

FAIR WORK COMMISSION

THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

Applicant

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

First Matter

AM2020/99

HEALTH SERVICES UNION

Applicant

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

Second Matter

AM2021/65

HEALTH SERVICES UNION

Applicant

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

Third Matter

**CLOSING SUBMISSIONS IN REPLY OF THE
AUSTRALIAN NURSING AND MIDWIFERY FEDERATION**

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A. Introduction

1. These submissions of the Australian Nursing and Midwifery Federation (“**ANMF**”):
 - (1) address the questions raised in Background Document 5, published by the Full Bench on 05 August 2022;
 - (2) reply to the closing submissions dated 22 July 2022 of Aged & Community Services Australia (“**ACSA**”), Leading Age Services Australia (“**LASA**”), and Australian Business Industrial (“**Joint Closing Submission**,” references taking the form **JCS [X]**);
 - (3) reply to the Commonwealth’s submissions of 08 August 2022 (“**Cth S [X]**”);
 - (4) where relevant, address the submissions of the Health Services Union dated 22 July 2022 (“**HSU CS**”), and the submissions of the United Workers’ Union, dated 25 July 2022 (“**UWU CS**”).
2. These submissions should be read and understood in conjunction with the ANMF’s closing submissions dated 22 July 2022 (“**ANMF CS**”).
3. These submissions are broken up into three large parts. Part B addresses the questions in Background Document 5. Part C deals with the Joint Closing Submission. Part D addresses the Commonwealth’s submissions.

B. Responses to Background Document 5

4. On 5 August 2022 the Full Bench published “*Background Document 5—The Applications.*” By its statement [2022] FWCFB 150 also issued 5 August, the Full Bench sought short written responses to the questions set out in that document. Where those questions are directed to the ANMF, the ANMF’s responses are addressed below.

B.1 Question 2 for all other parties: do you agree with the HSU submission that the above additional propositions are uncontentious?

5. The ANMF accepts that the additional propositions identified by the HSU are uncontentious. However, not all uncontentious propositions will carry the same weight. The propositions identified by the Full Bench at [116] of Background Document 1 each go to core issues of broad significance to the applications currently before the Commission. The additional propositions identified by the HSU are of less direct relevance and would not be accorded the same weight.
6. Further, the requirement for greater numbers of staff with a broad range of skills and responsibilities is not limited to clustered domestic and household models of care. Greater numbers of staff with a broad range of skills and responsibilities are required across residential care more broadly, and indeed across aged care.

B.2 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)?

7. In JCS [3.13(b)] it is suggested that the ANMF seeks “*the creation of a new classification structure for employees covered under the Nurses Award that are engaged in services for aged persons ...*” .
8. As the ANMF Application and ANMF CS Annexure 2 disclose, the ANMF seeks to retain the existing Nurses Award classification structure and for it to be incorporated in a new Schedule G applying to employees covered by the Nurses Award engaged in the provision of services for aged persons. (The full scope of the proposed Schedule is set out in ANMF CS Annexure 2.)
9. At JCS [3.14], the employer parties refer to the ANMF’s proposal as the insertion of a new classification structure into the Aged Care Award. The proposed classification structure and associated titles is for a separate personal care stream that nonetheless retains the substance of the existing structure of Levels 1 to 4. Minor changes are

proposed to the descriptors at Level 5 to reflect aspects of the work undertaken at that level. Background Document 5 at [221] summarises the proposal.

10. At JCS [3.15], the Joint Employers provide a Table comparing the current classification and minimum award rates with the ANMF’s proposed classifications and proposed rates involving a 25 per cent increase. The rates require updating to take account of the outcome of the Annual Wage Review 2021-22. Part B of ANMF CS Annexure 2 sets out the proposed rates reflecting the 25% increase sought by ANMF. The Table below contains the updated rates and aligns the proposed personal care stream Grades 1–5 with the existing Levels:

		Current Rate	Current Rate + 25%
Current Classification	Proposed Personal Care Employee Classification	Per Week \$	Per Week \$
Aged Care employee - level 1	-		
Aged Care employee - level 2	Grade 1	895.50	1119.40
Aged Care employee - level 3	Grade 2	929.90	1162.40
Aged Care employee - level 4	Grade 3	940.90	1176.10
Aged Care employee - level 5	Grade 4	972.80	1216.00
Aged Care employee - level 6	-		
Aged Care employee - level 7	Grade 5	1043.60	1304.50

11. At JCS [3.16], the employer parties note that, by the ANMF’s application, only the personal care employees covered by the Aged Care Award would receive an increase. As has been previously submitted, the ANMF also supports the wages increases sought for the other workers who would be affected by those applications.
12. At JCS [3.17], the employer parties submit that the ANMF’s “*new classification structure within the Nurses Award creates a new category of employee within the health industry by reference to ‘services for aged persons’ ...*”. As clarified above, the ANMF proposal is to wholly retain the existing classification structure in Schedule G. No new classification structure is proposed. Similarly, no new “*category of employee*” is

proposed. Rather, the current categories of employee are retained in a Schedule applying to a those employees engaged in the provision of “*services for aged persons ...*”. So much is acknowledged at JCS [3.18] where the description of the proposed Schedule is referred to as “*the aged care category*”.

13. At JCS [3.19], the employer parties provide a Table setting out the current rates and current rate plus 25 per cent for each classification in the Nurses Award. Again, these rates do not reflect the outcome of the Annual Wage Review 2021-22. The table at JCS [3.19] also omits minimum hourly rates and minimum entry rates entry rates for employees with a 4-year degree or a Masters degree, as are now included in clause 15 of the *Nurses Award 2020*. The rates and classifications as proposed by ANMF are set out in Part A of ANMF CS Annexure 2, based upon the Nurses Award in its current form.
14. Reference is also made to ANMF’s response to Questions 18 and 19 at paragraphs [46] to [54] below in relation to the classification structure as proposed for the Aged Care Award.

B.3 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?

15. The ANMF has much to say about the Joint Employers submission about the expert evidence and the weight that should be placed on that evidence. That issue is dealt with at Part C.6 below.

B.4 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?

16. Part 5 of Background Document 5 provides a summary of the HSU, ANMF and Joint Employer’s closing submissions ([111]–[193]).
17. ANMF notes the high-level nature of the summary. In respect of the summary of ANMF’s submissions the following observations are proffered:

- (1) [142] of the summary drawn from Part A.2.3¹ covers the same material as [154] and [155] drawn from Part G of the ANMF closing submissions. [142] might be combined with [154] and [155];
- (2) The summary, in dealing with Part A, does not refer to the 14 matters summarised in ANMF CS Part A.2.1 of the ANMF closing submissions involving changes to the complexity of aged care work and of changes to the skill, responsibility and conditions of those employees. (Although at [156] the summary refers to the 13 changes listed by ANMF as work value reasons justifying a wage increase in Section I of the closing submissions.)
- (3) Similarly, the summary in dealing with Part A does not refer to the 5 propositions advanced by ANMF in Part A.2.2 relating to the historical undervaluation of direct care workers' work. (There is a general reference to this issue at [157] of the summary.)
- (4) Reference to the summary material contained in Parts A.2.1 and A.2.2. of the ANMF's closing submissions might be included in the summary.

B.5 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)?

18. The ANMF agrees that the ACT Child Care Decision was made under a different statutory regime to the Commission's statutory task under s 157(2A).
19. The ANMF maintains its submission made at ANMF CS [79] to [86].

B.6 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?

20. The ANMF concurs with and endorses the HSU submission at HSU CS [16].
21. The unambiguous statement contained in the Consensus Statement is that "[t]he stakeholders agree that wages in the aged care sector need to be significantly

¹ At ANMF CS [20] rather than [16] as suggested at footnote 130.

increased” CS [page 1]). That Statement arose from meetings convened by the Aged Care Workforce Industry Council and where “[p]articipants at the meetings came from stakeholder organisations that represent the aged care workforce, aged care providers, and consumers – older people and their families.” CS [page 1]. The organisations which expressly supported the Statement include ACSA, LASA, Carers Australia, the Council on the Aging and the union applicants to this proceeding. The Consensus Statement has been filed in this proceeding.

22. Based upon the contents of the Consensus Statement, the Commission can safely conclude that “*the view of all major stakeholders is that wages need to be ‘significantly increased’*”.
23. The ANMF’s further submission as to points of agreement relating to “*Work value conclusions*” are set out below at identified below at Part C.1.1. The ANMF also refers to its further submissions regarding agreement that may be discerned from the Consensus Statement at Part C.1.5 below.

B.7 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?

24. The ANMF agrees that:
 - (1) The 16 propositions regarding the changing nature of work in the aged care industry set out at paragraph 116 to Background Document 1 are uncontentious.
 - (2) The relevant wage rates in the Aged Care Award, Nurses Award and SCAHDS Award have never been properly fixed;
 - (3) The Commission does not need to consider “*significant net addition*” or find a fixed datum point; and
 - (4) The *ACT Child Care Decision* was made under a different statutory regime to the Commission’s statutory task under s 157(2A).

B.8 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’?

25. The ANMF does not contend that section 134(1)(a)-(h) of the FW Act is a code so that the Commission would be precluded from considering any other matters in determining

whether making the determination is necessary to achieve the modern award objective. The ANMF does, however, contend that section 157(2A) exhaustively defines work value reasons.

26. The definition of work value reasons at section 157(2A) adopts different language to that used in section 134. Section 134(1) requires the Commission to ensuring that modern awards, together with the NES provide a fair and relevant minimum safety net of terms and conditions taking into account certain considerations.
27. Subsection 157(2A) defines “*work value reasons*”.² That section provides that “work value reasons are (not include) reasons justifying the amount that employee should be paid for doing a particular kind of work, being (not including) reasons related to any of the matters prescribed at s 157(2A)(a), (b) and (c). The word “*being*” is the present participle of the verb “*to be*”. It makes clear that “*work value reasons*” is a definition which “*means*” rather than “*includes*” reasons related to the matters identified in section 157(2A)(a), (b) and (c). As recognised in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,³ the requirement to determine the range of relevant considerations by implication from the subject matter, scope and purpose of the legislation, does not arise where factors enumerated in a definition are exhaustive.
28. The Penalty Rates Review decision does not count against this conclusion.
29. As identified in the *Pharmacy Case* at [165], the expression “*related to*” is one of broad import that requires a sufficient connection or association between two subject matters. Accordingly, the category of things that might constitute a “*work value reason*” is a very large category. Nonetheless, where section 157(2A) is an exhaustive definition, matters that are not “*related to*” the considerations identified in section 157(2A) will not be “*work value reasons*”.

B.9 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

² *Fair Work Act 2009*, s 12 “The Dictionary”.

³ [1986] HCA 40; 162 CLR 24 at 39-40.

to deliver safe and quality aged care' is a consideration relevant to the achievement of the modern awards objective?

30. It is the ANMF's submission that evidence going to attraction and retention would be relevant to both:
- (1) the identification and assessment of "*work value reasons*" under section 157(2A); and
 - (2) achieving the modern awards objective and minimum wages objective.
31. As to the first proposition, the Commission has evidence from direct care workers about the value of their work arising from workers' own assessment of the value of the work they are performing. That evidence is consistently to the effect that the remuneration received by direct care workers fails to properly value their work.
32. Evidence about the adequacy of wages paid that is related to the nature of the work, the level of skill or responsibility involved in doing the work and/or the conditions under which the work is done, will be relevant to an assessment of "*work value reasons*" and to determining whether a minimum wage variation is justified by work value reasons.
33. The ANMF is not aware of a case that decides this; rather, it relies upon the terms of section 157(2) and (2A).
34. The ANMF recognise that *Application to vary the Social, Community, Home Care and Disability Services Industry Award 2010*⁴ (the **COVID-19 Care Allowance Case**) and other decisions of industrial tribunals have considered "*attraction rates*" to have no proper role to play in the fixation of minimum wages. The ANMF's submission is not that the Commission would set "*attraction rates*"—*i.e.*, wage rates set at a level which are perceived as necessary for an employer to attract and retain sufficient labour. The submission is rather than the Commission is entitled, in deciding whether particular rates properly reflect the skill involved in doing a work, its nature, and the conditions in which it is done, to look to evidence of workers voting with their feet, or workers' assessments of the comparability of different kinds of work.
35. This issue is addressed in greater detail below at Part C.4.2.

⁴ [2020] FWCFB 4961.

36. As to the second proposition at [30] above, better attraction and retention of staff is also relevant to the promotion social inclusion through workforce participation and the existence of a fair and relevant minimum safety net of terms and conditions in accordance with sections 134(1)(c) and 284(1)(b).
37. Consistent with the approach, the Commonwealth at Cth S [9] recognise “*the need to ensure that the wages and conditions of the aged care sector support the attraction and retention of sufficient workers to meet the expected growth in demand for aged care services over the next 30 years*”.

B.10 Question 17 to all parties: do the parties agree with the points of contention identified at paragraph [202]–[219] above?

38. At [202]–[219], Background Document 5 identifies what is described as the main issues of contention. Where relevant, the ANMF addresses those identified points of contention below.

A significant change to the nature of the work of ENs and NPs

39. At [202] of Background Document 5, reference is made to identified issues in contention identified in Background Document 1, including. The issues identified at [124] to [126] of Background Document 1 included a submission by the employer parties to the effect that the changes to the work of ENs and NPs did not amount to a “significant net addition to work requirements”.
40. The position of the employer parties on these issues appears to have evolved somewhat during the course of the hearing. The employer parties now:
- (1) do not appear to assert that a “*significant net addition*” addition to work requirements is a requirement for varying minimum wages;
 - (2) at JCS [47], contend that “*based on the evidence given during the hearing, the work undertaken by [ENs] in residential aged care has significantly changed over the past two decades warranting consideration for work value*”;⁵

⁵ See also Background Document 5 at paragraph [174].

- (3) recognise (at JCS [20.4]) that “... *the evidence also reveals an increase in the level of support that ENs provide to PCWs and the increased supervisory role they play*”;
- (4) recognise (at JCS [20.5]) that the EN is more frequently placed as the conduit between the AIN / PCW and RN, and will make some decisions about when issues about nursing care should be escalated to the RN. This is a change that represents a clear “work value reason,” to be taken into account by the Commission in its deliberative exercise; and
- (5) do not actively oppose an increase to the award minimum wages for NPs, saying instead (at [21.5]) that “*the scope of the role of a NP employed by an aged care employer from the evidence does not have the same clarity as we have with a RN.*”

Is section 157(2A) a code

41. Whether section 157(2A) is a code (as addressed above at [25] to [29]) appears to remain an issue in contention.

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

42. Whether attraction and retention considerations relevant to the assessment of work value under section 157(2A) (as addressed above at [30] to [37]) appears to remain an issue in contention.

The status of the Consensus Statement

43. The position of the employer parties as to whether the status of Consensus Statement is an issue in contention is somewhat opaque. This issue is addressed further below at Part C.1.5.

The relevance of the C10 classification structure

44. Contrary to the suggestion at [218] of Background Document 5, the ANMF does not accept that the C10 classification structure (or the Metals Framework as it referred to in these submissions) is a useful starting point in the proper fixing of minimum rates.

45. The position of the ANMF as to the relevance of the Metals Framework is addressed further below at Part C.2.1. The ANMF does agree that the weight to be given to the Metals Framework is a matter in contention between the parties.

B.11 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?

46. The ANMF’s proposed classification structure for personal care workers has the same number of classification levels as the current Aged Care Award (*i.e.*, grades 1–5). Further, each grade would remain aligned with the same classification level of aged care employee as it is under the current Aged Care Award.

47. The ANMF has adopted the HSU’s proposed titles of Senior Personal Care Worker and Specialist Personal Care Worker. The ANMF considers that these are appropriate titles for personal care workers at grades 4 and 5 respectively.

48. It will be for the HSU to satisfy the Commission that an additional classification level (aligned with level 6) is necessary to achieve the modern awards objective. The HSU’s proposed level 6 classification “*may require formal qualifications at post-trade or Certificate IV or Diploma level and/or relevant skills training or experience.*” Its proposed level 7 classification “*may require formal qualifications at trade or Advanced Certificate or Associate Diploma level and/or relevant skills training or experience.*”

49. Advanced Certificates and Associate Diplomas are not known to the Australian Qualifications Framework. It may be presumed that a Diploma is a higher qualification than an Associate Diploma, in which case a requirement for the former at level 6 and the latter at level 7 should be rejected and particularly in the absence of evidence suggesting a work value basis for the requirement. It appears uncontroversial that a Personal care worker grade 5 may require formal qualifications at Certificate IV level and, on that basis, the classification structure proposed by the ANMF should be preferred.

B.12 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?

50. As noted in [221] of Background Document 5, the ANMF proposes to remove personal care workers from the main stream of “*aged care employee*” in Schedule B and create

a new classification structure for them. Apart from some minor amendments to the classification definitions that are a consequence of that proposed variation (*e.g.*, the exclusion from the new structure of terms which are expressed to apply only “*in the case of an admin/clerical employee*”), the classification definitions proposed by the ANMF are intended to ensure that personal care workers would retain their current grade under the Aged Care Award and would not be re-aligned with a lower level.

51. As indicated in the ANMF’s answer to question 18, the classification definition proposed by the ANMF for Grade 5 – Specialist Personal Care Worker (aligned with level 7) is intended to clarify that a personal care worker in that classification may already require formal qualifications at Certificate IV level. The classification definitions proposed by the HSU would now impose that requirement at level 6 instead.
52. The HSU’s proposal would also impose a further requirement for a particular qualification at level 5. The ANMF considers that the existing requirement of “*substantial on-the-job training, may require formal qualifications at trade or certificate level and/or relevant skills training or experience*” would already encompass a relevant unit of competency and that the addition of particular units is unnecessary.
53. The HSU proposes to add “*the responsibility for leading and/or supervising the work of others*” at level 6. The existing definition for level 7 already recognises that employees at that level “*may supervise the work of others, including work allocation, rostering and guidance*”. The ANMF proposes to retain this term in the definition of Grade 5 – Specialist Personal Care Worker. The ANMF has also adopted the HSU’s proposed references to Dementia Care and Palliative Care and included them in the definition for this grade.
54. It will be for the HSU to satisfy the Commission that the further amendments to the classification definitions it proposes are necessary to achieve the modern awards objective and would not cause any personal care workers to be re-classified at a lower level.

B.13 Question 21 for the ANMF: Why is it necessary, in the sense contemplated by s.138, that the schedule expire after 4 years?

55. By section 138, a modern award may include permitted terms, only to the extent necessary to achieve the modern awards objective.

56. As noted by the Full Federal Court in *CFMEU v Anglo American Metallurgical Coal Pty Ltd*⁶ at [23]:
- “The words ‘only to the extent necessary’ in s.138 emphasise the fact that it is the minimum safety net and minimum wages objective to which the modern awards are directed. Other terms and conditions beyond the minimum are to be the product of enterprise bargaining, and enterprise agreements under Pt 2-4.”
57. The ANMF seeks a new Schedule to the Nurses Award for employees otherwise covered by the award, where those employees are engaged in the provision of services for aged persons. Clause G.1.1 of the new schedule would provide that the schedule will apply until a date, 4 years after commencement. The expiry of the proposed schedule after 4 years is not a matter beyond the minimum terms and conditions that would properly be the product of enterprise bargaining, and enterprise agreements.
58. It has also been recognised that what is “*necessary*” to achieve the modern awards objective in a particular case is a value judgment, taking into account the section 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.⁷
59. It is submitted that variations to the Nurses Award sought by the ANMF are necessary to provide a fair and relevant minimum safety net of terms and conditions and achieve the modern awards objective. The creation of a new Schedule applying to persons engaged in the provision of services for aged persons might give rise to some additional complexity.
60. The clause providing for the expiry of the proposed schedule after 4 years is a clause which contributes to ensuring a fair and relevant minimum safety net of terms and conditions, having regard to the need to ensure a simple, easy to understand, stable modern award system for Australia. That is, increases to the wages payable to aged-care workers but not other nurses is, in the ANMF’s submission, appropriate as a medium-term solution. The longer-term solution will follow a subsequent application in regard to award wages of non-aged care workers covered by the Nurses Award. Inclusion of the 4-year period minimises any adverse impact on the simplicity of the

⁶ [2017] FCAFC 123.

⁷ See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* [2012] FCA 480; (2012) 205 FCR 227; and *4 yearly review of modern awards - plain language re-drafting - standard clauses* [2018] FWCFB 4177 at [12].

modern award system for the purpose of section 134(1)(g) by placing a temporal limitation on the operation of the new Schedule.

61. This issue is addressed in greater detail in Part C.3.1.

B.14 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?

62. The ANMF does not press a submission that the funded nature of the sector is related to any of the work value reasons under section 157(2A).

63. However, the ANMF maintains its submission that it is appropriate to take into account:

- (1) difficulties experience in bargaining by reason of the funded nature of the sector for the purpose of section 134(1)(b); and
- (2) the additional role played by minimum award rates in the industry where employers have limited capacity to pay over award rates because of the funded nature of the sector for the purpose of section 134 generally.

B.15 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?

64. The *Aged Care Amendment (Implementing Care Reform) Bill 2022 (Cth)* (the **Bill**) would implement Recommendation 86.5 of the Royal Commission. The recommendation was that, by 1 July 2024, the minimum staff standard time should include at least one RN on site, per residential facility at all times. The Final Report makes the recommendation on the basis that evidence shows that a continuous nurse presence improves the quality of care [FR. 3A. 12.6.3].

65. The Bill provides a provider must, on and after 1 July 2023, ensure at least one registered nurse is on site, and on duty, at all times at the residential facility. This requirement would be subject to exemptions as may be granted in accordance with provisions in the Quality of Care Principles.

66. The Bill, if enacted, would address the important issue of ensuring that there is a minimum of one RN on duty in a facility. It would not address the broader issue of changes to skill mix and the general decline in the proportion of nurses in the aged care

workforce. The Bill does not require there to be more than one RN in a residential aged care facility at any time. There is nothing in the Bill about increasing numbers of ENs in aged care.

67. There is a substantial body of evidence currently before the Commission about changes to work value as a result of there being fewer RNs in the industry. For example, as identified in the Lay Evidence Report (at [277]), several witnesses gave evidence that there are fewer RNs, which puts greater demands on them, and on ENs and personal carers.
68. Part E.2 of ANMF CS addressed evidence pertaining to the “*Changes to staffing levels and skill mix*”. That evidence overwhelmingly addresses difficulties arising because there are fewer RNs in the skill mix.
69. The evidence of Annie Butler (ANMF Federal Secretary) at [65] – [67] sets out the decline in the numbers of overall direct care workers and changes to the composition of the workforce. While the overall total of PAYG employees in residential aged care increased by 50 per cent from 2003 to 2016, the percent of the total number engaged in direct care has decreased from 74 per cent to 65 per cent over that time. Over the same period the number of RNs has decreased from 21% of the direct care workforce to on 14.6% in 2016. In contrast, the number of PCWs/AINS has increased from 56.5% to 71.5% of the direct care workforce.
70. The requirement to have an RN present on site 24/7 will only go some, comparatively small way to redress the decline in RN numbers and to alter the skills mix. In nursing homes where an RN is already rostered, the introduction of the Bill will have no impact on the change in skill mix, as no change will be required.
71. The Commission would determine whether the variations sought to modern award minimum wages are justified having regard to the evidence of work value reasons before it. That evidence is to the effect that there are now fewer RNs and ENs working in residential aged care facilities. The ANMF relies on submissions previously made as to the consequence of this in relation to work value reasons. Conversely, there is no evidence before the Commission of how the Bill may impact upon work value reasons.
72. Ultimately, there is no basis to conclude that the Bill will materially affect the issues identified in proposition 6, namely that:

“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).”

B.16 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

73. The ANMF is aware of decisions stating that minimum award wage rates and allowances should not seek to compensate for the risk posed to employees from being required to work in dangerous conditions, and that the focus should be on removing any risk to health and safety so far as is practicable rather than paying employees to put up with it.⁸ As stated by Commissioner Bennett in *Vickers Cockatoo Dockyard Pty Limited v FEDFA*⁹ “I am of the opinion that if the work in question is dangerous then it should be a matter of removing the danger rather than of the fixing of a penalty amount”.
74. There is an abundance of evidence before the Commission as to the increasing dangers faced by direct care workers. Some of this evidence is identified and addressed at ANMF CS Part E.9. The primary relevance of this evidence is not that employees should be paid to “put up with it”, but rather that this relates to work value reasons.
75. However, as recognised in the *COVID-19 Care Allowance Case* at [86] the principle identified by Commissioner Bennett and set out at [73] above has limitations where the danger cannot be removed, and the employees are nonetheless required to perform the work as an essential service.
76. The provision of aged care is a service providing care to vulnerable older people. That service cannot be stopped when a dangerous situation arises. Aged care workers cannot walk away from residents and clients in need of assistance. The requirement for care is continuous, regardless of the danger and so may be distinguished from other industries where work may be stopped until the danger is removed. Additionally, some of the dangers involved with the provision of direct care cannot be eliminated as there will always be some risk in providing direct, personal care to persons suffering from

⁸ For eg., *Social, Community, Home Care and Disability Services Industry Award 2010* [2020] FWCFB 4961 at [86]; *Vickers Cockatoo Dockyard Pty Ltd v Federated Engine Drivers' and Firemen's Association of Australasia* [1981] CthArbRp 101; (1981) 250 CAR 338

⁹ [1981] CthArbRp 101, 250 CAR 338.

cognitive impairment. As the prevalence of dementia in aged care increases, so too does the risk of violence and aggression.

77. Whilst it would be possible to remove some of the dangers of aged care work, legitimate policy reasons have prevented dangers being removed and, in some circumstances, made the work more dangerous. This is exemplified by the reduced use of physical and chemical restraints. As identified by Sheree Clarke (AIN / PCW) (at [56]), medications are a quick and simple way of dealing with behavioural problems. The reduced use of physical and chemical restraints inhibits the ability of direct care workers to remove potential risk from the work environment. Likewise, the shift to and effect of the introduction, of “*consumer directed care*” as a philosophy of care puts the direct care worker more frequently in harm’s way.
78. Navigating dangerous work conditions has involved the development of skills. As identified in the Lay Evidence Report:
 - (1) several witnesses gave evidence that they learnt how to deal behaviours and aggression in residents, including strategies such as distraction and de-escalation, in the Certificate III and 4 courses (at [529]); and
 - (2) witnesses commonly identified that they learnt strategies, including their formal training, about how to deal with aggressive and dangerous behaviours such as using de-escalation and distraction strategies (at [530]).
79. The evidence leaves little doubt that a high level of skill is required to identify, prevent and de-escalate violence and aggression. There is no reason to ignore this skill in assessing work value.
80. Direct care workers also bear a heavily responsibility to protect other residents from the risk of violence and aggression. For example, Sheree Clarke (AIN / PCW) described (at PN10044–PN10049) the responsibility she has towards the potential victim where a resident is aggressive and going towards another vulnerable older person. She described that she could not just walk away but rather “[y]ou've got to do whatever you can to get the attention back on you, away from the more vulnerable person.”
81. Dangerous conditions also affect the nature of the work and makes for difficult working conditions. For example, Irene McInerney (RN) explained (at [52]) that there is always the potential for violence from unpredictable residents who have mixed mental health

diagnoses (including dementia). In response to questioning in cross-examination about her experience of being assaulted, Dianne Power (AIN / PCW) said as follows (at PN9548):

“...there's always yelling around you or there's people being resistive or there's, you know, you've – there's always – because you're dealing with a lot of people that have got a lot of mental health problems, you know, there's always something, you know, going on during the shifts.”

