



# BACKGROUND DOCUMENT 5

*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, 5 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>
Aged Care Award	<i>Aged Care Award 2010</i>
AIN	Assistant in Nursing
ANMF	Australian Nursing and Midwifery Foundation
AQF	Australian Qualifications Framework
CCIWA	Chamber of Commerce and Industry of Western Australia
Commission	Fair Work Commission
EN	Enrolled Nurse
<i>Equal Remuneration Case 2015</i>	<i>Application by United Voice &amp; 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
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 [2017] FWCFB 1001</i>
<i>Penalty Rates Review</i>	<i>Shop, Distributive and Allied Employees Association v The Australian Industry Group (2017) 253 FCR 368</i>
<i>Pharmacy Decision</i>	<i>Four Yearly Review of Modern Awards – Pharmacy Industry Award 2010 [2018] FWCFB 7621</i>
RN	Registered Nurse
SCHADS Award	<i>Social, Community, Home Care and Disability Services Award 2010</i>
<i>Teachers Case</i>	<i>Independent Education Union of Australia [2021] FWCFB 2051</i>
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 (Cth)</i>

## 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).<sup>1</sup>
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.

[3] The Commission has published the following Background Documents:

- [Background Document 1 – the Applications](#) sets out, amongst other things, a summary of the applications, the procedural history, the legislative framework relevant to the applications and the main contentions of the principal parties.
- [Background Document 2 – Award Histories](#) sets out the history of wages and classifications in the Aged Care Award, the Nurses Award and the SCHADS Award.
- [Background Document 3 – Witness Overview](#) contains a brief overview of each of the witness’ statements (including employers, union officials and expert witnesses); the relevant page number of each witness statement in version 2 of the Digital Hearing Book, links to the final witness statements and transcript references; and specific paragraphs of the witnesses’ statements that they were taken to in cross-examination as well as links to any other documents referenced in the course of giving oral evidence.
- [Background Document 4 – The Royal Commission](#) sets out links and extracts from the submissions, witness evidence and the Research Reference List that are relevant to the findings and recommendations of the Royal Commission reports.

[4] The Commission also published the [Report to the Full Bench - Lay Witness Evidence](#) (Lay witness evidence report) which provides an overview of the evidence of lay witnesses called by the union parties, including:

- A summary of the lay witnesses who gave evidence (including charts);
- An overview of each witness’s evidence;

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

- An overview of the witnesses' evidence about the duties of various roles in the aged care industry; and
- Illustrative examples of the witness evidence grouped by theme.

[5] Background Document 1 and Background Document 2 posed a series of questions to parties with an interest in these proceedings. The answers to those questions were to be filed with the submissions due on Friday 22 July 2022. Interested parties were also invited to comment on Background Documents 3 and 4 and the Lay witness evidence report in their submissions.

[6] The following submissions were received:

- Health Services Union (HSU) dated [22 July 2022](#) and [2 August 2022](#)
- [Australian Nursing and Midwifery Federation](#) (ANMF) dated 22 July 2022
- [United Workers Union](#) (UWU) dated 25 July 2022
- Aged & Community Services Australia (ACSA), Leading Age Services Australia (LASA) and Australian Business Industrial (ABI) (collectively the Joint Employers) dated [22 July 2022](#) and [27 July 2022](#).

[7] This Background Document is structured as follows:

- Section 2 sets out the parties' responses to the *provisional* views.
- Section 3 sets out the answers provided to the questions posed in Background Document 1.
- Section 4 sets out the answers provided to the questions posed in Background Document 2.
- Section 5 sets out the main points of agreement between the parties.
- Section 6 sets out the main points in contention.
- Section 7 sets out some additional questions for the parties.

[8] There are questions for the parties in each section of this document. The questions are also extracted at Annexure A to the Statement.

## 2. Provisional Views

[9] Based on the material in Background Documents 1 and 2, the Full Bench expressed the following *provisional* views:

1. The relevant wage rates in the Aged Care Award 2010, the Nurses Award 2020 and the Social, Community, Home Care and Disability Services Industry Award 2010 have *not* been properly fixed.
2. It is not necessary for the Full Bench to form a view about why the rates have not been properly fixed.
3. The task of the Full Bench is to determine whether a variation of the relevant modern award rates of pay is justified by ‘work value reasons’ (and is necessary to achieve the modern awards objective), being reasons related to any of s.157(2A)(a)-(c) the nature of the employees’ work, the level of skill or responsibility involved in doing the work and the conditions under which the work is done

[10] Parties were invited to address the *provisional* views in their submissions. The UWU did not respond to the *provisional* views.

### *Provisional View 1*

[11] The ANMF agrees with the first provisional view.<sup>2</sup>

[12] The HSU agrees with the first provisional view and further submits that ‘the fact that it is common ground that the rates have not been properly set is an indication that the rates do not presently reflect the proper value of the work, and goes towards a conclusion that an increase is justified on work value grounds.’<sup>3</sup>

[13] The Joint Employers submit that in relation to the Aged Care Award and the SCHADS Award the Commission has never undertaken an exercise to properly set the minimum rates. In relation to the Nurses Awards, the Joint Employers submit that while it is ‘a little less clear’ it is clear that an exercise to properly set the minimum rates was not undertaken in award modernisation or since 2010.<sup>4</sup>

### *Provisional View 2*

[14] The ANMF agrees with the second provisional view, apart from the following:

- (a) The ANMF submits that the rates in the *Nurses Award 2020* and the *Aged Care Award 2010* have not been properly fixed for reasons including that there has been an historical undervaluation and that “*invisible skills*” have not been taken into account (in part because of gender bias).

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<sup>2</sup> ANMF closing submissions dated 22 July 2022 [91](1).

<sup>3</sup> HSU submission dated 2 August 2022 [1].

<sup>4</sup> ACSA, LASA and ABI submissions dated 27 July 2022 referring to [7.3] – [7.5] of their closing submissions.

- (b) As stated in the preamble to Question 8 of Background Document 1, “As noted in the Pharmacy Decision, while not part of the Commission’s statutory task [now under ss.157(2) and (2A)], it is likely the Commission would usually take into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way.”
- (c) In taking into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way, it may be necessary for the Commission to form a view about:
- (i) whether or not such features were taken into account in a way which was free of gender bias; and
  - (ii) whether or not the “*invisible skills*” were taken into account.’<sup>5</sup>

**[15]** The HSU agrees with the second provisional view however submits:

‘when considering whether it is satisfied that a variation to modern award wages is justified by work value reasons, it will be necessary for the Commission to consider factors that have resulted in the historical undervaluation of relevant work including the extent to which aspects of the nature of the work and the skills and responsibilities involved have been overlooked for gender based reasons.’<sup>6</sup>

**[16]** The Joint Employers submit that it is not necessary for the Full Bench to form a view about why the rates have not been properly fixed but argues that its position is that a consideration of the C10 framework is relevant to the exercise of the Commission’s discretion under s.157(2).<sup>7</sup>

### *Provisional View 3*

**[17]** The ANMF agrees with the third provisional view.<sup>8</sup>

**[18]** The HSU agrees with the third provisional view and ‘reiterates that historical gender-based undervaluation also has a role to play in this analysis.’<sup>9</sup>

**[19]** The Joint Employers maintain that when assessing the impact of proposed ‘work value reasons’ the evaluative task is informed by the relevant legal principles that inform the construction of s.157(2) and (2A) and submit:

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<sup>5</sup> ANMF closing submissions dated 22 July 2022 [91](2).

<sup>6</sup> HSU submission dated 2 August 2022 [2].

<sup>7</sup> ACSA, LASA and ABI submissions dated 27 July 2022 referring to [7.8]–[7.21] of their closing submissions.

<sup>8</sup> ANMF closing submissions dated 22 July 2022 [91](3).

<sup>9</sup> HSU submission dated 2 August 2022 [3].

‘The Commission will need to identify “*work value reasons*” sufficient to “*justify*” a variation to minimum award wages and with this determine what the extent of that variation should be in properly setting the minimum rates.’<sup>10</sup> [Joint Employers’ emphasis]

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<sup>10</sup> ACSA, LASA and ABI submissions dated 27 July 2022 referring to [7.22]–[7.31] of their closing submissions.



### 3. Responses to the questions posed in Background Document 1

#### 3.1 Procedural History

[20] Section 1 of BD1 set out the procedural history in this matter and summarised the respective applications. The UWU did not respond to the questions posed in Background Document 1.

*Question 1 of BD1: Are there any corrections or additions to section 1?*

[21] The HSU submitted that the summary of the procedural history should be clarified to note that the application to vary the Aged Care Award seeks to vary the Award by:

‘Varying the classification structure in Schedule B to provide for an additional pay level for Personal Care Workers (PCW) who have undertaken specialised training in a specific area of care and who use those skills, clarifying progression from Aged Care Employee Level 1 to Level 3, clarifying the role descriptions within the personal care stream, referring to the administration of medication as a task for a Senior Personal Care Worker and providing for a new role description for qualified and senior Recreational/Lifestyle Officers. The proposed replacement Schedule B is outlined at Annexure A.’<sup>11</sup>

[22] The ANMF clarifies that the wage increases sought in its application (and summarised at paragraphs [10] and [11] of Background Document 1) was dated 17 May 2021 and submits that there have been 2 developments since the application was made:

1. The ANMF application includes a proposal to insert a new Aged Care Employees Schedule into the Nurses Award which reflected the structure of clause 14 of the *Nurses Award 2010*. The *Nurses Award 2020* came into operation on 9 September 2021. Clause 15 of the *Nurses Award 2020* differs from clause 14 in the 2010 award in two significant respects: it contains a minimum hourly rate for each classification and minimum entry rates for employees with a 4-year degree or a Masters degree.<sup>12</sup>
2. The minimum wages in the Nurses Award and the Aged Care Award have increased as a result of the *Annual Wage Review 2020-21* and the *Annual Wage Review 2021-22*.<sup>13</sup>

[23] Annexure 2 of the ANMF’s closing submissions reflects the decisions in the *Annual Wage Review 2021-21* and *Annual Wage Review 2021-22* and in relation to the *Nurses Award 2020* includes a minimum hourly rate for each classification and minimum entry rate for employees with a 4-year degree or a Masters degree.<sup>14</sup>

[24] Paragraph [15] of Background Document 1 refers to the ANMF’s proposal to create a separate classification structure for AINs and PCWs in the Aged Care Award. The ANMF submits that the PCW Classification Variation does not involve any variation to modern award

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<sup>11</sup> HSU closing submissions dated 22 July 2022 [26].

<sup>12</sup> ANMF closing submissions dated 22 July 2022 [44].

<sup>13</sup> Ibid [42], [45] citing [2021] FWCFB 3500; PR729289; PR729273; [2022] FWCFB 3500; PR740715; PR740693.

<sup>14</sup> Ibid [46].

minimum wages and as a result work value considerations and the minimum wages objective are irrelevant considerations.<sup>15</sup>

[25] The ANMF refers to s.157(1) that provides that the Commission may make a determination varying a modern award otherwise than one varying minimum wages if the Commission is satisfied that making the determination is necessary to achieve the modern awards objective. The ANMF submits that all the modern awards objective considerations are ‘either irrelevant and hence neutral (i.e., sections 134(1)(f), (h)) or support the ANMF’s proposed variation.’<sup>16</sup> The ANMF divides these considerations into 2 categories: considerations that are immediately furthered by the variation and considerations that would be advanced in the future.<sup>17</sup>

[26] The ANMF submits that s.134(g) is ‘immediately furthered’ by its proposed variation because the Aged Care Award will be easier to understand if different work is treated differently whereas ss.134(d) and (da) would be ‘advanced in the future’ as dealing with PCWs differently would enable changes to address hours worked by PCWs, but not for example gardening superintendents, to be made more easily.<sup>18</sup> Similarly, the ANMF submits that dealing with PCWs separately encourages the insertion of terms into the Aged Care Award (s.134(1)(d)) or collective agreements (s.134(1)(b)) that address issues specific to PCWs and concludes:

‘It is appropriate for PCWs to have their own classification structure in light of the qualitative differences between their work and the work performed by other aged-care workers under the Aged Care Award. On the other hand, the commonality of work as between PCWs under the Aged Care Award and Nursing Assistants under the Nurses Award suggests the need for a separate PCW classification structure.’<sup>19</sup>

[27] In relation to the hearing of the 81 Union lay witnesses by Commissioner O’Neill and the preparation of a report for the Full Bench in respect of this evidence, the ANMF submits that for completeness reference should be made to the President’s Direction issued on 29 April 2022 formalising this position. The ANMF further suggests that given some witnesses were added and others did not ultimately give evidence, the Commission may wish to consider whether a further direction is required.<sup>20</sup>

[28] The Joint Employers propose the following revision to paragraph [28] of Background Document 1:

‘Further, the Joint Employers submit that the concept of properly set rates should not be divided from work value assessment. The Joint Employers submit any increase to minimum rates in the Aged Care Award, Nurses Award and SCHADS Award should be preceded by a consideration of the C10 framework and work value principles. The Joint Employers do not support an arbitrary increase of 25%.’<sup>21</sup>

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<sup>15</sup> Ibid [48].

