



TRANSCRIPT OF PROCEEDINGS  
*Fair Work Act 2009*

**DEPUTY PRESIDENT ASBURY  
DEPUTY PRESIDENT O'NEILL  
COMMISSIONER BISSETT**

**s.158 - Application to vary or revoke a modern award**

**AM2020/99 – Aged Care Award 2010 – Application by Ellis & Castieau and Others**

**AM2021/63 – Nurses Award 2020 – Application by Australian Nursing and Midwifery Federation-Victorian Branch**

**AM2021/65 – Social, Community, Home Care and Disability Services Industry Award 2010 – Application by Health Services Union**

**Melbourne**

**11.00 AM, MONDAY, 13 FEBRUARY 2023**

**Continued from 22/11/2022**

PN85

DEPUTY PRESIDENT ASBURY: Good morning. We'll just confirm the appearances.

PN86

MR GIBIAN: Thank you, Your Honour. As the members of (indistinct words) for the HSU.

PN87

MR McKENNA: If it please the Full Bench, my name is McKenna, initial J, appearing with Hartley, initial J, for the ANMF.

PN88

MS HARRISON: If the Commission pleases, Harrison on behalf of the United Workers' Union.

PN89

MR TAYLOR: If it pleases the Full Bench, Taylor, initial G, for the Australian Workers' Union.

PN90

MR WARD: If the Commission pleases, I probably should announce a change in the appearances which I don't think I've actually formally done so far but the clients I've been appearing for to date, which included LACSA and ACSA, the Commission might be aware that LACSA and ACSA have now formally merged into one association. So I now appear for the Aged and Community Care Providers Association Ltd and Australian Business Industrial, if the Commission pleases.

PN91

DEPUTY PRESIDENT ASBURY: Thanks, Mr Ward.

PN92

MR SHARRIFF: May it please the Commission, Sharriff. I appear with my learned friend Mr (indistinct) for (indistinct).

PN93

DEPUTY PRESIDENT ASBURY: Thanks. Are there any housekeeping matters before we start?

PN94

MR GIBIAN: I think this preliminary issue and that is there's been an objection taken the material we filed in reply. I suspect, Your Honour, it might be convenient that be dealt with first before anything else.

PN95

DEPUTY PRESIDENT ASBURY: Is that the case? I should just let you know, there's a housekeeping matter from the Full Bench's perspective, is we have to adjourn at 3 o'clock. If we have to come back later, maybe we'll need to do that but we need to adjourn at 3 o'clock, thanks.

PN96

MR TAYLOR: Is it convenient to deal with the further evidence? Perhaps if I could just – as I understand, the Commission wish to hear from the parties in stage 2 about a number of issues.

PN97

DEPUTY PRESIDENT ASBURY: Yes.

PN98

MR GIBIAN: We're in preliminary provisional (indistinct) views about the modern award and minimum wages objectives, the new amendments, the new provisions which came into the Act, timing and phasing issues and some further questions the Commission asked us – asked the parties – on Friday. I think for our part we were going to concentrate on the last of those two. The first two issues I think all the parties have dealt with reasonably substantially in writing and subject to anything the Bench has, I think that the second two of those issues are likely to consume us for most of today.

PN99

In that respect, perhaps before coming to Mr Ward's evidence, we also filed a further statement of Professor Eagar.

PN100

DEPUTY PRESIDENT ASBURY: Yes.

PN101

MR GIBIAN: And I don't think that there's any objection to that. It's been received and none of the parties have indicated she is required for cross-examination.

PN102

DEPUTY PRESIDENT ASBURY: Yes, if there is any objection or if Professor Eagar is required, I haven't seen any notification of that. No, Mr Ward? Okay, thank you.

PN103

MR GIBIAN: So to the extent necessary, I tender the – I think it's referred to as a supplementary statement of Professor Eagar, dated 20 January. I think Mr McKenna was going to say something about the receipt of Mr Ward's further evidence.

PN104

DEPUTY PRESIDENT ASBURY: Yes.

PN105

MR GIBIAN: At the outset, at least.

PN106

DEPUTY PRESIDENT ASBURY: Yes. Thanks.

PN107

MR McKENNA: If the Full Bench pleases, cognisant of what the indication of time has been provided, I can indicate that for the ANMF, I don't anticipate being more than 30 minutes with the primary submissions. I do wish to – the ANMF has taken objection to the filing of the further statements on behalf of the joint employers and if it please the Full Bench, it would take perhaps five minutes to elaborate on the basis for that objection.

PN108

DEPUTY PRESIDENT ASBURY: Certainly.

PN109

MR McKENNA: In short, the joint employers ought not be able to rely on the evidence of Mr Ward or Mr Shore, Mr Brockhaus and Ms Jenkins in circumstances where it's not a reply. The ANMF is or would be prejudiced by not being able to challenge it effectively and that prejudice is not something that can be cured by making an adjournment in circumstances where that would likely cause a delay to making a determination and the position taken by the ANMF is that the interim increase should proceed, as at the date of the determination. The directions made by the Full Bench on 23 November as amended in December, directed the parties to file any submissions and evidence in reply by 5 pm, 9 February.

PN110

The directions provided for filing on 20 January evidence of the submissions dealing with the timing and phasing of the interim increase to award minimum wages. There has been a very tight turnaround between 9 February reply material and today's hearing, which the Full Bench would be well aware of. That was a matter that was discussed in the directions. The ANMF consented to that very tight turnaround on the basis that the primary evidence and submissions would be made in chief on 20 January, some time before today, and that the ANMF's position was that the interim increase should commence, as I've already indicated, as soon as possible upon the making of the determination, cognisant of the effect of 166(3) the ANMF and presumably other parties did not want to stand in the way of this matter coming on today and progressing today.

PN111

The joint employers' submissions of 20 January asserted that the introduction of the interim increase in advance of the Commonwealth proposal for finding (indistinct) material and detrimentally impact upon the business. Apparently a forensic decision was made at that point not to file evidence in support of that assertion. That is so despite the fact that the ANMF and indeed other parties consistently and clearly foreshadowed that they sought wages increases from effect – with effect from the earliest possible moment and that the Aged and Community Care Providers' Association were a party to the most recent joint statement of 16 December 2022, which provided for the 15 per cent interim increase to the pay rates of direct aged care worker classification should commence operation under the relevant awards as soon as possible.

PN112

Now, that joint statement went on to talk about funding as well but it leaves no doubt as to the position of the union parties in this matter. The four statements

that the joint employers now seek to rely upon are not, in my submission, reply evidence. Having regard to the letter of instruction to Mr Corduroy, he is not taken to any evidence and asked to reply to it. It identifies – rather that letter identifies – a position taken by the union parties seeking that the interim increase operate as soon as possible. That is a matter, as I've indicated, about which the joint employers were or should have been appraised of as at 20 January.

PN113

The statements of Ms Jenkins, Mr Shore and Mr Brockhaus, again, they don't identify evidence to which they're replying. They do rather refer to the fact that they're aware of a 15 per cent increase and how the Commonwealth proposed to fund the increase and go on to give evidence about the financial positions of the respective organisations. The Commission has made orders, the Full Bench has made orders for the effective progression of this dispute. In short, the joint employers have not complied with those directions. They would now, in our submission, require leave to rely upon those four statements and leave ought not be granted in circumstances where it puts the ANMF and potentially other union parties in a position where we are unable to properly test that evidence.

PN114

It puts the Full Bench in a position where if that evidence is accepted it would have that evidence that has not been properly tested. So that's the basis for the objections, if the Full Bench pleases.

PN115

DEPUTY PRESIDENT ASBURY: Are you saying that the adjournment that you spoke about, assuming – I understand your primary position is you want to proceed as quickly as possible – but the adjournment you spoke about, what would that be used for?

PN116

MR McKENNA: We do not seek an adjournment.

PN117

DEPUTY PRESIDENT ASBURY: No, I know you don't seek one but you said in order to grant you fairness, you'd need an adjournment so what would the adjournment allow – would you perhaps consider cross-examining the four witnesses?

PN118

MR McKENNA: Yes. Sorry, Deputy President – of course.

PN119

DEPUTY PRESIDENT ASBURY: Yes.

PN120

MR McKENNA: So the adjournment, similarly, if the material had have been filed on 20 January, then the ANMF may well have sought to reply to that evidence, might have sought our own expert evidence and certainly, if nothing else, would be in a position where that evidence could be forensically tested in

cross-examination and between Thursday and today we're simply not in a position to do that.

PN121

DEPUTY PRESIDENT ASBURY: Yes, I understand. Thank you.

PN122

MR McKENNA: If the Full Bench pleases.

PN123

MR GIBIAN: Can I just indicate that my client supports the objection, if the employers wish to put on evidence in relation what is alleged to be the impact on employers in a financial sense of the increase or any (indistinct) that might exist with whatever decision is ultimately made with respect to funding, then it should have been put on in chief and it's not a position in which we can, as Mr McKenna said, have an adjournment because that would in a sense achieve procedurally what substantively is sought to be achieved by way of a delay.

PN124

Can I just give one example in that respect? Mr Corduroy's statement at paragraph 34, for example, makes an assertion about the global impact or in monetary terms of there being a non-alignment of Commonwealth funding with increases in rates of pay in a manner which is purely assertion – that is no workings or explanations provided to how those figures are arrived at and given the timing, we've obviously been unable to – to the extent that it is relevant, and I'll come in due course to the extent to which that issue is relevant – we're obviously deprived of the opportunity to examine those matters or go into any kind of investigations on them.

PN125

DEPUTY PRESIDENT ASBURY: I understand, thank you. Mr Ward.

PN126

MR WARD: Thank you. I think the allegation is primarily that we've failed to comply with the directions but there seems to be a subtext of fairness and they're not necessarily related so I might deal with them separately. The first thing I wanted to say is that we believe that it's absolutely clear that we have complied with the directions. I'm going to set out with some care how that's the case. There is no doubt that the starting point for this part of the proceedings, putting aside some technical questions asked by the Commission, and also technical questions about the amendment to the Fair Work Act, the starting point for this part of the proceedings is all about the Commonwealth and its position on funding and when one considers the statement that issued the directions for these proceedings, it's not surprising, therefore, that the first thing that's required to be done is for the Commonwealth to file and tell us what it's going to do. There are then two further directions. One is for the parties contemporaneously to file submissions and evidence and I just pause there to say that the approach of having parties file contemporaneously is increasingly adopted by this Commission. Occasionally it does present some difficulties, slightly differently to one party filing, then another, and then a reply.

PN127

Then the parties were given liberty to file submissions and evidence in reply and it's true that that timetable was truncated, the first requirement being 20 January, the second being 9 February. I suspect the Commission approached that with some optimism, given that the matter was listed for hearing today only if required. Perhaps that optimism hasn't materialised. That program is consistent with the provisional views proposed by the Commission on 17 November in its statement, which is found at FWCFB 208 and it's also consistent with the views expressed by the Commission as indicated in its interim decision of [2022] FWCFB 200.

PN128

The Commission indicated there that the case management was designed by all parties with an opportunity to make submissions in respect of the impact on employers once the extent of the Commonwealth fundings is known. So the conversation clearly was uncontroversially about Commonwealth funding. So the first question then is what happened? Obviously the Commission would be aware that the Commonwealth filed on 16 December and told us that for a variety of good reasons, they were prepared to find the interim wage increase in two tranches of 10 per cent and 5 per cent respectively.

PN129

The parties had the benefit of reviewing that and then they simultaneously filed their position. Our position has been mischaracterised by the nurses this morning in this sense: we took what we would describe as a reasonable and valid simply uncontroversial position, perhaps with some modest criticism, to accept the Commonwealth's timetable, and in so doing we explain why this made the impact on employers to be relatively benign. We also went on to explain how the Commission's considerations of section 134 were immediately less taxing because of that.

PN130

Now, that's the gravamen of the position we advanced on 20 January; that's the position. We didn't have to file any evidence in regard to that position, because, well frankly, by force of logic it's very, very clear that if you adopt that position then what I have said is true; that is the impact on the business is benign and the section 134 considerations are less taxing.

PN131

What were we confronted with? We were confronted with the union position that criticised the Commonwealth, said that the Commonwealth funding proposal should really be ignored and that employers should pay effectively immediately, and there was various formulations of that. Some suggested some prospective retrospective concept, others just that we should pay it. So there was two clearly differing positions. One was accept the Commonwealth's submission in relation to funding, and one was set it aside and in the alternative have the employers pay it now.

PN132

Now, I don't want to get too caught up in the guessing game issue; that is what we should have guessed was coming from the unions when we simultaneously filed

on the 20th, other than to simply say this. My client had the understanding at that time that people are probably going to be upset, but content to adopt the Commonwealth's position, and that understanding flowed from the joint statement of 16 December 2022, which I think was filed in these proceedings, and the ANMF and the HSU and UWU were party to, and that arose because it said this in that statement, that the interim increase of 15 per cent be fully funded by the Commonwealth Government including on cost.

PN133

But I am not really sure how far the guessing game gets you as to whether or not we should have guessed what they were going to do beforehand and filed something. So the simple question is this; were we entitled to file material in reply to the unions' position; that is when the union says we want the money now irrespective of funding are we entitled to reply to that. That's the question.

PN134

DEPUTY PRESIDENT ASBURY: Mr Ward, sorry to interrupt you, the joint statement that was filed on 16 December was that funding for the interim increase must be provided by the Commonwealth in full as soon as possible.

PN135

MR WARD: Yes, as soon as possible it appears is in two tranches, one in 10 per cent and one in 5 per cent.

PN136

DEPUTY PRESIDENT ASBURY: But I guess the proposition that it was news that the unions would want it forthwith is one I'm struggling with a bit.

PN137

MR WARD: I think it's a distraction, your Honour. The simple fact is this, the union put a case on, on the 20th. Are we allowed to reply to it or not? It's as simple as that. They argue that we should pay the money straight away irrespective of the funding. The question is are we entitled to reply to that proposition, and if you look at what we have done in our submissions and the evidence you see this; with the exception of I think four paragraphs at the end which comment very briefly on some issues associated with the new legislation, we make it very clear in our submission all we're replying to is their submission, their position, that we should pay straight away. And what is the evidence we file in relation to that? Well, it's evidence that assists this Commission understand both the context and the consequence of their position if the Commission is to consider it and possibly adopt it. That is all it does.

PN138

DEPUTY PRESIDENT ASBURY: So you would be submitting that because the Commonwealth filed on 16 December and notwithstanding that thereafter the union said we want it immediately that you're responding in that context?

PN139

MR WARD: Absolutely.

PN140



DEPUTY PRESIDENT ASBURY: I understand.

PN141

MR WARD: We are responding unambiguously and unashamedly to their position. Their position is we want the money now irrespective of the Commonwealth, and we're entitled, your Honour, to file material that goes to the context and the consequence of you considering and possibly adopting their position. That's all we're doing, replying. And when you look at the directions, and again this might be one of the challenges of simultaneous finding, when you look at the directions the directions said we were entitled to file submissions and evidence in reply, and we have done that in reply to what they have put on. That's what we have done. There was no skulduggery, there was no mischief, there was no games being played, it was a plain reading of the directions. It was an understanding of their position on the 20th and we felt it was necessary to respond to that. Had they had said on the 20th adopt the Commonwealth position we wouldn't have filed very much at all. But they didn't, they said pay the money straight away, so we provide the Commission with material, both evidentiary and submission, dealing with the context and the consequence of their submission; their submission. That's all we've done.

PN142

So we start this position from simply saying this; it's wrong to say we didn't comply with the directions. It is just simply wrong. We have complied with them. Now, if there's a concern in how we complied with them, some unfairness has arisen, well we're sympathetic to that because we don't think that should be allowed to happen. If there is an unfairness then the simple fact is that they should be given time, suitable time, to address what they think the unfairness is. It might well be that they wish to put on evidence to explain how the industry is flushed with money. Who knows what they want to put on, but we don't want to stand in the way. If there is some section that in complying with the directions that they now have an unfairness then that could be dealt with by way of an adjournment.

PN143

What they're really trying to do here today, what they're really trying to do here today is to prevent us replying. They don't want us to reply. That's what they're doing. It's inconvenient to them. That's the position we are in. Now, having said all of that I will also say this; the Commission should receive the evidence. It assists the Commission trying to deal with a particularly challenging issue, and that evidence assists it and it allows the Commission to understand the state of the industry, it allows in the context of the unions' claim, that is to claim to pay it now. It also allows the Commission to understand from actual operators perhaps the different ways different operators might approach it, because the evidence is quite textured in that regard.

PN144

So in any event we say the Commission should receive it, but we start with a premise that we have complied with the directions. I don't know how to say this. I can't see how that can't be accepted. We have responded in submissions and evidence to the position they articulated. Now, if this had been they go, we go, they go, well that's a different issue, but it wasn't. We all filed simultaneously,

we all reviewed what each other's written, and then the next time we filed submissions and evidence in reply to what we have just read, and that's what we have done. It's as simple as that.

PN145

DEPUTY PRESIDENT ASBURY: Do you say it's also responsive to some of the matters that Professor Eagar set out in her report?

PN146

MR WARD: I think it does in this regard, although I don't think that's the test, your Honour, but I think it does in this regard, that most of Professor Eagar's criticism seems to be levelled at the Commonwealth. Mr Shariff will deal with that possibly. But to the extent that she does in the final paragraph of her material essentially say employers can afford it because it will help with attraction and retention, it clearly goes to that.

PN147

Some of our evidence goes absolutely directly to that. Mr Brockhaus in particular talks about that. So does Ms Jenkins. So the answer is, yes, he does that, but our reply in the directions is not limited to replying to any evidence they filed, our reply is in relation to what they filed on the 20th, including their position. But if there's some real concern about prejudice just give them some more time. That would solve it. I don't know what they want to do with that time really, but give them some more time. We have complied with the directions. It's wrong to say we haven't. If the Commission pleases.

PN148

DEPUTY PRESIDENT ASBURY: I understand your submission. Thank you. Mr Gibian, is it the HSU's position that regardless of the view the Bench takes about admitting the statements that you don't wish to cross-examine?

PN149

MR GIBIAN: We were going to cross-examine Mr Corduroy, hopefully reasonably briefly.

PN150

DEPUTY PRESIDENT ASBURY: Briefly.

PN151

MR GIBIAN: Subject to a caveat about it may not have been as (indistinct) as it might otherwise have been if we had more time, but there were a few matters I wish to ask Mr Corduroy. The other witnesses we were not going to cross-examine in the circumstances.

PN152

DEPUTY PRESIDENT ASBURY: I think there were some submissions about Mr Corduroy's evidence in any event, weren't there?

PN153

MR GIBIAN: Yes, there were. Can I just say just in response to what Mr Ward has said, in relation to Professor Eagar she doesn't say at the end of her statement

that providers can afford it. She does make some observations about attraction and retention and the importance of that issue, which I think Mr Corduroy is fully in agreement with, at least as I read his reports, or the StewartBrown reports, and so this evidence can't be seen as responsive to anything Professor Eagar said which was directed primarily at the submissions of the Commonwealth concerning the feasibility of providing funding.

PN154

The second observation I was just going to make, which I think your Honour the presiding member was really referring to, is paragraph 2 of the consensus statement of 16 December says that the parties say or the participants in that process that the funding must be provided as soon as possible. The final sentence of that paragraph goes on to specifically identify a difference between the parties. That is the employers say it must be provided at the operative date, by omission identifying that the unions did not hold that position, or at least that one should be dependent upon the other, and Mr Ward and his clients were fully aware that the unions had a different position in that respect.

