

FAIR WORK COMMISSION

AM2021/63

AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO
AMEND THE *AGED CARE AWARD 2010* AND *NURSES AWARD 2020***

First Matter

AM2020/99

HEALTH SERVICES UNION

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO
AMEND THE *AGED CARE AWARD 2010***

Second Matter

AM2021/65

HEALTH SERVICES UNION

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO
AMEND THE *SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES
INDUSTRY AWARD 2010***

Third Matter

**STAGE 2 SUBMISSIONS OF THE
AUSTRALIAN NURSING AND MIDWIFERY FEDERATION**

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A. Introduction

1. These submissions of the Australian Nursing and Midwifery Federation (“ANMF”) address:
 - (1) each of the four amendments to the *Fair Work Act 2009* (Cth) (“FW Act”) introduced by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (“FW Amendment Act”) as identified at paragraph [2] of the Amended Directions issued in these proceedings on 6 December 2022;
 - (2) the matters set out at paragraph [3] of the 23 November 2022 Statement, namely:
 - (a) the timing and phasing of the interim increase to modern award minimum wages applicable to direct aged care workers;¹
 - (b) whether making the interim increases to modern award minimum wages applicable to direct aged care workers is necessary to achieve the modern awards objectives and the *provisional views* outlined at [1001] – [1072] in the 2 November 2022 decision [2022] FWCFB 200 (“Interim Decision”);²
 - (c) whether making the interim increases to modern award minimum wages applicable to direct care workers is necessary to achieve the minimum wages objectives and the *provisional views* outlined at [1073] – [1083] in the Interim Decision;³
 - (3) paragraph [10] of the 17 November 2022 Statement (consultation in respect of increases to minimum wages for Head Chefs /Cooks and Recreational Activities Officers/Lifestyle Officers (“RAOs”)); and
 - (4) where relevant, the submissions of the Commonwealth dated 16 December 2022 (“Cth S2S”).

¹ [2022] FWCFB 214. These submissions use the term “direct aged care workers” in accordance with the definition in the Interim Decision, namely “Employees in the aged care sector covered by the Awards in caring roles, including nurse practitioners, RNs, ENs, AINs, PCWs and HCWs.”

² [2022] FWCFB 200.

³ [2022] FWCFB 200.

2. These submissions should be read and understood in conjunction with the following submissions of the ANMF filed in these proceedings:
 - (1) ANMF Submissions of 29 October 2021 (“ANMF S”);
 - (2) ANMF Reply Submissions of 21 April 2022 (“ANMF RS”);
 - (3) ANMF Closing Submissions of 22 July 2022 (“ANMF CS”); and
 - (4) ANMF Closing Reply Submissions of 17 August 2022 (“ANMF RCS”).

3. These submissions are broken up into three primary parts. Part B addresses the relevant amendments in the FW Amendment Act. Part C deals with the matters set out at paragraph [3] of the 23 November 2022 Statement. Part D addresses the ANMF’s position with respect to RAOs.

B. The FW Amendment Act

4. On 6 December 2022 the FW Amendment Act received Royal Assent. Part 4 to Schedule 1 (Objects of the Fair Work Act) and Part 5 to Schedule 1 (Equal remuneration) of the FW Amendment Act came into effect on 7 December 2022, being the day after the FW Amendment Act received the Royal Assent.⁴

5. The ANMF agrees with the Statement of Acting President Hatcher⁵ (and the Cth S2S at [37]) that:

The new objects of the FW Act and the amendments to the modern awards and minimum wages objectives will apply to applications currently before the Commission ...

6. As such, the new objects of the FW Act and the amendments to the modern awards and minimum wages objectives will apply to the applications to vary modern award minimum rates pertaining to aged care work, currently before the Commission.

7. The amendments to the FW Act discussed below will have implications for the consideration of the issues addressed in Part C. These amendments will also be relevant to the further considerations to be undertaken by the Commission in Stage 3 to these proceedings.

8. The provisions of the FW Amendment Act have not yet received judicial consideration or consideration by the Commission. The proper approach to statutory construction was addressed by Kiefel CJ and Keane J in *The Queen v A2*⁶ where their Honours held that:

32. The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.

33. Consideration of the context for the provision is undertaken at the first

⁴ FWC Amendment Act s 2(1), items 9 and 10.

⁵ President's Statement Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022, 8 December 2022, Attachment A, p 6.

⁶ (2019) 269 CLR 507; [2019] HCA 35.

stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy. “Mischief” is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve.

9. In accordance with s 15AB of the *Acts Interpretation Act 1901* (Cth) (“**AI Act**”), it is also appropriate to have regard to extrinsic material such as the Explanatory Memorandum and Second Reading Speeches to:

- (1) confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and/or
- (2) determine the meaning of the provision when the provision is ambiguous or obscure or the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

10. Part 4 to Schedule 1 of the FW Amendment Act (Objects of the Fair Work Act) includes:

- (1) Amendments to the FW Act to include reference to the promotion of job security and gender equality addressed further at Part B.1 below;
- (2) Amendments to the modern awards objective to include secure work and gender equality considerations discussed further at Part B.2 below; and
- (3) Amendments to the minimum wages objective to include gender equality considerations discussed further at Part B.3 Below.

11. The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 Revised Explanatory Memorandum* (“**FW Amendment EM**”) provides the following overview of the amendments to the FW Act introduced by Part 4 to Schedule 1 of the FW Amendment Act:

330. This Part would introduce job security and gender equality into the object of the FW Act. It would place these considerations at the heart of the FWC’s decision-making, and support the Government’s priorities of delivering secure, well-paid jobs and ensuring women

have equal opportunities and equal pay.

331. In accordance with established principles of statutory interpretation, the FW Act is required to be interpreted in a way that would best achieve the object of the FW Act wherever possible (see section 15AA of the AI Act). The FWC is also required under existing paragraph 578(a) of the FW Act to take into account the objects of the FW Act when performing functions or exercising powers under the FW Act. This includes, for example, the FWC performing functions or exercising powers in relation to dispute resolution, including arbitration, setting terms and conditions in modern awards and approving enterprise agreements.
332. This Part would also introduce improved access to secure work and gender equality into the modern awards objective in section 134 of the FW Act as matters the FWC would be required to take into account when setting terms and conditions in modern awards. This Part would also introduce gender equality into the minimum wages objective in section 284 of the FW Act as a matter the FWC would be required to take into account when setting minimum wages.