<sup>16</sup> Ibid [49].

<sup>17</sup> Ibid [49].

<sup>18</sup> Ibid [50].

<sup>19</sup> Ibid [51].

<sup>20</sup> Ibid [55].

<sup>21</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.2].

### 3.2 Legislative Framework

[29] Section 157(2) of the FW Act provides that the Commission may vary modern award minimum wages if it is satisfied that the variation is ‘justified by work value reasons’. Section 135(1) is expressed in similar terms.

[30] Section 157(2A) of the FW Act defines ‘work value reasons’ as:

(2A) *Work value reasons* are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) the nature of the work;
- (b) the level of skill or responsibility involved in doing the work;
- (c) the conditions under which the work is done.

[31] The ANMF submits that s.157(2A) ‘exhaustively defined work value reasons as being reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to: (a) the nature of the work; (b) the level of skill or responsibility involved in doing the work; and (c) the conditions under which the work is done.’<sup>22</sup>

**Question 2 of BDI:** *What do you say in response to the ANMF submission?*

[32] The HSU submits it is ‘not clear’ that s.157(2A) is intended to confine the types of reasons the Commission may consider justify the amount employees should be paid for performing particular kinds of work. They note that the language of the provision contemplates those reasons will relate to the nature of the work, the skills or responsibility involved or the conditions under which the work is done but submit:

‘the use of the word ‘being’, in context, is better understood as intended to provide an indication of the type of matters which are likely to be relevant to an assessment of work value, rather than as limiting the matters which the Commission might consider justify the amount employees should be paid for doing particular kinds of work.’<sup>23</sup>

[33] The HSU maintains that this approach is consistent with historical approaches to the assessment of work value ‘which have emphasised the breadth of the considerations capable of being relevant’ and relies on *Re Crown Employees (Scientific Officers) Award* (1962) 61 AR (NSW) 250 to support this assertion.<sup>24</sup>

[34] The HSU further submits that, in any event, if work value reasons are confined to the matters in s.157(2A) the type of matters which are capable of constituting work value reasons are ‘obviously very broad’ and argues:

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<sup>22</sup> ANMF submissions dated 29 October 2021 [23].

<sup>23</sup> HSU closing submissions dated 22 July 2022 [34].

<sup>24</sup> Ibid [35].

‘Work value reasons’ do not need to directly concern the nature of the work, the skills or responsibility involved or the conditions under which the work is done, but need only ‘relate to’ one of those matters. The phrase ‘relate to’ is of broad import and generally denotes a connection or relationship, direct or indirect, between one subject matter and another although the degree of connection required will depend upon the statutory context.’<sup>25</sup> [footnotes omitted]

[35] The HSU submits that the FW Act ‘plainly intends to confer a very broad and generally unconstrained discretion upon the Commission to make and vary modern awards and to set modern award minimum wages’ and that it would be inconsistent with the statutory context for the degree of connection required between reasons advanced seeking to justify rates of pay in modern awards and the matters listed in section 157(2A) to be narrowly construed. The HSU maintains that ‘any matter which has a relationship, direct or indirect, with the nature of the work, the skills or responsibility involved or the conditions under which the work is done is capable of being a matter which justifies the amount to be paid to employees undertaking work as being ‘work value reasons’.’<sup>26</sup>

[36] The HSU submits that the answer to question 2 is:

‘Section 157(2A) does not confine the matters capable of being considered by the Commission other than that they justify the amount employees are to be paid for doing a particular kind of work. In any event, any matter which has a relationship, direct or indirect, with the nature of the work, the skills or responsibility involved or the conditions under which the work is done is capable of being a matter which justifies the amount to be paid to employees undertaking work as being ‘work value reasons.’’<sup>27</sup>

[37] In response to the ANMF’s submission, the Joint Employers submit the following:

- (a) ‘The definition of “*work value reasons*” in s. 157(2A), requires only that the reasons justifying the amount to be paid for a particular kind of work be “*related to any of the following*”, namely, “*the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done*”.
- (b) The expression “*related to*” is one of broad import that requires a sufficient connection or association between two subject matters. The degree of the connection required is a matter for judgment depending on the facts of the case, but the connection must be relevant and not remote or accidental.
- (c) The subject matters between which there must be a sufficient connection are, on the one hand, the reasons for the pay rate and, on the other hand, any of the three matters identified in s 157(2A).
- (d) The criteria are plainly exhaustive in the sense that if the matter is not related to one of the three prescribed criterion it is not relevant to the assessment of work value reasons.’<sup>28</sup> [footnotes omitted]

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<sup>25</sup> Ibid [36].

<sup>26</sup> Ibid [37] (footnotes omitted).

<sup>27</sup> Ibid p.24.

<sup>28</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.5].

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

1. The “nature of the work” includes the nature of the job and task requirements imposed on workers, the social context of the work and the status of the work.
2. Assessing “skills and responsibilities” involved in the work includes:
  - (i) Consideration of initial and ongoing required qualifications, professional development and accreditation obligations, surrounding legislative requirements and the complexity of techniques required of workers;
  - (ii) The level of skill required, including with reference to the complexity of the work and mental and physical tasks required to be undertaken; and
  - (iii) The amount of responsibility placed on the employees to undertake tasks;
3. The “conditions under which work is performed” refers to “the environment in which work is done.”<sup>29</sup>

**Question 3 of BDI:** *What is meant by ‘the social context of the work and the status of the work’ and how are these matters relevant to the assessment of work value?*

[39] The HSU submits that the reference to ‘the social context of the status of the work’ is ‘intended to convey that the social utility or worth of particular kinds of work has been considered to be relevant to the assessment of work value.’<sup>30</sup>

[40] The HSU submits that the social utility or worth of particular kinds of work has previously been considered relevant to the assessment of work value. It clarifies that the ‘status of the work’ is not intended to refer to the prestige, attractiveness or perceived social status of particular kinds of work rather that the Commission should ensure that the assessment of work value should not be affected by the ‘perceived prestige of particular types of work where such matters are likely to be affected by gendered and other historical bases of undervaluation.’<sup>31</sup>

[41] The HSU maintains that a consideration of the social utility or worth of work has been considered in previous work value cases and refers to comments by Bauer J in *Re Crown Employees (Scientific Officers, etc – Departments of Agriculture, Mines etc) Award* that the scientific officers concerned make ‘a substantial contribution to the common good, in ways which are often hidden from the public view and therefore unapplauded by the public at large.’<sup>32</sup>

[42] The HSU argues that considerations of the social utility or worth of work are relevant to the ‘objective value of the work in itself’ and also function as ‘an important consideration to

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<sup>29</sup> HSU submissions dated 1 April 2021 [38].

<sup>30</sup> HSU closing submissions dated 22 July 2022 [42].

<sup>31</sup> Ibid [41].

<sup>32</sup> Ibid citing *Re Crown Employees (Scientific Officers, etc – Departments of Agriculture, Mines etc) Award* [1981] AR (NSW) 1091 at 110.

guard against the conception that those performing socially useful work can be expected ‘partially to live off their dedication’.<sup>33</sup>

**[43] Question 4 of BDI:** *What do you say in response to the HSU submission?*

**[44]** The ANMF agrees with the summary of the HSU submission at [58] of Background Document 1 and refers to and repeats paragraphs [23] – [42] of its submissions dated 29 October 2021 and paragraphs [22] – [46] of its reply submissions dated 21 April 2022.<sup>34</sup>

**[45]** The ANMF submits that ‘reasons related to...the nature of the work’ which are relevant to the assessment of work value under s.157(2A)(a) including the following:

- (1) the findings of the Royal Commission into Aged Care Quality and Safety;
- (2) the vulnerability of the people who receive aged care services;
- (3) that the work involves human beings not objects;
- (4) that Commonwealth funding is 100 per cent (plus or minus a few percentage points) of labour costs, except in Government-operated facilities where it is around 66 per cent (plus or minus a few percentage points);
- (5) that aged care services are for the benefit of the community broadly;
- (6) that the industry is female-dominated;
- (7) that the work is performed in a setting that involves a complex combination of providing residential accommodation, the provision of health and nursing care, the provision of social and emotional support, as well as palliative care to the aged and infirm.<sup>35</sup>

**[46]** The ANMF submits that the reasons outlined at [45] above support the wage increases sought.<sup>36</sup>

**[47]** The Joint Employers submit that they ‘struggle with the terms “social context of the work”’ however will ‘address this further’ following the HSU’s response to question 3 in Background Document 1 and say:

‘these are matters which *may* be considered in assessing whether the nature of the work has changed. However, they should not be seen as a substitute for the words in the statute which should be afforded their plain and ordinary meaning.’<sup>37</sup>

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<sup>33</sup> Ibid citing *Re Crown Employees (Teachers – Department of Education) Award* [1970] 70 AR (NSW) 345 at 521.

<sup>34</sup> ANMF closing submissions dated 22 July 2022 [56].

<sup>35</sup> Ibid [57].

<sup>36</sup> Ibid.

<sup>37</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.9].

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

### 3.3 The Pharmacy Decision

[48] Paragraphs [63] – [68] of Background Document 1 set out the main propositions from the *Pharmacy Decision*.

**Question 5 of BDI:** Are any of the propositions from the *Pharmacy Decision* contested?

[49] The ANMF does not contest any of the propositions from the *Pharmacy Decision*.<sup>38</sup>

[50] The HSU generally accepts the propositions from the *Pharmacy Decision* at [163]-[169], subject to two observations.<sup>39</sup>

[51] Firstly, referring to the Full Bench’s comments at [168] of the *Pharmacy Decision* that it was ‘likely that the Commission would usually take into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way’, the HSU submits that this proposition may be accepted provided that a past ‘proper’ assessment was one which, according to the current assessment of the Commission, ‘correctly valued the work.’<sup>40</sup> The HSU further submits:

‘It goes without saying that it would not include a past assessment which was not free of gender-based undervaluation or other improper considerations.’<sup>41</sup>

[52] The HSU further submits that even where wages in a modern award have previously been the subject of an assessment, it cannot be assumed that the rates were consistent with the modern awards objective at the time the award was first made:

‘The proposition at [168] does not relieve the Commission of the task of ensuring that any work value reasons relating to the work of employees are properly reflected in modern award minimum rates. At most, the Commission might give little weight to a particular consideration relied on to justify an increase on work value grounds where that matter had been considered in an earlier assessment and the Commission is satisfied an earlier increase properly compensated employees with respect to that matter.’<sup>42</sup>

[53] Secondly, in relation to the comments of the Pharmacy Full Bench that the considerations in [190] of the *ACT Child Care Decision* may be of relevance, as may considerations in other authoritative past work value cases, the HSU submits that while past decisions under earlier statutory regimes can provide assistance, ‘some caution’ must be applied in adopting such an approach:

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<sup>38</sup> ANMF closing submissions dated 22 July 2022 [59].

<sup>39</sup> HSU closing submissions dated 22 July 2022 [44].

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid [45].

‘Whilst it is accepted that decisions under earlier statutory regimes provide some assistance, it is necessary to carefully consider the continued relevance of particular aspects of those approaches in light of the current Act. In particular, a number of the principles adopted under earlier statutory regimes were, expressly or impliedly, connected with the requirements then imposed for changes in work value to be demonstrated from a fixed datum point and that a ‘significant addition to work requirements’ be demonstrated.’<sup>43</sup>

[54] The Joint employers accept the propositions set out in the *Pharmacy Decision* and submit:

‘In the context of an application to vary minimum award rates based on work value reasons, the position of the employer interests is that the Commission must consider the propositions in the *Pharmacy Decision* and *Independent Education Union of Australia* [2021] FWCFB 2051 (**Teachers Case**).’<sup>44</sup>

### 3.4 The ACT Child Care Decision

[55] The ACT *Child Care Decision* sets out a number of considerations relevant to the assessment of whether or not changes constitute a “significant net addition to work requirements.”<sup>45</sup>

[56] The ANMF contends that these considerations fall into 2 categories:

1. Statements of matters which *are* likely to constitute or evidence a change in work value; and
2. Statements of matters which *are not*, by themselves, likely to constitute or evidence such a change.