PN155

DEPUTY PRESIDENT ASBURY: Is there a possible middle ground, speaking from my perspective, that we receive the statements, and conduct the proceeding today, receive the statements on the basis that you're given a period of time after we adjourn today to consider whether you want to put on any further evidence and whether you want to cross-examine those witnesses, which we could undertake to facilitate as soon as possible if that's necessary?

PN156

MR GIBIAN: Deputy President, can I suggest - I was just going to suggest - we are conscious, and Mr McKenna can speak for his client, of any delay at all, and for the reasons that the Full Bench will be fully aware of - an alternative approach would be for the Commission to receive the material, but in attaching weight to that material have regard to the fact that the union parties have had a limited opportunity to challenge it. The other course that your Honour has raised would potentially at least lead to some further delay with - - -

PN157

DEPUTY PRESIDENT ASBURY: I'm thinking a week, Mr Gibian, to look at it.

PN158

MR GIBIAN: I understand.

PN159

DEPUTY PRESIDENT ASBURY: So we receive it provisionally on the basis that we give leave if you want to file anything in reply, submissions, statements, and you want to cross-examine, and we do it expeditiously, if necessary by Teams. However it needs to happen - - -

PN160

MR GIBIAN: I understand, your Honour.

PN161

DEPUTY PRESIDENT ASBURY: - - - within a very short period after this proceeding finishes today.

PN162

MR GIBIAN: I understand, your Honour. My submission would be, perhaps understandably, that the course that I suggested is another one which is open and would perhaps be more efficient.

PN163

DEPUTY PRESIDENT ASBURY: Yes. But it would still allow - even the course you suggest would still allow some further submissions to be made in relation to weight once you've had some time to absorb the full details of those statements and get some instructions about them, et cetera.

PN164

MR GIBIAN: It's a matter for the Commission of course.

PN165

DEPUTY PRESIDENT ASBURY: Yes. Mr McKenna?

PN166

MR McKENNA: Thank you, Deputy President. I would endorse and adopt my learned friend's submission. The ANMF would oppose any course that would delay the making of a determination. If the Full Bench is to accept the evidence then the weight the Full Bench would give to that evidence is of course a matter for the Full Bench. Our submission would be that less weight - if it is accepted less weight should be given. Whether or not further submissions are made to this effect less weight ought be given on the basis that it can't properly be tested at this point, and to do so in the future would necessarily have the effect of delaying the determination the Full Bench - - -

PN167

DEPUTY PRESIDENT ASBURY: And while we're conscious of the parties very strong desire to progress the matter immediately I think there will be a short as possible period between when these proceedings adjourn and when the decision is released, and if you wanted to put in some further submissions in writing in relation to weight you could do that in that intervening period.

PN168

MR McKENNA: If the Full Bench pleases.

PN169

SPEAKER: Sorry, I don't want to take this any longer than I need to. Can I just make one comment. My friends are making a lot out of the very short time period between last Thursday and today. Had they filed evidence on Thursday we would have been in exactly the same position in terms of turning it around. So I just ask the Commission to be mindful of that. That's in the nature of these sorts of truncated programs.

PN170

DEPUTY PRESIDENT ASBURY: We might just adjourn for five minutes. Thank you.

**SHORT ADJOURNMENT**

**[11.35 AM]**

**RESUMED**

**[11.42 AM]**

PN171

DEPUTY PRESIDENT ASBURY: Thank you. We can indicate that it is our decision to admit the statements on the basis that we discussed it will be a question as to weight that will be placed on the statements, which the parties can make submissions about, and on the basis that the HSU will be cross-examining one of the witnesses in any event. Thank you. Ready to proceed?

PN172

MR GIBIAN: I believe so.

PN173

DEPUTY PRESIDENT ASBURY: You're kicking off, Mr Gibian?

PN174

MR GIBIAN: I am, given the timeframe that the Commission has indicated, and the fact we've filed written submissions, probably would be the convenient course to go to the witness evidence, which is only Mr Corduroy, so - - -

PN175

DEPUTY PRESIDENT ASBURY: Yes.

PN176

MR GIBIAN: - - - at least as far as oral evidence is concerned.

PN177

MR WARD: Your Honour, thank you to Mr Gibian. Can I perhaps deal with it this way: can I seek to have the statements of Mr Brockhaus, Ms Jenkins and Mr Shaw marked, and then I would propose to call Mr Corduroy, if that would be a convenient way to proceed.

PN178

DEPUTY PRESIDENT ASBURY: Yes, just bear with me for one moment. So firstly we'd probably need to tender Professor Eagar's - - -

PN179

MR GIBIAN: Yes.

PN180

MR WARD: (Indistinct).

PN181

DEPUTY PRESIDENT ASBURY: - - - supplementary statement, yes. So we'll mark that as HSU1 in these proceedings.

**EXHIBIT #HSU1 SUPPLEMENTARY WITNESS STATEMENT OF  
KATHLEEN EAGAR**

PN182

I'm not going to try to remember the number we got to in the last one.

PN183

MR GIBIAN: May it please.

PN184

Thank you. Mr Brockhaus' statement we will mark as the Joint Employers' 1 - - -

**EXHIBIT #JE1 WITNESS STATEMENT OF JOHANNES  
BROCKHAUS**

PN185

- - - Ms Jenkins as Joint Employers' 2 and Mr Shaw as Joint Employers' 3.

**EXHIBIT #JE2 WITNESS STATEMENT OF MS JENKINS**

**EXHIBIT #JE3 WITNESS STATEMENT OF MR SHAW**

PN186

MR WARD: On that basis – and I have Ms Rafter on the line, hopefully listening as I do this. We'll just see how well this goes. I'll call Grant Corduroy, and my understanding is Ms Rafter is going to communicate with him, have him join us on the link.

PN187

DEPUTY PRESIDENT ASBURY: Great, thank you.

PN188

MR WARD: If that doesn't work, I'll see what we can do.

PN189

MR GIBIAN: Just while that's happening, I think we could communicate with the Commission that we're proposing to provide an additional document which was just the earlier StewartBrown report, which relates to the entire financial year, 2021/2022.

PN190

DEPUTY PRESIDENT ASBURY: Yes.

PN191

MR GIBIAN: Does the Commission want hard copies of that or - - -

PN192

DEPUTY PRESIDENT ASBURY: We have them. We've got them, thank you. Yes, we've got them.

PN193

MR WARD: My understanding is Mr Corduroy is in the waiting room.

PN194

DEPUTY PRESIDENT ASBURY: Great.

PN195

MR WARD: I assume that has some significance.

PN196

DEPUTY PRESIDENT ASBURY: We need to admit him. Sorry, can I just advise the parties that notwithstanding we have to finish at 3 o'clock, I don't want to truncate you in any way, given the significance of these proceedings, so if necessary, we will resume at 5 and we'll just continue to make sure that you get an opportunity to put your full cases and you're not truncated in any way, thank you.

PN197

MR WARD: I think Mr Corderoy asked if people can see him. I can't see him. I don't know - - -

PN198

DEPUTY PRESIDENT ASBURY: No.

**DISCUSSION RE TECHNICAL ISSUES**

**[11.45 AM]**

PN199

DEPUTY PRESIDENT ASBURY: The associate is just speaking to you and asking you to state your full name and address so we'll try that again.

PN200

MR CORDEROY: My name is Grant (indistinct) Corderoy, my address is (address supplied).

PN201

THE ASSOCIATE: Thank you, Mr Corderoy.

**<GRANT CORDEROY, AFFIRMED**

**[11.48 AM]**

**EXAMINATION-IN-CHIEF BY MR WARD**

**[11.48 AM]**

PN202

MR WARD: Mr Corderoy, it's Nigel Ward speaking, can you hear me?---Yes, I can see you now too, which is good.

PN203

I'm down the end, Mr Corderoy. I don't think we've met before but I'm acting in the proceedings for the employers, including the Aged and Community Care Providers' Association. Can I just ask you again to state your full name and I think in your statement you had your office address so I might ask you to state your full name and your office address?---So (indistinct) Corderoy and our office, the address is Level 2/495 Victoria Avenue, (indistinct), New South Wales, 2267.

\*\*\* GRANT CORDEROY

XN MR WARD

PN204

Mr Corderoy, you've made a statement in these proceedings, haven't you?---Yes, I have.

PN205

Yes, you have that statement in front of you?---Yes, I do.

PN206

That statement is some 40 paragraphs, is that correct?---Yes, it is.

PN207

And has two annexures: annexure A, which is a letter from ACPA asking you to respond to various questions and then annexure B, which is the StewartBrown Aged Care Financial Performances Survey Report, 30 September 2022. Is that correct?---That is correct.

PN208

Yes, and is that statement true and correct to the best of your knowledge and belief?---Yes, it is true and correct to the best of my knowledge and belief.

PN209

Thank you, Mr Corderoy. Mr Gibian, who is from the Health Services Union, he's going to ask you some questions, sir, if you could just listen carefully.

PN210

DEPUTY PRESIDENT ASBURY: Firstly, you want to tender the statement, Mr Ward?

PN211

MR WARD: Yes, Your Honour, sorry, Your Honour.

PN212

DEPUTY PRESIDENT ASBURY: We'll mark that as Joint Employers 4.

**EXHIBIT #JE4 WITNESS STATEMENT OF GRANT CORDEROY**

PN213

MR WARD: If I could tender Mr Corderoy's statement, thank you, Your Honour.

**CROSS-EXAMINATION BY MR GIBIAN**

**[11.51 AM]**

PN214

MR GIBIAN: Yes, thank you, Mr Corderoy. As Mr Ward says, my name is Mark Gibian. I appear for the Health Services Union. Can you hear me adequately?---Yes, I can.

\*\*\*

GRANT CORDEROY

XXN MR GIBIAN

PN215

I think you just said you have a copy of your statement in front of you. I think we also asked you to be provided with – and no doubt you would otherwise have access to – in addition to that the StewartBrown financial performance survey



report for the 12 months to 30 June 2022. Do you also have access to that?---Yes, I do.

PN216

Excellent. I just wanted to ask a few things initially just to make sure that I've understood the content of the survey correctly: as you describe it in your statement and it's described in the report in the same way, the survey is a consequence of the subscription service that StewartBrown provides to operators within the aged care sector?---That's correct.

PN217

That is providers can choose to subscribe to StewartBrown's services and pay presumably some kind of subscription fee or not?---That's correct. It all depends on whether they subscribe. Actually, as an addendum, the government still have service for the business improvement fund, and if any provider has been successful in getting funds for the business improvement fund, part of the approval process is that they have to participate in the StewartBrown survey so an additional (indistinct) participants (indistinct).

PN218

Leaving that to one side then, the data that is ultimately represented in this, the public report that I think you produce every three months, is the consequence of the financial information of who – which is provided by the operators, who choose to subscribe to StewartBrown services or are under some obligation to do so as a consequence of the government funding arrangements?---That is correct.

PN219

And that is StewartBrown doesn't actually go out and survey people. It is dependent upon those providers who choose to take up the subscription service?---That is correct.

PN220

And in the September report and indeed in the 30 June 2022 report, and in your statement, you make various comparisons over time – that is in terms of various metrics, what the outcome was in the previous financial year or the September period of the previous year, correct?---Correct.

PN221

Just in terms of making those comparisons, the composition of the group of subscribers from which that information is drawn will change over time, is that correct?---That is correct, and you make adjustments for when new providers come in. (Indistinct words).

PN222

I'm sorry, I just missed the last thing you said?---Just so we can be – to make an anachronism – we compare apples with apples.

\*\*\* GRANT CORDEROY

XXN MR GIBIAN

PN223

That is, subscribers come and go, is that right?---We haven't had a subscriber leave for many years but new subscribers do join, yes, every year.

PN224

All right, and can you just describe what is the adjustment process you undertake in that respect?---We do an extensive cleansing process of the data received. We do the cleansing and checking and compare it to previous returns and how they've submitted. If we have a new provider that comes in that's – they're still familiar with the data set is very large. That will distort the data in comparisons. We exclude them from the comparison survey.

PN225

Okay, I might come back to that when I understand it more. The second thing is I just wanted to understand what the purpose of the subscribers or what they obtain from StewartBrown. Can you just go to the September report which is attached to your annexure B to your statement? I don't think it's independently page-numbered but the document itself – sorry, comprehensively paged-numbered – but the document itself has page numbers. Do you have that document?---Yes, I do.

PN226

I think you've described – if you just go to page 2 in the right-hand column from the top of that page – the top of that column, I should say – there's a description of the purpose of the survey which is described in the report as to benefit aged care providers in reviewing their financial performance and the considerations of (indistinct) direction. Do you see that?---Yes, I've got that section, yes.

PN227

Yes. Perhaps if I can just paraphrase: I'm right in understanding that the purpose of the survey, or at least the benefit derived by aged care providers, is that StewartBrown provides them with information against various particularly expense-based metrics as to the performance of other comparable operators?---Yes, I'd like to state that it's comparable aged care claimants. We break it down to (indistinct) there might be a provider that's got 70 homes and we look at the individual homes and additional to the expense we have quite a lot of focus on both revenue and the accommodation pricing and their staffing hours and their staffing methods.

PN228

Other matters that contribute - well, contribute to either revenue or expenses?---Correct.

PN229

And the purpose of that or the way in which it is envisaged at least that aged care providers will utilise that information is to identify those areas in which they are outside of - that is for example their expenses are greater than or their staffing arrangements depart from those which are generally applied or the results which are generally achieved by comparable clones as you've identified?---That is true, and they're allowed to I guess break it down with that and compare homes that might have similar size, similar age, similar geographic region, similar resident mix. So they break it down by a number of various metrics and it does allow, it provides for each of their homes to be able to make a comparison to other homes with similar characteristics.

\*\*\* GRANT CORDEROY

XXN MR GIBIAN

PN230

To identify where for example at least their expenses exceed those, or their arrangements depart from those which are commonly adopted by other operators or other homes of similar nature, so that they can identify areas where they should be able to improve to bring their expenses within their revenues?---This is correct, and the expenses are broken down quite gradually, so it's not just (indistinct) expenses, there's very individual expense lines. But that's correct, that they can look at what improvements can they make now or did they need to make any strategic decisions to assist their improvement.

PN231

And the objective at least, whether it's always achieved, is that if the guidance that StewartBrown is able to provide is to be followed the operators can bring their expenses within their revenues by making appropriate changes which are common to homes of a similar nature?---That's correct. I'd only make one slight point, is that we don't advise them of what changes. They get access to an interactive web where they can - they can break it down in the identified manner. We only advise if they come back to us and ask for particular queries on the dataset or any additional information we can provide.

PN232

I understand. So primarily the data in the granular way to provide it is made available and providers can make their own decisions by using those comparisons with aggregating information to identify those areas of expense or revenue where they could improve, or other homes of a similar nature are able to achieve better outcomes. But in addition to that you've just indicated that providers can come back to you for more specific advice and that's something you also provide; is that right?---If it's within our skillset. The first part of your statement is exactly correct. If they come back to us and they want to get some more granular data we can provide advice on that. If they come back about (indistinct) or operational matters then they would probably seek other consultants, but use the information from the dataset to be able to help other recognised consultants to use it. We don't provide that sort of service.

PN233

I understand. All right. Can I then ask you - I just want to ask you a few questions about - or by reference to the June 2022 report. I just picked this out, and I'm not being critical, but the report that you've attached to your statement as annexure B only reflects the results from the three months to 30 September 2022, and to the extent there's comparisons it seems to no doubt in the manner that's usually done compared to the same period in 2021. Is that right?---That's correct.

PN234

Whereas the 30 June report reflects the entire 2021/22 financial year?---Correct.

\*\*\* GRANT CORDEROY

XXN MR GIBIAN

PN235

All right. If I could ask you then to turn up the June 2022 report, and just go directly to - the summary of results commences on page 10, and then on pages 11 and 12 there are some summary tables, firstly on page 11 with respect to

residential aged care, and then on page 12 with respect to home care package results. Do you see that?---Yes, I do.

PN236

And if I could start with residential aged care on page 11, you will see that there's - I don't need to take you to all of this, but to revenue and expenses, and then the third row refers to operation results. Do you see that?---Yes, I do.

PN237

And it summarises in a way which is elaborated on in tables further on in the report to an operating result with respect to overall, and then with respect to three distinct revenue and expense lines referred to as direct care, indirect care and accommodation?---That's correct.

PN238

And in each case it's identified - I take it this is the aggregate result on a per bed day basis?---That's correct.

PN239

Now, those three - perhaps I don't need to go to it - but there are definitions of the direct care, indirect care and accommodation items in the glossary, which is pages 21 and 22 of the report?---Yes.

PN240

And the first alphabetically of course is the accommodation result, it's described as the net result of accommodation revenue and expenses, described then as related to capital items such as depreciation, property rental and refurbishment costs; that's correct?---Correct.

PN241

So that doesn't include labour costs, that is its capital costs associated with the type of matters that are listed there?---It includes labour costs for recurrent maintenance, you know, like painting and things like that, the labour costs of plumbing, not any recurrent maintenance costs.

PN242

Then direct care is the fourth definition there, so it's a comparison of then the ACFI and other supplements, supplements referable to direct care and the direct care expenditure as we will come to, primarily labour costs in that respect?---That's correct, it refers to the ACFI now and (indistinct) subsidy which is a subsidy paid for providing for care in any related subsidies, and the direct care expenses being the staff cost, predominantly registered nurses, enrolled nurses, other nurses, allied health agency costs. Medical (indistinct words) are the main components of that.

\*\*\* GRANT CORDEROY

XXN MR GIBIAN

PN243

And then, sorry, over on page 22 in the bottom of the right-hand column there's a reference to what constituted by the indirect care result, namely the revenue from the basic fee plus extra optional service fees less obviously the expenses related to

what is whether appropriately or not described as hotel type services, catering, cleaning and laundry?---That is correct.

PN244

And again that would be, perhaps to slightly lesser degree, but substantially labour costs?---Well, substantially labour costs, except for catering of course there's the two components, and any chemicals, chemicals and medicals for laundry and cleaning, but substantially labour costs is correct.

PN245

All right. Now, in the substance of the report itself, and this is back on page 5, you will see there is in the right-hand column on page 5 summaries of the outcome so far as indirect care and then accommodation in the middle of the right-hand column is concerned. Do you see that?---Yes, I have that.

PN246

I think there's similar comments made in the September 2022 report, perhaps unsurprisingly, but under the heading 'Accommodation' it's recorded that the accommodation results represents the major component of the poor financial performance of the sector by contributing the \$12.06 per resident per day?---Under the current - under the current legislation reforms that is correct.

PN247

All right. And to see that in more detail so far as residential care is concerned there's a table reflecting that on page 14 in the right-hand column?---Yes, that's correct.

PN248

So you will see that they're headed 'Residential aged care' and 'Table 4 summary, income and expenditure comparison dollars per bed day.' Do you see that?---Correct.

PN249

And this table allows us to compare the outcomes across various revenue and expenditure measures for direct care, indirect care and accommodation across the 2020, 2021 and 2022 financial years?---Correct.

PN250

If I could start with the - it's probably sufficient to start with the 2021 financial year, that's the third column, or the second from the right. Do you see that?---Yes.

PN251

So the summary there is that direct care results for the 2021 financial year was that with respect to direct care there was a surplus of \$13.63 per bed day, with respect to direct care?---Correct.

