12 The FW Act provides that, each financial year, the Commission must conduct and complete a Review in which the Commission:

- must review modern award minimum wages;
- must review the NMW;
- may make one or more determinations varying modern awards to set, vary or revoke modern award minimum wages; and
- must make a NMW order.[2]

2 *Fair Work Act 2009* (Cth), ss 285(2)(a)(i)-(ii), (b), (c).

13 The Commission must be constituted by an Expert Panel (Panel) for the purpose of conducting a Review and making a NMW order or a determination in the Review.[3] An Expert Panel must consist of seven Commission members and must include the President of the Commission and three Expert Panel Members who have knowledge of, or experience in, workplace relations, economics, social policy, or business, industry or commerce.[4]

14 The NMW order applies to award/agreement free employees only. The NMW order must set:

- the NMW;[5]
- special NMWs which apply to employees who are juniors, to whom training arrangements apply or with a disability;[6] and
- the casual loading for award/agreement free employees.[7]

15 An award/agreement free employee cannot be paid less than the applicable rate of pay specified in the NMW order.[8]

16 The making of a NMW order and the review and variation of modern award minimum wages are separate, but related, functions. They are related because they both form part of the "safety net of fair, relevant and enforceable minimum terms and conditions" referred to in the object of the FW Act in s 3(b). Additionally, s 285(3) of the FW Act provides that, in exercising its powers to set, vary or revoke modern award minimum wages, the Commission "must take into account the rate of the national minimum wage that it proposes to set in the [R]eview". Consequently, it is necessary for the Commission in its conduct of the Review to first reach a conclusion about the rate of the NMW it proposes to set so that it may then take that proposed NMW rate into account in exercising its powers to set, vary or revoke modern award minimum wage rates.

17 The minimum wages objective set out in s 284(1) applies to the conduct of the Review, both in respect of the NMW and modern award minimum wages. Under s 284(1), the Commission is required to "establish and maintain a safety net of fair minimum wages", taking into account the matters specified in paras (a)-(e) of that subsection. The Amending Act amended s 284(1) to remove the existing para (d) and add an additional matter requiring consideration as follows:

> (aa) the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps; …

18 We give specific consideration to s 284(1)(aa) below.

19 In respect of modern award minimum wages (but not the NMW),[9] the modern awards objective in s 134(1) also applies to the Review. The modern awards objective requires the Commission to ensure that modern awards, together with the National Employment Standards (NES), provide a "fair and

3 *Fair Work Act 2009* (Cth), ss 617(1), (2).

4 *Fair Work Act 2009* (Cth), s 620(1).

5 *Fair Work Act 2009* (Cth), s 294(1)(a).

6 *Fair Work Act 2009* (Cth), s 294(1)(b). While, under s 294(4), a special NMW may apply to a "specified class of … those employees", no NMW order to date has applied to such a specified class.

7 *Fair Work Act 2009* (Cth), s 294(1)(c).

8 *Fair Work Act 2009* (Cth), s 294(2).

9 See *Fair Work Act 2009* (Cth), s 134(2).

relevant minimum safety net of terms and conditions", taking into account the particular matters identified in paras (a)-(h) of the subsection. The Amending Act has also amended s 134(1) by removing para (e), which referred to "the principle of equal remuneration for work of equal or comparable value", and adding two matters for consideration as follows:

> (aa) the need to improve access to secure work across the economy; and
>
> (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; …

20 We also deal with these new matters in further detail below.

21 Section 578(a) of the FW Act requires the Commission, in performing its functions or exercising its powers, to take into account the objects of the FW Act and any part of the FW Act. Section 3 of the FW Act provides that the Act's object is to "provide a balanced framework for cooperative and productive relations that promotes national economic prosperity and social inclusion" by the means specified in subss (a)-(g). Of most relevance to the conduct of the Review in this context is s 3(b), which refers to "ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through … modern awards and national minimum wage orders". Also likely to be of relevance to the Review is s 3(a), which refers among other things to the promotion of "job security and gender equality" and "productivity and economic growth for Australia's future economic prosperity", and s 3(g), which refers to "acknowledging the special circumstances of small and medium-sized businesses". We note that the reference to "job security and gender equality" was added by the Amending Act.

22 The discharge of the Commission's statutory functions under s 285 involves an evaluative exercise which is informed by the considerations in ss 284(1)(a)-(e) and 134(1)(a)-(h) (as applicable) and the object in s 3. The statutory objectives are very broadly expressed and do not necessarily exhaust the matters which the Panel might properly consider to be relevant. The range of such matters "must be determined by implication from the subject-matter, scope and purpose" of the FW Act.[10] There is a degree of overlap between the various considerations which must be taken into account under ss 284(1) and 134(1)[11] and also a degree of tension between some of these considerations. No consideration is assigned any particular primacy and the relevance of and weight to be assigned to the considerations will vary depending upon the social and economic context and other facts and circumstances of the particular Review.[12] The complex balancing exercise which is required has led the Commission in previous Reviews to eschew a mechanistic approach to wage fixation.[13]

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10 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40; *Shop, Distributive and Allied Employees Association v Australian Industry Group* (2017) 253 FCR 368; 272 IR 88 at [48].

11 See *Re Annual Wage Review 2014-15* (2015) 252 IR 119 at [88]-[91]; *Re Annual Wage Review 2015-16* (2016) 258 IR 201 at [116]; *Re Annual Wage Review 2016-17* (2017) 267 IR 241 at [115], [129].

12 See *Re 4 Yearly Review of Modern Awards — Preliminary Jurisdictional Issues* (2014) 241 IR 189 at [32].

13 *Re Annual Wage Review 2016-17* (2017) 267 IR 241 at [129].

23 The matters which the Commission must take into account in its conduct of the Review contain some common elements. In past Review decisions, the Panel has grouped the matters of direct relevance to the Review into three broad categories, namely economic considerations, social issues, and collective bargaining. This categorisation requires modification in light of the amendments made to ss 134(1) and 284(1), which we discuss further below. We will deal with the mandatory considerations in the modern awards and minimum wages objectives in the following broad categories:

- Economic, labour market and business considerations: s 134(1)(c), (d), (f) and (h); s 284(1)(a) and (b).
- Relative living standards and the needs of the low paid: s 134(1)(a); s 284(1)(c).
- Gender equality: s 134(1)(ab), s 284(1)(aa).
- Job security: s 134(1)(aa).
- Collective bargaining: s 134(1)(b).
- Other considerations: s 134(1)(da) and (g); s 284(1)(e).

2.2. New considerations — job security and gender equality

The amendments and the Revised Explanatory Memorandum

24 The amendments to ss 3(a), 134(1) and 284(1) of the FW Act were effected by Pt 4, Objects of the Fair Work Act of Sch 1 of the Amending Act. Part 4 is discussed in paras 330-343 of the revised explanatory memorandum (the REM) for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth). The REM gives an "overview" of Pt 4 which commences as follows:

> 330. This Part would introduce job security and gender equality into the object of the FW Act. It would place these considerations at the heart of the FWC's decision-making, and support the Government's priorities of delivering secure, well-paid jobs and ensuring women have equal opportunities and equal pay.

25 Paragraph 331 of the REM refers to the principle of statutory interpretation which requires the FW Act to be interpreted in a way that would best achieve its object wherever possible, and to the requirement in s 578(a) for the Commission to take into account the objects of the FW Act when performing functions or exercising powers under the FW Act. Paragraph 332 states:

> 332. This Part would also introduce improved access to secure work and gender equality into the modern awards objective in section 134 of the FW Act as matters the FWC would be required to take into account when setting terms and conditions in modern awards. This Part would also introduce gender equality into the minimum wages objective in section 284 of the FW Act as a matter the FWC would be required to take into account when setting minimum wages.

26 Specifically in relation to the amendment to s 3(a), the REM states:

> 333. The existing paragraph 3(a) sets out one of the means by which the object of the FW Act is achieved. This item would amend that means to add job security and gender equality as considerations.
>
> 334. The reference to promoting job security recognises the importance of employees and job seekers having the choice to be able to enjoy, to the fullest extent possible, ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment. The reference to promoting gender equality recognises the

importance of people of all genders having equal rights, opportunities and treatment in the workplace and in their terms and conditions of employment, including equal pay. The intention of the references to "gender equality" in each of these provisions is to use language that is consistent with the *Convention on the Elimination of All Forms of Discrimination against Women* and ILO *Convention concerning Discrimination in Respect of Employment and Occupation (No 111)*. It is also intended to reflect the policy objective of both formal and substantive gender equality.

335. Job security and gender equality would sit alongside existing considerations in the object of the FW Act, such as providing workplace relations laws that are flexible for business, assisting employees to balance their work and family responsibilities, and achieving productivity and fairness (see existing paragraphs 3(a), (d) and (f)).

27 In relation to new ss 134(1)(aa) and (ab), para 338 of the REM relevantly confirms that the Commission will be required to take the specified factors into account when exercising its functions under Pt 2-6 of the FW Act (that is, the Review functions) in respect of modern award minimum wages. Paragraph 338 explains that s 134(1)(e) is repealed because the consideration of the principle of equal remuneration for work of equal or comparable value is included "as part of" the new s 134(1)(ab). In relation to the new s 284(1)(aa), para 342 relevantly confirms that the Commission will be required to take the new factor into account when exercising its functions under Pt 2-6 of the FW Act, and para 343 confirms that the previous s 284(1)(d) is repealed because the consideration of the principle of equal remuneration for work of equal or comparable value is "included as part of" the new s 284(1)(aa).

Job security

28 Job security is not a matter that has, in terms, been taken into account in previous Review decisions. In the award context, job security is a concept which is usually regarded as relevant to award terms which promote regularity and predictability in hours of work and income and restrict the capacity of employers to terminate employment at will. The award provisions which are likely to be most pertinent in this respect are those which concern the type of employment (full-time, part-time, casual or other), rostering arrangements, minimum hours of work per day and per week, the payment of weekly or monthly rather than hourly wages, notice of termination of employment and redundancy pay (noting that a number of these matters are dealt with in the NES).

29 Beyond the immediate award context, job security has a broader dimension and may be understood as referable to the effect of general economic circumstances upon the capacity of employers to employ, or continue to employ, workers, especially on a permanent rather than casual basis. In exercising the Commission's modern award powers, consequential effects of this nature arise for consideration under ss 134(1)(f) and 284(1)(a), and have always been taken into account on this basis in past Review decisions.

30 As set out above, para 334 of the REM explains that the reference to promoting job security in s 3(a) recognises the importance of employees and job seekers "having the choice" to be able to enjoy as much as possible "ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment". We see no reason to consider

that the expression "secure work" in s 134(1)(aa) bears any substantially different connotation to "job security" in s 3(a). However, we consider that it is significant that s 134(1)(aa) refers to "the need to improve access" to secure work rather than the general promotion of job security. The language of s 134(1)(aa) suggests that it is more tightly focused on the capacity of employees to enter into work which may be characterised as secure. This appears to reflect the REM's reference to the importance of employees being able to have a "choice" to enter into secure employment. As such, the consideration in s 134(1)(aa) would appear to direct attention primarily to those award terms which affect the capacity of employees to make that choice. This is not a matter likely to be of substantial relevance to the consideration of minimum award wages in the conduct of the Review except perhaps in respect of the casual loading. The fact that s 134(1)(aa) finds no equivalent in s 284(1), such that the secure work consideration has no application to the NMW, supports our conclusion in this respect. However, the broader dimension of job security to which we have referred will, of course, continue to be highly relevant in our consideration under ss 134(1)(f) and 284(1)(a).

Gender equality

31 It is clear that new ss 134(1)(ab) and 284(1)(aa) involve broader concepts of gender equality than the previous ss 134(1)(e) and 284(1)(d). The previous provisions were confined to the consideration of "the principle of equal remuneration for work of equal or comparable value". That expression "equal remuneration for work of equal or comparable value" was, and is, defined in s 302(2) to mean "equal remuneration for men and women workers for work of equal or comparable value". That definition was regarded as applicable to ss 134(1)(e) and 284(1)(d).[14] In the 2017-18 Review decision,[15] the Commission discussed ss 284(1)(d) and 134(1)(e) as follows:

> [34] In the *Equal Remuneration Decision 2015* ([2015] FWCFB 8200) the Full Bench concluded that the expression "work of equal or comparable value" in s 302(1) refers to equality or comparability in "work value" (at [280]). We agree and, further, the same meaning should be attributed to this expression in ss 134(1)(e) and 284(1)(d). As explained in the *Equal Remuneration Decision 2015*, the principle of equal remuneration for work of equal or comparable value is enlivened when an employee or group of employees of one gender do not enjoy remuneration equal to that of another employee or group of employees of the other gender who perform work of equal or comparable value …
>
> [35] The application of the principle of equal remuneration for work of equal or comparable value is such that it is likely to be of only limited relevance in the context of a Review. Indeed it would only be likely to arise if it were contended that particular modern award minimum wage rates were inconsistent with the principle of equal remuneration for work of equal or comparable value; or, if the form of a proposed increase enlivened the principle …

32 The definition of "equal remuneration for work of equal or comparable value" in s 302(2) has been indirectly modified by the new subss 302(3A), (3B) and (3C) introduced by the Amending Act, which identify matters which the Commission may take into account, and the analytical approach which may be

14 *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [33].

15 *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [34]-[35].

taken, in deciding whether there is equal remuneration for work of equal or comparable value. It remains the case that the conception is clearly not confined to modern award minimum wage rates and is applicable both at the individual and collective level to any arrangement produced by the labour market whereby there is a gender inequality in remuneration for work of equal or comparable value. To the extent that it is applicable to a modern award minimum wage rate, it implies that such a wage rate may have been founded on an historic undervaluation of the work to which the rate applies based on gender — a matter which the new s 302(3A) authorises the Commission to take into account. In this way, equal remuneration for work of equal or comparable value intersects with the concept of gender undervaluation, which we discuss further below.

33 As paras 338 and 342 of the REM tend to confirm, the repeal of ss 134(1)(e) and 284(1)(d) and the text of the new ss 134(1)(ab) and 284(1)(aa) indicate that the concept of "equal remuneration for work of equal or comparable value" has been subsumed into a broader mandate to take into account "the need to achieve gender equality", with "equal remuneration" being only one of a number ways specified in each provision by which "gender equality" may be achieved. We note that in s 134(1)(ab), but not ss 284(1)(aa) or 3(a), the words "in the workplace" follow "gender equality". However, given that the object and subject matter of the FW Act concerns workplace relations, we do not think that these additional words in s 134(1)(ab) are intended to give the expression "gender equality" a narrower meaning in that provision than it bears in ss 3(a) or 284(1)(aa) or that they operate to displace the presumption that "gender equality" has the same meaning where used throughout the FW Act.[16] No contrary indication is apparent in the REM.

34 As set out above, the REM explains the concept of "gender equality" by reference to the United Nations *Convention on the Elimination of All Forms of Discrimination against Women* (the UN Convention) and the ILO *Convention concerning Discrimination in Respect of Employment and Occupation (No 111)* (the ILO Convention). Article 11(1) of the UN Convention concerns the elimination of gender discrimination in employment, and provides:

> States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
>
> (a) The right to work as an inalienable right of all human beings;
>
> (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
>
> (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
>
> (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
>
> (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
>
> (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

16 See *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618 (Mason J).

35 The substantive provision of the ILO Convention is Article 2, which provides:

> Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

36 The key concepts which may be derived from the UN Convention and the ILO Convention, as potentially relevant to the Commission's NMW and modern award powers, are ensuring equality as between men and women of employment opportunity (including equality as to the right to work, selection for employment, promotion and access to training) and equality of treatment in employment (including equality as to remuneration and other benefits of employment, and as to the treatment of work of equal value and the evaluation of the quality of work). This is consistent with the statement in para 334 of the REM that the reference to promoting gender equality in s 3(a) recognises the importance of people of all genders "having equal rights, opportunities and treatment in the workplace and in their terms and conditions of employment, including equal pay". On its ordinary meaning, the expression "gender equality", once placed in the framework of workplace relations established by the chapeau to s 3 and the overall subject matter of the FW Act, comfortably carries the connotations which may be derived from the UN Convention, the ILO Convention and the REM.

37 In addition to "equal remuneration for work of equal or comparable value", ss 134(1)(ab) and 284(1)(d) both identify "eliminating gender-based undervaluation of work" as a means by which gender equality may be achieved. Although express reference to gender-based undervaluation of work is novel in the context of the modern awards and minimum wages objectives, it is a well-established industrial conception. The Full Bench decision in the *Equal Remuneration Decision 2015*[17] traced in detail the history and development of this concept in the NSW, Queensland and federal jurisdictions.[18] The Full Bench determined that the power to make an equal remuneration order under s 302 of the FW Act, as it then was, required a comparator group of the opposite gender, but went on to say:

> [292] Our conclusion that Part 2-7 requires a comparator group of the opposite gender does not exclude the capacity to advance a gender-based undervaluation case under the FW Act. We see no reason in principle why a claim that *the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons* could not be advanced for consideration under s 156(3) or s 157(2). Those provisions allow the variation of such minimum rates for "work value reasons", which expression is defined broadly enough in s 156(4) to allow a wide-ranging consideration of any contention that, *for historical reasons and/or on the application of an indicia approach, undervaluation has occurred because of gender inequity*. There is no datum point requirement in that definition which would inhibit the Commission from *identifying any gender issue which has historically caused any female-dominated occupation or industry currently regulated by a modern award to be*

17 *Equal Remuneration Decision 2015* (2015) 256 IR 362.

18 *Equal Remuneration Decision 2015* (2015) 256 IR 362 at [256]-[274].

> *undervalued*. The pay equity cases which have been successfully prosecuted in the NSW and Queensland jurisdictions and to which reference has earlier been made were essentially work value cases, and the equal remuneration principles under which they were considered and determined were likewise, in substance, extensions of well-established work value principles. It seems to us that cases of this nature can readily be accommodated under s 156(3) or s 157(2). Whether or not such a case is successful will, of course, depend on the evidence and submissions in the particular proceeding.

(Emphasis added)

38 The underlined parts of the above passage set out the core components of the concept gender-based undervaluation, namely that the minimum rates in an award have been established based on an undervaluation of the relevant work that has occurred for gender-related reasons. This concept is now articulated in the FW Act itself as a result of the amendments effected by the Amending Act. New subs (2B) has been added to s 157 to add the following requirement concerning the Commission's consideration of "work value reasons" in connection with the variation of minimum award wages under s 157(2). The new subsection provides:

> (2B) The FWC's consideration of work value reasons must:
> (3) be free of assumptions based on gender; and
> (b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.

39 In the 2017-18 Review decision,[19] the Commission said:

> We agree with the observations of a number of parties that Review decisions are of limited utility in addressing any systemic gender undervaluation of work. It seems to us that proceedings under Part 2-7 and applications to vary modern award minimum wages for "work value reasons" pursuant to ss 156(3) and 157(2) provide more appropriate mechanisms for addressing such issues.

40 In light of the amendments to s 284(1), the above proposition is no longer sustainable since we are now commanded to take into account "eliminating gender-based undervaluation of work" as part of our consideration concerning "the need to achieve gender equality" in applying the minimum wages objective in the conduct and determination of the Review. The reference to the elimination of gender undervaluation in para (aa) adds an important new dimension to the Review. In previous years, the Commission has approached the Review on the implicit premise that the task of establishing and maintaining a safety net of fair minimum wages involves determining the adjustment that should be made to the NMW and modern award minimum wage rates as they exist at the relevant time. However, the requirement to now take into account the elimination of gender-based undervaluation of work in the conduct of the Review itself necessarily requires us to consider whether the existing NMW and modern award minimum wage rates constitute a properly valued and non-gender biased foundation upon which to make any wages adjustment. We set out how we propose to go about this task later in this decision.

41 Section 134(1)(ab), but not s 284(1)(aa), refers to "providing workplace conditions that facilitate women's full economic participation". "Conditions" is an expression which, in the industrial context, usually connotes terms of

19 *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [35].

employment other than those relating to rates of pay. We consider that it bears that meaning in s 134(1)(ab), since it is difficult to identify how a minimum award rate of remuneration could facilitate women's full economic participation. This is more likely to relate to conditions such as flexible working hours, access to stable part-time employment and special types of leave such as family and domestic violence leave. That this consideration was included in the modern awards objective, but not the minimum wages objective, tends to confirm this.

42 Section 284(1)(aa), but not s 134(1)(ab), refers to "addressing gender pay gaps". Although the gender pay gap did not arise for consideration under the repealed s 284(1)(d) other than in a limited way, it has been taken into account in previous Reviews in connection with other considerations. For example, in the 2017-18 Review decision,[20] the Commission said (citations omitted):

> [36] But the broader issue of gender pay equity, and in particular the gender pay gap, is relevant to the Review. This is so because it is an element of the requirement to establish a safety net that is "fair." It may also arise for consideration in respect of s 284(1)(b) ("promoting social inclusion through workforce participation"), because it may have effects on female participation in the workforce.

43 The gender pay gap has been regarded as relevant to the setting of the NMW and modern award minimum wages in past Reviews because of the historical position that women are significantly more likely to be paid at the award rate than are men at all levels of the award structure, that workers paid at the award rate are much more likely to be low paid than are other workers, and that, at least at the highest rates in award classification structures, women are heavily overrepresented among those who are paid at the award rate. In the 2015-16 Review decision,[21] the Commission identified the significance of these matters in the following way:

> [75] An increase in award rates of pay relative to other wages would reduce the gender pay gap in two ways. The first is that it would raise the level of low pay rates relative to median pay rates, and hence particularly benefit women, who disproportionately receive low pay rates. The second is that an increase in the higher levels of award rates will particularly benefit women, because at the higher pay scales, women are substantially more likely to be paid the award rather than the bargained rate than are men.

44 The Commission concluded that this was a factor weighing in favour of an increase in the NMW and modern award minimum wages.[22] As discussed later in this decision, the latest available data confirms that it remains the case that women are disproportionately award-reliant, and the imperative in s 284(1)(aa) to take the gender pay gap into account in the context of the consideration of gender equality means that this remains a factor weighing in favour of an increase to the NMW and modern award minimum wages. Indeed, for the reasons explained in the above passage from the 2015-16 Review decision, it is a factor weighing in favour of an increase in excess of the wage increases being produced by the labour market, since only an increase of this nature would operate to reduce the gender pay gap.

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20 *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [36].