[57] The ANMF submits that:

‘the FWC may safely rely upon and apply category (1) matters, so far as they are relevant (though they are not exhaustive). But, reliance upon or application of category (2) matters would tend to lead into error. At the time that the Full Bench set out those principles, it was still necessary to show a, “significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.”<sup>60</sup> Now, it is not necessary so to demonstrate.

Because it is not necessary so to demonstrate, principles stated in terms of whether a particular change in work, “in itself constitute[s] a significant net addition to work requirements” (e.g., principle (f) from the ACT Child Care Decision quoted above), are addressed to the wrong question.

And even those principles that do not expressly call up the “significant net addition” test will tend to lead into error. The only question that the FWC now needs to consider is whether reasons

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<sup>43</sup> Ibid [46].

<sup>44</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.11].

<sup>45</sup> [2005] AIRC 28 [190].



related to any of the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done, justify payment of a particular amount.’<sup>46</sup>

**Question 6 of BDI:** *What do you say in response to the ANMF submission? In particular, do parties agree that the Commission may vary modern award minimum wages under s.157(2) (and subject to s.157(2)(b)) if it is satisfied, for reasons that relate to any of the nature of the employees’ work, the level of skill or responsibility involved in doing the work or the conditions under which the work is done, that a variation to the amount that the employees should be paid is justified?*

**[58]** The HSU agrees with the ANMF’s submission and says that the Commission may vary modern award minimum wages under s.157(2) (and subject to s.157(2)(b)) ‘if it is satisfied, for reasons that relate to any of the nature of the employees’ work, the level of skill or responsibility involved in doing the work or the conditions under which the work is done, that a variation to the amount that the employees should be paid is justified.’<sup>47</sup>

**[59]** The HSU submits that the current statutory regime ‘expressly departs from the requirement to establish change from any datum point at all’ and that s.157(2) simply requires that the Commission be satisfied that a variation to modern awards is justified by work value reasons and that the variation outside of an annual wage review is necessary to achieve the modern awards objective.<sup>48</sup> The HSU maintains that whilst the Commission may have regard to considerations in previous work value cases under earlier statutory regimes, the Commission has a ‘broad and relatively unconstrained judgment as to what may constitute work value reasons justifying an adjustment to minimum rates of pay.’<sup>49</sup>

**[60]** The HSU submits that the ‘overriding requirement’ in ss.134(1) and 157(2)(b) to ensure that modern awards provide a fair and relevant safety net means the Commission’s discretion ‘permits, and indeed requires’ a consideration of the following matters:

- a. any contention that, for historical reasons and/or on the application of an indicia approach, undervaluation has occurred because of gender inequity;
- b. the extent to which historical approaches to wage fixation have failed to appropriately recognise and remunerate occupations perceived to involve ‘caring’ or ‘nurturing’ skills such as aged care and home care; and
- c. whether enterprise bargaining is capable of providing an effective option for addressing low remuneration and poor rates of pay and working conditions in aged care.’<sup>50</sup> [footnotes omitted]

**[61]** In response to the ANMF’s submission, the Joint Employers accept that the considerations at [190] of the *ACT Child Care Decision* may be relevant to the evaluative task

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<sup>46</sup> ANMF submissions dated 29 October 2021 [34]–[36].

<sup>47</sup> HSU closing submissions dated 22 July 2022 p.34.

<sup>48</sup> Ibid [50]–[51].

<sup>49</sup> Ibid [51].

<sup>50</sup> Ibid [52].

under s 157(2)(a), particularly with respect to statements concerning changes that are unlikely to constitute a work value change (for example, “*progressive or evolutionary change is insufficient*”). The Joint Employers refer to section 7 of their closing submissions as to the approach to be taken by the Commission.<sup>51</sup>

[62] The Joint Employers further submit:

‘the ANMF contention is somewhat unclear. If by their contention they are saying that once any work value reason has been established the claim must be granted then this would be contrary to the statutory scheme in place.’<sup>52</sup>

### 3.5 The Re-enactment Presumption

[63] The re-enactment presumption is a principle of statutory interpretation.<sup>53</sup> The High Court has stated:

‘There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already “judicially attributed to [them]” ... although the validity of that proposition has been questioned ... But the presumption is considerably strengthened in the present case by the legislative history of the [Industrial Relations] Act [1988 (Cth)].’<sup>54</sup>

[64] More recently, the High Court has observed:

‘Where Parliament repeats words which have been judicially construed, it can be taken to have intended the words to bear the meaning already judicially attributed to them. The so-called “re-enactment presumption” has a long history, though its application has become more discerning as “parliamentary processes [have become] more exposed to examination by the courts”. Applied to a consolidating statute enacted in a legislative context in which periodical consolidation is practised, for example, the presumption can be “quite artificial”. In specialised and politically sensitive fields, where legislation is often amended and judicial decisions carefully scrutinised by those responsible for amendments, in contrast the presumption can have “real force”. In such areas, it is “no fiction” to attribute to the designated Minister and Department and, through them, Parliament, knowledge of court decisions dealing with their portfolio. Even outside specialised and politically sensitive fields, the presumption may be applicable because the legislative history shows an awareness by Parliament of a particular judicial interpretation. That awareness may be indicated by a specific legislative response that “followed upon an expert review of the law and presumably the case law” including reports of law reform commissions and subject-specific advisory committees. Temporal proximity between a decision and an enactment may also be relevant. Express reference to a particular judicial decision in the parliamentary debates at the time of enactment may assist, although the presumption can apply despite the absence of explicit parliamentary reference to the decision in question.’<sup>55</sup> [References omitted]

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<sup>51</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.13].

<sup>52</sup> Ibid [3.14].

<sup>53</sup> Director of Public Prosecutions Reference No 1 of 2019 [2021] HCA 26 [17] (per Kiefel CJ, Keane and Gleeson JJ).

<sup>54</sup> Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees (1994) 181 CLR 96 at p.106, per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. See also Electrolux Home Products P/L v Australian Workers’ Union (2004) 221 CLR 309 at pp.346-347 (per McHugh J) and Brisbane City Council v Amos (2019) 266 CLR 593 [45] (per Gageler J).

<sup>55</sup> Director of Public Prosecutions Reference No 1 of 2019 [2021] HCA 26 [51] (per Gageler, Gordon and Steward JJ).

**Question 7 of BDI:** *What is the relevance of the re-enactment presumption to the construction of ss.157(2) and (2A)?*

[65] The HSU submits that the re-enactment presumption has ‘limited relevance’ to the interpretation of ss.157(2)(a) and 157(2A) and says that the ‘mere re-enactment of the words in circumstances not involving any reconsideration of their meaning will not support the application of the presumption.’<sup>56</sup>

[66] The HSU emphasises that the current form of ss.157(2)(a) and 157(2A) is a result of consequential amendments following the repeal of the 4 yearly review and states:

‘Where the language of a provision is re-enacted merely by way of a consequential amendment following the reorganisation of the statute, it is unlikely that Parliament was concerned with the substance of the provisions or the meaning which had been attributed to section 156(3) and (4). In those circumstances, there is little room for the application of the re-enactment presumption.’<sup>57</sup>

[67] The ANMF submits that the re-enactment presumption is relevant to the construction of ss.157(2)-(2A) in two respects.<sup>58</sup>

[68] Firstly, the ANMF refers to paragraphs [59], [60] and [68] of Background Document 1 and submits that the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* by repealing s.156(4) and re-enacting the same words in s.157(2A) it can be ‘presumed that Parliament intended the words to bear the meaning already attributed to them in the *Pharmacy Decision*.’<sup>59</sup>

[69] Secondly, the ANMF refers to paragraph [69] of Background Document 1 and submits that it can be presumed that Parliament intended:

- ‘(1) the fundamental criteria re-enacted in section 157(2A) to bear the meaning already attributed to them in previous work value cases; and
- (2) that the additional requirements contained in earlier wage fixing principles no longer apply.’<sup>60</sup>

[70] The Joint Employers submit that the re-enactment presumption is relevant to the construction of ss.157(2) and (2A) and note that the predecessor to ss.157(2) and (2A) in the FW Act is ss.156(3) and (4). The Joint Employers submit that ‘the terms are nearly identical and therefore ss157(2) and (2A) is intended to have the same judicially attributed meaning.’<sup>61</sup>

[71] The Joint Employers rely on the following statement from the *Teachers Decision*:

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<sup>56</sup> HSU closing submissions dated 22 July 2022 [54].

<sup>57</sup> Ibid [56].

<sup>58</sup> ANMF closing submissions dated 22 July 2022 [60].

<sup>59</sup> ANMF closing submissions dated 22 July 2022 [61].

<sup>60</sup> Ibid [62].

<sup>61</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.16].

‘In the 2018 Full Bench decision in 4 yearly review of modern awards - Pharmacy Industry Award 2010, (Pharmacy Award decision) the construction of the requirement in s 156(3) of the FW Act that a variation to modern award minimum wages in the 4 yearly review of modern awards be “justified by work value reasons”, and the definition of the expression “work value reasons” in s 156(4), was considered at length in the context of the genesis and development of the concept of the fixation of wages based on work value in the history of industrial arbitration in Australia. Section 156 has since been repealed, but we consider that the conclusion stated in the Pharmacy Award decision are applicable to subsections 157(2) and (2A) because those provisions are in terms relevantly identical to subsections 156(3) and (4).’<sup>62</sup> [Joint Employer’s emphasis]

**Question 8 of BDI:** *As noted in the Pharmacy Decision, while not part of the Commission’s statutory task [now under ss.157(2) and (2A)], it is likely the Commission would usually take into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way.*

*It appears to be common ground between the HSU, ANMF and ABI that the minimum rates of pay in the Aged Care Award, the Nurses Award and the SCHADS Award have not previously been properly set.<sup>63</sup> In these circumstances, do parties agree that the Commission’s statutory task under ss.157(2) and (2A) is to fix the amount that employees should be paid for doing a particular kind of work based on the value of the work as it is currently being done, and that to undertake that task it is not necessary to measure changes in work value from a fixed datum point or to identify any ‘significant net addition’ to work requirements?*

[72] The ANMF and the HSU agree that, in the case of the present applications, the Commission’s statutory task under ss.157(2) and 157(2A) is to fix the minimum rates an employee should be paid for doing particular work ‘based on the value of the work as it is currently being done’ and that to undertake this task ‘it is not necessary’ to identify a change in work value from a fixed datum point or to identify a ‘significant net addition’ to work requirements.<sup>64</sup>

[73] The HSU further submits that it is not arguing for a ‘radical departure’ from the propositions advanced in the Pharmacy Decision, rather those propositions ‘should be refined and need to be correctly understood.’<sup>65</sup> The HSU says that, in any event, given the minimum rates of pay in the Aged Care Award and SCHADS Award have not been properly fixed, the application of the principles associated with a fixed datum point or a significant net addition do not arise in this case.<sup>66</sup>

[74] The Joint Employers accept that it is not necessary to measure changes in work value from a fixed datum point given the decision in the *Pharmacy Case*. However, in relation to

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<sup>62</sup> Ibid [3.17] citing [2021] FWCFB 2051.

<sup>63</sup> Transcript, 26 April 2022, PN377.

<sup>64</sup> HSU closing submissions dated 22 July 2022 [57]; ANMF closing submissions dated 22 July 2022 [63].

<sup>65</sup> HSU closing submissions dated 22 July 2022 [57].

<sup>66</sup> Ibid.

whether the Commission needs to identify any “*significant net addition*”, the Joint Employers submit that the Commission should also be guided by the *Teachers Case*.<sup>67</sup>

### 3.6 The Modern Awards Objective

[75] The modern awards objective is very broadly expressed.<sup>68</sup> 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).<sup>69</sup>

[76] 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.’<sup>70</sup>

#### **Question 9 of BDI:** *What do you say in response to the HSU submission?*

[77] 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.’<sup>71</sup>

[78] 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’<sup>72</sup> and submits that these concepts ‘are not any narrower in the context of minimum wages.’<sup>73</sup>

[79] The ANMF refers to and repeats [46] of its submissions dated 29 October 2021 and [838] of its closing submissions.<sup>74</sup>

[80] 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

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<sup>67</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.19].

