



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT O'NEILL
PROFESSOR BAIRD AO
DR L RISSE**

AM2020/99 and others

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

**Application by Ellis & Castieau and Others
(AM2020/99)**

10.02 AM, THURSDAY 14 DECEMBER 2023

Sydney

Continued from 13/12/2023

PN6197

JUSTICE HATCHER: Mr Ward?

PN6198

MR WARD: I'm going to kind of briefly finish off the issues of the evidence. I might then come to the question the Professor asked me yesterday, and I think the presiding member asked me a similar question.

PN6199

JUSTICE HATCHER: I can't hear you, Mr Ward.

PN6200

MR WARD: I apologise. Can you hear me now?

PN6201

JUSTICE HATCHER: I think so.

PN6202

MR WARD: Is that okay.

PN6203

JUSTICE HATCHER: Go ahead.

PN6204

MR WARD: I'll talk up, I apologise.

PN6205

I'll quickly finish off the submissions of the evidence. I'm going to then deal with that question the Professor asked me and I think the presiding member asked me, which really was about differential outcomes, I think, was probably the best way to describe it.

PN6206

Just reasonably quickly, before I get onto classifications then, can I just make a few observations further about the evidence? In relation to medications, we had a truck load of evidence in stage 1, and abundance of evidence in stage 1. I think we've learnt a little bit more, but I'm not sure how helpful it is, and I say that in this sense. We've learnt a little bit about medication shifts, which we hadn't got in the first round. Those shifts might not necessarily be full 7.6 hour shifts, but people are dedicated to doing the medical run.

PN6207

Ms Butler's evidence, on the distinction between assisting and administering medications, I'm not sure is particularly helpful in that she talked about the issue relying on the conscious awareness of the resident in receiving the medications. I'm going to come back to that when I talk about the classification structure in some detail.

PN6208

I would say that we learnt nothing extra about medications in home care. Nothing more in terms of medications homecare, so that's fairly settled from stage 1.

PN6209

In relation to the notion of dementia generally, I don't think last week told us anything new about dementia in the facility and caring about people with dementia, but it did tell us one thing that's new. That is that it's now clear that all employees in a facility receive some form of dementia training. Most of that training was accepted as being around an hour a year, so I don't want to necessarily suggest it is of high quality but at least they do receive some training and Ms Riboldi indicated that that's now mandatory, to reflect the changing demographic. And a number of the indirect care employees, when asked, indicated that that training had assisted them in their engagements with residents who have dementia, so we've learnt that here.

PN6210

I frankly don't discern anything new on palliative care, from the evidence last week at all. So I think that resides with stage 1. And I don't think we learnt anything new last week, in relation to the homemaker or household model, which we had some evidence on, in stage 1. I didn't see anything new on that.

PN6211

Very briefly then turning to the actual streams of activity, I think we should acknowledge this issue in relation to personal care workers interactions with support staff. That is, that we did have evidence, for the first time last week, of facilities seeking these as teams. I don't think that's a controversial notion, most businesses operate with values and see all their employees at teams, but we had practical examples of how that played out, with the notion of the huddle and things of that nature, including both care workers and non care workers.

PN6212

It was clear, from that evidence, that that was to ensure all persons on the shift were sort of broadly informed as to the general state of what's going on but also the state of the residents as well.

PN6213

We also had a number of witnesses, I think Ms Watson was one, which we have to be a little bit careful of. They are persons in support roles but who indicated they did care work. But when you actually look at those people they're actually qualified care workers. I think Ms Watson had a Certificate III and a Certificate IV, so you have to be a little bit careful in assuming that people in support roles are doing care work generally, but it is clear that there might be people in support roles who are otherwise personal care workers who might actually play a kind of blended role in an organisation and I think Ms Watson was the person who came from the country who said that was particularly the case in a small country facility.

PN6214

I don't think we learnt anything particularly new about recreational activity officers. Ms Ellis gave some evidence about her role as a lifestyle coordinator, but I don't think it really developed anything more than what we had in stage 1, which was that the primary qualification for an activity officer was a Certificate IV and that was very clear from the stage 1 evidence.

PN6215

We had 25 home care witnesses in stage 1, we had two more last week and, again, apart from those witnesses talking a little bit about COVID, I don't think we've learnt anything more about home care employees and the actual work performed.

PN6216

I've already talked about laundry and cleaning, in terms of high touch points. I've talked about PPE. I think it should be noted that while it was only one witness, one witness did say that while undertaking laundry work they wear gloves, as part of their ordinary routine. But I would say, that was only one witness who said that, I don't think that was a common theme, in the stage 1 evidence.

PN6217

We did get some evidence last week that some activities in cleaning are outsourced. One of the cleaning witnesses indicated that they have a contractor to do carpet cleaning and they have a contractor to clean outside windows. And I think, from stage 1, there was some evidence about contractors cleaning curtains and things like that. So I don't think there's any uniform evidence about the use of outsourcing of cleaning, but I suspect, in some facilities, some elements of what we might describe as the heavy type cleaning activity might be outsourced to a specialist contractor.

PN6218

I don't think we learnt a dramatically large amount about gardening. I think the actual work activities are pretty much resolved in stage 1. Ms Hood gave evidence that she wasn't required to be qualified when she started. I think she only holds a Certificate II. I don't think that's hugely inconsistent with the stage 1 evidence. I don't think there was much requirement, for instance, for Certificate III gardeners in the stage 1 evidence.

PN6219

We did get evidence last week about residents being involved in gardening activities, in part, as a social activity but my recollection is, at stage 1 we had similar evidence. The Deputy President might remember this when I say it, but the witness who downloaded, 'How to build a garden for people with Alzheimer's', she had talked about the fact that she often will get residents who'd had a love for gardening before the joined the facility actually come along with her and she'd talk them through and engage them in gardening. One of the witnesses last week, though, went a little further and said that some of the more capable residents actually helped her with her work, and that was new.

PN6220

We also had confirmation that some gardening activity might be outsourced, because one of the witnesses indicated that what was called perimeter gardening is outsourced to a contracting party.

PN6221

I don't think we learnt a lot more about administration and clerical activities. I think the witnesses that were called last week were probably confirming, in terms of their evidence, rather than actually anything particularly new.

PN6222

In relation to kitchen and food services, I think we learnt, as I said already, some things new, and I might just go through a few quickly again. It's very clear that, from the first stage of the case, that food services people are very focused on dietary requirements and they're very focused on some people described it as the diary, the book that's kept in the kitchen that actually lists the dietary requirements, which is built from the care plan.

PN6223

We learnt that in some facilities that list is summarised into a simple form and used in more places than just the kitchen, we learnt that. We also learnt that one of the witnesses went as far as to say that they memorise those dietary requirements, although they always periodically go back to the book or the diary to make sure that they're up to date. We had confirmed, last week, that it will ultimately be the responsibility of the registered nurse coming from the care plan to make sure that's correct.

PN6224

We also had some, I think I might have commented on this already, but just for completeness, I think most of the evidence, in stage 1, was that personal care workers took trays to residents' rooms to feed them. We had some evidence last week that food services people might do that, I think the evidence was, 'When, if the personal care workers are too busy, I will help out and I will do it'. The evidence was that when the food services person does that, that they are required to ask or gently encourage the residents sit in their seat in their room. They move the trolley table in front of them, they place the food on the trolley table. There was no evidence last week that the food services person is feeding the resident, and that still seems very much to be the domain of the personal care worker.

PN6225

We learnt something new last week, we learnt about decanting shifts. In stage 1 I think all of the witnesses who gave evidence the food was actually cooked on the facility. And we learnt, last week, that some operations don't cook on the facility but food is brought in. It's then decanted into a general fridge area and then it is moved to the kitchen, or kitchenettes, for reheating as is required. That was new evidence that wasn't in stage 1.

PN6226

I think it's reasonable to say that we also learnt, last week, that some of the work performed by the kitchen hand food services people is unsupervised within routine and my example for that was, and there was evidence a little bit like this in stage 1, you heard food services people talking about making a decision to cook scrambled eggs or a toasty for somebody. There was evidence, in stage 1, that kitchen staff and food services staff can do that, in breakfast, they don't do it in lunch and dinner. But you also got, I think, a little bit more texture in the evidence last week that they're actually involved in making the decision about when to do that for the resident, rather than, perhaps, going to the cook or the registered nurse, or something like that. Within the boundary of that competence they're actually making a decision based on the preference of the resident. 'They're not eating what I gave them this morning, I might quickly make them a toasty', or something like that. So there was clearly some evidence about

the activity but also about some level of autonomy in the actual exercise of that activity.