21 *Re Annual Wage Review 2015-16* (2016) 258 IR 201.

22 *Re Annual Wage Review 2015-16* (2016) 258 IR 201 at [76].

45 Finally, we note that s 284(1)(aa) (unlike s 134(1)(ab)), by the use of the word "including", specifies three means to achieve gender equality (by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps) in a non-exhaustive way. Therefore, as a matter of statutory construction, specific consideration of these three matters may not necessarily be all that is required to "tak[e] into account … the need to achieve gender equality". Further relevant considerations in this respect might include, among other things, women's participation in the workforce (although this would overlap with the considerations in ss 134(1)I and 284(1)(b)) and job security issues specific to women (overlapping with s 134(1)(aa)).

3. Practical scope of the Review — size and characteristics of the NMW-and modern award-reliant workforce

46 As earlier explained, the Review involves two fundamental aspects: review of the NMW and review of modern award minimum wage rates. In order to understand the legal and economic consequences which will flow from the Review, it is necessary to describe the extent of the workforce to which the NMW and modern awards minimum wage rates apply.

47 The proportion of the Australian employee workforce which is award/agreement free and to which the NMW wage rate applies (NMW-reliant) is small. Based on 2021 data, it appears that only 0.7 per cent of the employee workforce falls into this category and thus would be directly affected by any adjustment made to the NMW.[23] Beyond this data, it is difficult to identify in practical terms any occupations or industries in which NMW-reliant employees are engaged. In previous Commission proceedings, parties have been unable to identify with precision any such award free employees.[24] Further, the number of such low-paid, award free employees is likely to have diminished since the coverage of the *Miscellaneous Award 2020* was adjusted effective from 1 July 2020.[25] Accordingly, it cannot be concluded that any adjustment to the NMW considered in isolation will have discernible macroeconomic effects. Further, although any adjustment to the NMW is likely to have an effect upon a small segment of employers and employees, we are not in a position to be able to identify any particular characteristics of such employers and employees beyond stating that any employee reliant on the NMW will (as we discuss later) necessarily be low paid and likely to be experiencing difficulty in meeting day-to-day living expenses.

48 As at May 2021, 20.5 per cent of the employee workforce was paid at rates specified in the Commission's modern awards ("modern award-reliant").[26] The

23 Australian Government submission, 31 March 2023 Chart 4.1.

24 *Re 4 Yearly Review of Modern Awards — Miscellaneous Award 2010* (2020) 292 IR 373 at [39]-[40]; *Re 4 Yearly Review of Modern Awards — Miscellaneous Award 2010* [2020] FWCFB 1589 at [14]-[16].

25 *Re 4 Yearly Review of Modern Awards — Miscellaneous Award 2010* (2020) 292 IR 373; *Re 4 Yearly Review of Modern Awards — Miscellaneous Award 2010* [2020] FWCFB 1589; PR717774.

26 Kelvin Yuen and Josh Tomlinson, *A Profile of Employee Characteristics Across Modern Awards* (Fair Work Commission Research Report No 1/2023, March 2023) at 13.

proportion of employees who are "award reliant" (paid at rates specified in any awards, including modern awards and awards of State industrial tribunals) grew from 16.1 per cent in 2012 to 23.0 per cent in 2021.[27]

49 Employees who are modern award-reliant earn, on average, considerably less than other employees: their average hourly wage is lower ($28.60 compared to $46.20) and they work on average fewer hours per week (26.2 compared to 33.0).[28] As shown in Table 1, the effect of this is that these employees account for a much smaller fraction of the economy-wide aggregate wage bill, an estimated 11.2 per cent in 2021:

Table 1: Award-dependent wages in the total economy, modern award-reliant employees

	Number	Share total (%)	Share GDP (%)
Workers covered by modern awards (millions, 2021)	2.37	20.5	-
Average wage, modern award-reliant employees ($ per week, 2021)	749.2	53.7	-
Wage bill covered by modern award-reliant employees ($billion per year, 2021)	94.3	11.2	-
Total compensation covered by modern award-reliant employees ($billion per year, 2022)	123.6	-	5.0

Note: Total compensation of employees and GDP are based on the sum of the four quarters for calendar year 2022.

Source: "Information note — Replicating Table 1 from Jericho & Stanford (2023)", Fair Work Commission (15 May 2023).

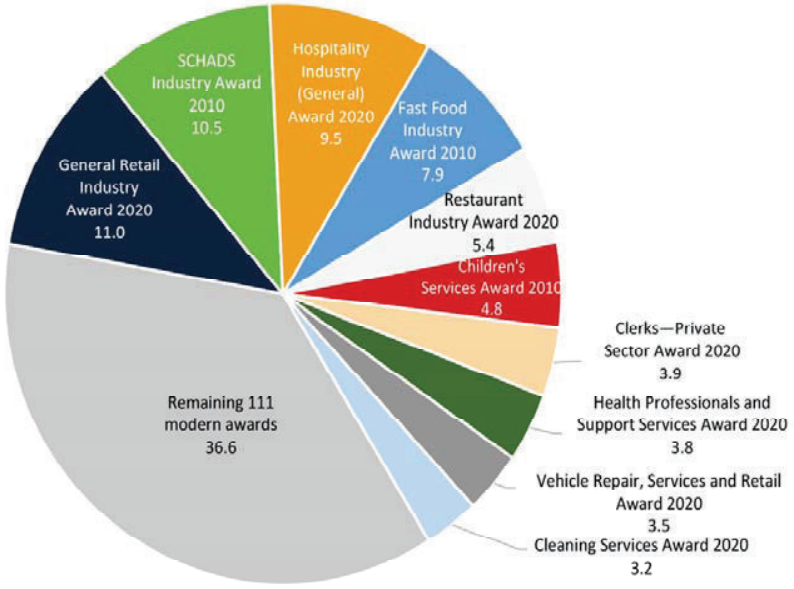
50 Modern award-reliant employees are not spread evenly across the workforce but are disproportionately covered by a small number of modern awards. Chart 1 below shows that almost two-thirds of modern award-reliant employees are covered by the ten most common modern awards and almost half are covered by six of these awards. Conversely, many of the Commission's 121 modern awards cover only a negligible proportion of modern award-reliant employees. For example, at least 37 modern awards each cover less than 1 per cent of all modern award-reliant employees:[29]

27 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 7.1.

28 Kelvin Yuen and Josh Tomlinson, *A Profile of Employee Characteristics Across Modern Awards* (Fair Work Commission Research Report No 1/2023, March 2023) Table B13.

29 Kelvin Yuen and Josh Tomlinson, *A Profile of Employee Characteristics Across Modern Awards* (Fair Work Commission Research Report No 1/2023, March 2023) Table A1.

Chart 1: Top 10 most common modern awards, 2021, per cent



Note: SCHADS Industry Award refers to the *Social, Community, Home Care and Disability Services Award 2010*.

Source: Kelvin Yuen and Josh Tomlinson, *A Profile of Employee Characteristics Across Modern Awards* (Fair Work Commission Research Report No 1/2023, March 2023) Chart 3.3.

51 Correspondingly, there are significant differences between industry sectors as to the proportion of employees who are modern award-reliant. Table 2 shows the proportion of employees in each industry division who are modern award-reliant, in descending order:

Table 2: Modern award reliance by industry division, 2021

Industry division	Proportion of employees in industry that are modern award-reliant (%)
Accommodation and food services	59.6
Administrative and support services	42.3
Other services	36.4
Retail trade	29.5
Arts and recreation services	25.9
Health care and social assistance	23.0
Rental, hiring and real estate services	21.4
Manufacturing	19.1
Construction	13.4
Transport, postal and warehousing	12.5
Wholesale trade	10.0

Industry division	Proportion of employees in industry that are modern award-reliant (%)
Information, media and telecommunications	7.3
Education and training	6.6
Electricity, gas, water and waste services	5.7
Professional, scientific and technical services	5.4
Financial and insurance services	4.1
Public administration and safety	4.0
Mining	1.1*
All industries#	20.5

Note: * Estimate of modern award reliance for Mining has a relative standard error of greater than 50 per cent and is considered too unreliable for general use. # All industries excludes Agriculture, forestry and fishing, which is out of scope of the EEH survey.

Source: Kelvin Yuen and Josh Tomlinson, *A Profile of Employee Characteristics Across Modern Awards* (Fair Work Commission Research Report No 1/2023, March 2023) Chart 3.1.

52 The Panel has, in the past, not accepted submissions that the different levels of award reliance between industries means that macroeconomic data is unlikely to be useful in the Review because it takes a high-level view of the economy, and that the primary consideration should be on the parts of the economy most affected by Review decisions. In the 2017-18 Review decision,[30] the reasons for not accepting such submissions included that all industries contained a proportion of modern award-reliant employees, the requirement to set the NMW required a national decision, all modern awards were required to be reviewed, and s 284(1)(a) required the national economy to be taken into account.[31] The Commission nonetheless went on to accept that it was necessary to "pay close attention to developments in the most award-reliant industries".[32] We continue to take such an approach in this Review.

53 It is also necessary to take into account that the modern award-reliant workforce has significantly different characteristics to the employee workforce as a whole. Table 3 shows that the modern award-reliant employee workforce predominantly works part-time rather than full-time hours, is highly casualised, is on average younger than the workforce as a whole, is predominantly female, and contains a high proportion of low-paid workers. It also has significantly higher proportions of employees paid junior rates or employed by small businesses:

30 *Re Annual Wage Review 2017-18* (2018) 279 IR 215.

31 *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [111]-[113].

32 *Re Annual Wage Review 2017-18* (2018) 279 IR 215 at [114].

Table 3: Characteristics of modern award-reliant employees

	Modern award-reliant employees	Employees not modern award-reliant	All employees
Full-time hours (%)	34.8	66.2	59.8
Part-time hours (%)	65.2	33.8	40.2
Casual (%)	49.7	14.5	21.1
Permanent/fixed term (%)	50.3	85.5	78.9
Average age (years)	34.8	41.5	40.1
Junior rates of pay (%)	10.5	2.1	3.8
Employed by small business (1-19 employees) (%)	35.6	23.2	25.7
Female (%)	58.1	48.5	50.4
Low paid[33] (%)	36.1	6.8	12.1

Source: Kelvin Yuen and Josh Tomlinson, *A Profile of Employee Characteristics Across Modern Awards* (Fair Work Commission Research Report No 1/2023, March 2023) Appendix Tables B2-B4; ABS, *Employee Earnings and Hours, Australia*, May 2021; ABS, *Microdata: Employee Earnings and Hours*, Australia, May 2021; *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Tables 7.4-7.5.

54 The differences pertaining to part-time hours, casualisation and age are likely to be associated with the concentration of modern award-reliant employees in industry sectors such as retail, hospitality, fast food and restaurants. Their identification provides further assistance in understanding the practical scope of the Review. For example, it can be identified that only 11.9 per cent of the full-time workforce is modern award-reliant, whereas almost half of all casual employees (48.3 per cent) are modern award-reliant.[34] This informs our understanding of the potential national economic implications of the Review and the extent of its impact on the Australian employee workforce.

55 The other significant characteristics of the modern award-reliant workforce, namely that it is predominantly low paid and female, are dealt with later as part of our consideration of relative living standards and needs of the low paid and gender equality respectively.

56 Apart from the direct legal effect of the outcome of the Review upon NMW-reliant and modern award-reliant employees and their employers, there are additional indirect effects which may operate to amplify the effect of a Review decision. These include the following:

(1) Some enterprise agreements require the prescribed wage rates to increase in line with Review decisions. However, this applies to only about 0.6 per cent of the Australian employee workforce.[35]

33 "Low paid" is defined as those earning less than 2/3 of median average hourly ordinary time earnings, adjusted to remove casual loading, across employees on adult rates of pay only.

34 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 7.4.

35 Australian Government submission, 31 March 2023, Chart 4.1.

(2) Some enterprise agreements which remain in operation (usually older, expired agreements) may contain base rates of pay which have fallen below those in the modern award which covers the employees to which the agreement applies. Section 206(2) of the FW Act operates in this situation to require that the agreement's rates of pay have effect as if they were equal to the modern award rates of pay. Similarly, in respect of employees not covered by a modern award, if the rates of pay in an enterprise agreement fall below the NMW, s 206(4) operates to require that the agreement's rates of pay have effect as if they were equal to the NMW. Therefore, an increase to modern award minimum wage rates or the NMW as a result of a Review decision will lead to an increase to the rates of any employees covered by such agreements by virtue of the operation of s 206, notwithstanding that they are not modern award- or NMW-reliant. It is not possible to quantify the proportion of all employees falling into this category, but it is likely to be very small.

(3) Some (but not all) State industrial tribunals have adopted a practice of "flowing on" wage increases determined in the Commission's Review decision to State awards.[36] However, only about 2.5 per cent of all employees are covered by State awards,[37] and employees benefitting from the flow-on of Review wage increases would only constitute a subset of this employee group (noting that, in NSW, the current legislative scheme[38] does not permit a flow-on of this nature).

57 Even taking the above matters into account, it is clear that Review decisions will operate upon the wage rates of about a quarter of the employee workforce. More broadly, and particularly in the context of the current strong labour market, it is possible that the Review wages outcome may send a "signal" to the labour market concerning expectations for wage increases which may influence the outcome of current or future enterprise bargaining and individual employment contract negotiations. This is a matter which we will take into account in relation to economic and labour market considerations.

4. Economic, labour market and business considerations

58 The current combination of economic circumstances, namely low unemployment, falling real wages and high inflation, is very unusual and presents a particular challenge in this year's Review. A further challenge is the expected sharp slowdown in economic growth over the next year. We detail these circumstances as relevant to s 134(1)(d), (f) and (h) and s 284(1)(a) and (b) in this part of our decision.

4.1. Economic growth

59 The most recently published National Accounts for the December quarter 2022 show that gross domestic product (GDP) grew by 0.5 per cent in the quarter and by 2.7 per cent over the calendar year 2022, with growth slowing somewhat in the second half of the year and falling below forecasts made this time last year[39] (Chart 2). This rate of growth is lower than for 2021 (4.6 per

36 See, eg, *Declaration of General Ruling (State Wage Case 2022)* [2022] QIRC 340.

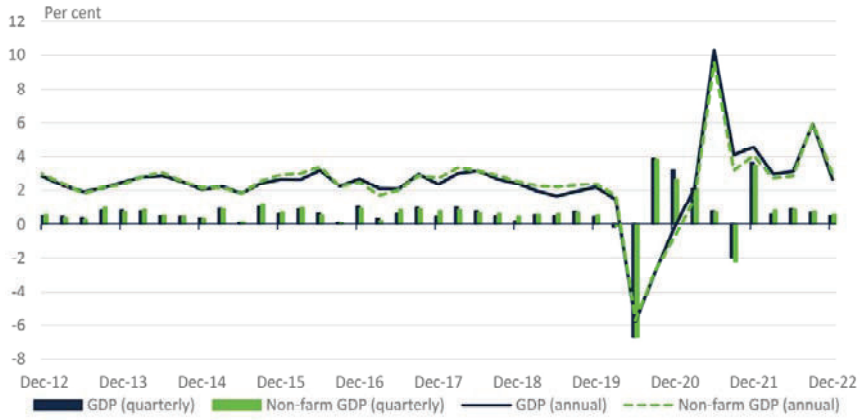
37 Kelvin Yuen and Josh Tomlinson, *A Profile of Employee Characteristics Across Modern Awards* (Fair Work Commission Research Report No 1/2023, March 2023) at 13.

38 *Industrial Relations Act 1996* (NSW), s 146C.

39 *Statistical Report — Annual Wage Review 2021-22* (Fair Work Commission, 8 June 2022) Table 14.4.

cent), although this was boosted by an unusually high result for the December quarter in that year (3.7 per cent) associated with the end of COVID-19 lockdowns in NSW, Victoria and the ACT.[40] Per capita GDP growth over 2022 was 0.8 per cent, significantly lower than for the previous year (4.0 per cent). The difference in growth rates between GDP and GDP per capita reflects higher population growth as a result of the resumption of immigration in 2022.[41] However, real net national disposable income grew by 4.0 per cent over the year, principally as a result of strong prices for commodity exports.[42] This was in line with the previous year's growth of 3.8 per cent:

Chart 2: Economic growth, annual and quarterly growth rates



Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 1.1; ABS, *Australian National Accounts: National Income, Expenditure and Product*, December 2022.

60 The main contributors to economic growth over 2022 were an increase to household consumption (accompanied by a reduction in the household savings ratio) and improvement in net trade resulting from growth in exports and a reduction in imports.[43] However, growth in household spending slowed to 0.3 per cent in the December quarter 2022.[44]

61 On an industry basis, annual growth — partly reflecting differences in the speed of recovery from COVID-19 — was strongest in Accommodation and food services, Transport, postal and warehousing, Arts and recreation services, Information, media and telecommunications, and Administrative and support services. Gross value added fell in Agriculture, forestry and fishing and Manufacturing (Chart 3). In the former case, this is primarily a result of

40 ABS, *Australian National Accounts: National Income, Expenditure and Product*, December 2022.

41 "Statement on Monetary Policy", Reserve Bank of Australia (May 2023), 23; Australian Government, *Budget 2023-24, Budget Paper No 1* (2023), May, 78.

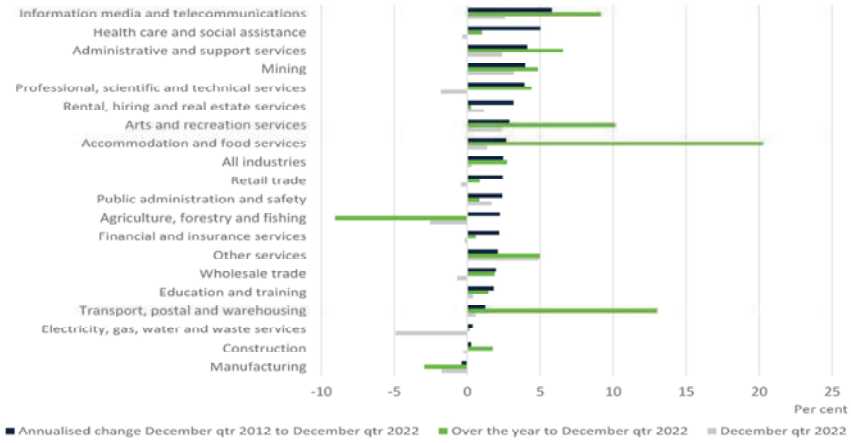
42 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Overview.

43 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 1.2.

44 ABS, *Australian National Accounts: National Income, Expenditure and Product*, December 2022.

flooding events occurring in the December quarter 2022. These events also negatively affected a number of sectors, including mining and food manufacturing:[45]

Chart 3: Gross value added by industry, average annual growth over decade, growth over year to the December quarter 2022 and growth in the December quarter 2022



Source: ABS, *Australian National Accounts: National Income, Expenditure and Product*, December 2022.

62 A further slowing in economic growth, substantially associated with the Reserve Bank of Australia's (RBA's) tightening of monetary policy to combat inflation, is forecast over this year and into 2024. Since last year's Review, the RBA has increased the cash rate target a further nine times, taking it from 0.85 per cent to 3.85 per cent, the first tightening of monetary policy since 2009-10.[46] The RBA forecasts for annual growth in GDP and household consumption are set out in Table 4:

Table 4: RBA forecast of growth rates in GDP and household consumption

	June 2023	Dec 2023	June 2024	Dec 2024	June 2025
Gross domestic product	1.7	1.2	1.4	1.7	2.1
Household consumption	1.8	1.3	1.8	2.1	2.4

Source: "Statement on Monetary Policy", Reserve Bank of Australia (May 2023) Appendix: Forecasts.

63 The May 2023-24 Budget forecast has growth slowing sharply to 1½ per cent in 2023-24, well below pre-pandemic trend levels. This is attributed to the global economic slowdown and an easing in domestic demand in response to

45 ABS, *Impacts of flooding in December quarter 2022*, 1 March 2023.

46 See "Minutes of the Monetary Policy Meeting of the Reserve Bank Board", Reserve Bank of Australia (5 July 2022 to 2 May 2023).

rising interest rates and high inflation.[47] Population growth is forecast to be 1.7 per cent in 2023-24, which implies a fall in GDP per capita. Table 5 shows the Budget forecasts for the domestic economy:

Table 5: 2023-24 Budget, domestic economy forecasts[(a)]

	Outcomes	Forecasts		
	2021-22	**2022-23**	**2023-24**	**2024-25**
Real gross domestic product	3.7	3¼	1½	2¼
Household consumption	3.7	5¾	1½	2½
Dwelling investment	2.9	-2½	-3½	-1½
Total business investment[(b)]	6.1	3	2½	2
Mining investment	8.4	0	2	1½
Non-mining investment	5.4	4	2½	2
Private final demand[(b)]	4.3	4	1	2¼
Public final demand[(b)]	6.5	1¾	1½	2
Change in inventories[(c)]	0.1	0	0	0
Gross national expenditure	5.1	3¼	1	2¼
Exports of goods and services	-0.3	8	6	3½
Imports of goods and services	7.0	9	4	3½
Net exports[(c)]	-1.3	0	½	0
Nominal gross domestic product	11.0	10¼	1¼	2½
Prices and wages				
Consumer price index[(d)]	6.1	6	3¼	2¾
Wage price index[(d)]	2.6	3¾	4	3¼
GDP deflator	7.0	7	-¼	¼
Labour market				
Participation rate[(e)]	66.6	66½	66¼	66¼
Employment[(d)]	3.6	2½	1	1
Unemployment rate[(e)]	3.8	3½	4¼	4½
Balance of payments				
Terms of trade[(f)]	11.9	1½	-13¼	-8¾
Current account balance (per cent of GDP)	2.0	¾	-2½	-3½
Net overseas migration[(g)]	184 000	400 000	315 000	260 000

Note: The exchange rate is assumed to remain around its recent average level

47 Australian Government, *Budget 2023-24, Budget Paper No 1* (2023), May, 39.

— a trade-weighted index of around 60 and a $US exchange rate of around 67 US cents. Interest rates are informed by the Bloomberg survey of market economists. World oil prices (Malaysian Tapis) are assumed to remain around US$87/barrel. Population growth is forecast to be 2.0 per cent in 2022-23, 1.7 per cent in 2023-24 and 1.5 per cent in 2024-25.

