



BACKGROUND DOCUMENT

7 – MODERN AWARDS OBJECTIVE

Fair Work Act 2009

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

Aged Care Award 2010

(AM2020/99)

Nurses Award 2020

(AM2021/63)

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

(AM2021/65)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT ASBURY
COMMISSIONER O’NEILL

MELBOURNE, 22 AUGUST 2022

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

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ABBREVIATIONS

ABS	Australian Bureau of Statistics
ABI	Australian Business Industrial
<i>ACT Child Care Decision</i>	<i>Australian Liquor, Hospitality and Miscellaneous Workers Union re Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998 - re Wage rates - PR954938 [2005] AIRC 28</i>
ACSA	Aged & Community Services Australia
Aged Care Award	<i>Aged Care Award 2010</i>
AIN	Assistant in Nursing
ANMF	Australian Nursing and Midwifery Foundation
AQF	Australian Qualifications Framework
Charlesworth Report	Dr Sara Charlesworth, <i>Report of Sara Charlesworth: Health Services Union of NSW – Regarding work value for aged care members</i> dated 31 March 2021
Charlesworth Supplementary Report	Dr Sara Charlesworth, <i>Supplementary Report of Sara Charlesworth</i> dated 22 October 2021
CCIWA	Chamber of Commerce and Industry of Western Australia
Commission	Fair Work Commission
Eagar Report	Dr Kathleen Eagar, <i>Report of Dr Kathleen Eagar</i> dated 29 March 2021
Eagar Supplementary Report	Dr Kathleen Eagar, <i>Supplementary Report of Dr Kathleen Eagar</i> dated 20 April 2022
EN	Enrolled Nurse
<i>Equal Remuneration Case 2015</i>	<i>Application by United Voice & Australian Education Union [2015] FWCFB 8200</i>
FW Act	<i>Fair Work Act 2009 (Cth)</i>
HSU	Health Services Union
Joint Employers	Aged & Community Services Australia, Leading Age Services Australia, Australian Business Industrial
Junor Report	Honorary Associate Professor Anne Junor, <i>Fair Work Commission matter AM2021/63, Amendments to the Aged Care Award 2010 and the Nurses Award 2010</i> dated 28 October 2021, as amended 5 May 2022.
Kurrle Report	Dr Susan Kurrle, <i>Report of Dr Susan Kurrle regarding work value for aged care members</i> dated 25 April 2021
LASA	Leading Age Services Australia

Meagher Report	Dr Gabrielle Meagher, <i>Changing aged care, changing aged care work: workforce and work value issues in Australian residential aged care</i> dated 31 March 2021
Meagher Supplementary Report	Dr Gabrielle Meagher, <i>Supplementary report on workforce and work value issues in Australian home care for older people</i> dated 27 October 2021
NES	National Employment Standards
Nurses Award	<i>Nurses Award 2020</i>
PCW	Personal Care Worker
<i>Penalty Rates Decision</i>	<i>4 Yearly Review of Modern Awards – Penalty Rates</i> [2017] FWCFB 1001
<i>Penalty Rates Review</i>	<i>Shop, Distributive and Allied Employees Association v The Australian Industry Group</i> (2017) 253 FCR 368
<i>Pharmacy Decision</i>	<i>Four Yearly Review of Modern Awards – Pharmacy Industry Award 2010</i> [2018] FWCFB 7621
RN	Registered Nurse
SCHADS Award	<i>Social, Community, Home Care and Disability Services Award 2010</i>
Smith/Lyons Report	Associate Professor Meg Smith and Dr Michael Lyons, <i>Report by Associate Professor Meg Smith and Dr Michael Lyons</i> dated October 2021, as amended 2 May 2022
<i>Teachers Case</i>	<i>Independent Education Union of Australia</i> [2021] FWCFB 2051
Unions	Australian Nursing and Midwifery Foundation, Health Services Union and the United Workers Union
UWU	United Workers Union
4 Yearly Review	4 yearly review of modern awards
4 Yearly Review Amending Act	<i>Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018</i>
WR Act	<i>Workplace Relations Act 1996</i> (Cth)

1. Introduction

[1] 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).¹

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] Collectively, 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.

[2] The Applications have been made pursuant to s.158(1) of the *Fair Work Act 2009* (Cth) (FW Act). Relevantly, item 1 of s.158(1) authorises a registered organisation of employees to apply for the making of a determination varying a modern award under s.157.

[3] The Applications seek to vary minimum wages in the Aged Care Award, the Nurses Award and the SCHADS Award. It is also uncontentious that the Applications seek to vary ‘modern award minimum wages’ as defined in s.284 in that they seek to vary ‘the rates of minimum wages in modern awards’: see ss.284(3) and (4).

[4] The general provisions relating to the performance of the Commission’s functions apply to these proceedings. 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 objects of the FW Act and any objects of the relevant part.

[5] Sections 157 and 158 are in Part 2-3 of the FW Act. The objects of Part 2-3 are expressed in the modern awards objective in s.134, which applies to the performance or exercise of the Commission’s modern award powers. The modern awards objective requires the Commission to ensure that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions, taking into account certain social and economic factors. The minimum wages objective in s.284 also applies to the performance or exercise of the Commission’s powers under Part 2-3 so far as they relate to, relevantly, varying modern award minimum wages: s.284(2)(b). The object of the FW Act is set out in s.3.

[6] This Background Document deals with the modern awards objective. Section 2 sets out some general observations about the modern awards objective and section 3 sets out the parties’ submissions about the modern awards objective.

¹ The *Nurses Award 2010* was varied and renamed the *Nurses Award 2020* on 9 September 2021 ([2021] FWCFB 4504).

2. The Modern Awards Objective General Observations

[7] The modern awards objective is in s.134 and provides:

‘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).²

[8] Background document 1 set out the following general observations about the modern awards objective:

‘The modern awards objective is very broadly expressed.² A ‘fair and relevant minimum safety net of terms and conditions’ is a composite phrase within which ‘fair and relevant’ are adjectives describing the qualities of the minimum safety net to which the Commission’s duty relates. This composite phrase requires that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’, taking into account the matters in ss.134(1)(a)–(h) (the s.134 considerations).³ As the Full Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (the *Penalty Rates Review*):

‘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.’⁴

...

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.⁵ No particular primacy is attached to any of the s.134 considerations⁶ and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

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.⁷ 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

² *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 [35].

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

⁴ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) FCR 368 [49]; [65].

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

⁶ *Penalty Rates Review* (2017) 253 FCR 368 [33].

⁷ *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 [105]–[106].

as broad social objectives.⁸ 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.

While the considerations in ss.134(a)-(h) inform the evaluation of what might constitute a ‘fair and relevant minimum safety net of terms and conditions’, they do not necessarily exhaust the matters which the Commission might consider to be relevant to the determination of a fair and relevant minimum safety net. The range of relevant matters ‘must be determined by implication from the subject matter, scope and purpose of the’ FW Act.⁹

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.’¹⁰

Further, in the *4 Yearly Review of Modern Awards – Penalty Rates*¹¹ (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.’¹²

Section 138 of the FW Act emphasises the importance of the modern awards objective in considering applications under s.157; it states:

‘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.’

⁸ See Ibid.

⁹ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39–40. Also see *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 [48].

¹⁰ (2017) 253 FCR 368 [53].

¹¹ [2017] FWCFB 1001.

¹² Ibid [128].

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’.¹³

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.¹⁴ Reasonable minds may differ as to whether a proposed variation is necessary (within the meaning of s.138), as opposed to merely desirable.’¹⁵

[9] Paragraphs [89] to [107] of Background Document 1 set out some general observations in relation to the s.134 considerations. The HSU, the ANMF and the Joint Employers do not contest the propositions set out at [89] to [107] in Background Document 1.¹⁶ Where relevant, these observations are set out at the start of each of the sections below to provide additional context.

¹³ *Shop, Distributive and Allied Employees Association v National Retail Association (No. 2)* (2012) 205 FCR 227 [46].

¹⁴ See generally: *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161.

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

¹⁶ HSU closing submissions dated 22 July 2022 [62]; ANMF closing submissions dated 22 July 2022 [67]; Joint Employers closing submissions dated 22 July 2022 Annexure P [3.25].

3. Submissions about the modern awards objective

3.1 s.134(1) a fair and relevant minimum safety net of terms and conditions

ANMF

[10] The ANMF submits that the wage rates are neither fair nor relevant, including because:

- the rates do not reflect the work value of the employees concerned;
- the rates of pay are out of step with community expectations as reflected in the work and findings of the Royal Commission and the other public enquiries referenced by ANMF’s witnesses;
- the context in which the awards operate have been the subject of analysis by a Royal Commission, which has concluded that the rates are inadequate for the purpose of securing the delivery of high quality care;
- the rates are inconsistent and out of step with those applying in other sectors for equivalent work; and
- the evidence in connection with attraction and retention discloses significant labour force deficiencies contributed to by the depressed rates in the current awards.¹⁷

[11] The ANMF submits that a significant number of aged-care workers are paid at award rates which considerably undervalue their work. This does not provide a ‘fair’ safety net because, among other things, it does not properly recognise work value and there is a significant disparity between these award rates and bargained outcomes.¹⁸ The ANMF maintains that low wages contribute to the perception that work in aged care is ‘undervalued, underappreciated, and not respected’¹⁹ while insufficient remuneration is a factor in the difficulty in attracting staff to, and in causing workers to leave, the sector.²⁰ The ANMF argues that an increase in pay for aged care workers ‘would be a factor in influencing workers to begin, continue in, or return to work in aged care.’²¹

[12] The ANMF submits that an increase in award wages is therefore necessary in order to ensure that a fair and relevant minimum safety net of terms and conditions (especially wages) is provided by the Awards.²²

¹⁷ ANMF closing submissions dated 22 July 2022 [838].

¹⁸ ANMF F46 application to vary a modern award (AM2021/63) dated 18 May 2021 [19].

¹⁹ Ibid [21].

²⁰ Ibid.

²¹ Ibid [21].

²² Ibid [22].