PN6227

PROF BAIRD: Mr Ward, did you recall that that extra work was sometimes beyond the breakfast service, it could be at other times during the day?

PN6228

MR WARD: I should answer that correctly, Professor. I think it's clear, from stage 1, that kitchen staff and some food staff can be asked to provide food in between breakfast lunch and dinner. I think the stage 1 evidence was, in some facilities they have prepared sandwiches which can be provided. But the evidence, last week, did indicate that, yes, that can also relate to those persons providing some form of, I'm gong to say modest meal, it wouldn't necessarily be a full meal, it might be a sandwich or something like that, in between.

PN6229

I think that's reasonably consistent with the evidence we took in stage 1 rather than, perhaps a sort of new revelation. I think that was there in stage 1.

PN6230

Can I deal with the question which was raised by the Professor and the presiding member about disparate outcomes and I'm going to put this submission with extreme care, given the nature of my instructions.

PN6231

I should start from this proposition, with the exception of the registered nurse, who we've been advocating for certain outcome fall from day 1, my clients have not, at any stage, advanced any submission in relation to quantum. I'm not instructed to do so today. I've apologized to the previous president that that might be unhelpful, I apologise again, but I'm not instructed to put any submissions to quantum.

PN6232

Our written submissions put two propositions in relation to the question of divergence, and I'm focusing mostly on indirect care at this stage. Our client's members have a human resources management issue which they're dealing with and that is that if one part of the support staff gets a different outcome to another part, there will be a natural HR cultural issue that challenges them. My client's members are concerned about that, such that we put that in our submission and we were instructed to put it in. Mr Mamarelis said something very similar in his evidence.

PN6233

However, we acknowledge that that is a human resource management issue, it's not a work value issue and we respect that this is a work value case and therefore we must respect that if the weight of the evidence falls differently on different people, that is what should guide the Commission in its deliberation as to outcome. That's how I wish to answer that question.

PN6234

JUSTICE HATCHER: Is there any evidence that the differential outcome, which has failed to date, has had any effect on attraction or retention of support staff?

PN6235

MR WARD: No, there's no evidence in regard to that at all. No.

PN6236

JUSTICE HATCHER: All right.

PN6237

MR WARD: I'll come to that. Now, can I turn then to classification - - -

PN6238

DEPUTY PRESIDENT O'NEILL: Just before you move off the evidence, could you remind me, in the consensus statement, which is, you know, attached to the stage 1 decision, there's a paragraph in there that talks about indirect care workers and it concludes with that, 'These workers are an important part of the aged care team. Their work necessitates higher levels of skills when compared to similar workers in other sectors or to aged care in the past'. Can you just remind me what your client's position is, in relation to that?

PN6239

MR WARD: Your Honour, can I take that on notice? It is - you'll recall, in stage 1, I had to navigate through that with great care. It's so long since I've read that, I might take that on notice if I can.

PN6240

DEPUTY PRESIDENT O'NEILL: Thanks.

PN6241

MR WARD: In terms of classifications, can we - and I'm not going to labour the classification issue to death, I think the Bench have got their mind around it, I want to deal with some very discrete issues. But can I just start by this proposition? The creation of a classification structure, in our view, is actually informed by section 139(1)(a). It's intriguing that classifications don't get mentioned, in their own right, in section 139. They're actually mentioned in the context of 39(1)(a), which is talking about setting the minimum wages and the inclusion of minimum wages in modern awards. Under the notion of including minimum wages in modern awards, section 139(1)(a) then talks about including classification structures that are skills based classification and career structures. It also talks about incentive arrangements as well.

PN6242

But I just want to say two things about that. Clearly it's not exhaustive but we accept that as a proposition, but it adverts the Commission's attention to this notion of career based classifications and skills based classifications. Our view about that is the fact that it sits within the context of minimum wages, it reinforces something the Bench have been saying in asking questions, over the last two and a half days, and that is the job here is to set the rate and then to make sure that the classification description is sufficiently appropriate so that when the employer

classifies somebody it's relevant to the work they're performing and they get the right rate. In that sense, the tail shouldn't wag the dog, the dog wags the tail.

PN6243

In our effort, and I'm going to accept straightaway that I suspect the Bench can criticise everybody's effort, perhaps not equally but the Bench would criticise everybody's effort. We've tried to emphasise skill and competency. We've tried to emphasise progression where there are changes in skill and competency and where there are changes in discretion, autonomy, and responsibility.

PN6244

Now, it could be put against us that we haven't done a very good job, that's possible. But that is the theme that we followed and I suspect, if one lines the three proposals up, certainly for care workers, it will be true to say that we're much closer to how the nurses have done theirs, rather than the HSU.

PN6245

We do accept that classification structures are, one way of putting it, part science and part art. From other proceedings I'm very conscious that different people have different styles that they prefer, in terms of drafting.

PN6246

I want to make a couple of propositions that we say you have to avoid, you must avoid. The first proposition I say you must avoid and you must be vigilant to avoid, is creating a situation where the employee gets a work value increase and then, through the device of the structure, gets a further increase on top of the work value increase that is not based on work value.

PN6247

I won't want to whale on the HSU about this, but I want to draw two examples of how that arises in what the HSU's proposed. I don't know – the HSU handed up this document the other day, I don't know if the Bench still have it. This is the document where his Honour, the presiding member, said 'Why can't we just put that in the award?'

PN6248

I want to start by explaining - we can do many of these, I won't because it will bore the Bench, so the way one of these works is the 34 per cent wage increase proposed. I'm going to explain how that happens.

PN6249

At the moment, if I am a Certificate III employee, under personal care worker, I'll be a level 4 in the award. At the moment that entitles me to assist and, frankly, administer medications, as long as the registered nurse has signed me off, and I can be paid as a Certificate III.

PN6250

The HSU's proposal, if one goes to level 5 in that document, is that their level 5 actually now includes medical competency. So what will happen with my current Certificate III person paid at level 4 doing medications is they get the 15 per cent, if they win their claim they get the 10 per cent and we haven't looked, but this is

now set at 109 per cent, so they actually get reclassified and get another 9 per cent.

PN6251

JUSTICE HATCHER: Can you just explain the current position? What qualification do they need to administer medication and still be a level 4?

PN6252

MR WARD: They need a Certificate III, they do not need a formal unit of competency from the Certificate IV, they simply need the registered nurse to authorise them. In the first part of the case there was a variety of evidence about in-house programs that people ran to make people medication competent. I'm happy if we need to get references for that, to get them. The Vice President is nodding yes. Some of those were like three day in-house courses and then the RN would assess the competency. Some of them went for a little longer. So at this stage you just simply could be a Cert III personal care worker who's been signed off by the RN and paid as a Cert III person.

PN6253

VICE PRESIDENT ASBURY: Is that the administer competency, or the higher level, because there's two levels of - - -

PN6254

MR WARD: Your Honour, I accept that, but the evidence from stage 1 didn't draw that distinction, in any neat way. The evidence from stage 1 is they are Certificate III people who have been signed off as medically competent were prompting, were sometimes crushing the pill up and mixing it in the custard, as a variety of witness talked about how they would feed the spoon to the resident.

PN6255

VICE PRESIDENT ASBURY: So it could be either.

PN6256

MR WARD: Could be either.

PN6257

JUSTICE HATCHER: It doesn't involve any unit of competency?

PN6258

MR WARD: No. No.

PN6259

VICE PRESIDENT ASBURY: And it's not safe to assume that it's equivalent to the administering medication module?

PN6260

MR WARD: Well, I couldn't say yes to that, unless we forensically examined how some of these people did these in-house programs.

PN6261

VICE PRESIDENT ASBURY: Well, assuming it is, Mr Ward, given administering medication is something that's regulated to some degree, assuming

that it is equivalent to the module, this is, again, maybe I've been doing this for too long, but this is like - this is like a special class issue, back in the - when the metal industry award classification structure came in, that some C10 employees have already some of the competencies of the next level - - -

PN6262

MR WARD: So they would have pneumatic competency as - - -

PN6263

VICE PRESIDENT ASBURY: - - - as part of their C10 qualification. So it was just how you drew the line, so whether it was in an additional competency or it was part of what they already had and therefore they couldn't double count it.