<sup>68</sup> *Shop, Distributive and Allied Employees Association v National Retail Association* (No 2) (2012) 205 FCR 227 [35].

<sup>69</sup> 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].

<sup>70</sup> HSU submission in reply dated 21 April 2022 [65].

<sup>71</sup> ANMF closing submissions dated 22 July 2022 [64].

<sup>72</sup> *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) FCR 368 [65].

<sup>73</sup> ANMF closing submissions dated 22 July 2022 [65].

<sup>74</sup> *Ibid* [66].

rates”’. The Joint Employers argue that the Commission ‘should act cautiously if considering departing from the approach in the Penalty Rates Review.’<sup>75</sup>

**[81]** 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.’<sup>76</sup>

**[82]** 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 (6<sup>th</sup> 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)<sup>77</sup>

**[83]** 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.’<sup>78</sup>

**[84]** Paragraphs [89] to [107] of Background Document 1 set out some observations in relation to the modern awards objective.

**Question 10 of BD1** *Are any of the observations about the modern awards objective (at [89] to [107] above) contested?*

**[85]** The HSU, the ANMF and the Joint Employers do not contest the propositions set out at [89] to [107] in Background Document 1.<sup>79</sup>

**Question 11 of BD1** *Is it common ground that the consideration in s.134(1)(da) is not relevant in the context of the Applications?*

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<sup>75</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.21].

<sup>76</sup> Ibid [3.22] citing [2015] FWCFB 8200 [272].

<sup>77</sup> Ibid [3.23] citing [2017] FWCFB 1001 [120].

<sup>78</sup> Ibid [3.24].

<sup>79</sup> HSU closing submissions dated 22 July 2022 [62]; ANMF closing submissions dated 22 July 2022 [67]; ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.25].

[86] The HSU accepts that the consideration in s.134(1)(da) is not relevant in the context of the Applications.<sup>80</sup>

[87] The ANMF submits that the consideration in s.134(1)(da) is relevant to the PCW Classification Variation<sup>81</sup> and 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.<sup>82</sup>

[88] The Joint Employers submit that this issue is of ‘minimal relevance’ to the Commission and note that the Award employees are paid “*additional remuneration*” for working in the specified circumstances of s.134(1)(da). The Joint Employers emphasise:

- ‘(a) The claims are not seeking to include additional remuneration for the circumstances set out in s.134(1)(da); and
- (b) No employee gave evidence to support the proposition that there was a need for further additional remuneration for working in the specified circumstances outside of the provisions of the Awards.’<sup>83</sup>

### 3.7 The Minimum Wages Objective

[89] Paragraphs [109] to [113] of Background Document 1 set out some observations about the minimum wages objective.

***Question 12 of BDI:*** *Are any of the observations about the minimum wages objective (at [109] to [113]) contested?*

[90] The ANMF and the Joint Employers do not contest any of the observations about the minimum wages objective at [109] to [113] of Background Document 1.<sup>84</sup>

[91] The HSU submits that there is ‘significant overlap’ between the minimum wages objective and the modern awards objective as both involve an ‘evaluative exercise’ that is informed by the considerations in ss.134(1) and 284(1). The HSU further submits that it ‘does not have particular observations to add in relation to the minimum wages objective.’<sup>85</sup>

***Question 13 of BDI:*** *Are any of the considerations in s.284(1) not relevant in the context of the Applications?*

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<sup>80</sup> HSU closing submissions dated 22 July 2022 [62].

<sup>81</sup> ANMF closing submissions dated 22 July 2022 [68].

<sup>82</sup> Ibid [50].

<sup>83</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.26].

<sup>84</sup> ANMF closing submissions dated 22 July 2022 [69]; ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.27].

<sup>85</sup> HSU closing submissions dated 22 July 2022 [64].

[92] The HSU and the Joint Employers submit that the consideration in s.284(1)(e) ‘does not appear to be relevant’ in the context of the Applications.<sup>86</sup> The ANMF submits that the consideration in s.284(1)(e) is not relevant in the context of the Applications.<sup>87</sup>

### 3.8 Main Contentions

[93] Paragraph [116] of Background Document 1 set out the following 16 propositions that appeared to be uncontentious:

1. The workload of nurses and personal care employees in aged care has increased, as has the intensity and complexity of the work.
2. The acuity of residents and clients in aged care has increased. People are living longer and entering aged care later as they are choosing to stay at home for longer and receive in-home care. Residents and clients enter aged care with increased frailty, comorbidities and acute care needs.
3. There is an increase in the number and complexity of medications prescribed and administered.
4. The proportion of residents and clients in aged care with dementia and dementia associated conditions has increased.
5. Home care is increasing as a proportion of aged care services.
6. Since 2003, there has been a decrease in the number of Registered Nurses (RN) and Enrolled Nurses (EN) as a proportion of the total aged care workforce. Conversely, there has been an increase in the proportion of Personal Care Workers (PCW) and Assistants in Nursing (AIN).
7. Registered Nurses have increased duties and expectations, including more administrative responsibility and managerial duties.
8. PCWs and AINs operate with less direct supervision. PCWs and AINs perform increasingly complex work with greater expectations.
9. There has been an increase in regulatory and administrative oversight of the Aged Care Industry.
10. More residents and clients in aged care require palliative care.
11. Employers in the aged care industry increasingly require that PCWs and AINs hold Certificate III or IV qualifications.

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<sup>86</sup> HSU closing submissions dated 22 July 2022 [64]; ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.28].

<sup>87</sup> ANMF closing submissions dated 22 July 2022 [70].



12. The philosophy or model of aged care has shifted to one that is person-centred and based on choice and control, requiring a focus on the individual needs and preferences of each resident or client. This shift has generated a need for additional resources and greater flexibility in staff rostering and requires employees to be responsive and adaptive.
13. Aged care employees have greater engagement with family and next of kin of clients and residents.
14. There is an increased emphasis on diet and nutrition for aged care residents.
15. There is expanded use and implementation of technology in the delivery and administration of care.
16. Aged care employees are required to meet the cultural, social and linguistic needs of diverse communities including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and members of the LGBTQIA+ community.

***Question 14 of BD1: do the parties agree that the propositions (set out at [116] of Background Document 1) are uncontentious?***

**[94]** The ANMF and the Joint Employers agree that the propositions set out at [116] of Background Document 1 are uncontentious.<sup>88</sup>

**[95]** The HSU accepts that the propositions set out at [116] of Background Document 1 are uncontentious and submits that the following 2 further propositions also appear to be uncontentious:

1. Clustered domestic and household models of care are growing in prevalence in the industry and require greater numbers of staff with a broad range of skills and responsibilities.
2. Home care workers work with minimal supervision, and the increase in acuity and dependency of recipients of aged care services means that these workers are exercising more independent decision-making, problem solving and judgment on a broader range of matters.<sup>89</sup>

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

***Question 15 of BD1 posed the following question for the Joint Employers: There does not appear to be a classification called 'Head Chef' or 'Head Cook' in the Aged Care Award. The Joint Employers are asked to clarify which of the classifications in the award they are referring to?***

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<sup>88</sup> ANMF closing submissions dated 22 July 2022 [71]; ACSA, LASA and ABI closing submissions dated 22 July 2022 [3.32].

<sup>89</sup> HSU closing submissions dated 22 July 2022 [81].

[96] The Joint Employers submit that the reference to “*Head Chef*” or “*Head Cook*” was a reference to an employee who is generally responsible for the main kitchen and note that ‘[d]ifficulty arises with assigning this title to a classification as it will be dependent on the facility, with many facilities not engaging trade qualified chefs/cooks to perform the role. It will also depend on the level of supervision of staff and their budgetary responsibilities.’<sup>90</sup>

[97] The Joint Employers argue that a person who is performing the Head Chef or Head Cook role ‘will most likely be classified as an Aged Care Employee Level 4 or Aged Care Employee Level 5.’<sup>91</sup>

[98] The Joint Employers note that in witness statements, at least two witnesses described their title as “*Head Chef*” but submit that during cross-examination ‘it became apparent the descriptor “*Head Chef*” is sometimes given to employees classified as “*Chef*” or a “*Cook*” (it simply denotes they have the most seniority in the kitchen in that context).’<sup>92</sup>

[99] Paragraphs [117] to [128] of Background Document 1 set out points of disagreement between the Joint Employers and the Unions on the extent of changes to work in the aged care sector.

***Question 16 of BD1:*** *Do the matters set out at [117] – [128] encapsulate the issues in contention, insofar as the work value claim is concerned?*

[100] The HSU accepts that the matters set out at [117] to [128] of Background Document 1 ‘appear to reflect the issues in contention’ however submit that it is not certain of the position of the Joint Employers and may need to address the question further once it considers their submissions.<sup>93</sup>

[101] The ANMF submits that it makes detailed submissions concerning the work done by ENs and NPs and the work value reasons justifying the same increase in wages for them as for other workers, in its closing submissions. The ANMF further submits that if question 16 is asking for an identification of all disputes in relation to the nature of the work performed by various kinds of workers ‘then there may be several more than those identified at [117]–[128] of Background Document 1 and suggests some of those disputes may be the following:

- divergences between the parties in relation to matters including the “*significant net addition*” / “*evolutionary change*” issue
- whether working conditions have been “*improved*”
- incremental increases

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<sup>90</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.33].

<sup>91</sup> Ibid [3.34].

<sup>92</sup> Ibid [3.35].

<sup>93</sup> HSU closing submissions dated 22 July 2022 [81].

- the role of AINs / PCWs in clinical care.<sup>94</sup>

[102] The Joint Employers accept the matters set out at [117] to [128] of Background Document 1 with the exception of the summary of the Joint Employers' position as to Food Services Employees at [123] of Background Document 1.<sup>95</sup>

[103] The Joint Employers submit that prior to having the opportunity to cross-examine aged care employees that worked as Chefs and/or "Senior Chefs", a preliminary view was formed that the changes to the role of Chef (i.e. as head of the kitchen staff) may amount to work value reasons. However, the Joint Employers note that consideration would also need to be given to the role of external services such as dietician. The Joint Employers submit that 'with the benefit of cross-examination, the position appears to less clear in one regard - a Head Chef or Cook does not appear to make the nutritional decisions on a menu. Rather this is the role of dietician or nutritionist.'<sup>96</sup>

[104] The CCIWA submits that the Unions have been unable to identify the extent to which the nature, conditions, skills and responsibilities of work across all classifications in the aged care sector have changed.<sup>97</sup>

***Question 17 of BD1:** Noting that the CCIWA did not participate in the evidentiary phase of the hearings who do the CCIWA represent in the proceedings?*

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

**Question 3 for the CCIWA:** the CCIWA is asked to respond to question 17 of BD1. If the CCIWA does not respond, the Commission may assume that the CCIWA does not represent anyone covered by any of the awards subject to these proceedings and as a result may not place weight on their submissions

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<sup>94</sup> ANMF closing submissions dated 22 July 2022 [72] and footnote 10.

<sup>95</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.36].

<sup>96</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.30] – [3.31].

<sup>97</sup> CCIWA submissions dated 4 March 2022 [31.3].

#### 4. Responses to questions posed in Background Document 2

[106] Background Document 2 sets out the history of wages and classifications in the *Aged Care Award 2010*, the *Nurses Award 2020* and the *SCHADS Award 2010*.

***Question 1 for all parties:*** *Are there any corrections or additions to Background Document 2? Is it common ground that the material set out in Background Document 2 is uncontentious?*

[107] The HSU submits that it considers the material in Background Document 2 to be uncontentious and does not wish to make any corrections or additions.<sup>98</sup>

[108] The Joint Employers submit that the material in Background Document 2 is uncontentious and suggest a minor revision at paragraph [76] where there is a reference to ‘the Joint Employers’ and ‘ABI and others’. The Joint Employers suggest that in the interest of consistency, reference to ‘ABI and others’ should be changed to ‘the Joint Employers.’<sup>99</sup>

[109] The ANMF does not propose any corrections to Background Document 2 and submits that it continues to rely on the history of the Nurses Award set out in the statement of Kristen Wischer dated 14 September 2021.<sup>100</sup>

[110] The ANMF notes that while it is uncontentious that the submissions in Background Document 2 have been made by the parties to which they are attributed, the subject matter of many of those submissions is contentious.<sup>101</sup> A range of examples of this are set out at paragraphs [76] to [87] of their submissions.

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<sup>98</sup> HSU closing submissions dated 22 July 2022 [81].

<sup>99</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [4.3].