\*\*\* GRANT CORDEROY

XXN MR GIBIAN

PN252

Which then was offset by deficits with respect to both indirect care and accommodation, and the red figures are the total, \$11.99 so far as indirect care is

concerned and the \$10.07 in that year with respect to accommodation results?---Correct.

PN253

For that year in particular it would be correct to describe the outcome for operators, on an aggregate basis at least, is that the revenue that was being received with respect to direct care was, albeit not completely, in part subsidising losses that were derived with respect to indirect care and accommodation costs?---That is correct.

PN254

Now, moving to the 2022 financial - and broadly there was a similar outcome in - sorry, going back in year to 2020 - broadly there was a similar outcome in 2020. The figures were slightly different, but direct care surplus was \$13.71, whereas indirect care had a deficit of \$10.80 and accommodation a deficit of \$9.81?---That's correct.

PN255

If we come then to the 2022 financial year the position on a per bed day basis with respect to direct care has deteriorated somewhat in the sense that there is a lesser - there's still a surplus but a significantly lesser surplus. That's correct?---That is correct.

PN256

Just before I go to that, the comparisons on a year and year end basis, you will see at the top underneath the financial year there's a reference to the number of homes that were involved in the survey?---Yes.

PN257

And there is marginally more, or there's somewhat more each year; correct?---Correct.

\*\*\* GRANT CORDEROY

XXN MR GIBIAN

PN258

I just wanted to understand it. So the newer ones have been excluded for the comparison purpose, have they, or - I just didn't understand the process that you described earlier?---The process - because, getting back to your point regarding what's the purpose of the survey, it's homes can then compare themselves to equivalent homes. So the number that we have at the top of the number page that we've written 'Survey' from that we've excluded homes, we exclude homes that are outside range. They might be outside range because they've had a sanction from the quality condition. They might be going through a major refurbishment or in fact might be the new home in ramping up, or there might have been a major COVID outbreak. And even though a part of those aggregate figures you see in the top that's just letting us - letting people know the number of homes, is that we exclude homes that are outside range, which coincidentally when you look at the whole of the sector (indistinct) and government releases its report, a (indistinct) report, actually show a worse result than what we show, because our providers are wanting to compare (indistinct) and wanting to compare like with like. And therefore that's why that shows the aggregate number of homes in the survey that

we use, but not necessarily the homes that are included in the figures that you've just been referring to.

PN259

All right. I think I understand. So the numbers reflect the total number of homes that participate in the survey or are subscribers. But the aggregate figures excludes certain matters that you've – by a process that I don't think we have time to delve into – are best excluded as outliers or not appropriate for comparison?---That is correct.

PN260

Yes, I understand. All right, now then looking then at direct care in 2020 – the financial year 2022 the position has changed from a surplus in direct care of \$13.63 per bed day to a 1.85. Now that seems to have been a product of two matters; expenses have gone up somewhat, although albeit a similar quantum to the previous years. But particularly it seems to be because revenue has gone down from \$198 per bed day to \$194 per bed day. Are you able to provide any explanation as to why that occurred? Or what that's a product of your super?---Yes, I looked at the two in isolation for the purpose of this discussion. Revenue declined because in financial year 21 and financial year 20 to a lesser extent the government of the day gave two total grants to the providers of \$900 per bed for homes and \$1350 per bed for regional homes. So the providers got an extra revenue flow, and they did get it to offset against certain additional expenses, but the revenue in this case is greater than the expenses. That's why we saw that drop from FY21 – financial year 21 to financial year 22 which didn't have the benefit of those two tranches of COVID grants which were grants paid through by the acting funding instrument. The other point which you raise, which is relevant, is you'll see the direct care labour costs have gone up from FY21, being \$130.55 per day, to \$139.17 per day. And that's a direct reflection of the royal commission recommending a mandated hours - or mandated minutes, the 200 minutes - and providers starting to move towards achieving those minutes. And the other big factor in that was, as we all know, got a staffing crisis, the number of staff, and the amount of agency which is external costs and overtime costs also contributed to the direct care labour costs increasing. But we saw an increase in the number of minutes per resident per day as providers started to ready themselves for the mandated minutes coming through.

PN261

All right, can I just ask you two questions about that. One is a matter I was going to raise with you and that is as you've said the direct labour costs incorporate – that are referable to direct care – incorporate agency costs and of course over time or additional work done by directors and employees?---That is correct.

PN262

And you mentioned increased minutes, and I was going to come back to this at the end. The change to the finding arrangements that you mentioned earlier, the commencement of the AN-ACC process is, I think as you've described in part at least, intended to ensure that the funding reflects the care minutes that are required. So far as direct minute care is concerned?---That's correct.



PN263

And I may be paraphrasing, but as I understood what's said in the reports it is that we're still in the process of finding out how that's going to play out at a practical level. But as a matter of objective at least, the intention is that the AN-ACC assessments allow the funding to match the care minutes as recommended by the royal commission?---That's correct.

PN264

All right, and sorry there was a third point in respect to your earlier answers and that is that I suspected that the change in funding had something to do with COVID – in revenue, had something to do with COVID given the years. The intention of those additional payments from the commonwealth that you refer to was to cover additional costs associated with dealing with the pandemic, rather than ongoing expenses?---Let me just correct, there were two one off payments, and I think to cover – because the need to cover the costs of PPE and staffing costs. Interestingly enough when the government of the day was aware of it, it actually provided a surplus to the aged care providers, in other words the funding was greater than what their additional expenses were, but of course that was a critical time as we all were as a society.

PN265

Of course. Secondly then can I just ask you about the direct – indirect care, I should say, because there was a substantial improvement in the position, albeit it still resulted in a deficit so far as indirect care is concerned, between 2021 and 2022 financial years, do you see that?---Yes, I do.

PN266

And that seems – the expenses seem to have gone up, albeit in a relatively gradual way generally speaking. The change seems to be primarily because there was a significant increase in revenue from \$54 per bed day to \$66 per bed day, do you see that?---Correct.

PN267

Is there an explanation for that, that you're aware of?---Yes, there is. From 1 July 2021 the government agreed to pay a \$10 per bed, per day supplement for every resident – sorry indirect care to compensate for the increasing losses that providers were facing in providing those indirection care services. And that supplement still continues today, it's paid for by AN-ACC but it is actually \$10 per bed, per day supplement for indirect care, so that's why that revenue went up by that \$10 plus, you know, a bit of additional services.

PN268

All right. Okay, I understand. All right and then so and the upshot for the 2022 financial year is that there was a significantly reduced, but still a surplus so far as direct care, but remains deficit so far as accommodation and indirect care is concerned?---That's correct.

PN269



And again the position is that the surplus, albeit to a lesser extent than the preceding years, of revenue versus expenses in direct care, offsets – albeit as I say to a lesser degree the deficits in indirect care and accommodation in costs?---That is correct. The royal commission recommended that there be a very minor margin in indirect care, and I think that the funding seems to be representing that going forward.

PN270

All right, can I ask you to go back to your statement then and to the September 22 report, which was annexure B?---Yes.

PN271

And you make a number of observations – sorry, I say you but the report makes a number of observations in relation to staffing issues. I think firstly at page 1 at the bottom of the left hand column there's a reference to staffing capacity is at a severe shortage, do you see that?---Yes.

PN272

And that impacting care. I think just for your – so we orient ourselves, at page 4 a further observation is made at that, in respect of the bottom of the left hand column under the heading 'Staff remuneration and benefits.' The report states that,

PN273

*'The bigger challenge facing aged care is staffing with considerable shortage in staff numbers being felt in all regions.'*

PN274

Do you see that?---Yes, that's correct.

PN275

And so I – I'm sorry?---I said yes, sorry.

PN276

And so I take it that your view, and the view expressed in the report is that staffing issues, or the need to address the issues that are being encountered with attracting and retaining sufficient and appropriate staff are critically important?---Absolutely correct.

PN277

And should be addressed as a matter of urgency?---I certainly - yes, that is correct.

PN278

I think, and it's on page 1 of the September report, the report expresses a view as to whether the interim Fair Work Commission ruling would be sufficient, or fall short of what is required, can you see that?---Yes, I do.

PN279

I take it that's – well, firstly, increases in pay have potential, no doubt, to assist at least with attracting and retention?---That's correct, it would be one component to assist in retention. I doubt whether it will assist in attraction.

\*\*\* GRANT CORDEROY

XXN MR GIBIAN

PN280

Well, just leaving the particular increase aside, generally speaking at least increasing wages has the potential in any role to assist – whether it's sufficient in itself to resolve issues – to assist in attraction and retention of staff?---That is correct.

PN281

The concern has been expressed whether – if whether the 15 per cent interim increase alone would be sufficient to address that issue in aged care, is that as I understand it?---Yes. I made the comment in the report that that's one component of required remuneration, there are other areas of remuneration that need to be considered, but also there obviously are areas about career path, technology and other areas. But certainly increasing their reward or their remuneration is an important component.

PN282

All right. Then the – as I understand the report – the difficulties that are being encountered in attracting and retaining staff have a number of ramifications. At least two, one is it has the potential to effect service provision and service standards, which you've identified?---Correct.

PN283

In addition to that, and this is a matter that if you could turn to page 2 of the September report. It has difficulties in attracting and retaining staff have themselves costs implications so far as aged care operators are concerned, correct?---That is correct.

PN284

At the top of the left hand column on page 2 the report identifies that the staffing shortage has been a major contributing factor to cost by increased levels of overtime and agency staff being required?---That is correct.

PN285

And in the second sentence of the first paragraph on that page the report identifies that staff – agency staffing alone represented \$13.42 per bed day, an increase of \$7.48 per bed day compared to the comparable period a year before, correct?---Correct.

PN286

Is that figure elsewhere in the report or is that taken from somewhere else? I don't know that that level of granularity was in the - - -?---No, it's not included in the report – the public report, it's included in the report back to the providers who provide the government or the department, it's not included in the public report. That's an extract of a figure highlighting I guess the extent of additional agency costs as we need to increase the minutes. What the extent of that is costs wise to providers.

\*\*\* GRANT CORDEROY

XXN MR GIBIAN

PN287

Yes, I understand. All right, and I think you haven't in the – or the report doesn't in itself identify the increased levels of overtime, or the costs associated with the increased levels of overtime to which reference is made in that paragraph?---Yes, that is correct.

PN288

Yes, and we can identify that elsewhere in this report itself, but we would be right in understanding that the more granular information reflects that there was – were increased costs associated with increased overtime caused by, or contributed to, by the staffing attraction and retention issues?---That's correct it's built into those – the tables that you referred to, before the more detailed tables later in the report, it's build into the staff – directly as staff costs under that component.

PN289

All right. If you could then, still within he September report, if you go to page 9 that's the – on the left hand side of page 9 there is the equivalent table with respect to aged care?---Yes, I have that page.

PN290

Sorry, with reference to residential aged care, I should say. And this time it's comparing the September 2021 quarter with the September 2022 quarter that as we understand this?---That's correct.

PN291

And so far as direct care is concerned, in those quarters the overall operating result went down from \$6.76 to 11 cents per bed day as a surplus?---Correct.

PN292

And there was a somewhat of an increase in revenue, but more than offset by the increase in costs, which on an overall basis increased from \$186 to \$196 per bed day?---This is true.

PN293

We are right in understanding - so that is about a \$10 increase, slightly more - we are right understanding, are we, that of that \$10 increase in costs, \$7.48 I believe it was which was attributed to additional agency costs?---That is correct.

PN294

On top of that, there was (indistinct words) in this report additional overtime costs caused by staffing difficulties?---(Indistinct) correct.

PN295

Finally, can I ask you a couple of questions in relation to home care? If I can ask you to go back to the 2022 report?---Yes.

PN296

The summary page so far as home care is concerned is page 12?---Yes.

\*\*\* GRANT CORDEROY

XXN MR GIBIAN

PN297

Again, if I can just go directly to the operating result, the fourth row, in the first dot point it refers to operating results have declined from \$6.05 per client day in financial year 2021 to \$3.98, so from \$6 to \$4, essentially, per - sorry, that is per client per day?---That's correct.

PN298

If you go then to page - the more detail of this, albeit in a slightly different way displayed, is on page 18. It is a little small on my copy so I am not sure the bench can see it adequately. In the top left of the page, there is a heading 'Home Care' and underneath, 'Figure 14. Home Care key metric summary.' Do you see that?---Yes, I do.

PN299

It refers to revenue per day, operating result, direct service costs, etc., etc. I think you have referred to the client revenue per day per client day, which jumped around a little bit. It was \$71 in 2020 year, \$72 and a little bit in 2021 year, and down to \$68 or nearly \$69 in the 2022 year, correct?---That's correct.

PN300

The operating result also seems to jump around. That is, the summary of the document refers to the fact that it went from \$6.05 in the 2021 financial year to \$3.98 surplus in the per client per day in the 2022 year. We have an extra year now. It is still above the amount - the surplus - that existed in the 2020 financial year, correct?---That's correct.

PN301

Which was \$3.59. The situation is, then, so far as home care operators is concerned is that they continue to derive a surplus on a per client per day basis, somewhat less than it was in the 2021 financial year but more than it was in the 2020 financial year?---That's correct.

PN302

All right, if you can then go back to page 6 of the June 2022 report, in the left-hand column of that page there is a heading halfway down the column 'Home Revenue Utilisation.' Do you see that?---Yes, I do.

PN303

Then in the second paragraph under that heading, it is indicated that revenue utilisation, being the actual services provided, as a percentage of the funding received continues to remain less than 90 per cent. Do you see that?---Yes, I do.

PN304

I just want to make sure I have understood this correctly. The client is allocated funding by the Commonwealth of a particular amount for the provision of particular services?---Correct.

PN305

That money is paid to the nominated provider?---Correct.

\*\*\* GRANT CORDEROY

XXN MR GIBIAN

PN306

That money can then be utilised by the provider to provide those services to that client in the particular time period?---As was agreed with the client, correct.

PN307

If the client doesn't use all of those services - that is, doesn't wish all of those services to be utilised - there is a surplus left over which has not been expended with respect to that client by the provider?---That's correct. To determine unspent funds, so it centres on my ability to the provider to be used by the fair recipient of the client if required in the future.

PN308

I am sorry, could you just repeat that? I just missed that?---Certainly. You are correct. All the funding hasn't been used. It centres on my ability and the provider's books as being unspent funds, and the unspent funds can be used by the fair recipient if required later in their requirement for care.

PN309

The report says in page 6 on the next sentence of that paragraph, the second paragraph under the heading 'Home Care Revenue Utilisation' that there are a number of valid reasons for such low utilisation. What are those reason?---Well, when you say valid reasons, I think the first statement is correct; that the client, or consumer, aren't using whatever funds are available to them and the cost of those funds as not available until June 2022 was an average of \$10,736 per consumer, which aggregates to over \$2 billion nationally with a funding that has been an issue that hasn't been used to provide services to the consumer.

PN310

Are we right in understanding those moneys are then required at some point to be returned to the Commonwealth?---Can I say this? Once a person leaves a home care package and finally transitions to residential care or unfortunately passes away, those unspent funds that relate to the funding, which is a majority, are in fact returned to the Commonwealth. The rule had changed now where the (indistinct words) contained some unspent funds from Services Australia. In other words, an avenue permits the funding as used to the provider. That has only been recently introduced.

PN311

As you have aggregated it to over \$2 billion nationally, at least as the outcome was in the 2022 financial year, the Commonwealth had allocated with respect to home care provision moneys more than \$2 billion in excess of what was actually used by care recipients?---This is correct.

PN312

I think those were the questions that I wished to ask Mr Corderoy, thank you.

PN313

DEPUTY PRESIDENT ASBURY: Thank you, Mr Gibian. Re-examination, Mr Ward.

\*\*\* GRANT CORDEROY

XXN MR GIBIAN

PN314

MR WARD: Thank you.

**RE-EXAMINATION BY MR WARD**

**[12.35 PM]**

PN315

Mr Corderoy, it is Mr Ward again, can you hear me?---Yes, I can hear you.

PN316

Mr Corderoy, you were being asked some questions by Mr Gibian about retention and attraction. Do you recall that?---Yes, I do.

PN317

You said at one point that, and I am paraphrasing, but increasing pay was one component concerning retention. I think you went on to say you did not think it would assist attraction. Do you recall saying that?---I do recall saying that.

PN318

Do you want to say anything more about that last point?---Yes, I would. First, the fact is that most providers through their employee agreements are paying significantly far (indistinct words) to retain staff. We have seen a decline in the numbers of staff, and to attract staff obviously it is clearly important to increase their remuneration, but also there is a number of other measures that are required to attract staff. If I might have (indistinct) course, and so this is just one component of attracting staff, but an important one. An important component of attracting staff, as (indistinct) via this, and will address this in part by paying the employment (indistinct) for those paying above the award, and some times extensively, to try and impress this.

PN319

At the end of your evidence, you were talking about home care revenue utilisation, which is on page 6 of the 30 June report. Do you recall that?---Yes, I do.

PN320

Okay, I just want to ask you some questions by way of clarification. By what you said to Mr Gibian, you talked about unspent funds being a liability for the operator. Can you just explain what that means?---To explain, I guess, in simple terms - if I as a consumer are assessed for care, they might be assessed for, say, level 3. There are four levels in pair care, which means they are entitled approximately \$34,000 a year in funding. That \$34,000, (indistinct) if comfortably sourced, that \$34,000 is paid to the provider, so they are in receipt of \$34,000 worth of funding for that particular consumer.

\*\*\* GRANT CORDEROY

RXN MR WARD

PN321

Now, during the course of that (indistinct words) apply \$29,000 of actual services (indistinct words) with your consent. So, we have \$5000 left over. That \$5000 isn't the provider's money, so it sits, in the accounting sense, in the value to being \$5000 of funding that hasn't been utilised and just ends up used later by the consumer or returned to the government. So, it is a liability. It is not shown as remuneration in the provider's books.

PN322

Thank you, Mr Corderoy. Just lastly, as you continued to be asked questions about that by Mr Gibian, you just made a comment about - I think you said something like, 'Since Services Australia, it is now remitted as it is used.' Can you please explain what you meant by that?---So, just going back to that example, up until say four months ago, that \$34,000 was paid to the provider each month, so they have received \$34,000 in cash, and then they spent \$29,000 by providing services and \$5000 in cash remains as a liability. The rule about change, where the consumer is entitled to \$34,000 worth of funding but if they (indistinct) \$29,000 of services to be remitted to the consumer, the provider has only remitted that \$29,000. So, in other words, you are reimbursed for the services they provided and that \$5000 differential, where in the past it would sit in the bank accounts of the providers, that \$5000 differential is held by Services Australia. Effectively, they would time that for over \$2 billion in unspent funds (indistinct) provider's bank accounts into those held by Services Australia.

PN323

Is that what is generally going to happen going forth?---What I know of the current arrangements, we have in our report (indistinct) make recommendations by changing the funding arrangements. The funding appears (indistinct) in home care is this build-up of unspent funds, which 96 per cent never gets used and therefore my argument is that money would be better spent by more consumers than by these home cares having access to those funds, but under the current arrangements, that figure will continue to increase.

PN324

Thank you, Mr Corderoy. Nothing further.

PN325

DEPUTY PRESIDENT ASBURY: Thank you for giving your evidence, Mr Corderoy. You are excused?---Thank you very much.

**<THE WITNESS WITHDREW**

**[12.40 PM]**

PN326

MR WARD: I should probably just tender the June - - -

PN327

DEPUTY PRESIDENT ASBURY: Yes.