PN6264

MR WARD: Can I hold that question? I'm going to come back and answer that question specifically, when I come to talk about what we propose?

PN6265

VICE PRESIDENT ASBURY: Yes, okay.

PN6266

MR WARD: The point I'm making here is simply this, that, in reality, the way the HSU has proposed this, that Cert III person today is being paid a level 4. There's evidence, in stage 1, that that's the case.

PN6267

JUSTICE HATCHER: So under the HSU they go up to grade 5, so if we granted the full claim, they get 25 plus 9 per cent.

PN6268

MR WARD: Exactly right. And we say that can't happen, properly shouldn't happen, it can't happen. If you accept that that's 34 per cent, that would mean you'd have to accept that there's a work value basis for giving those people - a value basis for giving those people at 34 per cent wage increase.

PN6269

VICE PRESIDENT ASBURY: Then your clients might have a bigger HR issue than they contemplated, because you could have some employees who have the medication competency already, as part of their initial Cert III and some who don't and who require it and so you could have, arguably, a different outcome for the same work.

PN6270

MR WARD: I'm not suggesting there's an easy way out of this, although I'm going to propose a way out of it. There's not an easy way.

PN6271

VICE PRESIDENT ASBURY: I'll wait with bated breath, Mr Ward, for your proposal.

PN6272

MR WARD: Please do. Please do. You might not be enamoured by what I'm going to suggest but I suspect I'm somewhere along the lines that your Honour is thinking.

PN6273

My client's great concern about that isn't the HR issue, it's that Mr Chin's client isn't going to fund it because it's outside of the 25 per cent claim and Mr Chin's submission's already said, on behalf of his client, they're only funding up to the claim.

PN6274

MR CHIN: That's not right.

PN6275

MR WARD: I apologise, I'm wrong on that. I'm wrong on that. But the point I'm making is, is that you can't give somebody a 34 per cent wage increase without finding there's work value basis given on the 34 per cent wage increase. Now, it gets - - -

PN6276

DEPUTY PRESIDENT O'NEILL: Does the same logic apply to giving them an allowance, which is your client's proposal?

PN6277

MR WARD: Yes. If you're going to give them an allowance, and I threw it on the floor yesterday, there's a decision of the Commission, I think the presiding member might have been a member of the Bench, in the Pastoral Award, about a crutching allowance, I think your Honour might remember it, and there was a view - I'm happy to get the authority - - -

PN6278

JUSTICE HATCHER: I don't know what crutching is?

PN6279

MR WARD: I think you headed the Bench, your Honour, you might have forgotten, but the general view the Bench took was that if it is a work related allowance, yes, there would need to be a work value justification for it. I'm happy to get that authority.

PN6280

So that's what we want to start with, you don't get the work value increase and then you don't get a cute increase because you've been cleverly reclassified on top of that. That has to be part of the work value equation.

PN6281

I just want to hand up another document, this very much replicates what the nurses did, but we're going to do it ourselves. We think that part of the problem also then is structural in how the HSU have actually worked out the relativities.

PN6282

Now, I've done one for aged care, which is the front one, I've done one for home care at the back. The home care one is a little bit more challenging because you have to do an alignment exercise. It's much easier for residential. But if you look at this document, and I'll take you to the bottom first, which is the general category, the support staff, what we've identified there, in the far left column for general, is the current rate of pay. So, for instance, if you take level 7, it's \$1103.60 and the equivalent rate of pay, in their claim, is \$1683.20 which, on any mathematical basis, is a 52 per cent increase. It's a 52 per cent increase. It's not a 25 per cent claim anymore.

PN6283

That arises because, and I'm not saying this is mischief, it's not, that arises because they're banking the claim and then they've completely rejigged the relativities and the banking relativities. They're banking the relativities.

PN6284

SPEAKER: (Indistinct words).

PN6285

MR WARD: No, I just said, there's no mischief. No, I'm not. There's no criticism of the HSU for - - -

PN6286

JUSTICE HATCHER: It might be structural efficiency.

PN6287

MR WARD: Well, it's certainly interesting. It's certainly interesting. We've done a similar exercise, at the top, for the aged care employee. We've taken the rate, as it currently is today, with the 15 per cent and the first column, with green numbers, tells you what the new rate would be, if they get what they want. So level 7 is actually an extra 32 per cent and the last column then is 15 per cent plus the new version. So, again, their claim for personal care workers, inclusive of the 15 per cent, ranges from 25 per cent to 47.63.

PN6288

So to put it fairly to you, if you're going to entertain their claim through their structure, with their relativities, you're contemplating a work value claim that ranges from 25 per cent through to 52.52 per cent. And you would have to find work value reasons to get that, you can't simply say, 'Here's 10 per cent for work value and by the way we accept some people might get another 15 through the structure'. With respect, that can't be done, it has to be based on work value. So that's the first thing we say you shouldn't do. In fact, we go further and say you can't do.

PN6289

In relation to the wording of the structure, we just want to make this comment, resolving undervaluation is the job you do, it's the job the Bench do. You don't have to write a classification structure to embed into it the reasoning and ratio of the undervaluation propositions, which is something, when I took the Professors to that, they said they were trying to do. That's something that's dealt with in your decision and it's dealt with in the ratio of your decision.

PN6290

The third proposition which we join the Nurses Union on, is the classification structure shouldn't be based on the condition of the resident or the client. The HSU structure seems to be essentially premised on that description of work which then didn't describe the work but described, in large measure, the condition of the resident or client. That is, whether or not they were competent to make decisions for themselves or not and a variety of other factors.

PN6291

VICE PRESIDENT ASBURY: But it could be based on the ability of the care worker to deal with a person who is or is not cognitive and the mix of those in the care of the particular resident, so that the employers will have to make a decision, on the basis of the care minute requirements, what mix of people they have so they can deliver the minutes that they're required to deliver, based on the mix of residents they've got.

PN6292

MR WARD: Well, at the moment the way that system works, and I'm conscious of the cross-examination of Ms Butler to that, the way that system works is this, the residents are classified into one to 13 categories, that's in J18 to 23. I note, before I keep going in the answer, that the language of those categories is entirely different to the language the HSU uses. The rules that the operator then operates with are the ones your Honour just talked about, which is care minutes. The only two propositions that arise from that are, firstly, there must be a certain number of care minutes that are specific for the registered nurse and then it's up to the operator, subject to the care plan, to decide who they employ and how they deploy resources to take care of the others. We might describe that as it's the operator who chooses the care model within that constraint, within that constraint.

PN6293

VICE PRESIDENT ASBURY: But if they've got a group of residents who – if they've got a percentage of residents in a particular wing, ward, cottage, home care situation, however they divide them up, and on an objective basis you can look at the level of acuity of those residents, based on this scale, and the people that are caring for - so let's say a lot of them are not cognitive, or a significant proportion of them are not cognitive, if all your personal care workers are not skilled with the dementia qualification or something that's at a higher level, then you can't possibly be providing the required care minutes.

PN6294

MR WARD: Your Honour, it's a matter for the employer to determine the care model within those constraints.

PN6295

VICE PRESIDENT ASBURY: That's right.

PN6296

MR WARD: It's not a matter for the classification structure to dictate the care model.

PN6297

VICE PRESIDENT ASBURY: No, but if your clients don't staff the care model appropriately, then the employees who are classified will be entitled to say, 'We're caring for residents with acuity that's higher than the level we're being paid at, and there, mathematically, are not enough of us to do that, so we can't possibly be being correctly paid if you're complying with your obligations to provide the care'.

PN6298

MR WARD: Being correctly paid is determined by the language of the classification structure one's looking at. But, clearly, the employer will determine what combination of resources, in a facility or a wing of facility are required. What we don't like about the HSU's proposal is it dictates that and we don't believe that the structure should dictate the care model, that's a matter for the employer, under the care plan.

PN6299

To give a very fast example of that, if I can, I'm sure I had an example.

PN6300

JUSTICE HATCHER: But on that point, your proposed structure, unless you've got a Certificate IV, your proposed structure puts everyone at level 4, regardless of the level of acuity they're dealing with?

PN6301

MR WARD: I don't understand why your Honour says that.