<sup>100</sup> ANMF closing submissions dated 22 July 2022 [73].

<sup>101</sup> *Ibid* [75].

## 5: Summary of submissions

### 5.1 HSU

[111] The HSU filed closing submissions on 22 July 2022.

[112] The HSU provides a summary of the background of the matter at [1] to [24] of its submissions.

*Procedural history, legislative framework, principles and proper approach to be adopted*

[113] At [25] to [81] the HSU sets out answers to the questions raised by the Full Bench on 26 April 2022 and in Background Documents 1 and 2.

[114] The HSU refers to the procedural history at [25] to [26] of its submissions.

[115] At [2] to [78] the HSU sets out the legislative framework and makes submissions in relation to the proper approach to be adopted by the Commission. The HSU begins by referring to the statutory context of the matter. At [31] the HSU states that the cumulative effect of the relevant provisions is that the Commission must:

- ‘a. be satisfied that the variation to minimum wages prescribed in the Aged Care Award and the SCHADS Award is justified by work value reasons;
- b. be satisfied that making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective;
- c. be satisfied that the variation is necessary to meet the minimum wages objective; and
- d. take into account the rate of the national minimum wage as currently set in a national minimum wage order.’

[116] The HSU then makes submissions in relation to ‘work value reasons’ for the purpose of s.157(2A). It is to be noted that at [47] and [48] the HSU refers to the considerations referred to in the *ACT Child Care Decision* at [190] and states that:

‘the suggestion that ‘progressive or evolutionary change’ is insufficient arose from the requirement to demonstrate sufficient change in work value and for such a change to pass the threshold of constituting a ‘significant net addition to work requirements’. As those are no longer part of the requirements imposed by section 157(2A), there is no reason in principle why reasons related to the nature of work or the skills and responsibilities involved which might in the past have been categorised as evolutionary should not be now considered ‘work value reasons’. The Commission simply needs to be satisfied that the reasons justify the amount employees should be paid for doing the particular kind of work.’

[117] The HSU contends that the question that the Commission is required to consider by section 157(2)(a) and (2A) is whether reasons related to the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done, justify payment of a particular amount.<sup>102</sup> The HSU submits that no further restriction is imposed on a proper reading of the statute.

[118] The HSU refers to the modern awards objective and minimum wages objective at [58] to [64]. In relation to the modern awards objective, the HSU submits that the considerations in s.134 do not necessarily exhaust the matters which the Commission might properly consider relevant to that standard.<sup>103</sup> It states that the s.134 considerations are not standards against which a modern award is to be evaluated but matters to be taken into account as part of the evaluative assessment of the qualities of the safety net and that is ‘necessary’ to achieve the modern awards objective requires a value judgment by the Commission taking into account the s.134 considerations.<sup>104</sup> The HSU submits that there is significant overlap between the minimum wages objective and the modern awards objective and both involve an ‘evaluative exercise’ which is informed by the considerations in sections 134(1) and 284(1).<sup>105</sup>

[119] In relation to wage fixing principles, the HSU submits that it is no longer correct to say that an increase in minimum wages will only be appropriate where an applicant can demonstrate a ‘significant net addition to work requirements’ and expressly departs from the requirement to establish change from any datum point at all. It states that, instead, the principal question remains whether or not the Awards provide a fair and relevant safety net.<sup>106</sup> It contends that ‘[w]hilst it is open to the Commission to have regard, in the exercise of its discretion, to considerations which have been taken into account in previous work value cases under differing statutory regimes, the FW Act leaves it to the Commission to exercise a broad and relatively unconstrained judgment as to what may constitute work value reasons justifying an adjustment to minimum rates of pay’.<sup>107</sup>

[120] The HSU refers to the C10 framework and award relativities from [65] to [78]. In relation to ABI’s suggestion that the Commission be primarily guided by the C10 framework and AQF alignment in properly setting minimum wages in modern awards, it states that the C10 system is not a direct fetter on the Commission’s discretion in setting minimum wages and is ‘merely one of consideration; the relevance of which in any case will depend on the nature of the work to be compared and its translatability’.<sup>108</sup>

### *The main contentions*

[121] The HSU sets out its submissions in relation to the propositions stated to be uncontentious in Background Document 1 at paragraphs [79] to [80] which we refer to below.

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<sup>102</sup> HSU closing submissions dated 22 July 2022 [49].

<sup>103</sup> HSU closing submissions dated 22 July 2022 [60].

<sup>104</sup> HSU closing submissions dated 22 July 2022 [61].

<sup>105</sup> HSU closing submissions dated 22 July 2022 [64].

<sup>106</sup> HSU closing submissions dated 22 July 2022 [66].

<sup>107</sup> HSU closing submissions dated 22 July 2022 [67].

<sup>108</sup> HSU closing submissions dated 22 July 2022 [72].

### *Work value considerations*

[122] At [82] to [87] the HSU sets out its general observations in relation to the residential aged care workforce and what it states are ‘the critical features of residential aged care work and home care work which, in addition to the fundamental skills which the work requires, justify at least the increase sought on work value grounds’.

[123] At [88] to [94] the HSU refers to the nature of care work and the skills involved in the work. Amongst other things it submits that the provision of personal care and support to aged persons ‘involves complex work involving emotional, intellectual and physical labour, frequently simultaneously, and a high degree of discretion, judgement and advanced interpersonal, communication and emphatic skills.’<sup>109</sup>

[124] At [95] to [139] the HSU makes submissions in relation to resident and consumer demographics and changes in care needs. It submits that ‘the increasing complexity of the needs of residents results in a direct increase in the complexity of the work required of direct and indirect care staff.’<sup>110</sup>

[125] The HSU submits that ‘[c]onsumers are increasingly requiring and receiving care to meet more complex needs including acute and sub-acute care, and the need for the workers who provide that care to have and exercise socio-emotional skills, in addition to clinical and care skills, is more apparent.’<sup>111</sup>

[126] The HSU contends, amongst other things, that there is an increase in the proportion of older people receiving home care and support services and that the added burden on care workers ‘who are required to provide the same care as would have been provided in an aged care home, but alone, with less resources and in a more limited time frame’ should not be ignored.<sup>112</sup>

[127] At [140] to [190] the HSU refers to changes to regulatory requirements including person centred models of care, reporting requirements and accreditation, stating that ‘[the] nature of the regulation involved has a direct impact on the skills and value of the work, in that it shapes both the nature of the service delivery tasks performed by workers and imposes new compliance-based tasks.’<sup>113</sup> It notes a ‘fundamental shift’ away from institutional-based to person-centred models of care which has ‘fundamentally and substantially increased the value of work performed by all aged care workers’<sup>114</sup> It states that the ‘changes to the regulatory framework which governs aged care have contributed to the increasing level of demand on workers across the aged care industry’ which is ‘evident across both residential aged care and home care, with the regulatory requirements all but identical, save in limited respects.’<sup>115</sup>

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<sup>109</sup> HSU closing submissions dated 22 July 2022 [88].

<sup>110</sup> HSU closing submissions dated 22 July 2022 [102].

<sup>111</sup> HSU closing submissions dated 22 July 2022 [127].

<sup>112</sup> HSU closing submissions dated 22 July 2022 [134].

<sup>113</sup> HSU closing submissions dated 22 July 2022 [140].

<sup>114</sup> HSU closing submissions dated 22 July 2022 [146].

<sup>115</sup> HSU closing submissions dated 22 July 2022 [161].

**[128]** At [191] to [216] the HSU addresses changes in qualification and training requirements and practices in residential and home care settings. It submits that the increased level of skill required of aged care workers is reflected in changes which have been made, and which are forthcoming, to the relevant qualifications required.<sup>116</sup>

**[129]** At [217] to [241] the HSU refers to changes to the composition of the aged care workforce, and ‘the diminution in the numbers of registered and enrolled nurses within the industry and the consequent increased burden that places on care as recognised in the [*Aged Care Sector Stakeholder Consensus Statement* filed on 17 December 2021]’.<sup>117</sup>

**[130]** The HSU sets out submissions in relation to changes to care work including the introduction of structured care plans, person centred care and the focus on relationships with residents and consumers at [242] to [271]. It refers to a shift in the manner in which aged care services are structured, notably via a move to Homemaker models of care, where residents live in home-like settings with significantly greater levels of flexibility and choice.<sup>118</sup> The HSU submits that this increases, in particular, the work of direct care workers assigned to these structures, who have duties that would traditionally be performed by ancillary staff absorbed into their role’.<sup>119</sup> Later it states that ‘[a]s professional nursing workers have been redirected into an additional focus on documentary requirements, the consequent increase in their workload has led to a flow-on increase in the level and complexity of care work performed by PCWs’.<sup>120</sup> It also states that [t]he introduction of a Consumer Directed Care model, whilst directed to improving the care provided to clients, and empowering clients to play an active role in tailoring the care they receive to their particular needs, inevitably imposes a great burden on care staff.<sup>121</sup>

**[131]** At [272] to [301] the HSU refers to the task of dealing with complex and difficult behaviour in aged care and the skills involved. It notes that the increase in aged care residents who have dementia and other mental health conditions increases staff exposure to behaviours of this kind.<sup>122</sup> It also states that home care workers are required to frequently manage complex and difficult behaviours and circumstances on their own, without the reassurance that is offered by operating within an institution.<sup>123</sup>

**[132]** At [302] to [353] the HSU makes submissions in relation to the challenges presented by the nature of the environment in which work is performed, including time pressures, dirty work and physically demanding work. It also refers to the emotional impact on carer’s whose role requires them to be person centred and focused on the client.<sup>124</sup>

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<sup>116</sup> HSU closing submissions dated 22 July 2022 [191].

<sup>117</sup> HSU closing submissions dated 22 July 2022 [234].

<sup>118</sup> HSU closing submissions dated 22 July 2022 [256].

<sup>119</sup> HSU closing submissions dated 22 July 2022 [258].

<sup>120</sup> HSU closing submissions dated 22 July 2022 [263].

<sup>121</sup> HSU closing submissions dated 22 July 2022 [264].

<sup>122</sup> HSU closing submissions dated 22 July 2022 [272].

<sup>123</sup> HSU closing submissions dated 22 July 2022 [286].

<sup>124</sup> HSU closing submissions dated 22 July 2022 [348].



**[133]** At [354] to [366] the HSU makes submissions in relation to resident/consumer and family/community expectations and interactions. It states that the increased regulatory standards have, in part, been driven by changing community expectations as to the appropriate minimum quality standards that can be expected to be found in aged care and flags rising expectations of families and the community about the level of care to be provided.<sup>125</sup>

**[134]** At [367] to [384] the HSU makes submissions in relation to the historical gendered nature of undervaluation and contends that conclusions reached in the expert evidence indicate that there are work value reasons for an increase to the current award rates.<sup>126</sup>

*Modern awards objective and minimum wages objective*

**[135]** The HSU submits that the variations sought are appropriate and relevant in that they will:

- ‘a. assist in the removal of a recognised obstacle to recruitment and retention of properly skilled workers within an industry that is crucial to the Australian economy and society and which is facing a skills crisis and a labour crisis;
- b. address a recognised wage gap between workers in comparable industries;
- c. via changes to the classification structure, simplify the operation of the Award and make it easier and fairer to implement;
- d. recognise, even if only in part, the inherent importance of work performed by aged care workers, and as such afford them the same dignity that they provide to older Australians in care.<sup>127</sup>

**[136]** At [390] to [431] the HSU sets out its submissions in relation to the considerations in s.134(1) and ss.284(1)(b), (c) and (d). In relation to the minimum wages objective, the HSU also states the following:

‘As to section 284(1)(a), as set out above, 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.

The setting of proper and fair rates of remuneration for employees in the aged care sector will, by rendering that sector sustainable, foster the performance and competitiveness of the national economy, contribute to productivity through the increasing participation of carers and those released from the obligations of care, and will contribute to the maintenance of a sustainable, productive and competitive national economy. Taking

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<sup>125</sup> HSU closing submissions dated 22 July 2022 [354] and [361].

<sup>126</sup> HSU closing submissions dated 22 July 2022 [372].

<sup>127</sup> HSU closing submissions dated 22 July 2022 [388].

into account those matters, the making of the variations is warranted to establish and maintain, as a safety net of fair minimum wages.’<sup>128</sup>

### *Classification changes in residential aged care*

[137] At [434] to [463] the HSU makes submissions in relation to the proposed changes to the classification structure for aged care employees set out in Schedule B to the Aged Care Award set out in the Amended Application.