11. In the Second Reading Speech for the Bill, the Minister for Employment and Workplace Relations said as follows:

Gender equity is at the very heart of our government's agenda; and this bill will place gender equity at the very heart of our Fair Work system—where it belongs.

Under our reforms, gender equity will be included as an overarching object of the Fair Work Act, in the modern awards objective and in the minimum wages objective.

These amendments will embed gender equity as a central goal of our workplace laws; and set a clear expectation that the Fair Work Commission must take into account the need to achieve gender equity when performing all its functions—when setting the minimum wage; when considering changes to awards; and in all other decisions.⁷

B.1 Amendments to the FW Act to include reference to the promotion of job security and gender equality

12. The objects of the FW Act set out at s 3 have been amended by the FW Amendment Act to add job security and gender equality as considerations. Section 3(a) of the FW Act now states:

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

- (a) providing workplace relations laws that are fair to working

⁷ Hansard, House of Representatives, 27 October 2022, page 2177 – 2178.

Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; ...

13. In respect of this amendment, The FW Amendment EM at [334] provides that:

... The reference to promoting gender equality recognises the importance of people of all genders having equal rights, opportunities and treatment in the workplace and in their terms and conditions of employment, including equal pay. The intention of the references to 'gender equality' in each of these provisions is to use language that is consistent with the Convention on the Elimination of All Forms of Discrimination against Women and ILO Convention concerning Discrimination in Respect of Employment and Occupation (No 111). It is also intended to reflect the policy objective of both formal and substantive gender equality.
14. The FW Amendment EM and the Second Reading Speech refer to the legislative amendments putting gender equity at the "*heart*" of the Commission's decision making and the Fair Work system respectively. In practice, this is achieved in a number of ways.
15. As noted in the FW Amendment EM at [331]:
 - (1) Section 15AA of the AI Act requires that the FW Act be interpreted in a way that would best achieve the object of the FW Act; and
 - (2) Section 578(a) of the FW Act requires the Commission to take into account the objects of the FW Act when performing functions or exercising powers under the FW Act.
16. The role of s 578(a) of the FW Act was recognised in the Interim Decision at [72] where the Commission had particular regard to s 3(a) of the FW Act, prior to its amendment.
17. The Commission in the Interim Decision at [148] and [293] (Section 157(2A) at [1]) also accepted that objects of the FW Act will inform the interpretation and application of the concepts within s 157(2A), despite the fact that this provision can be said to exhaustively define work value reasons in the sense that there are no other express provisions of in the FW Act which inform the meaning of that provision.
18. Additionally, the legislative notes to ss 134 and 284 each provide that "*[t]he FWC must also take into account the objects of this Act and any other applicable provisions. ...*".

19. The Commission in the Interim Decision at [1049] noted that the objects of the FW Act and other parts of the FW Act (aside from ss 134(1)(e), 284(1)(d) and 302(2)) make no specific mention of pay equity or the gender-based undervaluation of work. Following the commencement of the FW Amendment Act, this is no longer the case.
20. The amended objective to the FW Act at s 3(a) will be relevant to the proper interpretation of:
 - (1) Section 166, providing the Commission’s powers and functions regarding when variation determinations varying modern award minimum wages comes into operation;
 - (2) Section 157, including the meaning of “*work value reasons*” for the purpose of s 157(2A) and the Commission’s obligations regarding assumptions based on gender when considering work value reasons at s 157(2B);
 - (3) The modern awards objective at s 134 (including each of the prescribed considerations) and the Commission’s obligation to ensure that modern awards, together with the National Employment Standards (“NES”), provide a fair and relevant minimum safety net of terms and conditions; and
 - (4) The minimum wages objective at s 284 (including each of the prescribed considerations) and the Commission’s obligation to establish and maintain a safety net of fair minimum wages.

B.2 Amendments to the modern awards objective to include secure work and gender equality considerations

21. Section 134(1) of the FW Act sets out the modern awards objective. By the FW Amendment Act, the matters to be taken into account by the Commission when ensuring that the modern awards objective is met have also been amended and now provide, inter alia:

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:

...

(aa) the need to improve access to secure work across the economy; and

(ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women’s full economic participation; and

...

Secure work

22. The terms “*secure work*” and “*job security*” (as appears in the amended s 3(a)) are not defined by the FW Act. The meaning of these composite phrases must be considered in context, including by identifying the mischief these provisions were designed to address. Insight into the intended meaning of “*secure work*” for the purpose of s 134(1)(aa) (and “*job security*” for the purpose of s 3(a)) may be identified in the Second Reading Speech in which the Minister stated that:

Years ago, job security was simply defined across the economy as the difference between being a casual or a permanent employee. Job insecurity now has many faces. We see it in the gig economy, labour hire, new forms of insecurity for part-time employees, and rolling fixed-term contracts which effectively amount to a permanent probation period for employees. We see it where casual loading has not been a sufficient incentive to promote secure jobs.

All legitimate forms of employment have their place. All will continue to exist. But where there is abuse, we must curtail it. Where loopholes have arisen in legislation, we must close them.⁸

23. Accordingly, the object and purpose to which s 134(1)(aa) is directed may be identified as preventing the exploitative use of the “*many faces*” of job insecurity, including casual employment, labour hire arrangements, part-time employment, and rolling fixed-term contracts.
24. The ANMF agrees with Cth S2S at [49], that the applications before the Commission do not seek to vary any award terms that are directly relevant to secure work (including in implementing the proposed interim increase). Nonetheless, an interim increase of 15 per cent for the relevant employees is likely to contribute to increased security of work, and would not prejudice the objective.
25. The Commission has before it a substantial volume of evidence and material going to the high rates of staff turnover financial difficulties faced by aged care workers. This includes that:

⁸ Hansard, House of Representatives, 27 October 2022, page 2176 - 2177.