PN6302

JUSTICE HATCHER: Well, I'm asking you.

PN6303

MR WARD: No. Our structure would have people at Certificate III, it would have people at Certificate IV. We've got a proposition of a Certificate III experienced person in our structure. The employer would employ and deploy those people as they saw appropriate. That might differ, depending on not just the cognitive state of the resident. It might differ, depending on the level of mobility of the resident or whatever. Our structure - - -

PN6304

JUSTICE HATCHER: Can I just check I'm looking at the right document, so that - I'm at page - - -

PN6305

MR WARD: Two-four-five-nine?

PN6306

JUSTICE HATCHER: Yes. So for direct care, so level 4 is Certificate III, is that right, or is that level 3?

PN6307

MR WARD: It's level 3, your Honour.

PN6308

JUSTICE HATCHER: Level 3. I see. So level 4, that's Certificate III plus three years - - -

PN6309

MR WARD: Experience at that level.

PN6310

JUSTICE HATCHER: Then level 5 is Certificate IV?

PN6311

MR WARD: Correct, your Honour, that's how we've proposed it.

PN6312

JUSTICE HATCHER: But if you've got a Certificate III and you've got under three years experience, but you're dealing with persons in palliative care or with dementia, you stay at level 3?

PN6313

MR WARD: In terms of the structure, yes. I'm going to come onto whether or not they should get something more in a moment. I'll explain the difficulty of why we say there's a problem with all that in a moment. But, yes, the answer to your Honour's question is, 'Yes'. I'll leave it for later because I'll deal with it all in one go.

PN6314

The challenge we have when we read the HSU's proposal goes something like this. You could have a 10-winged part of the facility, we could have nine residents who fit the description of work at level 2. I could have one resident who fits the description of work at level 5, that's where the resident is incapable of making choices and the like and straightaway that means I've always got to have a level 5 person - sorry, I've always got to have somebody at that level 5 employed there all the time, whether or not that's actually necessary or part of my blended workforce plan, or whatever.

PN6315

So what we don't like is that their structure seems to be driven by subjective evaluation of the resident. The language used is not linked to the 13 categories, and it's really the structure dictating the care model, rather than the employer discharging the model of care appropriately in the context of the care plan and their overarching obligations. That's why we're not enamoured by the HSU's proposal.

PN6316

VICE PRESIDENT ASBURY: Mr Ward, if you've got that scenario and you have one resident that requires a higher level of care and care that's at a higher level of the structure, and you have rostered personal care workers who don't hold the qualification or have the skills to deliver that level of care, you don't have at least, mathematically, enough of them to deliver the care minutes that that particular resident requires, assuming you're not going to have the RN doing every part of the minutes, or whatever, you're going to have to have somebody who's allocated to that part of the operation, surely, or comes from - you're going to have

to say, 'Well, they're going to come here'. Well, how can you comply with the requirement to deliver care minutes to a resident with a higher level of acuity, if you don't have somebody that you can point to and say, 'It was that person that we were allocating for those care minutes'.

PN6317

MR WARD: Well, the first thing I'm going to say, your Honour, is we need to be very careful about our language here. I don't say that disrespectfully.

PN6318

VICE PRESIDENT ASBURY: No.

PN6319

MR WARD: But the language that they use in their structure is not aligned to the language in the 1 to 13 categories. So I don't want to immediately assume that this person is in one of the more challenging categories where they're immobile, they're heavily cognitively impaired, none of that language is appearing in the HSU's proposal. So I have a very real anxiety about that.

PN6320

VICE PRESIDENT ASBURY: But I think that that language is, because in the definitions that the HSU is proposing, it's referring to people who may be cognitive, people who are not cognitive. It goes up the scale, which was the point I was asking about a few days ago.

PN6321

MR WARD: Well, your Honour, all I can say is, respectfully, if one reads the language in JE18, that I've referenced to, I don't want to go down a rabbit warren with this, but it's not the language the HSU provides. But a general proposition is the same as nurses. We don't believe the structure should dictate the care model, that's a matter for the employer. I'm just content to leave it at that.

PN6322

JUSTICE HATCHER: Are there some people who are currently at level 4, in the current structure, who would immediately qualify for level 4 in your structure? I would have thought there must be.

PN6323

MR WARD: The answer to that is, 'Yes', but that would have to be justified on a work value basis. The only other place where we've suggested a rate, other than the nurses rate, that's above the current rate, is in relation to that.

PN6324

JUSTICE HATCHER: So what's your relativity of grade level 4?

PN6325

MR WARD: We've put that person in between Cert III and Cert IV.

PN6326

JUSTICE HATCHER: So what's the wage relativity?

PN6327

MR WARD: Bear with me, your Honour. Our grade 4 is 103.4 per cent.

PN6328

JUSTICE HATCHER: Thank you.

PN6329

MR WARD: I think it was clear, from our cross-examination of the Professors, some of the other criticisms we had of the HSU's proposal. I don't want to, in any way, diminish the standing of the Professors, but respectfully to them, they are clearly experts in many things. I'm not entirely sure we can comfortably say they're experts in drafting classification structures, but I don't want to say that to be offensive to them.

PN6330

We have issues with the sheer size of it and it's complexity. The Nurses Union have gone to that, it's some 20 pages long. The fact that there is a proposition in every classification called 'Description of work', which, on our reading, doesn't really seem to describe the work. It's predominantly about the nature of the resident is misleading. They have a category called 'Environment' that, on our cross-examination, demonstrates that most of those propositions are not so much about the environment but actually are a description of the work. So apparently the environment includes things like cleaning. All of that creates a vagueness which the Commission shouldn't be particularly attracted to.

PN6331

Now, I wanted to deal with a couple of issues that I think have come out of the Bench, about classifications. In some ways I'm going to deal with what the nurses have said as well, but I want to talk about some topics which we think are useful or challenging to deal with and I'm going to come to your Honour Vice President's question about medications.

PN6332

I just want to start, firstly, with technology. I think the more we thought about technology we're not inclined to think that technology is a particularly useful discriminator within a classification structure, if we're talking about using iPads, talking about using smart phones. I just don't see the role of it. It's very clear that this is a common usage thing, the majority of people are using them, they're a device to replace paperwork. The distinction I might draw there, I appreciate that I'm not using one, Your Honour, I appreciate that.

PN6333

VICE PRESIDENT ASBURY: We're all using them, Mr Ward.

PN6334

MR WARD: I might draw a slight distinction there with some of the administration activities because some of the administration activities are more about the software one uses, rather than the actual device. But the first thing I want to say is, I'm not really sure technology is a particularly useful discriminator.

PN6335

VICE PRESIDENT ASBURY: Because it can change exponentially and - - -

PN6336

MR WARD: Well, it's also - even though people keep - I mean everybody seems to complain about technology, including the Commission yesterday complaining about technology working, but it's part of our life and if you think about people - we had the person talking about the Blink App on their smart phone. It's so inherent in how we work today in all sorts of areas that I just don't think it really is a useful discriminator. To say somebody uses their smart phone a little more better than somebody else, or they might be able to use a feature on the Blink App a little bit differently to somebody else, that really doesn't get us very far in terms of discriminating in work and how we classify people.

PN6337

I want to perhaps try, with some anxiety, deal with medication. We've got to find a solution to this. We've got to find a solution. And I don't think the solution is going to be, necessarily, a simple one or, necessarily, one that makes everybody happy, but I'm somewhat attracted to the commentary from the Vice President about how we might find a solution for this, and that is this.

PN6338

If one is a Certificate III employee and one has obtained the Certificate IV administration module and is exercising that competency, that might be the answer for when somebody gets, on work value grounds, something more. I think it's difficult - - -

PN6339

JUSTICE HATCHER: But does that, when it plays out to the worker, actually do make a difference between somebody who's done that module and somebody who, as you've said before, has just been authorised by the RN?

PN6340

MR WARD: This is why I say I think it's not easy to answer. I think the first thing I'm going to say about that is, I can't see why somebody is getting more because this is part of the Cert III. And what I mean by that is assisting with medications is just part of Cert III. It might be that you do the module in your Cert III, it might be that you don't, but it's a Cert III level activity. So the idea that you get more, that troubles me.