82. This sense of always being on edge as a result of the work conditions was exemplified by the evidence Jennifer Wood (home care AIN / PCW), who said (at PN5616) that she always kept her car keys in her pocket because you never knew when you might have to exit in a hurry. As identified at ANMF CS [562], this captures, in addition to the risk, the awareness on the part of the worker of being at risk, and the need to plan to reduce that risk (but never eliminate it). Beyond just the “*danger*” to the direct care worker, this sort of challenging environment is relevant to the assessment of the skill involved in the work, its nature, and the conditions in which it is done. Put simply, direct care work requires (*inter alia*) heightened awareness, an ability to perceive and address threats to oneself or others (including pre-emptively), and all of this in stressful conditions.
83. As the prevalence of dementia and other cognitive impairment increases in aged care, so too will the danger of that work and need for direct care staff to have and exercise additional skills and responsibility for their own health and safety, and that of residents and clients. The nature of the aged care work and conditions under which the work is done have become more dangerous which in various ways relates to work value reasons.

C. The Joint Closing Submission

84. The Joint Closing Submission is constituted by:

- (1) a primary part addressing 24 topics;
- (2) Annexures A to J described as the employer parties' evidence review;
- (3) Annexures K to O being extracts from the employer parties' Opening Submissions, filed 4 March 2022; and
- (4) Annexure P, containing answers to questions posed by the Full Bench in Background Document 1.

C.1 Identification of points of agreement

85. It is apparent from the Joint Closing Submission that there is a substantial measure of agreement on a range of important matters. This Part C.1 identifies (non-exhaustively) matters that are agreed between the parties, under the following headings:

- (1) Work value conclusions;
- (2) Work value considerations;
- (3) Work value evidence;
- (4) Aged Care Classification structure;
- (5) The Consensus Statement;
- (6) Award history and properly set rates; and
- (7) Full Bench questions.

C.1.1 Work value conclusions

86. The Joint Closing Submission (at JCS [4.47]) concludes that the work of RNs, ENs, and Certificate III carers as well as experienced care workers, has significantly changed over the last two decades, warranting consideration for work value reasons.

87. In the case of personal care workers, the Joint Closing Submission at (JCS [9.23]) recognises work value reasons affecting work, including:

- (1) the change in the nature of work as a result of providing care to residents with predominantly high care needs;
 - (2) the change in the nature of work involved in providing care to residents with complex needs; and
 - (3) assisting registered nurses with more complex clinical activities.
88. In the case of ENs, the employer parties (at JCS [20.4]–[20.5]) submit:
- (1) “...*the evidence also reveals an increase in the level of support that ENs provide to PCWs and the increased supervisory role they play*”; and
 - (2) the EN is more frequently placed as the conduit between the PCW and RN and will make some decisions about when issues about nursing care should be escalated to the RN. This is a change that represents clear “*work value reason,*” to be taken into account by the Commission in its deliberative exercise.
89. In the case of RNs, the employer parties conclude (at JCS [19.6]) that:
- “the shift in emphasis with respect to the administrative/management duties of the work performed by the RN, and the increase in accountability, represent clear ‘work value reasons’ to be taken into account by the Commission in its deliberative exercise.”
90. The ANMF agree with the conclusions in respect of work value as set out above while noting that the ANMF’s position is not so confined either in respect of the employees affected by work value change or the extent and scope of that change.

C.1.2 Work value considerations

91. The Joint Closing Submission sets out a range of matters arising from the evidence relevant to the Commission’s assessment of work value. These include the following:
- (1) The impact of increased regulatory requirements on work in aged care generally involving increased expectations, the need for responsiveness to client and resident preferences, the care required of complex behaviours and changes in restrictive practices (at JCS [4.28(a)]);
 - (2) Delayed entry to residential care, increased incidence of complex health conditions and dementia and increased palliative care have had implications for the work undertaken (at JCS [4.28(c)]–[4.28(d)]; [9.17]);

- (3) Increased preferences on the part of employers for Certificate III qualifications to be held by personal care workers is a feature of the work (at JCS [4.28(e)]);
- (4) The intensity of work occasioned by higher care needs and the impact of regulation has had an impact on the work of RNs, ENs and PCWs (at JCS [4.28 (f)], [9.17] and [9.22]);
- (5) The explicit adoption of a person-centred care approach has required responsiveness and adaptability of the staff providing direct care (at JCS [4.28(g)], [9.18] and [9.22]);
- (6) This changed approach had led to RNs being required to change approach in regard to their engagement with families and next of kin, and employees are required to ensure sociability with families and visitors (at JCS[4.28(h)]);
- (7) Experienced care employees (AINs / PCWs) are highly valued for their ability to apply their accumulated skills and experience (at JCS [4.28(k)]);
- (8) ENs have developed a supervisory responsibility in respect of PCWs and a generally more active supervisory role (at JCS [4.28(q)], [4.28(r)] and [4.28(w)], [20.4] and [20.5]);
- (9) The work of RNs has changed, with increasing administrative and managerial responsibilities along with their direct care responsibilities involving different and additional responsibility (at JCS [4.28(t)], [19.4], and [19.6]); and
- (10) ENs and PCWs/AINs increasingly operate under general supervision rather than the direct supervision working alongside a registered nurse (at JCS [4.28(u)] and [9.22]).

92. The ANMF agrees that all the factors set out above are established on the evidence and are relevant to the Commission's task of assessing the work value of the RNs, ENs and AINs / PCWs. The sixteen propositions listed at [116] of Background Document 1 and repeated at [93] of Background Document 5 are not repeated here. As is noted at [94] of Background Document 5, the ANMF and Joint Employers agree that those propositions are uncontentious.

C.1.3 Work value evidence

93. At JCS [2.1(b)], the Joint Closing Submission refers to their summary of evidence by reference to the factors the employer parties identify as relevant to the evaluative task before the Commission.
94. In Annexures A, E and F, the employer parties have adopted a number of conventional headings for the purpose of its “*Summary of Evidence*” of each of carers, registered nurses and enrolled nurses, as follows:
- (1) The nature of the work performed;
 - (2) Supervision;
 - (3) Level of responsibility and skill involved; and
 - (4) Environment - the conditions under which work is done.
95. Under each of these four headings the Joint Closing Submission identifies numerous aspects of the evidence to be taken into account by the Commission.
96. In the following paragraphs the ANMF refers to factors in the Joint Closing Submission concerning the evidence that it wishes to expressly endorse as supported by the evidence and as relevant to the Commission's task. The headings adopted in the Joint Closing Submission have been maintained for the purpose.

The Nature of the Work

97. The Joint Closing Submission recognises the following with respect to the nature of the work performed by AINs / PCWs, with which the ANMF agrees:
- (1) The work is complex, physically, emotionally and mentally draining and stressful (at JCS Ann A [2.12] and [2.93]);
 - (2) The nature of the work calls upon requirements for judgement, time management and good communication and the ability to readjust to changing staff and work needs (at JCS Ann A [2.11]);
 - (3) Caring work is specialised with many aspects to it (at JCS Ann A [2.34]);
 - (4) RNs and AINs / PCWs work as a team (at JCS Ann A [2.35]);

- (5) Violence and verbal abuse are a feature of the nature of the work (at JCS Ann A [2.47(a)]);
 - (6) Recipients of aged care are of higher acuity, and thus more assistance is required and higher expectations have arisen about the level of care required as a consequence of the higher acuity (at JCS Ann A [2.47(c)]);
 - (7) There are more complex behaviours exhibited by residents requiring monitoring for falls, wandering, self-harm and violence to staff or other residents (at JCS Ann A [2.63]);
 - (8) The work is physically demanding as care needs have become more complex (at JCS Ann A [2.64]);
 - (9) Responding to a diverse resident population together with an awareness of different culture and custom and ways of treating family is a feature of the work (at JCS Ann A [2.65]); and
 - (10) Every day is different and the work is challenging (at JCS Ann A [2.77]).
98. The Joint Closing Submission recognises the following with respect to nature of the work performed by ENs:
- (1) The work is stressful, physically and emotionally demanding and the work load is heavy and ever increasing (at JCS Ann F [1.8] and [1.29(b)]);
 - (2) Skills required include observational skills, medication knowledge, maintaining hydration, provision of social support and palliative care and training staff about dementia (at JCS Ann F [1.9] and [1.10]); and
 - (3) Increased occupational violence and aggression and increased care needs in view of the prevalence of dementia are a feature of the work (at JCS Ann F [1.19(a)], [1.19(b)] and [1.19(e)]).
99. The Joint Closing Submission recognises the following with respect to nature of the work performed by RNs:
- (1) Many residents now require full assistance and thus a requirement for consistent re-evaluation of their care needs (at JCS Ann E [2.6(a)]);

- (2) In the residential care centre there is always the potential for violence (at JCS Ann E [2.6(b)]);
- (3) RNs are called upon to exhibit a variety of skills including clinical assessments, care planning, provision of timing clinical interventions, evaluation and monitoring of care services and this has required increased sophistication (at JCS Ann E [2.21]–[2.22]);
- (4) The residents have more complex needs, there are increased documentation requirements, more mental health issues among residents and less direct supervision by RNs in the delivery of direct care (at JCS Ann E [2.55]);
- (5) The work is more challenging due to the impact of meeting resident preferences, the requirements in dealing with elder abuse and caring for palliative patients (at JCS Ann E [2.67]); and
- (6) The time resources and skills associated with the work have increased such that the time resources and skills associated with managing residents with complex behaviours and to provide high-level quality of life for residents in aged care has dramatically increased over recent years (at JCS Ann E [3.8]).

Supervision

100. The evidence as to supervision arrangements in respect of RNs, ENs and AINs / PCWs is consistent and clear. The Joint Closing Submission identifies the following position as reflecting the evidence concerning supervision:
 - (1) AINs / PCWs are supervised by RNs or ENs to whom they report concerns about resident status condition (at JCS Ann A [2.36], [2.49], [2.66], [2.78], [2.80], [2.95], and JCS Ann E [2.11] and [2.71]);
 - (2) RNs and ENs are in charge of shifts (at JCS Ann A [2.14]);
 - (3) RNs have responsibility for and supervise the care needs of residents (at JCS Ann A [2.15]);
 - (4) RNs supervise ENs (at JCS Ann F [1.11], [1.20] and [1.30]) and ENs supervise carers (at JCS Ann F [1.21]);

- (5) RNs perform the role of RN In Charge on each shift, and are thereby responsible for the supervision of fellow RNs, ENs and care staff (at JCS Ann E [2.7], [2.23] and [2.40]); and
- (6) RNs perform a clinical care coordinator role having an overall responsibility for the day-to-day running of the care of residence. The clinical care coordinator delegates care responsibility to RNs (at JCS Ann E [2.39]).

101. The ANMF agrees with this material and submits it is uncontroversial. Of course, the ANMF's own submissions have more to say about the subject.

The level of responsibility or skill involved in the work

102. The Joint Closing Submission identifies a range of matters under the heading of level of responsibility or skill involved including:
- (1) The need for AINs / PCWs to plan work carefully and work as a team (at JCS Ann A [2.37]);
 - (2) The skill of AINs / PCWs is exercised in respect of numerous areas of work: manual handling; documentation; the making of observations; the delivery of care (eye, oral and stomas); the training of staff; the delivery of social support; palliative care and medication administration or assistance (at JCS Ann A [2.38] and [2.68]);
 - (3) The development of compassion and empathy for families and understanding their expectations and better communication skills are required in the area of palliation (at JCS Ann A [2.51]);
 - (4) A substantial responsibility rests with AINs / PCWs in the absence of an RN on site at night (at JCS Ann A [2.52(a)]);
 - (5) Documentation skills are required of AINs / PCWs by ACFI (at JCS Ann A [2.68(k)]);
 - (6) Observational skills are required in respect of residents' physical state and behaviour; as is maintaining relationships with residents and families adequately (at JCS Ann A [2.83] and [2.99]);

- (7) The nature of clinical work for an EN in home care involves changing catheters, wound care (including drains) treating ulcers, applying skin creams including medication, medication, assessments for mobility, skin integrity and weight; continence advice and documentation (at JCS Ann F [1.34]);
- (8) ENs undertake medication administration, pressure area assessments and wound care (JCS Ann F [1.22]) as well as blood pressure and blood sugar readings (at JCS Ann E [2.11(a)], [2.11(b)]);
- (9) ENs administer Schedule 4 medication and insulin; act as checker on Schedule 8 medication administration; and undertake wound care as assigned (at JCS Ann F [2.11(a)]) as well as falls initial assessment; catheter care; contributions for care plans (at JCS Ann E [2.41]);
- (10) Registered nurses have responsibility for assessing and delivering more complex care (at JCS Ann E [2.8]–[2.9]);
- (11) RNs have responsibility for assessment and decision making in relation to falls, skin tears, bedsores and wounds (at JCS Ann E [2.11(b)(i)]–[2.11(b)(ii)] and [2.41]);
- (12) RN responsibilities include delegating and coordinating the work of care staff; liaising with doctors and family members; assessing the efficacy of residents' medication regime and pain management; wound care; mentor and supervise staff; writing care plans; preparation of incident reports; notifying families of resident death; a manager role of being in charge (at JCS Ann E [2.26] and [2.28]);
- (13) RNs have responsibility for managing staff and supervising ENs and AINs / PCWs (at JCS Ann E [2.40] and [2.42]);
- (14) RN after hours coordinators have overall clinical responsibility and for non-clinical issues in the facility (at JCS Ann E [2.42]);
- (15) Clinical and non-clinical skills are required in relation to palliative care together with empathy and compassion (at JCS Ann E [2.44]); and

- (16) RNs have responsibility for writing and reviewing care plans (at JCS Ann E [2.69]) and for the supervision and direction of AINs / PCWs (at JCS Ann E [2.71]).
103. The ANMF, while relying upon its own concluding submissions, and in particular its approach to the evidence adopted in those submissions with a focus on themes, agrees with the Joint Employer Submissions in identifying the matters listed above as relevant to the Commission's task in respect of the skill and responsibility involved. The range of skills exercised in the delivery of direct care identified by the parties' submissions is reinforced by the evidence of the "interventions" identified in the course of the *National Aged Care Staffing Skills Project Report 2016* and provided at Annexure "RB 2" to the Statement of Robert Bonner.¹⁰

The Environment: The conditions under which work is done

104. Factors identified in the Joint Closing Submission under the heading of the "*Conditions under which the work is performed*" include those listed below. These aspects of the work have application to all direct care workers, although they may have been identified in the Joint Closing Submission in respect of a particular classification. The ANMF agrees these matters are relevant to the Commission's task:
- (1) The small size of rooms and bathrooms impairs safe manoeuvring of residents and creates tripping hazards (at JCS Ann A [2.23(a)]–[2.23(b)]);
 - (2) The environment involves physical and verbal aggression (at JCS Ann A [2.23(c)]–[2.23(d)], [2.71], [2.86] and JCS Ann E [2.73]);
 - (3) There is need for risk assessments in respect of possible resident falls (at JCS Ann A [2.54]);
 - (4) Responding to dementia and associated behaviours on the part of residents (at JCS Ann A [2.85]);
 - (5) The work is dirty in the sense of being required to clean up urine, faeces, vomit and blood (at JCS Ann A [2.102]); and

¹⁰ Witness Statement of Robert Bonner dated 29 October 2021 at [18] and "RB 2" (tab 187 10978)

- (6) The facility layout has made it hard to deliver care as a result of distances involved and difficulty in observing residents (at JCS Ann F [2.48]).

C.1.4 Classification Structure

105. The Joint Closing Submission (at JCS [4.37]–[4.38]) accepts that there is merit in the restructure of the aged care classification structure into a care stream and a general services strain. This proposal is part of ANMF’s application (see ANMF CS [870]ff).

C.1.5 The Consensus Statement

106. In its Closing Submissions (at ANMF CS [26]–[28]), the ANMF addressed the position of ACSA and LASA in respect of the Consensus Statement, submitting that the position of the employers should be understood consistently with the Consensus Statement. Those submissions are relied upon, but not repeated here.
107. The Joint Closing Submission is expressed to “*represent the position of the employer interests*” (JCS [2.1(a)]). The Joint Closing Submission addresses the question from the President in respect of the status of the Consensus Statement *vis-a-vis* their opening submissions on the basis that “*The Consensus Statement does not override the submissions filed by the employer interests and certainly cannot override findings available from the evidence*” (JCS [2.8]).
108. Five matters arise:
- (1) The Commission should reject the implicit submission (as JCS App P [2.9]) that the employer parties ought not be held to the Consensus Statement because the union parties had the opportunity to cross-examine the Chief Executive Officer of ACSA about this. Paul Sadler (CEO of ACSA) gave oral evidence on 11 May 2022,¹¹ more than two weeks after the question was posed by the President to the employer parties about inconsistencies between the Consensus Statement and submissions of the employer parties. This was a matter for the employer parties to address. As identified by the President in his question to Mr Ward, the ANMF and HSU had made their position clear in written

¹¹ Transcript [PN12202]ff.

submissions (filed on 21 April 2022).¹² No issue of fairness to the employer parties arises as a result of not cross-examining Mr Sadler about this.¹³

- (2) The Joint Closing Submission does not, in any event, depart in any significant respect from the Consensus Statement and the matters "*over which the parties have reached agreement.*" Almost every one of the matters listed in the numbered paragraphs of Consensus Statement has been adopted in the Joint Employer Submissions as a matter to be taken into account by the Commission in respect of the ANMF's application. Indeed, the consensus reflected in the numbered paragraphs of the Consensus Statement is maintained and expanded upon in the parties' closing submissions.¹⁴
- (3) The recognition in the Consensus Statement that "*wages in the aged care sector need to be significantly increased*" is not inconsistent with anything said in the Joint Closing Submission in respect of the ANMF's applications. On the question of a wage increase the position put in the Joint Closing Submission is simply that the employers "*do not support an arbitrary increase of 25%*" (JCS Ann P [3.2]). At JCS [4.47], it is said that the work of RNs, ENs and Certificate III care workers (and experienced care workers) has significantly changed for work value reasons.
- (4) The omission of AINs / PCWs without a Certificate III from the conclusion at JCS [4.47] is not supported by the evidence as is apparent from the ANMF's submissions and as reflected in the employer parties' own submissions in respect of work value considerations and work value evidence referred to above. The omission of reference to NPs seemingly arises from the employer parties' conclusion that the scope of the role "*does not have the same clarity as we have with a RN*" (JCS at [21.5]). The implicit assumption that NP's are immune from all the system-wide changes affecting RNs the subject of the evidence before

¹² Reply Submissions of the Australian Nursing and Midwifery Federation, dated 21 April 2022 at [8] and Part C.1 and Outline of Submissions in Reply for the Health Services Union and Other Applicants, dated 21 April 2022 at [28].

¹³ *Browne v Dunn* (1893) 6 R. 67.

¹⁴ The exceptions are that numbered items 6 and 14 are not expressly addressed by the Joint Closing Submissions and items 18, 19 and 22 are of less relevance to the ANMF's application.

the Commission is unsustainable. The ANMF refers to its submissions in respect of NPs (in the ANMF CS, including at Part D.7 and below at C.7.3).

- (5) So far as there is inconsistency as between the Joint Closing Submission and the Consensus Statement, the ANMF repeats its submissions at ANMF CS [26]–[28].

109. Accordingly, the ANMF submits that the Commission can rely upon the Consensus Statement as properly representing the position of the stakeholder parties to the statement, including ACSA and LASA, in respect of the ANMF’s application.

C.1.6 Award History and properly fixed rates

110. The evidence in respect of the Award history of the Aged Care Award and the Nurses Award provided by ANMF and HSU was unchallenged. The summary of that history material as supplemented by the Commission in relation to award modernisation in Background Document 2 is uncontentious (see JCS App P [4.2] and ANMF CS [73] and [75]) as recognised in Background Document 5 (at [107]–[110]).

C.1.7 Full Bench Questions

111. In Background Document 1, published on 9 June 2022, the Full Bench sought answers from the parties on a number of Questions. Insofar as the position of the employer parties and the ANMF are concerned there is agreement on the following answers:

- (1) Question 2: the Joint Closing Submission agrees with ANMF’s proposition (JCS App P [3.5(d)]);
- (2) Question 5: Agreed (JCS App P [3.10] and ANMF CS [59]);
- (3) Question 7: Agreed (JCS App P [3.15] and ANMF CS [60]);
- (4) Question 8: Agreed (JCS as to datum point JCS App P [3.19] as to a significant change being necessary, also JCS [4.22] and ANMF [63]);
- (5) Question 10: Agreed not contentious (JCS App P [3.25] and ANMF CS [67]);
- (6) Question 12: Agreed not contentious(JCS App P [3.27] and ANMF CS [69]);
- (7) Question 13: Agreed s 284(1)(e) not relevant (JCS App P [3.28] and ANMF CS [70]); and

(8) Question 14: Agreed not contentious (JCS [3.32] and ANMF [71]).

C.2 The Metals Framework and “properly set” minimum rates

C.2.1 Relevance of Metals Framework

112. By their opening submissions, the employer parties submitted that Commission should be primarily guided by the C10 framework (or the classification framework set out in the *Manufacturing and Associated Industries and Occupations Award 2020* (“**Metals Framework**”)) in properly setting minimum wages in modern awards.¹⁵ That position is not expressly re-stated in the primary part of the Joint Closing Submission, but is adopted at JCS Ann K [1.27].
113. At first blush, the position now put in the Joint Closing Submission might be seen as more nuanced, stating that the Metals Framework will have utility should the Commission be satisfied that there is justification to vary minimum wage rates (see JCS [4.25]).
114. However, it is uncontroversial that some increase (indeed a significant increase)¹⁶ to the minimum award rates covered by the ANMF application is justified by work value reasons. As such, the position of the employer parties on this issue has evolved very little. The Metals Framework is now described (at JCS [4.48]) as an effective starting point (and for some an end point) in any exercise apportioning value to a classification. Indeed, the employer parties contend (at JCS [7.8]) that the Commission should be “*strongly guided*” by the Metals Framework in properly setting minimum wages.
115. In addition, the Joint Closing Submission also retains as Annexures previous submissions regarding the Metals Framework, including as to fixing rates by identification and application of a key classification under the Metals Framework described the *ACT Child Care Decision*.¹⁷ This issue and the submissions of the employer parties in this respect are addressed further below at Part C.2.4.
116. These submissions seek to subvert the Commission’s statutory task and would not be accepted.

¹⁵ Joint Submissions [4.27].

¹⁶ Consensus Statement p 2.

¹⁷ See JCS Ann M [1.26] to [1.30].

117. The current applications involve the exercise of statutory power by the Commission under section 157 of the FW Act. Whether existing wages were or were not “*properly set*” or do, or do not align with the Metals Framework does not answer the central statutory question, namely whether work value reasons justify an alteration to award minimum rates. Nor does the application of the Metals Framework directly address whether a variation of modern award minimum wages is necessary to achieve the modern awards objective, or minimum wages objective.
118. The proper approach to the Metals Framework is that it may, in some cases, be relevant in addressing the statutory questions thrown up by section 157—but it is not the statutory question. The starting point *and* end point in any exercise apportioning value to a classification are the identified work value reasons. Any application of the Metals Framework should not distract from the Commission’s statutory task.

C.2.2 The significance of “properly setting” minimum rates and the AQF

119. It does not appear to be controversial that the current minimum award rates relevant to these applications have not been properly set. The ANMF agrees with the “*provisional view*” of the Commission that relevant wage rates in the Aged Care Award, the Nurses Award and the SCHCADS Award have not been properly fixed.¹⁸
120. The employer parties opened their case on the basis that “[*o*]ne of the things that we appear to agree on with the applicants is that the minimum rates under review have not previously been properly set”.¹⁹ The employer parties continue to not dispute this provisional view. It is said on behalf of the employer parties that the Commission has never undertaken an exercise to properly set the minimum rates for the Aged Care Award and SCHCADS Award. However, for the Nurses Award, the employer parties now contend that the position is “*little less clear, although it is clear that such an exercise was not undertaken in award modernisation or since 2010*”.²⁰
121. At JCS [7.4(a)], the employer parties also rely upon a statement by Commissioner Hingley made in 2003 to the effect that the rates in a pre-reform award (said to have

¹⁸ [2022] FWCFB 94 at [7.1]. See ANMF CS [91(1) and (2)], 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).

¹⁹ Transcript, 26 April 2022, [PN377] Mr Ward.

²⁰ Email from Alana Rafter, 27 July 2022 and JCS [7.4] to [7.5].

been used as the basis for the classification structure of the Nurses Award) were “*properly set minimum rates.*” Two points of clarification should be made:

- (1) *Firstly*, Commissioner Hingley’s identification of “*properly set minimum rates*” did not follow the application of wage fixing principles at that time. Rather, the description of the rates there as “*properly set*” was referable to the paid rates review undertaken in 1998 and the subsequent arbitrated safety net adjustment;²¹ and
- (2) *Secondly*, the classifications included in the relevant award at this time did not include AINs.

122. To the extent that it remains relevant, the ANMF takes issue with the statement in the employer parties’ opening submissions and extracted in Annexure M to the Joint Closing Submission to the effect that “[p]rior to varying the minimum rates in the awards, the Commission must form a view as to whether the minimum rates were ever ‘properly set’” (emphasis added, JCS Ann M [1.1]). This submission is not supported by the terms of the FW Act and misstates the effect of previous decisions of the Commission. The position as identified in the *Pharmacy Award Decision*²² at [168] was as follows (emphasis added):

“Fifth, it would be open to the Commission have regard, in the exercise of its discretion, to considerations which have been taken into account in previous work value cases under differing past statutory regimes. For example, although as already stated s.156(4) contains no requirement for the measurement of work value changes from a fixed datum point, we consider it likely that the Commission would usually take into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way (that is, in a way which is free of gender bias and any other improper considerations) in assessing wages in the relevant modern award or its predecessor in order to ensure that there is no “double counting”.”