## **5.2 ANMF**

[138] On 22 July 2022 the ANMF filed its closing submissions. Its submission is comprised of Sections A to I, with two annexures, as set out below:

- A. Introduction
- B. Response to Background Documents and Provisional Views
- C. Response to Provisional Views
- D. Overview of duties of various roles
- E. Evidence of relevant to work value, separated into themes
- F. The ANMF’s expert evidence
- G. Modern Award Objective and Minimum Wages Objective
- H. PCW Classification Variation
- I. Conclusion

**Annexure 1:** Hidden Skills Analysis

**Annexure 2:** Amended Schedules

[139] A brief summary of the ANMF’s closing submissions follows.

[140] Section A provides a background to ANMF’s application to vary the *Aged Care Award* and *Nurses Award*. Here the ANMF also sets out an overview of the conclusions the Commission would reach, consisting of two planks that it submits would justify a 25% increase to minimum wages for aged care workers under the *Aged Care Award* and *Nurses Award*:

1. The *first* is that the nature of aged-care work has changed over about the last twenty years, including in that the work is now more complex and stressful than previously, it involves more skill and responsibility than previously, and is performed

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<sup>128</sup> HSU closing submissions dated 22 July 2022 [432]-[433].

in conditions that are in many ways more demanding of employees than previously. These are all “*work value reasons*” within the meaning of the FW Act; yet wages have not increased in a way that accounts for these increases in work value.

2. The *second* is that, in any case, the wages of aged-care workers have historically been undervalued. The fact of aged-care workers being overwhelmingly women is at least a substantial explanation for this historical undervaluation.<sup>129</sup>

**[141]** The ANMF submits that each plank is cumulative, but that if either is established then that would found an increase in minimum award wages.

**[142]** The ANMF sets out 5 reasons that the Commission would be satisfied that the modern awards objective and minimum wages objective are met if the application is granted:

1. The current award minimum rates for all Nursing Assistants and Enrolled Nurse classifications under the Nurses Award and AIN / PCW classifications under the Aged Care Award are currently close to, or below the “*low paid*” threshold (see also the evidence in Part E.13 concerning the sufficiency of current wages).
2. Further, the current wage rates are neither fair nor relevant, including because 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 (see Part G.1 and G.2 below).
3. Enterprise bargaining has not solved, and will not solve, this problem (see Part G.4 in particular).
4. The Award Minimum Wages Variation would promote social inclusion through workforce participation by:
  - (a) a greater ability to attract and retain staff (as to which see, Part G.2 in particular);
  - (b) an incentive for career progression for workers in the industry;
  - (c) accordingly, higher-quality care and quality of life for aged-care residents.

This is especially so in circumstances where 86 per cent of the direct care workforce in aged care identify as female and where increased wages would promote further workforce participation and retention.

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<sup>129</sup> ANMF closing submissions dated 22 July 2022, [11]-[12].

5. A correction of the historical undervaluation of the work values of aged care employees would promote the principle of equal remuneration for work of equal or comparable value.<sup>130</sup>

**[143]** Regarding the PCW Classification Variation, the ANMF submits that the work performed by AINs/PCWs differs qualitatively from the work done by general and administrative services and food services workers, so their rates of pay should also be treated separately.<sup>131</sup>

**[144]** At A.3, the ANMF provides a summary of the evidence and material available to the Commission in determining its application, and on which the ANMF relies. In respect of material establishing agreement, the ANMF submits that the Consensus Statement is supportive of the ANMF's application and the Commission should give very considerable weight to its content. It submits that some content of the joint submissions filed by the ACSA, LASA and ABI dated 4 May 2022 may be read as departing from the Consensus Statement that they were a party to, however as neither the ACSA nor LASA have expressed an intention to abandon their status as parties to the statement or renounce any part of it, the position of ACSA and LASA in these proceedings should be understood consistently with the Consensus Statement.

**[145]** Sections B and C of the ANMF's submission consists of its response to background documents and provisional views.

**[146]** Section D sets out the duties of the roles relevant to the ANMF's application, in line with the structure of Part C.2 of the Report to the Full Bench concerning lay witness evidence, issued on 20 June 2022 (Lay evidence Report). Here the ANMF set out the evidence it relies on in support of its application according to each of relevant roles, as adopted from the Lay Evidence Report and further evidential references. In additional, ANMF provides evidence in respect of Nursing Teams, a topic not separately addressed in the Lay Evidence Report.<sup>132</sup> The ANMF submits that this section should be read together with, and as supplementing, the Lay Evidence Report.

**[147]** Section E sets out the evidence the ANMF seeks to rely on relevant to work value. Its structure mirrors the 15 'common issues and themes' set out in Part D of the Lay Evidence Report. As in Section D, the ANMF set out the evidence it relies upon according to each theme, as adopted from the Lay Evidence Report and further evidence such as witness evidence (lay witnesses, union officials and employer witnesses) and the findings of the Royal Commission. Again, the ANMF submits that this section should be read together with, and as supplementing, the Lay Evidence Report. Evidence about the impact of the COVID-19 pandemic, which was acknowledged but not identified in the Lay Evidence Report, has been addressed by the ANMF at E.16.

**[148]** Subsections E.1-E.16 contain the ANMF's submissions as to the relevance that evidence has to the assessment of work value. For example, the ANMF submits that evidence in respect of increased acuity and more complex needs in residential care set out at E.1 is relevant to each

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<sup>130</sup> Ibid [16].

<sup>131</sup> Ibid [870].

<sup>132</sup> Ibid [132].

of the matters in section 157(2A) of the FW Act. It submits that the evidence clearly establishes the nature of the job and task requirements imposed on workers having changed considerably over the last twenty years, stating *'It is more or less agreed between all interested parties and witnesses on all sides, and it is supported by the Royal Commission's findings, that: (1) residents in residential aged care present with more acute care needs than used to be the case;'*<sup>133</sup> Further, the ANMF submits that the evidence amply justifies *'a considerable increase in the amount that employees should be paid for doing the work that they do, across all classifications.'*<sup>134</sup>

[149] In subsection E.16, the ANMF submits that evidence regarding the impact of the COVID-19 pandemic, despite not being developed in the Lay Evidence Report, is relevant to work value for two reasons.

[150] *First*, the ANMF submits that COVID-19 is not a temporary event, having been a material reality in Australia for 2.5 years, and cite the recent rise in cases, emergence of new variants several times a year and continuing outbreaks in aged-care facilities resulting in serious illness and sometimes death.

[151] *Second*, the ANMF submits that *'the evidence before the Commission establishes that COVID-19 has caused permanent changes in the way that infection prevention and control is dealt with in aged care.'*<sup>135</sup> The ANMF go on to provide evidence from witnesses in these proceedings and the findings of the Royal Commission in support of this contention.

[152] The ANMF submits the nature of work in aged care during COVID-19 has been and continues to be more difficult, more stressful and more dangerous, and the work has involved and will continue to involve greater levels of skills and responsibility with respect to infection prevention and control. The ANMF adds that additional skills are also required in dealing with the heightened emotional needs of clients and residents, and other challenges.<sup>136</sup>

[153] Section F sets out the ANMF's submissions in respect of the Smith/Lyons Report and the Junor Report. The ANMF submits that the reports will assist the Commission to understand why aged-care work is undervalued, and that this undervaluation is gender-based.<sup>137</sup>

[154] In Section G the ANMF submits that the Commission can be satisfied that its proposed variation meets the modern award objective and minimum wages objective because, *inter alia*:

- (1) the current award minimum rates for all Nursing Assistants and Enrolled Nurse classifications under the Nurses Award and AIN / PCW classifications under the Aged Care Award are currently close to, or below the "*low paid*" threshold. The ANMF's evidence is that direct care workers face uncertainty about whether their current aged care income will be sufficient to meet their future living expenses and retirement;

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<sup>133</sup> Ibid [220].

<sup>134</sup> Ibid [223].

<sup>135</sup> Ibid [741].

<sup>136</sup> Ibid [766]-[796].

<sup>137</sup> Ibid [771]-[774].

- (2) enterprise bargaining has not (and will not) solve the low-wages problem in the aged care industry. Current minimum wages are a disincentive to collective bargaining;
- (3) the Award Minimum Wages Variations would promote social inclusion through workforce participation by:
  - (a) a greater ability to attract and retain staff;
  - (b) an incentive for career progression for workers in the industry;
  - (c) accordingly, higher-quality care and quality of life for aged-care residents.

This is especially so in circumstances where 86 per cent of the direct care workforce in aged care identify as female and where increased wages would promote further workforce participation and retention.

- (4) a correction of the historical undervaluation of the work values of aged care employees would promote the principle of equal remuneration for work of equal or comparable value.<sup>138</sup>

**[155]** The ANMF also submits that wages rates are neither fair nor relevant in the context of the modern award objective and minimum wages objective.<sup>139</sup> The ANMF submits that the difficulties in attraction and retention in aged-care reveal that the award rates have not maintained their relevance,<sup>140</sup> and make several submissions as to relevant of funding to the modern awards objective.<sup>141</sup> The AMNF also submit in respect of the need to encourage collective bargaining that it is evident from the materials that wage bargaining in the aged-care sector is not presently working and that if this sector-wide issue were resolved the objectives of collective bargaining would be furthered.<sup>142</sup>

**[156]** The ANMF's submission concludes by listing 13 changes to the nature of aged-care work that it submits the evidence demonstrates clearly, and state that all are 'work value reasons' within the meaning of section 157(2A) of the FW Act, which justify an increase to wages.<sup>143</sup>

**[157]** Further or alternatively, the ANMF submits that wages of aged-care workers have historically been undervalued due to aged-care workers being the overwhelming women, which requires correction.<sup>144</sup>

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<sup>138</sup> Ibid [832].

<sup>139</sup> Ibid [839].

<sup>140</sup> Ibid [843].

<sup>141</sup> Ibid Section G.3.

<sup>142</sup> Ibid [868]-[869].

<sup>143</sup> Ibid [880]-[881].

<sup>144</sup> Ibid [882].

[158] Annexure 1 to ANMF’s submission is a ‘hidden skills analysis’, consisting of 3 ‘spotlight skills’ charts extracted from the Junor report, followed by 48 tables in which extracts of the RN, EN and AIN/PCW witness statements are analysed against the charts. The ANMF submits that this supports a finding that Associate Professor Junor’s categorisation of hidden skills includes those utilised by aged-care workers.<sup>145</sup>

[159] Annexure 2 to ANMF’s submission contains its proposed amended schedule to the Nurses Award and proposed amended clause to the Aged Care Award.

### 5.3 UWU

[160] On 25 July 2022, the UWU filed their closing submissions.

[161] A brief summary of the UWU’s closing submissions follows.

[162] At [9] the UWU outlines the evidence they have filed in support of the applications.

[163] At [10] the UWU submits that it supports the submissions filed by the HSU and ANMF.

[164] At [11] the UWU submits that the evidence before the Commission supports a finding that the increases to minimum wages sought are justified by work value reasons, including on the basis of:

- a. The skill and responsibility exercised by aged care workers responsible for providing direct and indirect care in residential and home aged care settings
- b. The impact of resident and consumer needs on the exercise of skill and responsibility by aged care workers
- c. The impact of changes to models of care and care philosophy on the exercise of skill and responsibility by aged care workers
- d. The impact of regulatory and governance requirements on the nature of the work performed by aged care workers
- e. The impact of changes to workforce composition over the skill and responsibility exercised by aged care workers and the nature of the work
- f. The nature of the work environment in which aged care workers perform their work and the conditions under which the work is done
- g. The qualifications and training requirements associated with the work and changes that are sought to be made with respect to qualifications and training requirements;
- h. Changed expectations in relation to consumer, community and family interaction, as it bears on the nature of the skill and responsibility exercised;

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<sup>145</sup> Ibid [889].

- i. Historical undervaluation of the work (including a gendered view of the work as associated with unpaid care work).<sup>146</sup>

#### **5.4 The Joint Employers**

[165] The Employer interests in these proceedings are represented by ACS, LASA and ABI (collectively the Joint Employers). On 22 July 2022, the Joint Employers filed their closing submissions, which represent the position of the employer interests. To the extent reliance is placed on any aspect of the Joint Employers' submissions filed on 4 March 2022 it is incorporated and/or annexed to the 22 July 2022 submission. Annexures K to O are extracts from opening submissions.