PN6341

If you're going to get more, and the Commission was minded to try and give more for this, I think it has to be on the basis that you've got that Certificate IV module. I don't think that's a wholly satisfactory answer, because a number of people are probably going to be administering medications today without that module, but if you have that module it does demonstrate that you have an assessed competency, to a nationally recognised standard, in what you're doing.

PN6342

VICE PRESIDENT ASBURY: Well, there's no reason why people who have been - I'm assuming that RNs aren't going to go around and blithely say that

people are authorised, on their watch, to administer medication, so why couldn't we assume that a person who has been authorised internally wouldn't be able to have their prior learning recognised against the Cert IV competency, in any event?

PN6343

MR WARD: Well, again, that's about how one might express it. If the person is recognised as operating at that level of competency, then I don't cavil with that as a proposition because all awards acknowledge you could have formal certification or be recognised to have sufficient experience to operate at that level. I don't cavil with that. But it would be targeting the reference to experience to that actual level of certification, rather than just some generic proposition about medications. Because if you just had a generic proposition I'm back with the HSUs proposal, which might mean - if you get a work value increase, how do you want to spend the money? Do you want to spend it here or do you want to spend it somewhere else?

PN6344

VICE PRESIDENT ASBURY: Well, eventually, employers will make that decision and they will structure their training and their skill requirements to meet their needs. So employers will be entitled to say, 'We want to build a Cert III that looks like this and has the medication competency in the Cert III', and other employers will say, 'We want the medication competency, plus we want dementia, plus we want palliative care' and theirs will come out at a Cert IV. That's what will happen over time, but I accept we have to deal with the here and now, in terms of a work value claim. But over time that problem will work itself out, as it has everywhere else, where this competency based approach has come into effect.

PN6345

MR WARD: I accept that. I think the proposition I'm trying to put is this, and I'll come to dementia in a minute. The Commission can deal with the medications issue in one of two ways, as we said. It could form the view that it's ever present today, for a number of care workers, and therefore, in making a work value evaluation it could say, 'Look, we're going to add an extra percentage on to Certificate III generally, because of that'. It could do that. Or it could say, 'We want to target this as a proposition and for people who are exercising that particularly competency we want to give them some more money, based on work value grounds', and what we're then debating is, 'How do you describe what you're doing to get that', and all we've said today, given how challenging this area is, that that alignment, really in our view, needs to be to the Certificate IV administration level, not an earlier level.

PN6346

Respectfully I think the issue with palliative care and dementia is even more complicated. The reason why I say that, can I take the Bench to JE20? So, in waiting to go to that, can I just say that the reference in O'Neill DP's report to the whole med comp issue is found at 601 of the report, the report to the Full Bench.

PN6347

JE20 is the Certificate III in individual support. If the Bench opens it up, the Bench will see, on the left-hand side, that you need 15 units, packaging rules, 15 units. This is curiously worded, I didn't word it. There's nine core units. There's

six electives, but if you're going to specialise in ageing, there's mandatory electives. The mandatory electives are in what's called Group A, on page 3 of 5. And you'll see there that if you're going to specialise in aging, three of your mandatory electives, two of them are relevant, one is CHCAGE011, 'Providing support to people living with dementia', and one is CHCPAL002, 'Delivering care services using palliative care'.

PN6348

I'm not saying that to be mischievous but the challenge we've got here is that, one, we accept, as a general proposition that the majority of persons in aged care, leave home care aside for a minute, in aged care suffer from some form of dementia, and there's a very large rate. But the evidence, in stage 1, was the majority do. I think that's uncontroversial.

PN6349

The evidence is, is that the level of death in aged care facilities is tracking at about a third of the cohort, which is very sad. My point is, is that, one, people are, with a Certificate III today, working with people with dementia, working with people with dementia satisfactorily, being involved in palliative care. Palliative care gets even more complicated because at a certain point the role of the registered nurse and GP becomes considerably more involved because we are dealing there with schedule 8 medications, such as morphines and the like. But also the Certificate III level, if you're going to specialise in aged care, contemplates the necessity to be competent in dealing with people with dementia and palliative care.

PN6350

So the point I'm trying to make is, is that simply saying in a classification structure, a little bit like the nurses did, that you move up a level because you're dealing with people with dementia, I'm sorry, it's just too cute, because everybody deals with them.

PN6351

VICE PRESIDENT ASBURY: But you had a classification structure that said Cert III plus a recognised module in Cert IV, and it was based on, 'If you've already got it'. So assuming, and I don't know because I haven't looked at this, Mr Ward, but assuming that the, 'Provide support to people living with dementia and the deliver care services using a palliative approach', if the person's already got that, and they're using it in the workplace, then they're not going to go up a level. If you have a properly worded classification structure they're not going to go up a level for having that, they're going to go up a level if they don't have it, they were not required to use it and then they are. So they're now required to look after people with dementia, so they have to acquire it as an additional, and then it's towards a Cert IV.

PN6352

But if they already have it in their Cert III, then I agree, that that's part of the base Cert III qualification. But some of these modules might be, for some people, they'll do them in their Cert IV, because they didn't do them in their Cert III. It depends on how you write - so what you're saying is, we have to identify what competencies belong at what level.

PN6353

MR WARD: Well, what I'm saying is, is that you can't simply put in a classification structure to jump a level working with dementia. You just can't. It doesn't reflect the competency framework in the industry. It doesn't reflect the reality of where people are currently classified and being paid working with dementia. I'll end up with the same problem we've got with the HSU and their big sheet, where people will get a work value increase and then artificially jump a classification because of, with respect, some loose language.

PN6354

VICE PRESIDENT ASBURY: So I'm assuming that somewhere there are higher level modules dealing with dementia and palliative care - - -

PN6355

MR WARD: In Certificate IV there are. In Certificate IV there are.

PN6356

VICE PRESIDENT ASBURY: - - - at Certificate IV, yes.

PN6357

MR WARD: Absolutely. And Mr Hartley might, at some point, say that it's higher again when you're dealing with the scope of practice of an enrolled nurse or a registered nurse who's specialised in aging.

PN6358

PROF BAIRD: Is a further complication that the Cert III dealing with dementia and palliative care, those two units, are part of an elective package? So you could have Cert III workers, some of who have done that and some haven't done that?

PN6359

MR WARD: Absolutely, Professor, and I think - perhaps I'm not being very helpful, I think it's even more complicated than that, in that you might have people who did their Cert III 10 years ago, when they had none of this in there. You might have somebody who specialised in disability, if they're the only care worker the facility can get it will take them, and they've perhaps had to almost ease them into this so they gain experience.

PN6360

This is why the language one uses in the structure and what one is saying defines the differences is important. I'll give an example where it might be very obvious that there's a difference in work activity, and I'll give this answer. If you had a facility and you had a wing of a facility that was a secure dementia ward for advanced dementia residents, so that might have issues of quite severe cognitive impairment, there might be mobility issues and the like, that would really be easy to isolate because you could say, 'If somebody's working in there full-time, it's, by definition, what they're being exposed to is at a higher order'. So that wouldn't trouble us if that was a view the Bench took.

PN6361

It's what we might describe as how dementia plays out in the general population is something that's troubling us and how one then writes a structure and what then

the effect of that is, on the wage outcome. And I get back to what I said earlier, which is I don't want to see a situation where we get a work value increase and then a reclassification increase is not justified on work value grounds.

PN6362

VICE PRESIDENT ASBURY: So what you're effectively saying is that a Cert III includes competencies associated with working with dementia, administering medications - - -

PN6363

MR WARD: Assisting with medications.

PN6364

VICE PRESIDENT ASBURY: Assisting with administering medications and that we can't build it so that that can - that automatically is a jump up?

PN6365

MR WARD: Yes, unless you've going to make a work value finding, and because of that finding you're then going to work backwards and write a classification structure, then you've got to understand what the total cost of that's going to be, in the context of work value. Because it might not just be that 'You're going, here's 10 per cent', it might be you accept, 'Here's 10 per cent but because half the industry is going to move, it's actually 25 per cent'. That's what we're - - -

PN6366

JUSTICE HATCHER: So under your proposal, if you worked, as distinct from us dealing with some patients with dementia, if you worked in a specialist dementia unit or a specialist palliative care unit, where it would be presumed you have a Certificate IV and you'll be in grade 5, in your proposal?

PN6367

MR WARD: That was our presumption or, in the absence of that, if you were a Certificate III we said there should be some sort of allowance for that.