123. The Full Bench in the Teachers Case at [218] cited the above passage with approval. The Full Bench did not endorse a position whereby Commission must form a view as to whether the minimum rates were ever properly fixed prior to varying minimum award rates.

²¹ At [15] and [16].

²² *4 yearly review of modern awards - Pharmacy Industry Award 2010* [2018] FWCFB 7621.

124. The Joint Closing Submission at [7.12]–[7.13] also contends that the Australian Qualifications Framework (“AQF”) provides objective criteria which are additional to the Metals Framework, which is nationally regulated, to assist with the alignment of classifications across modern awards. It is said that the AQF provides a consistent means for aligning qualifications, by reference to the competencies and learning outcomes of each AQF level.
125. Whilst it may be accepted that the AQF may be used to conduct a comparison between classifications and the Metals Framework, this adds little to the utility of the Metals Framework and is not a satisfactory proxy for work value. So much has been recognised by ABI.
126. Upon publishing the *Pharmacy Award Decision*, the Commission invited submissions on various matters, including on the lack of alignment in pay rates and relativities as between pharmacists under the Pharmacy Award and those for classifications requiring equivalent qualifications under Metals Framework, as well as a lack of a consistent relationship with the AQF.²³ The submissions of ABI in response to that issue were as follows (emphasis added):
- “The structure of classifications in the Manufacturing Award and the nexus with C10 had not been the subject of arbitral consideration and the Commission should be cautious in treating these as an unalterable or unquestionable reference point. It was, ABI submitted, reasonably open to question how comfortably the manufacturing classification structure and the C10 nexus sat with a contemporary work value assessment as contemplated by s 156(4) and also ss 134 and 135 of the FW Act. It was also highly questionable whether the AQF alone could serve as a satisfactory proxy for determining work value.”²⁴
127. The issue addressed by ABI in that submission was subsequently referred to the President for consideration as to the procedural course to be taken. After receiving that referral, the President issued a Statement in which his Honour expressed a provisional view that awards with classifications requiring undergraduate degrees should be referred to a separate Full Bench.²⁵ Further, the President stated at [15] that the Full Bench may take into consideration, among other things, “*whether the AQF alone is a satisfactory proxy for determining work value.*”

²³ 4 yearly review of modern awards - Pharmacy Industry Award 2010 [2018] FWCFB 7621 at [194] – [198] and [199].

²⁴ See 4 Yearly Review of Modern Awards--Pharmacy Industry Award [2019] FWCFB 3949 at [9].

²⁵ Section 157 proceeding [2019] FWC 5934 at [13].

128. As is appropriately conceded by the Joint Closing Submission (at JCS [4.13]), the Metals Framework is inherently situated in an industrial sector context not a health sector context. As such, the utility of the Metals Framework for assessing work values in the health sector is particularly limited.
129. Likewise, the AQF alone cannot serve as a satisfactory proxy for determining work value. The task of the Commission remains to determine the applications having regard to “*work value reasons*” and the necessity to achieve the modern awards objective.
130. Despite the limited utility of the Metals Framework acknowledged by the employer interests, the Joint Closing Submission goes on to suggest (at JCS [7.14]) that this framework may be used to inform the assessment of the nature of the work and/or the work environment. Respectfully, that suggestion should be rejected. The case of the employer interests has not demonstrated how the Metals Framework may be so used here. There is no evidence and no submission about how the framework might be used to value work within a particular industrial context, recognising matters such as supervision. To the contrary, as identified above, the employer interests recognise that the Metals Framework is inherently situated in an industrial sector context not a health sector context.
131. In truth, the Metals Framework is a blunt instrument. Any use of it in this proceeding would be heavily reliant on the third step described in the *ACT Child Care Decision*, discussed below.

C.2.3 ACT Child Care Decision

132. The Joint Closing Submission does not now directly reference three-step process for proper fixation described in the *ACT Child Care Decision*²⁶ in the primary part of the submissions. However, in addition to contending that Commission should be *strongly guided* by the Metals Framework, the Joint Closing Submission includes Annexure M, “*The Legal Principles and Authorities that inform the Approach by which Minimum Rates are ‘Properly Set’*,” extracted from the employer parties’ Opening Submissions.

²⁶ *Re Australian Liquor, Hospitality, and Miscellaneous Workers’ Union*, PR954938, 13 January 2005, [2005] AIRC 28 (Ross VP, Marsh SDP, Deegan C) (“**ACT Child Care Decision**”).

133. In Annexure M, heavy reliance is placed on the *ACT Child Care Decision* as informing the approach by which minimum rates are said to be “*properly set*”.
134. As identified in ANMF CS [79]–[86], the *ACT Child Care Decision* was made under a different statutory regime and pursuant to wage-fixing principles which no longer exist. It is no longer the correct approach to the Commission’s statutory task under section 157(2)–(2A). The legislature chose to only import the fundamental criteria used to assess work value changes contained in earlier wage fixing principles.
135. In any event, even if the three-step process described in the *ACT Child Care Decision* is useful to apply in the context of a particular section 157 application, the way in which those three steps should be applied is exemplified by the *Teachers Case* [2021] FWCFB 2051. There are four points to be made about that:
136. *First*, the three steps from the *ACT Child Care Decision* are as follows:
- “1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA process with particular reference to the current rates for the relevant classifications in the Metal Industry Award. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.
 2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.
 3. If the existing rates are too low they should be increased so that they are properly fixed minima.”
137. *Second*, Annexure M to the Joint Closing Submission quotes these three steps (at JCS Ann M [1.26]), but then go on (at JCS Ann M [1.30]) to omit the third of the three steps—despite that the third step is, as explained below, critical.
138. *Third*, the first two steps in the above three-step process involve establishing the rate for the “*key classification*,” and then setting internal relativities. The third step contemplates that, even after this is done, “*existing rates*” may be “*too low*,” and therefore should be raised. A reason why those rates, even after application of the Metals Framework, may be too low is that the rates as thereby set fail to have regard to changes in work value over time or where work in a female-dominated occupation or industry has been historically undervalued. That is, even if there is some alignment with the Metals Framework, that is not a substitute for a proper work value assessment.

139. In this light, in one way or another—*i.e.*, as an application of *ACT Child Care Decision* step 3, or separately as a freestanding “*work value reason*”—section 157(2) of the FW Act requires a proper assessment of the work value to be brought to account in deciding whether work value reasons exist for altering minimum rates (and, accordingly, in deciding where those rates should be set).
140. Therefore, so far as the Joint Closing Submission should be taken to suggest that it would be enough, or appropriate, for the Commission simply to align existing rates with the Metals Framework, that submission should be rejected. In one way or another, it will also be necessary for the Commission to consider whether there have been changes in work value, or a historical undervaluation of the work, which constitute a “*work value reason*” for lifting existing rates.
141. *Fourth*, in some respects the law has moved on from the *ACT Child Care Decision*.²⁷ Contrary to JCS Ann M [1.30], it is no longer necessary (if it ever was) to use the C10 level in the Metal Industry award as the key classification against which the key classification in a subject award is to be compared. So, in the *Teachers Case*, the Full Bench considered that the “*key classification*” was “*a Proficient Teacher who has a degree and has obtained registration ...*” (see at [653]), which aligned not with C10 in the Metal Industry Award, but rather with level C1(a) (see at [654]). This issue is addressed further below.

C.2.4 Key classification

142. Again, the Joint Closing Submission no longer directly identifies the key classifications in the primary part of the submissions. However, in Annexure O, the following submissions are extracted:
- (1) “*It would not be controversial for the Commission to determine that “Aged Care employee Level 4” is the key classification for the award*” (at JCS Ann O [2.3]);
and
 - (2) “*It should not be controversial for the Commission to determine that “Nursing Assistant-Experienced” is the key classification for the award. That*

²⁷ See, *e.g.*, ANMF CS [32]–[37], [132]–[141] above.

classification requires the employee to be the holder of a relevant Certificate III qualification” (at JCS Ann O [3.1]).

143. The Joint Closing Submission (at [7.5]) also identifies the striking non-alignment of the RN classification to the Metals Framework, including (at JCS Ann O [3.5]), namely:
 - (1) The minimum rates for ENs currently align at 102% relativity, which sits between C10 and C9. However, an EN is required to obtain a Diploma of Nursing, which aligns to the C5 rate.
 - (2) The minimum rates for a RN currently aligns just below a C8. However, the standard qualification for a RN is an accredited tertiary degree—which is an AQF Level 7 and aligns with C1.
 - (3) The minimum rates for a NP currently aligns with a C2(b) rate. However, the qualification for NP is a post-graduate degree. As such, the current rate aligned to minimum experience of “*Advanced Diploma*” does not correlate.
144. Other anomalies and issues with alignment are identified (at JCS Ann O [7.7]) as arising with each award.
145. The ANMF's primary submission is that it is not necessary or appropriate for the Commission to identify a “*key classification*” and apply the Metals Framework in order to determine its application to vary the Aged Care Award or the Nurses Award.
146. If that submission is not accepted and the Commission considers that it is necessary to start by fixing a “*key classification*” to the comparable classification in the Manufacturing Award, then the ANMF's submission is that the key classification for the Nurses Award is, in fact, RN Level 1 Pay point 1. Nursing care is provided under the Nurses Award under the supervision of Registered Nurses. And, it would not make sense to view a Nursing Assistant, who is not a nurse, and whose employment is “*solely to assist an RN or [EN] in the provision of nursing care to persons,*” as being the key classification in a Nurses Award.

147. The weekly rate for an RN at Level 1, pay point 1 under the Nurses Award is currently at \$1,025.20, whereas with C1(a), at 148 per cent²⁸ of the C10 pay point in the *Manufacturing and Associated Industries and Occupations Award 2020*), the weekly pay rate is ($\$940.90 * 1.48 = \$1,392.53$). The Joint Closing Submission (at JCS Ann O [3.4]) accepts that the role of RN corresponds to AQF Level 7 and aligns with level C1 in the Metals Framework. Both levels—RN Level 1, C1(a) in the Manufacturing Award)—have a degree as a minimum qualification.²⁹ If existing relativities were then to be retained (as contemplated by step 2 from the *ACT Child Care Decision*, the result would be the following:

²⁸ That being the current compressed relativity in the Manufacturing and Associated Industries and Occupations Award 2020, instead of 180 per cent being the original relativity—see, *Re IEU* [2021] FWCFB 2051 at [562].

²⁹ As to an RN requiring a degree (which will not be controversial), see Statement of Julianne Bryce dated 29 October 2021, [21].

	Existing rate	Existing relativity against RN L1 G1	New rates	Relativity after alignment
<u>Nurse Practitioner</u>				
1st year	\$ 1,578.00	154%	\$ 2,144.50	154%
<u>Registered Nurse</u>				
RN Level 5 Grade 1	\$ 1,579.40	154%	\$ 2,144.50	154%
RN Level 4 Grade 1	\$ 1,565.10	153%	\$ 2,130.57	153%
RN Level 3 Pay point 1	\$ 1,371.30	134%	\$ 1,865.99	134%
RN Level 2 Pay point 1	\$ 1,264.70	123%	\$ 1,712.82	123%
RN Level 1 Pay point 1	\$ 1,025.20	100%	\$ 1,392.53	100%
<u>Enrolled Nurse</u>				
EN pay point 1	\$ 916.20	93%	\$ 1,295.05	93%
Student EN, >21 yrs	\$ 821.40	84%	\$ 1,169.73	84%
<u>Nursing Assistant</u>				
Experienced	\$ 899.50	92%	\$ 1,281.13	92%
3rd year	\$ 871.50	89%	\$ 1,239.34	89%
2nd year	\$ 857.20	87%	\$ 1,211.50	87%
1st year	\$ 843.40	86%	\$ 1,145.58	86%

148. This would amount to a 35 per cent pay increase across all levels. That is not the case that the ANMF is advancing. Rather, its submission is that the preferable approach to section 157(2) of the FW Act is to take a work value approach, and look at changes in work and historical undervaluation as justifying increases in wages, rather than by selecting a pay level (be it RN level 1 grade 1 or any other level), adjusting it to fit a qualifications framework, and then mechanically adjusting all other rates.

C.2.5 Intrinsic value of work and the purported utility of the Metals Framework

149. The Joint Closing Submission at [7.25] asserts that:

“work has no intrinsic value being determined in the open market simply by supply and demand. Valuing work will always involve some level of comparison rather than operating in an isolated vacuum.”

150. A similar submission is made, at JCS [4.25], apparently justifying the utility of the Metals Framework.
151. The ANMF accepts that supply and demand are not determinative “*work value reasons*”. Further, “*work value reasons*” will often require some level of comparison. However, that is not to say work does not have underlying or intrinsic value (which is a very large submission, raising a question for expert evidence if it were necessary to decide—which, happily, it probably is not).
152. As identified in the HSU CS at [41], consideration of the social utility or worth of work has been a feature of past assessment of work value. This is relevant to the objective value of the work in itself³⁰ and the “*nature of the work*”.
153. Clearly, neither the AQF nor the Metals Framework are capable of identifying (or valuing) this social utility or worth.

C.2.6 Consideration of the relevance of teachers as a comparator to the RN

154. The Joint Closing Submission at [19.7] refers to the approach taken by the Commission in the *Teachers Case* and suggests that the approach there taken assists the Commission’s assessment of work value reasons in the context of degree-qualified nurses. The Joint Closing Submission then goes on to describe aspects of the work in both occupations said to be analogous in function and performance.
155. At face value, the comparisons identified in the JCS do give rise to some similarities. However, the Commission should be cautious in drawing conclusions about comparisons between the functions and performance of the two occupations. There has been no attempt to advance evidence involving a comparison of the two occupations. The matters listed in the JCS are highly selective and do not attempt to address a work value comparison.
156. The *Teachers Case* provides some guidance on the approach to the assessment task to be undertaken by the Commission and is relevant to the establishment of a stable award system. It does not, however, provide a basis for a work value comparative exercise as between teachers and RNs.

³⁰ Citing *Re Crown Employees (Teachers – Department of Education) Award* [1970] 70 AR (NSW) 345 at 521.

157. As addressed above at Part C.2.4 the *Teachers Case* makes clear that, if the Metals Framework is to be used to in fixing work values, the key classification used for that assessment need not be the C10.
158. As addressed further below at Part C.3, the Award history of the Nurses Award discloses that the incremental structure applying to nurses has a proper work value basis for ENs and RNs and nothing has been advanced to warrant disturbing that structure. Accordingly, the classification and progression structure adopted in the Teachers Case has extremely limited relevance here.

C.2.7 Section 134(e) and the risk of “straying from the C10”

159. The ANMF notes the submissions of the employer parties with respect to section 134(e), the modern awards objective relating to “*the principle of equal remuneration for work of equal or comparable value*”. At JCS [23.19] it is said that section 134(e) of the FW Act is of minimal relevance “*save to say that the Commission should it stray too far from the C10 scheme could provoke a question of whether this principle is being met.*” This submission is understood in light of the opening oral submission on behalf of the employer parties that the Commission should exercise caution that the proceeding does not turn into an equal remuneration case by disguise.³¹
160. The ANMF understands the effect of the submission at JCS [23.19] to be that section 134(e) would not be relevant *unless* the Commission strayed too far from an application of the Metals Framework. This submission highlights the fallacy of giving primacy to the application of the Metals Framework. On one hand, the Metals Framework is an approach adopted under a different statutory regime and pursuant to wage-fixing principles which no longer exist. It finds no expression in the current legislative regime. On the other hand, section 134(e) is one of many, non-exhaustive, matters that the Commission will take into account in determining whether the proposed award variation is necessary to provide a fair and relevant minimum safety net of terms and conditions.
161. Primacy must be given to the Commission’s statutory task.

³¹ Transcript, 26 April 2022, Mr Ward [PN433] and [PN470].

C.3 Classification structures

162. At JCS [4.19], it is asserted that part of the Commission's deliberations will involve the Commission considering whether the classification structures are themselves appropriate for properly setting minimum rates in a modern award. More specifically, the employer parties:
- (1) question the benefit of separating out a new schedule to the Nurses Award applicable to aged care workers only;
 - (2) oppose the retention of wage increments;
 - (3) treat all direct care workers performing home care as being covered by the SCHCADS Award; and
 - (4) generally agree with amending of the aged care classification structure in the Aged Care Award into a care stream and a general services strain.
163. The first three of these issues are addressed further below. The fourth is addressed above at Part C.1.4.

C.3.1 Nurses Award

164. By its application, the ANMF seeks the amendment of the Nurses Award by inserting a new schedule, applicable to aged care workers only and expiring after four years, which increases rates of pay by 25 per cent.
165. By the Joint Closing Submission (at JCS [4.41]), the employer parties submit that in relation to the Nurses Award, 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. The Joint Closing Submission (at Ann O [1.2(a)]) also states that it is questionable whether it is desirable to dissect nurses in aged care from the current Nurses Award classification structure and to properly set the minimum rates for these nurses while not properly setting such rates for nurses outside of aged care. This, it is asserted, does not sit well with the approach taken in the *Teachers Case*.
166. It would (the ANMF submits) be an inappropriate exercise of power to decline to order an increase in the minimum wage for some employees, only because it is possible to point to other employees who could have been, but were not, the subject of the relevant

application. It is not necessary for all wage undervaluations to be fixed at once, in the one application.

167. In a perfect world, applications would cover all deserving employees at the one time. But the current ANMF application is made in a particular context, *i.e.*, as a response to a Royal Commission recommendation in regard to aged care employees in particular.
168. The Nurses Award is also the subject of potential further work value considerations in the undergraduate qualifications review, a review occurring on the Commission's own initiative under section 157(3)(a). That review follows the identification by a Full Bench of a lack of alignment in pay rates and relativities as between pharmacists (who require a four-year undergraduate degree) under the Pharmacy Award and those for classifications requiring equivalent qualifications under the *Manufacturing and Associated Industries and Occupations Award 2010*.³² The provisional view expressed by the President was that the awards with classifications requiring undergraduate degrees should be referred to a separate Full Bench.³³
169. Another application by the ANMF is anticipated to follow in regard to nurses outside aged care.³⁴ The ANMF seek a new Schedule to the Nurses Award to apply for a period of 4 years from the date of commencement. This is specifically intended to put a temporal limitation on the situation identified at JCS Ann O [1.2(a)], namely a situation whereby minimum rates for aged care nurses are adjusted in accordance with s 157(2), whilst rates for other nurses are not. This approach minimises any adverse impact on the simplicity of the modern award system for the purpose of s 134(1)(g).
170. In these circumstances, any short-term messiness involved in the creation of a new schedule does not prevent the variations sought by the ANMF from achieving the modern awards objective.

³² See *4 Yearly Review Of Modern Awards--Pharmacy Industry Award* [2019] FWCFB 3949 [1(3)]
³³ [2019] FWC 5934. The status of that proceeding had been on hold pending the outcome of the IEU's work value application in respect of the Teachers Award. A review of modern awards (including the Nurses Award) was scheduled to commence following the determination of the IEU's application to vary the Teacher's Award which occurred on 11 October 2021.
³⁴ As indicated by the ANMF in its Form F46 (at Annexure A, [7]).

C.3.2 Service/ experience based increments

171. The employer parties (at JCS [4.42] and [7.11(b)]) also refer to and rely on aspects of the *Teachers Case* at [546]-[656] and [647] to question the appropriateness of service-based increments with annual progression contained in the Nurses Award.

172. In *the Teachers Case* at [647], the following is said:

“We do not consider that either proposed variation would result in a rate structure that properly reflects the work value of teachers. The fundamental problem with both proposed variations is that they retain a classification structure which, we consider, is inappropriately based on years of service rather than the essential elements of qualifications, displayed competence and acquired experience and responsibility. It may be accepted, at a high level of generalisation, that a certain level of experience in an occupation will usually lead to an incrementally higher level of work value on the part of an employee, even if the nominal role of the employee has not changed. However, as the ACA submitted, there is no evidence before us to suggest that the work value of a teacher increases year by year for (in the case of a four-year qualified teacher) the first seven years of employment. Such a proposition is entirely counter-intuitive.”

173. Respectfully, this reasoning should be treated with caution. Incremental increases should be retained where they properly reflect work values, whether or not those increases are determined by length of service.

174. It does not require evidence that the work of any worker, at any level, in any industry, will (all else being equal) become more valuable as he or she gains experience in a role. As the Full Bench itself recognised in the middle of that extract, it is to be accepted that a certain level of experience will lead to incrementally higher work value. The qualification introduced by the Full Bench—“*at a high level of generalisation*”—does not detract from the force of the observations. Awards are intended to deal with the general case. Some individual workers may end up being underpaid relative to that individual worker’s work value, and others perhaps overpaid. But that will be true no matter what framework one selects to measure advancement from one grade to another.

175. Historically, Principle 8 of the *Paid Rates Review decision*³⁵ recognised that increments would be retained where they had been included in the award pursuant to the relevant work value principle or where it could be established that the increments were inserted

³⁵ Print Q7661, 20 October 1998 per Giudice J, Marsh and MacBean SDP, Smith and Larkin C.

by the Commission on grounds of structural efficiency. That decision involved an assessment of work value for ENs and RNs in which the Full Bench determined that:

“We are also satisfied that the incremental salary levels for nurses and enrolled nurses within the classification structures of the two nursing awards form part of the work value assessment of nurses' rates of pay conducted by Full Benches of the Commission in the development of professional rates for the nursing profession in federal awards. Accordingly, they are not affected by our decision.”

176. Progression by annual increments under these same two nursing awards was subsequently endorsed by a further Full Bench in the *South Australian Progression Determination Appeal*,³⁶ overturning a decision of a single Commissioner to reject a draft order to the effect that:

“A4 Progression for enrolled general nurse and registered nurses levels 1, 2 and 3, shall be by annual increments, having regard to the acquisition and utilisation of skills and knowledge through experience in his or her practice setting(s) over such period. Progression for Registered and Enrolled Nurse shall also be subject to other relevant provisions as currently provided by this award.”

177. Whilst it is the ANMF's case that the fixation of rates for ENs and RNs were not “proper” fixtures because they were not free of gender bias (see, e.g., ANMF CS [157]), that criticism does not apply to the proposition that increments recognise work value.
178. And in any event, here the submission of the employer parties (at JCS Ann O [1.2(d)]) identifies a shift in the competency of care workers at around three years. As such, the employers' own position is that they do regard experience as a proxy for work value. However, they appear to cavil with the timeframe required to progress through classification increments.
179. Further, progression through pay points in the Nurses Award does not depend on merely time spent in a role. Rather, in accordance with clause 15.7(b), progression through pay points will have regard to:
- (1) the acquisition and use of skills described in the definitions contained in Schedule A—Classification Definitions; and

³⁶ Print S7503, 28 June 2020 per Ross VP, Polites SDP and Merriman C.

- (2) knowledge gained through experience in the practice settings over such a period.

180. As identified above, the current structure of incremental advancement under the Nurses Award has been the subject of particular consideration by previous industrial tribunals. Whilst the employer parties may question the appropriateness of service or experience based increments under the Nurses Award, no alternate proposal has been put before the Commission and tested in evidence. Absent such an opportunity, the Commission would not depart from the existing classification structure.

C.3.3 Award coverage of Home Care Employees

181. Throughout the Joint Closing Submission, home care employees are treated as covered under the SCHCADS Award.³⁷ Some home care employees will, of course, be covered by that award. But others will not be. Any “*home care worker*” who is a nursing assistant within the meaning of Sch A cl A.1–A.2 of the Nurses Award will be covered by that award rather than the SCHCADS Award. And, of course, the Joint Closing Submission is not to be understood as suggesting that enrolled or registered nurses, even if providing nursing care in a “*home care*” setting, are covered by the SCHCADS Award rather than the Nurses Award. Any overlap between the Nurses Award and SCHCADS Award is minimal, and would likely be resolved by a proper analysis to determine which award classification is “*most appropriate*” to the work of the employees and to the “environment” in which the work is normally performed.³⁸

C.4 Matters that are, in fact, relevant to work value reasons

182. Throughout the Joint Closing Submission, various factors arising on the evidence before the Commission are said by the employer parties to have little or no relevance to the matters before the Commission. For the reasons that follow, the ANMF contends

³⁷ See, e.g., JCS [22.1] and Ann L [8.45].

³⁸ *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148; 245 IR 449 at [14] (Siopis, Buchanan and Flick JJ).

that proper consideration of the following matters is essential to the determination of the current applications.

C.4.1 Staffing levels

183. At JCS [5.19]–[5.23], the employer parties question whether staffing shortage issues are the proper subject of a work value assessment or a separate issue entirely. The employer parties go on to rely on *ACT Child Care Decision* for the proposition that:

“Increased workload generally goes to the issue of manning levels not work value. But, where an increase in workload leads to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration”

184. At JCS [5.23], the employer parties submit that staffing shortage issue in the aged care industry remains a matter for the industry and government, not the Commission through a work value case. Additionally, the Joint Closing Submission identifies evidence from witnesses to the proceeding relating to “*staffing*” as matters which “*should attract little (if any) weight*”.³⁹

185. Several matters arise from these submissions.

(1) *Firstly*, on the material before the Commission, it can comfortably be concluded that there is chronic understaffing across the aged care industry.⁴⁰ This has led to an increase in workload and work intensity across all classifications. The Joint Closing Submission does not suggest otherwise.⁴¹ Nor does the Joint Closing Submission contend that changes to staffing levels are temporary.

(2) *Secondly*, the *Commission* should be slow to apply the principle extracted from the *ACT Child Care Decision* above and relied upon by the employer parties. The Full Bench in the *Pharmacy Award Decision* indicated that it would be open to the Commission have regard, in the exercise of its discretion, to considerations which have been taken into account in previous work value cases under differing past statutory regimes. The principle regarding increased workloads identified in the *ACT Childcare Case* is a consideration which had

³⁹ See, e.g., JCS at Annexure A [2.10(b)] (Virginia Mashford); Annexure A [2.45(c)] (Christine Spangler); Annexure E [2.20(b)(ii)] (Jocelyn Hofman); Annexure E [2.53(b)] (Maree Bernoth); and Annexure F [1.18(a)] (Wendy Knights).

⁴⁰ See ANMF CJ at Part E.2.