[166] A review of the evidence is also annexed to the submission (the **Evidence Review**). The Evidence Review is said to be a summary of the evidence by reference to factors the Joint Employers identify as relevant to the evaluative task before the Commission and includes submissions as to weight. The Evidence Review is organised into a series of annexures by reference to the role/position of the witness, as set out below:

**Annexure A:** Personal Care Employee

**Annexure B:** Aged Care Employee -- Recreational/Lifestyle Activities Officer

**Annexure C:** Aged Care Employee -- General and Administrative Services

**Annexure D:** Aged Care Employee -- Food Services

**Annexure E:** Registered Nurse and Nurse Practitioner

**Annexure F:** Enrolled Nurse

**Annexure G:** Home Care Employee

**Annexure H:** The Employers

**Annexure I:** The Union Officials

**Annexure J:** The Experts

[167] The answers to the questions raised by the Full Bench on 26 April 2022 and in Background Documents 1 and 2 are set out at Annexure P.

[168] A brief summary of the Joint Employer's closing submissions follows.

[169] Section 1 sets out the background and notes the site visits undertaken and evidence adduced (see 1.3–1.8) and the reports produced by the Commission (see 1.10–1.12).

[170] Section 2 deals with the structure of the closing submissions and Section 3 provides an overview of the applications.

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<sup>146</sup> UWU closing submissions dated 25 July 2022 [11].



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

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

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

[172] In relation to the *Nurses Award* classification structure, the Joint Employers submit that ‘the Commission must be satisfied that the separation of the classification structure for aged care within an occupation based award is appropriate and justified by the evidence’ and, further, ‘the Commission must also consider that the award operates with service based increments with annual progression internally through the pay-points of the levels, and some where there are no pay point descriptors within the level.’<sup>147</sup>

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

[173] In relation to the *SCHADS Award* home care classification structure, the Joint Employers submit that ‘the Commission must be satisfied that the separation of the classification structure based upon the type of clients (i.e. disability home care and aged care home care) is appropriate and justified by the evidence’ noting that ‘[t]he separation of the classifications could create real operational difficulties.’<sup>148</sup>

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

[174] At [4.47] the Joint Employers contend that ‘based on the evidence given during the hearing, the work undertaken by the following classes of employee in residential aged care has significantly changed over the past two decades warranting consideration for work value reasons:’

- RN;
- ENs;
- (Cert III) Care Workers; and
- Head Chefs/Cooks.

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<sup>147</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 [4.41]–[4.42].

<sup>148</sup> Ibid [4.44]–[4.45].

[175] It is convenient to note here that sections 8 to 22 of the Joint Employers closing submissions analyses the evidence informing the evaluative judgment under s.157(2A) in respect of the various classifications in the Aged Care Award, the Nurses Award and the SCHADS Award.

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

[176] Further, at [4.41] the Joint Employers submit:

‘In any exercise apportioning value to a classification, clearly, the C10 Framework will be an effective starting point (and for some an end point). However, whether any marginal departure is then warranted will be determined by the Commission based upon its satisfaction that the variation is justified by the work value reasons and a consideration of modern awards objective and minimum wages objective.’<sup>149</sup>

**Question 9 for the Joint Employers:** A comparison with the C10 framework suggests if the Joint Employer submission is accepted, that the minimum rates for RNs should be increased by 35 per cent, is that what is being proposed by the Joint Employers?

[177] Section 5 deals with the relevance of what are categorised as policy and transitory issues: the impact of the pandemic on the work performed; observations about staffing in the aged care industry; and funding within the aged care sector. As to the pandemic, the Joint Employers submit:

‘To the extent the work performed by aged care employees was impacted by the Pandemic, particularly with respect to the requirement to infection control and hygiene practices, this amounts to a change however it is unclear as to whether this is temporary at this stage. The level of skill or responsibility was not impacted.

If the Commission considers a Pandemic allowance is warranted, that matter should be considered separately to the applications presently before the Commission.’<sup>150</sup>

[178] As to the staffing shortage issue in the aged care sector, the Joint Employers submit that it is ‘a matter for the industry and government to respond to – respectfully, not the Commission through a work value case’<sup>151</sup>

[179] As to the funding within the aged care sector, the Joint Employers submit that the funding arrangements:

‘do not assist with the Commission’s assessment of work value reasons in the context of s 157(2)(a). It is, however, relevant to the second aspect of the Commission’s assessment under s

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<sup>149</sup> Ibid [4.41].

<sup>150</sup> Ibid [5.17]–[5.18].

<sup>151</sup> Ibid [5.23].

157(2)(b), namely, consideration of the modern awards objective. Particularly, in terms of the impact of any increase upon the industry at large.’<sup>152</sup>

[180] In the event the Commission is minded to vary some minimum award rates, the Joint Employers seek to be heard as to the operative date for any increases and as to any timetable for phasing in of increases.

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

‘In summary, the Commission needs to be particularly cautious about that evidence because it did not relate to minimum award rates. In such circumstances, without critiquing the substance of the theories explored by the experts, the content is ultimately of minimal assistance in the context of a work value assessment determining how to properly set minimum wages in the awards.’<sup>153</sup>

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

[182] Section 7 is titled ‘Fixing Minimum Rates: A Principled Approach’ and addresses 4 issues.

**(i) Finding whether the minimum rates were never properly fixed**

[183] The Joint Employers submit that an analysis of the relevant case law, pre-reform awards and commentary surrounding the modernisation of awards reveals the *Aged Care Award* and *SCHADS Award* were not properly set. That analysis is set out in Annexure N.<sup>154</sup>

[184] As to the Nurses Award, the Joint Employers note that the preponderance of federal awards that informed the drafting of rates and classifications in the *Nurses Award* were subject to a series of work value assessments and, were expressly observed to be “properly set” minimum rates.<sup>155</sup>

[185] However, the Joint Employers go on to identify several anomalies and make a number of observations including that:

‘The most dramatic issue arising with respect to minimum rates concerned the classifications of EN and RN under the *Nurses Award*. The minimum rates sit too low within the C10 Framework; the rates do not align with the AQF and, as a result, are not consistent with classifications within the modern award system that require a Diploma and Degree, respectively.’<sup>156</sup>

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<sup>152</sup> Ibid [5.26].

<sup>153</sup> Ibid [6.5].

<sup>154</sup> Ibid [7.3].

<sup>155</sup> Ibid [7.4].

<sup>156</sup> Ibid [7.7](a).

(ii) *Relevance of the C10 framework (see 7.8 – 7.21)*

[186] Given that the notion of stability in s 134(g), the Joint Employers submit that the Commission ‘should be strongly guided by the C10 Framework in properly setting minimum wages in modern awards.’<sup>157</sup>

[187] In particular, the Joint Employers contend that the approach of the Full Bench in *Teachers Case* ‘is instructive as to the approach to be taken with respect to applications to vary an award based on work value reasons.’<sup>158</sup>

[188] The Joint Employers submit that the following approach was taken in the *Teachers Case*:

*First*, the Full Bench considered whether the minimum rates had been properly set. The Full Bench followed the principles set out in *ACT Child Care decision* and had regard to the C10 Framework.

*Second*, prior to addressing arguments as to the minimum rates, the Full Bench considered the classification structure. The following questions were considered: do the classifications align with the C10 Framework and if there are pay points and/or increments between classification levels, are they based on competency and/or work value considerations - or set based upon years of service. That latter was described as “*anachronistic*”.

*Third*, returning to the minimum rates and its consideration of any proposed adjustments, the Full Bench undertook an extensive evaluation of the evidence and considered whether work value reasons existed that would justify an increase in wages.

*Fourth*, in doing this the Full Bench gave primacy to fixing a benchmark classification (Proficient Teacher) to the C10 Framework and then resetting internal relativities in the new classification structure.’<sup>159</sup> [footnotes omitted]

[189] The Joint Employers submit that the C10 Framework ‘provides a consistent means for aligning qualifications, by reference to the competencies and learning outcomes of each AQF level.’<sup>160</sup> It is accepted that the C10 framework is ‘not the end of the analysis’:

‘When aligning classification levels to the C10 Framework, for example an AQF Certificate III, the work performed is not valued simply by reference to the attainment of a Certificate III. Rather, it is valued within a workplace setting (i.e. an industrial context), such that factors concerning supervision typically associated with an employee working at this level inform the assessment of value. It would be wrong to suggest that the C10 Framework, which is the valuation process built in part on the AQF, only deals with the “*qualification*” not the work environment or the nature of the work in general terms.’<sup>161</sup>

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<sup>157</sup> Ibid [7.8].

<sup>158</sup> Ibid [7.10].

<sup>159</sup> Ibid [7.11].

<sup>160</sup> Ibid [7.13].

<sup>161</sup> Ibid [7.14].

*(iii) The evaluative judgment under s.157(2)(a)*

[190] The Joint Employers submit that s.157(2) requires an evaluative judgment to determine whether work value reasons that warrant a variation are present:

‘Mere change of any form would not warrant this. It needs to be sufficient to move the Commission to conclude that the minimum rates do not reflect the value of the work and thus require variation.’<sup>162</sup>

[191] Guidance for that evaluative judgment is said to be informed by reference to case law such as the Pharmacy Case and Teachers Case.<sup>163</sup>

*(iv) The evaluative judgment under s.157(2)(b) – modern awards objective*

[192] The Joint Employers submit that prior to any variation based on work value reasons, the Commission will also need to be satisfied that any change to minimum rates is consistent with the modern awards objective and the minimum wages objective, which is addressed following a consideration of the factors relevant to s 157(2)(a).<sup>164</sup>

[193] The factors relevant to the Commission’s consideration of the modern awards objective and minimum wages objective appear at Sections 23 and 24, respectively.

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

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<sup>162</sup> Ibid [7.26].

<sup>163</sup> Ibid [7.28].

<sup>164</sup> Ibid [7.31].

## 6. Main points of agreement between the parties

[194] This section of the Background Document sets out the main points of agreement between the parties. There appear to be 4 main points of agreement, each of these is set out below.

### (i) *Agreed propositions*

[195] Paragraph [116] of Background Document 1 set out 16 propositions about the changing nature of work in the aged care industry. All parties agree that the 16 propositions are uncontentious.<sup>165</sup>

### (ii) *The rates in the Aged Care Award, Nurses Awards and SCHADS Award have never been properly fixed*

[196] It appears to be common ground that the relevant wage rates in the Aged Care Award, Nurses Award and SCAHDS Award have never been properly fixed.<sup>166</sup>

### (iii) *Significant Net Addition*

[197] It appears to be common ground that the Commission does not need to consider ‘significant net addition’ or find a fixed datum point. The HSU addresses this matter at paragraphs [43] to [57] of its closing submissions. The ANMF addresses the matter in its closing submissions at [87] and submits that it is also not necessary to apply the three step process from the *ACT Child Care decision*.<sup>167</sup> The Joint Employers address the matter in their closing submissions at Section 7 and Annexure P at [3.19].

### (iv) *The Pharmacy and Teachers decisions*

[198] The ANMF notes that at [159] of the *Pharmacy Decision*, as part of the “historical background”, the Full Bench set out the following 3 step process for the determination of properly fixed minimum rates from the *ACT Child Care Decision*.<sup>168</sup>

1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA process with particular reference to the current rates for the relevant classifications in the Metal Industry Award. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.

2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.

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<sup>165</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [3.32]; ANMF closing submissions dated 22 July 2022 [71]; HSU closing submissions dated 22 July 2022 [81].

<sup>166</sup> See ACSA, LASA and ABI closing submissions dated 22 July 2022 [4.16] – [4.18] and ACSA, LASA and ABI submission dated 27 July 2022 [1]; ANMF closing submissions dated 22 July 2022 [91](1); HSU submission dated 2 August 2022 [1].

<sup>167</sup> ANMF closing submissions dated 22 July 2022 [87].

<sup>168</sup> ANMF closing submissions dated 22 July 2022 [79].

3. If the existing rates are too low they should be increased so that they are properly fixed minima.’

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

‘[197] This outcome appears to be inconsistent with the principles stated and the approach taken concerning the proper fixation of award minimum rates in the *ACT Child Care Decision*, to which we have earlier made reference. However we note that the *ACT Child Care Decision* was made under a different statutory regime and pursuant to wage-fixing principles which no longer exist.’

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

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

[201] The ANMF submits:

‘It is no longer the correct approach to the Commission’s statutory task under section 157(2)-(2A). In accordance with the propositions from the Pharmacy Decision, which are not contested, “while it would be open to the Commission to have regard to considerations taken into account in previous work value cases under differing past statutory regimes, in enacting s.156(4) the legislature chose to only import the fundamental criteria used to assess work value changes contained in earlier wage fixing principles, not the additional requirements contained in those principles” (see Background Document 1 at [69]). Those additional requirements include the three step process from the *ACT Child Care decision*.<sup>169</sup>

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

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

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

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<sup>169</sup> ANMF closing submissions dated 22 July 2022 [86].