PN6368

JUSTICE HATCHER: Some equivalency.

PN6369

MR WARD: Some equivalency, yes.

PN6370

VICE PRESIDENT ASBURY: Or your working towards that higher level.

PN6371

MR WARD: Well, your Honour's now bringing me back to the C10 plus this unit and that unit. If that's where the Bench lands, well that's where the Bench lands. I'm not advancing that - - -

PN6372

VICE PRESIDENT ASBURY: It's not your preferred - - -

PN6373

MR WARD: - - - but I understand the theory of it. I understand the theory of it.

PN6374

VICE PRESIDENT ASBURY: Yes.

PN6375

MR WARD: But, again, your Honour, that would be - you'd need some - for instance, in palliative care it's very hard because I don't think the evidence is that there's a palliative care wing. There was some evidence about secure dementia wings for advanced dementia, in stage 1. But, yes, it would be a stage 4 proposition. But just because a Certificate III person is involved with somebody who is palliating, we don't believe that simply jumps you up to a Certificate IV, no. No.

PN6376

Can I then talk about the splitting of the structures? We've proposed that you have separation between care workers and non care workers. We saw this as an entirely uncontroversial idea. It's quite common, in modern awards, to have streams. The most obvious award to draw a parallel from is the hospitality award, which has streams for kitchen people, it has streams for food services people, and the like. We didn't think it was a particularly controversial idea.

PN6377

By splitting the streams, in our view, it just made it more readable and more easy to access. I'll talk about our supported proposal in a moment. So we thought splitting was just a sensible, pragmatic way. There's two ways you could split, in terms of support functions. You could actually have one for gardeners, one for maintenance, one for food services, one for the cleaner, one for the laundry. I'll confess, when we originally drafted ours that's how we drafted it. Our proposal, instead, has tried to reflect that I've called the job families that the evidence generally supports.

PN6378

The driver, the driver, we're not sure about, there was very little evidence on the drivers so we'll chuck the driver in somewhere. But it's very clear that cleaning and laundry tend to operate up to a particular manager. It seems to be clear, in the evidence, that maintenance and gardening tend to move up into a manager, so we've said we should split them and then into this kind of job family grouping, which seemed to make some logical sense. But we think having separate structures will aid in their readability and therefore their application. There are also some distinctions which we'll come to very quickly.

PN6379

I don't want to deal - because your Honour took me to our structure proposal, I just want to make one comment about - sorry, I withdraw that. I want to make a couple of comments about our proposal. One of the compression problems one has in dealing with residential aged care and home care to a lesser extent, but certainly residential care, is the entry level is already higher than most modern awards. Most modern awards enter at C14 or C13, the entry level, historically, in aged care, has been much closer to C12. So that creates a natural compression straightaway.

PN6380

In our proposal, even though if we were being purists, we probably go to C14 or C13, we kept it close to C12 in our proposal, on the basis that nobody goes backwards. That's proposition number 1.

PN6381

We have included in our proposal the Certificate III experienced person. That would have to be justified on work value grounds. There was some evidence of a view that that was important. In stage 1 several of the employer witnesses said that after about three years somebody with a Certificate III was actually applying the competencies at a greater level than somebody who had come in earlier than that. So we've proposed that the Certificate III plus three years be an intermediary step between Cert III and Cert IV.

PN6382

I don't suggest that that evidence was overwhelming, I can't do that, but there was some evidence of that. That's not entirely inconsistent with some of the themes from the teacher's case, about the person gaining accreditation and then after a period of three years being more proficient in the application of those competencies.

PN6383

JUSTICE HATCHER: So this is level 4?

PN6384

MR WARD: Yes, your Honour, it is.

PN6385

JUSTICE HATCHER: What page is the definition of that at?

PN6386

MR WARD: Your Honour, Ms Rafter will get that for me.

PN6387

MS RAFTER: Two-four-six-three.

PN6388

MR WARD: Two-four-six-three in the court book, your Honour.

PN6389

PROF BAIRD: You're talking about direct care and not support workers?

PN6390

MR WARD: Yes, I'm talking about direct care, yes.

PN6391

JUSTICE HATCHER: I thought you were talking about support workers.

PN6392

MR WARD: No, sorry, your Honour, that's direct care. My apologies.

PN6393

PROF BAIRD: With the support workers you jumped through that very quickly, that was - - -

PN6394

MR WARD: I'm going to come back, I'm about to jump but I'm happy to take question, Professor.

PN6395

PROF BAIRD: No, no I'll wait.

PN6396

MR WARD: With the support worker structure I think - sorry, I'll withdraw that. In terms of care work, we've pegged the team leader person, and we might be criticised for how we've worded this, but we pegged that at the Certificate IV level. One of the reasons we did that is the evidence, in stage 1, demonstrated that some people who were described as team leaders are Certificate III qualified, not Certificate IV qualified. And the team leader role, one has to be careful about the title, I think all the evidence supports that it's effectively, and I don't say this pejoratively, a modern leading hand type role. That is, the team leader works within the team. They're still performing but they have this guiding, mentoring role of the team. It was clear that some team leaders, for one way of putting it, are the first point of contact before one goes to the EN and RN, we accept that. But we didn't take them out, we've pegged them at Certificate IV because, in our view, many of them were already Certificate III team leaders. That's why we did that.

PN6397

In terms of support workers - - -

PN6398

JUSTICE HATCHER: Sorry, just before you move on, are there any personal care workers who do work at an equivalent or comparable level to an enrolled nurse?

PN6399

MR WARD: No. No. Mr Hartley might shoot me at very quick look if I said anything else. The answer to that has to be no, for this reason. The enrolled nurse, a lot of the evidence in this case is that the enrolled nurse played the role of the team leader. That was very consistent in stage 1. It was sometimes described as the conduit between the registered nurse and the care workers but the evidence has to support this proposition. The enrolled nurse does more than that.

PN6400

The enrolled nurse has a capacity, within this scope of practice, to do a variety of clinical functions, and I'm going to be careful when I say, 'independently of the RN'. That is, they're still working under the general supervision of the RN but they do have some ability to exercise a variety of clinical functions without necessarily simply going back to the RN to ask permission.

PN6401

So I think you have to accept the enrolled nurse, even if they're a team leader, their role sits above that Certificate IV type level, it sits above it. It sits above it.

PN6402

In relation to the support workers, we basically followed a relatively benign approach of entry level, below Cert III to Cert III. For some levels we've added the additional Cert IV level, because in some levels, from the stage 1 evidence, it was clear that there were some people operating at a team leader level. For some, in our proposal, we haven't gone above Cert III and we have to acknowledge that might now be flawed.

PN6403

We had, by way of example - so in our proposal we proposed the gardener stops at Cert III, the majority of gardeners that were in this case don't have a Cert III but they operate below that level. Some have a Cert III, some are paid at Cert III equivalent. The reason why we stopped at Cert III was, in the stage 1 evidence, it seemed to us that above the gardener was a manager role. I have to accept that last week there was some evidence that that's not always the case, that in some of the bigger facilities there's actually an employee of some form, not necessarily defined as management, sitting above that, so we accept that there might need to be, above that Cert III level, a Cert IV level.

PN6404

The same with how we've dealt with laundry and cleaning as well. We had thought that it capped out and that one then had management supervisors above that, but the evidence last week, from some of the larger facilities, was it's an award covered employee who sits above that level. So to the extent that we've not included, in our support structure, something above Cert III, it seems that that is flawed, based on the evidence from last week, and there would need to be something above that to comprehend that team leader type role.

PN6405

Other than that, we basically followed a very simple recipe in maintaining the C12 entry level for support workers, which is, as I said, it's higher than normal but we've maintained it. Operating the Certificate III it's the C10 level and to the extent that there's an intermediary, we tried to place them in between but we accept there's not much room. It's not because C10's wrong, it's just that the entry level is so high.

PN6406

That's all I was going to say about classifications, unless there were questions.

PN6407

JUSTICE HATCHER: Are you going to come and address us separately on the assistant and nursing question?

PN6408

MR WARD: I was hoping to avoid that one, your Honour. Yes, can I do that at the end, is that satisfactory?

PN6409

JUSTICE HATCHER: All right. Yes.

PN6410

VICE PRESIDENT ASBURY: And don't think we'll forget.