⁴¹ The Joint Closing Submissions appear to include a general acceptance of staffing shortages; see, e.g., [5.19] and [5.23].

been taken into account in previous work value cases under differing past statutory regimes. However, the relevance of this factor must be determined in the current legislative regime. At the time of the *ACT Child Care Decision*, it had been necessary to establish a “*significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.*” The legislature chose to only import the fundamental criteria used to assess work value changes contained in earlier wage fixing principles, not the additional considerations taken into account in the *ACT Child Care Decision*. Now, the central question that the FWC now needs to consider is whether reasons related to any of the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done, justify payment of a particular amount. Increased workloads (and other issues caused by inadequate staffing such as working up, work intensity, and providing “*rushed care*”) may be “*related to*” each of the work value reasons at section 157(2A). Accordingly, failure to consider such matters *would* tend to lead into error.

- (3) *Thirdly*, the evidence and material before the Commission regarding staffing shortages is “*related to*” the work value reasons identified at s 157(2A). The effect of staffing levels on the changing nature of the work and therefore work value is expressly recognised at [14] of the Consensus Statement. The evidence of Kathryn Chrisfield (Occupational Health and Safety Team Manager, ANMF) is also of particular relevance, identifying changes to the conditions under which work is done by reason of occupational health and safety issues arising from staff shortages.⁴²
- (4) *Fourthly*, comprehensive evidence of “*missed care*” resulting from staffing shortages is also detailed in the National Aged Care Staffing and Skills Project Report 2016 at Annexure “RB 1” to the Statement of Robert Bonner. Section 2.8 of the Report describes the MISSCARE survey and Tables 4.6 and 4.7 identify missed care by shift and by role respectively. Section 5.8 of the Report concludes that missed care was identified across all care activities and was the result of lack of staff, increasing resident acuity and the skills mix.

⁴² See the discussion of the evidence of Kathryn Chrisfield at ANMF CS [234] – [236].

It is submitted that the extent of “*missed care*” contributes to the intensity of work and the Report provides reliable evidence of the existence of missed care. In turn, the fact of missed care is related to the work value reasons in section 157(2A).

- (5) *Fifthly*, and relatedly, the increased workload flowing from staffing shortages has led to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration. This is exemplified by the evidence of Jocelyn Hofman (RN) at [35]:

“As a result of the staffing changes the delivery of care is always rushed. Daily work routines are pressured for the entire team of registered nurses, enrolled nurses and AINs/ PCWs/ CSEs. Accordingly, my work focus has shifted with a greater emphasis on exercising accountability for care. This means combining nursing assessments with other interventions, scanning residents at meal times to assess changes in such things as posture, mood, lack of appetite, as well as requiring and following up reports from care staff of changes in resident status.”⁴³

186. Accordingly, staffing shortage issues cannot be divorced from work value reasons. Evidence on this issue should be assessed accordingly.

C.4.2 Funding, attraction and retention

187. The employer parties recognise (at JCS [4.2]) that employees in aged care are not competitively paid at a market level and that this has, in part, led to a labour supply shortage. The employer parties also recognise (at JCS [4.3]) that because of the funded nature of the sector, the supply shortage cannot be corrected by market forces. So much is uncontroversial.

Attraction and retention

188. The Joint Closing Submission goes on (at JCS [4.8]) to submit that the Commission is not here dealing with the notion of competitive market rates of pay but rather the Commission is asked to vary minimum rates of pay in the award and this requires consideration of “*work value reasons*”. Whilst it is true that the Commission is here concerned with minimum rates of and the consideration of “*work value reasons*”, that

⁴³ Statement of Jocelyn Hofman dated 29 October 2021 (tab 261 page 13153).

is not to say that market forces will not be relevant to the assessment of “*work value reasons*”.

189. Direct care workers are leaving the aged care industry in droves. A reasonable hypothesis about why this is occurring is that workers have conducted their own assessment of the value of the work they are performing and decided that the amount they are paid is not sufficient, having regard to:

- (1) the nature of the work;
- (2) the level of skill or responsibility involved in doing the work; and/or
- (3) the conditions under which the work is done.

190. Here, the Commission has evidence from direct care workers about their own assessment of the value of the work they are performing. Witnesses in this proceeding have told the Commission that:

- (1) *“The work we do is undervalued and people don’t realise the amount or complexity of the work and the range of skills involved by all of us in the nursing team.”*⁴⁴
- (2) *“I do not think my work is valued. I do not think people know the real circumstances of aged care work, unless they work in it.”*⁴⁵
- (3) *“I think aged care work is undervalued for the amount of care and energy that we put in; people don’t see the extra work that AINs put in.”*⁴⁶
- (4) *“I do not think that the pay is adequate for the work that is done.”*⁴⁷

⁴⁴ Amended witness statement of Rose Nasemena, 6 May 2022 at [56] (tab 267 page 13362), noting that the JCS at [A 2.31(a)(ii)] content that this evidence should attract little (if any) weight.

⁴⁵ Statement of Christine Spangler dated 29 October 2021 at [40] (tab 257 page 13019), noting that the JCS at [A 2.45(b)] content that this evidence should attract little (if any) weight.

⁴⁶ Statement of Dianne Power 29 October 2021 at [91] (tab 258 page 13115), noting that the JCS at [A 2.61(b)] content that this evidence should attract little (if any) weight.

⁴⁷ Statement of Linda Hardman dated 29 October 2021 at [71] (tab 263 pages 13274)., noting that the JCS at [A 2.76(a)] content that this evidence should attract little (if any) weight.

(5) *“I love caring for old people, but I don’t do it for the money. I think if we want to offer better quality care, people working in aged care need to be better paid.”*⁴⁸

191. Whilst this evidence involves opinions, these opinions are based on the real-life experience and perceptions of direct care workers. Those workers know the nature of their work, the level of skill and responsibility involved in doing their work and the conditions under which their work is done. They know only too well what they are paid for that work, the costs of living and, it may be inferred, what they could be paid for performing different work. This evidence from direct care workers is necessary to obtain an adequate understanding of the value of their work. The nature of this evidence was perhaps best encapsulated by Gerard Hayes (Secretary of the Health Services Union New South Wales at New South Wales ACT) who, under cross examination, described aged care workers as:

“Underpaid compared to someone working at Bunnings, someone working at a pub, someone working twisting a sign on the road. It's one thing in my mind to, you know, drop a can, you know, when you're stacking shelves in Woollies, it's another thing to drop a person, fracture their hip and they die.”⁴⁹

192. The Full Bench also has before it direct evidence of witnesses who have chosen to leave left and/or plan to leave the aged care industry.⁵⁰ This includes evidence of Suzanne Hewson who, at [32], described that she was hoping to leave aged care as soon as possible to move into another field of nursing that she knew was better paid.⁵¹ She had, by the time of her oral evidence, actually so moved (PN8277–8288).

193. Together, this evidence supports the hypothesis that that direct care workers have conducted their own assessment of the work they performing in aged care and have decided that the amount they are paid is not sufficient, having regard to work value reasons. What is relevant here (and what the Commission can properly take into account) is the inadequacy of the minimum wages to direct care workers. This is

⁴⁸ Witness Statement of Sheree Clarke dated 29 October 2021 at [83] – [84] (tab 268 page 13377), noting that the JCS at [A 2.76(a)] content that this evidence should attract little (if any) weight.

⁴⁹ Transcript, [PN570]

⁵⁰ See ANMF CS at [684] to [687].

⁵¹ Statement of Suzanne Hewson dated 29 October 2021 (tab 270 page 13427) .

separate and distinct from the adequacy (or otherwise) of the funding model operating in the sector.

194. At JCS Ann P [2.22] to [2.30], the employer parties refer to “*a long history of reluctance to provide rates of pay which are designed to attract employment to a particular industry*” in the Federal and State industrial tribunals. However, each of the decisions relied upon in support of that proposition are distinguishable as arising in a different statutory context. The Joint Employer Submissions do not identify any authority to suggest that the attraction and retention of labour would not be a proper consideration when assessing work value reasons under section 157(2A). Whilst the *COVID-19 Care Allowance Case*⁵² did arise under the FW Act this application was not concerned with a variation to modern award minimum wages. As such, the statutory requirements of section 157(2) and (2A) were not engaged. This decision does not stand for a proposition that attraction and retention cannot be relevant considerations when assessing work value reasons under section 157(2) and (2A).
195. For the reasons identified above, attraction and retention of staff may be related to the work value reasons identified at section 157(2A) and thereby may be considered by the Commission in determining a variation to modern award minimum wages.
196. Better attraction and retention of staff is also relevant to the promotion social inclusion through workforce participation in accordance with section 134(1)(c). 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.

Funded nature of the industry

197. The ANMF and employer parties appear to agree that the funded nature of the industry is relevant to the Commission’s task in determining the present applications. However, the parties are at odds as to how and why the funded nature of the industry is relevant.
198. The position of the ANMF as to the relevance of the funded nature of the aged care industry is set out at ANMF CS Part G.3, particularly at [848]. The ANMF contend

⁵² [2020] FWCFB 4961.

that in maintaining a fair and relevant minimum safety net, it is appropriate to take into account:

- (1) The difficulties faced by the sector in attracting and retaining staff as a consequence of funding arrangements, particularly in respect of the not-for-profit sector and rural and remote facilities;⁵³
- (2) Difficulties experienced in bargaining by reason of the funded nature of the sector for the purpose of s 134(1)(b); and
- (3) The additional role played by minimum award rates in the industry where employers have limited capacity to pay over award rates because of the funded nature of the sector for the purpose of s 134 generally.

199. By contrast, the position of the employer parties is that:

“the fact that the industry is funded makes it imperative that any increase to minimum rates set out in the Awards by the Commission takes into consideration affordability of such increase in how it is introduced.”⁵⁴

200. The last four words of the above quote are of significance where it has been conceded by the employer parties that, “*the affordability issue for [the employer parties] might very well concern operative date, phasing, those types of issues, but it's not a relevant consideration to the actual setting.*”⁵⁵ In any event, for the reasons identified at ANMF CS [849]–[856], the Commission would not be satisfied that the an increase to award minimum wages as sought by the union parties would have a detrimental impact on the viability of aged care providers. This submission must now also be addressed in light of the Commonwealth’s commitment to fund any increases to award wages ordered by the Commission, as discussed at paragraph 461 below..

201. As such, the appropriate approach for the Commission would be to identify what increase to the modern award minimum wages may be justified and necessary:

- (1) having regard to the funded nature of the sector difficulties faced by the sector in attracting and retaining staff as a consequence of funding arrangements; and
- (2) taking no account of “the affordability issue”.

⁵³ ANMF CS [848].

⁵⁴ JCS [P 2.21].

⁵⁵ Nigel Ward, Transcript 26 April 2022 PN464.

C.4.3 COVID-19

202. The employer parties accept (at JCS [5.6]) that the COVID-19 pandemic resulted in an increase in infection control practices, use of PPE, and the necessary administration supplementing existing work practices. They also accept (at JCS [5.7]) that COVID-19 remains present in the Australian community and so the sector has to learn to continue to adapt to the challenges of living with it in the community. However, it is also contended (at JCS [4.31] and [4.10]) that it is difficult to calibrate the impact of COVID-19 for those working in the aged care industry now and into the future.
203. As identified at ANMF CS [740], COVID-19 is not a temporary event. There can be no doubt that COVID-19 remains a significant issue for direct care workers impacting each of the work value reasons under section 157(2A). Whilst it may be accepted that the Commission cannot know what the future will hold, this does not diminish the weight that should be attributed to the evidence of direct care workers about the impact of COVID-19 upon the performance of their work.⁵⁶ Difficulty predicting the future course of COVID-19 does not make evidence related to work value reasons irrelevant or diminish the weight that should be attributed to it.
204. In any event, as identified at ANMF CS [741],⁵⁷ 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.

C.4.4 Financial pressure

205. As identified in Background Document 1 (at [90]) and the Joint Closing submission (at [23.8]), section 134(1)(a) of the FW Act requires that the Commission take into account “*relative living standards and the needs of the low paid.*” This factor incorporates two related, but different, concepts as explained in the 2012–13 Annual Wage Review decision:⁵⁸

“The former, relative living standards, requires a comparison of the living standards of award-reliant workers with those of other groups that are deemed to be relevant. The latter, the needs of the low paid, requires an examination of the extent to which low-paid workers are able to purchase the essentials for a

⁵⁶ Cf JCS at Annexure A [2.31(b)] (Rose Nasemena); Annexure A [2.45(d)] (Christine Spangler); Annexure A [2.61(d)] (Dianne Power); Annexure A [2.76(d)] (Linda Hardman); Annexure A [2.92(c)] (Sheree Clarke); Annexure E [2.36(e)] (Lisa Bayram); Annexure E [2.66(a)] (Pauline Breen); Annexure E [3.4(d)] (Stephen Voogt); and Annexure E [3.20(g)] (Hazel Bucher)..

⁵⁷ See also ANMF CS at Part E.16, especially at [742(5)] and [743].

⁵⁸ [2013] FWCFB 4000 at [361].

‘decent standard of living’ and to engage in community life. The assessment of what constitutes a decent standard of living is in turn influenced by contemporary norms.”

206. The evidence of ANMF witnesses as to the financial pressures that they face is directly relevant to the ability of direct care workers to purchase the essentials for a “*decent standard of living*” and to engage in community life. For example, at [14]–[16] of her statement, Sherree Clarke (AIN) gives the following evidence:

“14. Because of my limited hours and my rate of pay, I have not been able to save a deposit to get a loan to buy a house or unit.

15. I have not attempted to rent a house or unit somewhere, because I am not confident of having enough income each fortnight to pay rent on a house or unit.

16. This is why I live in a caravan park. If I get evicted from my caravan park, I do not end up with a bad rental history. I hope one day to be able to afford rent of a house or unit and I know I will need a good rental history to be selected as a tenant of a house or unit.”

207. These paragraphs are amongst those identified in the Joint Closing Submission at Ann A [2.92(a)] as aspects of her evidence which should attract little (if any) weight.

208. Similar evidence is given by other witnesses.⁵⁹ This evidence is directly relevant to section 134(1)(a) and the Commission’s consideration of whether the increases to minimum rates sought are necessary to provide a fair and relevant minimum safety net of terms and conditions.

C.4.5 Bargaining

209. The employer parties at JCS [23.11]–[23.15] direct submissions towards “*The need to encourage collective bargaining*.” The ANMF and employer parties disagree as to the capacity of a change to minimum wages to encourage collective bargaining. The experience of direct care workers with collective bargaining will be relevant to determining that dispute by identifying:

- (1) whether there is a current need to further encourage collective bargaining; and
- (2) what the current challenges to collective bargaining may be.

⁵⁹ See, e.g., Amended witness statement of Rose Nasemena, 6 May 2022 at [15] (tab 267 page 13356); Amended Witness Statement of Virginia Mashford, dated 6 May 2022 at [6] – [8] (tab 271 page 13425).

210. The that end, evidence of direct care workers about their experience with collective bargaining will be immediately relevant. Accordingly, the ANMF relies upon Part G.4 of its closing submissions and the evidence identified therein.

C.4.6 Other disputed areas

211. The employer parties acknowledge differing evidence from their own witnesses with respect to the level of engagement between direct care workers and families of residents and clients in aged care. On one hand, the Joint Closing Submission (at JCS Ann H [6.66]) recognises that families are increasingly more concerned about their family member in care. On the other hand, the Joint Closing Submission (at JCS Ann H [2.94]) provides an artificially narrow description of how interaction with families may arise,⁶⁰ and submits (at JCS Ann H [2.111]) that frontline workers have always been required to have a level of good customer service skills and interpersonal skills for personal interaction with the families of the residents.
212. The Joint Closing Submission fails to recognise that interaction between direct care workers and the families of resident of clients has become more frequent, complex, and demanding.
213. The ANMF has comprehensively addressed the issue of “*Interactions with families*” at ANMF CS Part 4.6.6, upon which the ANMF relies.
214. The employer parties also maintain a submission (at JCS [9.21]) that, in some respects, the work to be performed has been eased with the introduction and increasing prevalence of technology aides and the overall improvement in the working environment at residential aged care facilities has moved away from institutional and hospital-like settings to emphasis upon creating an environment closer aligned to a home.
215. The ANMF has made comprehensive submissions with respect to:
- (1) the prevalence and us of technology in aged care at ANMF CS Part E.11; and

⁶⁰ The employer parties there rely on the Statement of Emma Brown dated 2 March 2022 at [78] (tab 290 page 13995). Under cross-examination, Ms Brown also accepted that family members and responsible persons can at times become quite frustrated with the facility and that his frustration can sometimes manifest in abuse towards staff members (at PN13472–PN13473.)

- (2) changes to the physical environment and built for of aged care facilities (ANMF CS Part E.11, esp. at [602]–[605], [612]–[615], and [623]–[624]).

216. Again, the ANMF relies on those submissions without repeating them here.

C.5 Approach to the “summaries” of evidence in JCS Ann E–F, as well as some miscellaneous matters of lay evidence

217. In Annexures A–J of the Joint Closing Submission, the employer parties set out what they describe as a “*comprehensive review of all union lay evidence, union official evidence, and expert evidence,*” which “*provides a summary of the evidence by factors the employer interests identify as relevant*” Annexure J, in relation to expert evidence, is dealt with separately below, in Part C.6.
218. In relation to the other evidence summaries, the ANMF’s principal submission is that the Commission would prefer the analysis set out in Parts D–E of the ANMF’s closing submissions. The Joint Closing Submission is divided up at the highest level by witness, rather than by work-related topic (which obscures commonalities in the evidence). Within the employer parties’ summary of a witness’s evidence, there are (brief) submissions directed at (*inter alia*, but relevantly): (1) qualifications and training; (2) the current nature of the work performed; (3) supervision; (4) the current level of responsibility and skill involved in doing the work; (5) the current environment in which work is done.
219. It is, of course, useful (in fact necessary) to understand what is presently involved in the work of RNs, ENs, and AINs / PCWs. In that connection, however (and with respect to the employer parties), the ANMF submits that the Commission will be assisted in far greater measure by reading the Lay Evidence Report of Commissioner O’Neill, as supplemented by the ANMF’s submissions in Part D of its Closing Submissions.
220. Further, in the ANMF’s submission, evidence that is important (but not squarely addressed in the JCS evidence summaries) is evidence of change in relation to the nature of the work performed, the level of responsibility and skill involved in doing the work, and the conditions in which the work is done. Part of the ANMF’s case is that there have been very significant changes in work value, which changes have not been tracked by wage growth. This is the subject of Part E of the ANMF’s closing submissions, including so far as that Part adopts large parts of the Lay Evidence Report.

221. Beyond this, the ANMF will address below *six* particular points that arise from the JCS evidence summaries. Most of these are responses to the evidence summaries in Joint Closing Submission, but some are in relation to submissions in the main body of the Joint Closing Submission. The six points are these.
222. *First*, the JCS evidence summaries understate the significance of evidence from union officials, many of whom give evidence directly relevant to work value reasons.
223. *Second*, in a few (minor) aspects, the JCS evidence summaries are factually wrong (in regard to qualifications, experience, and other “*biographical*” information, or incomplete (in regard to role descriptions).
224. *Third*, submissions are directed to the aspects of the JCS evidence summaries which address the weight to be given to particular aspects of witnesses’ evidence.
225. *Fourth*, as to JCS [4.28(e)], the submission that, “*the qualifications required to perform a lot of the work in aged care have not materially changed,*” requires qualification.
226. *Fifth, contra* what is submitted at JCS [9.5(h)], the evidence does not support a proposition that AINs / PCWs have a “*routine*” which they follow, nor that there is meaningfully a “*cadence*” of the working day.
227. *Sixth, contra* JCS [20.4], only at a level of generality that is so high as to be unhelpful (*i.e.*, nurses are still doing nursing work) could it be said that ENs are “*still performing the same role that has existed for the past two decades.*”

C.5.1 Relevance and significance of evidence of union officials

228. The summaries of the evidence of the union officials dramatically underrepresent the importance of that evidence. A clear example is that, in JCS Ann I [1.49], Julianne Bryce (Senior Federal Professional Officer and RN, ANMF) is said to have provided an “*overview of professional regulations of nurses, and how these have developed.*”
229. This evidence is relevant to, possibly amongst other things, the skill and responsibility involved in the providing of nursing care. This is because part of the “*professional regulation*” of nurses has to do with their education and continued professional development. The evidence of Ms Bryce that is relevant in this regard is summarised at ANMF CS [645]–[646].

230. The ANMF draws attention to the following parts of its closing submissions.
231. The evidence of Annie Butler (Federal Secretary, ANMF and RN) is relevant to:
- (1) the work performed by RNs (ANMF CS [100]), ENs (ANMF CS [107]), and AINs / PCWs (ANMF CS [119]), as well as work in nursing teams (ANMF CS [134]–[135]), and the supervision arrangements between practitioners (ANMF CS [582]);
 - (2) increases in acuity in aged care (ANMF CS [182]–[187]);
 - (3) changes in staffing levels and skill mix (ANMF CS [237]–[242]), as well as attraction and retention (ANMF CS [688]–[692]);
 - (4) changes in accountability and applicable regulations (ANMF CS [305]–[306]);
 - (5) the Serious Incident Reporting Scheme (ANMF CS [321]);
 - (6) reduction in the use of chemical and physical restraints (ANMF CS [351]);
 - (7) the importance of care plans (ANMF CS [391]);
 - (8) the care needs of residents with dementia (ANMF CS [493]);
 - (9) the qualifications of direct care workers (ANMF CS [642]);
232. The evidence of Julianne Bryce (Senior Federal Professional Officer, ANMF and RN) described in the JCS as largely uncontroversial is relevant to:
- (1) the increased acuity of residents (ANMF CS [181]);
 - (2) changes in staffing levels (ANMF CS [233]);
 - (3) ability to delegate wound care (ANMF CS [457]);
 - (4) the training and qualifications of nurses (ANMF CS [645]–[646]).
233. The evidence of Kathryn Chrisfield (Occupational Health and Safety Team Manager, ANMF) is relevant to:
- (1) increasing numbers of bariatric residents, residents with dementia, and increases in acuity more generally (ANMF CS [180]);

- (2) the occupational health and safety risks posed by reduced (and otherwise changed) staffing (ANMF CS [234]–[236]);
 - (3) difficulties created by increased focus on “*resident choice*” (ANMF CS [304]);
 - (4) incidents of workplace violence and aggression perpetrated by family members on staff (ANMF CS [401]);
 - (5) the interpersonal skills involved in dealing with bariatric residents and with aggression (ANMF CS [434]–[435]);
 - (6) the shortage of existing facilities suitable for psycho-geriatric care, and occupational health and safety risks posed by increased prevalence in dementia (ANMF CS [495]–[496]);
 - (7) the psychological effects of working in aged care, including from dealing with residents and their families, due to the sheer volume of work, from the constant pressure and scrutiny of work, and “*substantial work intensification*” (ANMF CS [541]–[545]);
 - (8) the built form of aged-care facilities and the use of technology (ANMF CS [606]–[611]);
 - (9) the effect (including longer-term effect) of COVID-19 (ANMF CS [742]).
234. The evidence of Andrew Venosta (former RN, now Industrial Officer, ANMF) is relevant to:
- (1) the work of RNs (ANMF CS [101]–[102]) and ENs (ANMF CS [108]);
 - (2) increased acuity of aged-care recipients (ANMF CS [190]–[191]), including in regard to dementia (ANMF CS [494]);
 - (3) the introduction, and effect of the introduction, of “*consumer directed care*” as a philosophy of care (ANMF CS [269]);
 - (4) ACFI accreditation (ANMF CS [340]);
 - (5) increased pressure on AINs / PCWs as to documentation (ANMF CS [364]);
 - (6) the significance of care plans (ANMF CS [382]);

- (7) the difficulties, especially for AINs / PCWs, in managing difficult family members of aged-care recipients (ANMF CS [402]);
 - (8) the greater level of knowledge and responsibility involved in palliative care (ANMF CS [498]);
 - (9) the increased prevalence of infection prevention and control, even before but particular during COVID-19 (ANMF CS [744]).
235. The evidence of Paul Gilbert (Assistance Secretary, Victorian Branch, ANMF) is relevant to:
- (1) increases in acuity in the aged-care sector (ANMF CS [189]);
 - (2) changed skill mix in aged-care staffing (ANMF CS [243]), and the effect of insufficient staffing or a lack of time in the workplace (ANMF CS [566]);
 - (3) the increased prevalence of medication “*endorsed*” ENs so that they are now the predominant category of EN, which had not previously been the case (ANMF CS [647]);
 - (4) attraction and retention (ANMF CS [700]);
 - (5) bargaining outcomes in aged care (ANMF CS [860]–[862]).
236. The evidence of Robert Bonner (Director, Operations and Strategy, South Australian Branch, ANMF) is relevant to:
- (1) function shift whereby AINs / PCWs are increasingly performing work that had previously been performed by ENs and RNs, and corresponding that affects the work of ENs and RNs (ANMF CS [120]–[121]);
 - (2) increases in acuity (ANMF CS [188]);
 - (3) research conducted in relation to staffing and skill mix in aged care (ANMF CS [244]–[245]);
 - (4) the prevalence of occupational violence (ANMF CS [565]);
 - (5) an explosion of clinical technology and its effects (ANMF CS [607]);
 - (6) changes in the Cert III qualification over time (ANMF CS [644]);

(7) attraction and retention (ANMF CS [693]);

237. The evidence of Kristen Wischer is, of course, relevant to Award History, and is also relevant to the difference between public sector pay rates and private-sector rates (see (ANMF CS [695]–[698]). *Contra* JCS Ann I [1.93], this evidence is in fact relevant, as discussed below.

C.5.2 Qualifications, experience, and role descriptions

238. There are a few minor corrections to make to the a few annexures so far as they contain “*biographical*” information and role descriptions.

239. As to JCS Ann A:

(1) as to Virginia Mashford, and as to JCS Ann A [2.4], the JCS correctly states that Ms Mashford started work in the industry in 1994, but that amounts to 28 years of service, not 38.

(2) as to Sherree Clarke, and as to JCS Ann A [2.89], the JCS correctly states that Ms Clarke started work in the industry in 1998, but that amounts to 24 years of service, not 32.

240. As to JCS Ann F:

(1) as to Suzanne Hewson, and as to JCS Ann F [1.5], the JCS correctly states that Ms Hewson started work in the industry in 2014, but that amounts to 7 or 8 years of service, not 11.

241. Within JCS [9.5], [19.3], and [20.3], the Joint Closing Submission contains submissions in relation to the work performed by AINs / PCWs, RNs, and ENs respectively. These are, in the ANMF’s submission, incomplete.