HSU

[13] The HSU submits that the Commission’s power to vary modern award minimum wages outside of the annual wage review process is conditioned, by section 157(2)(b), upon its satisfaction that it is necessary to do so in order to achieve the modern awards objective. The HSU submits that so far as the claims are for increased wages, the Commission must ensure that the wages set by the awards are:

- (a) fair, in that they appropriately reflect the very least of what a worker performing the relevant work ought to be paid;
- (b) relevant, in that they have some connection to market rates (i.e. are not so low as to be utterly irrelevant to the overwhelming majority of workers); and
- (c) appropriate minimums, in that they provide adequate protection for employees as at least a starting point.²³

[14] In its application to vary the SCHADS Award, the HSU submits that it is incumbent on an applicant under s.158 to make out a substantive merit-based case for the variation, including by reference to the current operation of the modern award and the likely impact of any variation on employers and employees.²⁴ Here, in short, the HSU must demonstrate:

- (a) that the current wage rates and classification structure in the SCHADS Award are set at levels which mean that it does not provide a safety net which is both fair and relevant; and
- (b) that the proposed variation is necessary to ensure that the modern awards objective is met.

[15] Background Document 1 noted that 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.’²⁵

[16] The other parties in this proceeding were invited to respond to the HSU submission and their responses were set out in Background Document 5 at paragraphs [77] to [83] as follows:

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

²³ HSU closing submissions dated 22 July 2022 [387].

²⁴ *Re Security Services Industry Award 2010* [2015] FWCFB 620 [8].

²⁵ HSU submissions in reply dated 21 April 2022 [65].

The ANMF refers to the statement in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) FCR 368 that the terms ‘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’ and submits that these concepts ‘are not any narrower in the context of minimum wages.’

The ANMF refers to and repeats [46] of its submissions dated 29 October 2021 and [838] of its closing submissions.

The Joint Employers submit that the Commission has previously considered the concept of ‘fair and relevant’ in the Penalty Rates Review and says that the submissions of the HSU go ‘beyond the scope of this 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 Review.’

The Joint Employers maintain 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.’

The Commission then goes on to consider what is meant by ‘relevant’ by stating:

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

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

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.’

Joint Employers

[17] The Joint Employers submit that the notion of a ‘fair and relevant’ minimum is clearly more than an absolute minimum or subsistence floor, but the notions of fairness and relevance concern both employers and employees.²⁶

[18] The Joint Employers submit if the Commission determines that a change to the classification structure and/or minimum award rates is justified by work value reasons, it is also required to be satisfied that any determination outside the system of annual wage reviews is necessary to achieve the modern awards objective: s 157(2)(b). The consideration of the annual wage review is in effect a temporal consideration of when any such variation should commence; 1 July or some other time.

[19] The Joint Employers submit that The Commission has a discretion in regard to this issue arising from s 166 and this can be better addressed in the context of commencement and phasing of any increase to minimum wages should one be contemplated.²⁷

The Commonwealth

[20] The Commonwealth submits that the Commission can be satisfied that increases to the minimum wages in the Aged Care Award, and the minimum wages for aged care employees in the SCHADS Award and Nurses Award are necessary to achieve the modern awards objective.²⁸

[21] Paragraphs [154] to [156] set out the Commonwealth’s submissions regarding the principles governing the construction of s.134. The Commonwealth submits that the requirement to take each matter in s.134 into account, so far as they are relevant, means that each ‘must be treated as a matter of significance in the decision-making process’ however, submits that ‘no particularly primacy’ is attached to any of the s.134 considerations.²⁹

[22] The Commonwealth maintains that it is ‘not necessary’ to make a finding that a modern award fails to satisfy one or more of the s.134 considerations in order to vary a modern award, rather ‘in giving effect to the modern awards objective, the Commission’s task is to perform an evaluative function, taking into account the matters in ss 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.’³⁰

[23] The Commonwealth relies on *4 yearly review of modern awards - Real Estate Industry Award 2010* and submits that in that case the Full Bench found that where the wage rates in a modern award have not earlier been the subject of a proper work value consideration, ‘there

²⁶ Joint Employers closing submissions dated 22 July 2022 [23.5].

²⁷ Ibid [23.3].

²⁸ Commonwealth submissions dated 8 August 2022 [153]

²⁹ Ibid [154] referring to *National Retail Association v Fair Work Commission* [2014] FCAFC 118 [56]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 [33].

³⁰ Ibid [155] referring to *Alpine Resorts Award 2010* [2018] FWCFB 4984 [52].

can be no implicit assumption that at the time the award was made its wage rates were consistent with the modern awards objective.³¹

[24] Paragraphs [157] to [165] set out the Commonwealth’s submissions in regard to ‘a fair and relevant minimum safety net of terms and conditions’, The Commonwealth submits that increases to the proposed increases to minimum wages for aged care workers ‘are necessary to ensure that modern awards, together with the National Employment Standards, provide a ‘fair and relevant minimum safety net of terms and conditions’ in the aged care sector.’³² The ANMF agrees with and adopts this submission.³³

[25] The Commonwealth does not contest the principles identified in the *Penalty Rates Review* and the *Penalty Rate Decision*, as set out in [79], [84]–[85] and [87]–[88] of *Background Document 1*, relating to the interpretation of the modern awards objective.³⁴

[26] The Commonwealth broadly supports the HSU’s submission 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.’³⁵

[27] The Commonwealth submits that what is ‘fair and relevant’ ‘must be viewed in the contemporary context of the aged care sector as a Government-funded sector’³⁶ and refers to the Full Federal Court’s observation in the *Penalty Rates Review Decision* that ‘[c]ontemporary circumstances are called up for consideration in both respects [of fairness and relevance]’³⁷ and the Full Bench’s observation in the *Penalty Rates Decision* that ‘relevant’ is to be considered by its dictionary meaning and ‘is intended to convey that a modern award should be suited to contemporary circumstances’.³⁸

[28] The Commonwealth maintains that ‘fairness’ should be considered from the perspectives of both employees and employers a supports the Applicants’ submissions that current award rates significantly undervalue the work performed by aged care workers, employees covered by the application are low paid and experience relative living standards aligned to low remuneration, and that the increase of modern award minimum wages would improve the living standards of the low paid.³⁹

[29] The Commonwealth submits that aged care employees covered by enterprise agreements are not paid ‘significantly more’ than those employees covered by a modern award and argues:

³¹ Ibid [156] referring to *4 yearly review of modern awards – Real Estate Industry Award 2010* [2017] FWCFB 3543 [80].

³² Commonwealth submissions dated 8 August 2022 [157].

³³ ANMF closing submissions in reply dated 17 August 2022 [458](15).

³⁴ Commonwealth submissions dated 8 August 2022 [157].

³⁵ Ibid [158] referring to HSU submissions in reply dated 21 April 2022 [65].

³⁶ Ibid [159].

³⁷ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) FCR 368 [49], [65].

³⁸ *4 Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFB 1001 [120].

³⁹ UWU outline of submissions dated 1 April 2022 [36]; ANMF submission dated 1 April 2021 [12]; HSU outline of submissions dated 1 April 2022 [64], [67].

‘Increases to modern award minimum wages in the aged care sector would therefore improve pay rates and provide a fair and relevant safety net for employees in the sector, not just for employees paid at award rates, but also those whose pay is set by an enterprise agreement.’⁴⁰

[30] The Commonwealth submits that addressing the gender pay gap is an element of fairness for the purposes of s 134(1) and relies on the Annual Wage Review 2017-18 in support of this proposition.⁴¹ The Commonwealth maintains that the expert evidence demonstrates that ‘gender has influenced the treatment of the sector at industrial and societal levels’ and relies the following observations from Dr Charlesworth:

- frontline residential aged care work has historically been viewed as quintessentially ‘women’s work’ and therefore of little economic value; and
- an assumed link between unpaid care work in the family and paid care work has influenced how it has been valued by society.⁴²

[31] The Commonwealth argues that gendered assumptions should not influence the assessment of fair minimum wages and conditions for aged care workers.⁴³

[32] With regard to fairness for employers, the Commonwealth submits that due to the ‘contemporary context for Government funding’ in the aged care sector, employers are ‘unlikely to experience significant detrimental impacts’ as a result of increases to modern award minimum wage for aged care workers and any such wage increase could as a result not be considered ‘unfair’ to employers.⁴⁴

Replies to the Commonwealth

[33] The HSU agrees with the Commonwealth’s submissions as to the modern awards objective subject to the following clarifications:

- the question of appropriate minimum rates is influenced by the nature of the sector and other contextual factors, including whether it is a funded or profitmaking sector.⁴⁵
- maintaining a relevant award system additionally requires reference to market rates, to ensure that awards are not ‘hollowed out’ by the enterprise bargaining system.⁴⁶

⁴⁰ Commonwealth submissions dated 8 August 2022 [161].

⁴¹ Ibid [163] citing *Re Annual Wage Review 2017-18* (2018) 279 IR 215 [36].

⁴² Ibid [163] citing Expert Report of Dr Sara Charlesworth at [43].

⁴³ Ibid [164].

⁴⁴ Ibid [165].

⁴⁵ HSU submissions in reply to the Commonwealth dated 17 August 2022 [24].

⁴⁶ Ibid [25].

- gendered assumptions should not influence the assessment of fair wages and conditions in the aged care sector.⁴⁷
- the wage increases sought, in the context of this application and the Commonwealth’s funding commitments, are not capable of being considered unfair to employers.⁴⁸
- the reality of the challenges faced by these workers attempting to survive on the current rates is a relevant consideration, and this evidence should not be disregarded as sought by the Joint Employers.⁴⁹
- bargaining in the sector is not likely to improve wages, but remains available to drive flexibility and productivity.⁵⁰
- the increases will assist in attraction and retention of staff, including lower skilled or unqualified workers, leading to potentially increased workplace participation.⁵¹
- considerations about the need to address gender-based wage undervaluation, the gender wage gap generally and specific undervaluation of skills are all relevant considerations, without the need for a male comparator to be identified.⁵²
- in the context of the Government’s commitment to ensuring that the outcome of the aged care work value case is funded, the cost to business of the increase sought will not be material and the overall impact on business will be positive by facilitating a strengthened ability to recruit staff and meet regulatory requirements.⁵³

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

[34] Background document 1 set out the following observations:⁵⁴

Section 134(1)(a) requires that we take into account ‘relative living standards and the needs of the low paid’. This consideration incorporates 2 related, but different, concepts. As explained in the *2012–13 Annual Wage Review decision*:

‘The former, relative living standards, requires a comparison of the living standards of award-reliant workers with those of other groups that are deemed to be relevant. The latter, the needs of the low paid, requires an examination of the extent to which low-paid workers are able to purchase the essentials for a “decent standard of living” and to engage in community life. The assessment of what constitutes a decent standard of living is in turn influenced by contemporary norms.’⁵⁵

⁴⁷ Ibid [26].

⁴⁸ Ibid [27].

⁴⁹ Ibid [28].