- (1) Just 11.9 per cent and 11.2 per cent of the direct care workforce are employed full time in residential and community care respectively. This may be contrasted to the 62 per cent of the broader Australian workforce who are employed full time;⁹
- (2) In 2020, 93 per cent of the total direct care workforce in permanent positions (full-time and part-time positions) were part time positions and 20.2 per cent of the residential aged care direct care workforce employed as casual/contractor on payroll;¹⁰ and
- (3) Between November 2019 and November 2020:
 - (a) 29 per cent percent of all workers in direct care roles in residential aged care had left their employment;¹¹
 - (b) 34 per cent percent of all workers in direct care roles in HCCP had left their employment;¹² and
 - (c) 26 per cent percent of all workers in direct care roles in CHSP had left their employment.¹³
- (4) The recognition in the Lay Evidence Report at [606] that witnesses gave a range of evidence including that low pay made it hard to attract workers and that there was high staff turnover;
- (5) Numerous aged care workers identify the inadequacy of wages to meet living expenses and/or to retire on. This includes the evidence of Linda Hardman (AIN/PCW at [4] – [6]), Suzanne Hewson (EN at [7] – [8]), Jocelyn Hofman (RN at [6] – [7]), Wendy Knights (AIN/PCW at [6] – [7]), Christine Spangler (AIN/PCW at [5] – [6]) and Sheree Clarke (AIN at [14] – [16]);

⁹ NILS 2016, 25 (table 3.16) and 84 (table 5.16); Amended Witness Statement of Annie Butler dated 2 May 2022 at [106]–[107].] (tab 181 page 9259 – 9260).

¹⁰ 2020 Census Report, 11 (table 2.2); Amended Witness Statement of Annie Butler dated 2 May 2022 at [86]. (tab 181 page 9255).

¹¹ 2020 Census Report, 23; Amended Witness Statement of Annie Butler dated 2 May 2022 at [91] and [123]. (tab 181 page 9256 and 9264–9265).

¹² 2020 Census Report, 35; Amended Witness Statement of Annie Butler dated 2 May 2022 at [123] and [123]. (tab 181 page 9256 and 9265).

¹³ 2020 Census Report, 35; Amended Witness Statement of Annie Butler dated 2 May 2022 at [123] and [123]. (tab 181 page 9256 and 9265).

(6) Numerous aged care workers gave evidence that they were considering leaving, or had left, work in aged care to pursue higher paid work elsewhere (see ANMF Note in relation to evidence of workers having left aged care for work value reasons dated 25 August 2022);

(7) The Royal Commission Interim Report found at [IR.1.229]:

“Given the low pay and limited career opportunities available, it is not surprising that staff leave the sector because of dissatisfaction with remuneration, income insecurity, and excessive and stressful work demands.” (emphasis added).

26. At [1039] of the Interim Decision, the Commission concluded that increasing minimum wages would assist in the attracting and retaining employees in the aged care sector. Likewise, the Commission would find that granting the interim increase would improve access to secure work across the economy. The benefit of the interim increase would make a contribution to countering exploitative use of the “*many faces*” of job insecurity. It would also contribute to the retention of direct aged care workers in the sector instead of them leaving because of dissatisfaction with remuneration and income insecurity.

27. For the reasons addressed further below at [95] to [102] the Commission would not find that applying the interim increase of 15 per cent before all Commonwealth funding is in place would have a significant negative impact upon the business of aged care providers. For similar reasons, the Commission would not find that applying the interim increase of 15 per cent before all Commonwealth funding is in place would have a negative impact upon need to improve access to secure work across the economy.

The need to ensure gender equity in the workplace

28. Section 134(1)(e) previously required the Commission to taken into account “*the principle of equal remuneration for work or equal or comparable value*” as was considered by the Commission at [1041] to [1063] of the Interim Decision. This item has now been repealed because these considerations are now included as part of the new s 134(1)(ab).¹⁴

¹⁴ See FW Amendment EM at [339].

29. New s 134(1)(ab) introduces additional elements to the modern awards objective. In ensuring that modern awards, together with the NES, provide a fair and relevant safety net of terms and conditions, the Commission must now take into account:

the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation;

30. These new elements involve a substantial re-casting of this aspect of the objective. Not least is the imperative effect of "*the need*" to achieve gender equality in the workplace. The Commission at [277] of the Interim Decision highlighted that "*necessary*" means "*that which 'must be done'*". Here, what must be done is the achievement of gender equality in the workplace. The ordinary meaning of the word "*achieve*" is "*to bring to a successful end; carry through; accomplish*".¹⁵

31. Each of the components of s 134(1)(ab) are directed towards accomplishing gender equity. Section 134(1)(ab) provides that this is to occur by:

- (1) ensuring equal remuneration for work of equal or comparable value;
- (2) eliminating gender-based undervaluation of work; and
- (3) providing workplace conditions that facilitate women's full economic participation.

32. The ordinary meaning of each of the verbs "*ensure*", "*eliminate*" and "*provide*" here echo the need to achieve gender equity, rather than merely aspiring to this. A distinction can be drawn between this need to achieve gender equality in the workplace and other aspects of the modern awards objective, namely the:

- (1) Need to improve access to secure work (s 134(1)(aa));
- (2) The need to encourage collective bargaining (s 134(1)(b));
- (3) The need to promote social inclusion (s 134(1)(c)); and
- (4) The need to promote flexible modern work practices (s 134(1)(d)).

¹⁵ *Macquarie Dictionary Online*, Macmillan Publishers Australia 2023.

33. The context of s 134(1)(ab) confirms the ordinary meaning of the language used. As identified above, this provision must now be read in light of the amended objectives of the FW Act in s 3(a), now including reference to promoting gender equality. Section 134(1)(ab) should also be read in light of the following statements in the Second Reading Speech:

Some of the most undervalued workers in our country are workers in female-dominated industries. Many are the very workers who put their health and safety on the line to guide us through the shutdown period of the pandemic. Workers in health care, aged care, disability support, early childhood education and care, the community sector, and other care and service sectors.

Work in these industries is undervalued because of unfair and discriminatory assumptions about the value of the work and the skill required to do the job.

This undervaluation is one of the biggest causes of the gender pay gap and our reforms take a number of key steps to address it.¹⁶

and:

The reforms in this bill are intended to reverse decades of unfair outcomes for women workers, by removing the need to find a male comparator and making clear that sex discrimination is not necessary to establish that work has been undervalued.¹⁷

34. This presents a significant change to the legislation applied by the Commission in stage 1 of this proceeding. Having regard to the statutory regime as was applicable prior to the commencement of the FW Amendment Act, the Commission determined at [866] of the Interim Decision that:

... these proceedings are not a general inquiry into the drivers of the gender pay gap. ... it is not necessary, for the purposes of these proceedings, that we determine why the minimum rates in the relevant Awards before us have not been properly fixed. Our task is to determine the actual value of the work in aged care and whether a variation of the current rates in the relevant awards is justified by ‘work value reasons’ being reasons related to any of the s.157(2A)(a)-(c) criteria. That task requires that we take into account all the skills exercised by aged care workers, which may include an assessment of skills that have previously not been considered or properly valued.