(a) Percentage change on preceding year unless otherwise indicated.
(b) Excluding second-hand asset sales from the public sector to the private sector.
(c) Percentage point contribution to growth in GDP.
(d) Through-the-year growth rate to the June quarter.
(e) Seasonally adjusted rate for the June quarter.
(f) Key commodity prices are assumed to decline from current elevated levels over four quarters to the end of the March quarter 2024: the iron ore spot price is assumed to decline from a March quarter 2023 average of US$117 per tonne to US$560 per tonne; the metallurgical coal spot price is assumed to decline from US$342 per tonne to US$140 per tonne; the thermal coal spot price is assumed to decline from US$260 per tonne to US$70 per tonne; and the LNG spot price is assumed to decline from US$16 per tonne to US$610/mmBtu. All bulk prices are in free-on-board (FOB) terms.
(g) Net overseas migration is forecast to continue at 260 000 in 2025-26 and 2026-27.

Source: Australian Government, *Budget 2023-24, Budget Paper No 1* (2023), May, 58.

64 The International Monetary Fund forecasts are for annual GDP growth in Australia of 1.6 per cent in 2023 and 1.7 per cent in 2024.[48]

4.2. Inflation

65 Inflation has accelerated since the last Review decision, when the Consumer Price Index (CPI) had increased by 5.1 per cent over the year ending March quarter 2022.[49] Inflation appears to have peaked in the December quarter 2022 with an annual increase of 7.8 per cent. This represented a 30-year high.[50] The March quarter 2023 has seen a slight moderation in inflation, with a quarterly CPI increase of 1.4 per cent and an annual increase of 7.0 per cent (Chart 4). Underlying inflation as measured by the trimmed mean also moderated somewhat in the March quarter 2023, rising 1.2 per cent for the quarter and 6.6 per cent annually compared to 1.7 per cent and 6.9 per cent, respectively, for the December quarter 2022.[51]

66 The Living Cost Index (LCI) for employee households which, unlike the CPI, includes mortgage interest rates in its calculation, is running at a higher rate than the CPI. For the December quarter 2022, the LCI rose 3.2 per cent for the quarter and 9.3 per cent annually. This is the highest rate of annual increase in

48 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 14.2.

49 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [42].

50 ABS, *Consumer Price Index, Australia*, March Quarter 2023.

51 ABS, *Consumer Price Index, Australia*, March Quarter 2023.

the LCI since the first annual LCI data was published in 1999.[52] The LCI can be expected to stay at a higher rate than the CPI if the RBA were to continue to increase interest rates:

Chart 4: Measures of inflation — Consumer Price Index, underlying inflation and Living Cost Index for employee households, growth rates

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 4.1; ABS, *Consumer Price Index, Australia*, March Quarter 2023; ABS, *Selected Living Cost Indexes, Australia*, March 2023.

67 The main contributors to inflation for the March quarter 2023 were housing, food and non-alcoholic beverages, health and education. We note that, in its March quarter 2023 publication, the Australian Bureau of Statistics (ABS) has attributed the 0.8 per cent quarterly increase in the Meals out and take away foods sub-group to "elevated operating costs and minimum wage increases". This sub-group contributed only 0.07 percentage points (or 3.9 per cent) towards the total March quarter 2023 CPI increase.[53] On an annual basis, this sub-group saw price increases of 7.3 per cent compared to the all-groups price increase of 7.0 per cent, making it unlikely that the increases to modern award minimum wages in this sector from the 2021-22 Review has had any material impact on the overall CPI level:

52 ACTU post-Budget submission, 12 May 2023 at [17].

53 ABS, *Consumer Price Index*, Australia, March Quarter 2023.

Table 6: Contributions to the CPI index

CPI subgroup/ expenditure class	June quarter 2022	September quarter 2022	December quarter 2022	March quarter 2023
Food and non-alcoholic beverages	16.8	17.2	17.0	17.1
Alcohol and tobacco	8.8	7.9	7.8	7.8
Clothing and footwear	3.3	3.4	3.4	3.3
Housing	23.6	22.3	22.3	22.4
Furnishings, household equipment and services	9.1	8.9	8.9	8.7
Health	6.3	6.3	6.2	6.3
Transport	11.0	11.0	11.0	10.9
Communication	2.3	2.3	2.3	2.2
Recreation and culture	8.5	10.8	11.2	11.1
Education	4.6	4.4	4.4	4.5
Insurance and financial services	5.7	5.6	5.6	5.6
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: ABS, Consumer Price Index, Australia, March Quarter 2023.

68 The Producer Price Index (PPI) is an industry-focused measure of price rises that measures the change in prices received by domestic producers for their output. Recent changes to the PPI also point to moderating inflation, with growth peaking at an annual rate of 6.4 per cent in the September quarter 2022 and since easing to 5.2 per cent in the March quarter 2023 (Chart 5):

Chart 5: Producer Price Index (final demand) and CPI, annual growth

Note: Producer Price Indexes measure price change from the perspective of the industries that produce goods and services. Other measures, such as the CPI, measure price change from the perspective of consumers. Final demand measures the price change of products (goods and services) consumed with no further processing.

Source: ABS, *Producer Price Indexes, Australia*, March 2023; ABS, *Consumer Price Index, Australia*, March Quarter 2023.

69 In his Statement concerning the RBA's Monetary Policy Decision issued on 2 May 2023, the RBA Governor characterised the current inflation outlook as follows:[54]

> While the recent data showed a welcome decline in inflation, the central forecast remains that it takes a couple of years before inflation returns to the top of the target range; inflation is expected to be 4½ per cent in 2023 and 3 per cent in mid-2025. Goods price inflation is clearly slowing due to a better balance of supply and demand following the resolution of the pandemic disruptions. But services price inflation is still very high and broadly based and the experience overseas points to upside risks. Unit labour costs are also rising briskly, with productivity growth remaining subdued.

70 The RBA forecast is for the CPI to increase by 6.3 per cent over the year to the June quarter 2023, 3.6 per cent over the year to the June quarter 2024 and 3.0 per cent over the year to the June quarter 2025.[55] The Budget expects inflation to reduce more quickly, increasing by 6 per cent in 2022-23, 3¼ per cent in 2023-24 and 2¾ per cent in 2024-25.[56] This is a direct result of Budget measures to alleviate cost-of-living pressures.[57]

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54 Reserve Bank of Australia, *Statement by Philip Lowe, Governor: Monetary Policy Decision* (Media Release 2023-10, 2 May 2023).

55 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 14.4.

56 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 14.3.

57 Australian Government, *Budget 2023-24, Budget Paper No 1* (2023), May 2.

4.3. The labour market

71 The labour market remains close to its strongest point in about 50 years[58] but has begun to show signs of weakening. The unemployment rate for April 2023 is 3.7 per cent, compared to 3.9 per cent at the time of the last Review (May 2022). The participation rate (66.7 per cent) and the employment-to-population ratio (64.2 per cent) are at near-historic highs. Underemployment and underutilisation rates remain historically low at 6.1 per cent and 9.8 per cent respectively (Chart 6):

Chart 6: Participation, unemployment and underemployment rates

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 6.1; ABS, *Labour Force, Australia*, April 2023.

72 The number of employed persons increased by 2.9 per cent in the year to April 2023, down from growth of 3.3 per cent for the year ending March 2023. The number of monthly hours worked in all jobs increased by 7.4 per cent in the year to April 2023, reflecting that employment growth has been primarily full-time. For the year to February 2023, growth in employment and hours worked has been strong in the industry sectors containing the highest numbers of modern award-reliant employees (Accommodation and food services, Retail trade, and Health care and social assistance).[59] The level of job vacancies has declined over the three months to February 2023 but remains at a high level, confirming the position described by many parties concerning labour shortages in a number of industries.

73 It is likely that strength in the labour market has peaked, with slowing economic growth depressing demand for labour and increased immigration increasing supply. The RBA's forecast is for employment growth to slow to 1.1 per cent over the year ending June 2024, with the unemployment rate

58 ABS, *Labour Force, Australia*, April 2023.

59 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 6.4 and Table 6.3.

to increase to 3.6 per cent in the June quarter 2023 and 4.2 per cent for the June quarter 2024. The Budget forecast is similar, at 3.5 per cent and 4.25 per cent, respectively.[60]

4.4. Wages growth

74 Growth in wages, as measured by the Wage Price Index (WPI), has reached its highest level for a decade. The WPI rose by 0.8 per cent in the March quarter 2023 and 3.7 per cent over the year, the highest quarterly results since the December quarter 2012.[61] This represents a significant pick-up in wages growth since the last Review decision, when the annual increase was 2.4 per cent (March quarter 2022).[62] Wages growth is higher in the private sector (3.8 per cent) than in the public sector (3.0 per cent) as a result of government policies capping or restraining public sector wage rises.[63]

75 Growth in average weekly ordinary time earnings (AWOTE) for full-time adult employees in the year to November 2022 was 3.4 per cent. The most recent data for wage increases in approved federal enterprise agreements published by the Department of Employment and Workplace Relations was for the December quarter 2022 and showed the average annualised wage increase (AAWI) for agreements containing quantifiable wage increases was 3.0 per cent. The Commission's own fortnightly published data concerning new enterprise agreements lodged with the Commission for approval shows that the AAWI each fortnight has been between 3.1 per cent and 4.4 per cent over the first eight fortnightly periods in 2023.[64] In addition, a small proportion of enterprise agreements lodged for approval have wages indexed to the CPI, which is likely to produce higher wage increases for employees covered by these agreements, at least in the short term:[65]

Table 7: Measures of nominal wages growth, growth rate over the year

Year ended (Quarter)	WPI (% change)	AWOTE^ (% change)	C14 (% change)	C10 (% change)	AAWI (% change)	AENA (% change)
Dec-12	3.4	5.0	2.9	2.9	3.2	1.9
Dec-13	2.6	2.9	2.6	2.6	3.4	3.2
Dec-14	2.5	2.8	3.0	3.0	3.4	2.0
Dec-15	2.2	1.6	2.5	2.5	3.0	0.6
Dec-16	1.9	2.2	2.4	2.4	3.1	0.3
Dec-17	2.1	2.4	3.3	3.3	2.5	2.0
Dec-18	2.3	2.3	3.5	3.5	2.9	2.2
Dec-19	2.2	3.3	3.0	3.0	2.7	3.2

60 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Tables 14.3 and 14.4.

61 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 5.1.

62 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [35].

63 ABS, *Wage Price Index, Australia*, March 2023.

64 "Statistical Reports on Enterprise Agreements Data", Fair Work Commission (Web Page).

65 For example, *Statistical report — Enterprise agreements & other bargaining data: 8 April-21 April 2023* (Fair Work Commission, 22 May 2023), Table 1.1.

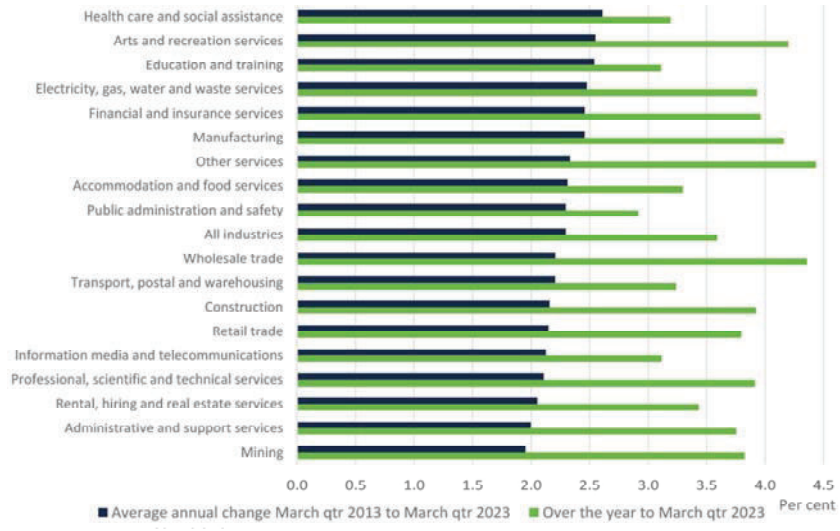
Year ended (Quarter)	WPI (% change)	AWOTE^ (% change)	C14 (% change)	C10 (% change)	AAWI (% change)	AENA (% change)
Dec-20	1.3	3.2	1.8*	1.8*	2.2	3.7
Dec-21	2.4	2.2	2.5	2.5	2.6	3.0
Dec-22	3.3	3.4	5.2	4.6	3.0	4.4
Mar-23	3.7	n/a	5.2	4.6	n/a	n/a

Note: * Actual increase was 1.75 per cent. ^Data are presented for November of each year.

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 5.1; ABS, *Average Weekly Earnings, Australia*, November 2022; ABS, *Wage Price Index, Australia*, March 2023; Department of Employment and Workplace Relations, *Trends in Federal Enterprise Bargaining*, December quarter 2022; *Manufacturing and Associated Industries and Occupations Award 2010*, *Manufacturing and Associated Industries and Occupations Award 2020*; ABS, *Australian National Accounts: National Income, Expenditure and Product*, December 2022.

76 Chart 7 shows increases in the WPI by industry for the year to the March quarter 2023 compared to annualised wage growth over the past decade. This shows that wages growth has accelerated significantly in all industry sectors except Information media and telecommunications, Education and Training and Public administration and safety. In the latter two industries, wages growth remains restrained as a result of federal and State government wage-capping policies:

Chart 7: Wage Price Index by industry, annualised growth over decade and growth over year to March quarter 2023



Note: Data are expressed in original terms.

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 5.2; ABS, *Wage Price Index, Australia*, March 2023.

77 The main contribution to increases in the WPI has come from jobs covered by individual arrangements. Table 8 shows the contributions of individual arrangements, enterprise agreements and awards to increases to the WPI for the four quarters to the March quarter 2023. This data is presented in original terms and does not add up to the total increase in seasonally adjusted terms:

Table 8: Contributions to WPI, by method of setting pay

	Enterprise agreement (%)	Individual arrangement (%)	Award (%)	Total increase (original) (%)	Total increase (seasonally adjusted) (%)
June 2022	0.21	0.38	0.00	0.59	0.86
September 2022	0.39	0.80	0.21	1.40	1.07
December 2022	0.29	0.46	0.07	0.82	0.85
March 2023	0.36	0.40	0.01	0.77	0.84
Sum over year	1.25	2.04	0.29	3.58	

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 5.3; ABS, *Wage Price Index, Australia*, March 2023.

78 The contributions to the WPI made by award increases in the September and December quarters 2022 substantially reflect the 2021-22 Review decision, which awarded an increase to the NMW of 5.2 per cent and increases to modern award minimum wages rates in the range of 4.6 per cent to 5.2 per cent, with the increases operative from 1 July 2022 or, in the case of modern awards in the aviation, hospitality and tourism sectors, from 1 October 2022. Over the year to the March quarter 2023, Table 8 indicates that award wage increases (which would predominantly have been made up of wage increases awarded in the 2021-22 Review) directly contributed only 8.1 per cent of the total increase (original) to the WPI.

79 On an industry-by-industry basis, the quarterly effect of the 2021-22 Review decision was more marked. In the December quarter 2022, the highest WPI increase was for Accommodation and food services, at 1.7 per cent.[66] Accommodation and food services has the highest proportion of modern award-reliant employees of any industry (see Table 2 above), and the 2021-22 Review minimum wage increases for three of the four modern awards mapped to this industry (the *Hospitality Industry (General) Award 2020*, *Restaurant Industry Award 2020* and the *Registered and Licensed Clubs Award 2020*) took effect in the December quarter 2022. However, over the course of the whole year, it is difficult to identify that the 2021-22 Review decision had any discernible differential effect upon the WPI for particular industries. Chart 7 above shows that the annual WPI increases for those industries with the highest proportion of modern award-reliant employees (see Table 2 above) did not

66 ABS, *Wage Price Index, Australia*, March 2023.

significantly depart from the private sector WPI of 3.8 per cent. For example, the annual WPI change for Accommodation and food services was 3.3 per cent and for Retail trade was 3.8 per cent.

80 The RBA forecasts a pick-up in growth in the WPI in this year and next year to around 4 per cent (Table 9). The Budget similarly forecasts faster WPI growth. Despite the recent pick-up in growth, wages will have declined in real terms from the September quarter 2020,[67] and are forecast to decline further through to the end of 2023, before starting to recover in the first half of 2024:

Table 9: Forecasts of growth rates in WPI

	June 2023	Dec 2023	June 2024	Dec 2024	June 2025
RBA	3.8	4.0	3.9	3.8	3.7
Budget	3.75		4.0		3.25

Source: "Statement on Monetary Policy", Reserve Bank of Australia (May 2023) Appendix: Forecasts; Australian Government, *Budget 2023-24, Budget Paper No 1* (2023), May, 58.

4.5. Business conditions and outlook

81 Total annual growth in business profits, to the December quarter 2022, has improved to 16.0 per cent compared to 14.2 per cent for the previous year (Table 10). This is above the five-and 10-year averages to the December quarter 2022. However, these outcomes were substantially the result of an increase in profits in the mining sector of 33.2 per cent, which is the result of high export mineral prices.[68] In the non-mining sector, growth was 2.2 per cent, which was higher than for the previous year but below the five- and 10-year averages:

Table 10: Company gross operating profits, mining and non-mining industries, growth rates

	Mining (%)	Non-mining (%)	Total (%)
Dec-12	-27.1	3.5	-7.4
Dec-13	37.0	1.3	11.2
Dec-14	-20.5	1.3	-6.2
Dec-15	-16.1	2.4	-3.0
Dec-16	78.2	10.7	27.7
Dec-17	2.4	6.3	4.9
Dec-18	28.2	2.9	11.6
Dec-19	8.0	0.9	3.7
Dec-20	3.6	23.5	15.3
Dec-21	37.3	0.7	14.2
Dec-22	33.2	2.2	16.0
5 years to Dec-22*	21.3	5.7	12.1
10 years to Dec-22*	15.9	5.0	9.1

67 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 9.2.

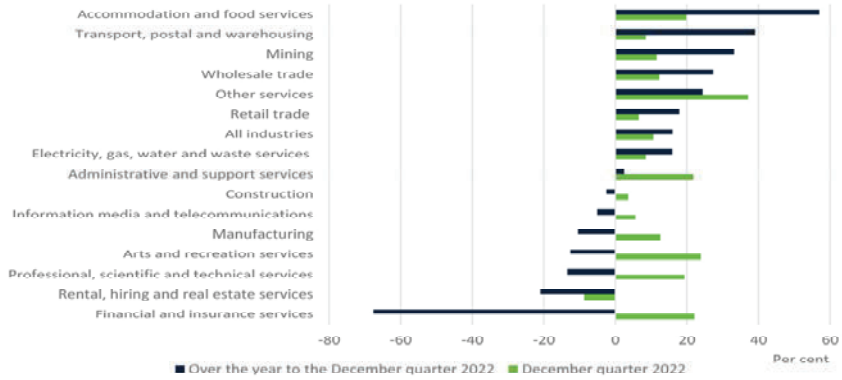
68 ABS, *Business Indicators, Australia*, December 2022.

Note: *Annualised growth rates.

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 3.3; ABS, *Business Indicators, Australia*, December 2022.

82 Growth in gross operating profits has generally been healthy in private sector industries which have the highest proportions of modern award-reliant employees. Of the 11 highest industries with 10 per cent or more modern award-reliant employees (see Table 2 above), all but one increased profits in the December quarter 2022 and six have increased profits over 2022. This includes substantial increases in profits in Accommodation and food services and Retail trade divisions, which alone correspond with private sector modern awards applying to approximately one-third of all modern award-reliant employees[69] (see Chart 1 above):

Chart 8: Growth in gross operating profits, current prices, by industry



Note: Excludes Agriculture, forestry and fishing. Data are only for the private sector and are not available for Public administration and safety, Education and training and Health care and social assistance.

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 3.2; ABS, *Business Indicators, Australia*, December 2022.

69 *General Retail Industry Award 2020*, *Hospitality Industry (General) Award 2020*, *Fast Food Industry Award 2010* and *Restaurant Industry Award 2020*.

83 The available data to June 2022 shows that business bankruptcy rates continue to decline,[70] the business entry rate (both for all businesses and employing businesses) remains well in excess of the exit rate,[71] and business survival rates (both for all businesses and employing businesses) measured over a rolling 4-year period are at, or very close to, the highest point in the last decade (notwithstanding the COVID-19 pandemic).[72] Insolvency statistics published by the Australian Securities and Investment Commission show a recent increase in insolvency numbers, but only to pre-pandemic levels.[73]

84 Business surveys indicate that while business conditions and leading indicators remain relatively firm, business confidence has fallen and costs pressures remain difficult. The NAB Quarterly Business Survey in March 2023 showed that:[74]

- business conditions continued to show ongoing resilience, edging lower in March but remaining well above the long-term average;
- trading conditions remain very elevated, indicating that businesses continue to experience strong demand, and conditions are generally strong across States and sectors;
- business confidence appears to have stabilised, following earlier falls, but remains below long run averages with deeper negatives in retail and wholesale; and
- labour cost growth for the quarter was 1.4 per cent (down from 1.6 per cent in the December quarter 2022) and purchase cost growth was 1.5 per cent (down from 1.8 per cent in the December quarter 2022).

85 The ACCI-Westpac Survey of Industrial Trends (conducted from 13 February 2023 to 6 March 2023), which focuses on manufacturing, indicates a somewhat more pessimistic outlook.[75] It reports that in the March quarter 2023, growth in new orders marginally recovered, having stalled in the previous quarter, with only a small positive net balance of survey respondents anticipating a rise in the next quarter.[76] Manufacturers' investment expectations have moderated, consistent with an expected downturn and survey respondents report continuing costs and competitiveness pressures leading to a general business sentiment which the survey describes as "deeply pessimistic".[77] Labour shortages remain "intense", albeit eased somewhat over the past six months as the economy has slowed and immigration numbers lifted.[78]

4.6. Productivity

86 The principal measure of productivity is GDP per hour worked. On this

70 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 3.4.

71 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Charts 3.5 and 3.5a.

72 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 3.6.

73 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 3.7; Australian Securities & Investments Commission, *Australian insolvency statistics* (2023).

74 *NAB Quarterly Business Survey* (Q1 2023).

75 *ACCI-Westpac Survey of Industrial Trends* (Report No 246, March 2023).

76 *ACCI-Westpac Survey of Industrial Trends* (Report No 246, March 2023) at 5.

77 *ACCI-Westpac Survey of Industrial Trends* (Report No 246, March 2023) at 3.