⁵⁰ Ibid [29].

⁵¹ Ibid [30].

⁵² Ibid [31].

⁵³ Ibid [32].

⁵⁴ Background Document 1 [90]–[92].

⁵⁵ [2013] FWCFB 4000 [361].

In successive annual wage reviews, the Expert Panel has concluded that a threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid’, within the meaning of s.134(1)(a).

The most recent data for the ‘low paid’ threshold is set out below:⁵⁶

Two-thirds of median full-time earnings	\$/week
Characteristics of Employment survey (Aug 2021)	1,000.00
Employee Earnings and Hours survey (May 2021)	1,062.00

ANMF

[35] The ANMF submits that the current minimum rates of pay under the Nurses Award and Aged Care Award classifications are close to or below the ‘low paid’ threshold and argues the current rates are neither fair nor relevant as:

‘the rates do not reflect workers’ work value, are out of step with community, expectations, are inconsistent with rates applying in other sectors for equivalent work, and result in significant labour force deficiencies.’⁵⁷

[36] The ANMF submits that aspects of the witness evidence regarding financial pressures⁵⁸ are directly relevant to the ability of aged care workers to purchase essentials for a decent standard of living’ and to engage in community life.⁵⁹

HSU

[37] Similarly to the ANMF, the HSU submit the current classifications under the Awards are close to or below the ‘low paid’ threshold, being two-thirds of median full-time wages. The HSU relies on lay witness evidence which describes the difficulties faced by workers in meeting necessary living expenses with their current wages.⁶⁰

[38] The HSU argue that the employers involved in the proceeding ‘recognise the striking inadequacy of the current rates of pay’, and note their participation in the development of an Australian Aged Care Collaboration (AACC) press release⁶¹ that analysed ABS data finding that after expenses:

⁵⁶ MA000028; Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2020* (Report, 11 December 2020); Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, August 2021* (Report, 19 January 2022).

⁵⁷ ANMF closing submissions dated 22 July 2022 [20].

⁵⁸ See Witness Statement of Sheree Clarke dated 29 October 2021 [14]-[16].

⁵⁹ ANMF closing submissions in reply dated 17 August 2022 [206].

⁶⁰ See Witness Statement of Carol Austen dated 29 March 2021 [39]; Witness Statement of Charlene Glass dated 29 March 2021 [92]; Witness Statement of Sandra O’Donnell dated 25 March 2021 [107]-[112]; Witness Statement of Tracey Roberts dated 23 March 2021 [162]-[166]; Witness Statement of Michael Purdon dated 6 October 2021 [87]-[92], Witness Statement of Suzanne Wagner dated 28 October 2021 [160]-[161], Witness Statement of Julie Kupke dated 28 October 2021 [127]-[128], Witness Statement of Catherine Evans dated 26 October 2021 [104]-[105].

⁶¹ 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.

- A single aged care worker has \$112 per week
- An aged care worker in a two-parent household with two children has \$17 per week.
- An aged care worker in a single-parent household cannot afford basic essentials, with weekly costs exceeding income by \$148 each week.⁶²

[39] The HSU submits these stories are ‘common’ from low-paid aged care workers and argue:

‘It is jarring, however, that it is the consistent experience of workers performing such complex and critical work in an industry that is a central supporting pillar to the Australian economy and society. It ought to be corrected; the variations sought go some of the way toward this.’⁶³

[40] The HSU submits that ensuring aged care workers receive wages that properly value their work will address the needs of low paid workers and improve living standards and as a result the consideration in s.134(1)(a) weighs in favour of a finding that the variations sought are necessary to meet the modern Awards objective.⁶⁴

Joint Employers

[41] The Joint Employers refer to the 2012-2013 Annual Wage Review decision⁶⁵ and submit that while it is self-evident that any employee who is considered low paid will benefit from an increase in pay, this does not justify doing so in an ‘unfettered manner’.⁶⁶

[42] The Joint Employers further submit that 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’; fair and relevant to employees and employers and further something that is conditioned by s 138 and section 157 and 284.⁶⁷

Commonwealth

[43] Paragraph [166] of the Commonwealth’s submissions deals with the consideration in s.134(1)(a). The Commonwealth submits 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.⁶⁸

[44] The Commonwealth submits that many of the minimum rates in the Aged Care, Nurses and SCHADS Awards sit below the low paid threshold of two-thirds of median full-time wages

⁶² HSU closing submissions dated 22 July 2022 [400].

⁶³ Ibid [401].

⁶⁴ Ibid [402].

⁶⁵ [2013] FWCFB 4000 [361] as referenced in *Four yearly review of modern awards - Penalty Rates* [2017] FWCFB 1001 [165].

⁶⁶ Joint Employers closing submissions dated 22 July 2022 [23.9].

⁶⁷ Ibid [23.10].

⁶⁸ Commonwealth submissions dated 8 August 2022 [166].

and argues that evidence before the Commission demonstrates the challenges many workers face in meeting financial obligations and saving for the future due to the low rates of pay and the often insecure nature of work in the aged care sector.⁶⁹

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

[45] Background Document 1 sets out the following observations:⁷⁰

‘Section 134(1)(b) requires that the Commission takes into account ‘the need to *encourage* collective bargaining.’ [Emphasis added]

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.’⁷¹ Further, various annual wage review research reports have examined factors that may have influenced changes in the collective agreement coverage of employees.⁷²

ANMF

[46] The ANMF submits that aged care workers ‘have experienced the compounding effect over many years of difficulty bargaining successful in the sector’ and argue these challenges arise because of:

- high levels of casual and part-time employment;
- low hours contracts;
- the female-dominated nature of the industry (which workforces have, historically, been less industrially organised);
- the shift-based nature of the work and rostering arrangements;
- the proportion of workers from culturally and linguistically diverse backgrounds (which presents as a barrier to effective communication in bargaining);
- a cultural reluctance (arising out of a sense of professional commitment) to take industrial action that may be seen to negatively affect residents;
- industrial regulation limiting rights to take industrial action;
- a lack of union density; and

⁶⁹ Ibid.

⁷⁰ Background Document 1 [93]-[94].

⁷¹ [2016] FWCFB 3500 [540].

⁷² Peetz D & Yu S (2017), *Explaining recent trends in collective bargaining*, Fair Work Commission, Research Report 4/2017, February; Peetz D & Yu S (2018), *Employee and employer characteristics and collective agreement coverage*, Fair Work Commission, Research Report 1/2018, February.

- the impact of insecure work.⁷³

[47] The ANMF relies on the lay witness evidence of Kevin Crank,⁷⁴ Paul Gilbert,⁷⁵ Paul Bonner⁷⁶, Christopher Friend⁷⁷ and Sue Cudmore⁷⁸ as evidence of the difficulties associated with bargaining for higher wages in the aged care sector.⁷⁹

[48] The ANMF submits that the common themes emerging from the lay witness evidence include:

- employers claimed during bargaining to be constrained by an absence of funding,⁸⁰
- difficulty organising aged-care workforces or in actually negotiating (*e.g.*, due to perceived power imbalance, reticence of workers from a CALD background to make waves),⁸¹
- actual or perceived unwillingness of aged-care workers to take industrial action.⁸²

[49] 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;
- 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 minimum.⁸³

[50] The ANMF further submits that there is evidence that the ‘difficulties [of] bargaining would be lessened by an increase in minimum award rates’ and similarly to the HSU rely on the evidence of Mr Friend that if the issue of a wage rise is no longer the principal concern of bargaining, parties can focus bargaining on enterprise specific matters.⁸⁴

⁷³ ANMF Form F46 Application to vary a modern award (AM2021/63) dated 17 May 2021 [25]–[26].

⁷⁴ Witness statement of Kevin Crank dated 29 October 2021 [11]–[21].

⁷⁵ Witness statement of Paul Gilbert dated 29 October 2021 [36]–[51].

⁷⁶ Witness statement of Robert Bonner dated 29 October 2021 [36]–[38].

⁷⁷ Transcript, 26 April 2022, [PN928].

⁷⁸ Transcript, 12 May 2022, [PN13559]–[PN13565].

⁷⁹ ANMF closing submissions dated 22 July 2022 [857].

⁸⁰ Witness statement of Christine Spangler dated 29 October 2021 [42]; witness statement of Kevin Crank dated 29 October 2021 [14].

⁸¹ Witness statement of Jocelyn Hofman dated 29 October 2021 [47]–[49]; see also witness statement of Linda Hardman dated 20 October 2021 [82]; witness statement of Wendy Knights dated 29 October 2021 [98]–[99]; witness statement of Dianne Power dated 29 October 2021 [100]–[103]; witness statement of Patricia McLean dated 29 October 2021 [125].

⁸² Witness statement of Linda Hardman dated 20 October 2021 [82]; statement of Wendy Knights dated 29 October 2021 [98]–[99]; see also the cross-examination of Christopher Friend, Transcript, 26 April 2022, [PN923]–[PN928], and the cross-examination of James Eddington, Transcript, 3 May 2022 [PN3513]–[PN3514].

⁸³ ANMF Form F46 Application to vary a modern award (AM2021/63) dated 17 May 2021 [27].

⁸⁴ ANMF closing submissions dated 22 July 2022 [867] citing Transcript, 26 April 2022, [PN932]–[PN941].

[51] The ANMF argues that it is ‘evident’ from the evidence before the Commission that bargaining in the aged care sector is presenting not working, in respect of wages, and says:

‘there is no reason to think otherwise than that bargaining will continue to fail to achieve wage rises, and that the disparity between wages in the aged-care sector and other sectors (*e.g.*, acute care) will continue to grow. That is to say, the biggest impediment to bargaining is not really an enterprise-level issue at all; it is a sector-wide issue.’⁸⁵

[52] The ANMF submits that it therefore follows that if the sector-wide issue of wages were to resolve, parties’ focus will shift to matters specific to each individual enterprise, and thereby the objectives of collective bargaining would be furthered.⁸⁶

HSU

[53] The HSU submits that there are ‘significant and widespread difficulties associated with collective bargaining in the aged care sector’ and consequently the majority of aged care workers are paid the minimum rates in the award or rates set under enterprise agreements that are typically no higher than 5 per cent above the award rates.⁸⁷ The HSU suggests there are various challenges with enterprise bargaining in the aged care sector, including:

- the lack of incentive for employers to bargain with employees due to the existing low wage rates and minimum conditions, of which the availability of overtime from part-time employees at single rates is a notable example
- in the case of home care, the longstanding employer orientated flexibilities in the scheduling of part-time and casual workers
- the dispersed nature of the work
- the undesirable impacts upon care recipients of any industrial action
- the fact that the majority of funding for the sector comes from the Commonwealth Government.⁸⁸

[54] The HSU relies on the expert evidence of Professor Charlesworth at paragraphs [30] – [41] of her expert report, including the following:

‘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

⁸⁵ Ibid [868].