35. It remains true that the Commission’s primary task is to determine the actual value of the work in aged care and whether a variation of the current rates in the relevant awards is justified by “*work value reasons*”. However, the effect of the amendment to

¹⁶ Hansard, House of Representatives, 27 October 2022, page 2177.

¹⁷ Hansard, House of Representatives, 27 October 2022, page 2177.

s 134(1)(ab) is that the Commission must now take into account whether the work of direct aged care workers is undervalued for gender-based reasons.

36. Section 134(1)(ab) refers to the need to achieve gender-based equality in “*the workplace*”. Reference to “*the workplace*” pertains to the particular modern awards and particular work under consideration. It would not be possible for the Commission to take into account the requirements of s 134(ab) unless it has regard to whether there exists a gender-based undervaluation of “*the work*”.
37. Despite determining that the Commission was not required to make a finding as to whether the minimum rates of relevant awards are affected by gender undervaluation, the Commission in the Interim Decision at [356] accepted the expert evidence that, as a general proposition, work in feminised industries, including care work, has been historically undervalued. The Commission also accepted at [356] that:
 - (1) the reason for the historical undervaluation in feminised industries is likely to be gender based; and
 - (2) the evidence pertaining to gender undervaluation provides a useful context for the assessment of work value and skills used in feminised industries.
38. At [758] of the Interim Decision the Commission made important findings of general principles regarding gender-based undervaluation based on the expert evidence. In the context of the legislative amendments, including s 134(1)(ab), the Commission would now further find that the work of direct aged care workers has been historically undervalued for gender-based reasons.
39. This finding may be comfortably made based upon the evidence before the Commission and the findings made in the Interim Decision. Central to this is the evidence of Hon Assoc Prof Junor, a summary of which is quoted at [783] of the Interim Decision. There, Assoc Prof Junor expresses her opinion that:

... the primary reason for the low pay rates of aged care workers in Australia is that they are a function of the fact that the work is performed overwhelmingly by females...
40. The Commission at [806] to [812] further identified unchallenged evidence of Hon Assoc Prof Junor including:

- (1) A table in relation to the linkage between gender concentration and undervaluation, further developed with regard to the “*V’s*” of “*vocation*”, “*value-add*” and “*variance*”, having specific regard to work in aged care (Interim Decision at [806] – [807] and Table 12);
- (2) The identification of further factors leading to skill invisibility in female-dominated sectors as being that the work involved is “*female*” in some way and as being analogous to unpaid housework and volunteer work, as well as gender segregation based on role demarcations, informal recruitment, small workplaces, lack of career paths, part-time work and (in the case of AINs/PCWs but not in the case of nurses) lack of formal qualifications (Interim Decision at [808]); and
- (3) That the historical legacy of “*care work*” includes that:

The growth of care work reflects social trends that have contributed to the creation of low-status but skilled service jobs, mostly performed by women who have been recruited on the basis of skills acquired outside the labour market or formal training system. As a result, the skills in question have tended not to be defined as such, but to be “naturalised” to women, perhaps on the basis of earlier gender-specialised education and life and prior work experience.”

41. The Commission at [813] rejected as “*unpersuasive*” criticism of Hon Assoc Prof Junor’s evidence by the Joint employers regarding why the current award minimum pay rates in the aged care sector do not reflect underlying work value.
42. As addressed at ANMF CS [773] ff, the Junor Report also helps to explain why there is a gender-based undervaluation of the work performed by direct aged care workers. Assoc Prof Junor identifies that there are particular skills—associated with female-dominated work—that have not traditionally been recognised as skills bearing upon the value of work performed—“*invisible skills*.” In her evidence, Hon Assoc Prof Junor applied the Spotlight Tool to the work performed by direct aged care workers. The Spotlight Tool is a job and skills analysis tool designed as an aid in identifying, naming and classifying “*invisible skills*” used in undertaking service work processes that are not directly observable. Assoc Prof Junor’s evidence was that “*Invisible*” in this context means “*hidden*”, “*under-defined*”, “*under-specified*” or “*under-codified*”.
43. In applying the Spotlight Tool to the work performed by direct care workers, Hon Assoc Prof Junor identified a very large number of countable instances of the kinds of skills

that traditionally have not been recognised as such (and hence have been left out of account in the setting of rates of pay).

44. With respect to Hon Assoc Prof Junor, the Commission concluded at [856] of the Interim Decision that:

Assoc Prof Junor's evidence was cogent, probative and relevant to our assessment of whether a variation of modern award minimum wages in the relevant awards is 'justified by work value reasons' (s.157(2)(a)). The force of Assoc Prof Junor's evidence was undiminished during cross-examination which, as we have mentioned, was somewhat perfunctory.

45. In light of the legislative amendments, the Commission would now also find Hon Assoc Prof Junor's evidence to have been cogent, probative and relevant to the assessment of whether a gender based undervaluation exists in aged care, for the purpose of its consideration of s 134(1)(ab).

46. Hon Assoc Prof Junor's evidence identifying gender as the primary reason for the low pay rates of aged care workers in Australia is supported by a significant body of additional material. The gendered nature of the aged care workforce is beyond dispute. Evidence in support of this proposition includes:

- (1) Evidence addressed in the Lay Evidence Report at Part D.14 (at [626]–[637]);
- (2) In 2016, the NILS Report identified that 87 percent of the residential aged care direct care workforce were female. By occupational group at that time:
 - (a) 87.6 per cent of RNs were female;
 - (b) 91.4 per cent of ENs were female;
 - (c) 86.2 per cent of AINs / PCWs were female.¹⁸
- (3) The 2020 Census Report identified that 86 per cent of the aged care workforce in direct care roles identify as female.¹⁹

¹⁸ NILS 2016 at 127 (figure 3.4) and Amended Witness Statement of Annie Butler dated 2 May 2022 at [72].] (tab 181 page 9252).