78 *ACCI-Westpac Survey of Industrial Trends* (Report No 246, March 2023) at 7.

measure, productivity fell by 3.5 per cent over the year to the December quarter 2022. This was a result of the number of hours worked during the course of the year increasing significantly more than GDP. It reversed the experience of the previous two years, where GDP figures were ahead of hours worked as a result of lockdowns and other restrictions during the COVID-19 pandemic:

Table 11: Productivity growth and its components, growth rate over the year

Quarter	National Accounts						Labour Force
	Total			Market Sector			
	GDP (% change)	Hours worked (% change)	GDP/ hour worked (% change)	GVA (% change)	Hours worked (% change)	GVA/ hour worked (% change)	Hours worked (quarterly) (% change)
Dec-12	2.8	0.8	2.1	3.6	-0.1	3.7	0.5
Dec-13	2.5	0.4	2.0	2.4	0.3	2.0	0.5
Dec-14	2.1	0.3	1.7	2.2	-0.2	2.5	0.2
Dec-15	2.7	2.5	0.2	2.6	2.0	0.6	2.7
Dec-16	2.7	0.8	1.8	2.1	-0.1	2.1	0.9
Dec-17	2.4	3.2	-0.8	2.5	3.8	-1.2	3.2
Dec-18	2.4	1.7	0.7	2.0	0.6	1.4	1.8
Dec-19	2.2	1.4	0.7	1.9	1.5	0.4	1.5
Dec-20	-0.1	-2.3	2.4	-1.2	-4.1	3.1	-2.0
Dec-21	4.6	2.4	2.0	5.3	2.7	2.5	2.5
Dec-22	2.7	6.5	-3.5	3.2	8.9	-5.2	6.7

Note: The percentage changes are calculated in relation to the corresponding quarter of the previous year.

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 2.2; ABS, *Australian National Accounts: National Income, Expenditure and Product*, December 2022; ABS, *Labour Force, Australia*, April 2023.

87 In assessing productivity, the Commission in past Reviews has usually placed greater weight on productivity changes over multi-year cycles, since this tends to even-out short-term fluctuations in the number of hours worked. Chart 9 shows that during the current (albeit incomplete) cycle, labour productivity has grown at 1.2 per cent annually. This continues the long-term trend of annual productivity growth averaging somewhat above 1 per cent a year, lower than the growth achieved in the 1990s:[79]

79 Philip Lowe, *Inflation, productivity and the future of money, address to the Australian Strategic Business Forum 2022* (2022), Governor, Reserve Bank of Australia, Melbourne, 20 July.

Chart 9: Productivity cycles, average annual growth in the market sector

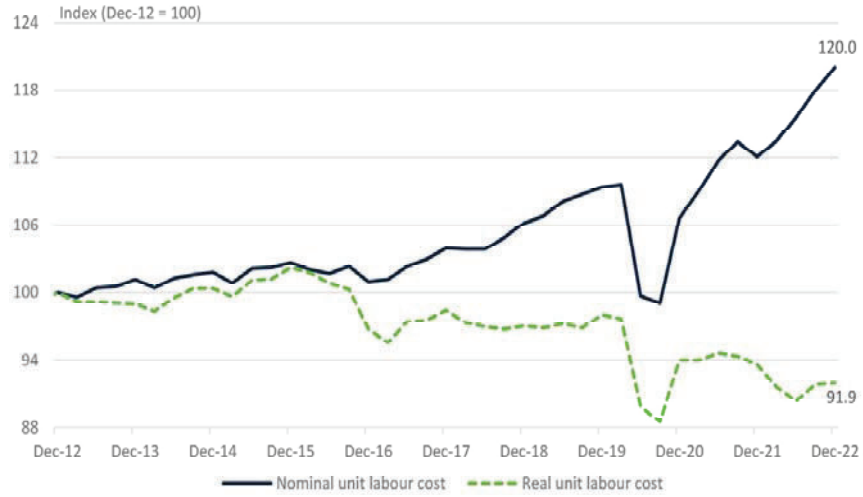
Note: Multifactor productivity is measured as output per combined unit of labour and capital. Capital deepening is the component of labour productivity growth which is due to the increase in the amount of capital that each unit of labour has to work with. Labour productivity is represented by the numbers above the bars and is the sum of multifactor productivity and capital deepening. Due to rounding, the sum of multifactor productivity and capital deepening may not equal labour productivity. The current productivity cycle from 2017-18 is incomplete.

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 2.2; ABS, *Australian System of National Accounts*, 2021-22 financial year; ABS, *Estimates of Industry Multifactor Productivity* (2023), 2021-22 financial year.

88 The decline in labour productivity in 2022 along with the pick-up in nominal wages growth has resulted in a surge in nominal unit labour costs, up by 7.1 per cent. However, the decline in real wages more than offset the decline in productivity to result in a fall of 1.8 per cent in real unit labour costs.[80] Real unit labour costs are well below pre-pandemic levels (Chart 10):

80 ABS, *Australian National Accounts: National Income, Expenditure and Product*, December 2022.

Chart 10: Unit labour costs, index



Source: ABS, *Australian National Accounts: National Income, Expenditure and Product*, December 2022; *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 2.3.

5. Relative living standards and the needs of the low paid

89 For the purpose of this consideration, we will continue the approach taken in previous Review decisions whereby the "low paid" are defined as persons whose ordinary-time earnings are below two-thirds of median (adult) ordinary-time earnings of all full-time employees.[81] There are two different measures of median earnings by which this threshold may be calculated:

(1) Based on ABS *Characteristics of Employment* (COE) data published in August 2022, the low paid threshold is $1016.67.[82]

(2) Based on ABS *Employee Earnings and Hours* (EEH) data published in May 2021, the threshold is $1062.00.[83]

90 The COE threshold would nominally encompass the minimum weekly rates for all classifications at C8 or below in the *Manufacturing and Associated Industries and Occupations Award 2020* (the Manufacturing Award), while the EEH threshold would nominally encompass minimum weekly rates for all classifications below C4. However, because median weekly earnings include penalty rates paid on ordinary hours, it is not necessarily the case that a person who is classified below C8 in the former case or C4 in the latter will fall below the threshold. This qualification is important in respect of the modern award-reliant workforce because, in a number of the industries in which modern award-reliant employees are concentrated (in particular, Accommoda-

81 See *Re Annual Wage Review 2015-16* (2016) 258 IR 201 at [359].

82 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 8.2.

83 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 8.2.

tion and food services and Retail trade), it is highly likely that employees would earn penalty rate payments for ordinary time worked in unsociable hours from Monday to Friday and on weekends and public holidays.

91 As we have earlier discussed, the proportion of low-paid employees among modern award-reliant employees is higher than among other employees. On the basis that hourly earnings of casual employees are deflated for the casual loading (which is paid in lieu of a range of NES and other entitlements which employees, including low-paid employees, would otherwise receive), 36.1 per cent of modern award-reliant employees are low paid, compared to 6.8 per cent of employees not reliant on modern awards (see Table 3). In four of the five most common modern awards, the proportion of low-paid employees is significantly higher:[84]

Restaurant Industry Award 2020:	62.2 per cent
Hospitality Industry (General) Award 2020:	52.2 per cent
Fast Food Industry Award 2010:	50.0 per cent
General Retail Industry Award 2020:	47.9 per cent

92 Of all low-paid employees, 56.2 per cent are modern award-reliant.[85]

93 In previous Review decisions, a benchmark of 60 per cent of median equivalised household disposable income has been used to measure the poverty line. Subject to the qualifications stated below, we will continue to use this benchmark.

94 Modelling of disposable incomes for 14 selected household types earning the NMW or C14 wage rate, the C10 wage rate and the C4 wage rate compared to the poverty benchmark shows that a number of household types fall below that benchmark (Table 12):

Table 12: Ratio of disposable income of selected households earning various wage rates to a 60 per cent median income poverty line, December 2022

	60% median income PL	Disposable income as a ratio of 60% median income PL			
Household type	**($ pw)**	**C14**	**C10**	**C4**	**AWOTE**
Single adult	638.35	1.12	1.26	1.45	2.11
Single parent working FT, 1 child	829.86	1.21	1.30	1.44	1.79
Single parent working PT, 1 child	829.86	0.82	0.88	0.97	1.28
Single parent working FT, 2 children	1021.36	1.10	1.18	1.28	1.55

84 Kelvin Yuen and Josh Tomlinson, *A Profile of Employee Characteristics Across Modern Awards* (Fair Work Commission Research Report No 1/2023, March 2023) Table B12.

85 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 7.4.

	60% median income PL	Disposable income as a ratio of 60% median income PL			
Household type	**($ pw)**	**C14**	**C10**	**C4**	**AWOTE**
Single parent working PT, 2 children	1021.36	0.77	0.83	0.90	1.16
Single-earner couple (with NSA/JSP)	957.53	1.01	1.02	1.03	1.43
Single-earner couple	957.53	0.76	0.84	0.97	1.43
Single-earner couple, 1 child (with NSA/JSP)	1149.03	1.01	1.02	1.04	1.29
Single-earner couple, 1 child	1149.03	0.87	0.94	1.04	1.29
Single-earner couple, 2 children (with NSA/JSP)	1340.54	0.96	0.97	0.98	1.18
Single-earner couple, 2 children	1340.54	0.83	0.90	0.98	1.18
Dual-earner couple	957.53	1.17	1.32	1.52	2.24
Dual-earner couple, 1 child	1149.03	1.15	1.23	1.33	1.87
Dual-earner couple, 2 children	1340.54	1.07	1.14	1.21	1.60

Note: Poverty lines are based on estimates of median equivalised household disposable income in 2019-20 for, adjusted for movements in household disposable income per head as calculated by the Melbourne Institute of Applied Economic and Social Research and for household composition using the modified OECD equivalence scale. AWOTE data are expressed in original terms. For assumptions see Table 8.6 in Statistical Report.

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 8.6; ABS, *Average Weekly Earnings, Australia*, November 2022; ABS, *Household Income and Wealth, Australia*, 2019-20 financial year; Fair Work Commission modelling; *Manufacturing and Associated Industries and Occupations Award 2020*; Melbourne Institute of Applied Economic and Social Research, *Poverty Lines: Australia*, December quarter 2022; *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 8.6.

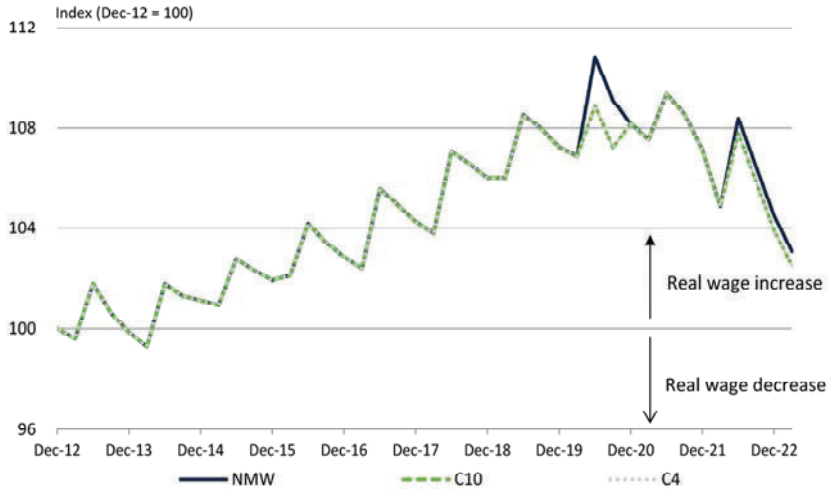
95 At the C14 rate, six household types fall below the poverty benchmark. The same six household types fall below the poverty benchmark at the C10 rate, and five of them fall below at the C4 rate.

96 As was recognised in the 2021-22 Review decision, there are limitations upon the extent to which this type of modelling can be used to guide minimum wage-setting for the low paid. The poverty line benchmark is itself essentially a measure of inequality at the lower end of the income distribution rather than

necessarily a measurement of deprivation or financial stress.[86] Further, some of the outcomes identified in Table 12 above are a result of the operation of the tax-transfer system and cannot realistically be remedied by adjustments to minimum wages alone.[87]

97 As more direct indicators of deprivation and financial stress amongst low paid NMW or modern award-reliant employees and their households, we take into account two matters. *First*, it is clear that there has been a reduction in such employees' real wages over the last two years, which has resulted in a reversal of steady progress made in earlier Review decisions to improve the real wages of low-paid workers (Chart 11):

Chart 11: Real value of the NMW and selected award rates of pay, index



Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 9.1; ABS, *Consumer Price Index*, Australia, December Quarter 2022; Fair Work Australia/Fair Work Commission decisions.

98 Calculated on the NMW, the reduction in real wages was 1 per cent over the year to the December quarter 2021 and a further 2.5 per cent over the year to the December quarter 2022.[88] We expect there will have been a further reduction in the real NMW in the calendar year 2023 to date. This position is exacerbated by the fact that CPI inflation in non-discretionary goods (such as food, automotive fuel, housing and health costs) has been higher than that for discretionary goods (Table 13):

86 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [72].

87 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [75].

88 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 9.1.

Table 13: Non-discretionary and discretionary inflation, growth rates over the year

Quarter	Non-discretionary (% change)	Discretionary (% change)	Discretionary excluding tobacco (% change)
Dec-12	3.4	0.6	0.3
Dec-13	3.1	1.9	1.4
Dec-14	1.7	1.7	0.7
Dec-15	1.1	2.6	1.7
Dec-16	1.8	1.0	-0.1
Dec-17	2.4	1.2	0.1
Dec-18	1.5	2.2	1.2
Dec-19	1.5	2.5	1.5
Dec-20	-0.6	2.9	1.2
Dec-21	4.5	1.9	2.0
Dec-22	8.4	7.1	7.2
Mar-23	7.2	6.8	7.0

Note: The ABS define non-discretionary expenditure as goods or services that are purchased because they meet a basic need (food, shelter, healthcare), are required to maintain current living standards, or are a legal obligation. Discretionary expenditure includes goods or services that could be considered as "optional" purchases.

Source: ABS, *Consumer Price Index, Australia*, March Quarter 2023; *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 4.3.

99 The picture is worse for mortgage-holders having regard to the increase in the LCI earlier discussed. It can readily be inferred from the above data that households dependent on the earnings of low-paid, modern award-reliant employees are experiencing financial stress as a result of the high rate of inflation.

100 *Second*, the updated budget standards research report published in March 2023 by the Commission[89] demonstrates, by reference to 14 household types, that households dependent upon low-paid, modern award-reliant employees will have difficulty in meeting their basic financial needs. The core budgetary concept upon which the report proceeds is the Minimum Income for Healthy Living (MIHL) standard, which is designed to achieve levels of consumption (of food, clothing, medications, transportation, personal care, and the like) and participation (in lifestyle, exercise and social activities) that are consistent with healthy living. The budgets constructed in the report reflect the minimum amounts necessary to achieve the MIHL standard. In addition, the report has constructed a supplementary budget covering some common discretionary expenditures not included in the "basic needs" budget concept.[90]

89 Megan Bedford, Bruce Bradbury and Yuvisthi Naidoo, *Budget Standards for Low-Paid Families* (Fair Work Commission Research Report, March 2023).

90 Megan Bedford, Bruce Bradbury and Yuvisthi Naidoo, *Budget Standards for Low-Paid Families* (Fair Work Commission Research Report, March 2023) at 2-3.

101 Table 14 below, which reproduces Table 14 in the report, analyses disposable incomes when receiving the NMW on a full-time basis relative to the budgets formulated for each of the 14 household types. It demonstrates that, even after excluding discretionary spending, 12 out of the 14 household types earn less than the budgeted amounts necessary to meet the MIHL standard. If discretionary spending is included, none of the household types meets the formulated budget amount:

Table 14: Disposable income when receiving minimum wage, relative to budget

	Disposable income when receiving minimum wage (July 2022)	Budget			MW disposable income as % of budget	
		Excluding housing & discretionary	Housing	Discretionary	Including Housing	Including housing & discretionary
Single adult	$717	$377	$426	$89	89	80
Single parent, FT, 1 child	$1000	$579	$461	$96	96	88
Single parent, PT, 1 child	$673	$559	$461	$87	66	61
Single parent, FT, 2 child	$1115	$756	$495	$109	89	82
Single parent, PT, 2 child	$788	$719	$495	$100	65	60
Single-earner couple (JSP for second adult)	$942	$608	$461	$165	88	76
Single-earner couple	$728	$596	$461	$156	69	60
Single-earner couple, 1 child (JSP for second adult)	$1139	$814	$461	$167	89	79
Single-earner couple, 1 child	$1000	$762	$461	$158	82	72

	Disposable income when receiving minimum wage (July 2022)	Budget			MW disposable income as % of budget	
		Excluding housing & discretionary	Housing	Discretionary	Including Housing	Including housing & discretionary
Single-earner couple, 2 children (JSP for second adult)	$1260	$998	$495	$178	84	75
Single-earner couple, 2 children	$1115	$888	$495	$169	81	72
Dual-earner couple	$1124	$608	$461	$165	105	91
Dual-earner couple, 1 child	$1312	$814	$461	$167	103	91
Dual-earner couple, 2 children	$1427	$998	$495	$178	96	85

Note: Minimum wage disposable income calculation following the assumptions of in the Statistical report, updated to 1 July 2022. Wage for full-time (FT) workers is $812.60 per week; part-time (PT) is 50 per cent of this. Dual-earner couples have one partner working full time and one partner working part time. Taxes and benefits as at 1 July 2022. Single parents assumed not looking for work and hence not eligible for JobSeeker. Second earners are looking for work and hence eligible for JobSeeker where indicated. Full rate Rent Assistance assumed for those eligible. Budgets for single earner couples where the second person is eligible for JobSeeker (i.e. looking for work) are set at the level of dual-earner couples.

Source: Megan Bedford, Bruce Bradbury and Yuvisthi Naidoo, *Budget Standards for Low-Paid Families* (Fair Work Commission Research Report, March 2023) at 49.

102 The analysis above does not include measures announced in the 2023-24 Budget intended to deliver targeted cost of living relief to support Australians facing pressure from high inflation and interest rates, and to lower inflation. The measures are primarily directed at those in receipt of welfare payments, some of whom will be low-paid workers.

103 It may be acknowledged that the above analysis is likely to be representative of only a very small proportion of the adult NMW- and modern award-reliant

employee workforce directly affected by this Review. As earlier discussed, NMW-reliant employees only constitute about 0.7 per cent of the Australian employee workforce. The C14 rate, which is the same amount as the NMW, applies to a further 0.8 per cent of the workforce (or 3.3 per cent of the award-reliant workforce).[91] However, in the large majority of modern awards in which the rate appears, the rate applies merely for a transitional period for new employees, with employees then proceeding to a higher rate of pay. The small number of modern awards which fall in the exceptional category are currently the subject of review (C14 review), which we anticipate will result in them likewise only applying the C14 rate for a transitional period.[92]

104 The above analysis also takes no account of casual employees in receipt of the 25 per cent loading (noting that casual employees constitute almost half of the modern award-reliant cohort). To the extent that the analysis may be applied to modern award-reliant employees on the C14 rate, it does not account for additional earnings by way of award penalty rates payable for ordinary-time work (such as evening or weekend penalty rates) or award overtime penalty rates, which are common incidents of modern award-reliant employment.

105 Nonetheless, at least for those employees of the NMW who do conform to any of the household types, the NMW cannot be said to constitute a "living wage" which meets the basic MIHL standard. During the period of operation of the FW Act, it does not appear that the NMW has ever been set with this purpose in mind. The first Review decision made under the FW Act was the 2009-10 Review decision.[93] Although the Minimum Wage Panel in that decision considered various measures of poverty and then-available budget standards research,[94] it did not set the NMW by reference to any such material. Instead, it first determined that modern award minimum weekly wages should be increased by $26, then noted that the NMW, as transitionally established under Sch 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (the Transitional Act), was currently set at the minimum wage for the C14 classification in the Manufacturing Award, and concluded: "That position should continue".[95] The effect of this approach was simply to continue the way in which the previous federal minimum wage (FMW) had been set under the provisions of the *Workplace Relations Act 1996* (Cth).

106 The FMW had its origin in the *Safety Net Review — Wages — April 1997* decision of a Full Bench of the Australian Industrial Relations Commission (the AIRC).[96] The Full Bench majority determined to establish, for the first time, a FMW set, for full-time adult employees, at $359.40 per week (with proportionate amounts for junior, part-time and casual employees). This was to be implemented by way of an award clause which provided that no employee should be paid less than the FMW. As to the quantum, the Full Bench majority said:[97]

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91 Australian Government submission, 31 March 2023, Chart 4.1.

92 See *Review of certain C14 rates in modern awards* [2023] FWC 716.

93 *Re Annual Wage Review 2009-10* (2010) 193 IR 380.

94 *Re Annual Wage Review 2009-10* (2010) 193 IR 380 at [215]-[228].

95 *Re Annual Wage Review 2009-10* (2010) 193 IR 380 at [338]-[339].

96 *Safety Net Review — Wages — April 1997* (1997) 71 IR 1.

97 *Safety Net Review — Wages — April 1997* (1997) 71 IR 1 at 60.

> The federal minimum wage, adjusted from time to time, will be an important part of the award safety net of fair minimum wages. Its maintenance will ensure a secure minimum level in award classification structures.
>
> The ACTU sought the introduction of a minimum award rate of $380 per 38 hour week. There were various submissions supporting a minimum rate, but at a lower level than proposed by the ACTU. For example, ACCI submitted that the Commission should consider reviving the minimum wage (which is about $260 per week), granting a modest increase to it and reviewing it in the next review of principles. The BCA, in the context of a single minimum wage, submitted that there were strong arguments for making such a wage about $9.19 per hour, which is the C14 rate in the Metal Industry Award (currently $349.40 per week). Both ACOSS and The Brotherhood of St Laurence supported the concept of a minimum wage.
>
> For reasons given in Chapter 7.6, *we have decided not to link the level of the federal minimum wage with any defined benchmark of needs*. We think that the most appropriate course to follow now is to equate the federal minimum wage with the minimum classification rate in most federal awards; that is, the rate of the C14 classification in the Metal Industry Award. This approach (which is consistent with the proposal of the BCA), in our view, lends industrial realism to the minimum wage we have set because it is linked to the classification structure established by the Commission as a result of the *August 1989* decision. The Commission, in deciding to establish minimum classification rates in the metal and building industries, said:
>
> > Subject to what we say later in this decision, we have decided that the minimum classification rate to be established over time for a metal industry tradesperson and a building industry tradesperson should be $356.30 per week with a $50.70 per week supplementary payment. The minimum classification rate of $356.30 per week would reflect the final effect of the structural efficiency adjustment determined by this decision. [Print H9100 at p 12]
>
> As a result of this decision, minimum awards were varied, over a period of time, to reflect the relativities so decided, leading to the C14 rate in the Metal Industry Award becoming the minimum classification rate in most federal awards.