⁸⁶ Ibid [869].

⁸⁷ HSU closing submissions dated 22 July 2022 [403].

⁸⁸ Ibid [404].

federal government is effectively almost the sole purchaser and lead employer in an aged care supply chain of contracted out residential aged care services.’⁸⁹

[55] The HSU further relies on Dr Charlesworth’s opinion that the challenges facing bargaining in residential care are ‘amplified’ in home care.⁹⁰

[56] The HSU submits that the evidence of Dr Charlesworth ‘aligns with the experience of the HSU’ and rely on the evidence of Mr Friend including 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.’⁹¹

[57] The HSU notes the following observations from the Full Bench in *United Voice v Australian Workers’ Union of Employees, Queensland*:

‘There was a deal of evidence from employers that the applicants and other unions had not been particularly active in pursuing enterprise bargaining. On the other hand the evidence of the applicants’ witnesses was that bargaining is hampered by a number of factors. The main factor appears to be the commonly held employer position that wage increases cannot be granted without government funding and that the level of government funding does not permit bargained increases. Other factors are that the nature of residential aged care makes it difficult for employees to take protected industrial action, the existence of a large number of small enterprises and that wage increases have been offset with changes in other wages and conditions leading to only marginal outcomes. It was also submitted, relying on evidence from Dr Cooper, Equity Research Fellow, Work and Organisational Studies, Faculty of Business and Economics, The University of Sydney, that employees in the aged care sector are in a weak bargaining position for a number of reasons including structural factors in the labour market, the nature of the work and the characteristics of the workforce.

It is clear from the aggregate data concerning the level of aged care employees’ pay, the evidence from union officials about difficulties in bargaining and the evidence and submissions concerning funding arrangements, that many employees in the aged care sector have not had access to collective bargaining or face substantial difficulty in bargaining at the enterprise level, or both. ...’⁹²

[58] 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.’⁹³

⁸⁹ Ibid [405] citing Charlesworth Report.

⁹⁰ Ibid [406] citing Charlesworth Supplementary Report [47], [58].

⁹¹ Ibid [407] citing amended witness statement of Christopher Friend dated 20 May 2022 [22].

⁹² (2011) 207 IR 251 [21]–[22].

⁹³ HSU closing submissions dated 22 July 2022 [409].

[59] The HSU notes the limitations for enterprise bargaining in the aged care sector to ‘significantly depart from award rates’ due to the nature of the industry, poor bargaining position of many workers and the reliance on government funding and submits:

‘the lack of potential for enterprise bargaining outcomes to achieve pay outcomes significantly above the award is a significant consideration in favour of increasing modern award minimum rates to ensure that employees actually receive proper reward for their work.’⁹⁴

[60] The HSU submits that, in any event, the variations sought would to some extent encourage employers to engage in collective bargaining by:

- increasing the relevance of the minimum rates applicable to the work performed;
- encouraging industrial parties to bargain for particular arrangements in workplaces to improve productivity and properly utilise a skilled workforce; and
- increasing the competitiveness of enterprises who currently engage in enterprise bargaining.⁹⁵

[61] The HSU relies on the evidence of Mr Friend 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.⁹⁶

Joint Employers

[62] The Joint Employers submit that the evidence demonstrates that a ‘significant proportion’ of aged care workers are covered by enterprise agreements and maintains that nursing in particular may be described as non-award reliant, with the majority of nurses covered by enterprise agreements with rates above the award minimum.⁹⁷ The Joint Employers submit 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.’⁹⁸

[63] The Joint Employers maintain that it ‘should be uncontroversial’ that pay is a ‘cornerstone focus’ of bargaining.⁹⁹ The Joint Employers argue this fact was conceded by Christopher Friend who said that raising minimum award rates would remove pay as a priority issue in bargaining.¹⁰⁰

⁹⁴ Ibid [410].

⁹⁵ Ibid [411].

⁹⁶ HSU closing submissions dated 22 July 2022 [412] citing amended witness statement of Christopher Friend Statement dated 20 May 2022 [18].

⁹⁷ Joint Employers closing submissions dated 22 July 2022 [23.11].

⁹⁸ Ibid [23.12].

⁹⁹ Ibid [23.13].

¹⁰⁰ Ibid [23.14].

[64] 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’.¹⁰¹

[65] In response, the HSU submits that there is no evidence to support this ‘apocalyptic proposition and the reasoning is unsound’.¹⁰² The HSU submits that it:

‘... would be absurd to refuse to accede to a request for higher wages supported by every actual industry stakeholder on the basis that it would inhibit bargaining in relation to rates of pay. The funded nature of the sector already constrains bargaining in relation to rates of pay.’¹⁰³

The Commonwealth

[66] 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 says that, at best, it anticipates that if the increases sought were granted it would have a ‘neutral effect’ on bargaining.¹⁰⁴

[67] The Commonwealth notes the decision in the *Annual Wage Review 2021-22* and argues that the current proceedings should be distinguished on the basis that the AWR relates to minimum wage increases across the entire workforce as opposed to a single sector.¹⁰⁵

[68] 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 EBAs, in most cases they have a ‘low bargaining premium’.¹⁰⁶

[69] The Commonwealth notes the observation from Dr 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 evidence of the UWU 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.¹⁰⁷

[70] The Commonwealth submits that it supports ‘increases to modern award minimum wages for aged care workers and for further encouragement for the sector to engage in collective bargaining’ and argues:

¹⁰¹ Ibid [23.15].

¹⁰² HSU closing submissions in reply dated 19 August 2022 [185].

¹⁰³ Ibid [186].

¹⁰⁴ Commonwealth submissions dated 8 August 2022 [167].

¹⁰⁵ Ibid [168]–[169] citing *Annual Wage Review 2021-22* [2022] FWCFB 3500 [85].

¹⁰⁶ Ibid [170].

¹⁰⁷ Ibid [171] – [172] citing Expert Report of Dr Sara Charlesworth [39]; UWU submissions dated 29 October 2021 p.12.

‘Collective bargaining will continue to be an important driver of flexibility and productivity in the aged care sector. EBAs can provide a means of improving operational efficiency and including additional employee incentives in a way that is tailored to the needs of the business and assist[s] with employee retention. However, increasing the rate of collective bargaining in the aged care sector, by itself, will not necessarily improve wages as the bargaining premium for the sector is unusually low. The bargaining premium in the aged care sector has been quite low for at least the last few years.’¹⁰⁸

Replies to the Commonwealth

[71] In reply to the Commonwealth’s submission that ‘the number of nominally expired enterprise agreements suggests that the bargaining power for the sector is low compared to previous years’, the Joint Employers submit that the Commonwealth does not take into account that bargaining in the aged care sector ‘is entirely constrained by funding.’¹⁰⁹

[72] The Joint Employers argue that collective bargaining is ‘widespread’ and submit that the number of nominally expired EBAs is not due to bargaining power but ‘due to the industry not being able to afford increases due to the limited funding available to it.’¹¹⁰

[73] The Joint Employers disagree 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.’¹¹¹

[74] Referring to the enterprise agreement coverage data which the DoHAC prepared for the Commonwealth’s submission, the Joint Employers submit that the data ‘does not appear to be fulsome’ and ‘invite the Commonwealth to provide this DoHAC modelling to the parties for consideration.’¹¹²

[75] The ANMF does not press a submission that the funded nature of the sector is related to any of the work value reasons under section 157(2A)¹¹³ but maintains its submission that it is appropriate to take into account:

- difficulties experience in bargaining by reason of the funded nature of the sector for the purpose of section 134(1)(b); and

¹⁰⁸ Ibid [174].

¹⁰⁹ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 [3.3].

¹¹⁰ Ibid.

¹¹¹ Ibid [3.4].

¹¹² Ibid [3.5]–[3.6].

¹¹³ ANMF closing submissions in reply dated 17 August 2022 [62].

- the additional role played by minimum award rates in the industry where employers have limited capacity to pay over award rates because of the funded nature of the sector for the purpose of section 134 generally.¹¹⁴

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

[76] Background document 1 set out the following observations:¹¹⁵

‘In the context of s.134(1)(c), the Full Bench in the *Penalty Rates Decision* noted that obtaining employment is the focus of s.134(1)(c).¹¹⁶ The Commission has also observed that ‘social inclusion may also be promoted by assisting employees to *remain in employment*.’¹¹⁷ 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.¹¹⁸

ANMF

[77] The ANMF submits that the proposed variations to the award would promote social inclusion through workforce participation by:

- a greater ability to attract and retain staff
- an incentive for career progression for workers in the industry
- accordingly, higher-quality care and quality of life for aged-care residents.¹¹⁹

[78] The ANMF further argues that given 86 per cent of the direct care workforce in the aged care sector identify as female, increased wages would promote further workforce participation and retention.¹²⁰

[79] The ANMF submits that better attraction and retention of staff is also relevant to the promotion social inclusion through workforce participation and the existence of a fair and relevant minimum safety net of terms and conditions in accordance with sections 134(1)(c) and 284(1)(b). This is said to be consistent with the Commonwealth’s submissions at [9].¹²¹

¹¹⁴ ANMF closing submissions in reply dated 17 August 2022 [63].

¹¹⁵ Background Document 1 [95].

¹¹⁶ *Penalty Rates Decision* [179].

¹¹⁷ *4 yearly review of modern awards: Family and domestic violence leave* [2018] FWCFB 1691 [282].

¹¹⁸ *Annual Wage Review 2015–2016* [2016] FWCFB 3500 [467].

¹¹⁹ ANMF closing submissions dated 22 July 2022 [832](3).

¹²⁰ *Ibid.*

¹²¹ ANMF closing submissions in reply dated 17 August 2022 [36]-[37].