¹⁹ 2020 Census Report, 15; Amended Witness Statement of Annie Butler dated 2 May 2022 at [87] (tab 181 page 9255).

47. A conclusion that minimum award rates applicable to direct aged care workers undervalue the work for gender-based reasons is the natural (if not inevitable) conclusion to be drawn from:
- (1) The propositions accepted by the Commission at [758];
 - (2) Assoc Prof Junor's application of the Spotlight Tool.
 - (3) The additional evidence of Assoc Prof Junor, Assoc Prof Smith and Dr Lyons and Professor Charlesworth;
 - (4) The evidence of Kristen Wischer (ANMF Senior Federal Industrial Officer) as to the industrial history of the Nurses Award, and the evidence of Leigh Svendsen (HSU Senior Industrial and Compliance Officer) in relation to the industrial history of the Aged Care Award;
 - (5) The gendered nature of the aged care workforce.
48. After reaching such a conclusion, the Commission must then take into account the need to achieve gender equality in the workplace, including by:
- (1) Ensuring equal remuneration for work of equal or comparable value;
 - (2) Eliminating gender-based undervaluation of work; and
 - (3) Providing workplace conditions that facilitate women's full economic participation.
49. A 15 per cent interim increase for the relevant employees is supported by consideration of the need to achieve gender equality in the workplace, as required by s 134(1)(ab). The 15 per cent increase is properly to be seen as part (though not all) of the process, now underway in this proceeding, of achieving gender equality in the relevant workplace, ensuring equal remuneration for work of equal value, eliminating gender based undervaluation in relation to the relevant employees, and providing workplace conditions that facilitate women's full economic participation. Failing to grant the interim increase, conversely, would fail to ensure the provision of a fair and relevant safety net of minimum terms and conditions, having regard to s 134(1)(ab) and the need to achieve gender equality in the workplace.

B.3 Amendments to the minimum wages objective to include gender equality considerations

50. Section 284(1) of the FW Act sets out the minimum wages objective. By the FW Amendment Act, the matters to be taken into account by the Commission when ensuring that the minimum wages objective is met have also been amended and now provide, inter alia,

The FWC must establish and maintain a safety net of fair minimum wages, taking into account:

...

(aa) the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps; and

...

51. Section 284(1)(d) previously required the Commission to take into account “*the principle of equal remuneration for work of equal or comparable value*”. This item has now been repealed because these considerations are now included as part of the new s 284(1)(aa).

52. There is a substantial overlap between the terms of the modern awards objective at s 134(1)(ab) and the minimum wages objective at s 284(1)(aa). The submissions made above in relation to the identical factors to be taken into account for the purpose of the modern awards objective apply equally to the minimum wages objective and are not repeated. However, whereas the modern awards objective at s 134(1)(ab) refers to the need to achieve gender equality in the workplace by, inter alia, “*providing workplace conditions that facilitate women’s full economic participation*”, the minimum wages objective at s 284(1)(aa) refers to the need to achieve gender equality, including by “*addressing gender pay gaps*”.

53. The reference to addressing gender pay gaps is an apt reference in respect of minimum wages to the practical consequence of gender-based undervaluation. The Commission has received evidence as to a gender pay gap in respect of female dominated industries and the undervaluation of the work concerned in this case resulting in a pay gap.

54. The evidence of Assoc Prof Smith and Dr Lyons is that there is a gender pay gap in Australia, the measurement of which varies depending on what dataset is used (see

table 1, page 4), but which is persistent ([10]). Using the dataset of adult full-time ordinary time average weekly earnings, they identify the gender pay gap to be 14.2 per cent (table 2, page 5).

55. Associate Professor Smith and Dr Lyons identify two approaches to identifying the contributing factors to the gender pay gap, namely:
 - (1) the “*standard*” / “*orthodox*” approach assumes that women make a “*rational choice*” to work in lower-paying occupations ([16]); and
 - (2) “*institutional*,” “*sociological*,” or “*heterodox*” approach which suggests that there is an array of organisational, social, and labour-market forces that affect women’s occupational choices ([16]).
56. The authors prefer the institutional approach, but note that even “*orthodox*” approaches allow that there is a gender pay gap, the most-significant contributing component of which is gender discrimination ([24]).
57. Associate Professor Smith and Dr Lyons also identify other contributing factors to the gender pay gap as:
 - (1) gender segregation as between occupations (i.e., as between female-dominated occupations and male-dominated occupations) as another significant contributing factor (see, e.g., [32]–[33]);
 - (2) the “*undervaluation of feminised work and skills*” (see at [36], [39], [41]). This is “*influenced by social expectations and gendered assumptions about the role of women as workers*” ([56], see also [59], [60]); and
 - (3) “*sex-based stereotyping*” and devaluing of work that is “*intrinsically ‘feminine’ in nature*,” such as care-giving, manual dexterity, human relations, and working with children ([52]).
58. Their evidence is that undervaluation based on these kinds of considerations develop into “*social norms*” being attitudes or values that shape behaviour and perceptions in a given context ([51]). Norms and regulation are in an overlapping, or mutually-reinforcing, relationship ([61]).

59. The Commission at [865] of the Interim Decision accepted as uncontroversial that a gender pay gap exists in Australia. The Commission accepted the logic of the position in the expert evidence that gender undervaluation of work is a driver of the gender pay gap. The Commission also accepted as a general proposition that if all work was properly valued there would likely be a reduction in the gender pay gap.
60. However, as identified above, the Commission found that it was not necessary to determine why rates had not been properly fixed and found that the proceeding were not a general inquiry into the drivers of the gender pay gap.
61. Again, whilst it remains true that these proceedings are not a general inquiry into the drivers of the gender pay gap, the terms of s 284(1)(aa) now direct the Commission to consider the need to achieve gender equality including by addressing gender pay gaps. This invites the Commission to further develop the findings made in the Interim Decision at [865].
62. Accordingly, the Commission would now find that:
- (1) The gender pay gap manifests in the gender-based undervaluation of the work of direct aged care workers; and
 - (2) Eliminating that gender-based undervaluation would address the gender pay gap and facilitate achieving gender equality and a safety net of fair minimum wages.