(Emphasis added)

107 In short, the FMW was not established by reference to the needs of the low paid. It was simply aligned with the lowest classification rate established for what was then the *Metal Industry Award 1984 — Part I* (the Metal Industry Award). The C14 classification which then appeared in the Metal Industry Award, and remains in the Manufacturing Award today, has only ever applied to an employee undertaking "[u]p to 38 hours induction training" and was never intended to apply on an ongoing basis to a person's employment. Consistent with the approach taken in the *Safety Net Review — Wages — April 1997* decision, the quantum of the FMW remained aligned with the C14 classification rate while the *Workplace Relations Act* remained in effect and, by virtue of the 2009-10 Review decision, it was carried through when the FW Act came into operation. This approach has remained unchanged in every Review decision since.

108 We do not consider that the position whereby the NMW is simply set by reference to the C14 rate should continue. This is particularly the case when almost all modern awards which contain a classification with a C14 rate prescribe a limit on the period employees can be classified and paid at that level, after which employees move automatically to a higher classification and

pay rate. Further, an employee classified at the C14 rate under a modern award may be entitled to a range of additional earnings-enhancing benefits such as weekend penalty rates, overtime penalty rates, shift loadings and allowances to which an employee on the NMW will not be entitled. A comprehensive review of the NMW should be undertaken by reference to the budget standards research and other relevant material to arrive at a NMW amount which is set having proper regard to the needs of the low paid and the other considerations in s 284. That is beyond the scope of the current Review, but we discuss later the interim measure we intend to take in this Review having regard to all the mandatory considerations in the minimum wages objective.

109 The application of the budget standards model to modern award classifications above C14 may also raise questions about whether modern award minimum wage rates are meeting the needs of the low paid. For example, Table 15 applies the model to the C10 rate:

Table 15: Disposable income when receiving C10, relative to budget

	Disposable income when receiving C10 (July 2022)	**Budget**			**C10 disposable income as % of budget**	
		Excluding housing & discretionary	**Housing**	**Discretionary**	**Including Housing**	**Including housing & discretionary**
Single adult	$805	$377	$426	$89	100	90
Single parent, FT, 1 child	$1079	$579	$461	$96	104	95
Single parent, PT, 1 child	$728	$559	$461	$87	71	66
Single parent, FT, 2 child	$1201	$756	$495	$109	96	88
Single parent, PT, 2 child	$842	$719	$495	$100	69	64
Single-earner couple (JSP for second adult)	$953	$608	$461	$165	89	77
Single-earner couple	$805	$596	$461	$156	76	66

	Disposable income when receiving C10 (July 2022)	Budget			C10 disposable income as % of budget	
		Excluding housing & discretionary	Housing	Discretionary	Including Housing	Including housing & discretionary
Single-earner couple, 1 child (JSP for second adult)	$1152	$814	$461	$167	90	80
Single-earner couple, 1 child	$1079	$762	$461	$158	88	78
Single-earner couple, 2 children (JSP for second adult)	$1274	$998	$495	$178	85	76
Single-earner couple, 2 children	$1201	$888	$495	$169	87	77
Dual-earner couple	$1264	$608	$461	$165	118	102
Dual-earner couple, 1 child	$1405	$814	$461	$167	110	97
Dual-earner couple, 2 children	$1520	$998	$495	$178	102	91

Note: C10 disposable income calculation following the assumptions as in Table 14.

Source: Megan Bedford, Bruce Bradbury and Yuvisthi Naidoo, *Budget Standards for Low-Paid Families* (Fair Work Commission Research Report, March 2023) at 50; *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 8.9.

110 Although the qualifications expressed in [104] above apply equally to the analysis in Table 14, we consider nonetheless that it may require further consideration in future Reviews.

6. Gender equality

6.1. Gender pay gaps

111 The term "gender pay gap" refers to the "difference in the earnings of men and women".[98] The gender pay gap can be measured in different ways and in different workforce segments, giving rise to the notion of gender pay *gaps* (e.g. adult average weekly ordinary time earnings; adult average weekly full time earnings including overtime and bonuses, average weekly total earnings; hourly earnings, industry pay gap or occupation pay gap). It is usually expressed either as a ratio of female to male wages (e.g. females earn 87 per cent of male wages) or the difference between male and female wages (e.g. 13 per cent). Table 16 shows the extent of the gender pay gap across the entire employee workforce according to various measures:

Table 16: Estimates of the gender pay gap

Measure	Male earnings ($)	Female earnings ($)	Gender pay gap (%)
Weekly			
AWOTE *(November 2022)*	1906.20	1650.80	13.3
EEH adult ordinary time cash earnings, non-managerial full-time *(May 2021)*	1809.10	1617.10	10.6
Hourly			
EEH adult ordinary time cash earnings, adjusted for casual loading* *(May 2021)*	45.50	39.42	13.4
EEH modern award-reliant employees, total cash earnings, adjusted for casual loading*# (*May 2021)*	28.05	27.55	1.8

Note: AWOTE refer to full-time adult employees. The gender pay gap is calculated as the difference between female's and male's earnings, expressed as a percentage of male's earnings. * Adult rate of pay employees with earnings deflated by a casual loading of 25 per cent. # Total cash earnings include overtime.

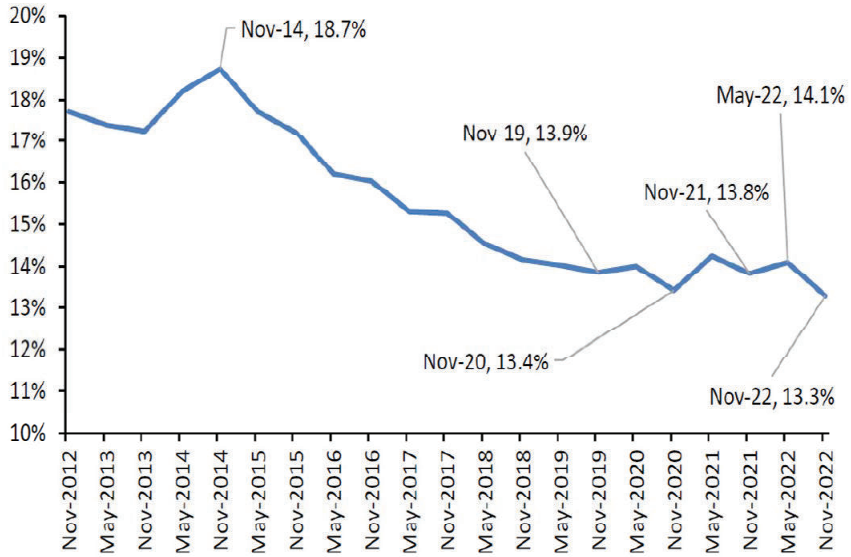
Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 11.1; ABS, *Average Weekly Earnings, Australia*, November 2022; ABS, *Microdata: Employee Earnings and Hours, Australia*, May 2021; ABS, *Employee Earnings and Hours, Australia*, May 2021.

112 Chart 12, taken from the Australian Government's submissions,[99] shows that the gender pay gap (as measured by AWOTE) narrowed slightly in the period to 2018 but has remained at approximately the same level over the last five years and continues to be significant:

98 ABS, *Gender pay gap guide* (Web Page, 21 February 2023).

99 Australian Government submission, 31 March 2023, Chart 5.1.

Chart 12: Gender pay gap, November 2012-November 2022



113 The data can be disaggregated to identify industry-level pay gaps. Chart 13 shows the gender pay gap by AWOTE in each industry division:

Chart 13: Gender pay gap by industry, AWOTE, November 2022

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 11.1; ABS, *Average Weekly Earnings, Australia*, November 2022.

114 Modern award-reliant employees are disproportionately female compared to non-modern award-reliant employees and the workforce as a whole, as shown in Table 17:[100]

Table 17: Percentage of female employees in workforce categories

Employee category	Percentage that are women (%)
Modern award-reliant	58.1
Not modern award-reliant	48.5
All employees	50.4

115 The position is accentuated in respect of the 10 awards which cover the largest number of modern award-reliant employees. Table 18 shows that nine of these are female-dominated (with a proportion of 60 per cent or more female employees). The proportion of employees who are women is highest in the *Children's Services Award 2010* and *Health Professionals and Support Services Award 2020* at 96.1 per cent and 91.2 per cent, respectively:[101]

Table 18: Women employees across 10 most common modern awards, May 2021

Modern award	Number of employees who are women (No)	Proportion of employees who are women (%)
General Retail Industry Award 2020	174,300	67.0
Social, Community, Home Care and Disability Services Industry Award 2010	172,300	69.3
Hospitality Industry (General) Award 2020	148,600	65.8
Fast Food Industry Award 2020	113,900	60.8
Children's Services Award 2010	108,500	96.1
Health Professionals and Support Services Award 2020	83,000	91.2
Restaurant Industry Award 2020	79,300	61.4
Clerks — Private Sector Award 2020	73,900	80.8
Cleaning Services Award 2020	45,200	60.0
Vehicle Repair, Services and Retail Award 2020	22,900	27.8

100 Kelvin Yuen and Josh Tomlinson, *A Profile of Employee Characteristics Across Modern Awards* (Fair Work Commission Research Report No 1/2023, March 2023) at 18; *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 7.4.

101 Kelvin Yuen and Josh Tomlinson, *A Profile of Employee Characteristics Across Modern Awards* (Fair Work Commission Research Report No 1/2023, March 2023) Table B1.

Source: Australian Government submission, 31 March 2023 at para 111, Table 5; *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 11.7.

116 The position above is however partly counter-balanced by the fact that modern award-reliant employees under some other modern awards are predominantly, if not almost exclusively, male. For example, the proportion of modern award-reliant men covered by the Manufacturing Award and the *Building and Construction General On-site Award 2020* is in each case over 93 per cent.[102]

117 A consequence of the disproportionality of women in the modern award-reliant workforce is that, as found in the 2015-16 Review decision[103] (see [43] above), if Review decisions increase modern award minimum wage rates of pay relative to median wage rates produced by the labour market, then this is likely to reduce the gender pay gap to some degree. In this Review, the consideration in s 284(1)(aa) concerning the need to achieve gender equality including by, relevantly, addressing gender pay gaps would therefore weigh in favour of increasing modern award minimum wage rates by a percentage amount in excess of the WPI.

118 However, the aggregate gender pay gap cannot be closed simply by adjustments to NMW and modern award minimum wage rates, primarily because the wages of more than three-quarters of the workforce is determined other than in accordance with NMW and modern award minimum wage rates. Indeed, the extent to which it can even be narrowed by this means (assuming NMW and modern award minimum wage increases within the range of reasonableness) is very limited.

119 The gender pay gap across all modern award-reliant employees (difference between average hourly total cash earnings of females and males) is 1.8 per cent[104] but varies markedly by industry. Further research is required to gain a better understanding of how to compare female and male award-reliant earnings. It is unlikely that this pay gap, however measured, can be addressed by uniform percentage wage increases to modern award minimum wages, since this will not improve the position of female modern award-reliant employees relative to male modern award-reliant employees. This pay gap may better be addressed in the context of a consideration as to whether modern award minimum wage rates in female-dominated industries and occupations are undervalued relative to male-dominated industries and occupations.

6.2. Equal remuneration for work of equal or comparable value and eliminating gender-based undervaluation of work

120 For the reasons earlier discussed, we consider that as a result of the amendments to ss 134(1) and 284(1) made by the Amending Act, any issues of unequal remuneration for work of equal or comparable value or gender undervaluation relating to modern award minimum wage rates can no longer be left to be dealt with on an application-by-application basis outside the

102 Kelvin Yuen and Josh Tomlinson, *A Profile of Employee Characteristics Across Modern Awards* (Fair Work Commission Research Report No 1/2023, March 2023) Table B1.

103 *Re Annual Wage Review 2015-16* (2016) 258 IR 201.

104 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 11.2.

framework of the Review process. Such issues, insofar as they may be identified, should now be dealt with in the Review process or in other Commission-initiated proceedings between Reviews.

121 There is some basis to think that, across modern awards, there is an issue as to whether minimum wage rates for female-dominated work are equal to minimum wage rates for male-dominated work of equal or comparable value or are based on a valuation of work that is free from gender considerations. In the decision in *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010*[105] (the *Pharmacy Decision*), a Full Bench outlined the history of the process by which, following on from the *National Wage Case August 1988*[106] and the *National Wage Case February 1989 Review*,[107] a system of standard cross- and intra-award relativities was implemented by the AIRC for federal awards. The key step in this was the establishment in the *National Wage Case, August 1989*[108] of a benchmark rate for metal industry and building industry tradespersons. The classification for the metal industry tradesperson in the Metal Industry Award which embodied this benchmark rate later became known as the C10 classification. The AIRC said:

> Minimum classification rates and supplementary payments for other classifications throughout awards should be set in individual cases in relation to these rates on the basis of relative skill, responsibility and the conditions under which the particular work is normally performed. The Commission will only approve relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards.[109]

122 To assist in this task, the AIRC then assigned indicative percentages of the benchmark (C10) rate to four other metal industry classifications (subsequently known as C11, C12, C13 and C14), as well as truck driving and storeman/packer classifications.[110] As part of this process, the AIRC introduced as part of its wage-fixing principles a new Minimum Rates Adjustment (MRA) principle, which allowed for phased-in wage increases to allow award classifications to reach the appropriate relativity level. The MRA principle was later characterised by the AIRC as having been "designed to establish a consistent pattern of minimum rates in awards covering similar work thereby removing inequities and providing a stable foundation for enterprise bargaining".[111] To establish a measure of finality to this new system of relativities, the wage-fixing principles established by the *National Wage Case, April 1991*[112] required that minimum classification rates, "once reviewed and fixed in an appropriate relationship", could only be changed if warranted on the basis of changes in work value occurring after the date of the second structural efficiency wage adjustment allowable in accordance with the *National Wage Case, August 1989*.[113] The only exception to this was that if there were

105 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121.

106 *National Wage Case August 1988* (1988) 25 IR 170.

107 *National Wage Case February 1989 Review* (1989) 27 IR 196.

108 *National Wage Case, August 1989* (1989) 30 IR 81.

109 *National Wage Case, August 1989* (1989) 30 IR 81 at 94.

110 *National Wage Case, August 1989* (1989) 30 IR 81 at 94.

111 *Re Paid Rates Review* (1998) 123 IR 240.

112 *National Wage Case, April 1991* (1991) 36 IR 120.

113 *National Wage Case, August 1989* (1989) 30 IR 81.

"extraordinary circumstances" demonstrated in special case proceedings. As to this new requirement, the Full Bench in the *Pharmacy Decision*[114] observed:

> [156] Subject only to the narrow exception provided by the capacity to mount a "special case", the effect of this modification was that, once an award had been subject to the structural efficiency process in which, among other things, classification in minimum rates awards were to be fixed in appropriate relativities with other classifications within the award and in other awards, no adjustment on work value grounds was permissible other than on the basis of changes to work which occurred after the structural efficiency exercise had been completed. Importantly, the new paragraph (d) in the Work Value Changes Principle prevented any "double-counting" not only of work changes which were taken into account in the structural efficiency exercise, but those which *should have been* taken into account, whether they actually were or not. This meant, for example, that the full work value assessment of awards covering female-dominated areas of work which was sought by various women's groups in the *National Wage Case 1983* was permanently foreclosed (subject again only to the limited capacity to advance a special case).

123 The proper fixation of minimum award rates was, consequent upon the implementation of the MRA process, characterised in the *ACT Child Care Decision*[115] as involving the following three steps:[116]

1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA process with particular reference to the current rates for the relevant classifications in the Metal Industry Award. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.
2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.
3. If the existing rates are too low they should be increased so that they are properly fixed minima.

124 Two potential gender-related difficulties may readily be identified in this process. *First*, as identified in the *Pharmacy Decision*,[117] the *National Wage Case, April 1991*[118] effectively foreclosed retrospective reconsideration of work value in any federal award. This operated, at least until the advent of the FW Act, to prevent any review in accordance with contemporary standards of rates of pay in female-dominated awards which were fixed pre-1990 and may consequently have been influenced by the gender-based assumptions about work value which were then prevalent. *Second*, the benchmarks for the MRA process were derived solely from male-dominated occupations and industries, and their application to female-dominated awards may have involved gender-based assumptions about relative work value.

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114 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [156].

115 *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* (unreported, AIRC (FB), PR954938, 13 January 2005).

116 *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* (unreported, AIRC (FB), PR954938, 13 January 2005) at [155].

117 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121.

118 *National Wage Case, April 1991* (1991) 36 IR 120.

125 The modern awards made by the Commission in 2009 as a result of the award modernisation process initiated under Pt 10A of the *Workplace Relations Act* generally continued the rates of pay contained in the pre-existing awards of the AIRC. Thus, to the extent that the MRA process suffered from the gender-based difficulties described, that has been carried forward into the modern awards system.

126 A 2017 study by Broadway and Wilkins concerning the effects of the award wages system on the gender wage gap,[119] which analysed data from the Household, Income and Labour Dynamics in Australia (HILDA) Survey, identified that there was a "femaleness penalty" associated with award-reliant employees with lower educational attainments working in female-dominated industries. They concluded (citations omitted):[120]

> To summarise, it appears that there is indeed a strong penalty associated with working in an industry that is typically female. This penalty is found for male and female employees alike, and suggests that the award system sets systematically lower minimums the more heavily an industry employs women. However, due to the higher returns to university education in such industries, this effect applies only to less educated employees. Moreover, we do not find any evidence that the award wage system rewards experience in female Industries any less well than it does in male industries. Instead, we find strong differences in returns to experience by individual gender: individual career progression is faster for men than it is for women, rather than being faster in male-dominated industries than in female-dominated ones. Since the award system has no way of tailoring wages to an individual's gender, this cannot plausibly be caused by the award system.
>
> …
>
> For award-reliant employees, there is a penalty for working in a female-dominated field compared with working in a male-dominated field, but only for those with medium or lower levels of educational attainment. However, because award wages are less likely to be binding the more highly skilled is the employee, a large percentage of award-reliant employees has low education levels. In our sample, 31.9% of all male award-reliant employees and 29.2% of all female award-reliant employees were in our lowest educational attainment category (had not completed high school).

127 The study analysed difference in average hourly wage rates for the most common male and female-dominated industries and occupations, and said:[121]

> Overall, the femaleness penalty for low-educated, award-reliant workers seems to stem to a large degree from lower wages in retail, hospitality and personal care compared to workers in construction and road transport. There are many potential reasons for this disparity. To the degree that the minimum wage level set by the industrial court is informed (however indirectly) by "typical" wages in the industry or a general perception of an "appropriate" wage level, male-dominated fields might have benefited from a long history of strong

119 Barbara Broadway and Roger Wilkins, "Probing the Effects of the Australian System of Minimum Wages on the Gender Wage Gap" (Working Paper No 31/17, Melbourne Institute Applied Economic & Social Research, December 2017).

120 Barbara Broadway and Roger Wilkins, "Probing the Effects of the Australian System of Minimum Wages on the Gender Wage Gap" (Working Paper No 31/17, Melbourne Institute Applied Economic & Social Research, December 2017) at 22.

121 Barbara Broadway and Roger Wilkins, "Probing the Effects of the Australian System of Minimum Wages on the Gender Wage Gap" (Working Paper No 31/17, Melbourne Institute Applied Economic & Social Research, December 2017) at 24.

> unionisation that led to higher average wages — a history not shared by service jobs — which may contribute to female-dominated fields falling behind.
>
> It is also possible that minimum wages include compensation for certain non-monetary job characteristics, such as the dirtiness or dangerousness of a job. If these job characteristics are correlated with the share of women working in an occupation, a spurious correlation of hourly wages with the femaleness of an occupation or industry could be the result. For example, the $4.08 hourly wage premium for mobile plant operators relative to child carers might be compensation for higher rates of work accidents, noisy environments, the requirement to perform outdoor work in often unfavourable weather conditions, or other non-monetary job characteristics. However, this argument seems less compelling in a comparison of, for example, the average wage for truck drivers ($21.65) with that of hospitality workers ($15.97), where the latter group of employees would often perform physically demanding work in hot and/or loud environments.

128 As to the causation of the "femaleness penalty" identified, the study said:[122]

> It is not immediately clear whether this job-femaleness penalty in the low-skill sector of the labour market can be interpreted as discrimination against women, and this paper does not attempt to determine conclusively whether the minimum wages as set by the Fair Work Commission are "justified" or not. In principle, the job-femaleness penalty could result from the Commission taking into account factors other than the required skill level, such as "dirtiness" and "danger", in determining the minimum wage of a job. If true, and typical male jobs tend to have less desirable traits than typical female jobs, the observed job-femaleness penalty would result.
>
> There is in fact little evidence that such non-skill factors are considered in Fair Work Commission decisions; there is certainly no transparent, data-driven process for the setting of minimum wages in place that could establish a direct link between the job-femaleness penalty and objective job characteristics. We therefore doubt that the observed job-femaleness penalty is actually derived from compensating differentials determined by the Fair Work Commission. Rather, what seems more likely is that the award-wage decisions have been influenced by observed "typical" wages in industries and occupations, and male-dominated fields have benefited from a long history of strong unionisation that led to higher average wages.
>
> In any case, irrespective of whether non-skill-related differences in award wages are justified by other job characteristics, what is clear is that the gender wage gap among minimum-wage employees is greater than it would be were award wages neutral with respect to the gender composition of jobs. Indeed, the gender wage gap within the award system would probably be negative if minimum wages depended only on the skill requirements of jobs, since the observed human capital of female minimum-wage employees is on average greater than the observed human capital of male minimum-wage employees.