PN6411

MR WARD: I lost the bet, I hoped you had. I'll deal with that at the end. I was going to deal with a couple of nurses issues at the end.

PN6412

Can I come to home care? Now, let's just start by saying that we are vehemently opposed to what's been proposed by the HSU, that is, the movement of part of the home care sector out of the SCHADS Award into the Residential Aged Care Award.

PN6413

I want to advance these arguments in support of that, if the Bench just bears with me. In terms of the history, and I'm happy to get a reference for this. I neglected - I've left the folder back in my office. In terms of the history of award modernisation, there actually is a draft, in the Residential Aged Care stream, which included home care for aged people. There's actually a draft in it. I'll get a reference for the Bench on that. It's in transcript, it's not actually in a decision, but we found that.

PN6414

As to how that got taken out, and the home care sector proper being put where it was, I have to be honest, that's magic art stuff. We've read the transcripts, we can't see a lot that really helps with that. At some point that seemed to be accepted by the parties, across both streams. But we do acknowledge that, at least very early on in award modernisation, in terms of the history, there was a proposition that home care for aged people should be in residential care.

PN6415

Firstly, can I say this, there is such a thing as the home care sector, and I want to develop this in some detail. It's what is defined in the SCHADS Award and that is the home care sector is defined as, 'Providing domestic or personal care to aged persons or persons with a disability in a private residence'. It is a sector of industry.

PN6416

If you look at the evidence in this case, there are actually three categories of home care that we've heard about. One seems to be very obscure and might be very limited, Mr Brockhaus gave evidence that Buckland, while operating a retirement village of their own, in situ, I think, on their big estate, for persons who have a high degree of independence, provided home care into that in situ village. We might call that category 1.

PN6417

I don't know if there's any other evidence of anybody else doing that, but it's clear that that could happen, that's category 1.

PN6418

VICE PRESIDENT ASBURY: Did Buckland also provide it into the community generally?

PN6419

MR WARD: Yes, they do. They do. Yes, they do. More recently. I think his evidence was, more recently they've moved into that.

PN6420

VICE PRESIDENT ASBURY: Yes, but they started just with their own - - -

PN6421

MR WARD: Yes, they started just with their own.

PN6422

VICE PRESIDENT ASBURY: - - - retirement - - -

PN6423

MR WARD: Yes.

PN6424

PROF BAIRD: I don't think that is unusual in the sector, that you provide home -
- -

PN6425

MR WARD: No, no, no, the first category?

PN6426

PROF BAIRD: Yes.

PN6427

MR WARD: No. All I'm saying is that in terms of this case the only evidence we've got is of that.

PN6428

PROF BAIRD: Yes, you didn't have any evidence.

PN6429

MR WARD: So I've called that category 1, for want of a way of putting it.

PN6430

Category 2 is what your Honour the Vice President has just said, which is, 'I'm a residential facility operator and I've made a decision to move into home care'. All of the evidence in these proceedings, for those people, is they've only moved into part of home care. That is, they've moved in to providing home care for aged people. But I accept, some of those people might be both aged and dealing with a disability but they are aged people. That's category 2.

PN6431

And I don't think it's correct to say that that's a new phenomena, I think it's the case that that's been a feature of some residential facility operators for a long time. It appears that the evidence here is that some of them are now increasingly moving into it, so I think we have to accept that.

PN6432

There's then a third category, which is what we call the home care sector proper. That is persons who don't have anything to do with residential aged care who are running home care businesses, providing services to persons with a disability and aged persons in their private residence. It's perhaps not surprising that we haven't had a lot of evidence from those people because this case is focused on the aged issue, but we have had some evidence, in stage 1, from persons who are in home care proper.

PN6433

I draw the Commission's attention to the evidence of Michelle Jenkins, from Community Vision Australia and the evidence of Sue Cudmore, from Health Solutions Group Australia. They were what I might describe, in commercial terms, as pure home care players. That's what they do. Their evidence was that they don't differentiate that people might have a roster where they do both disability care and aged care in a given day or a given week together.

PN6434

There were some witnesses, called by the unions, that indicated that they did both aged and disability work. This might not be - I've only found a few in the short time I've looked, Ms Kupke, HSU50 exhibit; Bridget Payton, HSU58; Catherine Evans, HSU56. Respectively they work for Absolute Care and Health, SAI Home Care and Regis and they were going to private residences providing both disability care and aged care at different times. That is, they were dealing with some people who were NDIS disability clients and they were dealing with some people who were aged care funded clients and, yes, some of them said they were dealing with people who had both.

PN6435

VICE PRESIDENT ASBURY: But Regis does aged care residential - - -

PN6436

MR WARD: No, I accept that, your Honour. That group of employees I wasn't saying were in the home care sector proper, it's just that they gave evidence about the fact they do both. They do both, that's all I was saying.

PN6437

VICE PRESIDENT ASBURY: Yes.

PN6438

MR WARD: The challenge that we have is that our focus - the home care issue should, in many respects, not lose sight of persons who are in the home care sector, purely in the home care sector. If you move aged persons out of the SCHADS Award and you move aged person home care into the Aged Care Award then you'll have an employer, in a sector who does both, now having to deal with two awards. I'm going to come to the conditions issue in a minute. I'll come to the conditions issue in a minute. Now, how does that - - -

PN6439

VICE PRESIDENT ASBURY: Doesn't that happen either way - - -

PN6440

MR WARD: Sorry?

PN6441

VICE PRESIDENT ASBURY: Doesn't that happen either way because there's employers who complain that, 'I do residential aged care' and I've had a few trying to run an interesting argument that that includes home care, because it's in people's residences, but it works both ways, though, doesn't it? So if you're a large residential aged care provider and you branch into home care, you're going to have two awards and if you're - - -

PN6442

MR WARD: Yes, but, respectfully, two things about that. The first one is, all the evidence last week, of those people, was that they effectively run those operationally separately. They did give some evidence that they shared office space. They did give some evidence that they would like to see some employee lap over but I think Ms Riboldi said it hasn't worked.

PN6443

VICE PRESIDENT ASBURY: It hasn't worked as yet, I recall that, yes.

PN6444

MR WARD: Hasn't worked, but I don't disagree - I'm not sure who's advising them, I think it's very clear if you're doing home care work you're under the SCHADS Award and it's very clear if you're in a residential facility you're under the Aged Care Award, I'm not sure how anybody would run that argument, other than to say what I've just said.

PN6445

VICE PRESIDENT ASBURY: What if it's a facility where the residences are - so there's aged care facility that provides high care, et cetera, and then there are villas or self-contained houses that are part of the same facility, but - - -

PN6446

MR WARD: I was desperately hoping to avoid that question. I think that's more challenging. I think there is, at least, an argument that that person would be covered by the Aged Care Award. I'm not going to say definitively, but I think it's an arguable proposition.

PN6447

VICE PRESIDENT ASBURY: Because it's one campus that's got - it's got an aged care - like a traditional residential facility and then it's got villas with various levels of - - -

PN6448

MR WARD: Yes. I think that would arise, at least, as an arguable proposition from the definition of aged care industry and the Aged Care Award, which means the provision of accommodation and care services for aged persons in a hostel, nursing home, aged care independent living unit, et cetera - - -

PN6449

VICE PRESIDENT ASBURY: It's an independent living - - -

PN6450

MR WARD: - - - within these classifications and that - you'd have to presume it's a personal care worker who's going into that independent living are, owned by the same operator. I think that category 1 person, I think there is at least an argument that they are actually covered by the Aged Care Award already.

PN6451

I'm not particularly perturbed by those, at the moment. My anxiety is about those people who are the home care sector proper. This will involve the consideration of section 163. The only consideration of 163 that we can find of any utility, is the Alpine Resorts Award case, FWCFB 4984, we've provided it to the Bench. I don't think it illuminates greatly because it was in a very particular context. Your Honour, presiding member, will recall heading the Bench, about alpine lift operators getting one - the benefit of one award and the operators down at Thredbo not getting the benefit of that award, it's not (indistinct) but it does accept, I think 163 is this proportion.

PN6452

There's a prohibition on moving people's coverage unless the Commission decides it's appropriate where they're going to. So there's an appropriateness test, for want of a way of putting it.

PN6453

In this case we think it's not appropriate to move - split the home care sector in two, for a number of reasons. The pure home care player will actually have to make a decision about award coverage, respectfully, almost week by week, based on the roster. Because clause 4.7 will kick in and they'll have to decide which is the more appropriate classification for the employee, based on their roster this week.