B.4 The addition of s 157(2B) specifying that the Commission’s consideration of work value must be free of assumptions based on gender and include consideration of whether historically the work has been undervalued because of assumptions based on gender

63. Section 157 of the FW Act deals with the power of the Commission to vary modern awards. The FW Amendment Act inserted a new s 157(2B), providing:

The FWC’s consideration of work value reasons must:

- (a) be free of assumptions based on gender; and
 - (b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.
64. In respect of this amendment, The FW Amendment EM provides that:

345. Subsection 157(2) of the FW Act currently sets out the requirements

for the FWC to make a determination varying modern award minimum wages. This includes the requirement that the FWC be satisfied that the variation is justified by work value reasons, which are defined in subsection 157(2A).

346. This item would introduce subclause 157(2B) to clarify that the FWC's consideration of work value reasons must be free of assumptions based on gender and must include consideration of whether historically the work being assessed has been undervalued because of such assumptions. This item is modelled after subsection 248(3) and paragraph 248(4)(c) of the Industrial Relations Act 2016 (Qld) and would ensure that the FWC's consideration of work value applications cannot be affected by gender-based assumptions about the value of work.
347. In the Equal Remuneration Decision 2015, the Full Bench of the FWC expressed a view that the definition of work value reasons would be sufficiently broad to allow a party to advance a claim that minimum rates of pay in a modern award undervalue work due to historical gender-related reasons. This item would have the effect of confirming the Full Bench's view in the FW Act. (citations omitted)
65. As identified by this passage of the FW Amendment EM, one consequence of this amendment will be to confirm that a party may advance a work value claim on the basis that minimum rates of pay in a modern award undervalue work due to historical gender-related reasons.
66. Recognising the existence of historical undervaluation and eschewing the need for a fixed datum point will go some way to removing gender-based assumptions from work value considerations. Similarly, the use of work value assessments designed to recognise skills otherwise hidden for gender-based reasons will also assist to allow considerations of work value reasons that are free of assumptions based on gender.
67. It would appear that the insertion of s 157(2B) will require the Commission to revisit [866] of the Interim Decision (and other similar paragraphs, like [355]). There, the Commission held that it was not necessary for the Commission to decide why minimum rates in relevant Awards had not previously been properly fixed. Now, it is necessary for the Commission to "*consider[] ... whether historically the work has been undervalued because of assumptions based on gender.*"
68. The Commission has, however, already gone a substantial way to undertaking the kind of "*consideration*" contemplated by s 157(2B). The Commission accepted Hon Assoc Prof Junor's evidence not only that skills utilised by aged care workers were "*invisible,*" but also her evidence as to why they were invisible (see Interim Decision

at [806]–[813]). In short, those reasons are (or include) gender-based assumptions about the work (see, in particular, [807], [809], [812]). The evidence of Assoc Prof Smith and Dr Lyons, which the Commission also accepted, was broadly to the same effect (see as summarised at [780]–[783] of ANMF CS and [339]–[357] of ANMF RCS, in particular).

69. It is not necessary, in order to comply with the requirement of considering whether historically there has been gendered undervaluation, to closely analyse earlier decisions setting wages; it suffices to find that there has been a historical undervaluation of “*the work*” based on gender reasons. The basis upon which that finding would be made are addressed above at Part B.2. Because of s 157(2B)(b), that finding would now be made expressly.
70. By the time this proceeding is completed (and a final, rather than interim, variation to minimum award wages is made), the Commission will wish to be satisfied that the quantum of increase ordered eliminates the effect of historical gender-based assumptions. The 15 per cent interim increase goes partway, of course, to so eliminating. The ANMF will direct further submissions to this issue as part of the stage 3 process.

C. The matters set out at paragraph [3] of the 23 November 2022 Statement

C.1 Timing and phasing of the interim increase

71. By the Interim Decision the Commission was satisfied that an interim increase of 15 per cent for aged care workers in the relevant classifications is plainly justified by work value reasons. The Commission also concluded that the 15 per cent increase was “*comfortably below the level of increase [it] may determine on a final basis*” (at [938]). The ANMF contends that this increase should come into effect immediately upon the determination to vary the respective Awards being made, subject to the potential to defer increases for a period of around eight weeks.

The appropriateness of the principles canvassed in the Interim Decision at [974]-[990]

72. The ANMF agree that the principles set out in the Interim Decision at [974] – [990] are generally appropriate, subject to the following matters.
73. *Firstly*, the Full Bench at [974] – [990] set out extracts from:
- (1) *Australian Workers Union* [2022] FWCFB 4;
 - (2) *Independent Education Union of Australia – NSW/ ACT (130N-NSW)* [2021] FWCFB 6021;
 - (3) *Penalty Rates – Transitional Arranges decision* [2017] FWCFB 3001;
 - (4) *4 yearly review of modern awards – Award stage – Group 4 – Aged Care Award 2020 – Substantive claims* [2019] FWCFB 7094; and
 - (5) *4 yearly review of the General Retail Industry Award 2010* [2018] FWCFB 5897.
74. Aspects of those decisions extracted by the Commission in the Interim Decision relate to the specific facts and evidence in those matters. The application of principles in those decisions are, in some cases, specific to the facts and evidence in those matters. Accordingly, the ANMF is not to be taken as endorsing the application of those principles in the same way or to the same end in these proceedings.
75. *Secondly*, in *Australian Workers Union* [2022] FWCFB 4 at [163] and [169], extracted in the Interim Decision at [980], the Commission identified that employers would there

require a reasonable time to adjust to the imposition of a minimum wage floor for pieceworkers under the *Horticulture Award 2020* . It was further noted that this may involve them making arrangements for matters such as the need to adjust payroll systems and recruitment practices.

76. Whilst it may be accepted that changes to minimum award rates may (in some cases) increase a regulatory burden, these findings must be considered in light of the award variation there being introduced, namely the imposition of a minimum wage floor for pieceworkers. That variation was substantially different to a percent increase to minimum award rates.
77. Currently, there is not material before the Commission to establish that the regulatory burden of an interim increase is such that employers would require any particular time to adjust after a determination is made. If such material were adduced, and the Commission was so satisfied, it would be open to the Commission to specify that the interim increase come into effect on the date of the determination, but order that the effect of this be deferred for a period (say, a number of weeks). The interim increase would then be payable to employees retrospectively that number of weeks after the determination. In that way:
 - (1) There would be no further delay in recognising the interim increase to the minimum award wages of direct aged care workers, as has been found to be plainly justified by work value reasons, albeit that increase would be paid after that deferral period; and
 - (2) Employers would have a reasonable period to make arrangements for the increase.
78. *Thirdly*, and most significantly, the principles canvassed in the Interim Decision at [974] – [990] predate the amendments to ss 3(a), 134(1)(ab) and 284(1)(aa). The object of providing workplace relations laws that promote gender equality is now relevant to the proper interpretation of s 166 and the Commission must also have regard to this when exercising its functions or powers under s 166. Accordingly, the summary of the effect of s 166 set out at [982] to [984] must now be revised to reflect those amendments.