129 The issues raised in the above study were further traversed in the proceedings before a Full Bench in 2022 concerning applications to increase the minimum wages of workers in the aged care sector covered by the *Aged Care Award 2010* (Aged Care Award), the *Nurses Award 2020* and the *Social, Community, Home Care and Disability Services Award 2010* (the SCHADS Award) (matters AM2020/99, AM2021/63 and AM2021/65). These applications were heard following the tabling of the Final Report of the *Royal Commission into Aged*

122 Barbara Broadway and Roger Wilkins, "Probing the Effects of the Australian System of Minimum Wages on the Gender Wage Gap" (Working Paper No 31/17, Melbourne Institute Applied Economic & Social Research, December 2017) at 25-26.

Care Quality and Safety[123] on 1 March 2021. The Royal Commission found that there was a shortage of appropriate staff in the aged care sector, that such staff "are poorly paid for their difficult and important work",[124] and that the "bulk of the aged care workforce does not receive wages and enjoy terms and conditions of employment that adequately reflect the important caring role they play".[125] To address this pay issue, the Royal Commission made the following recommendation:[126]

> Recommendation 84: Increases in award wages
>
> Employee organisations entitled to represent the industrial interests of aged care employees covered by the *Aged Care Award 2010*, the *Social, Community, Home Care and Disability Services Industry Award 2010* and the *Nurses Award 2010* should collaborate with the Australian Government and employers and apply to vary wage rates in those awards to:
>
> a. reflect the work value of aged care employees in accordance with section 158 of the *Fair Work Act 2009* (Cth), and/or
>
> b. seek to ensure equal remuneration for men and women workers for work of equal or comparable value in accordance with section 302 of the *Fair Work Act 2009* (Cth).

130 The Full Bench issued an initial decision on 4 November 2022[127] (the *Aged Care Decision*). In that decision, the Full Bench found that the evidence before it established that the existing minimum rates of pay for direct care workers in the aged care sector did not properly compensate employees for the value of the work they perform.[128] The Full Bench awarded an interim pay increase of 15 per cent based for such workers under the Aged Care Award and the SCHADS Award on work value grounds pursuant to s 157(2) of the FW Act, with the final amount for the relevant classifications in these awards to be determined in a later stage of the proceedings.

131 Two aspects of the *Aged Care Decision* are of relevance to the wider gender considerations arising in this Review. *First*, in [293], the Full Bench referred to the outline of the AIRC's development of the system of cross- and intra- award classification relativities referred to in the *Pharmacy Decision*[129] and made the following finding:

> Having regard to relativities within and between awards remains an appropriate and relevant exercise in performing the Commission's statutory task in s 157(2). Aligning rates of pay in one modern award with classifications in other modern awards with similar qualification requirements supports a system of fairness, certainty and stability. The C10 Metals Framework Alignment Approach and the AQF are useful tools in this regard. However, such an approach has its limitations, in particular:
>
> • alignment with external relativities is not determinative of work value

123 *Royal Commission into Aged Care Quality and Safety* (Final Report, March 2021).

124 *Royal Commission into Aged Care Quality and Safety* (Final Report, March 2021) vol 1 at 124.

125 *Royal Commission into Aged Care Quality and Safety* (Final Report, March 2021) vol 2 at 214.

126 *Royal Commission into Aged Care Quality and Safety* (Final Report, March 2021) vol 1 at 263.

127 *Re Aged Care Award 2010* (2022) 319 IR 127.

128 *Re Aged Care Award 2010* (2022) 319 IR 127 at [922].

129 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121.

- while qualifications provide an indicator of the level of skill involved in particular work, factors other than qualifications have a bearing on the level of skill involved in doing the work, including "invisible skills" as discussed in Chapter 7.2.6
- the expert evidence supports the proposition that *the alignment of feminised work against masculinised benchmarks (such as in the C10 Metals Framework Alignment Approach) is a barrier to the proper assessment of work value in female-dominated industries and occupations* …, and
- alignment with external relativities is not a substitute for the Commission's statutory task of determining whether a variation of the relevant modern award rates of pay is justified by "work value reasons" (being reasons related to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is done).[130]

(Emphasis added)

132 *Second*, in [958]-[960] of the *Aged Care Decision*, the Full Bench found that the existing benchmark rates in the Aged Care Award did not represent a proper valuation of the work to which they applied notwithstanding that these rates were properly aligned with the C10 rate in the Manufacturing Award (being the modern award descendant of the former Metal Industry Award). The Full Bench said:

> [958] In respect of the Aged Care Award, the Joint Employers submit that "Aged Care Level 4" is the key classification level. PCW grade 3 (with a minimum qualification requirement of a Certificate III) sits within this level. The minimum rate for an Aged Care Level 4 employee is $940.90 per week, which is aligned with the current minimum rate for a C10 level under the Manufacturing Award (as does the minimum qualification of Certificate III).
>
> [959] In respect of the SCHADS Award, the Joint Employers submit that Home Care Employee level 3 is the key classification. That classification requires the employee to either be the holder of a relevant Certificate III qualification or to have knowledge and skills gained through on-the-job training commensurate with the requirements of the work at that level. The minimum rate for that classification is also $940.90, which is consistent with the minimum rate for a C10 level under the Manufacturing Award.
>
> [960] It follows that in terms of step 1 in the 3-step process set out in the *ACT Child Care Decision*, the key classifications in the Aged Care and SCHADS Awards are properly aligned with the C10 Metals Framework, insofar as the requisite qualifications are concerned. But, of course, that is not the end of the story … *Insofar as the Joint Employers are to be taken to suggest that it would be enough for the Commission to simply align existing rates with the C10 Metals Framework, we reject that proposition. Plainly, it is necessary for the Commission to consider whether there have been changes in work value, or a historic undervaluation of the work, which constitute work value reasons which justify an increase in minimum rates*.[131]

(Emphasis added)

133 The issues raised by the *Pharmacy Decision*,[132] the Broadway and Wilkins

130 *Re Aged Care Award 2010* (2022) 319 IR 127 at [293].

131 *Re Aged Care Award 2010* (2022) 319 IR 127 at [958]-[960].

132 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121.

study and the findings made in the *Aged Care Decision* indicate that that there may be a systemic problem, of pre-FW Act origins, concerning the way in which modern award minimum wages in female-dominated industries have been set which involves gender undervaluation and unequal remuneration for work of equal or comparable value. The specific issue concerning undervaluation of work in the aged care sector will be resolved to finality in the foreshadowed further stage of those proceedings, but we consider that any wider issue should, for the reasons already stated and as discussed further below, be resolved in or in association with the Review process.

134 There is a further work value issue which may also have implications for the minimum wage rates of modern award-reliant females on higher award classifications, particularly those which apply to persons holding undergraduate degrees. We have earlier described the process whereby across-award relativities were established by reference to the classification structure in the then Metal Industry Award. Under this structure, employees with degree qualifications were meant to be aligned with a theoretical C1 classification, with relativities to C10 in the range of 180-210 per cent. However, for most degree-qualified classifications in awards, this process was never carried through and they were never placed in the appropriate relativity to C10. For example, it was observed in the *Pharmacy Decision* that the minimum wage rate for a degree-qualified pharmacist was (at the time of the decision in 2018) less than the C3 classification rate in the Manufacturing Award payable for an employee holding an Advanced Diploma or equivalent training, with the Full Bench stating that this constituted a potential work value issue.[133] Similarly, the Full Bench in its 2021 decision in *Re Independent Education Union of Australia*[134] (the *Teachers Decision*) found that the then minimum commencement wage rate for a 4-year degree qualified teacher under the *Educational Services (Teachers) Award 2020* (Teachers Award) was equivalent only to the C4 rate in the Manufacturing Award (80 per cent towards an Advanced Diploma or equivalent), and at no level of seniority did modern award minimum wage rates for teachers reach the C1 relativity.[135] This finding contributed to the Full Bench's conclusion that the minimum wage rates in the Teachers Award were not properly fixed minimum rates.[136] The Full Bench ultimately established a new classification structure and pay rates for the Teachers Award founded upon an alignment between the new Proficient Teacher classification and the notional C1 classification.[137]

135 Consequent upon the *Pharmacy Decision*, the then-President of the Commission issued a Statement on 27 August 2019[138] in which he identified 29 modern awards containing classifications requiring an undergraduate degree and expressed the provisional view that they should be the subject of a review. However, in a subsequent Statement issued by the then President on

133 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [194]-[198].

134 *Re Independent Education Union of Australia* [2021] FWCFB 2051.

135 *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [562]-[563].

136 *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [563].

137 *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [653]-[657].

138 *Re Section 157 proceeding* [2019] FWC 5934.

4 November 2022[139] concerning Occupational segregation and gender undervaluation (the Gender undervaluation statement), the President indicated that no further steps would be taken in respect of the contemplated review on the Commission's own initiative at that time and observed that it would be preferable for undergraduate classifications to be reviewed in the context of work value applications in respect of specific awards.

136 The gender dimension of this issue is apparent in two related ways. First, women are more award-reliant than men and there is evidence that the proportion of women in the award-reliant workforce is at its highest level at higher-paid classifications including those requiring undergraduate qualifications. That is, 58.7 per cent of higher-paid award-reliant employees are women; by contrast, 41.3 per cent of higher-paid award reliant employees are men.[140] Second, as was pointed out in the Gender undervaluation statement, there is a considerable overlap between the 29 modern awards containing undergraduate classifications and those applying to female-dominated industries.

137 The issues we have identified are obviously too broad and complex to be resolved within the limited timeframe of this Review, and their resolution will require a body of research to support it. As foreshadowed in the President's statement of 3 February 2023 in relation to expert panels for pay equity and the Care and Community Sector, the Commission is undertaking a research project to identify occupations and industries in which there is gender pay inequity and potential undervaluation of work and qualifications.[141] This research will inform future Reviews. The research will take place in two stages. Stage 1 of the research project will soon commence. It involves an evidence-based process to identify occupations and industries in which gender-based occupational segregation is prevalent, including at the classification level if possible. This stage is expected to identify:

- the modern awards that cover those occupations and industries;
- whether employees in those occupations and industries are predominantly award-reliant or receive above-award rates of pay by virtue of enterprise agreements or other wage arrangements;
- any common characteristics of employment in the relevant occupations and industries (including whether employment is insecure due to the prevalence of casual and/or non-ongoing employment); and
- whether employees within particular modern award classifications are more likely to receive award rates of pay than those classified at other levels within the same award.

138 A final report on that stage is expected by September of this year. Stage 2 of the research will build on the above expected findings by reporting on the extent to which the gender-segregated occupations, industries and classifications (including undergraduate classifications) identified in Stage 1 have associated indicia that suggest they may also be subject to gender undervaluation.

139 Once this research project has been completed and the research reports have

139 President's statement: Occupational segregation and gender undervaluation (4 November 2022).

140 Roger Wilkins and Federico Zilio, *Prevalence and Persistence of Low-Paid Award-Reliant Employment* (Fair Work Commission Research Report No 1/2020, February 2020) Table 7; *Re Annual Wage Review 2019-20* (2020) 297 IR 1 at [400].

141 President's statement: Pay equity and the Care and Community Sector — Expert panels (3 February 2023).

been published, Commission proceedings will be initiated to consider and, if necessary, address the outcomes of the research project. Depending upon the timing, this may occur as part of or in association with the 2023-24 Review.

6.3. Female participation in the workforce

140 The female participation rate has significantly increased over the last decade, both in absolute terms and relative to men. The overall growth in the participation rate over this period is entirely attributable to the increase in female participation. The female participation rate has continued to grow over the year to April 2023, albeit accompanied by similar growth in the male participation rate (Table 19). However, the gap between the male and female participation rates remains large, indicating that impediments to female participation in the workforce remain:

Table 19: Participation rate by gender, seasonally adjusted

	Males (%)	**Females (%)**	**People (%)**
April 2013	71.5	59.0	65.1
April 2022	70.9	62.2	66.5
April 2023	71.1	62.4	66.7

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Charts 6.1, 6.1a; ABS, *Labour Force, Australia*, April 2023.

141 Because the cohort of modern-award reliant employees is female dominated, as are the employees covered by most of the 10 most common modern awards, it is possible that increases to modern award minimum wages which exceed those produced by the labour market generally may attract more women into those award-reliant industries and occupations.

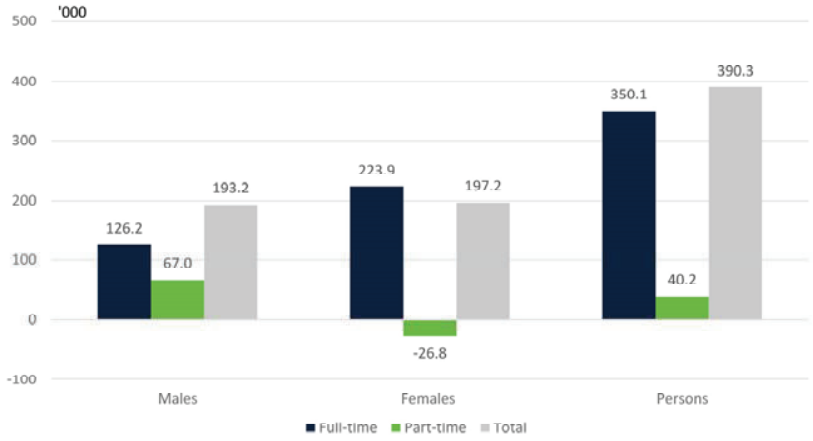
7. Job security

142 We have earlier discussed the limited relevance that s 134(1)(aa) is likely to have in the context of the Review. The outcome of this Review will not affect those legal incidents of employment which may enhance or detract from job security (noting that no party has suggested any alteration to the NMW or standard modern award casual loading of 25 per cent). The Review outcome will only affect the capacity of employees to have access to secure work across the economy to the extent that it promotes or diminishes the capacity of employers to offer permanent employment.

143 We have already dealt with the current state of the labour market. Having regard to the growth in employment and the historically low unemployment and underemployment rates and high participation rate, it is clear that the capacity of persons to obtain employment over the last 12 months has been at its highest point since the 1970s.[142] Moreover, most of the job growth in the past 12 months has been in full-time employment (Chart 14):

142 ABS, *Labour Force, Australia*, April 2023.

Chart 14: Change in full-time, part-time and total employment by gender, April 2022 to April 2023



Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 6.6; ABS, *Labour Force, Australia*, April 2023.

144 The composition of the job growth over the last 12 months has led to a reduction in the proportion of casual employees in the employee workforce. The proportion was 22.1 per cent in February 2023, down from 23.0 per cent in February 2021 and from a peak of 25.5 per cent in May 2016. Except for the COVID-19 lockdown-affected period in mid-2020, this is the lowest proportion of casual employees, based on quarterly data, since August 2014.[143] This data suggests that the capacity of persons to access secure employment across the economy is currently at its highest for the last decade.

145 However, as earlier discussed, the composition of the NMW and modern award-reliant workforce is significantly different to that of the employee workforce as a whole, with casual employees making up almost half of the modern award-reliant cohort. In this cohort, although there has been a decline in the proportion of casual employment in recent years, there is no consistent trend over the last decade, and the proportion of full-time employees has fallen (Table 20):

Table 20: Characteristics of award-reliant employees, 2012 to 2021

	2012	2014	2016*	2018	2021
	(000s)	(000s)	(000s)	(000s)	(000s)
Full time	603.0	758.9	941.5	845.4	994.0
Part time	941.1	1101.9	1334.6	1387.5	1665.4
Permanent or fixed term	825.4	1031.0	1252.6	1171.0	1449.3
Casual	718.7	829.7	1023.5	1061.9	1210.2
Total	**1544.1**	**1860.7**	**2276.1**	**2232.9**	**2659.4**

143 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023), Chart 12.1.

	2012	2014	2016*	2018	2021
	(%)	(%)	(%)	(%)	(%)
Full time	39.1	40.8	41.4	37.9	37.4
Part time	60.9	59.2	58.6	62.1	62.6
Permanent or fixed term	53.5	55.4	55.0	52.4	54.5
Casual	46.5	44.6	45.0	47.6	45.5
Total	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**

Note: Data for 2018 from Tablebuilder may not sum total. * Available for non-managerial employees only.

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 7.6; ABS, *Employee Earnings and Hours, Australia*, various; ABS, *TableBuilder: Employee Earnings and Hours, Australia*, May 2018.

146 As at August 2022, around 25 per cent of all females were casual (i.e. without paid leave entitlements) compared with around 21 per cent of males. Further, female casuals are more likely to be employed on a part-time basis (20 per cent of all female employees are casuals working part-time hours) than full-time (6 per cent of all female employees are casuals working full-time hours). For males, the picture is different and more evenly split, with 12 per cent of all male employed part-time and casual, and 10 per cent employed full-time and casual.[144]

147 Tightening monetary policy and a slowing economy are likely to be the main factors bearing upon job security in the most general sense in the coming year. It is unlikely that any uniform percentage increase to the NMW and modern award minimum wages, at least within a reasonable range, will negatively impact the capacity of individual employers to employ, or continue to employ, workers on a permanent rather than casual basis.

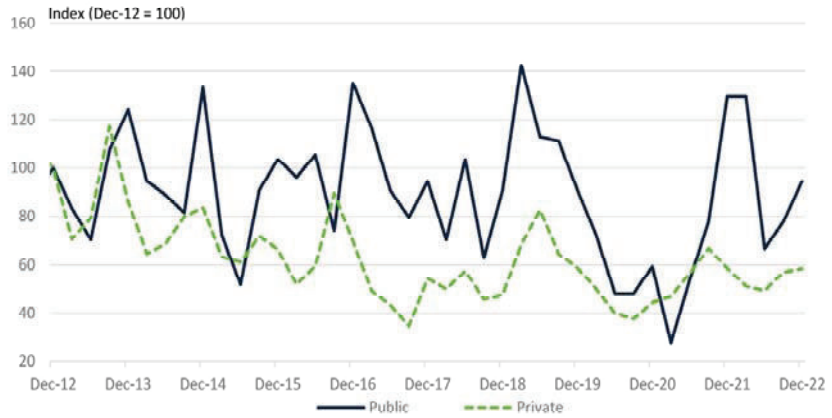
8. Collective bargaining

148 The requirement in s 134(1)(b) to take into account "the need to encourage collective bargaining" focuses attention on the consequential relationship, if any, between the exercise of modern award powers and the extent to which enterprise bargaining is occurring or may occur. It is not concerned with the outcome of enterprise bargaining.

149 The long-term trend since the enactment of the FW Act has been a decline in the number of enterprise agreements approved by the Commission. This trend is most marked in the private sector (Chart 15):

144 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023), Chart 12.1a.

Chart 15: Number of agreements approved in the quarter by sector, index



Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 10.1; Department of Employment and Workplace Relations, *Trends in Federal Enterprise Bargaining*, December quarter 2022.

150 In the last five years, there was a decline in enterprise bargaining during the COVID-19 pandemic restrictions (2020), but in 2022 the numbers of agreements approved and the number of employees covered returned to 2018-19 levels (Table 21):

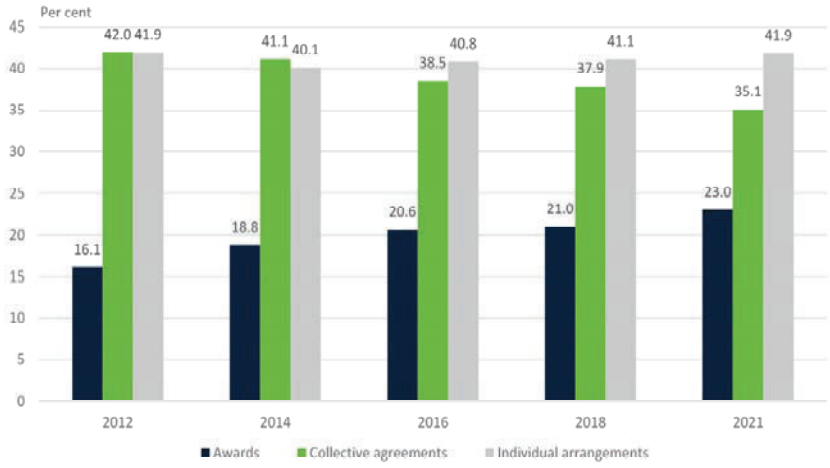
Table 21: Number of enterprise agreements and employees covered, 2018 to 2022

	Number of enterprise agreements approved	Employees covered ('000)
2018	3864	668.5
2019	5284	933.7
2020	3281	521.5
2021	4362	546.7
2022	4166	913.6

Source: *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Table 10.1; Department of Employment and Workplace Relations, *Trends in Federal Enterprise Bargaining*, December quarter 2022.

151 As a consequence of the long-term reduction in the number of agreements being made and approved, the proportion of employees whose pay is set by an enterprise agreement fell from 42.0 per cent in 2012 to 35.1 per cent in 2021, with a corresponding rise in the proportion of employees whose pay is set by an award (Chart 16):

Chart 16: Method of setting pay



Note: Awards refers to the proportion of employees in an industry that are paid exactly the award rate and are not paid more than that rate of pay. As defined by the ABS, individual arrangements include registered or unregistered individual agreements and owner managers of incorporated businesses. Estimates of the proportion of employees on awards and collective agreements in 2016 have been revised on the basis of the 2018 conceptual treatment of these methods of payment. Owner managers of incorporated businesses comprised the following proportion of all employees: 2012 = 3.3%; 2014 = 3.4%; 2016 = 3.6%; 2018 = 3.8%; 2021 = 4.1%.

Source: ABS, "A Guide to Understanding Employee Earnings and Hours Statistics", Feature Article, in *Employee Earnings and Hours, Australia*, May 2018; ABS, *Employee Earnings and Hours, Australia*, various; *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 7.1.

152 There is no consensus as to why this has occurred. In previous Review decisions, the Commission has been unable to identify any causal relationship between the decline in enterprise bargaining and increases to the NMW and modern award minimum wages arising from past Reviews. For example, in the 2018-19 Review decision, the Commission said (citations omitted):

> We do not detect anything in these data to suggest that past Review decisions have impacted on collective agreement coverage. We see nothing to change the view expressed in previous Review decisions that the extent of enterprise bargaining is likely to be impacted by a range of factors.[145]

153 Similarly, in the 2020-21 Review decision, the Commission said (citations omitted):

> Consistent with the views expressed by the majority in the 2019-20 Review decision, we accept that there has been a decline in current enterprise agreements,

145 *Re Annual Wage Review 2018-19* (2019) 289 IR 316 at [372].