HSU

[80] The HSU notes that the ‘overwhelming majority’ of aged care employees are women and submits that incentivising employees to remain in the aged care sector through increased rates of pay and an enhanced classification structure ‘has the potential to increase the workforce participation of women.’¹²²

[81] The HSU further points out that women perform the majority of unpaid caring responsibilities to the elderly outside of paid employment and submits that ‘increased confidence in the aged care sector may allow those women providing unpaid care to their elderly relatives, the opportunity to return to the workforce.’¹²³

Joint Employers

[82] The Joint Employers note that the evidence demonstrates that the majority of PCWs and home care employees hold, or are required to hold, a Certificate III in Individual Support as a minimum qualification.¹²⁴ The Joint Employers maintain that when considering ‘social inclusion’ attention should be given to the ‘value of maintaining an entry level classification’ in the Aged Care and SCHADS awards and submit:

‘Despite the negative connotations carried by reference to “*low skilled*”, entry level jobs serve an important function within society to allow vulnerable persons “*such as the young and low skilled employees*” to enter into the workforce. The provision would also enable providers to employ more persons which may receive training and/or take steps towards qualification on the job.’¹²⁵

[83] The HSU submits that the Joint Employer’s submissions are misconceived. They submit that the evidence suggests that many, if not most, employers have adopted the practice of requiring qualifications as a requirement for employment in care roles.¹²⁶ That is a recognition by employers of the skills and responsibilities required of care workers rather than a consequence of award provision. The applications do not seek to alter the capacity for a person to perform work as a Personal Care Worker at Aged Care Worker Level 2 and Level 3 under the Aged Care Award without qualifications or as a Home Care Employee Level 1 in the SCHADS Award without qualification or industry experience.¹²⁷

The Commonwealth

[84] The Commonwealth submits that increasing modern award minimum wages in the aged care sector ‘could significantly improve workforce participation and social inclusion’ as higher

¹²² HSU closing submissions dated 22 July 2022 [413].

¹²³ Ibid.

¹²⁴ Joint Employers closing submissions dated 22 July 2022 [23.16](a).

¹²⁵ Ibid [23.16](b) [Joint Employers’ emphasis].

¹²⁶ HSU closing submissions in reply dated 19 August 2022 [188] referring to Amended witness statement of Lauren Hutchins Statement [41]-[42], LH-6.

¹²⁷ Ibid [188].

wages make jobs ‘more attractive’ and would encourage those currently unemployed, underemployed or not in the labour force to join the workforce.¹²⁸

[85] The Commonwealth notes that areas of high unemployment are often areas of social exclusion and submits that encouraging employees from this pool to join the aged care industry will promote social inclusion by ‘improving participation, increasing their income and enhancing their opportunities, in meaningful aged care work.’¹²⁹

[86] Relying on ABS statistics, the Commonwealth notes that in June 2022, there were 493,900 people unemployed, 857,000 underemployed, and a further 3.2 million (aged 15-64) who were not in the labour force.¹³⁰ The Commonwealth further notes that correspondingly, the aged care sector is facing ‘a projected shortfall in workers’ and relies on DoHAC modelling that estimates the aged care workforce will have to expand by an average of 6.6 per cent each year over the next 5 years to support quality of care and growing demand.¹³¹ The Commonwealth submits that in 2020, the ACWC estimated that there were 22,000 vacancies in direct care roles across the aged care sector.¹³²

[87] 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).¹³³
- Approximately 51.5 per cent of residential care services industry workers have a skill level commensurate with a Certificate II or III qualification while a further 9.5 per cent have a skill level commensurate with having completed secondary education.¹³⁴
- In February 2022, 294,500 people who were not employed said that carrying for an ill or elderly person affected their workforce participation.¹³⁵ 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.

[88] 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

¹²⁸ Commonwealth submissions dated 8 August 2022 [175].

¹²⁹ Ibid [176].

¹³⁰ Ibid [177] citing Australian Bureau of Statistics, *Labour Force, Australia, June 2022* (Catalogue No 6202.0, 14 July 2022).

¹³¹ Ibid [178]; see Tables B2, B4, B8 and B11 of Annexure B of the Commonwealth submissions dated 8 August 2022.

¹³² Ibid.

¹³³ Ibid [179].

¹³⁴ Ibid [179] citing Australian Bureau of Statistics, *Characteristics of Employment, Australia*, August 2021.

¹³⁵ Ibid [180] citing Australian Bureau of Statistics, *Participation, Job Search and Mobility, Australia* (Catalogue No 6226.0, 25 June 2022).

across the rest of the states.¹³⁶ 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.¹³⁷

[89] The Commonwealth points out that the aged care sector is female dominated; in 2020 86 per cent of direct care workers in residential aged care identified as female.¹³⁸ The Commonwealth argues that due to the female-dominance of the sector, higher wages will encourage more women to enter the workforce, resulting in an overall improvement in the female workforce participation rate.¹³⁹ The Commonwealth further reasons that as women still undertake the majority of unpaid caring responsibilities, ‘increased confidence in the aged care sector may allow those women providing unpaid care to their elderly relatives, the opportunity to return to the workforce.’¹⁴⁰

[90] The Commonwealth cites research from the University of Adelaide which found that perceptions of caring as being ‘women’s work’, client preferences, trouble adapting to a workplace with a high proportion of female employees, poor working conditions and a lack of career opportunities discourage men from entering the aged care sector.¹⁴¹ The Commonwealth posits that higher wages in the sector may encourage more men to enter the sector, in turn increasing workforce participation across the economy.¹⁴²

[91] The Commonwealth submits that evidence filed by the HSU supports the conclusion that higher wages in the aged care sector could improve workforce participation and therefore social inclusion. The Commonwealth also points to the *Teachers Decision* and submits the Full Bench found a ‘strong possibility’ that higher wage rates in the early childhood sector would attract greater workforce participation from teachers and this ‘weighed significantly’ in favour of granting the application.¹⁴³ The Commonwealth argues that this finding supports its submission that ‘increasing wages in the sector will improve attraction and retention in the sector and overall workforce participation in the Australian economy.’¹⁴⁴

[92] In regard to the Commonwealth’s submissions that an increase in minimum wages will promote social inclusion through workforce participation, the Joint Employers submit that these submissions are ‘largely speculative statements without evidence to support this position’ and argue the submissions are of no assistance to the Commission.¹⁴⁵

¹³⁶ Ibid [181] citing Australian Bureau of Statistics, *Labour Force, Australia, Detailed May 2022* (Catalogue No 6291.0., 23 June 2022).

¹³⁷ Ibid.

¹³⁸ Ibid [182] citing 2020 Aged Care Workforce Census.

¹³⁹ Ibid [183].

¹⁴⁰ Ibid [184].

¹⁴¹ Ibid [186] citing Linda Isherwood, Kostas Mavromaras, Megan Moskos and Shang Wei, ‘Attraction, Retention and Utilisation of the Aged Care Workforce’ (Working paper prepared for the Aged Care Workforce Strategy Taskforce, The University of Adelaide, 19 April 2018).

¹⁴² Ibid [186].

¹⁴³ Ibid [185] citing *Teachers Decision* [661].

¹⁴⁴ Ibid [185].

¹⁴⁵ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 [3.7]–[3.8].

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

ANMF

[93] The ANMF notes that Australia has an ageing population and the increasing demand for care will require the aged care workforce to ‘significantly’ grow.¹⁴⁶

[94] The ANMF submits that increasing the minimum rates for aged care workers will attract new aged care workers, will help address the challenges with recruitment and retention and facilitate the upskilling of the existing workforce.¹⁴⁷

[95] The ANMF submits that 134(d) would be advanced in the sense that dealing with AINs / PCWs differently would enable, in future, changes to remuneration to address (say) unsocial hours worked by AINs / PCWs (but not, say, gardening superintendents) more easily to be made. In the same way, dealing separately with AINs / PCWs would encourage the insertion of terms into the award that address issues specific to AINs / PCWs.¹⁴⁸

HSU

[96] The HSU submits that the undervaluation of work in the aged care sector ‘is a significant obstacle to attracting and retaining skilled aged care workers.’ The HSU maintains this poses ‘material risk’ to the efficient and productive performance of work and note that due to an ageing population, the number of aged care workers will need to increase 3 times their current numbers by 2050 to sustain the sector.¹⁴⁹

[97] The HSU argues that the inability to attract and retain workers ‘is a contributing factor to understaffing, increased workloads and more challenging working conditions within the sector’ and as a consequence negatively impacts on the quality of care provided. The HSU maintain that the persistent undervaluation of work in the aged care sector will ‘dramatically decrease the efficient delivery of a high standard of care’ and submits that granting an increase to minimum wages will provide incentives for aged care workers to improve their qualifications and skills, thereby translating into productivity gains.¹⁵⁰

Joint Employers

[98] The Joint Employers submit that the consideration in s.134(1)(d) ‘does not appear relevant in the current proceedings.’¹⁵¹

¹⁴⁶ ANMF Form F46 Application to vary a modern award (AM2021/63) dated 17 May 2021 [30].

¹⁴⁷ Ibid [31].

¹⁴⁸ ANMF closing submissions dated 22 July 2022 [877].

¹⁴⁹ HSU closing submissions dated 22 July 2022 [414].

¹⁵⁰ Ibid [415].

¹⁵¹ Joint Employers closing submissions dated 22 July 2022 [23.17].

The Commonwealth

[99] The Commonwealth’s submission did not address s.134(1)(d).

3.6 s.134(1)(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

ANMF

[100] The ANMF submits that the consideration in s.134(1)(da) is relevant to the PCW Classification Variation¹⁵² and, as set out above, argues that its proposed variation to the classification structure would advance ss.134(d) and (da), as dealing with PCWs differently would enable changes to remuneration for example, to address unsocial hours worked by PCWs, but not by gardening superintendents, to be more easily made.¹⁵³

HSU

[101] The HSU accepts that the consideration in s.134(1)(da) is not relevant in the context of the Applications.¹⁵⁴

Joint Employers

[102] The Joint Employers submit that this issue is of ‘minimal relevance’ to the Commission. The Joint Employers note:¹⁵⁵

‘(a) The majority of employees in aged care setting work regular hours or have regular shifts. They may be required to undertake additional hours/shifts from time-to-time.

(b) The employees that gave evidence as to working additional hours (for example, by picking up shifts) did not suggest they were not paid for that time in accordance with their employment classification and the relevant industrial instrument (noting, the majority of employees that gave evidence were covered by an enterprise agreement).

(c) A common theme through the evidence of home care employees was a reference to expenses that were related to travel. The issues cited included the requirement to own a vehicle, the expense of petrol and the time spent traveling between appointments. This issue is already covered by the SCHADS Award with the inclusion of an allowance for “travelling, transport and fares”.’

The Commonwealth

[103] The Commonwealth’s submission did not address s.134(1)(da).

¹⁵² ANMF closing submissions dated 22 July 2022 [68].

¹⁵³ Ibid [50].