242. To illustrate (without intending to be exhaustive), in regard to PCWs the following tasks are performed, beyond those listed in JCS [9.5]:

(1) from the statement of Sherree Clarke dated 29 October 2021 at [36]–[37]:

- (a) checking fingernails and toenails;
- (b) cleaning bedroom cupboards, drawers, bathrooms;
- (c) reporting clothing and bathroom supplies needed;

- (d) checking shoes are stable;
 - (e) checking review date on care plan hasn't expired and that descriptions of residents care needs are still accurate;
 - (f) restocking supplies;
 - (g) changing soiled incontinence pads;
- (2) from the statement of Virginia Mashford dated 29 October 2021, teaching new staff how to do the job (at [30]), and cleaning and unblocking toilets (at [46]);
- (3) from the statement of Linda Hardman dated 29 October 2021 at [18], attending to pressure area care.
243. In regard to RNs (again without intending to be exhaustive), the following tasks are performed beyond those listed in JCS [19.3]:
- (1) from the statement of Lisa Bayram dated 29 October 2021, making arrangements for end of life care (at [36]), weight loss monitoring and swallowing assessments (at [58]), and risk assessments for falls (at [62]);
 - (2) from the statement of Jocelyn Hofman dated 29 October 2021 at [15], assessing the efficacy of a current medication regime, checking for signs of infection, and urinalysis.
244. In regard to ENs (again without intending to be exhaustive), in addition to the tasks listed in JCS [19.3], in the statement of Wendy Knights dated 29 October 2021 she gives evidence at [83] of assisting newer staff through the palliation process.

C.5.3 Submissions about the employer parties' "weight" submissions for ANMF witnesses

245. In this part, submissions are made as to the sections in each of the JCS summaries of evidence (for ANMF witnesses) dealing with the "*weight*" to be given to particular parts of witnesses' evidence.

Virginia Mashford—AIN / PCW

246. As to JCS Ann A [2.10(a)], financial pressure is relevant to the task confronting the Commission. This has been addressed above (in Part C.4.4 above). The short point is that the evidence goes to, possibly amongst other issues, relative living standards and

the needs of the low paid (section 284(1)(c)), attraction and retention, and whether wages have kept track with workload and intensity.

247. As to JCS Ann A [2.10(b)], staffing levels are relevant to the task confronting the Commission. This has been addressed above (in Part C.4.1). The short point is that, assuming (which the evidence shows), that staffing levels and mix have been the subject of an enduring change (not some temporary aberration), and that has an effect on workload, work intensity, stress, and decision-making (and the evidence is that it does), then that is relevant to work value.

Rose Nasemena — AIN / PCW

248. As to JCS Ann A [2.31(a)], evidence as to reliance on penalty rates is relevant for reasons given in Parts C.4.2 and C.4.4 above. The impact that work has on well-being and energy is plainly relevant: whether work does, or does not, take an emotional toll on the worker is relevant to the nature of the work and is capable of capable of constituting a work value reason. Ms Nasemena's reasons for working in aged care are relevant to, perhaps *inter alia*, attraction and retention.
249. As to JCS Ann A [2.31(b)], evidence in relation to COVID-19 is relevant for reasons given in ANMF CS [740]–[741]—in short, COVID-19 is not temporary, and in any event it has resulted in permanent changes in the work.

Christine Spangler — AIN / PCW

250. As to JCS Ann A [2.45(c)]–[2.45(d)], these raise staffing and COVID-19. This evidence is relevant for reasons given above.
251. As to JCS Ann A [2.45(a)], evidence about enterprise agreement negotiations is relevant to the need to encourage collective bargaining (section 134(1)(b)).
252. As to JCS Ann A [2.45(b)], doubtless Ms Spangler's evidence as to whether her work is or is not valued, and whether an increase in wages is likely to attract further staff, are matters of opinion, but they are lay opinions within the meaning of section 78 of the *Evidence Act 1995* (Cth) and hence admissible.

Dianne Power — AIN / PCW

253. As to JCS Ann A [2.61(a)], submissions as to the weight of evidence of a witness's age might be seen to show a slightly overeager approach. Ms Power's living circumstances,

previous employment, and reasons for working in aged care (as well as her income and financial circumstances) are all relevant, if only to attraction and retention and the needs of the low paid.

254. As to JCS Ann A [2.61(b)], Ms Power's opinions about the perception of the aged care industry are lay opinion (section 78 *Evidence Act 1995* (Cth)), and are relevant again to (perhaps amongst other things) attraction and retention.
255. As to JCS Ann A [2.61(c)]–[2.61(d)], enterprise agreement negotiations and COVID-19—are relevant for reasons given above.

Linda Hardman — AIN / PCW

256. As to JCS Ann A [2.76], evidence as to Ms Hardman's perception of the aged care industry and work, enterprise agreement negotiations, and COVID-19, are all relevant for reasons given above.

Sherree Clarke — AIN / PCW

257. As to JCS Ann A [2.92], evidence as to Ms Clarke's personal circumstances, her perception of working in aged care, and COVID-19, are all relevant for reasons given above.

Irene McInerney — RN

258. As to JCS Ann E [2.5(a)], [2]–[8] of Ms McInerney's statement are relevant. There is evidence of the shifts Ms McInerney works (which is necessary to understand the balance of her evidence as to the nature of her work), and her income including in comparison with acute care and other nurses (relevant for reasons given above).
259. JCS Ann E [2.5(b)] is an (odd) submission that Ms McInerney's evidence at [13], [19]–[20], [21], [25]–[29], [33], [43]–[45], [48], [50], [53], and [55]–[58] is all in relation to her "*personal circumstances/opinion and distaste for her employer.*" It is as well to spend some time on this objection, because it exemplifies the over-exuberant approach that the employer-parties have taken to evidential objections:
- (1) [13] contains, amongst other evidence, that "*residents in the Tasmanian facility were older, more frail and required higher levels of care,*" that staffing has declined, that "*care needs have increased and continue to increase,*" and that the work is "*exhausting.*" This evidence is, obviously, relevant.

- (2) [19]–[20] are in relation to Ms McInerney’s short experience in the community aged care sector (which is relevant to her experience), and the fact that she works a shift work roster (which is relevant to understanding everything else she says about the nature of her work);
 - (3) [21] contains, amongst other evidence, that staffing has not kept up with higher care demands on an RN. This is plainly relevant.
 - (4) [25]–[29] contain evidence as to the acuity of residents, residents entering aged care being already palliative, the complexity of care needs, the degree of cognitive decline in comparison with 10–15 years ago, the absence of doctors and shortage of RNs onsite, the time pressure of the work, the effect on workload of using agency staff, the ability to manage workloads, and Ms McInerney’s reasons for doing aged-care work. Listing these topics makes plain that they are all relevant.
 - (5) [33] contains evidence in relation to the effects of large number of workers from CALD backgrounds. This is relevant to the skill involved in performing the work.
 - (6) [43]–[45] contains evidence about time pressure in work, and the pressure that exists to complete funding documentation rather than perform care work. These are relevant to the nature of the work, and the skill involved in doing it.
 - (7) [48] is short and so can be set out in full: “*We need more skills in the workforce. We need to continue to grow in our role. It is complex now with the multiple disease and mental health processes we are dealing with.*” Everyone accepts that the increased acuity of patients is relevant to work value.
 - (8) [50] and [53] are relevant to staffing mix in the sense of the decline in the number of RNs, and the increased workload on remaining RNs as a result.
 - (9) [55]–[58] set out Ms McInerney’s reasons for working in aged care.
260. None of the paragraphs contain anything that could fairly be characterised as showing “*distaste for [Ms McInerney’s employer].*” Submissions of that kind should be made carefully: they have the capacity to affect people’s employment. The submission was unjustified. Further, every paragraph that is referenced by the employer parties is

relevant or, in some cases, highly relevant (in fact, their own witnesses give evidence directed to the same topic—*e.g.*, increased acuity of residents). Quite why the employer parties saw the need to object to evidence of this kind is difficult to understand.

Jocelyn Hofman — RN

261. As to JCS Ann E [2.20(a)], the employer parties object to [5]–[6] of Ms Hofman’s statement on the basis that it “*expresses personal opinion.*” The paragraphs are as follows:

“5. I generally work six (6) shifts a fortnight only. I would like to work more but cannot due to the physical and emotional nature of the work.

6. My income working in aged care is sufficient to meet my living expenses however, it is probably not sufficient for me to retire on. I am looking at retiring in about five (5) years.

262. The only bit of these paragraphs that is a matter of opinion is Ms Hofman’s view that her current income is probably not sufficient for her to retire on. But even that is lay opinion, and hence is admissible under section 78 of the *Evidence Act 1995* (Cth). On no view is a statement that, “*I generally work six (6) shifts a fortnight only*” a statement of opinion. It is the same with the balance of [5]–[6].

263. One can perhaps start to understand why objections of this kind are made by reading underneath JCS Ann E [2.20(b)(iii)], where the employer parties say that, for example, “*my work is physically and emotionally draining*” is “*information based on Ms Hofman’s opinion and belief,*” and is not “*supported by any objective evidence or particulars.*” Every aspect of this is misdirected.

264. A statement by a person that she feels drained, physically and emotionally, is not opinion evidence. It is evidence as to what the person perceives. As for the “*objective evidence*” objection, what evidence do the employer parties think can be adduced to show, objectively, how a person feels at the end of a shift? There is no “*objective corroboration*” rule for evidence to be admissible (or to be given weight). Ms Hofman can simply say, “*I felt tired.*” She does not need to produce a document that records blood glucose level or something of that kind. And as for “*particulars,*” Ms Hofman’s evidence is not a pleading. If the employer parties wished to challenge Ms Hofman’s evidence that she finds the work tiring, they could have cross-examined on it.

265. All of the objections to Ms Hofman’s evidence would be rejected.

Lisa Bayram — RN

266. In order, in relation to JCS Ann E [2.36(a)]–[2.36(e)]:
- (1) an opinion as to the skill required to perform particular work is lay opinion and hence admissible;
 - (2) difficulty performing work is, in fact, relevant to the nature of the work;
 - (3) the emotional challenges of work are, in fact, relevant to the nature of work;
 - (4) reasons for working in aged care are relevant to attraction and retention;
 - (5) evidence as to COVID-19 is relevant for reasons given above.

Maree Bernoth — RN

267. As to JCS Ann E [2.53(a)], Ms Bernoth is not briefed as an independent expert. She primarily gives non-opinion primary evidence. Accordingly, it would be inappropriate for her to refer to the expert witness code of conduct, even if that code were a condition of admissibility or weight under the *Fair Work Act 2009* (Cth) or the *Fair Work Commission Rules 2013* (Cth). The fact that Ms Bernoth is called to give primary evidence does not render inadmissible evidence of opinions she might express. If she has specialised knowledge (she does) and expresses opinions on the basis thereof, then that evidence is admissible (section 79 of the *Evidence Act 1995* (Cth)).
268. Further, as the employers note, the parties in this case have focussed on changes in the work over the last two decades (JCS [4.20]). Ms Bernoth was working in aged care for a good part of that period, commencing at Charles Sturt University only in 2009 (see at [17]). Accordingly, contrary to the employer parties' submission, Ms Bernoth can give relevant primary evidence of her experiences in aged care.
269. In any case, Ms Bernoth “*is in regular contact with new RNs in the industry,*” and hence is able to give first-hand hearsay evidence as to what those RNs tell her, and primary evidence as to her observations concerning their qualifications and training. This evidence is all admissible and relevant (as to the admissibility of first-hand hearsay where it would cause undue expense or delay to call every RN with whom Ms Bernoth spoke, see section 64 of the *Evidence Act 1995* (Cth)). In any case, Ms Bernoth was not required for cross-examination. That would have been an opportunity for the employer parties to have put that what she had heard from other RNs was wrong.

270. As to JCS Ann E [2.53(b)], evidence about staffing is relevant. It does not cease to be relevant because it relates to a period partway through, rather than at the end of, the two-decade period upon which the parties have focused. And, evidence that, “[t]here is often no supervision of RNs” is not, *contra* JCS Ann E [2.53(b)(iv)], evidence of “belief.” It is primary evidence of what Ms Bernoth observed. That is admissible.
271. As to JCS Ann E [2.53(c)], “particulars” are not necessary for evidence. Evidence is not a pleading.
272. As to JCS Ann E [2.53(d)], remuneration plainly is relevant in a work value case. This has been addressed above.
273. As to JCS Ann E [2.53(e)], it is again wrong to say that Ms Bernoth is expressing a “belief” when she says that staff sacrifice their safety. That is primary evidence about something she has observed. As to generality and absence of particulars, the point about particulars has been addressed above, and the point about generality does not go anywhere: if the employer parties wanted to suggest to Ms Bernoth that she was wrong to say that staff sacrifice their safety to provide adequate care, they could have cross-examined. The same point is made in relation to JCS Ann E [2.53(f)].

Pauline Breen — RN

274. As to JCS Ann E [2.66(a)], COVID-19 is relevant for reasons given above.
275. As to JCS Ann E [2.66(b)], Ms Breen’s evidence is that, “*proper assessment of a client’s environment is not conducted before we visit them for the first time.*” The employer parties say that that evidence would not “*sustain a conclusion that assessments do not take place or that all home environments are inherently hazardous.*” There is nothing in this objection. Ms Breen did not say that assessments do not take place; she did not say that all home environments are inherently hazardous. She said that a proper assessment is not conducted. That evidence is admissible and there is no reason to give it diminished weight.
276. JCS Ann E [2.66(c)] is (with respect) a confused objection. Ms Breen’s evidence is as follows:

“I have concerns relating to my health and safety at work. A proper assessment of a client’s environment is not conducted before we visit them for the first time. There are many issues that need to be assessed (e.g. access to dangerous

driveways, vicious dogs, domestic violence, guns in the house etc.) Staff are not necessarily trained to deal with these kinds of issues. In many cases the client will have relatives living with **them**. Sometimes those relatives have drug or alcohol problems. This can be dangerous and unsafe for our staff.”

277. Starting with JCS Ann E [2.65(c)(i)], then, the word “*them*” (emphasised above) does not, in fact, refer to “*vicious dogs, domestic violence, guns in the house, etc.*” It refers to the client. The employer parties go on to say that the evidence “*is not supported by reference to any objective evidence.*” There is no requirement, for evidence to be admissible or carry weight, that a witness’s sworn testimony be supported by “*objective evidence.*” A witness’s testimony is evidence. If Ms Breen has encountered a relative in a house, she can say that—she does not have to produce a document which shows it.
278. The employers then say that this is unparticularised and “*generalised information based on Ms Breen’s belief.*” This would not be accepted. If Ms Breen says she encountered a relative in a house, that is not a belief, that is a fact. If she says she encountered a gun in a house, that is not a belief, it is a fact. If the employers disbelieved Ms Breen’s sworn evidence, they should have cross-examined her on it. Again, as for “*particulars,*” there is no need for Ms Breen to go beyond saying, “*some driveways are dangerous,*” into saying, “*for example the driveway at X address had a one in five gradient and was poorly surfaced.*” Particulars are not a condition of admissibility or weight.
279. Moving on to JCS Ann E [2.65(d)], Ms Breen gives evidence as follows:
- “Another issue is the heat. Many aged persons do not have air conditioning. Our staff can become exhausted and dehydrated, particularly while working in the afternoon.”
280. *Contra* the employers’ submission, having to work in hot conditions plainly is relevant to both the nature of the work, and the conditions in which it is performed, and hence is relevant to a “*work value assessment.*” The employer parties then say that “*that matter should have been raised by Ms Breen with her employer.*” That is not relevant to whether it is admissible or should carry weight. Further, the evidence is not (*contra* the employer’s submission) hearsay evidence so far as it relates to her experience. There is no reason to give the paragraph diminished weight.
281. As to JCS Ann E [2.65(e)], financial matters are relevant for reasons given above. As to JCS Ann E [2.65(f)], the impugned paragraph is lay opinion.

Stephen Voogt — NP

282. As to JCS Ann E [3.4(a)], the availability of external support in a person's role is relevant to the nature of the work and the skill and responsibility involved in doing it.
283. As to JCS Ann E [3.4(b)], Mr Voogt's evidence as to the ability to manage residents non-pharmacologically is relevant to the nature of work (including the risk involved in doing it) and the skill and responsibility involved in doing it.
284. As to JCS Ann E [3.4(c)], Mr Voogt's basis for saying that doctors are increasingly reluctant to prescribe medicine is his personal experience. No other basis is required.
285. As to JCS Ann E [3.4(d)], evidence as to COVID-19 is relevant for reasons given above.

Hazel Bucher — NP

286. It is not possible to respond to JCS Ann E [3.20(a)]. A bare assertion that particular evidence is "*not of assistance*" is not of assistance.
287. JCS Ann E [3.20(b)] takes objection to this evidence of Ms Bucher's:
- "Family members with pre-existing mental health illnesses such as anxiety can be challenging to manage for the RNs as at times phone calls can be abusive and difficult to end. Over time interactions with families has become more frequent, with expectations and a need to provide feed back to and consultation with families increasing."
288. The basis on which that evidence is given is plainly Ms Bucher's own experience. No other basis is required.
289. As to JCS Ann E [3.20(c)], the employer parties take objection to Ms Bucher saying that the work of aged care workers has profoundly increased, "*without foundation*." To begin with, Ms Bucher did not, at [43], even say that work had "*profoundly increased*"; she said that it had been "*profoundly influenced*" by particular changes, which she then describes in sub-paragraphs (a)–(e). If any "*foundation*" were needed for a statement, given by a witness of fact without challenge, that work has increased over time, in any event it is found in those sub-paragraphs.
290. It is the same in regard to JCS Ann E [3.20(f)]. If Ms Bucher has found that dealing with families is challenging, she can simply say so. She does not need to give some further "*foundation*" for that evidence as to her personal experience.

291. As to JCS Ann E [3.20(d)]–[3.20(e)], the ANMF submits that Ms Bucher’s evidence will, in fact, assist the Commission. And as to JCS Ann E [3.20(g)], COVID-19 is relevant for reasons given above.

Suzanne Hewson — EN

292. JCS Ann F [1.7(a)] attributes to Ms Hewson something she did not say, and then objects to that thing she did not say. It says that Ms Hewson expressed “*frustration*”—that word appears in quotes—as to reduced shift length, in [16] of her statement. [16] of Ms Hewson’s statement is this:

“I always work the morning shift, and I alone am responsible for the 26 residents downstairs. The EN morning shift used to be 7.5 hours but it is now 5.5 hours. This changed in mid 2020 as a cost saving measure. I am now required to do 7 hours of work (the 1400 drug round takes 30 minutes) in just 5.5 hours, with no additional assistance and ever-increasing duties and complexity of residents’ care needs.”

293. The word “*frustration*” does not appear there, or anywhere else in Ms Hewson’s statement (or for that matter in her oral evidence). Evidence as to time pressure that Ms Hewson is under, due to having to perform more work in less time, is relevant to work value.
294. The objection at JCS Ann F [1.7(b)] does not appear to have been completely expressed. In any event, the ANMF presses the evidence.

Wendy Knights — EN

295. As to JCS Ann F [1.18(a)], [1.18(b)], and [1.18(d)], staffing, bargaining, and COVID-19 are relevant for reasons given above. As to JCS Ann F [1.18(c)], the evidence is relevant. The fact that Ms Knights considers it part of her role to advocate in regard to matters of clinical care is relevant to the nature of the work and the skill and responsibility involved in doing it.

Patricia McLean — EN

296. As to JCS Ann F [1.28(a)], Ms McLean’s personal circumstances are relevant in understanding the balance of her evidence.
297. As to JCS Ann F [1.28(b)], at [121]–[124] of her statement Ms McLean says that when she drives for work she has to walk long distances, is exposed to high temperatures, and

rain, and cigarette smoke. These are all relevant to (if nothing else) the conditions in which Ms McLean's work is done.

298. As to JCS Ann F [1.28(c)], Ms McLean's perceptions of aged-care work and her reasons for doing it are relevant to (at least) attraction and retention.

Kathryn Chrisfield — Occupational Health and Safety Unit Coordinator

299. As to JCS Ann I [1.58], it is not a condition of admissibility, nor is it relevant to weight, that Ms Chrisfield does not provide data in relation to her evidence at [31]–[39] on incidents of occupational violence and aggression. She makes it clear that, in at least many cases, her evidence is hearsay evidence (see, *e.g.*, [34]). Even if the *Evidence Act 1995* (Cth) applied, this would be admissible under section 64 on the basis that it is not reasonably practicable to call every person who has ever reported occupational violence to the OH&S unit. In any case, there is ample primary evidence of occupational violence before the Commission. And, some of Ms Chrisfield's evidence (see at [35], [38]) is primary evidence as to the courses of investigations in which Ms Chrisfield was involved. The evidence would not be given diminished weight.

300. As to JCS Ann I [1.59], COVID-19-related evidence is relevant for reasons given above.

301. As to JCS Ann I [1.60], as with occupational violence, Ms Chrisfield's evidence as to mental health and workload pressure is based on reports made to her (see, *e.g.*, at [42]) and her involvement in investigations (see, *e.g.*, at [43]). The evidence is admissible.

302. As to JCS Ann I [1.61], if the employer parties considered that they were prejudiced by an absence of detail in, *e.g.*, [50] of Ms Chrisfield's statement, they could have cross-examined her about those issues to garner further information (or have written to the ANMF in advance of the hearing, raising the issue and seeking further information). Having not done so, they should not now be heard to complain about not having enough information.

Paul Gilbert—Assistant Secretary, Vic Branch

303. As to JCS Ann I [1.79]–[1.80], evidence as to bargaining and COVID-19 is relevant for reasons given above.

304. As to JCS Ann I [1.81], the evidence is in relation to (amongst other matters) staffing mix (at [62], [71]), staffing levels ([63]–[64], [72], [74], [76]–[77]), staffing levels and instances of injury, aggression ([65]–[66], [70]), funding (at [73], [75]), and changes in acuity (at [78]). These are relevant subject matters.
305. As to Mr Gilbert expressing views on occasion during these paragraphs, he is a person with 42 years' experience in and around the sector, as a worker and a union official. His opinions are expressed based on specialised knowledge derived from his training, study, and experience. They will assist the Commission and would be received.

Robert Bonner—Director of Operations and Strategy, SA Branch

306. As to JCS Ann I [1.91], the survey is in relation to staffing levels and mix ([44], [48]), attraction and retention ([46], [51]–[52]), workloads ([47]), resident acuity ([49]–[50]), and rates of pay ([53]–[54]). These are relevant matters.

Kristen Wischer—Senior Federal Industrial Officer

307. JCS Ann I [1.93] says that Ms Wischer's statement of 29 October 2021 is largely controversial. It is assumed that this is a typographical error given that Ms Wischer was not required for cross-examination, and the vast majority of the statement goes to matters such as award coverage and classification structure, with which the employer parties have taken no issue.
308. The employer parties submit that Ms Wischer's comparison of private sector rates to public-sector rates is irrelevant. It is relevant. If a carer can get more money for doing largely-equivalent work in public sector acute care, that would tend to support a variety of propositions, including that: (1) attraction and retention are a problem in aged care; (2) aged-care work is undervalued.

Conclusion

309. The ANMF presses all of its evidence and does not accept that any of it should be given any particularly-reduced weight. Of course, some evidence will be more important than other evidence. The ANMF does not think it is necessary for the Commission to give written reasons for its resolution of any of these evidential issues.

C.5.4 JCS [4.28(e)]—qualifications

310. At JCS [4.28(e)], the employer parties submit as follows:

“The qualifications required to perform a lot of work in aged care have not materially changed except to say that there is now an increased preference for ‘care employees’ to obtain a Certificate III (noting that some AINs require a Certificate III).”

311. The Commission would have regard, as well, to the fact that the content of the Cert III has itself changed, and continues to change, over time. As to the continuing change, see, in particular, the statement of Robert Bonner dated 29 October 2021 at [89]–[90].

C.5.5 “Routine” and the cadence of the day

312. At JCS [9.5(h)], the employer parties submit that a PCW will have a “*routine*” that they follow which follows the usual cadence of a domestic day. They footnote JCS Ann A at [2.19], [2.20], [2.51], [2.68], [2.77], [2.81], [2.98], [2.113], [2.134], [2.136(h)], [2.153], [2.156], [2.172(b)], [2.191], [2.210], [2.215], [2.227], [2.240], [2.266], [2.281], [2.297], [2.299], [2.314]. The employers also contend that a PCW providing palliative care will “undertake their usual routine, however this may involve greater frequency of activity as well additional assistance to comfort the consumer” (JCS [9.5(ii)]. No reference is made to PCWs undertaking their usual routine in these circumstances in the evidence relied upon for this proposition (or elsewhere).
313. Very few of these paragraph references have anything to do with routine. At [2.19], there is evidence of Ms Mashford’s to the effect that work generally follows a routine. But [2.20] is about tasks performed on a shift (not routine), [2.51] is Ms Spangler’s view about skills required to perform work, [2.68] is Ms Power’s evidence about work she performs on a shift (not routine).
314. [2.81] (Ms Power), [2.98] (Ms Hardman), [2.113] (Ms Jones), [2.134] (Ms Ellis), [2.136(h)], [2.153] and [2.156] (Ms Kelly), [2.172] (Ms Curry), [2.191] (Ms Schmidt), [2.210] and [2.215] (Ms Ghimire), [2.227] (Ms Youd), [2.240] (Ms Glass), [2.266] (Ms Bowers), [2.281] (Ms Clarke), [2.297] (Ms Roberts), [2.299] (Ms Field), and [2.314] (Ms Jennings) are all in the same category: they are evidence about the tasks that the various workers perform in the course of their work, or the skills involved in doing so. None refer to the work being “*routine*” or following any particular “*cadence*.”
315. Some paragraphs cited directly contradict the submission. At JCS Ann A [2.77], Ms Hardman is quoted as saying, “*Every day is different working in aged care.*”

316. Moreover, the employer parties fail to address the evidence contradicting their submission, including from their own witnesses. As outlined at ANMF CS [104], Kim Bradshaw (General Manager at Warrigal’s Stirling Facility) accepted that every day incidents can and do occur which throw any schedule out the window. All of the evidence in ANMF CS Part E.3—in relation to consumer-directed care—also negatives the existence of fixed “*routines*.”
317. The submission that an AIN / PCW has a “*routine*” that they follow would be rejected, so far as it goes beyond the uncontroversial (but not particularly salient) point that people tend to sleep at night, be up during the day, *etc.*, and that work—changing and unpredictable as it is—will of course reflect these sorts of considerations. For the same reasons the employer submission that the provision of care by RNs is built around routine (JCS 19.3(g)) would be rejected.