> but a range of factors impact on the propensity to engage in collective bargaining, many of which are unrelated to increases in the NMW and modern award minimum wages.[146]

154 No party in the current Review advanced a submission which sought to revisit these findings or identify a causal relationship between Review decisions since 2010 and the long-term decline in enterprise bargaining. Nonetheless, some parties submitted that it was "axiomatic"[147] or "incontrovertible"[148] that relatively higher minimum wages would operate to discourage enterprise bargaining because it would make it harder to satisfy the better off overall test for approval of enterprise agreements and would reduce the motivation or incentive for employees and their representatives to bargain. While, at a high level of generality, this proposition has a degree of plausibility at least in respect of the minority of employees who are NMW- or modern award-reliant, it is of little assistance in determining whether a particular level of increase will discourage enterprise bargaining. Nor does it take into account the countervailing influences likely to affect the propensity to bargain which may be operative at any given time.

155 Over the last 12 months, the number of enterprise agreements made has, broadly speaking, returned to the position immediately before the COVID-19 pandemic. There has been no decline in the number of agreements lodged for approval following the 2021-22 Review decision, notwithstanding that this decision awarded the highest nominal increase to the NMW and modern award minimum wage rates since the FW Act commenced. The factor most likely to influence the extent of enterprise bargaining over the next 12 months is the major amendments to the enterprise bargaining and enterprise agreement approval provisions of the FW Act effected by the Amending Act. We have no sound basis to consider that, within a reasonable range, any increase we order to the NMW and modern award minimum wage rates will either encourage or discourage enterprise bargaining. Accordingly, this is not a matter to which we give any significant weight in reaching our decision in this Review.

9. Consideration

9.1. General conclusions

156 In overview, the Australian economy has weathered multiple shocks over the past few years, including containing the spread of COVID-19 and associated lockdowns and other restrictions, the disruption of supply chains as global demand for goods rose, and the global surge in energy and food prices following the Russian invasion of Ukraine. Record levels of government support allowed households and businesses to mostly ride out these shocks. The level of annual GDP was 7.1 per cent greater in real terms in 2022 than in 2019, while real GDP per capita was 4.4 per cent higher.[149] It is clear, however, that reverberation effects from these shocks and government responses to them continue to be felt across the economy, with employment patterns and labour productivity, and costs and prices, all adjusting to changed circumstances, often

146 *Re Annual Wage Review 2020-21* (2021) 307 IR 203 at [160].

147 Ai Group submission, 31 March 2023 at 47.

148 ACCI submission, 31 March 2023 at [141].

149 ABS, *Australian National Accounts: National Income, Expenditure and Product*, December 2022.

sharply. Indeed, the current constellation of high inflation, low unemployment and falling real wages is unprecedented in contemporary Australian economic history.

157 Since April 2022, the RBA has tried to curtail inflation by raising the target cash rate from 0.10 per cent to 3.85 per cent (as of May 2023). Monetary policy tends to operate with a lag and the full effect of this tightening cycle on the economy is not yet apparent.[150] Our decision was made in advance of the release of the March quarter 2023 set of National Accounts. A range of indicators, however, point to a slowing of economic activity since the start of this year. This includes falling retail sales volumes, a decline in new dwelling investment, and deteriorating business conditions and consumer sentiment. Official forecasts by both the RBA and the Australian Government are for economic growth to slow substantially in 2023-24 to 1.4 per cent and 1.5 per cent, respectively, well below long-run trend levels. As the population is forecast to grow by more than that, the inference is that living standards are likely to fall.

158 Real wages have been in decline since the middle of 2020 and are forecast to fall further this calendar year, before beginning to slowly recover in the first half of 2024. The scale of the decline in real wages is affected by the circumstances that individual workers find themselves in. For those who are NMW- or modern award-reliant, their wages growth is determined by Review decisions, while the prices they pay are determined by their own "basket" of goods and services. Such workers have seen their wages rise by 7.8 per cent since 2020 if working full-time on the NMW/C14 rate, or by 7.2 per cent if on the C10 rate or a higher award classification rate. It is well-established that NMW- and modern award-reliant workers spend a higher proportion of their income on goods and services such as food, housing, energy and healthcare.[151] Prices for these non-discretionary items have risen faster than the 15.9 per cent increase in prices as a whole since June 2020.[152]

159 The decision last year to award a 5.2 per cent increase to those on the NMW and 4.6 per cent increase to those on the C10 rate or a higher classification was intended to alleviate the fall in real wages. The decision was made in the context where inflation was forecast to peak below 6 per cent in 2022 and then begin to fall to near the top of the RBA's target range over the course of 2023, implying that any further decline in real wages would be modest. Inflation has instead risen more sharply than forecast, peaking at an annual rate of 7.8 per cent in the December quarter 2022 and is now not expected to return to the RBA's medium-term target range of 2-3 per cent until mid-2025.

160 Indications of a downward trajectory in inflation are now evident, with the March quarter 2023 CPI increasing by 1.4 per cent, the smallest quarterly rise since the December quarter 2021.[153] Nonetheless, there is a reasonable probability that inflation will remain somewhat "stickier" than forecast over the coming year, which may further erode real wages.

161 While inflation has been stronger and more persistent than forecast, there is no evidence in Australia of a wage-price spiral *despite* a very tight labour

150 "Statement on Monetary Policy", Reserve Bank of Australia (May 2023), 3.

151 For example, ACTU submission, 31 March 2023 at [300].

152 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 4.5.

153 ABS, *Consumer Price Index*, Australia, March Quarter 2023.

market. Growth in nominal wages has begun to pick up, with the WPI rising by 3.7 per cent over the year ending March quarter 2023, the highest rate of growth for a decade. Increases in award wage rates have had only a modest impact on the WPI, contributing 8.1 per cent of the increase in the WPI. This is consistent with the evidence to which we have earlier referred showing that the wages of modern award-reliant employees constitute just 11.2 per cent of the aggregate Australian wage bill. We are unaware of any concrete evidence that increases to modern award minimum wage rates have had a material spillover impact on pay-setting behaviour for those whose pay is set by enterprise agreements or individual negotiation. Our view is that pay in these settings is largely determined by prevailing labour market conditions. In circumstances where labour market conditions appear to be softening, we do not foresee any broader consequences for nominal wages growth arising from our decision.

162 A return to full employment has been a very welcome feature of the Australian economy in the past couple of years. Employment has grown consistently and strongly since October 2021. Over the year to April 2023, employment has increased by more than 390,000 people (or 2.9 per cent), pushing down the rates of unemployment and underemployment.[154] Employment growth has drawn more people from outside of the labour force into work, pushing up the participation rate to record highs.[155]

163 Consistent with the slowing in economic activity, there are indications that the labour market — which always tends to lag other changes in the economy[156] — is at a turning point. The number of job vacancies came close to matching the number of unemployed persons in mid-2022 but have since fallen. While it is unwise to read too much into a single month's figures, the April 2023 Labour Force release does suggest that employment growth is weakening at the same time as workforce growth is rising. Forecasts by the RBA and in the Budget are for employment growth to fall to around 1 per cent over 2023-24 and for the unemployment rate to increase to around 4.2 per cent by this time next year and settle around 4.5 per cent beyond that. The participation rate is also expected to ease somewhat. However, this forecast deterioration in the labour market needs to be seen in the longer-run context: prior to 2021, the unemployment rate had not been below 5 per cent on a sustained basis since the 1970s.[157]

164 The sluggish growth in productivity is a significant concern. Ideally, real wages would increase over time in line with productivity growth, which has been averaging 1.2 per cent per annum in the current cycle. However, there has been no growth in labour productivity since the March quarter 2020.[158] Over the course of 2022 there was a surge in *nominal* unit labour costs, a function of a pick-up in nominal wage growth and a fall in labour productivity in that period. However, *real* unit labour costs fell in 2022 and are well below pre-pandemic levels. This fall solely reflects the decline in real wages since the

154 ABS, *Labour Force, Australia*, April 2023.

155 Australian Government, *Budget 2023-24, Budget Paper No 1* (2023), May, 71; "Statement on Monetary Policy", Reserve Bank of Australia (February 2023), 24.

156 "Minutes of the Monetary Policy Meeting of the Reserve Bank Board", Reserve Bank of Australia (2 May 2023).

157 ABS, *Labour Force, Australia*, April 2023.

158 *Statistical Report — Annual Wage Review 2022-23* (Fair Work Commission, 18 May 2023) Chart 2.1.

onset of the pandemic. It is likely that the multiple shocks to the economy since 2020 have disrupted working patterns and the organisation of work and these will take some time to settle into new norms and return the economy to trend productivity growth.

165 The decline in real wages amongst the modern award-reliant has had significant adverse effects on the low paid, causing a decline in living standards, financial pressure on households and, for some household types, a likely incapacity to meet basic budgetary needs. Because of the make-up of the modern award-reliant cohort, these adverse effects of the high rate of inflation will have disproportionately affected female employees and employees in less secure employment.

166 Gender pay gaps remain a significant issue in the Australian labour market, both in aggregate across the entire employee workforce and amongst the modern award-reliant. The extent to which the former phenomenon can be addressed through the Review process is limited because of the modest proportion of the workforce which receives wage increases as a result of the Review. However, it remains the case that an increase to the NMW and modern award minimum wage rates which is above the general wage outcomes produced by the labour market will disproportionately benefit female employees and may make some contribution to narrowing the aggregate gender pay gap. The issue of any gender pay gap amongst modern award-reliant employees, and the associated issue of potential gender undervaluation underlying modern award minimum wage rates applying to female-dominated industries and occupations, are capable of being addressed by the Commission, but a further body of research and evidence must be undertaken to permit this to occur.

167 We now turn to the various wage proposals advanced by parties which have made submissions in this Review. Although, as stated earlier, the Review is not a process of adjudicating between competing positions, we consider that it is useful before setting out our conclusions to briefly outline why we do not intend to adopt any of those proposals.

168 The proposal advanced by the ACTU that we should adjust the NMW and modern award minimum wages by 7 per cent[159] in line with the current CPI places, in our view, too little weight on the considerations in ss 284(1)(a) and 134(h). We are concerned, in particular, that the adoption of a simple wage indexation approach may engender or entrench high inflation expectations in that it might be taken as an indication that the Panel is willing to respond to any level of inflation with a matching increase to the NMW and modern award minimum wages. This may cause inflation to remain higher or "stickier" than it otherwise would have been, with negative consequences for national economic and business competitiveness and relative living standards (s 284(1)(a) and (c); s 134(1)(a) and (h)).

169 The approach proposed by the Australian Government would, as we understand it, involve a similar approach to that in the 2021-22 Review whereby there would be a flat dollar increase to the NMW and the lower-paid award classifications which would preserve the level of their real wages, and a percentage increase for higher-paid classifications which would not necessarily match the CPI increase. We note that the Budget forecast for wages growth involves a technical assumption about the outcome of this Review which

159 ACTU submission, 31 March 2023 at [1]-[2].

appears to align with the Australian Government's submissions, namely that there would be a CPI-matching wage increase to the NMW and the C14 award rate, an equivalent flat dollar wage increase to classifications up to the C10 award rate, and a 4 per cent increase to award rates at C10 and above.[160] The adoption of that technical assumption is consistent with the Budget forecasts of falling inflation over the next two years.[161]

170 While this approach would protect the interests of low-paid workers and thus give significant weight to the considerations in ss 284(1)(c) and 134(1)(a), the continuing adoption of the mechanism of awarding proportionately higher, flat dollar wage increases to lower-paid award classifications raises problems in respect of the consideration in s 134(1)(g), namely the stability and sustainability of the modern award system. The effect of flat dollar increases in the longer term is to compress relativities between award classifications, which distorts the relationship between classification rates and relative work value and diminishes the incentive for workers to upskill and move to higher classifications. Such an approach was adopted in Safety Net Reviews and Reviews across the period from 1993 through to 2010 and resulted in a very significant compression of classification relativities, to the extent that it was found in the *Pharmacy Decision* that the relativity of a degree-qualified Pharmacist to the C10 rate had declined from 140 to 123 per cent.[162] As further explained in the *Pharmacy Decision*[163] and also in the *Teachers Decision*,[164] it becomes very difficult to unwind this type of compression of relativities at any future time. Accordingly, while there were special circumstances justifying the award of a flat dollar increase to lower-paid classifications in the 2021-22 Review, we do not propose to continue this approach.

171 Most employer groups which advanced any specific proposal for wage increases proposed that the increase should be 3 per cent or more but less than 4 per cent. The adoption of wage increases in this range would, we consider, give insufficient weight to the considerations concerning relative living standards and the needs of the low paid (s 284(1)(c) and s 134(1)(a)). As set out in Chart 11 above, the real value of the NMW and modern award minimum wage rates has significantly reduced since 2019, reversing a long period of steady real wage increases. The employer proposals would further reduce the real value of NMW and modern award minimum wages to a significant degree in a context in which low-paid workers are clearly experiencing financial stress for the reasons discussed in section 5 of this decision. The submissions to the effect that this reduction can simply be set off against the earlier period of growth in the real value of the NMW and modern award minimum wages cannot be accepted, since that growth in broad terms reflected trend productivity growth of 1.2 per cent per year. Further, the employers' proposals give insufficient weight to the current strength of the labour market which, despite a weakening economy, will remain at historically low levels of unemployment and high levels of participation. They also involve levels of increases below the

160 Transcript, 17 May 2023 at PN23-PN34.

161 Transcript, 17 May 2023 at PN35-PN36.

162 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [190].

163 *Re 4 Yearly Review of Modern Awards — Pharmacy Industry Award 2010* (2018) 284 IR 121 at [192].

164 *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [650]-[651].

RBA and Budget forecasts for the WPI over the forthcoming year, which is unjustifiable having regard to the state of the labour market and would worsen the relative living standards of the NMW- and modern award-reliant workforce.

9.2. The NMW

172 There are two aspects to our consideration of the NMW. *First*, for the reasons set out in section 5 of our decision, we consider that the historic alignment between the NMW and the C14 rate should cease. We note in this connection that there is no requirement in the FW Act for the NMW to align with the lowest modern award adult rate, nor does the NMW operate as a floor to modern award minimum wage rates.

173 A wider review of the NMW in light of the budget standards research, the finalisation of the C14 review (which we anticipate will be completed later this year and will result in all C14 award classifications becoming genuinely transitional in nature) and other relevant matters (including the research being conducted as to gender segregation and undervaluation) is required. That wider review cannot be undertaken within the timeframe of the current Review. It is necessary therefore to identify an interim step that can be taken in this Review which gives appropriate weight to the needs of the low paid (s 284(1)(c)) but also balances this with the other mandatory considerations in the minimum wages objective. The step we will take is to align the NMW with the current C13 rate, which is the lowest award rate which, apart from exceptions in a small number of awards, may apply to employees in respect of ongoing employment. This will result in a modest wage adjustment of 2.7 per cent.

174 *Second*, having regard to all the matters in s 284(1), we will increase the NMW by a further 5.75 per cent. The total increase to the NMW which will result will slightly exceed the current rate of inflation, although it will not make good the reduction in the real value of the NMW which has occurred since 2019. However, it is the maximum amount we consider that can responsibly be awarded in the current circumstances to address the needs of those low paid workers to whom the NMW applies. Having regard to our analysis in section 3 of this decision, the increase is also likely to disproportionately benefit female employees. The consideration in paras (aa) and (c) of s 284(1) therefore weigh significantly in favour of the outcome we have determined. Because the NMW only applies to 0.7 per cent of the employee workforce, the increase awarded will not have any discernible macro-economic effects or affect the level of workforce participation, and the matters in paras (a) and (b) of s 284(1) therefore have neutral weight in our consideration of the NMW. As to s 284(1)(a), the special NMWs applicable to junior employees, employees to whom training arrangements apply and employees with a disability who are award/agreement free will be as set out in section 10 of this decision. The casual loading for award/agreement free employees will remain at 25 per cent. Consistent with s 287, the NMW Order we make by this decision will come into operation on 1 July 2023.

9.3. Modern award minimum wage rates

175 We have taken three matters as the starting point for our consideration as to the extent to which minimum wage rates in modern awards should be increased. *First*, the high rate of inflation has reduced, and is continuing to further reduce, the real value of modern award minimum wage rates, and is causing significant financial stress to modern award-reliant employees, especially the low paid. A

relatively high increase to modern award minimum wages is necessary to alleviate this. *Second*, assessed in the longer-term context, the labour market is robust and will remain so notwithstanding the relative weakening evidenced by the April 2023 Labour Force results and the RBA and Budget forecasts for employment growth, unemployment and workforce participation. This creates room for a relatively large increase. *Third*, because the cohort of modern award-reliant employees is female-dominated, increases to modern award minimum wage rates above the level of general wages growth in the labour market generally will disproportionately benefit women and are likely to make some contribution to a narrowing of the aggregate gender wage gap in Australia.

176 However, there are a number of matters which we have taken into account which we consider favour a moderation of the increase to modern award minimum wage rates which we might otherwise award. They are as follows:

(1) The Superannuation Guarantee contribution rate will increase by 0.5 per cent, from 10.5 per cent to 11 per cent, effective from 1 July 2023.[165] This will, in the broad sense, constitute an increase to employees' remuneration, albeit that it will not increase their disposable income. Perhaps more significantly, this increase will constitute a cost to employers which they will have to bear simultaneously with any minimum wage increases flowing from this Review.

(2) While we have earlier stated that the turning point in the labour market demonstrable in the April 2023 labour market figures should be seen in the context of forecasts of continued historically low levels of unemployment and high levels of participation, it is necessary to be sensitive to the particular circumstances of employees who are modern award-reliant and their employers. Two related matters have weight in this context. First, a large proportion of modern award-reliant employees work in sectors which would likely be significantly affected by a reduction in discretionary expenditure associated with an economic slowdown — particularly the Accommodation and food services sector and the Retail trade sector. Thus, a weakening labour market may disproportionately affect those sectors. Second, casual employees are likely to constitute the category of employees most immediately and significantly affected by any decline in demand for labour via a reduction in their hours of work, and almost half of all modern award-reliant employees are casually employed.

(3) As stated above in relation to the ACTU's wages proposal, we are concerned that an increase to modern award minimum wage rates which attempts to track the current rate of inflation might be perceived as an indication of the Commission adopting a wage indexation approach that will be applied regardless of the rate of inflation, with the risk that this will adversely affect inflation expectations.

(4) Australia's productivity performance remains poor, with there having been no productivity growth over the past three years. While this is likely a reflection of the disruptive effects of the COVID-19 pandemic

165 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [144].

and a return to trend productivity growth might reasonably be expected over the coming years, it nonetheless calls for a degree of caution in the current environment.

177 We also take into account that, in the aviation, hospitality and tourism sectors, the 2021-22 Review modern award minimum wage increases were operative from 1 October 2022, not 1 July 2022 as for all other industry sectors.

178 Taking into account and balancing the matters we are required to take into account under s 134(1)[166] and s 284(1), the object of the FW Act in s 3, and the rate of the NMW we have set, we have decided that all minimum wage rates in modern awards shall be increased by 5.75 per cent. Consistent with s 286, the variations to modern awards to increase minimum wage rates by this amount will come into operation on 1 July 2023. Because, as we have earlier explained, the total wages of modern award-reliant workers constitute a limited proportion of the national wage bill and, over the past year, increases to modern award minimum wage rates have only made a modest contribution to the WPI, we are confident that the increase we have determined will not cause or contribute to any wage-price spiral.

179 It is necessary to acknowledge that the increase to minimum wage rates in modern awards in this Review will not maintain the real value of award wages or reverse the earlier reduction in real value which has occurred. That result has pertained because of the requirement in the FW Act to balance the prescribed matters in ss 134(1) and 284(1) and because the establishment of a safety net of fair minimum wages requires us to take employer interests and the national economic interest into account as well as employee interests. We accept that, in the medium to long term, it is desirable that modern award minimum wages maintain their real value and increase in line with the trend rate of national productivity growth. However, it is not possible to achieve that objective in the immediate circumstances of the current Review. Future Reviews, if conducted in a lower inflationary environment, are likely to provide an opportunity to make up the loss of real value in modern award minimum wages rates which has occurred and return to the path of real growth which prevailed prior to the COVID-19 pandemic.

180 It is also not possible in this Review to address to finality the potential underlying gender-related problems in modern award minimum wage rates which we have identified in section 6 of this decision. However, parties should be aware that these issues are firmly on the Commission's agenda and will be dealt with in future proceedings, including future Reviews, in the way contemplated in section 6 of this decision.

9.4. Adult apprentices and trainee wages

181 There is an outstanding issue concerning adult apprentice and trainee wages arising from the 2021-22 Review. In the 2021-22 Review decision,[167] the Panel awarded a two-tier increase to modern award minimum wage rates, comprised of $40 to weekly rates below $869.60 per week and 4.6 per cent to weekly rates above that amount. In response to an opportunity for interested parties to submit corrections or amendments prior to the determinations giving effect to the decision being issued, the ACTU, the Communications, Electrical, Electronic,

166 We note that the considerations in s 134(1)(da) are not relevant to the subject matter of this Review and accordingly we assign neutral weight to those matters.

167 *Re Annual Wage Review 2021-22* (2022) 315 IR 367.

Energy, Information, Postal, Plumbing and Allied Services Union of Australia (the CEPU), and the Construction, Forestry, Maritime, Mining and Energy Union (the CFMMEU) made submissions raising an issue concerning the application of the flat dollar component of the increase to wage rates for adult apprentices and trainees. The issue identified was that some rates fixed by reference to a percentage of another classification in an award (or underlying rate) would receive an increase below $40 per week, while those with wages expressed as 100 per cent of the lowest non-apprentice/trainee classification would receive the full $40 increase. The ACTU and the other union parties contended that, to give proper effect to the 2021-22 Review decision, the determinations should have provided for all adult rates in modern awards (including those applicable to apprentices and trainees) to be increased by $40 per week. The CEPU also submitted that certain junior apprentices covered by the *Electrical Power Industry Award 2020* or the *Electrical, Electronic and Communications Contracting Award 2020* should also have received the full $40 increase.

182 In a Statement issued on 28 June 2022,[168] the Panel for the 2021-22 Review concluded that the determinations should not be amended as sought by the ACTU for reasons including that they reflected the historical approach to adjusting apprentices and trainee rates and preserved the relativities between those rates. The Panel observed that the issues could be raised in submissions to the 2022-23 Review and the Commission would issue a background paper dealing with the issues prior to the commencement of the 2022-23 Review. The contemplated Background Paper on adjustment of adult apprentice and trainee wages was published on 10 March 2023.