PN328

MR WARD: - - - the report for the 12 months - the StewartBrown report for the 12 months ending in 30 June 2022.

PN329

DEPUTY PRESIDENT ASBURY: Yes. We will mark that as HSU2.

**EXHIBIT #HSU2 STEWARTBROWN REPORT ENDING ON  
30/06/2022**

\*\*\* GRANT CORDEROY

RXN MR WARD

PN330

Thank you.

PN331

MR WARD: I believe I am content to move to submissions if that is the Full Bench's desire?

PN332

DEPUTY PRESIDENT ASBURY: Yes.

PN333

MR WARD: As I indicated at the outset, I was not subject to anything that the Full Bench might raise with me, going to elaborate more orally on the issues in relation with the - Mr Ward's objective and the amendments that have been made to the legislation, perhaps other than to a brief comment on the interaction with the timing and phasing issues. But I would rather concentrate in oral submissions on the timing/phasing issue and then I think probably relatively briefly, hopefully, address the specific questions the Commission asked of the parties on Friday.

PN334

If I can turn first, then, to the timing phasing issues. I thought it might be appropriate at the outset just to set out in summary what we say on those issues because the issues that the Commission has to consider, in our submission at least, have changed somewhat having regard to the submissions that received from the Commonwealth later on Friday afternoon.

PN335

As the members of the bench know, the position communicated by the Commonwealth in its December submissions were that it was proposing to provide funding referable to the interim increase that the Commission had determined was justified on work value grounds, in two parts. Funding referable to 10 per cent increase from 1 July 2023, and funding referable to a further five per cent from 1 July 2024. In terms of justification, frankly, we didn't read any justification for the second part of that. That is for the deferral of five per cent of the interim increase to 2024, and no doubt that, without being presumptuous, prompted one of the questions the Commission addressed to the Commonwealth on Friday.

PN336

So far as the delay to 1 July 2023 is concerned, the December submissions of the Commonwealth at paragraphs 12 and 13 did make a submission that it was not feasible or appropriate for funding to be provided earlier, and some basis was given by way of submission at least as to why it was said there may be some practical difficulty in providing funding earlier than 1 July 2023. Now, there is no evidence about that; it was made purely by way of submission.

PN337

My client responded to that position in its submissions of 20 January and through the evidence in the supplementary statement of Professor Eagar, which as the members of the bench will have seen provided an opinion that it would be feasible



and there were various mechanisms that the Commonwealth could adopt to provide funding referable to the interim increase earlier than 1 July 2023.

PN338

There's no challenge to Professor Eagar's evidence as a matter of focus in that respect. No one has said that Professor Eagar does not have appropriate expertise to give evidence in relation to that subject. And, as I'll come to, in our submission the Commission would accept the evidence of Professor Eagar, it being the only evidence on the subject and it being unchallenged. That is the Commission would conclude that the Commonwealth could provide funding in a practical way referable to the costs associated with living increase at an earlier time, if it chose to do so.

PN339

Now, the position communicated in the submissions of the Commonwealth, communicated in its submissions later on Friday afternoon, was somewhat different. It is now said that the Commission should not or is not required to, and we would interpolate should not, consider the Commonwealth's rationale for the timing of its funding commitment. It is not necessary for the Commission, according to the Commonwealth's submission, to decide whether it was practical or impractical to provide funding.

PN340

The Commission should simply take what's now described as the funding decision, as a fact, and assess the objective considerations and the minimum wages effective considerations in light of that position as a fact. That seems to be the position which is put - the primary position which is now put. There is an annexure that to those submissions which the members of the bench will have seen, responding in part to things by way of submission only, in part to some things that Professor Eagar said in her statement.

PN341

I will in due course just briefly go to some of those matters. In substance they agree with what Mr Eagar says, subject to some - I don't want to say quibbling but equivocation about the difficulty or complexity of adopting particular courses. As I say, nothing of an evidentiary nature in that respect, but by way of submissions. But as we understand it, the primary position of the Commonwealth seems to be that those are not matters about which the Commission ought concern itself.

PN342

In those circumstances the position in our submission is this. It is that the Commission should and can accept the evidence of Professor Eagar that the Commonwealth could provide funding earlier than 1 July of this year, and could do so, as a practical matter at least, for the full 15 per cent interim increase the Commission has found justified by work value reasons.

PN343

If the Commission decides that the interim increase - we submit it should - should commence earlier than 1 July in the full amount or the full 15 per cent should commence earlier than the current commitment that, well, that the Commonwealth

has made so far as funding is concerned, two matters. Two things might happen. One is the Commonwealth might change its mind and change its funding decision; that's possible. The other thing that might happen is that it doesn't and it remains the current - what's described as funding decision, is applied.

PN344

Now, if that happens, we accept there's some kind of impact upon operators, employers, if there are increased wage costs or employment costs which are not reflected in additional funding provided for some transitional period of time. We obviously do have something to say about the significance of those impacts and the evidence that Mr Ward has more latterly put forward in that respect, but we accept there's some impact obviously enough.

PN345

The question for the Commission, though, is: what is the relevance or significance of that impact in the Commission's consideration of the Modern Award and minimum wage objectives, so far as they are directed at the timing question. That is, when the interim increase should commence. In circumstances in which, as I have said, the Commission should be able to be satisfied that the Commonwealth could provide funding either earlier than July or the full 15 per cent from July. If it does not, it is simply made a policy decision about the level of funding that the Commonwealth wishes to provide to the aged care sector.

PN346

That is a matter for the government to decide. No doubt my client has views about whether that's the right thing, and no doubt Mr Ward's clients have views about whether that's the right or proper thing for the Commonwealth to do, and will no doubt take those matters up with the Commonwealth. But if there is any impact by way of a disjuncture between the timing of an interim increase that the Commission awards and any additional funding the Commonwealth may provide, in our submission that is a consequence of the policy decision that the government has decided to make with respect to funding.

PN347

Whatever one's views about that, it's not for the Commission to decide whether that is appropriate or inappropriate, wise or unwise. As I say, no doubt my client and the other parties here have views about that which they would express to the government. But ultimately any impact is a consequence of a policy decision that the government has made, rather than the exercise of Modern Award powers by the Commission which is the matter to which section 134(1)(f) directs the Commission to take into account in making decisions with respect to the variation of - relevantly the variation of Modern Awards.

PN348

Our primary position is that any impact of a transitional nature in terms of at this juncture in time between the timing of an increase - of the interim increase, and the timing of any additional funding being provided by the Commonwealth, is a factor of policy decision for government which the government is perfectly entitled to make, but which should not be significant, much less determinative of the Commission's considerations of the timing of the interim increase it has found is justified by work value reasons.

PN349

That approach is substance or consistent with at least what the Full Bench said in the Four Yearly Review matter in 2019, to which reference has been made in the Commission's decision from November. I was just going to refer briefly to that, if that's convenient. Would hard copies be - the Commission can access them otherwise but - - -

PN350

DEPUTY PRESIDENT ASBURY: Thank you.

PN351

MR GIBIAN: In that respect, I don't want to go to too great a length because the members of the bench are no doubt familiar with it. The decision from around paragraph 129 considered a submission of the AI Group in relation to the adequacy or otherwise of the NDIS funding, and the role that submissions about the adequacy or otherwise of that funding model ought play in decisions the Commission would make in relation to varying entitlements under the relevant Modern Award.

PN352

That submission is summarised essentially from paragraph 129 to 131, and there's an extract at paragraph 131 in which the submission is made that the operation of the NDIS and the constraints placed on employers should form the cornerstone of the Commission's considerations of the impact of the unions' claims. Over the page at paragraphs 134 and 135 the Full Bench noted the requirement to have regard to all of the factors in section 134, obviously enough.

PN353

And then at paragraphs 136 to 138, noted the relevance of the impact on employers and the potential impact on service provision if there was inadequate funding in a funded - a sector that is dependent upon government funding. Particularly at 137 the Full Bench noted that:

PN354

*In the context of the provision of social services largely dependent on government funding - we are cognisant of the fact there's simply an underfunding (indistinct) employment costs increases may result in a reduction in services to vulnerable members of the community.*

PN355

It then said in the middle of that paragraph:

PN356

*But such outcomes are the consequence of current funding arrangements which are a matter for government.*

PN357

They then note about the inadequacy of the evidence in that respect. And then at paragraph 138, which I think is the passage which was extracted in the Full Bench's decision in this matter in November, the Full Bench referred to the relevance in a statutory context, of the Commission's obligation to ensure that

Modern Awards provide a fair and relevant safety net. And the fact that it is not the Commission's function to make any determination as to the adequacy or otherwise of funding models operating in the sectors covered by the (indistinct). Award the level of funding provided and any consequent impact on service delivery is a (indistinct) by-product of the process. We say that's the approach the Commission ought to adopt in this matter as well.

PN358

There were just two additional observations I was going to make in that respect. Firstly, at paragraph 139 the Full Bench there recognised that it may take time for funding arrangements to adapt, and that that may be a matter that's needed to be dealt with by way of transitional arrangements. We accept that. That is, if there was evidence before the Commission and upon which the Commission could find that there was the need for some delay to allow the Commonwealth funding arrangements to, in a sensible and practical way, provide additional funding referable to the interim increase, that may be relevant to the Commission's consideration because, at least at a level of practicality, the variation to which the Commission was giving effect, would have some impact which was unavoidable in the sense that there was the need for some delay to accommodate funding arrangements. As I said, although there is a submission to that effect in the Commonwealth's initial December submissions, it was not supported by evidence; we now - the Commission has contrary evidence which is unchallenged before it. That is not an issue - the practicality, at least, is not an issue - and that indeed, the Commonwealth urges the Commission just to regard the funding decision as described as a matter of policy.

PN359

The final matter I just wished to make reference to was at paragraph 140, I think it is. There's - the Full Bench observed that the approach advocated by Ai Group in that matter would result in employees covered by the schedule (indistinct) effectively subsidising the level of services delivered by the NDIS through lower minimum terms and conditions of employment that weren't warranted on a merits-based assessment of the claims before us. Although we are here discussing a question of timing, the same is the case by reason of any delay, that is, the Commission has found, as we've explained in our submission, that the current rates of pay for at least direct care workers engaged under relevant awards, do not properly reflect the value of that work, by a substantial margin. Indeed, a margin greater than 15 per cent minimum increase, which has found to be justified on work value grounds.

PN360

The consequence of any delay is, obviously, that the employees would continue to perform work which is not properly rewarded by the rates of pay that they are receiving and, in effect, the employees by way of being underpaid - not in a legal sense of being paid less than legal minima, at least generally speaking, no doubt, but because the legal minima does not reflect the value of their work. And given the findings of the Full Bench and the evidence to which it has had access, the basis upon which those findings were made, namely that the work is undervalued, was, or reflected changes which have been occurring for a long time, not for a short time, that is - and the proper conclusion to be drawn is that the employees

have been engaging in direct care work, have been receiving rates of pay significantly below the true value of that work, for a very significant period of time, which is also relevant to the question of the urgency of the increase.

PN361

Now, in that, I can pass on from the (indistinct) in that context. In summary, then, my client's position is that the interim increase should commence from the date of the Commission's determination, or as soon as possible thereafter; that any impact on business that there may be, or on employers that there may be by reason of any non-alignment between funding and the commencement of the interim increase - sorry, I withdraw that. Any non-alignment between any additional funding the Commonwealth decides to provide and the commencement of the interim increase is a matter of policy decision of government rather than a necessary consequence of the exercise of the modern award powers, which is the matter to which the Commission would have regard. Or, in the alternative, it should be given relatively little weight in that context - in that particular context. We don't make light of the extent of the impact in itself, but it must be weighed both in the context of it being, in our respectful submission, primarily the consequence of policy of government decision rather than the Commissioner's action, and in the context of the other considerations to which we've referred, which would favour an earlier commencement.

PN362

Now, in respect to the approach to timing and phasing issues, the Commission summarised those - some earlier authorities - in paragraphs 976 to 990 of the decision of November. I don't think anyone has really disagreed in any substantial part with the summary that the Commission provided. I just perhaps wanted to make two observations about it: that the section 166 and the default position - I think some of the authorities describe it as a presumption, or a default position, that a change to modern award minimum wages would commence on 1 July the following financial year. In my submission, it's really appropriate to describe it as a default position, that is, the Commission doesn't order otherwise, then the change is - it may be a distinction without much difference, but it doesn't suggest that there is a predisposition that 1 July the following year is the appropriate date.

PN363

DEPUTY PRESIDENT ASBURY: That has to be overcome.

PN364

MR GIBIAN: Yes. There's no rebutting - presumption to be rebutted. It's the default position in the sense that if a commission doesn't set a different date, that's the date that it commences, and it goes on, of course, to say that if the Commission decides a different day is appropriate, it commences on that day, the long and the short of which is, the Commission just decides when it's appropriate; no different. And the function of section 166 in that respect is simply to set the day if the Commission doesn't identify a different day.

PN365

DEPUTY PRESIDENT ASBURY: Except, in fairness, it's not a positive - it says that the Commission must not specify another date unless it is satisfied.

PN366

MR GIBIAN: Yes. Yes, I take the point. The observation that was made on earlier occasions is that that's not much of a hurdle, in the sense it's just a test of appropriateness, and whilst the Commission must be satisfied another day is appropriate, my submission is that the function of it is really to set a default position rather than indicate a preference in the legislation that it commences on a particular day and allows the commission to set a different day, purely on the basis of appropriateness.

PN367

The only other observations I wish - is that some of the - the authorities have generally said that, obviously, the Commission must, separate the substantive decision in respect of matters of timing and phasing, be satisfied that the variation is necessary to achieve an award's objective and have regard to the modern, and relevantly, the minimum wage's objective considerations. The authorities have generally considered that, within the section 134 factors, (i) to (f) and (g) are most likely to be relevant, namely the effect on the low-paid and the like, the impact on business, and to ensure that the modern award system is easy to understand, and the like. In our submission, (c) is also relevant in the present context, at least dealing with social inclusion through workforce participation.

PN368

We've set out in the written submissions, in substance, in those dated 20 January, why we say those considerations taken together constitute or support the early increase or the early - sorry - commencement of the interim increase. I was just going to add, or emphasise, four matters in that respect. The first is the question of - to which I've already made reference, that the work of the employees engaged in direct care is presently, according to the findings of the Full Bench, undervalued, and that is, in our submission, plainly fundamental to the consideration of what is necessary to ensure that modern awards provide for a fair and relevant safety net of terms and conditions and that any delay will merely perpetuate a situation of employees receiving less by way of remuneration than the value of their work warrants.

PN369

That's relevant at least for three reasons. One is, it's relevant to a general assessment of what is a fair and relevant minimum safety net. The second is that - and this in some way interacts with - I'm sorry, I withdraw that. The second is that - and I think the UWU has elaborated upon this to some degree - but the Commission has already made findings in relation to the financial - that employees are experiencing at present and have been experiencing for some time, financial difficulties as a consequence of the level of remuneration provided for, in the relevant awards. The third way in which it's relevant, which interacts perhaps with the impact on business, is that the consequence of the undervaluation of the work is that the direct care workers have, themselves, been subsidising the aged care industry for many years, no doubt, and what is sought by reason of any delay is that those employees continue to subsidise. That is, employers should not need to go into more deficit; rather, employees should be, albeit of a transient nature, but rather employees should be required to continue, by their labour, to subsidise what providers no doubt say is the underfunding of the sector.



PN370

Now, that's - so one doesn't see the impact one way of increased costs, one way. The impact of not increasing wages, and any delay, in respect, is simply who is subsidising the continued operation of what's no doubt a vital sector, and what is being urged by those parties urging delay, is that the employees be required, by their labour, to continue subsidising. And I might say, by reference to - particularly to direct care, and perhaps all of these matters are a matter of - sorry, are related in some way to the funding arrangements, but the members of the Full Bench will have noticed from the StewartBrown reports and from the cross-examination earlier, that what one discerns from the headline figures, that is, insofar as residential care is concerned, there is a - at least so far as the participants in the StewartBrown survey are concerned, a deficit-per-bed-day in terms of revenue versus expenditure. When it's broken down, and we tendered the June 2022 report because it allowed a greater spread of information across a longer period - when one looks at the table on page 14 of the June 2022 StewartBrown report, which was marked as Exhibit HSU2, one sees that, in fact, the funding received with respect to direct care has in all times resulted in a surplus, which has been cross-subsidising primarily accommodation costs, which are said to be the major cause of the deficit, or inadequate funding of indirect care costs which have been, as Mr Corderoy explained in part, addressed by recent changes to funding to provide the additional \$10 per bed.

PN371

So what we have is a circumstance in which, so far as the direct care costs and expenditures are concerned, which is the cohort of employees to whom the interim increase is directed, the funding has been sufficient to cover expenses, and in fact, the savings and surpluses which have been derived over the years from direct care work have been used by operators to - albeit not completely - offset costs in other areas. Now, the surplus has decreased in this year for the reasons that Mr Corderoy explained were related to the one-off payments for - and related to COVID-related expenses, but it remains the case that there is surpluses with respect to direct care. If there are deficiencies, it's inadequacies in funding in respect to accommodation costs and indirect care costs, which really puts to even more distant relevance, what are said to be the deficits both in the causes of the deficits both in operating costs of providers and in terms of where the funding is lacking as well, which puts those matters to, as I say, more distant relevance to the matters that the Commission is able to - now we've got to consider so far as the interim increase for direct care workers is concerned.

PN372

The second observation I wish to make is we've referred to the interim nature of the increase the Commission has decided to award - has decided (indistinct). In particular - I don't need to go to it - but at paragraph 922(3) of the Full Bench's decision it referred to the fact that there were complex issues that still needed to be considered in what's proposed, we say, as three of the proceedings and that there was no reason to delay an increase while that process takes place. It might be difficult - it would be no doubt difficult to make the submission with respect to the date of 1 July 2023 but so far as it is suggested there ought be a delay of part at least of the interim increase to 1 July 2024, it really conflicts with what the Commission contemplated was intended by way of an interim increase - that is

the reason it was an interim increase is the Commission was contemplating that it would commence and not a late determination before (indistinct) the proceedings.

PN373

Proceedings of this type tend to take longer than might initially be contemplated. But we certainly hope that we'd be well through dealing with stage 3 issues by later this year or certainly early next year and the upshot of the submission, the second part of that delay at least, is that it turns not into an (indistinct) increase at all but one which hopes follows the conclusion of the other complex issues the Commission is contemplating need to be dealt with in stage 3. The third observation I wish to make is by way of attraction and retention and which – the Commission has made findings in that respect and there seems to be no sensible dispute that staffing and attracting retention are a critical issue as far as the aged care sector is concerned and that there is urgency in addressing that issue.

PN374

That in our submission favours, for obvious reasons, an early commencement of the interim increase. Whilst we don't necessarily dispute Mr Corderoy's evidence that there are other things that could be done in relation to attraction and retention as well, no doubt there are and my client would know (indistinct), no doubt pay in our submission is a more important one whilst the interim increase may not solve all of those problems overnight. It is a positive development as far as attraction and retention is concerned and that is an issue that ought be addressed as a matter of urgency, favouring, as I say, an early commencement.