¹⁵⁴ HSU closing submissions dated 22 July 2022 [417].

¹⁵⁵ Joint Employers closing submissions dated 22 July 2022 [23.18].

Question 1 for the ANMF: The ANMF is invited to elaborate its submission as to the relevance of s.134(1)(da) to these proceeding

3.7 s.134(1)(e) the principle of equal remuneration for work of equal or comparable value

[104] Background document 1 set out the following observations:¹⁵⁶

‘Section 134(1)(e) requires that the Commission take into account ‘the principle of equal remuneration for work of equal or comparable value’.

The ‘Dictionary’ in s.12 of the FW Act states, relevantly:

‘In this Act: equal remuneration for work of equal of comparable value: see subsection 302(2).’

The expression ‘equal remuneration for work of equal or comparable value’ is defined in s.302(2) to mean ‘equal remuneration for men and women workers for work of equal or comparable value’.

The appropriate approach to the construction of s.134(1)(e) is to read the words of the definition into the substantive provision such that in giving effect to the modern awards objective the Commission must take into account the principle of ‘equal remuneration for men and women workers for work of equal or comparable value’.¹⁵⁷

ANMF

[105] The ANMF submits that a correction of the historical undervaluation of the work value of aged care employees would promote the principle of equal remuneration for work of equal or comparable value.¹⁵⁸

HSU

[106] The HSU submits that, unlike other comparable occupations, an increase in the qualifications, knowledge and skills required to perform work in the aged care sector, has not resulted to an increase in wages. The HSU submits that the workforce is heavily female dominated and that the undervaluation of aged care work has been contributed to significantly by the fact that the work has commonly been considered ‘women’s work’ and is therefore inherently undervalued. The HSU concludes that granting the variation sought would address the inherent undervaluation of feminised work and would be an important step in closing the gender pay gap that currently exists and is concentrated in the caring sectors (including in aged care).¹⁵⁹

¹⁵⁶ Background Document 1 [101]-[104].

¹⁵⁷ *Equal Remuneration Decision 2015* [2015] FWCFB 8200 [192]

¹⁵⁸ ANMF closing submissions dated 22 July 2022 [20].

¹⁵⁹ HSU closing submissions dated 22 July 2022 [416]; HSU Amended F46 Application to vary a modern award (AM2020/99) dated 17 November 2020; HSU F46 Application to vary a modern award (AM2021/65) dated 31 May 2021.

Joint Employers

[107] The Joint Employers submit that s.134(1)(e) is 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.’¹⁶⁰

The Commonwealth

[108] Paragraphs [187] to [199] set out the Commonwealth’s submissions in relation to the consideration in s.134(1)(e). The Commonwealth notes that the aged care sector has one of the highest proportions of women compared with other workforces and industries in Australia and as a result submits that the consideration in s.134(1)(e) is ‘of particular relevance’ in the proceedings.

[109] The Commonwealth maintains that in relation to an application under s 157, it is not necessary to identify a male comparator.¹⁶¹

[110] The Commonwealth submits that, based on the evidence in the proceedings, the Commission should find that the current award rates ‘significantly undervalue the work performed by aged care workers, for reasons related to gender’ and as a result ‘the principle of equal remuneration for work of equal or comparable value should weigh in favour of increasing the award rates for aged care workers.’¹⁶²

[111] The Commonwealth argues this therefore enables the Commission to consider gender-related issues and whether a variation in award minimum rates would contribute to closing the gender pay gap, which in November 2021 was 13.8 per cent,¹⁶³ and says:

‘a decision to increase minimum award wages in care classifications in the Awards would deliver significant benefits to the women working within this highly feminised and undervalued sector, and, by increasing the relative earnings of a female dominated sector, would contribute to narrowing the gender pay gap.’¹⁶⁴

[112] The Commonwealth refers to the *Gender-inclusive job evaluation and grading Australian Standards* (the Australian Standards)¹⁶⁵ and submits that they provide an ‘objective standard’ that may assist the Commission with assessing the relevant skills in these proceedings. The Commonwealth notes that Appendix C of the Australian Standards sets out frequently overlooked job characteristics in roles predominantly performed by women, including:

¹⁶⁰ Joint Employers closing submissions dated 22 July 2022 [23.19].

¹⁶¹ Commonwealth submissions dated 8 August 2022 [189].

¹⁶² Ibid [190].

¹⁶³ Ibid [191] citing Workplace Gender Equality Agency, *Australia’s new national GPG of 13.8% released; employers urged to take action as IWD approaches* (24 February 2022) available at: <https://www.wgea.gov.au/newsroom/Australias-new-national-GPG-of-13.8-percent-released>, citing ABS Average Weekly Earnings seasonally adjusted November 2021 data. See also *Annual Wage Review* [2022] FWCFB 3500, [86].

¹⁶⁴ Ibid [192].

¹⁶⁵ Standards Australia, *Gender-inclusive job evaluation and grading* (Standard, AS 5376-2012, 15 May 2012).

- ‘Demands and working conditions, such as: dealing with upset, hostile and irrational clients; providing caring and emotional support to individuals (both to care recipients and families); managing one’s own response to disgusting situations; the physical nature of regular moving and lifting of clients; and dealing with the trauma of death of care recipients (on both the care worker and the family).¹⁶⁶
- Knowledge and skills such as: interpersonal skills of being able to engage with elderly clients, many with declining health or mental capabilities and from many cultural backgrounds; non-verbal communication; dispensing medication to patients; manual dexterity in giving injections or typing; and awareness of complex requirements when dispensing medication to patients.¹⁶⁷
- Skills for which there are no name such as tact, discretion, or work behind the scenes.¹⁶⁸

[113] The Commonwealth submits that there is evidence that the skills set out in the Australian Standards are characteristics of the caring classifications under the Aged Care, Nurses and SCHADS Awards and are ‘likely not to have been taken into account in assessing the work value of those classifications’¹⁶⁹ and supports a conclusion that there is gender-based undervaluation in respect of the aged care workers subject to the applications.¹⁷⁰

[114] The Commonwealth points out that in the *Annual Wage Review 2017-18* the Expert Panel noted that the broader issue of gender pay equity, and in particular the gender pay gap, is relevant to establishing a fair safety net¹⁷¹ and submits:

‘increasing aged care minimum wages is a critical and necessary step to address the gender undervaluation within Australia, going some way towards appropriately recognising the highly skilled and technical work which workers in the aged care sector perform.’¹⁷²

[115] While the Commonwealth is of the view that paragraph 134(1)(e) already enables the Commission to take into account gender when making a determination to vary a modern award, it also notes that the ‘Government intends to introduce amendments to the FW Act to explicitly add gender pay equity as an object of the FW Act to strengthen the Commission’s powers to order pay rises for workers in low paid industries dominated by women.’¹⁷³

¹⁶⁶ Commonwealth submissions dated 8 August 2022 [194.1] citing Standards Australia, *Gender-inclusive job evaluation and grading* (Standard, AS 5376-2012, 15 May 2012) 37.

¹⁶⁷ Ibid [194.2] citing Standards Australia, *Gender-inclusive job evaluation and grading* (Standard, AS 5376-2012, 15 May 2012) 36.

¹⁶⁸ Ibid [194.3] citing Standards Australia, *Gender-inclusive job evaluation and grading* (Standard, AS 5376-2012, 15 May 2012) 38.

¹⁶⁹ Ibid [195].

¹⁷⁰ Ibid [196].

¹⁷¹ Ibid [197] citing *Annual Wage Review 2017-18* (2018) 279 IR 215 [36].

¹⁷² Ibid [198].

¹⁷³ Ibid [199] citing Commonwealth, *Australian Women Labor’s Plan for a Better Future* 2022, 6-9.

[116] Regarding the Commonwealth’s statistics on the gender pay gap, the ANMF submits that there are ‘various ways’ to measure the gender pay gap and relies on the analysis in the expert report of Associate Professor Smith and Dr Lyons.¹⁷⁴

[117] The ANMF refers to the Commonwealth’s reliance on the Gender Inclusive job evaluation and grading Australian Standards and notes that Honorary Associate Professor Junor was involved in the development of the Standards and draws on and adapts the standards in her application to the Spotlight Tool. The ANMF agrees with the Commonwealth that the Standards are useful in assessing relevant skills.¹⁷⁵

[118] The Joint Employers submit that the Gender-inclusive job evaluation and grading Australian standards ‘were created to assist *business* to develop gender-equitable remuneration and pay equity as it has “business benefits”’ and ‘were not made to assist a regulatory body, such as the Commission, in establishing minimum rates in awards or for assisting in the assessment of work value.’¹⁷⁶ The Joint Employers rely on their closing submissions as to why the Commission should adopt a ‘cautious approach’ in determining work value cases.¹⁷⁷

3.8 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

[119] Background document 1 set out the following observations:¹⁷⁸

‘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’.

‘Productivity’ is not defined in the FW Act but given the context in which the word appears it is apparent that it is used to signify an economic concept. The conventional economic meaning of productivity is the number of units of output per unit of input. It is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. As the Full Bench observed in the *Schweppes Australia Pty Ltd v United Voice – Victoria Branch*:¹⁷⁹

‘... we find that “productivity” as used in s.275 of the Act, and more generally within the Act, is directed at the conventional economic concept of the quantity of output relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.

¹⁷⁴ ANMF closing submissions in reply dated 17 August 2022 [486].

¹⁷⁵ Ibid [463]–[465].

¹⁷⁶ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 [3.10]–[3.11]

¹⁷⁷ Ibid [3.12].

¹⁷⁸ Background Document 1 [97]–[99].

¹⁷⁹ [2012] FWAFB 7858.