## 7. Main issues in contention

[202] Background Paper 1 set out a number of issues in contention between the parties at [117] to [128]. These issues related to the work value claim and whether there has been a significant change to the nature of the work for employees in each of the following categories:

- employees in the general, administrative and maintenance streams
- employees in the food services stream
- enrolled nurses
- nurse practitioners, and
- home care workers.

[203] This section of the Background Document deals with the main additional issues in contention between the parties but does not attempt to deal with:

- the issue of the weight to be attributed to each piece of evidence in these proceedings.
- The points of difference between the parties as to the changes in conditions etc. affecting each classification level.

### (i) *Is s.157(2A) a code?*

[204] The HSU submits that it is not clear that section 157(2A) is intended to confine the types of reasons the Commission may consider justify the amount employees should be paid for doing particular kinds of work.<sup>170</sup> The Joint Employers appear to agree that the Commission has a broad discretion as to the matters that might constitute work value reasons.<sup>171</sup>

[205] However, the ANMF submits that s.157(2A) exhaustively defines work value reasons being reasons justifying the amount that employees should be paid for doing a particular kind of work'.<sup>172</sup>

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

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

This submission should be rejected. It fails to recognise that the modern awards objective requires the FWC to perform two different kinds of functions, albeit that the modern awards

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<sup>170</sup> HSU closing submissions dated 22 July 2022 [34].

<sup>171</sup> Joint Employer submissions dated 22 July 2022 [1.9]

<sup>172</sup> ANMF closing submissions dated 22 July 2022 [56].



objective embraces both kinds of function. The FWC must “ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions” and in so doing, must take into account the s 134(a)-(h) matters. What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a “fair and relevant minimum safety net of terms and conditions”, they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters “must be determined by implication from the subject matter, scope and purpose of the” Fair Work Act (Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24 at 39-40).

This construction of s 134(1) necessarily rejects the applicants’ argument that the words “fair and relevant” qualify the considerations in s 134(1)(a)-(h) and not the minimum safety net of terms and conditions. This submission is untenable. It is apparent that “a fair and relevant minimum safety net of terms and conditions” is itself a composite phrase within which “fair and relevant” are adjectives describing the qualities of the minimum safety net of terms and conditions to which the FWC’s duty relates. Those qualities are broadly conceived and will often involve competing value judgments about broad questions of social and economic policy. As such, the FWC is to perform the required evaluative function taking into account the s 134(1)(a)-(h) matters and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance. It is entitled to conceptualise those criteria by reference to the potential universe of relevant facts, relevance being determined by implication from the subject matter, scope and purpose of the Fair Work Act.<sup>173</sup>

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

**(ii) Are attraction and retention considerations relevant to the assessment of work value under s.157(2A)?**

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

‘labour supply constraints that exacerbate staff shortages and inadequate skill mix increase the intensity and work requirements of existing staff. These are matters “related to” the nature of the work, the responsibilities involved and the conditions under which the work is performed.’<sup>174</sup>

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

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<sup>173</sup> Shop, Distributive and Allied Employees Association v The Australian Industry Group (2017) FCR 368 [47]-[49].

<sup>174</sup> ANMF closing submissions dated 22 July 2022 [714].

[208] The Joint Employers submit that the idea of “minimum rates” is, by its very nature, ‘inconsistent with the notion of a market rate or attraction rate’, the latter of which is the domain of contract or bargaining.<sup>175</sup>

[209] The Joint Employers argue that it ‘should be uncontroversial’ that rates relating to attraction are ‘anything but ‘minimum’ and reflect the notion of the market or discretionary payments made by an employer’ to be more competitive.<sup>176</sup> They submit that as a result, the consideration of work value ‘should not stray into the realm of attraction or market rates.’<sup>177</sup>

[210] The Joint Employers rely on the following statement from the Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010:

‘The first proposition is also misconceived because it has as an implicit premise that “attraction rates” - that is, wage rates set at a level which are perceived as necessary for an employer to attract and retain sufficient labour - have a proper role to play in the fixation of safety net wages and conditions in modern awards. We reject this. Tribunals tasked with wage fixation in Australia have consistently refused to set minimum award wages on the basis of attraction rates. The only possible exception, namely where a long-term shortage of employees has a consequential effect on the work value of the employees performing the work, has no relevance here.’<sup>178</sup>

[211] The Joint Employers maintain that while the Commission ‘left the door open to attraction rates being considered when the shortage of labour has had a consequential effect on the work value’ this should not be adopted in these proceedings.<sup>179</sup> They submit that the reason for considering attraction rates in these proceedings appears to be ‘solely due to a shortage of labour and to fix a supply side issue, rather than the shortage of labour causing an increase in the value of work’<sup>180</sup> and say:

‘the proposition that setting minimum wage rates in order to attract labour to address a suggested shortage is an inappropriate basis for the setting of minimum rates of pay.’<sup>181</sup>

[212] The Joint Employers further submit that, as a general proposition, Australia is facing a labour shortage across the board and that it is ‘highly unlikely’ that workforce composition issues in the aged care industry will be solved by only increasing minimum award rates. The Joint Employers note that despite having higher rates of pay, the Disability Care industry, in particular those who perform work in the social and community services stream of the Award, is also facing staff shortages<sup>182</sup>, while both the public and private sectors are reporting on nurse shortages, despite there being higher rates of pay for these categories of nurses in these

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<sup>175</sup> Ibid [2.23].

<sup>176</sup> Ibid [2.24].

<sup>177</sup> Ibid [2.25].

<sup>178</sup> *Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010* [2020] FWCFB 4961 [80].

<sup>179</sup> Ibid [2.28].

<sup>180</sup> Ibid [2.29].

<sup>181</sup> Ibid [2.30].

<sup>182</sup> <https://www.abc.net.au/news/2022-04-12/home-care-system-failing-australians-with-disability/100965512>

industries.<sup>183</sup> They further maintain that many RNs are paid ‘materially above the Award under enterprise agreements’ and yet most aged care providers claim a lack of RNs in their facilities.<sup>184</sup> The Joint Employers argue:

‘It would be misconceived to assume that the issues concerning supply of labour can be simply solved by higher minimum rates of pay; the solution of what must be regarded as a national, socio-political problem to solve.’<sup>185</sup>

[213] The Joint Employers finally submit that were the Commission to consider attraction and retention, it would be faced with the practical problem of how to assess an attraction element and determine whether it has succeeded.<sup>186</sup>

**(iii) The status of the consensus statement**

[214] The ANMF submits that despite ACSA and LASA being parties to the Consensus Statement, some of the content of the submissions of the Joint Employers ‘may be read as departing from the Consensus Statement’. The ANMF submits that as ACSA and LASA have not expressed an intention to abandon their status as parties to the Consensus Statement or to renounce any part of the Consensus Statement, their position in these proceedings ‘should be understood consistently with the Consensus Statement.’<sup>187</sup>

[215] The ANMF argues that making submissions inconsistent with the Consensus Statement would be akin to seeking to withdraw an admission without explanation and submit that parties to litigation and a Court or tribunal are entitled to assume that admissions were properly made, so that where leave to withdraw a submission is sought an explanation should be given. The ANMF submits that the Joint Employers have not provided an explanation as to why they are departing from the Consensus Statement.<sup>188</sup>

[216] The Joint Employers submit that the Consensus Statement ‘does not override’ its submissions filed in this matter and ‘certainly cannot override findings available from the evidence.’<sup>189</sup> The Joint Employers note the following:

- ‘(a) The Consensus Statement pre-dates the preparation of opening submissions, preparation of evidence and, significantly, the testing of evidence.
- (b) The absence of ABI from the Consensus Statement does not render any perceived “inconsistency” between the Consensus Statement and the submissions filed by the employer interests as not representative of the position of ACSA, LASA and ABI. As

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<sup>183</sup> Ibid [2.32].

<sup>184</sup> Ibid [2.33] the Joint Employers point to the *Uniting Aged Care Enterprise Agreement (NSW) 2017* as at 1 July 2018, between a RN 1.1 and RN 1.5 was 41% and 62% more than the equivalent Award rate and the *Warrigal and NSW Nurses and Midwives’ Association, Australian Nursing and Midwifery Federation NSW Branch, and Health Services Union NSW/ACT Branch Enterprise Agreement 2017* a RN 1.1 to RN 1.5 is paid between 25% and 48% more than the equivalent award rate as at 1 July 2019.

<sup>185</sup> Ibid [2.33].

<sup>186</sup> Ibid [2.34].

<sup>187</sup> ANMF closing submissions dated 22 July 2022 [28].

<sup>188</sup> ANMF closing submissions dated 22 July 2022 [28].

<sup>189</sup> ACSA, LASA and ABI closing submissions dated 22 July 2022 Annexure P [2.8].

mentioned at the hearing, *everything* filed by the employer interests has been reviewed by and subject to instructions from all three clients: ACSA, LASA and ABI.

- (c) The Consensus Statement represents a negotiated position between 12 separate organisations at a particular time and context. The preparation of such a position on 23 issues relevant to work value, together with two separate policy issues, namely, attraction and retention of workers and funding in the sector, it does not act as a bar to the employer interests preparing submissions and evidence in this matter.<sup>190</sup>

[217] The Joint Employers further submit that the unions had the opportunity to cross examine the CEO of ACSA to clarify the relevance of the Consensus Statement ‘and chose not to do so.’<sup>191</sup>

*(iv) The relevance of the C10 classification structure*

[218] It appears to be common ground that the alignment with the C10 classification structure is a useful starting point in the proper fixing of minimum rates. But, the weight to be given to the C10 classification structure in the Commissions’ consideration of appropriate wage rates appears to be a matter in contention between the parties. The Joint Employers submit that

‘in any exercise apportioning value to a classification, clearly, the C10 Framework will be an effective starting point (and for some an end point). However, whether any marginal departure is then warranted will be determined by the Commission based upon its satisfaction that the variation is justified by the work value reasons and a consideration of modern awards objective and minimum wages objective.’<sup>192</sup>

[219] The HSU submits that ‘significant caution should be exercised before attempting to translate the qualifications directly into the C10 scale’<sup>193</sup> ... and that ‘the C10 scale is a useful starting point, but no more than that’.<sup>194</sup>

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

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<sup>190</sup> Ibid [2.7].

<sup>191</sup> Ibid [2.9].

<sup>192</sup> Joint Employer submissions dated 22 July 2022 [4.48]

<sup>193</sup> HSU submissions dated 22 July 2022 [74].

<sup>194</sup> HSU submissions dated 22 July 2022 [75].

**8. Additional questions for the parties**

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

[221] The ANMF proposes to vary the Aged Care Award by deleting ‘personal care worker’ from the definitions of aged care employee levels 2, 3, 4, 5, and 7 in Schedule B and inserting a new classification structure for personal care workers. The proposed new classification structure retains a 5-level personal care worker classification structure as in the current Award:

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

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

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

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

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

**Question 19 for the ANMF and HSU:** there are some differences in the classification definitions proposed by each party. How does each party respond to the classification definitions proposed by the other party?

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

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

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

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

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

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

...

The Commission’s statutory function should be applied consistently to all modern award employees, while recognising that the particular circumstances that pertain to particular awards may warrant different outcomes. The fact that a sector receives government funding is not a sound basis for differential treatment. Further, given the gendered nature of employment in many government funded sectors such differential treatment may have significant adverse gender pay equity consequences.’<sup>195</sup>

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

[227] Contention 6 of the Main Contentions states:

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

[228] The *Aged Care Amendment (Implementing Care Reform) Bill 2022* (Cth) was introduced to the House of Representatives on 27 July 2022. The Bill proposes an amendment to the *Aged Care Act 1997* which will require approved providers who provide residential care to care recipients in a residential facility or flexible care of a kind specified in the Quality of

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<sup>195</sup> 4 yearly review of modern awards—Group 4—Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claims [2019] FWCFB 6067 [138] – [143].

Care Principles to care recipients in a residential facility to ensure at least one registered nurse is one site, and on duty, at all times at the residential facility.<sup>196</sup>

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

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

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

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<sup>196</sup> *Aged Care Amendment (Implementing Care Reform) Bill 2022 (Cth)* Schedule 1, s.54-1A(1)–(2).