PN375

I was only going to add to that what arose from Mr Corderoy's evidence today and from the examination of the StewartBrown reports and that is as was explained in the September report, that not only do staffing and attraction and retention issues affect – and have the potential to affect – service provision. They directly are the cause of a substantial part of the increase in costs – that is Mr Corderoy's evidence is, and as he explained in the September 2022 report, staffing shortages have been a major contributing factor to costs through the need to engage agency staff and through increased overtime. We don't have all of the figures in the report but we have sufficient to know that the substantial part of the deterioration in the surplus in direct care between 2021 and 2022 financial years was – which was about \$10 per day – was \$7.50, increase in agency costs. Not total agency costs – increase in agency costs that occurred, plus increase overtime of an amount that we don't know from the documents that are there.

PN376

So to the extent – and this really does interact with the (indistinct) employers – that is that we do say the impact on employers can be positive and negative. There is not only employment costs. It's obviously other things, to the extent that an interim increase and its early commencement can assist attraction and retention and the Commission could (indistinct) it should assist at least. That both is a positive for business in terms of supporting service provision and the quality of service provision but it's a positive for business in terms of employee costs as well because of the matter Mr Corderoy referred to in his evidence: mainly that staffing difficulties are a major driver of increases in costs.



PN377

So to the extent that there is a disjuncture of timing between funding and commencement of the interim increase, the Commission also has to regard to the fact that an early interim increase has the potential to in a positive way affect costs as well to the extent that it can assist in attraction and retention issues. The final additional observation in addition to the written submissions – sorry, I realise it's quarter-past 1 but I'm happy to continue till lunchtime.

PN378

DEPUTY PRESIDENT ASBURY: I'm not going to stop you.

PN379

MR GIBIAN: I assume it won't be a long time. I was going to just briefly in terms of gender-based undervaluation – we've dealt with that in the written submissions. So far as the new section 134(1)AB and 284(1)AA are concerned, they – as we've explained – support an earlier increase to the extent that the Full Bench has found that, albeit not achieving those outcomes, an interim increase will at least have a positive or will be a step in that direction. I just wanted to note the Commonwealth's reply submissions on Friday at paragraph 15 appeared to suggest that my client's submission was that those new provisions mandated the early increase in the – early commencement, I should say – of the interim increase. I don't know – I didn't read that in their submissions, at least. We say they are considerations which favour an early commencement, not that any particular consideration mandates it.

PN380

I should just make clear that there is a distinction between – in the question of timing in that respect, is that that is we may – and this may need to be dealt with in stage 3 – but section 157(2)B(a) – to the extent it deals with historical gender-based undervaluation in the setting of rates, separate to issues of timing, does to us seem to be different in nature in the sense that it mandates addressing gender-based undervaluation. So far as questions of timing are concerned, however, those are – the 134(1)AB and 284(1)AA are considerations we accept that mandating any particular outcome the Commission no doubt has to take into account all of those factors.

PN381

The final matter in relation to the time issues I just wanted to identify was just briefly by reference to the additional evidence that was filed by Mr Ward's clients. I won't go to it at any great length but I just wanted to identify that whilst we accept that if there is a disjuncture of – leaving aside the question about its relevance, the fact that any disjuncture of timing is a matter of government policy, we do accept there will be some impact. We don't think that the evidence that has been filed suggests that the impact of any disjuncture in timing between the commencement of an interim increase and additional funding the Commonwealth provided is quite at the level that is suggested in Mr Ward's submissions even on the evidence that has been filed. If one looks at it, Mr Corderoy's statement suggests that as far as home care is concerned there are still services being derived on a per client, per day basis, somewhat down from 2021 financial year but above what it was at the 2020 financial year. So far as residential care is concerned, on a overall basis the respondents to the survey or the aggregation of their results

suggests that there is a deficit on a per bed day basis. But as I've explained, that seems to primarily be derived from accommodation as the major contributing factor and indirect care as the minor contributing factor where as direct care on a revenue expenditure basis is in surplus.

PN382

We also note in that respect Mr Corderoy's evidence with respect to the under-utilisation of home care and the fact that the consequence of that appears to be that there is available to the Commonwealth some in excess of \$2 billion on an annual basis which has been allocated and under the former rate that had been paid indeed to operators in home care, now is retained by the group Services Australia, which had been allocated to be spent in that way but it was being utilised for the reasons that were explained by Mr Corderoy – that is the funding has – and that is well in excess of Mr Corderoy's unexplained explanation of the cost of the interim increase or the costs that might be occasioned by any disjuncture between the timing and funding.

PN383

That is – he said it was something in the range of \$500 million to \$600 million for the 2023/2024 financial years respectively. So far as the other witnesses are concerned, I won't go to them at length. Can I just note that so far as Mr Brockhaus is concerned, his evidence doesn't assist to a great degree because so far as financial figures are concerned, at paragraphs 15 to 17, he explains that the figures for the current financial year are not particularly useful because they're doing a major renovation and they have vacant rooms. At paragraph 19 he makes clear that they're projecting a deficit in any event. The highest it is at paragraphs 33 and 34 is that there would be a higher deficit, he says doubling the (indistinct) deficit. They are in a position where they can cover it out of their retirement village operations in any event.

PN384

That doubling of a deficit would be temporary. Obviously that is only something that's going to occur in, at worst, the tail end of this financial year and next financial year. That is, it's not an ongoing, built-in deficit. So far as Ms Jenkins is concerned, from paragraphs 15 to 17, it appears that what Ms Jenkins says is that that provider funds – will pay the increased rates to persons who are performing disability work and aged care work. Now, there is an issue which I think the Commission has identified, for stage 3, about that. But clearly she seems to be going beyond what would be required by the interim interests, which the Commission is contemplating here and all of her calculations are done on that basis and again, the outcome for that provider is said to be – at paragraphs 41 and 42 – no more than that their cash reserves will be depleted; will be further depleted, not to zero but will be depleted. As far as Mr Shaw is concerned, who gives evidence with respect (indistinct), there is an issue which is raised in some of the other statements as well in relation to the absorption of over-award payments currently provided by enterprise agreements, which at paragraph 21, he says they will do if there is not additional funding provided contemporaneously by the Commonwealth.

PN385

Nonetheless, the calculations that are then provided are for the full amount, not taking into account any absorption issues. Overall, the evidence doesn't suggest the type of impact which will be of significance – or would outweigh the other considerations to which we've referred in our submissions. Unless there's anything further, that was what I proposed to say in relation to the timing and phasing issues. In relation to the questions that the Commission provided to the parties last Friday, questions 2, 3 and 4 are addressed to us or to all of the parties including my client.

PN386

Question 2 relates to the timing issues, that is, I think – as I understand it, the Commissioner's raised a concern that there might be either confusion as to method of calculation of the correct rates of pay if an interim increase is coincidental with the annual wage review. That seems a common-sense view so far as my client is concerned, that is, to make clear that the interim increase would be applied, then the national annual wage review, sorry, would be then applied subsequent to that. Now, obviously, my client's submission is that the – it should commence earlier than 30 June. The Full Bench understands that.

PN387

DEPUTY PRESIDENT ASBURY: It won't be a problem on your client's position.

PN388

MR McKENNA: Of course. It'd be even clearer, on my submission, of course. More straightforward and easier to understand. Question 3 relates to the classifications in Schedule E of the SCHADS Award and, particularly, the increase – whether the interim increase ought apply to levels 4 and 5. In my client's submission, it should.

PN389

We address that matter in paragraph 6 of our submissions of 20 January, the substance of which was that we understood the Commission had already found that. So, to the extent that we were wrong about that, there's nothing further I can say about it. There were three further things I was going to say about it.

PN390

The first is that the consensus statement – the further consensus statement of 16 December – sorry, if I could just have a moment. Sorry. I forgot the – I've lost the right part of it. It suggested at, I think it's paragraphs 2 and 3, that the interim increase ought apply to all classifications within the home care. So, that's the first observation. The second is that to the extent that the Commission's question was based on a view as to whether levels 4 and 5 were involved in direct care, I think we have to concede that the evidence is not terribly clear on the issue, but there were two matters which I've referred to.

PN391

There were at least one of the witnesses, Laurie Safert for – called by my client gave evidence as a team leader involving a significant amount of office-based work, obviously enough, but including supervising and mentoring workers by attending clients' homes and being involved in direct care in that way at least.

PN392

In addition to that, much of the – and I haven't gone back and got all the transcript references, but much of Mr Ward's cross-examination of Home Care witnesses was directed at establishing that they had available to them a team leader who they could contact and seek advice from and seek intervention from if they had encountered difficulties in dealing with a client, or there were health and safety concerns or medical issues so far as the Home Care client was concerned. So, to describe the more supervisory role as disconnected from the provision of direct care doesn't take into account that that is a critical aspect of the role that they are performing.

PN393

And, for those reasons, we don't think it's quite correct to regard them as distinct from direct care in that way. It's not purely an administrative role in the way that other roles might be. The third point which – and which the Commission's also sought – or alerted to in its question was the effect it would have on relativities. Someone has prepared a table, fortunately, which I can provide.

PN394

It both describes in the top table if the increases were only applied to levels 1 to 3, the impact, both at a 10 per cent level or a 15 per cent level. The Bench doesn't need me, probably, to describe it, but the upshot is if the full 15 per cent interim increase is applied only to level 1 and 3 being – 1 to 3, I should say, then levels 2 and 3 would be above level 4, and the higher grade of level – or level 3.2 would be above level 5.

PN395

DEPUTY PRESIDENT O'NEILL: So, the supervisors have been paid less than the people they're supervising.

PN396

MR MORROW: Yes, and those rates have – or one must work on the assumption being set historically on the basis of a comparable work value between the different roles, and, so, that's a further reason why the interim increase would be applied.

PN397

DEPUTY PRESIDENT O'NEILL: It's also on the Schedule E question. There's two other dimensions which – one is that the home care sector isn't confined to the provision of personal care, but also domestic assistance and home maintenance. Given that the interim increase is only in respect of personal care, any determination, I presume, would have to separate out that part of home care from the balance. That's the first dimension, and the second dimension is, similarly, in respect of whether it's the home care or personal care provided to an aged person as distinct from a person with a disability who's not aged.

PN398

MR McKENNA: Yes. As to the first question, I might take that on notice, if that's convenient, Commissioner, but as to the second question, I mean, I think I said what we want to say this initially with respect to that question, and that is there's not a lot of evidence on the point, but there is intimations, at least, and the

further statement of Ms Jenkins is, perhaps, a further suggestion that these things happened, that is, that there's individuals who perform home care work with respect to disabled persons with a disability and aged persons.

PN399

Our earlier submission about that, as the members of the Bench might recall, is that either one applies a substantial and operative – sorry, a major and substantial employment type approach. Either the person is employed under this award or employed under the SCHADS Award under a job which falls into the different category. So, and that's the way in which those issues have historically been undertaken, not that they get a different rate of pay depending on which client they see on a particular day. One has to decide - - -

PN400

DEPUTY PRESIDENT ASBURY: Yes. Except the aged care is residential aged care, and the SCHADS Award is in people's homes, and it could be performing duties that are not direct care.

PN401

MR McKENNA: It does include that work in addition to direct care work, yes.

PN402

DEPUTY PRESIDENT ASBURY: And do we have evidence about the people that do that work? Is it the same people, or is it - - -

PN403

MR McKENNA: Look, I don't think the evidence – the evidence is that, certainly, home care workers do direct care work and work in the nature of around the house type work, if I can refer to it not dismissively in that way, that they are part of the same, that it's – individuals do both. I don't know that there's evidence that individual home care workers only perform – that is, don't perform any direct care work at all, but they perform a combination, but I'll just seek some instructions here, but other people have more direct recollections of the evidence in that respect.

PN404

The question 4, which was the final question that directed to parties including us related to head chefs, cooks issue, the further consensus statement in December identified the relevant classifications as levels 4 to 7 as appropriate to reflect the – well, perhaps if I can take a step back. As I understand the Full Bench's indication in that respect, it flowed from Mr Ward's clients accepting that there was a work value – a relevant work value changed justifying an increase so far as - - -

PN405

MR WARD: Well, just – Your Honour, I'll need to address that because that's not what I said. I'll need to address that.

PN406

MR McKENNA: Well, Mr Ward can address it. That there was an acceptance, not of amount, but that there were work value changes so far as head chefs, head cooks are concerned, and the Full Bench invited the parties to go away and

consider that – discuss that matter and whether the interim increase ought apply to those employees within that category without there, perhaps, having been in the earlier stage of the proceedings a direct attention on what that category was.

PN407

DEPUTY PRESIDENT ASBURY: It's really not so much the category as how it's classified because there's a number of possibilities where it could be classified at various levels. So, it might be that in one establishment, the senior cook is in charge of the kitchen. In another establishment, it's the chef or the senior chef, and they're at different levels in the structure. So, it's how to - - -

PN408

MR McKENNA: Yes. As I say, the position that the parties collectively arrived at after the process that was engaged in before Christmas involving former Deputy President Booth was that it would be appropriate to identify that class by reference to persons who are levels 4 to 7. Most of the evidence suggested that most establishments don't have many cooks, don't have many – that is, there are some that had – obviously, there are a number of services workers generally speaking, but the person who's – that the head chef is – there's not a large number of those persons in each – there's not 15 cooks in each establishment. So - - -

PN409

DEPUTY PRESIDENT ASBURY: Yes, but where there are multiple cooks, it would be possible to identify who's the head, or do you propose they all get it?

PN410

MR McKENNA: What we propose is levels 4 to 7 get the interim increase, yes.

PN411

COMMISSIONER BISSETT: Everyone on level 4 to 7?

PN412

MR McKENNA: I'm sorry.

PN413

COMMISSIONER BISSETT: So, the issue from the bench's perspective is who in level 4 to 7, or is it everyone in level 4 to 7?

PN414

MR McKENNA: In our submission, it is everyone.

PN415

COMMISSIONER BISSETT: So, regardless of – you might have a kitchen that has level 4s, 5s, 6s and 7s working in it. So, they should all get it.

PN416

MR McKENNA: The evidence would not suggest that that is a scenario – that is – those classifications – the only one that – which would be potentially debatable would be level 4. That's delineated by way of having a trade qualifications. Levels 5, 6 and 7 are delineated by way of responsibility and – of a supervisory kind of nature which one would not have a – and I don't think there's

any indication in the evidence that there would be homes that had a 5 and a 6 and a 7.

PN417

I can't exclude the possibility that there would be an establishment that might have two cooks who are trade qualified. Although, I'd have to say this is – I'm only speaking, really, from my perception. I can't speak to direct evidence of it, but my perception is that's probably unlikely, that is, that many of the – some of the cooks are not, indeed, trade qualified who are – from my understanding, who are – from my understanding who are in this.

PN418

So, it seemed to be a – that would seem to be an unlikely scenario. I can't, obviously, rule out that it might happen, but the parties having discussed the matter again through a facilitated process identified for those at 4 to 7 would be appropriate to fall into that category and affected by the type of work value changes that appear to be contemplated by the Commissioner in that respect.

PN419

Unless there's anything further, I think that was – I'll have some discussions, just about the specific issue about home care that's been raised.

PN420

DEPUTY PRESIDENT ASBURY: Thank you.

PN421

MR SHARIFF: Yes, may I just rise. I'm conscious of the timetable here today. Mr Fuller and I have real difficulties coming back at five. And I know that Mr McKenna only had (indistinct words), about half an hour. And I assume Mr Ward's (indistinct) some time. I'm just conscious that everyone has a break but also trying to allocate the time between (indistinct) available. I won't be that long. I'll probably be between - I'll probably be about five minutes.

PN422

DEPUTY PRESIDENT ASBURY: Does anyone object hearing from the Commonwealth earlier than, say, before your submissions, Mr - - -

PN423

SPEAKER: No, Deputy President. I have no concern with that.

PN424

DEPUTY PRESIDENT ASBURY: Okay, thanks, Mr Shariff.

PN425

MR SHARIFF: (Indistinct words) wish to hear from me now?

PN426

DEPUTY PRESIDENT ASBURY: Yes, I think that would be the most expeditious way. And then we can consider having a short break, and then coming back and batting on.

PN427



MR SHARIFF: The position that's being stated by the Commonwealth (indistinct words) addressed in our written submissions and I didn't want to repeat that, but I thought it might be an opportune time just to place a reminder on what the Commonwealth's position has been.

PN428

The Commonwealth's not a party proper to these proceedings. (Indistinct) that we have parties proper to the proceedings. The Commonwealth is not an employer, as such, under the (indistinct) of laws. The Commonwealth wish to make submissions in relation to the proper construction of the relevant statutory provisions, and to give some assistance to the parties, in terms of its policy position on funding.

PN429

I think it's a matter of record that this government, post the election last year, has taken a position on funding that's distinct to a non-committed position of the previous government. And as the Commonwealth, there's a singular position that those who instruct me, that through the relevant ministries, have made clear at the outset, from when we appeared in these proceedings last year, that it was my instructions to indicate that the Commonwealth would commit the funding.

PN430

What we wish to be heard on is how and when that will occur. The position that we've communicated is the policy position of a group of (indistinct) that's been (indistinct). We've set out in our primary written submissions, and we've said something about that further in reply to the extent that it's necessary to do so.

PN431

But that is the position. We are committing to funding. And how that funding would work.

PN432

In our reply submissions, we've also made clear that the task of this Commission under the statute, having determined that there ought to be (indistinct) increase, how it should be implemented should be guarded by the criteria in the Act. How that is funded may well be relevant to the task that is that Mr Ward raises, and to which there's been some rebuttal (indistinct) examination.

PN433

But the funding position of the Commonwealth, in a way, stands outside of the statutory criteria. Albeit it's relevant to how it works. That's the position I've already indicated.

PN434

I'd embrace what Mr Gibian says. People can have different views about that. But ultimately, that's the policy position that's been communicated.

PN435

What I next wanted to do, with the Commission's leave is to quickly address the five questions, to the extent that they raise matters for the Commonwealth.



PN436

The first question is directed to us. That wishes to explain the rationale for (indistinct) increases. I'm instructed that that is what we've put in writing, is as far as we can take it. In other words, the 10 per cent, and the five per cent has been formulated, and this policy position depended on, that is drawn from the relevant funding models, and I can't take that matter any further. So we have – we have given the Commission the best answer to that question, that we are able to give.

PN437

In relation to the second question about the impact of the (indistinct) wage review, obviously how the interaction occurs is a matter that will input back into the model. That's a matter for the Commission, and we leave it to the Commission to determine that. One can see that there would be an advantage in having the increment increased, at least determined, so that one knows, at the time of the determination of the (indistinct) wage review, what the data – what is relevantly - what the relevant starting point is for further increases, that's resulting in a wage review. But we say that's a matter for the Commission.

PN438

In relation to the third question, we say that that is in relation to home care employees, level 4 and level 5. And internal relativities, our position is, which is open to the Commission (indistinct) before it can make the decision that it considers appropriate. The Commonwealth has nothing to say about that point.

PN439

In relation to Question 4, again, it's the same answer. The Commonwealth doesn't have any position on the issue about head chefs and cooks.

PN440

In relation to Question 5, I think we've stated what our position is in relation to the way that question is specifically formulated at paragraph 10 of our reply submissions. And we have indicated there that the timing of the – subject to the timing commitments, we have not taken any issue with the extension of the funding to head chefs and cooks. So that is the Commonwealth's decision. Again, it's a matter for the parties to address, and the Commission.

PN441

That's all I wish to address by way of supplement to our submissions in writing. May it please the (indistinct).

PN442

DEPUTY PRESIDENT ASBURY: Okay, we might break until ten past two. And we'll come back and keep going. Thank you.