183 In its submission to the 2022-23 Review, the CEPU maintained the position it advanced in the 2021-22 Review and sought the application of the $40 2021-22 Review minimum wage increase to adult apprentices and trainees and certain junior apprentices.

184 We do not consider that the application of the minimum wage increases determined in the 2021-22 Review to apprentices and trainees should be revisited in this Review. As stated in the 28 June 2022 Statement, the approach taken was consistent with the approach historically taken in respect of flat dollar increases, and we see no reason to review this approach now. This is particularly the case because, as explained above, we do not intend to continue the approach of awarding flat dollar increases to lower-paid classifications and accordingly the issue does not arise in this Review.

9.4. Transitional instruments

185 As earlier stated, we are required to review and may make one or more determinations varying wages in a number of transitional instruments as part of the Review. Those transitional instruments are transitional Australian Pay and Classification Scales, State reference transitional awards, Division 2B State awards and transitional pay equity orders, insofar as they remain in operation.[169] For convenience, we refer to these transitional instruments as "relevant transitional instruments".

168 *Re Annual Wage Review 2021-22* [2022] FWCFB 113.

169 See *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Sch 9, items 10 and 20, Sch 3, item 12A(5) and Sch 3A, item 30D (as inserted by reg 3A.01B of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* (Cth)).

186 The content, coverage, operation and termination of transitional instruments was discussed in the 2009-10 Review decision[170] and in Fair Work Australia's Research Report 6/2010.[171] Further background on these instruments was provided in the *Annual Wage Review 2016-17* — Preliminary decision.[172]

187 The ACTU and the Ai Group both submitted that the approach taken in previous Reviews should be maintained, such that the rates in the relevant transitional instruments are increased consistently with any increase determined for modern award minimum wages.[173] Consistent with this position, we have decided that the wage rates in the relevant transitional instruments will be varied by the same percentage amount we have determined shall apply to modern award minimum wages.

188 As was observed in the 2021-22 Review decision, most transitional instruments have been terminated or have ceased to operate.[174] However, some continue to operate. These instruments include, but are not limited to:

- transitional instruments that cover employees also covered by enterprise instruments;[175]
- transitional instruments that cover employees also covered by State reference public sector transitional awards which have not been terminated by the Commission or replaced by a State reference public sector modern award;[176] and
- transitional instruments that were not terminated as part of the termination of modernisable instruments process which commenced in 2010.[177]

189 The Transitional Act confers power upon the Commission to terminate certain categories of transitional instruments.[178] The principal power to terminate transitional instruments is contained in item 3 of Sch 5 of the Transitional Act.[179] However, in the 2016-17 Review decision, it was concluded that the FW Act does not authorise the termination of transitional instruments in the course of conduct of the Review.[180] Accordingly, we do not propose to terminate any transitional instruments in this Review. It will be necessary to establish a separate process to consider the status of transitional instruments and whether they have been, or can be, terminated by the Commission.

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170 *Re Annual Wage Review 2009-10* (2010) 193 IR 380 at [370]-[396].

171 Alice Dunn and Giles Bray (2010), *Minimum wage transitional instruments under the Fair Work Act 2009 and the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, Research Report 06/2010, Fair Work Australia, June 2010.

172 *Re Annual Wage Review 2016-17* [2017] FWCFB 1931 at [81].

173 ACTU submission, 31 March 2023 at [409]; Ai Group submission, 31 March 2023 at 54.

174 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [266].

175 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Sch 6, items 5(1)-(5) and 9(4).

176 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Sch 6A, items 5(3), 6 and 10(1).

177 For example, certain instruments that covered employees who were also covered by the *Social, Community, Home Care and Disability Industry Award 2010* were preserved by the *Re Award Modernisation* (2010) 202 IR 150 at [44]. As at the date of this decision, they have not been terminated.

178 *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Sch 3, item 9(2).

179 *Re Annual Wage Review 2016-17* [2017] FWCFB 1931 at [146].

180 *Re Annual Wage Review 2016-17* (2017) 267 IR 241 at [697].

9.5. Copied State awards

Background

190 Copied State awards (CSAs) are federal instruments which come into existence and apply when employees of non-national system State public sector employers transfer employment to a national system employer. Amendments to the FW Act which established the legislative scheme for CSAs came into effect from 5 December 2012. The scheme largely reflects the transfer of business provisions in Pt 2-8 of the FW Act. Under that scheme, the requirement in s 285 of the FW Act to review modern awards minimum wages and the power to vary them as part of the conduct of the Review apply equally to wage rates in CSAs.[181] A detailed overview of the statutory framework applying to CSAs and how they have been dealt with in previous Reviews was set out in Chapter 6 and Appendix 5 of the 2021-22 Review decision.[182] We rely upon, but do not repeat, that overview. Since the 2016-17 Review, the adjustment to modern award minimum wage rates determined in each Review has been applied to copied State awards except in specially-identified cases.

191 In the 2021-22 Review, a number of employers involved in the conduct of privatised bus operations in NSW submitted that Review minimum wage increases should no longer automatically apply to CSAs and that, instead, wage rates in CSAs should be considered on a case-by-case basis and only upon application. In its decision in the 2021-22 Review, the Panel determined not to adjust the wage rates in the CSAs applying to those specific employers (which included Busways North West Pty Ltd (Busways) and Transdev Australasia Pty Ltd, but increased the wage rates in all other CSAs in line with the increases to modern awards. However, the Panel left for further consideration in this Review the general question as to "how copied State awards should be dealt with in future [Reviews]" and proposed a program for submissions as to this question.[183]

The current Review

192 In the current Review, submissions by employer parties fell into two categories. *First*, there were submissions again made about the specific position of two employers operating privatised bus operations in NSW, namely Busways (represented by Australian Business Lawyers and Advisors) and Transdev John Holland Buses (NSW) Pty Ltd (Transdev) (represented by the Ai Group). Busway employs transferring employees covered by CSAs with terms derived from three awards of the NSW Industrial Relations Commission,[184] while Transdev employs transferring employees covered by a CSA with terms derived from one of these awards[185] (collectively, NSW Bus CSAs). *Second*, Australian Business Industrial and the NSW Business Chamber (ABI), the ACCI and the

181 *Fair Work Act 2009* (Cth), s 768BY; *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), Sch 9, item 20.

182 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [278]-[447] and Appendix 5. See also *Background Paper on Copied State Awards* (Fair Work Commission Background Paper, 25 May 2022) which was published with a Statement issued by the Expert Panel: *Re Annual Wage Review 2021–22* [2022] FWCFB 78.

183 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [446]-[447].

184 *State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2020*; *State Transit Authority Bus Operations Enterprise (State) Award 2021*; and *State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2021*.

185 *State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2020*.

Ai Group all made submissions about the general approach to be taken to CSAs in this and future Reviews. The ACTU responded to all these submissions.

193 The cases respectively advanced on Busways and Transdev involved the same essential propositions, namely:

- the rates in the NSW Bus CSAs, which were derived from paid-rates State awards, significantly exceed comparable rates in modern awards;
- their contracts with the NSW Government give them little capacity to adjust fees to cover wage increases;
- they are currently engaged in enterprise bargaining, and the award of an increase in this Review would adversely affect the negotiations by disincentivising employees from making an enterprise agreement on appropriate terms; and
- consequently, the wage rates in their CSAs should not be increased by this Review.

194 Mr Robert Gibson, the Workplace Relations Manager of Busways, gave evidence concerning Busways' position via a witness statement. He described the relevant terms of Busways' contract with the NSW Government, and also gave evidence that it is his and Busways' expectation that a new enterprise agreement will be implemented this year which provides for wage increases from 1 January 2023 for drivers and senior salaried officers and from 1 April 2023 for maintenance staff. Busways submitted on the basis of this evidence that if wages under the NSW Bus CSAs are subject to further increases, operating under an enterprise agreement will be significantly less attractive and economically viable since the "fair and reasonable starting wages position" from which they have commenced bargaining will be undermined.[186]

195 Ms Rachel Spencer, the Managing Director of Transdev, gave evidence about difficulties recruiting bus drivers and said that Transdev does not set or control fares charged to the public for services. Ms Spencer also gave evidence in relation to the enterprise bargaining process for bus maintenance workers currently underway involving Transdev, the Australian Manufacturing Workers' Union and the CEPU. She said that wages are a contentious issue and that, if the Review results in increased rates in the NSW Bus CSAs, it would be unlikely that employees would agree to an increase less than that awarded in the Review and hence Transdev's bargaining position would be undermined. Transdev submitted that most of the reasons for which the Commission decided not to vary the CSA applying to Transdev in the 2021-22 Review remained relevant and that, in the absence of cogent reasons, the Panel should not depart from the approach it adopted last year.

196 The general submission advanced by the ACCI, ABI and the Ai Group was that no increases should be applied to CSAs in the absence of a specific application to do so. It was variously submitted that:

- a cautious approach was required in circumstances where it was difficult to identify what CSAs were in existence and in order to avoid the risk of creating "double dipping" effects in respect of CSAs that might already be the subject of wage increases;
- without examining each individual CSA and the relevant surrounding circumstances, including how each CSA's rates compare with minimum wages prescribed by modern awards that would cover the

186 Busways North West Pty Ltd submission, 17 February 2023 at [59].

relevant employees, recent and likely wage adjustments, when each CSA will terminate and whether the employer under the CSA is engaged in (or intends to engage in) enterprise bargaining, the Commission could not be satisfied that a safety net of minimum rates has been maintained;

- the existing approach to wages adjustments under CSAs unfairly imposes a burden on employers to apply for exemption, and requires employers to be aware of and understand the implications of the Review for CSAs as well as to participate in the Review process;
- NSW businesses will be disproportionately disadvantaged by Review decisions since it is the State in which most privatisation is likely to occur in the future, thereby creating the most CSAs; and
- increasing wage rates in CSAs may discourage enterprise bargaining because, as was stated in the 2021-22 Review decision, "an upward adjustment to wage rates in these copied State awards could act as a disincentive to bargaining, in circumstances where employers are already paying above modern award rates of pay".[187]

197 The ACTU submitted that the Review wage increase should be applied to all CSAs, consistent with the practice of the Commission in recent years, noting that the net result of any approach to CSAs must not be that workers who are covered by them are left worse off than would be the case if they had remained in their respective State systems. The ACTU also proposed applying a "top up" approach to CSAs which already provide for wage increases in the year of a Review to address the issue of "double dipping". The ACTU pointed to the fact that, outside of the Review, there is no capacity to adjust wages in CSAs, and submitted that the enactment of Pt 6-3A of the FW Act and consequential amendments were designed to provide continuation and maintenance of the wages safety net provided in CSAs at an individual level, for a limited period of time and absent a normative re-evaluation against modern awards. It submitted that the employers' position that CSAs should be ignored in the Review absent a moving party contending for a particular adjustment was wholly inconsistent with the statutory requirement to "review" CSAs. The ACTU rejected the assertion that an upward adjustment to wage rates in CSAs might act as a disincentive to bargaining in circumstances where the employers are already paying above modern award rates of pay, submitting that CSAs have a limited period of operation, a factor which is likely to motivate employees to participate in bargaining.

198 Specifically in relation to Busways and Transdev, the ACTU submitted that where a State government seeks to divest assets or outsource in circumstances that give rise to transfer of business, all national system employers that are bidders for the same work face the same labour cost and compete on a level playing field. The ACTU further submitted that neither employer made any mention or allowance for the fact that CSAs apply only to transferring employees in discussing their potential impact. As to enterprise bargaining, the ACTU submitted that this constitutes a "ready tool for managing unplanned increases in labour costs",[188] and the evidence that bargaining is proceeding undermines the employers' contention that bargaining will be negatively impacted.

187 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [422].

188 ACTU reply submissions (copied state awards), 3 March 2023 at [28].

Consideration and conclusions

199 The submissions advanced by employers in relation to CSAs generally are founded on a number of premises that we do not accept. First, the proposition that, in the absence of any specific application to do so, we can simply take no action in the Review with respect to CSAs is not consistent with the statutory requirement to "review" the minimum wages provided for in CSAs. The requirement to "review" CSA wages implies that we must consider whether they should be adjusted in light of the material before us in the Review bearing upon the applicable considerations in the minimum wages objective and the modern awards objective. Absent the identification of any specific circumstances which might cause us to take a particular approach with respect to particular CSAs, it is open for us to apply the general conclusions reached in this Review to CSAs. This is the approach which has been taken in past Reviews, including the 2021-22 Review. We do not accept that this approach is unfair or unduly burdensome for employers to which CSAs apply. As for all employers under any instrument that is the subject of the Review, it is necessary to identify the exceptional circumstances which might justify departure from the general outcome of the Review for a special case.

200 Second, the previous approach to dealing with "double-dipping" has been confined to ensuring that employees do not receive two increases from different sources referable to the same period. This approach has arisen because CSAs may contain in-built wage increase mechanisms or have been subject to wage increases from a State tribunal before they come into operation. It has never been the case that the "double-dipping" addressed by these approaches encompasses any margin between CSA rates and minimum rates in comparable modern awards. The effect of a CSA coming into existence under the FW Act is that the rates in the CSA become the minimum wages safety net for the employees covered, and this is so regardless of jurisdictional differences applying to the State instrument from which the CSA terms were derived. No issue of "double dipping" arises in this context.

201 Third, the proposition that the imposition of the general Review outcome on employers under CSAs might be unfair because it is unforeseen and therefore commercially untenable cannot be accepted. It is the action of an employer successfully tendering for work previously performed by a State government enterprise, and employing persons who undertook that work, that results in a CSA coming into operation. In such circumstances, it can reasonably be presumed that the employer would undertake a process of due diligence in respect of its obligations under the FW Act in relation to transferring employees. There can therefore be no reasonable basis for employers contracting to undertake work previously performed by a State public sector employer to be ignorant of the potential interaction between CSAs and increases arising from Reviews given the length of time that CSAs have existed.

202 We do not accept that, because we cannot necessarily identify all CSAs currently in operation, this is a basis for not applying the Review increase to those instruments. In the absence of any specified contraindication, our consideration of the matters we are required to take into account under ss 134(1) and 284(1) may be taken to apply equally to employment under CSAs. The presumption that CSAs should move in line with Review wage increases unless a basis for an exception is made out is more closely aligned with our positive obligation to review CSAs and to maintain a safety net of fair minimum wages

than the employer proposal that we disregard CSAs unless an application is made to flow on an increase. It is also the case that Reviews are the only mechanism to adjust wages in CSAs, which supports increases applying to CSAs unless a basis for exemption is established on application.

203 In relation to Busways and Transdev specifically, we are not persuaded that they should be exempted from the minimum wage increases to apply as a result of this Review. The exemption granted to Busways and Transdev in the 2021-22 Review was based on considerations including that the relevant CSAs provided for wage increases on dates early in 2022 and did not provide for any further increases beyond those dates.[189] The Panel also noted Busways' statement that it had commenced or intended to commence bargaining for enterprise agreements to replace the CSA terms and that "there is every likelihood that enterprise agreements will be in place … by the end of 2022".[190] It was also observed by the Panel that Transdev had made an enterprise agreement with employees covered by one CSA which was awaiting approval, and had commenced bargaining for agreements with employees covered by the two other CSAs.[191] On this basis, the Panel was satisfied that the current wage rates in the CSAs applying to Busways and Transdev provided a safety net of fair minimum wages,[192] and decided that the minimum wage increase generally applicable to modern award wages should not be applied to CSAs covering employees of Busways and Transdev "on this occasion".[193] However, the Panel decided that the Review increase should flow on to all other CSAs.

204 In the current Review, the position is that no CSA applicable to Busways or Transdev provides for any further wage increases referable to the current Review period. Additionally, despite the exemption for a 12-month period obtained in the 2021-22 Review, Busways has not finalised an enterprise agreement, and Transdev has not finalised its contemplated agreement. As for Busways' and Transdev's commercial position under the contracts they have entered into with the NSW Government, they had no basis to assume that minimum wage increases arising from Reviews conducted by this Commission would not apply to employees who transferred to their employment from the NSW public sector. A basic review of the provisions of the FW Act relating to CSAs, including the application of ss 284 and 285 to CSAs, and the past history of Review decisions applying wage increases to CSAs, would have indicated the probability of Review increases applying to transferring employees.

205 However, we consider that there are grounds for delaying the operation of the Review wage increases in respect of Busways and Transdev. Section 286(1) of the FW Act requires that determinations in relation to minimum wages in modern awards operate from 1 July in the next financial year, but s 286(2) provides that if the Commission is satisfied that there are exceptional circumstances justifying why a variation determination should not come into operation until a later day, the Commission may specify that later day as the day on which the variation determination comes into operation. If the Commission does so, the variation determination comes into operation on that later day (s 286(3)). We are narrowly persuaded, on the basis of the evidentiary cases

189 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [330]-[333].

190 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [352].

191 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [359].

192 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [391], [423].

193 *Re Annual Wage Review 2021-22* (2022) 315 IR 367 at [391].

advanced by Busways and Transdev, that the Review wage increases should take effect in the NSW Bus CSAs from a date later than 1 July 2023. It is highly desirable from all perspectives that these employers enter into enterprise agreements which allow them and their transferring employees to exit the CSA regime.[194] Applying the minimum wage increases from 1 July 2023 would, we accept, disrupt the current bargaining and perhaps create a disincentive for transferring employees to make an agreement. Some further space is required to allow the successful conclusion of bargaining. Accordingly, we have decided that the increases to the wage rates in the NSW Bus CSAs will be deferred until 1 January 2024. For all other CSAs, rates of pay will be adjusted in line with the increases to minimum rates in modern awards in this Review and will operate from 1 July 2023.

10. Conclusion

206 This section sets out the outcome of this Review and other relevant matters.

207 The NMW order will contain:

(a) A national minimum wage of $882.80 per week or $23.23 per hour;

(b) Two special national minimum wages for award/agreement free employees with disability: for employees with disability whose productivity is not affected, a minimum wage of $882.80 per week or $23.23 per hour based on a 38-hour week, and for employees whose productivity is affected, an assessment under the supported wage system, subject to a minimum payment fixed under the Supported Wage System Schedule;

(c) Wages provisions for award/agreement free junior employees based on the percentages for juniors in the *Miscellaneous Award 2020* applied to the national minimum wage;

(d) The apprentice wage provisions and the National Training Wage Schedule in the *Miscellaneous Award 2020* for award/agreement free employees to whom training arrangements apply, incorporated by reference; and

(e) A casual loading of 25 per cent for award/agreement free employees.

208 The NMW order will operate from 1 July 2023, and will take effect in relation to a particular employee on the start of the employee's first full pay period on or after 1 July 2023.

209 Modern award minimum wages will be increased by 5.75 per cent. The variation determinations in respect of all modern awards, modern enterprise awards and State reference public sector awards will operate from 1 July 2023 and take effect in relation to a particular employee on the start of the employee's first full pay period on or after 1 July 2023.

210 The determinations necessary to give effect to the increase in modern award minimum wage rates will be made available in draft form shortly after this decision. Determinations varying the modern awards will be made as soon as practicable and the modern awards including the varied wage rates will be published as required by the FW Act.

211 Our determination in this Review is that the wages in all relevant transitional instruments are also increased by 5.75 per cent. This determination comes into operation on 1 July 2023 and takes effect in relation to a particular employee on

194 *Fair Work Act 2009* (Cth), s 768AU(2).

the start of the employee's first full pay period on or after 1 July 2023. The Commission is not required to publish the rates of the wages in the relevant transitional instruments as so varied, and accordingly we will not do so.

212 With regard to CSAs, our determination in this Review is that the wage rates in all CSAs are increased by 5.75 per cent. For all CSAs other than the NSW Bus CSAs, this determination comes into operation on 1 July 2023 and takes effect in relation to a particular employee on the start of the employee's first full pay period on or after 1 July 2023. For the NSW Bus CSAs, this determination comes into operation on 1 January 2024 and takes effect in relation to a particular employee on the start of the employee's first full pay period on or after 1 January 2024. The Commission is not required to publish the rates of the wages in the relevant CSAs as so varied, and accordingly we will not do so.

213 We wish to express our appreciation to the parties who participated in this Review for their contributions and to the staff of the Commission for their assistance.

Orders as per [207]-[212]

DR RJ DESIATNIK

Appendix: Proposed minimum wages adjustments

Submission	Proposal
Australian Government	No quantum specified
Government of South Australia	No quantum specified
Queensland Government	No quantum specified
Victorian Government	No quantum specified
Western Australian Government	No quantum specified
Australian Council of Trade Unions	7 per cent increase, applicable to all
Australian Industry Group	3.8 per cent increase, applicable to all
Australian Chamber of Commerce and Industry	3.5 per cent increase, applicable to all
Australian Council of Social Service	No quantum specified
Australian Catholic Council for Employment Relations	7.2 per cent increase to the NMW and, at a minimum, to the C13 to C10 rates
Australian Automotive Dealer Association	No quantum specified
Australian Business Industrial and Business NSW	3.5 per cent increase, applicable to all
Australian Foodservice Advocacy Body Board	No more than 3.8 per cent increase, applicable to all
Australian Retailers Association	3.5 per cent increase applicable to all
Drycleaning Institute of Australia	No quantum specified. The increase should not exceed nominal wages growth as measured by the WPI and AWOTE
Housing Industry Association	No quantum specified
Laundry Association Australia	No increase
Master Grocers Australia Limited	3.5 per cent increase in the *General Retail Industry Award 2020* and *Timber Industry Award 2020*
National Farmers' Federation	No quantum specified
National Retail Association	Increase should not exceed 3.25 per cent
Restaurant & Catering Industry Association of Australia	No more than a 3 per cent increase
South Australian Wine Industry Association	No higher than 3.5 per cent increase, applicable to all

Submission	Proposal
Australian Services Union	7 per cent increase, applicable to all
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union	7 per cent increase, applicable to all. In addition, apprentices should receive the full $40.00 increase from the 2021-22 Review
Retail and Fast Food Workers Union	NMW to increase to at least $28 per hour and all rates lower than this in the retail, miscellaneous and fast food awards be increased to at least $28 per hour
Shop Distributive and Allied Employees' Association	7 per cent increase, applicable to all
United Workers' Union	7 per cent increase, applicable to all
Kaptich, F	Variation to the *Corrections and Detention (Private Sector) Award 2020*
Thompson, B	No quantum specified. Increase should be less than the rate of inflation
Wingent, S	No quantum specified