C.5.6 ENs not the same role [20.4]

318. At JCS [20.4], the employer parties submit that, “[*i*]n many respects ENs are still performing the same role that has existed for the past two decades, providing nursing care under the supervision of a RN, which comprises a combination of personal care together with nursing care which includes a clinical care element consistent with their competency and experience level.”
319. That is pitched at a level of generality that is too high meaningfully to assist the Commission. The reality is that the work of ENs, like that of RNs and AINs / PCWs, has been changed by (*inter alia*):
- (1) changes in the acuity of residents (and corresponding changes such as increased need for dementia care and palliative care)
 - (2) changes in philosophy and models of care;
 - (3) changes in accountability and regulation;
 - (4) changes in levels of workplace violence and aggression;
 - (5) changes in the use of chemical and physical restraints;
 - (6) changes in the way that families interact with carers.

320. In short, ENs are not insulated from changes affecting the aged-care industry, over the past two decades. It is wrong to suggest that the work of ENs has not changed in two decades, or has only changed in the way identified JCS [20.5]. The ANMF otherwise relies on its principal closing submissions, and in particular ANMF CS Part E.

C.6 Expert evidence

321. Quite a few pages in the Joint Closing Submission are devoted to the expert evidence. Within these pages, quite a few criticisms are offered of the experts. Very few were put in cross-examination. The employer parties are willing to wound, but were afraid to strike.⁶¹ Considerations of fairness (*i.e.*, *Browne v Dunn* (1894) 6 R 67) require the Commission to avoid findings not put to witnesses for comment.

322. For the most part, failure to meet the standard expressed in *Browne v Dunn* (1894) 6 R 67 does not matter, because the employer parties' criticisms are answered by reading the expert's report fully, rather than selectively. However, there are a few criticisms that really should not have been put in submissions. These are identified, below.

C.6.1 JCS Ann J Part 2—Gender pay gap and minimum rates

323. Annexure J Part 2 of the Joint Submission is concerned with "*The Gender Pay Gap and Undervaluation.*" The essence of the submission is at JCS Ann J [2.2], but there are a number of sub-propositions, each of which will now be addressed in turn. The short answer, though, is that the Joint Submission misunderstands, in various ways, the Smith/Lyons Report, and misunderstands the use that the ANMF makes of it.

324. It is convenient at the outset to explain (further to ANMF CS [766]–[774]) the use to which the ANMF puts this evidence, and then in the course of responding to particular aspects of the Joint Closing Submission to detail how this use has been misunderstood.

325. The starting point is that all parties accept that the relevant wage rates in the affected awards have not been properly fixed.⁶² From there, the union parties contend (and the employer parties seem to agree, in at least many cases), that there exist work value reasons justifying an increase in minimum award rates in the affected awards (which

⁶¹ Alexander Pope, *An epistle from Mr. Pope, to Dr. Arbuthnot*, London: printed by J. Wright for Lawton Gilliver, 1734, at line 203.

⁶² Email from Alana Rafter dated 27 July 2022 at point 1, referring to various passages in the Joint Submission; ANMF CS [90(1)]; HSU CS [6]; UWU CS [10].

inheres a proposition that the rates as set do not reflect, because they understate, the value of the work that is being performed).

326. As the ANMF has submitted (ANMF CS [91(2)]), it is not necessary that the Commission form a view about why the rates as presently set have not been properly fixed and do not reflect the work value of the work that is in fact performed.
327. The union parties seek significant increases in minimum award rates. While it is not necessary to make a finding as to why the current award rates dramatically undervalue the relevant work, the ANMF advances two propositions as to why that might be so, to assist the Commission in reaching a conclusion on the question of whether the rates have been properly fixed.
328. The *first* is that the value of the work has increased dramatically over the last twenty years, and wages have not kept pace. This is supported by the submissions in Part E (in particular) of the ANMF's closing submissions.
329. The *second* is that the work was undervalued because the industry is a female-dominated industry in which stereotypically "*women's work*" is done. Why might the Commission conclude that work has been undervalued in such an industry? Because of the persistent existence of a gender pay gap (Smith/Lyons Report), together with identification of skills brought to bear in female-dominated industries which traditionally have not been recognised as having value (Junor Report). Associated with the second reason, is that the industrial mechanisms in place over time have not been adequately equipped to value the work in the way now provided by the Act (Smith/Lyons Report).
330. These first and second theses may each be partially explanatory (each in some proportion), or it may be that the Commission prefers exclusively the first (it is difficult to see, given the evidence, that the Commission would prefer exclusively the second).
331. This, then, is the use to which the ANMF puts the expert evidence

JCS Ann J Part 2(a)—“The evidence does not concern minimum rates in awards”

332. This part of the Joint Closing Submission itself contains four sub-headings, and it is convenient to address them under corresponding sub-headings, below.

“The gender pay gap”

333. It is convenient here to address the submission which is, in effect, this: (a) we are, in these applications concerned with award rates; (b) the Smith/Lyons Report draws its conclusions about gender pay gap (“**GPG**”) based on actual earnings rather than award rates; (c) therefore, the Smith/Lyons report has nothing useful to say in this application.
334. This misunderstands the point. The Smith/Lyons Report at [6]–[13] (which are the paragraphs the Joint Closing Submission is considering)⁶³ is not addressed to whether there is a GPG in aged care in particular. It is addressed to whether there is a GPG in general. Whether this is measured by reference to actual earnings or earnings at the award minimum is not to the point. The point is just to show that, on a variety of measures, women are paid less than men for work of equal value.
335. Further, JCS Ann J [2.7(a)] mischaracterises the report and the cross-examination. The report is plainly not limited to “*average weekly earnings or average weekly overtime earnings.*” Table 1 on page 4 shows a GPG based on a variety of measures, including (*e.g.*) hourly earnings as well. And the actual question and answer at PN3278 (referred to at JCS Ann J [2.7(a)] was this:
- “WARD: Thank you, Professor. So when you talk about the gender pay gap in this paper, you're talking about it in the context of average weekly earnings or average weekly ordinary time earnings. It's not about minimum rates of pay in awards?”
- SMITH: No, it's not, and the other distinction I should make is in the second part of that table it distinguishes our non-managerial earnings. I should have made that comment at the beginning.”
336. The question was compound, and the answer was clearly addressing the second aspect of the compound question (“*it's not about minimum rates of pay in awards*”). It is the answer, not the question, which is evidence.⁶⁴ And in any case, neither question nor answer could be understood as the witness departing from what she had outlined in Table 1 of her report.
337. It is wrong to regard Assoc Prof Smith’s evidence that she was not comparing award rates of pay as somehow constituting a “*concession*” (*cf.* JCS Ann J [2.8]). It is plain

⁶³ See JCS Ann J [2.6], ft 7.

⁶⁴ See, *e.g.*, *R v Fernando* [1999] NSWCCA 66 at [329]–[329] (Newman, Studdert and James JJ), *Want v State of Western Australia* [2006] WASCA 189 at [92]–[93] (Roberts-Smith JA), *Ritchie (a Pseudonym) v R* [2019] VSCA 202 at [89] (Kaye and Weinberg JJA, Kidd AJA).

on the face of her report that she was not comparing award rates. The evidence that she gave in cross-examination did not “*concede*” matters; it accurately described the content of her report.

338. JCS Ann J [2.9] seeks to undermine Professor Smith’s conclusion by saying that “*differences in occupation or hours worked can contribute significantly to the differences observed between male and female earnings.*” Reference is made to an ABS publication. So far as this submission involves a proposition that Assoc Prof Smith somehow failed to consider that differences in occupation or hours worked might affect measurement of a GPG, that submission would be (strongly) rejected. But it is convenient to pick this point up under the next heading.

“Gendered undervaluation”

339. At JCS Ann J [2.12], reliance is placed on Assoc Prof Smith having said that she inclines to the “*institutional sociological*” approach to measuring the GPG, rather than the “*economics view*” of measuring. And it is said that Assoc Prof Smith’s approach is thereby undermined, because the types of things that are brought to bear in an institutional approach—“*organisational, social and labour market factors that impact on women’s occupational choices*”—involve only an “*interesting academic exercise*” which involves “*imprecision*” (JCS Ann J [2.12]).
340. This is an unfair treatment of the Smith/Lyons Report. Yes, Assoc Prof Smith prefers the institutional approach. But she spends a great deal of time outlining how even on a “*standard economics*” approach, a GPG gap is still presented (see Smith/Lyons Report at [18]–[33], in particular [18]–[24]). The “*standard economics*” approach controls for things like hours worked and occupational differences. And even controlling for all “*explained*” differences earning,⁶⁵ still adherents to the standard economics approach conclude that:
- (1) “*there is a significant, persistent, unexplained wage gap between men and women that is attributed to discrimination or other unobserved characteristics*” (Smith/Lyons Report at [23]); and

⁶⁵ See Smith/Lyons Report at [18] for use of this term.

- (2) *“only a small proportion of the GPG can be attributed to differences in the productivity-related characteristics of men and women”* (Smith/Lyons Report at [23]);
 - (3) *“overall there is substantial evidence to suggest that a combination of discrimination or other unobserved characteristics play an important role in maintaining the wage gap in Australia”* (Smith/Lyons Report at [23]);
 - (4) *“the most significant component contributing to the GPG in Australia was gender discrimination, accounting for 39% in 2017”* (Smith/Lyons Report at [24]).
 - (5) occupational segregation has more, not less, explanatory force as female domination increases in a given industry, which supports the proposition that the female-dominated nature of the aged-care industry is relevant to whether that industry is a contributor to the overall GPG (Smith/Lyons Report at [33]).
341. Of course, the Smith/Lyons Report also contains the opinion that, if the institutional / sociological approach is adopted as a lens, still there is a GPG (see at [34]–[41]). But the Smith/Lyons approach was not limited to adopting this lens.
342. Accordingly, the criticism that is impliedly made of Professor Smith in JCS Ann J [2.12] would not be accepted.
343. Before leaving this heading, it might be noted that the Joint Closing Submission seeks to make a virtue of necessity. The “*necessity*” is that the employer parties are faced with a range of expert opinion, all from experts whose credentials cannot be questioned, all of whom say that there exists in Australia a GPG, all of whom were unshaken on that point in cross-examination (indeed, it was not even put to these experts that they were somehow mistaken in that opinion).
344. The Joint Closing Submission seeks to make a virtue of this by selectively or wrongly reading the expert reports, and making unfounded and unlikely assumptions such as that undoubted experts somehow failed to take into account, in concluding that there is a GPG, that people work different hours in different occupations (*cf.* JCS Ann J [2.9]).
345. The only conclusion that the Commission could reach, given the uncontradicted and substantially unchallenged evidence of the experts whose reports it has received, is that:

- (1) there is a GPG; and
- (2) there is no basis for thinking that the aged-care industry is somehow immune from what is otherwise an economy-wide phenomenon;
- (3) in fact, there is basis for thinking that the GPG is particularly pronounced in aged care, given the explanatory force that “*occupational segregation*” has on the existence of a GPG.

“Gender bias in tribunal decisions”

346. Again, the Joint Closing Submission is only able to make a submission such as that the Smith/Lyons Report does not “*sustain a conclusion that the tribunals in Australia have consistently undertaken an improper assessment of work value*” (JCS Ann J [2.16]) by referring (in ft 26) only to [94]–[107] of that report, and ignoring the detailed analysis in [65]–[93] of the report, over about ten pages.
347. The conclusion that the history of wage-setting in this country has involved gender-based discrimination is not only open, it is inevitable. Taking only one example in the historical examination set out in the Smith/Junor Report (at [71]), when (as recently as 1969) a principle of “*equal pay for equal work*” was established, there was a specific exclusion for work predominantly undertaken by women.
348. The question is therefore not whether there is a basis for thinking that gender-based discrimination is an historical possibility in Australian wage-setting history; the question is whether, at any point, undeniable gender-based discrimination has ever been reversed. The point of the Smith/Lyons analysis from [81]–[93] is to explain why there is reason to think that gender-based discrimination (unknowing discrimination latterly, to be sure—but still discrimination) has not been reversed. In essence, the reason is that there are features of the wage-setting mechanism in Australian industrial law that present as barriers to rectifying past gender-based discrimination. These are summarised at [93] (emphasis added):

“In summary it is our opinion that barriers and limitations to the proper assessment of work value in female dominated industries and occupations include:

- changes in the regulatory framework for equal pay and equal remuneration applications and the interpretation of that framework
- procedural requirements such as the direction in wage-fixing

principles that assessment of work value focus on changes in work value and tribunal interpretation of this requirement

- conceptual including the subjective notion of skill and the “invisibility” of skills when assessing work value in female-dominated industries and occupations.”

349. The emphasised passage aligns directly with Hon Assoc Prof Junor’s analysis and identification of precisely such skills (to which further attention will shortly be directed).

350. Finally in this heading, in relation to JCS Ann J [2.18], reference to the fact of awards being “*centred ostensibly on the C10 framework or otherwise the AQF*” assumes too much. Namely, it assumes that: (1) the C10 framework is itself gender- and industry-neutral; and (2) the AQF is a suitable proxy for work value. Not only are these propositions doubtful, they have been doubted by ABI (one of the parties to the Joint Submission) itself, in a different case. In *4 Yearly Review Of Modern Awards—Pharmacy Industry Award* [2019] FWCFB 3949; 287 IR 129, ABI is recorded at [9] as having made this submission (emphasis added):

“The structure of classifications in the Manufacturing Award and the nexus with C10 had not been the subject of arbitral consideration and the Commission should be cautious in treating these as an unalterable or unquestionable reference point. It was, ABI submitted, reasonably open to question how comfortably the manufacturing classification structure and the C10 nexus sat with a contemporary work value assessment as contemplated by s 156(4) and also ss 134 and 135 of the FW Act. It was also highly questionable whether the AQF alone could serve as a satisfactory proxy for determining work value. ...”

351. And in their opening submissions (at JS [3.22] and JS [26.5]–[6]), and in their closing submissions (JCS [4.13]), the employer parties submitted (rightly) that the C10 framework is inherently situated in an industrial sector context and not a health sector context. Why might this be relevant to gender-based undervaluation? For the reason given in (many of the expert reports but for example in) the Smith/Lyons Report at [92]:

“The capacity to address the valuation of feminised work has also been limited by the requirement to position that valuation against masculinised benchmarks. This requirement for a comparator has been a feature of equal remuneration proceedings has been noted but the pivotal role of the metal industry tradesperson in wage fixing is also well documented. As an example the award restructuring requirements of wage fixing principles from 1988 was ultimately designed around a set of masculinised classifications and credentials and thus offered a limited capacity to properly describe, delineate and reward work in feminised industries and occupations. Work value comparisons continued to be grounded by a male standard, that being primarily the classification structure of the metal industry awards and to a lesser extent a suite of building

and construction awards. This template rested on the relativity of masculinist classifications to the position of metal industry or building industry tradesperson. Peetz and Murray (2017) note that while the GPG is lower for “award dependent” workers in Australia, this does not mean Australian industrial tribunals are immune from stereotypical gender attitudes when they assess work value (Peetz 2015, pp. 351-354).”

352. Also relevant in this connection are the observations from [42]–[64] of the Smith/Lyons Report, which assist in understanding why the C10 framework might involve gendered assumptions, favouring “*male*” work. It probably suffices for the present moment to quote from [60]–[61], which capture aspects of the non-recognition of “*female*” skills, and how it is that feeds into the industrial wage-setting framework:

“[60] ... Therefore, gender-based undervaluation and/or undervaluation on a gender basis in the employment context means the skill level of occupations, work or tasks is influenced by subjective notions about gender and gender roles in society. Skills of the job occupant are discounted or overlooked because of gender. Skills required to perform work tasks are discounted or overlooked because of gender. Skills of the occupation (e.g. proficiency, complexity, responsibilities, and the conditions under which work is performed) are discounted or overlooked because of gender. Skills are devalued or overlooked because of norms, ascribed gender roles, and gendered stereotypes that prevail in the wider social environment. Work becomes “sex typed” when a job or occupation is viewed as being socially appropriate for women to perform, often because of the similarity of the work and tasks of the job to the activities women historically undertake in the domestic (unpaid) environment. Consequently, the work is perceived as “women’s work”. Therefore, the work undertaken by women in such jobs or occupations is considered to be less valuable and can be paid less than work undertaken by men that has no obvious similarity to the activities men historically undertake in the domestic (unpaid) environment. For example, primary responsibility for children is a stereotypical role of women and mothers in the domestic (unpaid) sphere. Working with children in the market (paid) sphere is an extension of women’s household roles, and is an ascribed undertaking due to their nurturing roles in the domestic household (Orupabo 2018). This process of devaluation is partly shaped by the “male breadwinner model” and the gender division of paid and unpaid labour (Aboim 2010).

[61] Norms and regulation overlap, shaping each other. For example, the 1907 Harvester judgment and other Australian industrial tribunal decisions on female pay in the twentieth century reflected and reinforced the dominant social norms about women and paid work (Peetz 2017, p. 9). Indeed, even in the 1990s the QIRC held working with children involved “attributes” and were not skilled (Peetz 2017, p. 12) and the work was “simple” (Miscellaneous Workers’ Kindergartens and Child Care Centres etc (State) Award (2006) 150 IR 290 at [104]). If there is a resemblance between the activities women historically perform in households and the work of a female-dominated occupation, norms holding that domestic unpaid labour is unskilled can influence how the paid labour is valued (Peetz 2017, p. 12). For example, women have a “natural” predilection for communication and caring due to their role as mothers (Grimshaw and Rubery 2007, p. 60).”

353. The submission (JCS Ann J [2.20]), then, that little weight should be placed on the Smith/Lyons Report's analysis of the relevance of gender in the industrial wage-setting framework would be rejected. On the contrary, the report advances a persuasive rationale for the conclusion that historical gender-based undervaluation has not been rectified as a result of the application of industrial wage-setting mechanisms.

“Low’ Rates”

354. It suffices to say in relation to JCS Ann J [2.21]–[2.22] that the rates are low. As the ANMF has already submitted at ANMF CS [834]–[835], the rates of pay for (for example) PCWs are barely above minimum wage. Various witnesses, employers, and the Royal Commission, drew attention to the fact that better pay for similar work is available in the acute-care sector (see ANMF CS [662], [666], [674]–[675], [692] [694], [703], [708]). It is one of the more uncontroversial facts in this proceeding is, as the Royal Commission put it, that, “*The staff in aged care are poorly paid for their difficult and important work*” ([FR.1.124]). It is difficult to see why Assoc Prof Smith should be criticised for saying that the rates of pay are low.

355. Then JCS Ann J [2.23] is an example of one of the submissions, referred to in [322] above, that should not have been put. The reference to the Smith/Lyons Report as being a “*connect-the-dots*” exercise is difficult to understand otherwise than as involving either a proposition that the authors’ analysis is simplistic or childish (like a “*connect the dots*” drawing), or that the authors’ analysis was directed to achieve a particular outcome rather than reflecting the authors’ genuine opinions. Neither proposition was put to Assoc Prof Smith (who was required for cross examination), nor to Dr Lyons (who was not even required). No proper basis could exist for putting either proposition.

356. Even if it had been put, no view of the detailed and scholarly report prepared by Assoc Prof Smith and Dr Lyons could justify such a finding. The report contains ample (indeed, abundant) reasoning in support of its conclusion—for example, as outlined above, Assoc Prof Smith goes as far as to explain why even a scholarly view which she does not favour supports the conclusion she draws (that a GPG exists).

Conclusion

357. The submission at JCS Ann J [2.24] would be rejected. The Smith/Lyons Report amply serves the purpose for which it was produced: to support findings that:

- (1) there is a GPG; and
- (2) there is no basis for thinking that the aged-care industry is somehow immune from what is otherwise an economy-wide phenomenon;
- (3) in fact, there is basis for thinking that the GPG is particularly pronounced in aged care, given the explanatory force that “*occupational segregation*” has on the existence of a GPG;
- (4) the historical and current system of industrial wage-setting mechanisms have involved (and do involve) barriers to the rectification of gender-based pay disparities;
- (5) these include (but are not limited to) gendered assumptions about what are “*skills*,” how they are identified, and how they are then valued.

JCS Ann J Part 2(b)—“No evidence of a gender pay gap within the modern award framework”

358. It is, of course, obvious that the awards do not set male and female rates (JCS Ann J [2.25]). As to JCS Ann J [2.26], it is preferable to read the entirety of Smith/Lyons Report [166], rather than just the extract that the employer parties have selected for their submission:

“In our opinion, the ending of any specific reference to the gender of employees in aged care does not mean gender was no longer an issue when work value was assessed and/or when wage rates were set. Absences of a direct gender reference in the various awards or industrial tribunal decisions should not be interpreted as an end of the influence of gender-stereotypical attitudes.”

359. The full quote makes clear what has already been addressed above, especially at [348]: given a history of gender-based undervaluation of stereotypically “*female*” work, the absence of express reference to gender could not safely lead to a conclusion that all historical gender-based differences in wages has been addressed. Given the presence of a GPG (no matter how many things one controls for, and no matter which approach to measurement one would adopt), it would be a surprising conclusion that, somehow, the aged-care industry was unique (or unusual) in having managed to eliminate historical gender-based undervaluation of “*female*” work.

360. As for JCS Ann J [2.28]–[2.39], there are a variety of points to make.

361. *First*, [2.29] (clerks), [2.30] (laundry hands), [2.31] (cleaners), [2.32] (gardeners), [2.33] (food services assistant and cook), [2.34] (maintenance / handy person), [2.35]–[2.36] (driver), and [2.38] (recreational / lifestyle activities officer), [2.39] (general services supervisor), and [2.40] (interpreter) are irrelevant to the ANMF’s application.
362. The only relevant paragraph to the ANMF’s application is [2.37], which compares minimum rates for “*personal care employee*” as between the Aged Care Award, SCHCADS Award, and the *Social and Community Services Employees (State) Award*, and finds that those rates are similar.
363. Quite what point the Joint Closing Submission is making here is not clear. It is entirely unsurprising and proves nothing that “*care work*” carries similar wages across a few awards. This says nothing about whether, across those awards, those consistent wages for “*care work*” are too high, too low, or about right. In fact, precisely the premise of the applications before the Commission is that both the Aged Care Award and the SCHCADS Award undervalue the relevant work and both should see increases.
364. For the Joint Submission to make a meaningful cross-award comparison, it would have to find work that was manifestly of equivalent “*work value*” to the work of a “*personal care employee*,” but which was not stereotypical “*women’s work*”, and then to compare those wages. Of course, that exercise would be fraught (and may very well require expert evidence), including because there would be ample scope for argument about whether any particular kind of non-care work was of equivalent “*work value*.”
365. *Second*, though it is probably not necessary to make this submission (given what is said in [361] above), even if the comparisons in JCS Ann J [2.30]–[2.36] and [2.38]–[2.40] are relevant to the ANMF’s application (which they are not), still they do not show what the Joint Employers think they show. The submission seems to be as follows (taking “*gardener*” in JCS Ann J [2.32] as an example):
- (1) a Cert III gardener working in the aged care industry is paid the same amount as a Cert III gardener working otherwise than in the aged care industry, under (say) the *Gardening Award*;
 - (2) the work done by a Cert III gardener is of the same value whether done in the aged care industry or otherwise than in the aged care industry;

(3) accordingly, there cannot be a gender pay gap within the modern award framework, since people are paid equivalent wages for equivalent work.

366. There are two problems with this logic. One is that the proposition in [365(2)] is, to say the least, doubtful. The ANMF will leave it to others to make submissions in regard to the work value of aged-care gardening employees, but will note that there was evidence from gardening employees directed at the unusual (and value-adding) features of gardening in an aged-care environment. So, it may be that the correct conclusion is that the Cert III gardener in aged-care is deserving of a higher wage than the Cert III otherwise than in aged care, because of the nature, skills involved in, and conditions of, the aged-care gardener's work.

367. The other problem is that, as outlined above in regard to personal care workers, one cannot demonstrate the absence of a gender pay gap in the aged-care industry by drawing comparisons between similar or identical work, as covered by different awards. An equally-available conclusion from the same premise is that the work in the other industry is similarly undervalued (which might be shown were ever an application to be brought in relation to that other award).

“Conclusion”

368. Accordingly, the Commission would reject the submission at JCS Ann J [2.41] that the analysis in the Joint Closing Submission “*suggests that there is no gender pay gap.*”

C.6.2 JCS Ann J Part 3—“Sociological theories for undervaluation”

369. There is a short answer to the entirety of JCS Ann J [3.1]–[3.22]. In those paragraphs, the Joint Closing Submission criticises the application of sociological approaches to conclude that there is a GPG. The short answer was that given at [339]–[341] above: Assoc Prof Smith also outlined literature which applied a “*standard economic*” approach to analysis of whether a GPG gap exists, and stated that that approach does show a GPG. She was not challenged on that conclusion in cross-examination.

370. The Joint Closing Submission makes no criticism of application of a standard econometric approach to identification of a GPG. Assoc Prof Smith's opinion is that the literature utilising that approach shows the existence of a GPG, the most-significant component contributing to which is gender discrimination (see Smith/Lyons Report at [24]). There was no cross-examination on any of this. There is no contrary evidence.

That completely undermines the Joint Closing Submission's attempt to avoid a finding of a GPG by characterising all of the experts as adopting a sociological approach.

371. In any event, even if Assoc Prof Smith had only adopted a sociological approach, the criticisms made of that approach are unfounded. This is addressed under headings corresponding to the Joint Closing Submission, below.

JCS Ann J Part 3(a)—“Rates in female-dominated occupations vs male-dominated occupations”

372. While the criticism in JCS Ann J [3.5]–[3.7] is directed at Professor Meagher, it is the same criticism that was made about Assoc Prof Smith: the only way that an analysis of pay can be useful is if it looks at minimum award rates rather than actual rates of pay. This submission would be rejected for the same reasons as given at [333]–[345] above.

JCS Ann J Part 3(b)—“The relevance of “gendered undervaluation” and “women’s work””

373. One thing is immediately noticeable about JCS Ann J [3.8]–[3.18]. Despite that the Joint Closing Submission identifies that Hon Assoc Prof Junor and Assoc Prof Smith each expressed the opinion that “*women’s work*” had historically been, and is, undervalued (JCS Ann J [3.8] for Hon Assoc Prof Junor; [3.12] for Assoc Prof Smith), there is no reference to any cross-examination of those two witnesses in which it was put to them that they were wrong about that.

374. That is because there was no such cross-examination.

375. In the case of Hon Assoc Prof Junor, at PN3195–PN3199 she was asked what she meant by “*gendered job*,” and she was asked whether she would accept the term, “*women’s work*.” The cross-examination immediately then turned to whether Hon Assoc Prof Junor’s Spotlight Tool could be used to recognise skills that were under-recognised for reasons other than gender. It was never put to Hon Assoc Prof Junor that she was wrong to have expressed the opinion that “*women’s work*” was undervalued. The topic was not even broached.