79. Further, in ensuring a fair and relevant safety net for the purpose of the modern awards objective, the Commission must now have regard to the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women’s full economic participation. As such, the summary of the matters relevant to phasing-in variations to modern awards set out in the Penalty Rates Decision (set out in the Interim Decision at [986]) and in other previous decisions must also be revised to give effect to those legislative amendments.

Basis for seeking application of interim increase immediately upon determination being made

80. The award minimum rates for direct care workers in aged care have historically failed to reflect the work value. This undervaluation has been substantial and recognition of this not new:

- (1) In June 2018, the Aged Care Workforce Strategy Taskforce recommended that the industry develop a strategy to support the transition PCWs and nurses to pay rates that better reflect their value and contribution to delivering care outcomes;²⁰
- (2) The Royal Commission Final Report published 1 March 2021 recognised in plain terms at ([FR.2.214]) that:

“The bulk of the aged care workforce does not receive wages and enjoy terms and conditions of employment that adequately reflect the important caring role they play”

- (3) In December 2021, the parties agreed by the Consensus Statement that wages in the aged care sector need to be significantly increased because the work of aged care workers has been historically undervalued for a range of reasons and had not been properly assessed by the Fair Work Commission or any other industrial tribunal.
81. The interim increase proposed by the Commission is justified by work value reasons. The Commission has determined that the minimum modern award rates “*significantly undervalue*” the work performed but these employees (Interim Decision [1004]). They

²⁰ Aged Care Workforce Strategy Taskforce (2018), A matter of Care: Australia’s Aged Care Workforce Strategy, Report, 2018 at 93.

are “*at least*” 15 per cent below the rate necessary to properly reflect work value. This is one (significant) reason why the relevant awards do not provide a safety net of fair minimum wages or a fair and relevant minimum safety net of terms and conditions.

82. Applications to increase the minimum rates for direct aged care workers have been on foot since:
- (1) 17 November 2020 with respect to the *Aged Care Award 2010*;
 - (2) 18 May 2021 with respect to the *Nurses Award 2020* and *Aged Care Award 2010*; and
 - (3) 1 June 2021 with respect to the *Social, Community, Home Care And Disability Services Industry Award 2010*.
83. The Interim decision was published on 4 November 2021. Direct care workers in aged care should receive the benefit of the Interim Decision without further delay. The proposal by the Commonwealth to phase in the interim increase at a rate of 10 per cent on 1 July 2023 and a further 5 per cent on 1 July 2024 fails to meet the statutory objectives set out above.
84. Direct aged care workers should not have to wait a further nine months from the date of the Commission telling them what the parties (including the Joint Employers) already knew. They should not have to wait until 1 July 2024 (nearly 20 months after the interim decision) to receive a minimum rate increase that is plainly justified by work value reasons. A minimum rate even 5 per cent below value (in fact, more than this, given that the 15 per cent is only the interim increase) does not bear a proper relationship to the value of the work performed by relevant employees (Interim Decision at [1003]).
85. Having regard to the matters identified above, and the object of the FW Act to provide workplace laws that, inter alia, provide gender equity, it would be appropriate for the Commission to specify in the determination that the interim increase is to come into operation immediately. So much would be consistent with putting gender equity at the heart of the Commission’s decision making and the Fair Work system.

86. The Commission might, on appropriate evidence, order that the operation of the variation be deferred for a period of a number of weeks, after which the variation would apply retrospectively.
87. A transitional arrangement of this nature could be made if the Commission was satisfied that the regulatory burden of the interim increase was such that employers would require a reasonable time to adjust after a determination was made. At present, there is no evidence before the Commission capable of so satisfying it. Such an arrangement would fall within the Commission's powers under s 166(4) of the FW Act, to specify that the determination take effect in stages. The power to specify that a determination that changes to modern award minimum wages be made in stages is limited only upon the Commission being satisfied that it is appropriate to do so. Upon being satisfied of appropriateness the matters in [77] above, the Commission may specify that the interim increase:
- (1) Come into effect from the day of the determination (stage 1); and
 - (2) Be deferred for a period of a number of weeks and then apply retrospectively (stage 2).
88. Alternatively, the arrangement could be made by order pursuant to s 157(2) as:
- (1) Justified by work value reasons; and
 - (2) Necessary to achieve the modern awards objective (and the minimum wages objective).
89. It is submitted that this arrangement would satisfy these requirements of s 157(2) having regard to:
- (1) The fact that the interim increase is plainly justified by work value reasons;
 - (2) The effect of the FW Amendment Act discussed above;
 - (3) The submissions at Parts C.2 and C.3 below; and
 - (4) The need to provide employers may require a reasonable time to adjust to the imposition of the variation of minimum wages for the purpose of s s 134(1)(f).

C.2 The interim increases are necessary to achieve the modern awards objectives

Response to provisional views

90. At [1008] the Commission notes that it is not persuaded that 134(1)(d) (da) and (g) are relevant to the proposed interim increase. Whilst that ANMF maintains that ss 134(1)(d), (da) and (g) are relevant to the PCW Classification Variation, (see ANMF CS at [50]) and may otherwise be relevant to considerations in stage 3, it is accepted that they are not relevant to the determination of whether the proposed interim increase is necessary to achieve the modern awards objective.
91. The ANMF respectfully agrees with the provisional view of the Full Bench at [1012] that s 134(1)(a) weighs in favour of the variation of the relevant Awards to give effect to the interim increase determined to be justified by work value reasons;
92. The ANMF accepts that there is a complexity of factors which may contribute to decision making about whether or not to bargain and that it is difficult to predict the effect of increasing minimum wages will have on collective bargaining in the aged care sector, as identified in the Interim Decision at [1028]. However, the ANMF maintains its position set out at [857] to [869] of its closing submissions. It respectfully disagrees with the provisional view of the Full Bench (at [1030]). In particular, even if amending the award would not positively encourage bargaining (and the ANMF submits it would), at worst this consideration would then be neutral: it would not weigh against the variation of relevant Awards to give effect to the interim increase determined to be justified by work value reasons.
93. The ANMF respectfully agrees with the provisional view of the Full Bench at [1039] that increasing minimum wages will assist in attracting and retaining employees in the aged care sector, thereby promoting social inclusion through increased workforce participation for the purpose of s 134(1)(c).
94. The ANMF also agrees with Commonwealth submission that the amendments to the FW Act mean that the issue as to the proper construction and application of s 134(1)(e) (and s 284(1)(d)) raised by the Full Bench at [1048] falls away. The proper construction of s 134(1)(ab) is discussed at [29] to [35] above.