Financial gains achieved by having the same labour input – the number of hours worked – produce the same output at less cost because of a reduced wage per hour is not productivity in this conventional sense.¹⁸⁰

While the above observation is directed at the use of the word ‘productivity’ in s.275 of the FW Act, it has been held to be apposite to the Commission’s consideration of this issue in the context of s.134(1)(f).¹⁸¹

ANMF

[120] The ANMF submits that where reference is made to the concept of ‘*productivity*’ such as used in s.134(1)(f), the Commission is not constrained by reference to any suggested loss of productivity in its task of fixing appropriate rates.¹⁸² The impact of Government funding mechanisms and regulatory arrangements on productivity, in the relevant sense, are not material here. The ANMF makes 5 submissions in this regard:

- The ANMF adopts the observations set out at Background Document 1 [98].¹⁸³
- In relation to the Joint Employers submissions about the ability to fund a wage increase, the ANMF relies on decisions made in the context of the Four Yearly Review of the SCHADS Award: [2019] FWCFB 6067 at [130]–[143], and [2021] FWCFB 2383 at [223]–[228].¹⁸⁴
- In circumstances where the statutory task is directed to maintaining a fair and relevant minimum safety net, it is appropriate to take into account the difficulties faced by the sector in attracting and retaining staff as a consequence of funding arrangements, particularly in respect of the not-for-profit sector and rural and remote facilities. If the usual tools available to employers to address labour shortfalls (such as over award payments or competitive collective bargaining agreements) are not available, then it becomes necessary for the Commission to maintain the relevance and fairness of the award minimum rates by appropriate adjustments.
- The only material before the Commission about funding is the StewartBrown reports which cannot be afforded significant weight. This submission is made for 3 reasons, firstly, that nobody was called to prove the analysis in the reports. Secondly, there is no explanation of whether the sample of aged care homes is representative and finally, there is no way of verifying the data provided to StewartBrown.¹⁸⁵

¹⁸⁰ Ibid [45]–[46].

¹⁸¹ *Horticulture Award 2020* [2021] FWCFB 5554 [512].

¹⁸² ANMF closing submissions dated 22 July 2022 [844].

¹⁸³ Ibid [845].

¹⁸⁴ ANMF closing submissions dated 22 July 2022 [846]–[847].

¹⁸⁵ Ibid [849]–[855].

- In the light of the Labor Party’s election promise there is no reason to think that funding will present as a serious issue for the aged-care sector in the event that increases to minimum rates are ordered.¹⁸⁶

HSU

[121] The HSU submits that the variation sought is likely to address the skill shortage that currently exists in the aged care sector. They submit that this skill shortage is forecast to dramatically increase in the coming decade, addressing this issue will increase productivity and benefit business.¹⁸⁷

[122] The HSU submits that the aged care sector has difficulty attracting and retaining well-skilled people due, in part, to low wages and poor employment conditions. They submit that this was recognised by both the Royal Commission and that Professor Charlesworth made similar observations.¹⁸⁸ The HSU also relies on the recommendations from the CEDA Report.¹⁸⁹

[123] The HSU concludes that the crisis of staffing in aged care and home care is causing damage to the industry and to businesses operating aged care facilities or home care businesses. Ensuring workers in the industry are properly remunerated is critical to the viability of business and this factor weighs heavily in favour of the Applications.¹⁹⁰

Joint Employers

[124] The Joint Employers submit that there is a direct correlation between employment costs, regulatory burden and funding, which needs to be at the forefront of consideration when making changes to the minimum rates. This is because:

- the funding provided is limited and determined by the government, currently it is not increasing at a rate consistent with consumer price index;
- 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 is provided to consumers has left major providers within the aged care sector to operate at a deficit.¹⁹¹

¹⁸⁶ Ibid [856].

¹⁸⁷ HSU closing submissions dated 22 July 2022 [418].

¹⁸⁸ Ibid [419] citing Charlesworth Report [60]. See also Charlesworth Supplementary Report [65].

¹⁸⁹ Ibid [420] citing Reply witness statement of Lauren Hutchins [51].

¹⁹⁰ HSU closing submissions dated 22 July 2022 [423].

¹⁹¹ Joint Employers closing submissions dated 22 July 2022 [23.20].

[125] The Joint Employers further submit that as a sector reliant on funding in order to operate, any increase to minimum award rates - absent support from the government - has the potential to have a crippling effect upon the industry.¹⁹²

[126] In response, the HSU submits that the Joint Employer's position ignores the fact that the principal task for the Commission is to set fair and minimum rates for the work.¹⁹³ The HSU submits that the Commission has previously rejected the proposition that, in the context of government funded social services, determinative weight should be given to the impact of a proposed variation on employment costs or the fact that existing funding arrangements may present difficulties in meeting additional employment costs.¹⁹⁴

[127] The HSU also notes that the Joint Employers 'recognised at the commencement of the proceedings that no incapacity was being advanced relevant to setting of rates. It was accepted that, at most, questions of affordability might be relevant to operative date and phasing, but are not a relevant consideration in relation to the actual setting of rates of pay.'¹⁹⁵

The Commonwealth

[128] Paragraphs [200] to [201] set out the Commonwealth's submissions in relation to the consideration in s.134(1)(f).

[129] The Commonwealth acknowledges that the cost to business of increasing aged care sector wages 'would likely be substantial', subject to the quantum and phasing of any increase.¹⁹⁶ However, the Commonwealth submits that 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' and the Commission can therefore proceed on the basis that the impact on business of significant increases to award minimum rates in the aged care sector 'will not be material.' The Commonwealth further maintains that the impact on business will overall be positive, as it will facilitate a strengthened ability to recruit staff and meet regulatory requirements.¹⁹⁷

Replies to the Commonwealth

[130] The ANMF notes the Commonwealth's submission that it will fund any increases to award wages and agrees with the Commonwealth that the effect of a wage rise will be positive as it will assist employers address the problem of attraction and retention. The ANMF submits that the Commonwealth's funding commitment 'largely eliminates the relevance of any "capacity to pay" submissions made by the employer parties.'¹⁹⁸

¹⁹² Ibid [23.21].

¹⁹³ HSU closing submissions in reply dated 19 August 2022 [189].

¹⁹⁴ Ibid [190] citing *Re 4 yearly review of modern awards – SCHADS Award* [2019] FWCFB 6067.

¹⁹⁵ Ibid [190] referring to Ward, Transcript, 26 April 2022, [PN464].

¹⁹⁶ Commonwealth submissions dated 8 August 2022 [200].

¹⁹⁷ Ibid [201].

¹⁹⁸ ANMF closing submissions in reply dated 17 August 2022 [461].

[131] The Joint Employers submit that ‘it is encouraging’ that the Commonwealth is prepared to fund any increase to award minimum wages¹⁹⁹ however, submit that ‘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.²⁰⁰

[132] The Joint Employers maintain that the above factors are relevant to the consideration under s.134(1)(f), particularly ‘given the current financial viability of the sector.’²⁰¹ The Joint Employers ‘invite the Commonwealth to provide its position regarding whether its support extends to funding the associated on-costs of any minimum rate increase.’²⁰²

Question 2 for the Commonwealth: Does the Commonwealth’s funding support extend to the associated on-costs of any increase in minimum wage rates?

3.9 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

[133] Background document 1 set out the following observations:²⁰³

‘Section 134(1)(g) requires the Commission to take into account ‘the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards’.

The Commission has observed that ‘the effectiveness of any safety net is substantially dependent upon those who are covered by it being able to know and understand their rights and obligations.’²⁰⁴ A ‘stable’ modern award system implies that the variation of a modern award be supported by a merit argument. The extent of the argument required will depend on the circumstances.²⁰⁵

¹⁹⁹ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 [3.13].

²⁰⁰ Ibid [3.14](a)–(e).

²⁰¹ Ibid [3.14].

²⁰² Ibid [3.15].

²⁰³ Background Document 1 [105]–[106].

²⁰⁴ See *4 yearly review of modern awards—Annual leave* [2015] FWCFCB 3406 [168].

²⁰⁵ *Penalty Rates Decision* [253] and *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFCB 1788 [23].

ANMF

[134] The proposed amendments perpetuate some overlap of modern award coverage between Assistants in Nursing under the Nurses Award and PCWs under the Aged Care Award. Such overlap is not “unnecessary” (see Award Modernisation Decision [2009] AIRCFB 345 at [152]).²⁰⁶The ANMF also submits that s.134(1)(g) is furthered by the proposed variations because the award will be easier to understand if different work is treated differently.²⁰⁷

HSU

[135] The HSU submits that granting the variations sought is crucial to ensuring a stable and sustainable modern award system. They submit that the variations will simplify progression in the Personal Care Stream (in the Aged Care Award) and for home aged care workers (in the SCHADS Award), through the inclusion of tenure-based progression and will set wages that accurately reflect the value of the work performed.

[136] The HSU submits the evidence indicates that the current classification structure is unclear and often misunderstood, creating uncertainty as to award entitlements and impeding collective bargaining.²⁰⁸ This is fundamental to the integrity of the modern award system and maintaining its relevance to the labour market. The HSU submits that maintaining wage rates that are fair and equitable is a key component of an award system that is simple and easy to understand.²⁰⁹ Ensuring that wage rates are equivalent in both residential aged care and home care will also ensure that the award system does not operate to unbalance the supply of labour to either sector, and that skilled workers may readily move between the sectors without disincentive.²¹⁰

Joint Employers

[137] The Joint Employers make the following observations about s.134(1)(g):

- The analysis of the work performed by support employees covered by the Aged Care Award (namely, administrative staff, laundry staff, cleaning staff, gardening staff and maintenance staff) demonstrates that the work being performed has not changed in any significant form.
- The equivalent classifications and rates for support employees in different occupations and industries, which appear in the other awards.²¹¹

²⁰⁶ ANMF Form 46 Application to vary a modern award (AM2021/63) dated 17 May 2021

²⁰⁷ ANMF closing submissions dated 22 July 2022 [877].

²⁰⁸ HSU closing submissions dated 22 July 2022 citing Amended witness statement of Christopher Friend [20]-[21]; Amended witness statement of Lauren Hutchins Statement [29].

²⁰⁹ HSU Amended F46 Application to vary a modern award (AM2020/99) dated 17 November 2020; HSU F46 Application to vary a modern award (AM2021/65) dated 31 May 2021.

²¹⁰ HSU closing submissions dated 22 July 2022 [425].

²¹¹ See Annexure O of Joint Employers closing submissions dated 22 July 2022.

- In terms of easy to understand and stability of the modern award system, regard should also be had to the approach of the Full Bench in previous work value decisions. Whilst not bound by that precedent, the practice has been to follow the approach of the Full Bench. The Joint Employers submit that the approach in the *Teachers Case* should be followed and rely on their analysis as to the observations made by the Full Bench in that matter with respect to Child Care Teachers and their relevant application in the context of RNs.²¹²

[138] In relation to the ANMF application to vary the Nurses Award, The Joint Employers submit that the application does not concern all employees covered by the award, but instead presents a discrete section of the nursing workforce for consideration by the Commission. They submit that the exclusion of an entire section of the nursing occupation, becomes problematic should the application be granted because, absent a consideration of the hospital-based section of nursing employees, the nursing occupation would be divided into 2 sections with disparate rates of pay. To make changes to an occupation award based on a discrete section does not promote stability.