376. It was the same with Assoc Prof Smith. At PN3285–3287, she gave this evidence:

“WARD: ... But about two thirds of the way down paragraph 60, you start talking about this notion of women's work and I appreciate it's not necessarily your phrase. As I understand what's written there - and I'm happy for you to take time to read it if you need to, to refresh your memory - this is a

notion that certain types of work have historically been done predominantly by women, predominantly in a domestic, unpaid setting, and therefore the society doesn't place economic value on that work. Is that a reasonable summation of that concept?

SMITH: In a sense, yes, that it's a struggle to gain a sense of being deemed skilled work or, to use your phrase, of value in a sense; the recognition of its value has been impacted by the nature of the work and some of the normative assumptions about the work.

WARD: Sorry, can I just explore that? You said something, I think, that might not have come up before. It's not just that there is no - society doesn't attribute economic value to it, it's that society has perceived it to be unskilled or less skilled?

SMITH: Yes, it's struggled to have that sense of being identified as skilled or gradations of skilled work. Skills can be overlooked or discounted in the worker.

WARD: I'd be right in saying that in your analysis you believe that's a true today as it's ever been?

SMITH: I say that it remains - I would conclude that it remains. Clearly, gains have been made so it's not as - not as evident now as it would have been in the early 60s, for example."

377. Shortly thereafter, the cross-examination moved to another topic. The opinions that Assoc Prof Smith expressed in her report, and again her oral evidence (extracted above), were never challenged.
378. At least as far as Assoc Prof Smith and Hon Assoc Prof Junor were concerned, then, their unchallenged, and uncontradicted (in the sense that there was no contrary evidence), evidence was that "*women's work*" had historically been, and is, undervalued.
379. The Commission is not, of course, bound to accept expert evidence only because it is unchallenged, but it would be a rare case in which it would decline so to accept it. That is especially so where, as here, no fewer than six eminent witnesses gave reasoned evidence, directly within their field of expertise, to the effect that "*women's work*" has been and is undervalued. Those six are, for ease of reference, Professor Charlesworth, Professor Meagher, Hon Assoc Prof Junor, Professor Eagar, Assoc Prof Smith, and Dr Lyons.
380. Some of them were not cross-examined at all; others were cross-examined lightly and not in a way that shifted them from their opinions; there was no contrary evidence. In

these circumstances, it would be—and this may understate the position—a strong thing to reject all of the evidence.

381. In any case, JCS Ann J [3.9]–[3.16] really do little more than set out the nature of the evidence that certain witnesses gave, without explaining why that evidence would not be accepted. The thread running through the submission seems to be that, because the various witnesses did not demonstrate the existence of gender-based undervaluation using the particular methodology favoured by the employers—comparison of minimum award rates—that somehow undermines their conclusion that there is gender-based undervaluation. This submission has been addressed above, at [333]–[345].

“Conclusion”

382. The submission at JCS Ann J [3.17] would be rejected. For one thing, it would be rejected because the employer parties concede that the rates in the relevant awards have never been properly fixed.
383. For another, it would be rejected because it adopts the same framing that has been addressed above. That is, the employer parties in effect start from the premise that one can assume that there is no history of gender-based undervaluation, and then it falls to the union parties to show precisely where, along the line of the development of these particular awards, some tribunal was affected by gendered considerations.
384. That is not the right analysis. As Assoc Prof Smith shows, it is beyond argument that the Australian experience of wage-setting did (expressly), in the past, involve gender-based undervaluation of “*women’s work*.” The question is whether wage-setting processes have been effective to correct that error, or not. The existence of a GPG, which correlates with occupational segregation, provides good reason to think that the error has not been corrected. Six experts say that “*women’s work*” continues to be undervalued, and give reasons why that is so.
385. Even though (as explained at the outset) this conclusion is not necessary in order for the Commission to find that the award rates requires significant increase to reflect work value, the Commission would have no hesitation (if it desired to do so, or if for some reason it found it necessary) in finding that “*women’s work*” remains undervalued.
386. It remains to address the (vaguely *in terrorem*) submission in JCS Ann J [3.18]. The logic of the submission is effectively this:

- (1) modern awards are largely aligned around the C10 Framework and the AQF;
- (2) this is so whether the awards apply to work that is seen as “*women’s work*” or work that is seen as “*men’s work*”;
- (3) the C10 Framework and the AQF are “*gender neutral ground*”;
- (4) to accept, then, that “*women’s work*” is generally undervalued would require the uncoupling of awards involving “*women’s work*” from the C10 Framework and would require increases of the minimum rates of pay in all such awards;
- (5) this requires accepting that “*all women’s work is of greater value than all ‘men’s work’.*”

387. There are a number of reasons why this logic would not be accepted.

388. *First*, propositions (1)–(2) are immediately undermined just by looking at the Nurses Award, which (the employer parties accept) involves large departures from the C10 framework, to the disadvantage of the nurse (see JCS Ann O [3.5]). It would require close analysis to identify the degree to which it can any longer fairly be said that modern award pay structures align with the C10 and AQF, and that analysis has not been done by the employer parties.

389. *Second*, proposition (3) is not only a very large assumption, it is inconsistent with the Joint Employers’ own submission. As noted at [350]–[351] above, the employer parties in this very proceeding submit that the C10 framework is inherently situated in an industrial context and not a health sector context, and in another proceeding ABI submitted that it was “*highly questionable*” that the AQF alone could serve as a satisfactory proxy for determining work value.

390. Transference of the C10 framework from one context (industrial, “*men’s*” work) into another context (caring, “*women’s*” work) involves value judgment. It is precisely where value judgment is involved that the evidence of six experts to the effect that “*women’s work*” is undervalued becomes relevant. The assumption that the C10 framework is “*gender neutral*” is, therefore, not a safe one, and the rest of the logic breaks down.

391. (This does not mean that the C10 framework should be entirely jettisoned. Rather, it means, as the ANMF has submitted elsewhere, that it is one consideration, out of many,

that the Commission would take into account, and that it carries no extra weight within the cohort of considerations).

392. It is not, because of the *first* and *second* points above, necessary to go further—but in any case proposition (5) in the list in [386] clearly would not follow even if (in fact, especially if) proposition (4) were accepted. If the Commission were to accept that all women’s work had in the past been undervalued, increases in the wages payable for such work would not involve a conclusion that “*women’s work is of greater value than men’s work*”; it would involve a conclusion that women’s work is of equal value to men’s work, and should be paid accordingly.

JCS Ann J Part 3(c)—“The generalised consideration of roles and skills”

393. The ANMF will leave it to the HSU to respond to JCS Ann J [3.19]–[3.22] in relation to Professor Meagher, except to say that the identification by Professor Meagher of skills that are not recognised, or paid for, in the Aged Care classification structure provides similar analysis to that made by Professor Junor as to invisible skills. The employer parties (at JCS Ann J [3.22]) dispute the proposition that the failure to expressly refer to a skill used in a role in classification descriptors means that skill was not factored into the minimum rates. Consistent with the evidence of Professor Meagher, the ANMF submit that that the Commission can rely on the failure to identify skills, demands and responsibilities as evidence that these have not been properly taken into account in assessing work value.

C.6.3 JCS Ann J Part 4—“The Spotlight Tool and ‘Invisible Skills’”

394. At JCS Ann J [4.3]–[4.4], the Joint Closing Submission advances three propositions. These are set out below, with a summary of the ANMF’s response (for ease of reference), before more-detailed analysis commences.
395. Proposition 1: “*application of the Spotlight Tool is an academic exercise designed to identify particular skills against a set criteria, by design it is intentionally selective and can be applied to numerous industries to achieve similar results.*” The fact that a tool is selective, and can be applied in more than one context, does not go any way to demonstrating that, when the tool is applied in a particular context (*i.e.*, the aged care industry), it is somehow less useful.

396. Proposition 2: “*application of the Spotlight Tool cannot demonstrate all skills identified are ‘invisible’ based on gender reasons.*” The demonstration that the skills involved here are likely to be “invisible” for gender reasons is not in the part of the Junor Report that applies the Spotlight Tool; it is elsewhere in the Junor Report, and in the Smith Report.
397. Proposition 3: “*the absence of express inclusion of “Spotlight Skills” in the Aged Care Award and Nurses Award is not determinative.*” It is not determinative, and the ANMF does not rely on it as such. The efficacy of the Spotlight Tool does not rest, in any degree (let alone in substantial degree), upon this point.

JCS Ann J Part 4(a)—“A highly selective academic exercise, applicable to all industries”

398. Exactly what criticism the employer parties are seeking to make in JCS Ann J [4.6]–[4.9] is unclear. Yes, the Spotlight Tool can be used in industries other than the aged care industry (JCS Ann J [4.7]). This does not mean that it is inutile in the aged care industry, or that Hon Assoc Prof Junor was wrong to have applied it in the way that she did. Yes, the Spotlight Tool may not identify all skills in a work process (JCS Ann J [4.9]). That does not mean that it is wrong in identifying the skills that it does identify.
399. If it were true that application of the Spotlight Tool to a female-dominated industry like aged care revealed the same quantity and quality of invisible skills as application of the Tool to a male-dominated industry like construction, then perhaps that might undermine use of the Spotlight Tool to demonstrate undervaluation of aged care work. But there is no basis at all for assuming that that is (or would be) true.
400. Hon Assoc Prof Junor was simply asked whether one could apply the Spotlight Tool to the construction industry (PN3122). She was not asked whether, if one did apply the Tool to the construction industry it would reveal the same quantity and quality of invisible skills. It is highly unlikely that, if she were so asked, she would have answered “yes.” That is because the tenor of her report (and those of at least five other experts) was to the effect that it was precisely “*women’s work*” that was likely to bring to bear skills that were “invisible,” for reasons Hon Assoc Prof Junor identified—see in particular at [191]–[212], and [246]–[261] of the main body of her report, and annexures 8 and 9 to her report (these are considered in detail hereunder).

401. If it is the case that skills associated with “*women’s work*” are more likely to be “*invisible*” and hence undervalued—and this was the evidence not only of Hon Assoc Prof Junor but also of every other expert, uncontradicted—then the only available conclusion is that application of the Spotlight Tool:
- (1) would reveal more hidden skills in a field of work involving stereotypical “*women’s work*” than in a field involving stereotypical “*men’s work*”; and
 - (2) would tend, then, to support a conclusion that the rates of pay in the field of work involving stereotypical “*women’s work*” do not reflect the skills brought to bear in that field.
402. Beyond these submissions, here again the employer parties have somewhat ill-temperedly used adjectives in their submission that should not have been used. It was not put to Hon Assoc Prof Junor that her work was of “*academic*” interest only (JCS Ann J [4.9]). If it had been, she may well have drawn attention to (*inter alia*) the fact that Employment New Zealand (an instrumentality of the New Zealand Government) uses the tool to accompany an “*Equitable Job Evaluation system*”—which presumably that nation-state does not do because of the academic interest involved in pointlessly applying a tool to a particular job. She may well have given other explanations as to why it would not be accepted that she was engaged in a purely “*academic*” exercise. One cannot know, because it was not put.
403. It was not put to Hon Assoc Prof Junor that her exercise was “*self-serving*.” It is difficult to know what benign interpretation can be given to those words. It is also difficult to know what kind of motivation the employer parties are ascribing to Hon Assoc Prof Junor in describing her sworn evidence as “*self serving*.” At least often, that kind of epithet is used in relation to a witness who has an interest in the outcome of the matter, and gives evidence that serves that witness’s interest. It is impossible to see how that could be said about Hon Assoc Prof Junor. It does not really suffice to say that this phrase should not have been used about Hon Assoc Prof Junor; the employer parties should formally withdraw the submission, or at the very least explain how it does not mean what, on its face, it means—and draw attention to where, in fairness, they put it to Hon Assoc Prof Junor for her response.

JCS Ann J Part 4(b)—“The Spotlight Tool cannot prove or substantiate the reason for “Invisibility”

404. As to JCS Ann J [4.10], there is no inconsistency between the Junor Report and the evidence that she gave in cross-examination. To begin with, it was not suggested to her that there was any inconsistency, and that should have been done as a matter of fairness if it was going to be the subject of a submission. But in any case, it is easily demonstrable that no inconsistency exists.

405. Hon Assoc Prof Junor does say in her report that:⁶⁶

“The Spotlight tool was expressly designed to bring to light skills that are under-recognised on gender grounds, in order to assist a more accurate valuation. The purpose of the Spotlight tool is to address “assumptions [that] are made about the nature and value of work in jobs that are mainly done by women”⁶ and hence to supply more accurate job data to support equitable valuation processes.”

406. Footnote 6 (bolded in the above quote) is a reference to, “Employment New Zealand, 2018.” One sees from the “References Consulted” that that is a reference to, “*Employment New Zealand (2018) Equitable job evaluation. Wellington: Ministry of Business Innovation and Employment. <https://www.employment.govt.nz/hours-and-wages/...equity/equitable-job-evaluation>.” The full link for the webpage is <https://www.employment.govt.nz/hours-and-wages/pay/pay-equity/equitable-job-evaluation/>. At that page, there is an entire heading (in which the quote Hon Assoc Prof Junor selects) appears dealing with “*Reducing Gender Bias*,” which states as follows:*

“Reducing gender biases

Gender bias in job evaluation is less likely to occur when:

- evaluators are trained in job evaluation and how to recognise and avoid gender bias
- there is transparency when designing and planning job evaluation projects
- there is good communication throughout the project
- the job evaluation system measures all of the characteristics of all the jobs
- processes and results are carefully documented

⁶⁶ Junor Report, Ann 8, [81].

- there is ongoing monitoring and evaluation of outcomes by gender.

Gender bias is often not intentional and can occur in any of the processes involved in describing, analysing and evaluating jobs. Most commonly, gender bias in job evaluation occurs when **assumptions are made about the nature and value of work in jobs that are mainly done by women or mainly done by men.**

This is often because some skills are difficult to observe, especially those used in services involving changing interactions with people over time; and some skills are overlooked or undervalued, for example, if they are similar to unpaid domestic work, such as looking after others, cleaning and cooking.

A better understanding of the skills used in service work, which can be overlooked or taken for granted, and especially skills used in interacting and relating, coordinating and shaping awareness.”

407. Further, the report that the employer parties adduced into evidence commences at page 15906 of the Court Book. This is described as a “Background Research Report.” Hon Assoc Prof Junor was the first-named member of the “*Project Team*” (page 15907). Part 4.4 of the report describes the “*theoretical base*” for the Spotlight Tool. After an overview in Part 4.4.1, Part 4.4.2 describes, “*deriving a typology of social and coordinating skills.*” Why was this seen as important? Because:⁶⁷

“Theories of emotional labour have been important as a first step in gaining recognition of the invisible skills of service work, particularly work done by women. Airlie Hoschschild is usually credited with creating the concept, and her study of the work of flight attendants is very widely cited. After nearly two decades of ground-breaking work on comparable worth, for example, in the health and care sectors, Ronnie Steinberg picked up the concept of emotional labour as a possible pay equity tool.”

408. The idea that Hon Assoc Prof Junor was wrong in describing the purpose of creating a tool that she created is inherently unlikely. Still more so is it an unlikely finding where it was not put to her that that part of her report was wrong. Even if it had been put to her, the material referred to in her report amply supports what she said. The correctness of what she said was in fact assumed as a premise to one of the cross-examiner’s questions: at PN3207, after Hon Assoc Prof Junor said that “*the [S]potlight [T]ool was originally developed in order to identify skills that were under-recognised on gender grounds,*” the cross-examiner said, “*Yes, I understand that was its original purpose.*” Far from challenging the correctness of Hon Assoc Prof Junor’s evidence, it was expressly stated as having been something that the cross-examiner herself understood.

⁶⁷ Pages 15975–15976.

409. Having addressed JCS Ann J [4.10], one moves to the heart of the submission in this sub-part of the Joint Closing Submission. This is at [4.12], which is that the Spotlight Tool is “*limited to skills identification.*” This is not a concession—at the very outset of her report, Hon Assoc Prof Junor described her area of special knowledge as being “*skill identification,*” and described the Spotlight tool as “[*t]he suite of Spotlight skill identification tools that emerged from my peer-reviewed research.*”⁶⁸ At [7], she described the tool as being, “*an aid in identifying, naming and classifying invisible skills used in undertaking service work processes.*”
410. As to JS Ann J [4.13], it is literally unthinkable that somehow Hon Assoc Prof Junor failed to consider that sometimes men do work that is stereotypically “*women’s work.*” It is plain from reading her report, but just in case further clarity is required, Hon Assoc Prof Junor’s sequence of logic is this:
- (1) work that has historically been regarded as “*women’s work*” does, in fact, involve skills;
 - (2) for a variety of reasons, those skills are not recognised as such in the same way as the skills involved in stereotypical “*men’s work*” are recognised as skills;
 - (3) the Spotlight Tool helps to identify the unrecognised skills in stereotypical “*women’s work*”, so that they can be valued.
411. Work does not cease to be stereotypically “*women’s work*” just because a minority of men happen to be performing it. In the same way, work does not cease to be stereotypically “*men’s work*” when women are performing it. Hon Assoc Prof Junor is obviously not to be understood as saying that what has historically been regarded as “*women’s work*” involves skills that only women have, nor is she saying that work is regarded as “*women’s work*” because in some normative sense only women should do that work. A man who performs stereotypically “*women’s work*” will have his work undervalued just as a women doing that work will. And that is because he will be exercising skills that are associated, as a stereotype, with the female sex (and hence under-recognised, and under-valued). The fact that 30 per cent (or any other per cent) of the aged-care workforce is men does not, even in the smallest degree, undermine Hon Assoc Prof Junor’s analysis. In any event the percentage of men working as RNs,

⁶⁸ Junor Report, [5].

ENs and PCW/AINs, in residential aged care, the subject of Hon Assoc Prof Junor's Report, is 12.6%, 8.6% and 13.8% respectively (See Amended Statement of Annie Butler [107] Table 18).

412. Finally, there are two points to make in relation to JCS Ann J, [4.14]–[4.16]. The *first* is that there is absolutely no inconsistency between saying, “*the purpose of this tool was originally to identify skills that are under-recognised on gender grounds,*” and saying, “*the tool can also be used to identify skills that are under-recognised on other grounds.*” So far as the suggestion is that, from PN3207–PN3209, Hon Assoc Prof Junor was caught in some inconsistency, setting that passage out in full immediately shows that that is not what happened:

“RAFTER: Yes, I understand that was its original purpose. But at the end of the project the final tool that's now published on the New Zealand employment website isn't designed to just identify skills that may not be recognised due to gender bias. Is that correct? The tool has broader application, to put it - -?

JUNOR: It has broader application. Its primary purpose though is to identify skills that are under-recognised on gender grounds as a basis for undertaking a further valuing of those skills through an evaluation or work value process. It's a job analysis tool.

RAFTER: Where in the tool do you connect it to gender, because from our understanding of going through the skillsets, and the levels, they can apply to a male-dominated industry, a female-dominated industry and an array of activities with a range of different contexts. So how can you can sustain the conclusion that it expressly shows gender bias by applying it?

JUNOR: It doesn't seem to me that that's what I was arguing. The purpose isn't to prove gender bias. The purpose is to identify skills that have not been identified on gender grounds. The purpose isn't to document gender bias. The purpose is to bring to light skills that had hitherto been under-recognised on gender grounds.

RAFTER: I would put to you that based upon your earlier answers that gender grounds is indeed one of the grounds that a skill may be under-recognised but there are other grounds on which a skill may be recognised and the spotlight equally helps you identify those skills?

JUNOR: It could.”

413. The evidence, then, was as follows: (1) the tool was originally developed for skills under-recognised on gender grounds, and that remains its primary purpose; (2) it has broader application, as well, and is a job analysis tool; (3) Hon Assoc Prof Junor has not argued that one expressly shows “*gender bias*” in applying the tool; (4) rather, the purpose of the tool is to bring to light skills that had been under-recognised on gender

grounds; (5) it can also be used to identify skills that have not been brought to light for other reasons.

414. There is nothing, at all, inconsistent about any of that evidence. Beyond this, it is a grossly unfair submission and—again—should not have been put, that somehow Hon Assoc Prof Junor responded to this line of questioning by “*advocat[ing]*” (JCS Ann J [4.14]). That—again—was not put to Hon Assoc Prof Junor, which in fairness it must have been if that submission was going to be put.
415. The *second* point, which Hon Assoc Prof Junor did not say because she was not asked about it, is this—it is not via application of the Spotlight Tool itself that one links the skills that have been identified with gender; it is by reading the 70-odd pages of her report ([191]–[212], and [246]–[261] of the main body of her report, and annexures 8 and 9), which deal with this issue, that one draws that link. These pages were not the subject of any cross-examination.
416. The short point is this: the Tool itself just identifies skills that have not been recognised. The question of why they have not been recognised is a separate question. It is, however, a question that Hon Assoc Prof Junor addressed.
417. At [246] of her report, she said that she was of the opinion that among the reasons for the rate of pay in aged care being what it is (she characterised it as low, and it is, but even that is not necessary to accept in order to understand her analysis), were these:
- “• aged care work is part of a feminised care economy (“the labour market is structured on gender lines”) (a)
 - care work jobs and skills have, or are seen to have, characteristics such as care-giving that have historically been associated with women (“the job is gendered and its skills are seen as gender-linked”) (b)
 - skill recognition and valuation processes are affected by gender (“recognition and valuation have been gender-biased”) (c)”
418. Hon Assoc Prof Junor was not cross-examined on this evidence.
419. Starting from [248], Hon Assoc Prof Junor set out the following table in relation to how it was that gender concentration was linked to undervaluation:

Table MR-13 Gender segregation and undervaluation: Adapted from Burchell et al., 2014³³

The five Vs	Relationship to undervaluation	Relationship to segregation
Visibility	Women's skills may not be visible.	Care-related skills are intangible; occupations may have limited industrial history of work value investigations.
Valuation	Women's skills often not valued.	Female-dominated occupations may be measured against skill hierarchies developed outside the service sector.
Vocation	Women's skills are often treated as 'natural', deriving from women's 'essence' as mothers and carers, and do not require rewards due to the high job satisfaction derived from the work.	Segregation may be explained by vocation; also, segregation allows employers not to reward skills in caring jobs.
Value added	Women are more likely than men to be found in labour intensive occupations; there may be a tension between "quality" and "productivity".	If segregation facilitates low wages, employers have less incentive to raise productivity in ways compatible with service quality and instead seek to keep wages low.
Variance	Jobs that do not comply with a male norm of full-time work may be less valued.	Segregation into non- standard jobs may allow for differences in pay by type of employment contract, rather than by skills, experience etc.

420. This is, it bears noting, evidence based on specialised knowledge derived from Hon Assoc Prof Junor's study, training, and experience. If the employer parties wanted to submit that the link between gender and skill recognition was not an area of specialised knowledge, then they should have put that to Hon Assoc Prof Junor for comment. As it was, no challenge was made to her expertise. Nor was there any cross-examination directed at whether Hon Assoc Prof Junor was right to say that, for example, "*female-dominated occupations may be measured against skill hierarchies developed outside the service sector.*" In any case, that proposition is plainly right: the C10 framework is a clear example.

421. At [249], Hon Assoc Prof Junor developed her analysis as follows: "*The term 'vocation' used by Burchell et al. refers to the historical legacy of perceptions of care work as a vocation of care, performed for 'love' not 'money'— the lingering so-called 'virtue script' of service and altruism. Tendencies to under-recognise and undervalue the work are also partly driven by pressures to 'value-add' by containing the costs of necessarily labour intensive care work through aged that do not properly reflect value.*

As aged care is not a standardised or uniform product, particularly in the context of dementia and palliation, measures of productivity place pressure on both work intensity and wage share, with implications for work value measurement and gender pay outcomes. Further, variance from the male-normed standard full-time employment, justified as 'family-friendly', also helps keep wages low and make bargaining difficult."

422. Hon Assoc Prof Junor was not cross-examined on this. It is similar to what Assoc Prof Smith says at [60] of the Smith/Lyons Report (see at [351] above), upon which Assoc Prof Smith was also not cross-examined. Hon Assoc Prof Junor also explained, at [250], that further factors leading to skill invisibility in sectors that have historically been (or are) female-dominated as being that the work involved is "*female*" in some way and as being analogous to unpaid housework and volunteer work, as well as, "*gender segregation based on role demarcations, informal recruitment, small workplaces, lack of career paths, part-time work and (in the case of AINs/PCWs but not in the case of nurses) lack of formal qualifications.*"

423. This reflects, as well, the historical legacy of "*care work*," which includes (see [251]) that, "*The growth of care work reflects social trends that have contributed to the creation of low-status but skilled service jobs, mostly performed by women who have been recruited on the basis of skills acquired outside the labour market or formal training system. As a result, the skills in question have tended not to be defined as such, but to be "naturalised" to women, perhaps on the basis of earlier gender-specialised education and life and prior work experience.*"

424. This has been, as Hon Assoc Prof Junor explains, the subject of study and theorisation over the last several decades, and there have been calls for empirical measurement ([252]–[253]). Hon Assoc Prof Junor explained (at [255]) that:

"Thus, definitions of the skills of care-work were still being thrashed out as recently as 10-15 years ago. I think this helps explain the lag in defining, recognising and valuing care skills. I believe that a belated start is now under way to address the issue of recognising and valuing the invisible skills of care."

425. Hon Assoc Prof Junor was not cross-examined on any of this.

426. The foregoing is a summary of material that is developed, in greater detail, in Annexure 8 to the Junor Report. That Annexure was not the subject of any cross-examination. And, as Hon Assoc Prof Junor makes plain in Annexure 9, her evidence was based on a literature review designed to "*set out the wider research basis of the*

typology of invisible skills discussed in the main report and applied in Annexures 5–8 to the work of [RNs], [ENs] and [AINs / PCWs]” (Ann 9, [2]).