**LUNCHEON ADJOURNMENT**

**[1.49 PM]**

**RESUMED**

**[2.13 PM]**

PN443

MR McKENNA: If the Full Bench pleases, the ANMF adopts its written submissions on 20 January, 9 February. I won't rehearse them. What I would

propose to do by way of oral submission is first address the questions from the Full Bench from 9 February to the extent that they're relevant to the ANMF. Address in summary the response to the directions issued in November and December; the matters to which the parties have been directed in terms of submissions. I'd then make some brief submissions about the effect of the legislative amendments, address some of the factors arising under the modern awards objective and the minimum wages objective to the extent that there is issue between the parties about them, and then finally address the point of timing and phasing.

PN444

So then the questions issued by the Full Bench last Thursday. Question 2 presents a provisional view of the Full Bench. It remains the ANMF's position that the interim increase should commence operation as soon as possible, namely on the date of the determination. To the extent that the Full Bench is not inclined to do, it is submitted that a departure from the proposal by the Commonwealth would be appropriate such that the entirety – if it is to commence, the entirety of the interim increase can and should occur on 30 June 2023.

PN445

As to the date of 30 June as opposed to 1 July, as indicated by Mr Gibian in the exchange with the Full Bench, the threshold test is not a high one for the reasons that have been addressed. Having regard to the annual review, it would be appropriate, in our submission, to adopt the date of 30 June if it is not to occur on the date of the determination.

PN446

Questions 3 and 4 are directed to all parties. However, they raise matters that are outside the scope of the ANMF's applications, and I don't think that we can take those matters any further.

PN447

Question 5 is not a matter that is directed to the ANMF, but I understand that the Commonwealth's commitment in its submissions at paragraph 10 hopefully addresses the issue sufficiently.

PN448

Full Bench please, then turning to an overview of the matters raised in the directions to which this hearing is directed. As for timing and phasing, it's a matter that I will elaborate on. The ANMF's position, as I've indicated, remains that the interim increase should be applied as soon as possible, and ideally on the date of the determination. Whether the making of the interim increase is necessary to achieve the minimum award objective, whether the making of the interim increase is necessary to achieve the minimum wages objective, the ANMF's submission is that the answer to those questions is yes. And as I've indicated, further submissions as to the weight to the various factors will be given in a moment.

PN449

The effect of the legislative amendments from the Fair Work Legislative Amendment (Secure Jobs, Better Pay) Bill, it's addressed in some detail in the

written submissions. I don't propose to elaborate on our submission as to the proper construction of those points, but I will touch upon the ANMF's submission about what that means for the Full Bench's reasoning processes and the findings that ought be made in stage 2 to allow proper consideration of the matters, and to be satisfied that the objectives are met.

PN450

With regard to the status of Head Chefs/Cooks and Recreational Activities Officers/Lifestyle Officers, as per the joint statement filed on 16 December, the Federation's position is that the interim increases should be extended to those employees.

PN451

Turning then to the effect of the legislative amendments on the Commission's task. As I have indicated, written submissions are made as to the proper instruction. I won't repeat those. In terms of the consequences, it's uncontroversial that the new objects of the Fair Work Act and changes to the minimum wages objectives and modern award objectives apply to this application.

PN452

The amendments to the objects of the Fair Work Act in subsection 3(a), including the insertion of a reference to the need to achieve gender equality, will be relevant to the proper construction of section 166, section 157(2)(a) and (2)(b), and the objectives at sections 134 and 284.

PN453

It's noted that the Commonwealth has identified that the legislation refers to gender equality, gender equity. That is, of course, correct, and it should be read in that way. It's submitted that those references ought not be reduced to a reference to fairness between genders, which is a suggestion made in the joint employer's submission.

PN454

As a consequence of needing to be satisfied that the interim increase is necessary to achieve the modern award objective, the Commission will be required to take into account whether work of direct aged care workers is undervalued for gender-based reasons for the purpose of 134(1)(ab). And so in that respect the Commission has made significant findings regarding gender-based undervaluation, but it stopped short of determining why minimum rates were not properly fixed. And in our submission, it stopped short of an express finding that the work of direct aged care workers is undervalued for gender-based reasons.

PN455

There is, in our submission, ample material and findings – material before the Full Bench and findings that have already been made to enable that additional finding. That finding should then enable and inform the proper consideration of section 134(1)(ab), which the Full Bench can then proceed to take into account the need to achieve gender equality in the workplace by ensuring equal remuneration, eliminating gender-based undervaluation, and providing workplace conditions that facilitate women's full economic participation.

PN456

To the extent that it's suggested by the joint employers that the Full Bench has already concluded that the elimination of gender-based undervaluation at work has been achieved, in my submission that is not the effect of the Full Bench. In our submission, that's not the effect of the Full Bench's reasons to date. And it is not the case that the elimination of gender-based undervaluation of work is not something that has occurred to this point.

PN457

DEPUTY PRESIDENT ASBURY: Something that would occur if the interim increase?

PN458

MR McKENNA: No, it would not. It is a step along the path, Deputy President. Section 284(1)(aa) involves similar requirements, but it also refers to addressing gender pay gaps. Again, to properly take account of that factor the Commission, in our submission, would now need to develop its findings at 865 to 866 and proceed to make a finding that the gender pay gap manifests in gender-based undervaluation of direct aged care workers, and that eliminating gender-based evaluation(sic) of direct aged care workers would address the gender pay gap.

PN459

Again, to the extent that the joint employers suggest that that factor under the minimum wages objective has been done by the Commission by addressing or perhaps by considering that issue, that should be rejected that that factor is clearly directed towards achieving gender equality rather than a procedural consideration.

PN460

With respect to section 157(2B), that requires the Commission to consider whether historically the work has been undervalued because of assumptions based on gender. And in our submission, that will require the Full Bench to revisit the proposition that it was not necessary to form a view about why rates and relevant awards were not properly fixed. In our submission, that does not require close analysis of earlier wage decisions. That finding can be comfortably made based upon the previous findings in evidence before the Full Bench, and they're set out at part B2 to the ANMF's submission of 20 January.

PN461

And again, at the risk of repeating myself, contrary to the submissions of the joint employers in their submissions of 20 January '23, the elimination of gender-based undervaluation has not yet been achieved and the Full Bench, as I understand, has not made – as we understand, it's not made any finding to the effect that it has.

PN462

Dealing then with the factors to be considered for each of the objectives, and particularly where the parties are at issue about the interpretation and effect of those. If I can make four primary points. The first of those is that the consideration of section 134(1) factors relevant to the modern awards objective must occur in light of the overarching objective, which is to:

PN463

*Ensure that modern awards, together with National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions.*

PN464

So the starting point for the Full Bench coming to consider whether the interim increase is necessary to achieve the modern awards objective is the finding that has been made that the current minimum wages undervalue the work of direct aged care employers by at least 15 per cent. And in those circumstances, it's submitted that the current minimum rates are neither fair nor relevant.

PN465

The second general point that we make is that the joint employers appear to suggest that the safety net referred to in section 134 exists for the benefit of employers. It's accepted that having regard to the modern awards objective will require a balancing exercise involving competing value judgments and competing interests. However, there is nothing in that objective that suggests that the safety net referred to in the chapeaux of the provision exists for the benefit of employers.

PN466

The third point I'd make is that the parties seem to be in heated agreement that no single factor under section 134 or, indeed, under 284 is to be determinative.

PN467

And the final point – and this is perhaps the crux – is that there is disagreement as to the significance and weight to be given to different factors. And on that point, if I can start with a closer review of the position of the parties on section 134(1)(f).

PN468

In respect of that, the ANMF accepts that granting the interim increase in advance of it being fully funded by the Commonwealth may have some impact on business by way of increased employment costs. But it is submitted that the Commission should treat with caution the suggestion made by the joint employers that delinking the implementation of interim increase from a Commonwealth funding proposal will materially negatively impact the ability of providers in the sectors to provide critical services to vulnerable members of the community.

PN469

The Full Bench has evidence from a number of – on behalf of a number of operators. I understand we've been invited to make some further submissions about that if appropriate. In making our objection, I have made submissions about what weight to be given to those, and I won't repeat them. But in terms of the nature of that evidence, it's been addressed by Mr Gibian. I won't take the Full Bench in detail to those statements. But as to the height that it rises to, Mr Brockhaus of Buckland says that his facility Buckland is in a position where it can likely subsidise any losses arising from an unfunded wage increase from other parts of the business. So the extent that there is a transitional oncost or increased cost to the business, that would be absorbed.

PN470

Ms Jenkins on behalf of Community Vision Australia gives evidence of her calculations of unfunded wage costs and Community Vision Australia's cash reserves and says that potentially this will create a position where the organisation is unable to meet its liabilities within a short period of time. Of course, that evidence is equivocal. And having regard to the figures that she cites, it appears that that statement enjoys little support from her own analysis of the figures, or the figures that are provided by that witness.

PN471

And the highest that the evidence of Mr Shaw rises - Mr Shaw from the Royal Freemasons Benevolent Institution - is a suggestion that to the extent the increases aren't funded this would put their trading position into further deficit and impact the ongoing sustainability of the business.

PN472

So that is the evidence that the Full Bench has from facilities. In our submission it does not support a proposition that vulnerable members of the community would go without care. The evidence of Mr Corderoy of StewartBrown indicates that parts of the industry are not profitable. Mr Gibian has made submissions about that and about the cross-examination. The StewartBrown report also identifies that staffing capacity and staffing shortages have been a major contributing factor to higher costs and, again, this is a matter that's been addressed by Mr Gibian and I won't repeat it, save to say that Mr Corderoy recognises that the effect of this proceeding may contribute to the attraction and retention of staff in a way that would have a beneficial impact upon employees.

PN473

It's to be noted as well that the StewartBrown report annexed to the evidence of Mr Corderoy predates the introduction of the AN-ACC, A-N-A-C-C, which as he recognises may have a financial benefit. The key point, though, in our submission, is that the impact of any increase on business, particularly with respect to the phasing will be only one consideration to be taken into account. And the ANMF respectfully adopts the observation made by his Honour Ross J during opening submissions in this matter on 26 April, where speaking about the issue of affordability of a minimum wage variation his Honour said that:

PN474

*It seems to me that's fundamentally a result of a work value assessment and the application of the statutory framework. I mean, to reach a different view would, it seems to me, to be almost delegating our function to the government of the day based on whatever funding they want to provide.*

PN475

That's in the transcript at paragraph 458. It's submitted that those comments apply with equal force here. The ANMF agrees with and adopts the submission made by the HSU that for phasing to be determined by funding would involve the Commission abdicating its powers to the Commonwealth. The current award minimum wages for direct aged care employees substantially undervalue the work of direct aged care workers. That is a finding that has been made by this Full Bench.

PN476

That has been the case for some considerable time. It will continue to be the case until stage 3 of this proceeding is heard and determined and implemented. As a result, direct aged care workers have and will continue to subsidise the profit margins of their employers and, indeed, the Commonwealth budget and taxpayers. And Mr Gibian has taken the Full Bench to paragraph 140 of the SCHADS' decision where an observation to a similar effect is made in that proceeding.

PN477

Finally, the joint employers' submissions in evidence as filed on 9 February now raise for consideration the extent to which operators will pass on the full 15 per cent. That is a matter that may need to be addressed in funding arrangements involving the Commonwealth. It's enough here to note the position of the ANMF that funding ought be passed on in full, and depending upon how this matter progresses it may be something that could be addressed by the Commission through the implementation process but not a matter that arises squarely for consideration in stage 2.

PN478

I'm a little bit out of order because with the Modern Awards' objective I've started with 134(1)(f). I'll now proceed to move through the other relevant or perhaps disputed factors, starting with the secure work consideration at section 134(1)(aa). There are two points I make about this and hopefully briefly. As identified in the submissions of the ANMF of 20 January, the legislative purpose or the mischief that this provision appears to be directed towards, as can be extracted from the extrinsic material, is in our submission the many faces of job insecurities. It is a broad concept.

PN479

One way in which job insecurity arises in the aged care industry is in the high turnover of staff caused by a failure to properly remunerate employees to enable them to meet living expenses. The evidence that the Full Bench has is that workers are leaving aged care to get better paid work, despite their love of the work and wanting to remain in the industry. And otherwise the ANMF relies upon the submissions of 20 January in paragraph 22 and following.

PN480

The other point with respect to this factor we would make is in reply to the submissions of the joint employers of 20 January. It's paragraph 71 to 73. And we note that it is correct that this consideration operates at a macro level, but that how secure work arises across or - I'll withdraw that. How this consideration operates at a macro level will be informed by what happens at an industry level. And so it is a mandatory consideration that improved security of work in aged care, the Full Bench have regard to have. And our submission is what happens at an industry level will be relevant to how that arises across the economy.

PN481

With respect to section 134(1)(ab), the ANMF makes a similar point to that made by Mr Gibian on behalf of the HSU. It's suggested by the Commonwealth that the



ANMF is saying that this is a consideration that mandates the interim increase commencing immediately. That's not the submission that we make. Of course, as I indicated earlier and as is not in issue, no factors are to be determinative. However, in weighing factors the task of the Full Bench is to have regard to the specific language of those factors and to that end the language used in section 134(1)(ab) and, indeed, in 284(1)(aa), is relevant and the Commission should have regard to that.

PN482

Those factors identify the need to ensure gender equality in the workplace, and having particular regard to 134(1)(ab). That must occur by ensuring equal remuneration, illuminating gender-based under-valuation and providing workplace conditions that facilitate women's full economic participation. That's the language which the Full Bench must now have regard to in determining whether the increase is necessary to achieve the Modern Awards' objective.

PN483

With respect to the need to encourage collective bargaining, 134(1)(b), there is some difference in how this point is understood as between the HSU and the ANMF. At paragraph 1030 of the interim decision the Full Bench indicate that it was not persuaded that the interim increase would encourage collective bargaining. That appears under a heading of 'Provisional Views'. The ANMF understand what is said by the Full Bench there is a provisional and not a concluded view. It's submitted that this is distinguishable from a finding that the proposed variations would not encourage collective bargaining.

PN484

That is not a finding that has been made, in my respectful submission, and so we rely upon what is said in our written submissions about the need to encourage collective bargaining. In particular, there are significant difficulties bargaining in the sector. The evidence of that is identified in the ANMF's closing submissions of 22 July 2022 at paragraphs 858 to 867. The Full Bench now has some additional evidence filed by the AWU about the difficulties of bargaining having stalled pending the finalisation of stages 1 and 2. And that, in our submission, is reflective of the difficulties identified in the evidence already before the Full Bench.

PN485

Bargaining is not currently working, so far as wages is concerned. That is a major - indeed, in our submission, the major impediment. If it were addressed on a sector-wide basis it would allow the focus on bargaining to shift to enterprise specific issues. It's acknowledged that this is a difficult issue to make predictions about. As recognised by the Full Bench, there are a complexity of factors which may contribute to this. The ANMF maintains its submission that this is a positive factor in support of an interim increase. Alternatively, it's submitted that the factor should be taken as a neutral consideration.

PN486

The final topic for the ANMF's submission is timing and phasing in. Now, this is of course the primary factor for consideration in this proceeding. I don't propose to spend a lot of time on it. What I have said about the other submissions really



flow through to timing and phasing in. As is uncontroversial, the timing and phasing in at interim increase requires consideration of the statutory context, the substantive decision and fairness.

PN487

In relation to the statutory context we rely upon the submissions made, particularly to the effect that section 134(1)(f) cannot and be determinative. In respect of the substantive decision there is strong reasons - there is a strong basis on the findings made to support the commencement of the interim increase as soon as possible. The Full Bench has already found that the current minimum wages significantly undervalue the work performed by direct aged care employees.

PN488

This proceeding has been on foot for some time; relevant parts have been filed in late 2020 and early 2021. And the proceeding occurs against the background of previous reviews and public indications to the effect that aged care workers are substantially underpaid. And we refer in particular to the 2018 Aged Care Workforce Strategy Taskforce, the reports of the Royal Commission, and indeed the consensus statement - the fact that it is really an uncontroversial position between the parties that there is an undervaluation of work.

PN489

With respect to fairness finally, then, the interim decision was published on 4 November. If the staged increase - if the interim increase is to be applied in accordance with the Commonwealth's funding proposal that would involve a delay of eight months for these workers to receive a 10 per cent increase, and a delay of 20 months to receive the balance of the interim increase. And of course that then only takes these employees to the point of receiving the interim increase in circumstances where that would still - the rate after the interim increase will still fall comfortably below a proper recognition of the value of the work performed by those employees.

PN490

Having regard to fairness from the perspective of both employers and employees, employees are not being properly compensated for what is difficult and important work. It is a historical undervaluation. It is not new and recognition of this is not new. And so in those circumstances it's the ANMF's position that that should be rectified without further delay. If the Full Bench pleases, those are the submission of the - - -

PN491

DEPUTY PRESIDENT O'NEILL: Mr McKenna.

PN492

MR McKENNA: Yes.

PN493

DEPUTY PRESIDENT O'NEILL: Just one point of clarification on a different matter. In the original application occupational health nurses weren't included in the increase.

PN494

MR McKENNA: Yes.

PN495

DEPUTY PRESIDENT O'NEILL: I just want to double-check that that's not an inadvertent omission but flows from the fact that such nurses aren't in the aged care industry.

PN496

MR McKENNA: That's my understanding. The occupational health nurses are not employed in aged care, so it is a deliberate omission from the application.

PN497

DEPUTY PRESIDENT O'NEILL: Thank you.

PN498

MR McKENNA: The Full Bench please.

PN499

DEPUTY PRESIDENT ASBURY: Thank you. Ms Harrison.

PN500

MS HARRISON: Thank you. If the Commission please, I first would start by endorsing the submissions of the HSU and ANMF. We intend to keep our oral submissions brief, and in this respect I intend to start by just addressing the questions as well put by the Bench at the end of last week, and then I will briefly turn to the general task before the Commission in respect to Stage 2. In this respect I don't intend to repeat the substance of our submissions that we filed on 20 January 2023 and would rely on those.

PN501

In relation to questions 1 and 5 I note they were posed to other parties. In relation to question 2, which relates to the timing of the interim increase from 30 June the UWU reiterates our submission and the submissions of the HSU and the ANMF and the AWU that it's appropriate for such increase to be implemented as soon as possible. In terms of the difference between 30 June 2023 and 1 July 2023 in circumstances that the Fair Work Commission were to accept the Commonwealth's position we would not raise any concerns to that approach.

PN502

In relation to question 3, which is in relation to whether or not the interim wage increase should be applied to Level 4 and Level 5 of the SCHADS award we would support the submissions again of the HSU and the ANMF on this point. It makes little sense for the wage increase not to be passed through to Level 4 and 5 of the SCHADS award, and indeed to not do so would create an absurdity where Level 3.1 of the SCHADS award would be higher than Level 5.

PN503

In terms of the number of persons affected we would agree that such a number is not so large and therefore the Fair Work Commission should have the confidence that such a decision would not have a significant impact in terms of funding or

similar. As the HSU pointed out there's I think two witnesses in relation to classifications above Level 3, and there's no evidence in relation to the broadness of that classification 4 and 5 outside of that.

PN504

In relation to question 4, which is the question on how head chefs and cooks are identified in the classification structures in the Aged Care Award we again reiterate the same positions as put by the HSU and the ANMF in relation to the consensus statement, and that proposition that the interim wage increase be applied to Level 4, 5, 6 and 7 of the Aged Care Award, noting that, yes, Level 4 is the trades qualification level for cooks, and for those that are deemed to be cooks that don't have trade qualifications they're classified at Level 3.