[139] In relation to the HSU application to vary the SCHADS Award, the Joint Employers submit that the *SCHADS Award* consists of four classification types, with the “*home care employee*” being the relevant classification on the present application. As set out in Annexure N to the Joint Employer’s closing submissions, the minimum rates with respect to the home care employee do not appear to be properly set.²¹³ If this view is reached, in the interest of promoting stable and sustainable awards the remaining classifications should also be reviewed upon the same basis.²¹⁴

The Commonwealth

[140] The Commonwealth notes the Joint Employer’s submission that the C10 framework plays a central role in the maintaining a stable and sustainable modern award system for the purposes of s134 (1)(g).²¹⁵

[141] The Commonwealth maintains that a ‘starting point’ that aligns rates of pay in one modern award with classifications in other modern awards is ‘one means of achieving the broad objective of stability’ however submits:

‘... a strict alignment of award relativities based on qualifications, without proper consideration of the true work value of the cohort of employees in question cannot be expected to result in outcomes that are fair or relevant ... stability can be achieved by the Commission adopting an approach that involves a rigorous work value assessment in each case before it, having regard to all relevant factors.’²¹⁶

²¹² Joint Employers closing submissions dated 22 July 2022.

²¹³ See Joint Employers closing submissions dated 22 July 2022 Annexure N [3.1]-[3.22]. See also Annexure O [4.1]-[4.14].

²¹⁴ Joint Employers closing submissions dated 22 July 2022 [23.22](e)(ii).

²¹⁵ Commonwealth submissions dated 8 August 2022 [202].

²¹⁶ Ibid [203] – [204].

Replies to the Commonwealth

[142] In respect of consideration s.134(1)(g), the HSU submits “a wage-fixing methodology which relies on a decades-old decision made, fundamentally, in the context of a particular industry is not particularly ‘simple’ or ‘easy to understand’”, agreeing with the Commonwealth however that a principled approach to wage fixation promotes stability.²¹⁷

[143] The Joint Employers submit ‘the position of the Commonwealth regarding the C10 framework, and its utility in this matter, appears to be more aligned to our view than that of the ANMF.’²¹⁸

3.10 s.134(1)(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.

[144] Background document 1 set out the following observations:²¹⁹

‘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’ (emphasis added) focuses on the aggregate (as opposed to sectorial) impact of an exercise of modern award powers.’

ANMF

[145] The Final Report identified a clear and pressing need for a substantial development of the workforce in the aged care sector. Increased wages will be a critical element of the development of the workforce.²²⁰

HSU

[146] The HSU submits that an aged care system which provides good quality and reliable care to the elderly is critical in permitting the working aged population to contribute to the economy, reducing pressures on the health care system and supporting economic activity, competitiveness and growth.²²¹ The HSU relies on the evidence of Professor Charlesworth and submits that improved rates of pay for workers in aged care and home care have potential flow on benefits for the economy as a whole.²²²

[147] The HSU submits that the setting of proper and fair rates of remuneration for employees in the aged care sector will foster an efficient, productive and skilled workforce and support an

²¹⁷ HSU submissions in reply to the Commonwealth dated 17 August 2022 [33].

²¹⁸ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 [3.16].

²¹⁹ Background Document 1 [107].

²²⁰ ANMF Form 46 Application to vary a modern award (AM2021/63) dated 17 May 2021.

²²¹ HSU Amended F46 Application to vary a modern award (AM2020/99) dated 17 November 2020; HSU closing submissions dated 22 July 2022.

²²² HSU closing submissions dated 22 July 2022 [427]-[428]; Charlesworth Report [65].

aged care system which is able to contribute to the maintenance of a sustainable, productive and competitive national economy.²²³

UWU

[148] The UWU relies on the CEDA report²²⁴ and the Final Report, the Royal Commission into Aged Care Quality and Safety²²⁵ and submits the exercise of award powers to increase wages in a sector in which low wages and poor employment conditions are having a detrimental effect on the attraction and retention of employees, in circumstances where that sector is critical to the sustainability and performance of the national economy, is consistent with and necessary to achieve the modern awards objective.²²⁶

Joint Employers

[149] The Joint Employers submit that the issue of critical importance in this case is ‘*sustainability*’ and identify the following factors as relevant to the application:

- (a) The aged care sector is reliant upon funding. This reliance ... has direct implications upon the amount of care services that can be provided and staff that can be employed. To date, funding is not keeping up with the increases to the consumer price index. This reliance referred to in the evidence of the aged care providers. The Full Bench has previously acknowledged the relevance of a funded sector in the context of s 134(1)(h).
- (b) The aged care industry is of critical importance to the community, both the consumers of care service and their families. Absent a guarantee by the government to increase funding, wage increases may have the effect of crippling the sector, such that providers can no longer afford to employ enough staff or provide the requisite number of services required, which may result in providers that already operate at a deficit being forced to discontinue services.
- (c) In the event the Commission is minded to increase rates, as previously mentioned, the employer interests will seek to be heard as to the operative date and any phasing in of increases and put additional evidence on as to the impact of funding upon the sector.²²⁷ [footnotes omitted]

[150] In response, the HSU submits that the Joint Employers rely on little evidence to support the submission that the increases sought will cripple the sector and therefore the submission must be rejected.²²⁸ The HSU seeks to distinguish these proceedings from the *Supported Employment Services* decision²²⁹ and submit that the affected interests in that case led evidence

²²³ HSU closing submissions dated 22 July 2022 [429].

²²⁴ Reply Witness statement of Lauren Elizabeth Beamer Hutchins dated 22 April 2022 “Introduction”.

²²⁵ Royal Commission into Aged Care Quality and Safety, Final Report: Care, Dignity and Respect, Volume 2, section 4.10, p.213.

²²⁶ UWU closing submissions in reply dated 19 August 2022.

²²⁷ Joint Employers closing submissions dated 22 July 2022 [23.23]

²²⁸ HSU closing submissions in reply dated 19 August 2022 [195].

²²⁹ *4 yearly review of modern awards – Supported Employment Services Award 2010* [2019] FWCFB 8179.

in support of the proposition that an increase in wages would adversely impact the sector. The HSU submits further that the decision concerned a completely different, and highly specific, sector.²³⁰

[151] The HSU concludes that:

‘The fundamental error in the ABL submissions is that it distills to a proposition that the rates can only be set at a level the Commonwealth is willing to fund. This makes the Commission’s decision subservient to the Government’s – in other words, requires a complete abdication from the actual role of the independent regulator in this respect. It cannot possibly be correct. As has been mentioned, the ‘employer interests’ do not suggest that considerations of affordability or constraints imposed by government funding are relevant in setting minimum rates and, at most, may be relevant to questions of operative date or transitional arrangements.’²³¹

The Commonwealth

[152] Paragraphs [205] to [209] set out the Commonwealth’s submissions in relation to the consideration in s.134(1)(h).

[153] The Commonwealth submits that the considerations in s.134(1)(h) ‘do not militate against award minimum wage rises in this matter.’²³²

[154] The Commonwealth notes that the aged care sector currently makes up around 2.4 per cent of total workers and points to DoHAC modelling that estimates that the aged care workforce would have to expand by an average of 6.6 per cent each year over the next five years to support quality of care and growing demand, with this labour force mostly drawn from workers in other sectors of the economy, as well as new entrant workers and migrants.²³³

[155] The Commonwealth submits that modelling undertaken by Treasury has found that a 25 per cent increase to minimum wage for aged care worker wages ‘could potentially increase labour supply in the aged care sector by up to five to 10 per cent after five years over what would otherwise occur without the policy change.’ The modelling assumes workers are indifferent between sectors and there is no impediment to the functioning of the labour market.²³⁴

[156] The Commonwealth further 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

²³⁰ HSU closing submissions in reply dated 19 August 2022 [195].

²³¹ Ibid [196].

²³² Commonwealth submissions dated 8 August 2022 [205].

²³³ Ibid [206].

²³⁴ Ibid [207].

in the current economic environment, there would be risks to inflation expectations if similar wage rises are demanded in associated industries.²³⁵

[157] The Commonwealth points to Treasury modelling which finds the effect on Gross Domestic Product and productivity of an increase in minimum wages for aged care workers to be ‘ambiguous.’ The Commonwealth submits that reflects the fact that the aged care sector is predominantly government funded and subject to ‘significant intervention’ making it difficult to determine economic impact. Given the small size of the aged care sector, the Commonwealth notes that Treasury would expect the effect on GDP to be modest.²³⁶

Replies to the Commonwealth

[158] Relevant to the consideration in s.134(1)(h), the HSU submits that the Treasury’s modelling of a very minor positive effect on the economy of increasing aged care workers’ wages by 25%, noting that the modelling has not been disclosed or put into evidence, strongly suggests wages should be increased by at least the percentage sought.²³⁷ The HSU also submits that to the extent warnings of inflationary pressures are alluded to by the Commonwealth, they should be disregarded.²³⁸

[159] The ANMF notes that it does not have access to the Treasury modelling referred to by the Commonwealth and submits that ‘there has been no evidence concerning inflating risk’ and as a result the Commission cannot safely make any findings as to the degree of inflation risk.²³⁹ In relation to the Commonwealth’s submission that there would only be an inflation risk if ‘similar wage rises are demanded in associated industries’, the ANMF submits that ‘there is no basis’ for finding that this is likely.²⁴⁰

[160] The Joint Employers note the Treasury modelling that suggests the aged care workforce could increase by between 5 per cent to 10 percent after 5 years if minimum rate were increased by 25 per cent and submit:

‘Given the widespread skills shortages in Australia currently across a number of industries, if this assertion was true, the workers would simply be taken from other industries so the weight in terms of the modern awards objective seems limited.’²⁴¹

[161] The joint Employers invite the Commonwealth to provide the Treasury modelling to the parties and the Commission.²⁴²

[162] The Joint Employers further argue that while the notion of ‘attraction and retention’ may be relevant to the consideration of the modern awards objective, it is not a relevant consideration

²³⁵ Ibid [208].

²³⁶ Ibid [209].

²³⁷ Ibid at [37].

²³⁸ Ibid at [38].

²³⁹ ANMF closing submissions in reply dated 17 August 2022 [487].

²⁴⁰ Ibid.

²⁴¹ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 [6.4].

²⁴² Ibid [6.3].

to the assessment of work value and the determination of the quantum of any such work value increase.²⁴³

Question 3 for the Commonwealth: The Commonwealth is invited to provide the Treasury modelling to the parties and the Commission.

²⁴³ Ibid [6.5].