427. The following points (*inter alia*) emerge from the literature review that follows:
428. Over the past quarter century, Australia’s service economy has grown substantially, “*as a result of bringing into the public and market spheres aspects of work that were formerly undertaken by women in the spheres of household and community*” (at [6]). Staffing of this growing sector has been shaped by a perception of jobs “*fit for women,*” based on their similarities with domestic work such as caring for others (at [6]). Women have been recruited for such jobs in part for skills they have acquired outside the labour market (*i.e.*, in a domestic setting), where such skills are under-recognised and hence undervalued (at [10]).
429. The rise of the service economy has seen a rise in the skill demand in such jobs, including in regard to, “*scope, use of judgment, interweaving of analytical and contextual knowledge, management of unpredictable client interactions, use of information and communication technology, complex multi-tasking, advising, exercise of delegated responsibility without formal authority, informal training/teaching/persuading/influencing others, teamworking, careful listening, coordinating, knowledge of how the organisation works, problem analysis and solution, reading and producing information, organising own and others’ time and thinking ahead,*” which skills are present in aged care work (at [7]).
430. Care work is defined as involving four key criteria, which are that it: (1) contributes to physical, mental, social, and/or emotional well-being; (2) its primary labour process involves person-to-person relationships with those cared for; (3) those receiving care are members of groups that cannot provide for all of their own care (*e.g.*, because of age); (4) it builds and maintains human infrastructure that cannot be adequately maintained through unpaid work or unsubsidised markets (at [13]).
431. A reason why this sort of work is undervalued is that it has a cultural association with the work of “*nurturance*” (*i.e.*, the development of the human capabilities of the care recipient), which is seen as “*women’s work*” (at [14]).
432. Further, the “*virtue script*”—by which care work is characterised by service, altruism, and emotional connection with patients—creates the impression that direct care

workers are “*born not made*” (which hides the development of skills), and naturalises, as if they were female attributes, the learned skills of managing psychosocial aspects of work (at [15]). It also overlooks the significant technical skills that are involved in the work (at [15]–[16]).

433. Hon Assoc Prof Junor goes on to further explain why each of the four types of skill invisibility are linked with gender. So, a “*hidden skill*” is one that one that is kept hidden because to draw attention to it is to undermine its effectiveness (at [20]) (e.g., emotional management of an elderly person so as to preserve that person’s dignity). Amongst other reasons why this kind of skill is invisible is because of its relationship with the “*virtue script*” (see at [25]):

“The ‘virtue script’ that sentimentalises care work as a ‘labour of love’, has been critiqued in paragraph 15 above. Nevertheless, respect for the dignity of residents or community-based clients may carry the need to work ‘quietly and out of the limelight – to aspire to be invisible’.”

434. An “*under-defined*” skill that is hard to “*pin down*”, such as the use of fleeting sensory cues, and aesthetic skills that influence mood and behaviour. For example, “*They include the aesthetic skills of managing space and physical resources (visual, aural) to build a stimulating or soothing environment, or to enhance participants’ well-being, creativity or calm.*” The link with gender is apparent: these skills are of especial importance in care work, which (as outlined above) is seen as involving “*nurturance*”: the classical instance of stereotypical “*women’s work.*”
435. An “*under-specified*” skill is one that is seen as being, really a personal quality rather than a skill (e.g., “*good with people*”; “*good sense of humour*”) (at [36]). The link with gender is the same: these “*qualities*” (in fact, skills) are important in care work; care work is seen as “*women’s work.*”
436. An “*under-codified*” skill is one that involves second-order “*supra*” or integrative skills to bring together a range of other skills in a work process. “*It is the thinking part of multi-tasking*” (at [42]). It involves interweaving one’s own work process with that of others (at [44]). To anticipate an obvious objection—yes, of course, to varying degrees depending on the work, there is multi-tasking and interweaving work processes involved in stereotypical “*men’s*” work as well. Nothing in Hon Assoc Prof Junor’s analysis is properly to be taken as suggesting that these skills are exclusively the domain of women; and the skills would be undervalued in a man performing care work as well

as a woman performing care work. The point is not that when a particular task is carried out by a man it will be seen as involving more skill than if it is carried out by a woman (whether or not this may also be the fact); the point is that, if the work is stereotypically “*women’s work*,” it will be undervalued (no matter who does it). And, relevantly here, these “*under-codified*” skills are more prevalent or requisite in work that society has coded as “*women’s work*,” than in work that society has coded as “*men’s work*.”

437. Under [56], Hon Assoc Prof Junor sets out the five “Vs” table that is extracted at [419] above. Many of the cells in “*relationship to under-valuation*” and “*relationship to segregation*” columns relate to the caring nature of the work. At [57], Hon Assoc Prof Junor summarises research in relation to the “*care penalty*,” which is the phenomenon whereby the hourly rate of persons working in caring jobs is lower than would be predicted on the basis of other characteristics, such as skill demands. The penalty, in an Australian context, was found to be between 18 and 27 per cent.
438. From [60]–[62], Hon Assoc Prof Junor sets out how it is undervaluation can be remedied. Not surprisingly, an aspect of the process is recognition—and it is here that the Spotlight Tool is relevant. Returning to an earlier point in the submissions, the Spotlight Tool is not a tool for demonstrating gender bias (and Hon Assoc Prof Junor did not say that it was). It is a tool that, assuming gender bias in skill recognition exists (and Hon Assoc Prof Junor and Assoc Prof Smith give reasons for believing it does, which reasons were not challenged in cross-examination), can be used in its correction. It can also be used, as Hon Assoc Prof Junor said in cross-examination, for recognising skills that are under-recognised for any other reason. To say this does not detract, in the least, from the force of Hon Assoc Prof Junor’s analysis.
439. The Joint Closing Submission gives perfunctory treatment (over about a page) to the many pages, based on review of 120 or more primary sources, of Hon Assoc Prof Junor’s analysis and explanation of the relationships between gender and skill under-recognition. This does a profound disservice to the careful way in which Hon Assoc Prof Junor has in fact explained the relationship in the Junor Report. It has been sought, over the preceding pages, to give a fair treatment of Hon Assoc Prof Junor’s analysis. The Joint Closing Submission’s approach to this aspect of Hon Assoc Prof Junor’s report would be rejected.

JCS Ann J Part 4(c)—“Spotlight Skills and Award descriptors”

440. The point made in this part is that, even if Hon Assoc Prof Junor is able to use her Spotlight Tool to identify skills, this cannot prove that those skills are not implied in skill descriptors in the award.
441. The short answer is this: there is no reason to think that these skills have been taken into account in skill descriptors. And, there is a reason to think that they have not been: the whole purpose of the Spotlight Tool—the efficacy of which was not meaningfully challenged in cross-examination; which has been peer-reviewed; the research basis for which was explained (unchallenged) by Dr Junor over dozens of pages—is to identify skills that are not generally recognised. If they are not recognised, they cannot be valued. If they are not valued, then they are not brought to bear in assessing the work value of given work. There is every reason to think, then, that these skills have not been taken into account in previous work value assessments, and the employer parties point to no reason for thinking that they have been taken into account.
442. It amounts to nothing that Hon Assoc Prof Junor agreed that it was possible that Spotlight skills might be implied in skill descriptors. What, responsibly, could she otherwise say? But just because a thing is possible does not mean it is the fact. The employer parties offer no analysis in support of the proposition that, despite that the skill descriptors in the award make no reference to Spotlight-type skills, somehow they have been implied.

C.6.4 JCS Ann J Part 5—“The Smith Report”

443. For the most part, this part of the Joint Closing Submission is unremarkable. It contains a partial summary of the Smith/Lyons Report. The ANMF presses its analysis of that a report and its significance.
444. So far as, interspersed throughout the summary, there is commentary, the ANMF relies on its answers given above. So, at JCS Ann J [5.2(h)], on page 30 just above (k), there is a submission that the identification of barriers to the proper recognition of work value in female-dominated industries does not “*sustain a conclusion that the minimum rates in modern awards were infected by gender bias.*” The ANMF repeats what it has said at [346]–[353] above.

C.6.5 JCS Ann J Part 9—“The Junor Report”

445. It is the same here. The ANMF relies on its submissions in relation to what should be taken from the Junor Report. In response to JCS Ann J [9.25], the ANMF repeats what it has said at [404]–[439] above.

C.7 Miscellaneous reply matters

C.7.1 Minor errata in the Joint Closing Submission

446. JCS [1.4], and footnote 1, omit reference to the evidence of Annie Butler, Federal Secretary of the ANMF.
447. JCS [1.5] omit reference to the witness statements of Kirsten Wischer dated 14 September 2021 and 29 October 2021, and to the witness statement of Kevin Crank dated 29 October 2021.
448. JCS [1.8] should probably note, as well, that the ANMF tendered the statements of Emmali Johnson and John Alberry but did not ultimately rely on those statements.
449. As to JCS [3.15] and [3.19], and fn 27, this is not an error on the employer parties’, but the rates there stated (from the ANMF’s application) have been superseded by more-recent wage increases. The ANMF relies on Annexure 2 to its closing submissions.

C.7.2 Palliative Care

450. JCS [9.25] seems to assume, rightly (with respect), that the evidence supports the propositions that: (1) all aged-care employees are exposed to palliative residents and residents with dementia; (2) some aged-care employees, engaged in specialist wings or wards, will have greater exposure than others.
451. It does not seem, therefore, that the Joint Closing Submission advances a proposition that, for example, every aged-care facility has such specialist wings, so that non-specialist workers will be insulated from dementia and palliation. If that proposition is put, then the ANMF would rely on what it submitted at [114]–[128] of its reply submissions dated 22 April 2022, in support of the following conclusion:

“... palliative care is part of the experience of all aged care employees, or at least that it is a commonplace. The Commission could not proceed on the basis that “specialist providers” assume responsibility for all such work. Rather, the increased prevalence of palliative patients and end-of-life care is a feature of aged-care work generally.”

C.7.3 Nurse Practitioners

452. JCS [21.5] could be mistaken for a submission that NPs, unlike RNs (who the employer parties' seem to accept should have a wage increase), do not deserve a wage increase. If that is put, then that involves departure from the Consensus Statement and the ANMF repeats its submissions in that connection.

453. The ANMF draws attention to PN9316 (in the cross-examination of Mr Voogt):

WARD: You seem to be that crossover person between the registered nurse and the doctor?

VOOGT: Look, I'm probably more crossover with the doctor actually. Generally speaking, like, for example here today at St Catherine's in Wangaratta I have 50 residents. And I generally look after most of their medical needs, and, you know, by virtue of the collaborative agreement I will communicate with the GPs that the relationship thus far is so good that there's trust and - yes, so I'm managing them medically, yes.

454. This, of course, is fairly conclusory questioning and answering, but it is amply supported by the evidence in the Lay Evidence Report (see [170]–[172]), and at ANMF CS [130]–[131]. Further all of the changes in aged-care work (ANMF CS Part E) affected NPs who work in aged care, as well.

455. Accordingly, were the Commission to be satisfied that a particular wage increase were appropriate for RNs, it would be satisfied that the same wage increase is appropriate for NPs.

C.7.4 “Clinical care”

456. In a few places in the Joint Closing Submission, the term “*clinical care*” is used. It is unlikely, given the quantity of evidence now before the Commission as to precisely the kinds of care work done by RNs, ENs, and AINs / PCWs, that anything much turns on the use of this phrase. But, if it assists the Commission, the ANMF continues to rely on the submissions at [82]–[88] of its 22 April 2022 reply submissions, in support of this proposition:

“... it is not possible, nor is it necessary, and it would introduce conceptual confusion, to seek to identify which parts of the work done by which members of a “care team” are clinical. The proper analysis of the work done in aged care by RNs, ENs, and AINs/PCWs, would focus on the nursing care provided by a care team, or nursing team, and identifying changes in the roles of each member of that nursing team.”

D. Reply to the Commonwealth's submissions

457. There are many parts of the Commonwealth's submission with which the ANMF agrees, and only a few matters that (in the ANMF's submission) require some qualification. These will be separated out into corresponding parts

D.1 Points of agreement

458. There are large parts of the Commonwealth's submissions with which the ANMF agrees. So, and this list is non-exhaustive, the ANMF adopts the submissions that:

- (1) the work value of aged care workers is significantly higher than the modern awards currently reflect (Cth S [3]);
- (2) strengthened regulatory demands have increased the expectations of the workforce to have the skills and attributes to deliver a higher standard of care, while also imposing additional administrative requirements on AINs / PCWs, ENs, and RNs (noting that the Commonwealth appears to be treating NPs as a subset of RNs) (Cth S [6]);
- (3) a range of skills and other factors relating to work value have not been previously recognised, on account of the overwhelmingly-female nature of the sector, based (in part) on gender-driven assumptions about the work value of that work (Cth S [7]);
- (4) average care requirements for aged care recipients have increased alongside acuity and complexity, which further contributes to the work value of aged care workers being significantly higher than the modern awards currently reflect (Cth S [8]);
- (5) the vast majority of direct care workers in residential and in-home aged care services identify as female (over 83 per cent) (Cth S [18]);
- (6) the current Aged Care Quality Standards (ACQS) "*place the consumer at the centre of every decision, ... give consumers greater control over their care,*" and there is "*a greater emphasis on the individual needs of consumers under the Standards*" (Cth S [29]–[30]);

- (7) care and service plans are signed off by RNs, which means that RNs are spending more time with residents to assess needs, goals, and preferences (Cth S [31]);
 - (8) further, given greater acuity and complexity of care needs, the workload associated with the maintenance of care plans has increased (Cth S [31]);
 - (9) the increased regulation on the use of restrictive practices has led to a change in the roles performed by aged-care workers, and in particular RNs (Cth S [43]-[45]);
 - (10) the QI reporting most impacts RNs (who now spend more time on mandatory reporting than previously), and that impact flows on to ENs and AINs / PCWS (Cth S [55]);
 - (11) SIRS reporting likewise adds to the responsibilities of workers (Cth S [67]-[70]);
 - (12) the Commonwealth takes no issue with a finding that wages have not been “*properly fixed*” (Cth S [79.1]), and in any case the “*proper fixation*” of minimum rates is not a “*gateway*” to an exercise of power under section 157 (Cth S [79.2]);
 - (13) the C10 framework may be relevant, but is not determinative or limiting (see Cth S [98]–[106]);
 - (14) current award rates significantly undervalue the work performed by aged-care workers for reasons relating to gender (Cth S [120]);
 - (15) increases to minimum wages in the relevant awards are necessary to achieve the modern award objective (Cth S [153]), and the minimum wages objective (Cth S [157]);
459. At Cth S [107]–[121], the Commonwealth endorses the approach of various of the expert witnesses, including (in particular) Hon Assoc Prof Junor’s approach to the identification of “*invisible*” skills. The only point to note is that Cth S [111], [115], [117], and [118] refer to these skills being utilised by AINs / PCWs and ENs. The ANMF understands that the absence of a reference to RNs is oversight rather than

deliberate and the Commonwealth's position is that it supports Hon Assoc Prof Junor's analysis in relation to RNs as well.

460. The ANMF also notes the following submissions which are significant to the Commission's resolution of these applications.
461. *First*, the Commonwealth will fund any increases to award wages ordered by the Commission (Cth S [5]). This is repeated at Cth S [201], where the Commonwealth submits (and the ANMF agrees) that the Commission may proceed on the basis that the impact on business of significant award rates will not be material. In fact, as the Commonwealth submits, the effect will be positive because it will assist employers in what they recognise is a problem in regard to attraction and retention. This largely or entirely eliminates the relevance of any "*capacity to pay*" submissions made by the employer parties.
462. *Second*, the Commonwealth makes detailed submissions about relevant factors concerning the minimum wages objective, which the ANMF agrees with and adopts (Cth S [157]–[209]), save only in a few respects (addressed in Part D.2 below).
463. It is appropriate to say something briefly about the Commonwealth's submissions on section 134(1)(e) of the FW Act. The Commonwealth relies on the *Gender-inclusive job evaluation and grading* Australian Standards, which (it is submitted) would provide an objective standard for the Commission to consider, and would assist the Commission with assessing relevant skills in this matter (Cth S [193]–[194]). In this connection, the ANMF notes that Hon Assoc Prof Junor was a nominated university representative on the "*Standards Australia Technical Committee/Project Group MB020 developing the Australian Standard for Gender-Inclusive Job Evaluation and Grading (AS 5376-2012)*"⁶⁹
464. In the Junor Report, Hon Assoc Prof Junor draws on, *inter alia*, the "*Guide to the Australian Standard on Gender Inclusive Job Evaluation*" to develop her Table A8-1,⁷⁰ which is a list of advice from gender-inclusive pay practice. This table is again set out at Table A9-3,⁷¹ where Hon Assoc Prof Junor explains that the "*Workplace Gender Equality Agency has provided advice on ways of avoiding biasing processes when*

⁶⁹ Junor Report, Annexure 3, page 4, item 5.1.

⁷⁰ Junor Report, Annexure 8, page 8.

⁷¹ Junor Report, Annexure 9, page 19.

assigning value,” and that Table A9-3 “*draws on this advice, re-expressing it and adding to it in ways relevant to aged care settings*” (at [62]).

465. Accordingly, the ANMF agrees that (consistently with Hon Assoc Prof Junor’s opinion), the Australian Standards are useful in assessing relevant skills. Happily for the Commission, Hon Assoc Prof Junor was involved in the development of these Standards, has adapted relevant parts to aged-care settings, and utilised that adaptation in her application of the Spotlight Tool, as outlined in the Junor Report.
466. *Third*, a few matters in relation to the figures set out in Annexure B to the Commonwealth’s submissions:
- (1) Annexure B, [6], states that Deloitte’s modelling determined that there were effectively no AINs classified on the Nurses Award. Without having seen that modelling it is difficult to know how Deloitte reached that conclusion, but it is not right. The ANMF has many members who are classified as AINs under the Nurses Award. The ANMF is aware that the process of data collection in regard to such workers can be difficult (given that sensible arguments can usually be given for classifying the same worker under any of the three relevant awards), and that might explain Deloitte’s view. But, the Commission could not safely proceed that there are “*effectively no*” AINs classified on the Nurses Award;
 - (2) It appears from pages 13–14 of Annexure B that about 70 per cent of workers classified under the Aged Care Award are on award rates (even if an EBA applies to them), about 60 per cent of workers under the Nurses Award are in that category, and about 90 per cent workers on the SCHCADS Award are in that category. This is relevant for a number of reasons:
 - (a) it emphasises submissions made by the union parties (and the Commonwealth) about the needs of the low paid;
 - (b) it emphasises submissions made by (at least) the ANMF about the failure of enterprise bargaining to meaningfully deal with the low wages paid in aged care;
 - (c) it considerably undermines the strength of any critique advanced by the employer parties concerning expert witnesses analysing gender pay gaps based on actual pay rather than award rates (given that there is,

evidently, a very large overlap between the two). The ANMF has explained above why that criticism would not be accepted in any event; but if the Commission considers that it has some force in the abstract (which the ANMF denies), that force is reduced considerably in practice, in the light of figures on pages 13–14 of Annexure B.

D.2 Qualifications to the Commonwealth's submissions

467. The following ten matters in the Commonwealth's submissions require, in the ANMF's submission, some qualification. Many of these distil into a central tension (which may not really be much of a tension). A submission that the ANMF has repeatedly made is that it tempts error to substitute other words for the words actually used in section 157(2A), and that it tempts error to import into the extremely-broad discretion created by section 157(2A) limitations or restrictions that the Commission had adopted in previous wage-fixation regimes.
468. A few of the Commonwealth's submissions, at least on one reading, involve propositions that read limitations into section 157(2A), or import tests or frameworks that elevate some considerations over others (where the statute does not involve any such elevation of considerations). While it is doubtful that any of these would affect the outcome of these applications, the ANMF's submission is that the Commission would prefer an approach that does not read in any restrictions or limitations, and does not involve establishing tests, frameworks, or considerations of elevated status, where no such thing appear from the statute.
469. Now, the ten matters.
470. *First*, the figures in Cth S [16] shows that the submission in Cth S [15]—most care is provided by AINs / PCWs—must be right. That is, the aged-care workforce is predominantly AINs / PCWs, and so they will be providing the predominance of the direct, hands-on, care. What should be noted, however, is that: (1) there are certain kinds of care that only ENs and RNs perform or provide; and (2) when AINs / PCWs provide care, they do so as part of a nursing team and under the direction and supervision of an EN or an RN.
471. *Second*, as to Cth S [73]–[77], the Commission could not, in the ANMF's submissions, take into account the effect on work value of changes to funding arrangements that have

not been made. Whether administrative workload will in fact be reduced is a matter for speculation. The kind and amount of work that will be required, for example, in order to prepare for assessments to be performed by independent assessors (see Cth S [74.1]) is not known. Whether changes will, in fact, reduce the workload of workers, or instead reduce one kind of work and replace it with a different kind of work, is likewise not known. The Commission would proceed on the basis of the evidence as to the existing funding model.

472. *Third*, in Cth S [79.3]–[79.4] (and see also [95]), the Commonwealth submits, in effect, that historical approaches to wage-fixing (*i.e.*, approaches arrived at under predecessor legislation to the FW Act) can be a “*relevant consideration*” in determining whether a variation is justified by work value reasons, but is not “*necessarily the first step*” in doing so. Expressed at that level of generality—*i.e.*, some aspects of former approaches may be relevant—there is nothing objectionable in the submission. But the Commission would not treat earlier approaches as any kind of “*step*,” whether first, last, or middle.
473. For reasons set out by the ANMF in its opening submissions at [32]–[38] (which submissions it presses), some of the principles set out in the *ACT Child Care Decision* at [190] can probably be safely applied, but many cannot, and the application of some (*i.e.*, those that call up the “*significant net addition*” language) will lead into error.
474. It is undesirable to overlay statutory expressions with a multiplicity of expositions, functioning as “*tests*,” which might carry the consequence that the words of the statute are overlaid and forgotten. The result can be that, as Kitto J put it in *Ballas v Theophilos (No.1)* (1957) 97 CLR 186 at 196, “*expressions which have been used in other cases [are carried] to such a length as to desert the language of the statute.*”
475. The question—the only question at this stage of the analysis—for the Commission is whether work value reasons exist so as to justify an increase in minimum award wages. the statute contains no words of limitation so that only certain kinds of work value reasons (*e.g.*, those demonstrating “*significant net addition*”), *etc.*, qualify. The Commission would artificially narrow the scope of its broad discretion were it to import any limitations on its power. This seems not to be terribly inconsistent with the Commonwealth’s approach, if it is at all—see Cth S [95]–[96]; but the ANMF

considered it worthwhile to be clear as to what, in its submission, is the correct approach to section 157(2A).

476. *Fourth*, and in a way relatedly, as to Cth S [84], the submission there put is that section 157(2A) is “*sufficiently broad so as to import the fundamental criteria used to assess work value changes under the wage fixing principles which operated from 1975 to 1981 and 1983 to 2006.*” It is necessary to approach this submission with caution.
477. When, in the *Pharmacy Decision* (2018) 284 IR 121 at 181 [166] (which the Commonwealth cites), the Full Bench referred to the “*fundamental criteria*” from earlier wage-fixation approaches, they meant, and meant only, 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—see *Pharmacy Decision* at [138], [142] at principle 7(a), and [148] at principle 4(a). The Full Bench went on to say that section 157(2A) does not import any of the additional requirements from previous wage-fixing approaches (even so as to require changed from a fixed datum point).
478. Accordingly, what *Pharmacy Decision* (2018) 284 IR 121 at 181 [166] means is that it the language used in section 157(2A) picks up, as work value reasons, three things (and three only) that were fundamental in earlier approaches, but does not pick up any other limitation or restriction. This is very probably what the Commonwealth meant at Cth S [84]—but in case it was not, then the Commission would have regard to the language of *Pharmacy Decision* (2018) 284 IR 121 at 181 [166] rather than the paraphrase in Cth S [84].
479. *Fifth*, and again relatedly, so far as Cth S [85]–[86] mean that comparison of relativities between and within awards is necessary, or part of a stepped process that the Commission must or even would adopt, that submission would be rejected. That does not mean that relativities are always and necessary irrelevant. It means that they might sometimes be relevant, and might other times be irrelevant, and that nothing in section 157(2A) requires that any kind of relativity analysis be performed.
480. Of course, if the Commission’s approach to determining whether work value reasons justified an increase in wages resulted in huge disparities, between awards, for work of similar value, then that might suggest that in a particular case the Commission’s approach to evaluation of work value had miscarried. So, it would (probably) not

involve error to have regard to relativities; but that is not the test, nor is it even part of the test.

481. *Sixth*, at HSU [41], the gist of the HSU submission was that the Commission would not be swayed by the “*prestige*” of particular work, when assessments of how prestigious particular work is might be affected by gendered assumptions. This was (appropriately) a warning against undervaluing aged-care work based on gendered assumptions about the “*prestige*” (or value, or whatever) of that work.
482. At Cth S [91], the Commonwealth seems to turn that submission on its head—suggesting that there is a risk of overvaluing aged-care work because people presently recognise, in the COVID-19 era, the importance of that work. In the ANMF’s submission, there is no realistic risk of overvaluation on this basis. The fact that, for a short period in time, the community is aware of (does not overestimate; is simply aware of) the importance of aged-care work does not give rise to any risk that the Commission would be swayed somehow into overestimating, itself, the importance of the work.
483. *Seventh*, as to the AQF (Cth S [126]–[142]), for the reasons expressed above the ANMF submits that (*contra* Cth S [141]) the Commission would not use the AQF as a “*starting point*.” That elevates the AQF in a way that is not justified by the statutory language.
484. As with other submissions put in this Part D.2, there may not be very much practical difference between the way that the Commonwealth puts the submission, and the way that the ANMF does. Of course the Commission can take into account, in deciding what level of skill is involved in doing work, what qualifications the workers have. The ANMF submits, though, that this is not a “*starting point*”—it is just one of many points, none of which has special status, going to demonstrate the skill involved in doing the particular work.
485. Similarly, as to [152], it may be descriptively correct that it would be open to Commission to align modern award rates with AQF levels (*i.e.*, that outcome would not, of itself, bespeak error). But so far as what is suggested is that the Commission might start with the AQF, and depart therefrom only if some good reason were shown for doing so, that approach may involve error (because it might involve giving the AQF a significance that the statute does not give it).

486. *Eighth*, in regard to Cth S [191], that there are various ways to measure a gender pay gap, and that the ANMF relies on the analysis in the Smith/Lyons Report in that connection.
487. *Ninth*, as to Cth S [208], the ANMF does not (and neither does the Commission) have access to the Treasury modelling to which the Commonwealth refers. There has been no evidence concerning inflation risk. It suffices, in that light, to say that the Commission could not safely make any finding as to the degree of inflation risk. Even on the Commonwealth's submission, there would only be inflation risk of "*similar wage rises are demanded in associated industries*," and there is no basis for finding that that is a likelihood.
488. *Tenth*, as to submissions on classification structure, the ANMF's submission has been outlined in Parts B.11 and B.12 above. All that is necessary to say here is that, where in Cth S [226], the Commonwealth submits that, "*the ANMF's application to vary the Aged Care Award would include reference to Certificate IV within Level 5*," that should be understood as meaning reference to Certificate IV within Grade 5, which is the equivalent of Level 7.

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17 August 2022

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