PN505

In determining the timing of the interim wage increase for the reasons outlined in our submissions on 20 January it's the UWU's position that the interim wage increase for direct care workers in both the Aged Care Award and in Social Community Home Care and Disabilities Award should be implemented as soon as possible from the first full pay period on or after the determination is made, and that the interim wage increase should not be phased in. And we agree with the HSU's submissions on this point that there appears to be no basis for a delay in that second tranche anywhere in the Commonwealth's submissions.

PN506

In respect of the timing of that interim wage increase we also agree with the HSU and the ANMF's submissions regarding the relevance of the level of funding provided by the Commonwealth, and the application of the SCHADS decision into this matter, that being that the level of funding provided by the Commonwealth isn't determinative in terms of the timing of the interim wage increase.

PN507

In relation to what I have just outlined we reiterate our view that the interim increase is necessary to achieve the modern award objectives for the reasons outlined in paragraphs 10 to 27 of our submissions that we previously filed, and the minimum wages objective outlined in paragraphs 28 to 39 of our submissions.

PN508

The one final matter that I haven't addressed just briefly is in relation to head chefs, cooks and recreational activity officers, lifestyle officers. It is our position that they should be afforded the same interim wage increase as direct care workers, and of note I note from the consensus statement such a position is endorsed by the joint employers and it's endorsed by a number of other employer groups who are not party to these proceedings in that consensus statement.

PN509

I also note my learned friend representing the Commonwealth's position that it appeared from his submissions that the Commonwealth didn't directly oppose the application of the interim wage increase, but merely left it as a position that it was up to the Fair Work Commission to make the determination in relation to that interim wage increase for head chefs, cooks, recreational officers and lifestyle

assistants, and also said in that same submission that such interim wage increase would be funded.

PN510

So respectfully it would be our submission that notwithstanding the position that was put in the determination that was issued by the Fair Work Commission previously in relation to the parties reaching a joint position about head chefs, cooks, recreational and activity officers and lifestyle officers, that the Fair Work Commission should exercise its discretion in relation to affording that 15 per cent wage increase to those groups of workers as well. If it pleases the Commission.

PN511

DEPUTY PRESIDENT ASBURY: Thank you.

PN512

MR TAYLOR: If it pleases the Commission we've made a discrete number of written submissions about the timing and phasing. We otherwise adopt the submissions of the other unions insofar as they're not inconsistent with ours. As to question 2 from the statement and directions issued on Fridays if the annual wage review pay increases apply from the first pay period on or after 1 July, it's the usual wording in the awards, we can see that there are some problems under section 134(1)(g) for a number of factors, being the need to ensure a simple easy to understand a stable and sustainable modern award system.

PN513

Two pay rises in very short order would seem to be problematic for the Commission in the publication of new awards for the Fair Work Ombudsman and the publication of pay guides, obviously for employers to understand implement pay increases in their payroll systems and with their pay officers, and it would be problematic for employees to understand exactly what their pay rates are and should be at those times. We say at least some weight should be given to that. If there are two pay rises to be given they probably shouldn't be in short order.

PN514

We also say that 134(1)(f) would be a relevant consideration, because it would be problematic for employers, but for those reasons as well, and some weight should be given to that. Otherwise those are the submissions of the AWU.

PN515

DEPUTY PRESIDENT ASBURY: Thank you. Mr Ward, I'm sorry, I think we are going to have to adjourn now and come - - -

PN516

MR WARD: That's fine. Sorry, are your Honours suggesting the Bench will come back at 5?

PN517

DEPUTY PRESIDENT ASBURY: Yes. Is that going to be suitable for you?

PN518

MR WARD: I will be making it suitable, your Honour, and obviously I will do that.

PN519

DEPUTY PRESIDENT ASBURY: Without too much inconvenience.

PN520

MR WARD: It doesn't matter. No, it doesn't matter and I will just make it suitable. I just need to make various calls and work out where I need to be tomorrow morning, and that's all, that's fine.

PN521

DEPUTY PRESIDENT ASBURY: Yes, okay. We will adjourn and we will resume at 5. Thank you.

**SHORT ADJOURNMENT**

**[2.52 PM]**

**RESUMED**

**[5.05 PM]**

PN522

DEPUTY PRESIDENT ASBURY: Thanks. Mr Ward.

PN523

MR WARD: Thank you, your Honour. The Commission pleases, I'll try and be succinct. Can I deal firstly with the questions that came out on Friday. I will then - it's not my intention, in any sense, to repeat anything we've filed. I just wish to sum up on the key point and deal with the evidence we filed last Thursday in regard to the matter. In relation to question 2, can I simply use the phrase that that's acceptable to my side. We understand what the Commission is trying to achieve there in terms of the inter-relationship between the commencement of the interim increase and the annual wage case, and it seems to be sensible that this pre-date 1 July, so we understand what we're working with.

PN524

If it's possible I would like to take questions 3 and 4 on notice. I won't take too long in providing a response to the Commission. My sense is our answer to question 3 is likely to be yes, that's the relativity question, but I just want to have the opportunity to confirm instructions on that in terms of how it was worded to me today.

PN525

I need to take question 4 on notice. I'm not suggesting our clients are resiling from what they've already said, it's just that it is a little trickier in light of, I think, the presiding member's observations about that as to exactly who it's meant to apply to, and my clients want to have a chat with me before I commit on that, just to make sure that we are clear.

PN526

In relation to question 5 all I can say at this stage is that the Commission properly summarised my client's positions. I think on the last occasion I said something like this: my clients were happy for them to be the beneficiary of 15 per cent

simply because there weren't many of them, and as long as the government funded it. And that's probably best described as an industrial position to have reached. I don't - I'm not instructed to be drawn on any issue as to whether or not we say that's the proper work value consideration. My clients have simply reached the industrial position because there's very few of them, and because the government will fund it.

PN527

I think the challenge now is that it's not clear that the government have agreed to fund it. I might be wrong on that but I've got the impression from material Mr Shariff filed that the government are now saying that's for further consideration by them. To the extent that that might be the case, it's possible that I might need to take further instructions to assist the Commission; I don't know. But my instructing officer indicated to me that that's what they understood Mr Shariff to have said.

PN528

DEPUTY PRESIDENT O'NEILL: Was that the Commonwealth's position?

PN529

MR WARD: I think - well, I've been told it was but I haven't read in my - I just haven't had time to read it myself.

PN530

DEPUTY PRESIDENT O'NEILL: I'd understood their position to be that they agreed to fund it but the timing of the funding was a decision that hadn't been made because the Commission hadn't determined to award the increase.

PN531

MR WARD: Your Honour, if that's the case it makes my life a lot easier. As I said, I just hadn't had time personally to read it. If they have agreed to fund it, then the position is very clear then. Subject to it being funded my clients were prepared to, for want of a way of putting it, throw them into the mix.

PN532

COMMISSIONER BISSETT: Para 10 of the submission they filed on Friday.

PN533

MR WARD: Commission, thank you for that. It's my negligence but I haven't had the benefit of reading it. Not in that detail anyway. Thank you.

PN534

DEPUTY PRESIDENT O'NEILL: And can I just check, when you say you need to take questions 3 and 4 on notice, how long do you anticipate?

PN535

MR WARD: If you could give me 48 hours, your Honour, that would be more than satisfactory. It's more a case of me just - I have some written instructions which, to put it bluntly, I need to clarify before I articulate them. It won't take me very long. If I had 48 hours that would be fine. It's possible it might just have

been - something might have been lost in interpretation as they have been emailed to me this morning.

PN536

I want to just, if I can, use the rest of my time this afternoon purely to sum up on what I think is the critical question. And I want to start where we should start which is the Modern Awards objective, section 134. We have said clearly that the Commission is tasked with setting a fair and relevant minimum safety net for both employees and employers, and unless I've misheard him, I got the impression that Mr McKenna has cavilled with my inclusion of employers in that.

PN537

Can I indicate to the Commission that we understood this proposition to be settled, and I'm going to take the Commission briefly to a number of decisions. I'm only going to read from one and then I'll give the references to the others. I take the Commission to *Re Four Yearly Review of Modern Awards* [2019] FWCFB 272 at 14, the Full Bench said this:

PN538

*The modern awards objective is broadly expressed. It is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in section 134(1)(a)-(h) -*

PN539

as it then was. Continuing:

PN540

*Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.*

PN541

That proposition, that fairness is to be assessed from the perspective of the employees and employers covered by the modern awards in question, has been affirmed many times, and I'd ask the Commission to consider *Four Yearly Review of Modern Awards Penalty Rates* [2017] FWCFB 1001, 23 February 2017, at 37. *The Annual Wage Review 2017 to 2018* [2018] FWCFB 3517. *Pharmacy Industry Award* [2018] FWCFB 7621 at 126. A case that's already been referred to in these proceedings *The Independent Education Union of Australia* [2021] FWCFB 2051 at 220. And, lastly, *The Alpine Resorts Award 2010* [2018] FWCFB 4984 at 52.

PN542

Now, where we don't cavil with the unions is that obviously the Commission has to have regard to the various limbs of section 134, and we don't cavil with the proposition that no limb should be placed as being more dominant than any other limb. But as I quoted earlier, it is a composite and it requires an exercise of evaluation and balance. The Commission in these proceedings seems now to be presented with two relatively stark alternatives.

PN543



One is to accept the Commonwealth's proposition on funding. Or the other is to accept the Unions' proposition to walk away from that and introduce the interim increase immediately. And obviously it is the case that the Commission isn't bound by either of those propositions and it can form a view that it's appropriate to do something different to both of those. I want to address that notion, that is the context and consequence of diverting from the Commonwealth's position to adopting the Unions' position in closing, and I say respectfully that sadly that is not a simple consideration. It is not a simple consideration even on the evidence we filed last week because of what I will go into.

PN544

I start that consideration with Mr Corderoy's evidence and at page - sorry, I'll withdraw that. At paragraph 34 Mr Corderoy set out an assessment of the financial impact of introducing the 15 per cent interim increase as of 1 March 2023 in one go without government funding, and he's assessed that at being \$639 million for the first unfunded tranche, as it were; and 575 million for the second. Which in broad terms is \$1.2 billion. \$1.2 billion. There's a few shekels on top of that but for present purposes 1.2 billion will do.

PN545

The industry is currently facing the potential for two wage changes. One obviously is the 15 per cent interim increase and the other of course will be the annual wage review in July. Now, it would be wrong of me to be too firm on what the annual wage review will be but if one looks at the annual wage review last year, in the context of inflation and everything else, it was in the order of five per cent. One might be surprised if it's not in the order of five per cent this year. The point I'm making is simply that the industry is faced with the potential for material wage increases affecting it.

PN546

Those increases of that size and order can't be described as small. They shouldn't be trivialised; they are, on any proper basis, material. My clients obviously would have been happier if the Commonwealth had agreed to fund the increases earlier. We said as much. But I don't intend to get into a debate today about the Commonwealth's position. We accept it is what it is. And in some regards my clients in a way have become the meat in the sandwich.

PN547

The first thing I wanted to say about that which should be uncontroversial, is that the Commission needs to consider what I have just said in the context of this industry being funded. It simply does not have the economic framework that a typical private sector industry would have. When confronted by major costs pressures, private sector business normally resort to one of two things. They have some level of price elasticity and they increase price and/or they resort to redundancy and cut jobs to save costs.

PN548

Neither of those phenomena are present in the context of my client's interests. In fact, quite the opposite given that many of my client's members are for-purpose organisations serving, as we've said, one of the most vulnerable parts of the community in Australia. The other thing that should be uncontroversial from Mr

Corderoy's evidence is however one wants to cut it, however one wants to pick at it, the industry is in a financially challenged position. You cannot escape that as a proposition in terms of the StewartBrown analysis. Whether or not one looks at HSU 2 which Mr Gibian spent a lot of time with, which is the annual analysis, or whether one looks at the quarterly analysis that was annexed to Mr Corderoy's statement.

PN549

I just want to make a couple of comments about that, if I can. If one turns to HSU 2 which is the annual analysis, and Mr Gibian spent a great deal of time cross-examining Mr Corderoy on HSU 2 and, in particular, page 14. I appreciate that Mr Gibian endeavoured to demonstrate that there were a variety of other things undermining the operational financial viability of the industry. But the simple fact is if one looks at table 4 on page 14, one is hit by the proposition that the per bed, per annum position in terms of operating results is in the red. With respect, we simply say it's not particularly helpful to understand why they're in the red but it is entirely relevant to understand they are in the red. Unfortunately that position seems to have deteriorated from FY21 to FY22.

PN550

Now, it is true, as was evidenced in the cross-examination, that that is a combination of factors. One is that revenue fell after COVID because there was some level of COVID subsidy and it is true that costs have gone up and it's that combination of factors that is squeezing the residential sector at the moment, generating operating deficits. The evidence in relation to home care – and I'll come to that in some more detail in a minute – is a little less parlous and we accept that the StewartBrown report does indicate that home care is currently travelling in the black, although it appears when one reads the report, it's not in the healthiest state it could be.

PN551

The underfunding issue is intriguing but from our perspective it doesn't really take you very far. If the underfunding issue simply meant that the employers could grab that money and keep it, well, it might have some particular relevance. The fact that there is underfunding in the sector in terms of people not using all the money they have allocated to them, doesn't help the financial position of the operator because that money sits in the balance sheet as a liability. It's not their money, it's not the operator's money. It's money that ultimately has to be spent on the client or returned to the government in some form. That was Mr Corderoy's evidence.

PN552

If you look at the evidence in Joint Employer 1, 2 and 3 – and I'm going to take the Commission through this in a little bit of detail – the position of those operators is not dramatically different to what Mr Corderoy said. The Buckland operation is currently in deficit. There has been some explanation for that. That's a little bit unusual. As we'll show the Commission, if Buckland was to fund unfunded wage increases that would have been sufficient to drive it into deficit anyway. I'll come to how they manage that in a moment. It's clear that CVA in Western Australia as running at a loss. I'll take the Commission to that. It's also clear that RFBI, a very large operator, is also running at a loss and I'll take the

Commission to that. I want to start there because I think that's important context for understanding insuring that the safety net is operating in a manner that is fair and relevant to employers. Now, it would be wrong for me to suggest at all that the industry, if this 15 per cent is unfunded, is going to be hit by the amount of \$1.2 billion. It will not be that amount and I'm going to explain why as I develop my submission.

PN553

So I'm not suggesting for a minute that we're going to be hit by a \$1.2 billion unfunded bill. I will give the Commission before I finish some indication of what I think the bill will most likely be if there is not funding associated with the increase. Can I start, though, by just taking the Commission briefly to the lay evidence that was filed on Thursday. I might start with Mr Brockhaus, Johannes Brockhaus from Buckland in the Blue Mountains of New South Wales. Mr Brockhaus, at paragraph 29, provides the Commission with the potential cost of paying the 15 per cent interim increase on 1 March on an unfunded basis in paragraph 29. Now, it's clear that from a legal perspective if one turns to paragraph 23, that Buckland did not need to fund all of that from a legal perspective.

PN554

The evidence in paragraph 23 is that the Certificate III carers they employ, of which his evidence is there are about 80, are paid a margin of 2 per cent above the award and enrolled nurses 6 and registered nurses, 22. He says in paragraph 24 – and I suspect many in the industry will say this – he would prefer to pass the whole 15 per cent on if he can, if it's funded. I don't think that would surprise anybody, that they want to do that. That is what he has in his mind. Paragraph 33 he talks about his operating deficit and yes, he explains that there is something unusual this year which has driven him into deficit but he also indicates that if he has to fund the unfunded wages, even those he's only required to fund, that will further materially increase his operating deficit.

PN555

Now, he's in a lucky position and his evidence indicates that. He runs a business that has a variety of elements to the portfolio, including a retirement village and to put it simply, he's able to rob Peter to pay Paul in regard to that. Now, the unions refer to that in a very glib way. It's not appropriate to think of that glibly. The simple fact is this is the proposition: if Buckland pay wages that are not funded, be it all of them or only that which they're required to pay as a matter of law because of section 206, their business will be financially weaker. Now, they're fortunate that they can take some money out of another part and put it here. But the bottom line is their business is going to be financially weaker. So the impact on them is that we are financially weakening their business in a material way if the wages are paid as the unions ask on an unfunded basis. If one takes Ms Jenkins' evidence, from CVA, we find a number of things. If we go to paragraph of her evidence, JE2, we find that CVA, which purely provides home care, has made operating losses for the financial year of '21, financial year '22 and on current projections is projected to make a loss for the FY23 financial year.

PN556

Now, her evidence is that in paragraph 32, they pay 1.6 per cent above the award and it is her evidence that she intends to absorb 1.6 into any unfunded wage increase. Now, she explains in paragraph 38 the consequence of that. It would leave her with a residual unfunded wage increase, the fund of 13.4 per cent. Let's assume again 1 March 2023. She sets out, therefore the consequences of that for the first four months to 1 July being \$289,000 and some and then for the financial year '24, 220. The Commission only has to reflect the amount of those losses against the current projections of financial performance to see that they're material.

PN557

Now, again the unions quite glibly dealt with Ms Jenkins, inappropriately. They're lucky, they've got some reserves. They indicate in paragraph 24 that their current reserve position is \$2.18 million, down from a historical high of 4.34 in FY20. Not surprising it's down, they've been making losses. The union glibly just say they can pay for that out of their reserves. The consequence, though – that's good fortune for them. They don't have to go to the bank and borrow the money. The consequence of that is that business is, again, financially weakened for the long term. Can't keep paying things out of reserves. The fact of the matter is there are most likely many people in this industry don't have that level of reserves.

PN558

So the consequence of adopting the union's position for that business is to drive its operating deficit further, to make it draw down on its relatively modest reserves and to financially weaken that business. If one turns to RFBI, the largest employer who gave evidence filed on Thursday, RFBI has set out in some detail its financial position at paragraph 12. It's perhaps conveniently set out in that it talks about the RFBI group and then also breaks down the various elements of that group. If the Commission considers it is set out where it is year to date, this financial year, it's then given you last financial year, '12 financial year, '20 financial year, '19 financial year, '18 financial year. The picture of that business is simply one that has had some historical fortune in making surpluses and more recently has made material losses. In 2022, its group loss was \$22 million. It's year-to-date loss at a group level is 5.4; \$2.8 million of that loss is driven from residential care. It's making a small surplus out of its retirement villages, which are independent living and its making a small surplus out of home care.

PN559

So that is a business that has a diversified portfolio but as can be seen there, is making material losses at a group level but also substantial losses at a residential care level. Now, Mr Shaw's evidence is that they will most likely absorb that which they can legally until funding kicks in and perhaps the most important part of that consideration for the Commission is paragraph 19 where on Mr Shaw's analysis, he indicates that of their 1,123 residential employees in direct care and the 54 in home care, his assessment is about 776 of those people are equivalent to level 1B, which essentially means that we have something in the order of a 3.07 per cent payment in their enterprise agreement above the award. So they have a capacity to absorb 3.07 per cent but obviously will have to pass on the rest.

PN560

In paragraph 25 Mr Shaw explains to you what paying the whole 15 per cent unfunded would be and then gives you some general idea of what funding the 11.93 per cent with the 3.07 per cent being absorbed would mean for him on the basis that 76 per cent of his direct care labour costs will be impacted by that. So, again, you'll have an employer who might absorb part of it, but there will still be a very material part that they'll have to fund if there isn't Commonwealth funding aligned to it. What's the consequence of that? Well, his evidence is it will just drive their deficit up further; it will drive their deficit up further. And that will move them further into their operation challenge. So it's a little glib just to talk about the fact that somebody might use money out of a retirement village, somebody might draw down their reserves, it's a little glib to say that's easy, don't worry about that.