95. As to s 134(1)(f), the ANMF respectfully agrees with the meaning of “*productivity*” as discussed at [1065]. It is submitted that granting the interim increase to minimum wages would not have any negative impact on productivity.
96. Further, the additional regulatory burden associated with the award variation would be limited to ensuring that rates paid to employees met the increased minimum award rates. The ANMF does not accept that the accountability mechanisms referred to at Cth S2S [12.3] would be a relevant consideration. Those mechanisms relate to funding arrangement, not to the consequences of proposed award variations. In any event, the Commonwealth accepts that those accountability mechanisms would involve minimal regulatory burden, such that the regulatory burden would be a neutral consideration.
97. As to employment costs, the Commonwealth has now committed to fully fund the cost to employers of the 15 per cent interim increase (Cth S2S at [8]), including on-costs (Cth S2S at [14]), albeit that it currently proposes that the funding would be delayed and staggered. The ANMF accepts that granting the interim increase to modern award minimum wages prior to those increases being fully funded by the Commonwealth may have some impact on business, namely aged care providers, by reason of increased employment costs. However, even having regard to this, the application of the interim increase in its entirety upon the making of the determination is necessary to ensure that the modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account all of the factors in s 134(1).
98. The ANMF respectfully agrees with and adopts the Commission’s analysis in the Interim Decision at [911] to [914]. The consideration at s 134(1)(f) is but one factor to be considered by the Commission in ensuring that modern awards, together with the NES, provide a fair and relevant safety net of terms and conditions. This factor should not be given determinative weight.
99. Further, a party who may suggest that this consideration is a negative factor will bear the onus of providing an evidentiary basis for such a finding.²¹ It would be a matter for the Joint Employers to establish that any impact on employment costs and that this

²¹ See by way of analogy *Application by the Independent Education Union of Australia* [2021] FWCFB 6021 at [19(5)].

would result in a scenario by which the modern awards, together with the NES, would not provide a fair and relevant safety net of terms and conditions.

100. The ANMF has previously made submissions as to the material currently before the Commission with respect to funding and the likely impact on business of any increase to award minimum wages at CS [849] – [855]. In summary:
 - (1) Substantially the only material currently before the Commission in regard to funding and the financial position of employers are analyses conducted by StewartBrown. Nobody from that firm is called to prove that analysis. The analysis is plainly in the nature of opinion evidence, and yet the specialised knowledge of the authors of the report has not been proved. The link between that specialised knowledge and the conclusions expressed in the report is not apparent from the report, and has not been explained on oath. The report cannot, in that light, carry any significant weight.
 - (2) None of the employer parties who rely on the StewartBrown reports have sought to demonstrate that the sample of aged care homes surveyed by StewartBrown is a representative sample.
 - (3) There is also no way of verifying the data provided to StewartBrown.
101. Should additional evidence as to this consideration be filed, the ANMF may address that evidence in reply, and may seek to cross-examine.
102. Accordingly, the ANMF respectfully agrees with the provisional view of the Full Bench at [1072] that s 134(1)(h) is here a neutral consideration.
103. Further, for the reasons identified at [29] to [48] above, it is submitted that s 134(1)(ab) weighs in favour of the variation of the relevant Awards to give effect to the interim increase.
104. For these reasons, the Commission would find that the interim increases are necessary to achieve the modern awards objective.

C.3 The interim increases are necessary to achieve the minimum wages objectives

105. The ANMF respectfully agrees with the provisional view of the Full Bench at [1079] – [1080] that section 284(1)(a) is a neutral consideration in the present context.
106. The ANMF respectfully agrees with the provisional view of the Full Bench at [1081] with respect to s 284(1)(b) adopting the provisional view with respect to s 134(1)(c).
107. The ANMF respectfully agrees with the provisional view of the Full Bench at [1082] with respect to s 284(1)(c) adopting the provisional view with respect to s 134(1)(c).
108. As noted by the Commission in the Interim Decision at [1077], it is common ground that s 284(1)(e) is not relevant in the context of the Applications.
109. With respect to s 284(1)(aa) the ANMF refer to and repeat the submissions above at [50] to [62].
110. For those reasons, the Commission would find that the interim increases are necessary to achieve the minimum wages objective.

D. Head Chefs /Cooks and Recreational Activities Officers

111. A Joint Statement regarding Stages 2 and 3 of these proceedings was filed in these proceedings on 16 December 2022 (“**JS2**”). That statement arose from meetings of industry stakeholders, convened by the Commonwealth on 14 and 17 November 2022 and reflects the matters of agreement between stakeholders, including the Aged & Community Care Providers Association, the ANMF, the HSU and the UWU.

112. Paragraph [3] of JS2 provides as follows:

The classifications of Recreational Activities Officers and ‘head chefs and head cooks’ (the latter being employees in the food services stream of the Aged Care Award 2010 at Aged care employee levels 4 to 7) should also have a 15% interim increase applied to their pay rates at the same time as the Direct Aged Care Workers. These classifications were not included in the definition of Direct Aged Care Workers by the Fair Work Commission other than those Recreational Activities Officers who are classified and paid as Direct Aged Care Workers under the Award.

113. The ANMF agrees with and endorses this statement.

114. Paragraph [3] of JS2 is a consequence of the parties having conferred and reached agreement in respect of these issues. Accordingly, the Full Bench would give consideration to determining an increase of 15 per cent for Head Chefs /Cooks and RAOs in stage 2.²²

J C McKenna

J E Hartley

Counsel for the ANMF

20 January 2023

.....
Gordon Legal
Solicitors for the ANMF

²² See Interim Decision at [1093] and [1094].