PN561

The bottom line is that if you introduce the wage increase without funding the evidence clearly demonstrates that it has a financial consequence, it will most likely even for people on enterprise agreements in relation to care workers be immaterial. Some people might be able to manage that in the short term, but the bottom line is even if they can it means that the economic consequence to their business is their business is financially weakened. And, respectfully, we would say that is a proper matter for the Commission to contemplate in considering the union's claim. It's even more relevant to contemplate in the general context of this industry in terms of its financial position. It's even more relevant to contemplate in the context of this industry being a funded industry rather than a typical private sector industry.

PN562

Now, my rough maths tells me that if you applied this sort of formula the RFBI have, that is well look it's only going to apply – predominantly this might be an issue for my personal care workers, I might be able to absorb a little bit from an enterprise agreement. Most of the workers are personal care workers, they're not nurses, then realistically that \$1.2 billion is probably going to look something like 800 million. Now, I don't know what world the unions work in but imposing \$800 million on an already financially distressed industry I would think is a material consideration for the commission. It is true in what I've just said, and the evidence shows this, that some employers may be legally entitled to absorb all of the increase, it's possible. It's certainly, if one looks at the submissions we filed last Thursday, that certainly seems to us to be the case legally available in relation to quite a few registered nurses because all of the evidence that was taken from the lay witnesses who were covered by enterprise agreements, most of the nurses are already paid 30 to 50 per cent above the award.

PN563

Also though, as Mr Brockhaus indicates, there's probably a very clear preference not to do that and that will have an economic consequence as well. Some people will be able to absorb some of it, and if you look at the evidence from CVA they can absorb 1.6 per cent, if you look at the evidence from RFBI for their personal care workers they can absorb a few per cent. So there will be some level of absorption and there's no evidence before the Commission on this but I think it's

reasonable to say that some people won't be able to absorb anything if they're not covered by enterprise agreements or paying overall payments.

PN564

So the bottom line is this it's that introducing this wage increase on an unfunded basis to a funded sector already under some financial distress, the increase is of an order of magnitude. I'm not saying the industry is about to go bankrupt and fail, I'm not saying that at all. What I am saying though is just that the unfunded increase will drive deficits, some will be in a better position than others to defend that, some won't, the bottom line though is that the only way you manage a deficit is drawing down on something you might already have and the consequence of that is we are weakening the business financially. And that is the proposition that we ask the Commission to give some consideration and weight to in its difficult deliberations on this topic.

PN565

Now, quite a bit has been made about attraction and retention, I just wanted to make a couple of short submissions about that. Professor Eagar – I think it's professor, I don't want to get that wrong – she expresses some opinions at paragraphs 33 and 34 of her supplementary statement. I would ask the Commission to be cautious about those opinions, I don't in any way impugn the professor's knowledge of the aged care sector, but it is the case that she simply expressed a relatively naked opinion without any foundation. She's not referred to any economic theory, she's not referred to any empirical analysis about why, in her view, increasing wages will in any material sense improve attraction and retention.

PN566

Now we accept, and we've accepted all along, that improving wages will have some role to play certainly in retention. I think the hope is it might have some role to play in assisting with attraction, but that's yet to be seen. And one of the reasons that I say that with some case is if you take registered nurses under enterprise agreements who are already paid 30, 40, 50 per cent above the award well apparently the industry has an attraction and retention issue with them. And yet they're already paid massively above the award. So one just has to be a little cautious in adopting a view that in some ways improvements to attraction and retention, as it were, will offset the hundreds of millions of dollars that might be imposed if you adopt the unions' submissions, because it won't.

PN567

Mr Brockhaus who has been in the industry for quite a while holds the view that he doesn't think it will have much practical effect on attraction and retention, because as he says in his evidence he thinks the issues run deeper than that in terms of the broader perception of the industry and the work performed. Ms Jenkins from SVA indicates in her evidence that they already have a relatively low labour turnover at 10 per cent, and they only pay 1.6 per cent above the award, so they're obviously doing something different in terms of attraction and retention. Mr Corderoy indicated that in relation to retention, under cross-examination from Mr Gibian, he saw that as one component. And we accept it's component, you have to accept that he was a little less bullish when he was asked about whether or not the 15 per cent would really assist with attraction, he was a



little less bullish about that, he was considerably more reserved. So, we don't suggest that the Commission shouldn't take that into account, we accept that its already made some views about that in its primary decision but we'd ask the Commission to approach that proposition with some care because that proposition can't be said in any economic sense to outweigh the very real cost of imposing unfunded wages on the sector.

PN568

Now, some was made of this notion that the employees somehow have been subsidising the industry for years, and that's a relatively emotive proposition. And without wishing to be unduly critical of those to my right, nothing has stopped them for applying for a work value increase previously. In fact, perhaps a little mischievously, we said I think in our very original submissions we're surprised that the nurses' union didn't do that as early as 2010 because it seemed to us to be obvious that the registered nurse classification was inappropriately valued. So again I would just ask the Commission to approach that with some care. It's not the employer's burden, it's their burden. The fact that they've decided to get moving and do something about that, well commendable, but one shouldn't place too much weight on that as a proposition when the unions had it in their hands to deal with it much earlier than they have.

PN569

Now, simply put in closing the Commission can adopt the Commonwealth's timetable. It can do so, I think there's sufficient evidence before it to form the view that when it balances its 134 considerations it can arrive back in making the safety net fair and relevant for employees and employers, it can arrive at that conclusion. If it does so it is respectfully an entirely reasonable and safe position to adopt. The Commission can be entirely confident that it will not place any material burden on the industry financially and it can be confident that the traditional comments made by people like me would fall into the neutral category, that is there would not be any material economic impact on the industry. I'm being careful when I say that because I suspect there might be some small impact even if you do that, mostly concerned in terms of how the home care arrangements are going to work. Because it's very clear from the Commonwealth's submission that the issue that hasn't quite been resolved yet is the home care recipient has to agree to change the pricing of their packaging before the operator can actually change the pricing of their packaging. So, it would be wrong to say if you adopt the Commonwealth's timetable it's absolutely dead neutral, it might not be, but you can be rest assured that in terms of the impact on this sector that is already distressed you wouldn't not be doing it any more harm.

PN570

Now, in that context the opposite is the case with the union's position; it would not represent, in our submission, a fair and relevant minimum safety net from the employer's perspective on any reasonable consideration, it just would not. The industry is distressed, it will drive deficits, it will weaken businesses – I'm not saying those things as platitudes, I'm not saying those things as hyperbole, it certainly will not drive the industry into the sea – but it will have a material negative impact on the industry. And it's for that reason that my clients ask the



Commission to not be enticed by the union's position, but to travel the safe road and adopt the Commonwealth's timetable, particularly in light of the very important work my clients member's do in the community and the people in the community that it cares for and supports. It's important that the aged care sector in its broadest sense is alive and economically well because if it's alive and economically well it can provide high quality service to its clients, to its residents, which is in the interests of the community generally. And for those reasons we ask the Commission to reject the union's claim and to support the increase being introduced consistent with the Commonwealth's timetable. If the Commission pleases, those are our submissions.

PN571

DEPUTY PRESIDENT ASBURY: Thank you. Did you have anything in reply?

PN572

MR GIBIAN: There is just a couple of matters. Self-evidently, the upshot of what Mr Ward has just said is an appeal to the Commission to regard the impact on business, on the operators of the prospect of a difference in timing between the commencement of the interim increase and the Commonwealth funding decisions as determinative, in effect, of the exercise for discretion and for the Commission's consideration to be dictated by the foreshadowed position of the Commonwealth in a manner which is not compatible with the provisions of the Act to which we referred earlier.

PN573

And particularly so where there was really no response to that proposition. Mr Ward went directly to what was said to be the impact of that - of any misalignment of the timing on operators, without addressing developments (indistinct) of that question to the Commission's consideration in the context of it flowing from funding decisions.

PN574

Leaving that to one side, in terms of the evidence just briefly, Mr Ward referred to the figures at paragraph 34 of Mr Corderoy's statement. That was the matter that I adverted to earlier this morning, that in relation to which it's very difficult to assess on the evidence how those figures were arrived at or to place any particular weight on them. Leaving that to one side, quoting a figure, whether it be 1.2 billion or 800 million doesn't really tell across an industry, doesn't really say anything much at all about impact on individual operators and its significance at all.

PN575

It doesn't really assist the Commission to put it into any kind of context or to assess the impact on business in any material way. To the extent that the particular evidence was referred to of Mr Brockhaus, Ms Jenkins and Mr Shaw, the height of the submission seems to be that for those operators if there is a difference in timing between the commencement of the interim increase and Commonwealth funding decisions, that it will to some undefined degree, cause those operators to be financially weakened.

PN576

No particular consequence for the business is even alluded to in the evidence. It's not said that any of them will go to the wall or be unable to continue operating or to provide services which are adequate or sufficient to meet service standards. It is said that there will be, to some undefined extent some financial weakening. That, with respect, is not something that we have - well, it is - leaving aside the submissions about the cause of it, it's not something with which we have no sympathy at all, but it is not the type of impact which would have been given significant weight in the context of the overall considerations to which we've earlier referred.

PN577

Mr Ward says, well, maybe other operators wouldn't have the cash reserves that Ms Jenkins' organisation has or the diversified operations that Mr Brockhaus has. The fact of the matter is there is no evidence from any such operator before the Commission that says it wouldn't be able to accommodate a temporary deficit of the nature that is potentially or may potentially arise as a consequence of a disjuncture between the interim increase commencing and government funding decisions.

PN578

Finally, in respect of attracting or retention, a submission was made that there was some lack of explanation in Professor Eagar's opinion on that subject. I was just going to identify firstly that the Commission made a finding in respect of that issue, perhaps at some level of generality but at paragraph 1039 of the decision, Member. In any event, Professor Eagar's opinion is of an expert nature and perhaps holds more weight than assertions from individual experience of Mr Brockhaus and Ms Jenkins on which Mr Ward relied.

PN579

Furthermore, Mr Corderoy although he said that in his opinion there might be other mechanisms that would also be adopted, a matter with which presumably no one would disagree, but increases in pay have the potential to assist at least in those issues, consistent with the Commission's findings in that respect.

PN580

Finally, there seemed to be some criticism of the unions not bringing cases earlier for work value increases, and that affecting in some way the proposition that workers have been subsidising the industry for a long time by working at rates which do not appropriately value their work. Leaving to one side whatever implied criticism of the union was involved, it doesn't changed the fact - and leaving that - and in addition to which what we are now talking about is whether after the Commission has made a finding, and we've heard evidence to that effect, that the circumstance of employees receiving wages which do not properly reflect the value of their work should be made to continue for a period of time, and that is a significant consideration for the reasons I set out earlier.

PN581

DEPUTY PRESIDENT ASBURY: Thank you. Anything in reply?

PN582

MR MCKENNA: If it please the Full Bench, Mr Hartley will address the Federation's reply submissions.

PN583

MR HARTLEY: I hope to be similarly as brief as Mr Gibian. Many of the points that Mr Gibian made I was also going to make. We agree with the submission that the figures of 1.2 billion or 800 million are not figures upon which the Commission can safely rely. There's no reasoning offered in support of those figures in Mr Corderoy's statement, and the figure of 800 million doesn't even appear in that, from it seems to be have been drawn on (indistinct).

PN584

We will be saying a little bit more about why it is that the Commission ought not to give weight to the report of Mr Corderoy in the submissions that the Commission granted us leave to file and we'll do that very soon. Very briefly in respect of a point which I think amounts to nothing about fairness as between employers and employees, we obviously accept that there's authority from the Commission to assess that fairness in the context of the Modern Awards objective means fairness for employers and employees.

PN585

The point that we were seeking to make was only that in paragraph 19, and I think also in my learned friend's oral address, the way that it was phrased was a fair and reasonable safety net for employers and employees. The safety net is for the employees. Fairness is to be assessed from the perspective of both sides but the safety net plainly exists for the employees. It's probably just a question of phrasing but it's one that we think may be important.

PN586

It was said against us on several occasions that we were glib in our treatment of the witnesses advanced by the joint employers. Our response to that is that we didn't choose their witnesses; they chose their witnesses. And if all of the witnesses that they put up are able to say, 'We can absorb this', then it's not unreasonable for us to say, 'There you have it, they can absorb it.' If they had put up witnesses who had said, 'Well, we can't absorb it', then the submission might have been different; but they didn't. And Mr Ward says, 'Well, we've given you a handful of employers but imagine there might be other people out there who aren't in a position to absorb it.' Well, they didn't put on evidence.

PN587

The position that the Commission is faced with is evidence from employers who say, 'We can absorb these increases.' Now, it's the case of course that that means money out of their pockets. That's uncontroversial. What I'd like to draw to the Commission's attention is that it's, in effect, sort of zero sum. If the money isn't taken out of the pockets of one entity, then it's taken out of the pockets or it's kept out of the pockets of the employees.

PN588

It shouldn't be forgotten that there is quite a lot of evidence before the Commission about the difficult circumstances that are faced by employees. I won't take the Commission to all of them but I will draw to just a few

selections. In the witness statement of Christine Spangler she identified that her wages in aged care are not enough for her to retire on. Very difficult for her to pay off her loan. They're only just managing now, don't have other sources of income.

PN589

Witness statement of Virginia Mashford, she lives very frugally. She has money set aside from a divorce and an inheritance which leaves her in a better position than if she was relying solely on work income. Even still when the cost of electricity goes up she has to stretch her pay further. Her pay hasn't risen with the cost of living. The witness statement of Linda Hardman. Ms Hardman says she was not certain if her current income would meet her future living expenses or retirement, that's despite working both weekend days.

PN590

And Ms Clarke gave evidence that because of her limited hours and rate of pay, she's been unable to save a deposit to get a loan to buy a house and a unit. She lives in a caravan park. She does that because if she were to get evicted from a caravan park it wouldn't end up on the bad rental list, so as to make it more difficult for her to find accommodation elsewhere.

PN591

It is important that the fact that these workers are very low paid and have been undercompensated for a long time, enters into the Commission's consideration in addressing this issue on timing and phasing. The financial weakness is not only a matter that confronts employers. It confronts employees and in a way that is very real. Mr Ward concluded by saying that the services provided by his clients/members is very important. The same can be said for work that's done by the employees for those members.

PN592

Mr Ward said it's important that his members be economically well. The same could be said of the employees who after all do the work for the members. So we encourage the Commission to retain in their mind that a decision to keep employees out of appropriate compensation for their work or at least a step along the way to appropriate compensation for their work has significant impacts on them as well. Those are the points that we wish to make in reply.

PN593

DEPUTY PRESIDENT ASBURY: Thank you. Anything from the UWU?

PN594

MS BARRY: Nothing from us, thank you.

PN595

DEPUTY PRESIDENT ASBURY: Thank you. If - - -

PN596

MR GIBIAN: I just forgot to mention the issue that particularly Commissioner O'Neill raised with me about the home care, domestic and care or personal care work. It's an issue perhaps that we might need to just reflect upon and give

note. The evidence - the position is, and it's ultimately summarised at paragraphs 886 to 888 of the decision, Mr Ward did start the case, I think, by raising an issue about the differentiation between residential care and home care work, part of which was - one reason for which was a reference to the fact that in home care there is a degree of what was referred to as domestic work or cleaning and the like

- - -

PN597

DEPUTY PRESIDENT ASBURY: Yes.

PN598

MR GIBIAN: - - - what was involved in that work. Ultimately, no submission was pressed that a differentiation was appropriate on that basis, that is on a kind of swings and roundabouts, to put it colloquially, approach. That is, there are some things that are different in terms of supervision and independence, and other things that are - and some things are different in terms of the type of duties, the range of duties and the like that are performed.

PN599

That was where the argument as between the parties at least was reached, that is that the home care workers do do some domestic work. There are some shifts where that is the primary duty. But they perform the range of duties including care and domestic work. Now, if it would assist the Commission we can prepare a short note about that which puts those references, but that in short is the position.

PN600

DEPUTY PRESIDENT ASBURY: Okay. So if parties are planning on filing anything additional, if you could do so sooner rather than later. I think Mr Ward has set the bar with the 48 hours to get his instructions, so if you could try to get anything in quickly, that would be - - -

PN601

MR GIBIAN: We were thinking by Friday if that was - it just - we can do it a bit earlier if it's - I noticed your raised eyebrow.

PN602

DEPUTY PRESIDENT O'NEILL: As soon as you can.

PN603

MR GIBIAN: Of course.

PN604

MR WARD: Well, perhaps it would help if we have some clarity on as soon as you can. Is the timetable Friday or 48 hours, your Honour?

PN605

DEPUTY PRESIDENT ASBURY: Well, you agreed to 48 hours, Mr Ward.

PN606

MR WARD: I did, your Honour.

PN607

DEPUTY PRESIDENT ASBURY: Are you stepping back from that?

PN608

MR WARD: I assumed everybody else would be tarred with the same brush.

PN609

DEPUTY PRESIDENT ASBURY: Friday.

PN610

MR WARD: Friday.

PN611

MR GIBIAN: Sorry, in suggesting Friday I was actually thinking Mr Ward would do it sooner, only in the sense that Mr Ward reserved his answers to questions 3 and 4 in relation to the SCHADS award classification and the head chef/cook issue. And I just don't know what he's going to say about it. We might want to say something about what Mr Ward's said about it. I don't want to go backwards and forwards but - - -

PN612

DEPUTY PRESIDENT ASBURY: And neither do we, I can assure you. Neither do we.

PN613

MR GIBIAN: I just don't know what their position is.

PN614

MR WARD: I don't want any further rancour about simultaneously filing and people being prejudiced, so why don't I do mine in 48 hours on that issue, but to the extent that there might be something we want to say about the home care issue, we will take Friday like the HSU have.

PN615

COMMISSIONER BISSETT: We would ask the HSU if they can get to it earlier, then - - -

PN616

MR GIBIAN: Of course. The Commission pleases. Indeed.

PN617

DEPUTY PRESIDENT ASBURY: All right. Thank you for your submissions and on that basis we'll adjourn.

**ADJOURNED INDEFINITELY**

**[6.06 PM]**

**LIST OF WITNESSES, EXHIBITS AND MFIs**

**EXHIBIT #HSU1 SUPPLEMENTARY WITNESS STATEMENT OF  
KATHLEEN EAGAR ..... PN181**

**EXHIBIT #JE1 WITNESS STATEMENT OF JOHANNES BROCKHAUS . PN184**

**EXHIBIT #JE2 WITNESS STATEMENT OF MS JENKINS ..... PN185**

**EXHIBIT #JE3 WITNESS STATEMENT OF MR SHAW ..... PN185**

**GRANT CORDEROY, AFFIRMED ..... PN201**

**EXAMINATION-IN-CHIEF BY MR WARD ..... PN201**

**EXHIBIT #JE4 WITNESS STATEMENT OF GRANT CORDEROY ..... PN212**

**CROSS-EXAMINATION BY MR GIBIAN ..... PN213**

**RE-EXAMINATION BY MR WARD ..... PN314**

**THE WITNESS WITHDREW ..... PN325**

**EXHIBIT #HSU2 STEWARTBROWN REPORT ENDING ON 30/06/2022.. PN329**