PN6454

So if the employee is doing 90 per cent of their work in aged care then you might go, 'It's the Aged Care Award this week'. If the employee is doing 90 per cent disability well, 'It's the SCHADS Award this week', and we think that is antithetical to the modern awards objective. It's antithetical to stability, it's antithetical to 134(d), (f) and (g). It will require the employer either to split and redeploy their workforce, which is inconsistent with 134(1)(d), (f) and (g) and, in the alternative, it will require an immense administrative burden on the employer to make that roster based evaluation on a week by week basis.

PN6455

It certainly isn't creating simplicity in the award system, quite to the contrary, it's creating abject confusion. And we have two other areas where we have a problem. One is the conditions. Rather than spend too much time on this we prepared a document we gave the HSU yesterday which I want to hand up actually looking at the implication of change in award coverage.

PN6456

Now, I've handed up two documents, I don't intend to read them. We would - I don't intend to read them. These documents form part of our closing submission. I want to take the Commission, first of all, to the note and then I'll

take the Commission, very briefly, to the table, by way of example. By the way, there's no criticism of the HSU in this at all. I'm not suggesting there's any mischief involved here at all. But what the HSU have done is they have picked up some conditions from the SCHADS Award, they've put them into the Aged Care Award and they've said, 'These are for home care employees', that's proposition number 1.

PN6457

They seem to have changed some conditions in the Aged Care Award and some of that seems to be, 'We'll take out what's in aged care and we'll put in what's in home care instead', and I just want to go through the categories.

PN6458

So category 1, which is identified in the table, is a number of issues they just failed to address. Again, that might be an oversight but by way example, there's a material difference in the standard rate in both awards, which is used to determine allowances. That's not addressed in their proposal.

PN6459

In terms of the conditions they picked up and moved, they seem to be relatively benign and uncontroversial. But there's then a third category, as we've put in the note, which is the application of existing aged care employee conditions for home care employees. That is, there are quite a number of home care conditions which haven't been moved and therefore if these people move across they will now pick up aged care condition employees. I'm going to take you to some examples to show the ramifications of that.

PN6460

Then there's this category, which we've called category for new conditions where what seems to have happened is, is that we've decided to delete the existing aged care condition and put a new one in and that has ramifications as well.

PN6461

There is one final category where it appears the aged care condition has just been replaced by a SCHADS condition, so that's not a problem for home care but that's now an issue for aged care people because there's a new condition put in for Saturday and Sunday work.

PN6462

So it's not just that the way they've done this condition thing is affecting home care, it's actually affecting aged care employees as well.

PN6463

I'll give a couple of very quick examples, I don't want to labour the point. In category 3, in the third dot point - I withdraw that, I'll go to dot point 5. Overtime rates, if I ask the Bench to go to pages 34 of the table, sorry, my apologise, 35. Just by way of example, this is an analysis of the distinction in overtime rates between two awards, as it plays out in the translation in the HSU's application. If you look in the far right column, that's examining the distinction between overtime rates, and it says:

PN6464

The overtime rate for full-time employees on a Saturday is greater under the Aged Care Award. This is because full-time employees are entitled to receive a flat rate of 200 per cent for all time worked, whereas under the SCHADS Award employees are entitled to receive 150 for the first two hours and 200 per cent thereafter.

PN6465

That is an example where what one might say, inadvertently, if we do move these people, we've now just simply changed the condition which has cost implication.

PN6466

There are many other examples in the table that will invoke increased costs for the home care provider or increased costs for the aged care operator, in how this is done, or will introduce very real inflexibilities because the inflexibility the home care provider had, under the SCHADS Award, has evaporated in the translation.

PN6467

A good example of that is how part-time work is structured under SCHADS compared to aged care. The way that the part-time has been translated has removed many of the flexibility that over the last 15 years, in arbitrated decisions, this Commission has decided are appropriate for the SCHADS Award.

PN6468

Now, again, I'm not criticising the HSU for this, but it's a material change. The first thing we would say is this, this Commission has said, ad nauseam, that you don't make material changes in conditions unless there is cogent, persuasive evidence to support them. That is obviously found in many decisions of the Commission but the Four-yearly review of Modern Awards preliminary jurisdiction issues decision says that with absolute clarity.

PN6469

Respectfully, that demonstrates, if you like, why this is a little half-baked, what's been proposed because if this was a proper application, put onto various SCHADS Awards, with all of this being put forward, there would be a substantial case.

PN6470

Now, we only came to this late, and I don't say this in a silly way, and I shared this with those in front of me, I actually overheard something they said the other day, which made me wonder about this and I went and looked, we had thought this was a benign exercise because the unions said it was a benign exercise. It is not a benign exercise at all. It's a material change in conditions but in regard to aged care and also in relation to the home care sector. That cannot be allowed to happen without cogent, persuasive, probative evidence in relation to each of those changes. The Commission said that, ad nauseam, in its decisions.

PN6471

The other thing I want to say is that the SCHADS Award, inclusive of the home care sector, has been the subject of 14 Fair Work decisions since its inception and we've put in our authorities some of the leading ones but, importantly, it has been

found to meet the modern awards objective for the home care sector, in the 2012 review and the 2014 review.

PN6472

One of the things that we say is against the HSU is, there's actually no evidence that it's not working for the home care sector. To the contrary, all of the decisions of the Commission, some of which have gone into the home care sector, have demonstrated the Commission is satisfied that that award for the home care sector meets the modern awards objective.

PN6473

Now, the Professors didn't like it, they described it in their report as poorer conditions than aged care. With respect to the Professors, that's not the test.

PN6474

The other thing that we want to say, with some care, is this. It's questionable how this came about. Mr McKenna talked about procedural fairness yesterday. There really is a procedural fairness issue here because the size and extent of what's now being contemplated here raises the question of other interested parties in the home care sector not having an opportunity to comment. The obvious one is National Disability Services. They're not here. And that's because a proper application has not been put on in the SCHADS Award to deal with this issue, which is what it should do, so that everybody had the ability, as a matter of procedural fairness, to address it. This is, respectfully, a backdoor move which should not be endorsed by the Commission.

PN6475

It's contrary to the modern award objective. It's contrary, in our view, to a proper exercise of the discretion of 163. It has fundamental ramifications for splitting an actual sector in half and it shouldn't be tolerated. We oppose it.

PN6476

JUSTICE HATCHER: Of course, having regard to those submissions about the unity of the home care sector, having differential rates for a different type of home care workers will have obvious implications down the track, I would have thought.

PN6477

MR WARD: Well, there's two things about that and I think, in stage 2, I addressed the Vice President. It hasn't been made easy and the operators in the home care sector at the moment are trying to manage their way through how they pay people, based on their funding packages. This would just compound and escalate the problem.

PN6478

That brings us to our proposal about the home care classification structure. We've left our proposal relatively similar to how it's structured today. We've made some refinements, which we've explained in our submissions, but we've left it similar because we are cognisant of the home care sector doesn't necessarily need to deal with two dramatically different classification structures. It's got to deal with different rates of pay, which is complex enough, so we've actually proposed very

minor changes to the home care structure, in the SCHADS Award, and that's why, because it's a question about trying to make it as simple as possible for the home care sector.

PN6479

Can I just comment on the economics question?

PN6480

JUSTICE HATCHER: Is that a convenient time to take a morning tea break?

PN6481

MR WARD: Yes, your Honour, it is.

PN6482

JUSTICE HATCHER: All right, we'll adjourn now and we'll resume in 15 minutes.

SHORT ADJOURNMENT

[11.41 AM]

RESUMED

[11.59 AM]

PN6483

JUSTICE HATCHER: Mr Ward.

PN6484

MR WARD: I'll be quick to finish. Can I just make a comment about the economic position of the industry and say this. My clients have said in their stage 3 submission - obviously respecting this is a work value case, but in the context of that, my clients have said that they would welcome further increases. My clients have said that that is contingent on them being funded both in the context of amount and in the context of operative date.

PN6485

Mr Hutcheon's evidence is not about work value. It's not about work value. We had some criticism made against us last time about putting that material on late. We didn't want that criticism to hit us again this time. If the Commission, as I said, do provide further increases, which my clients will see as welcome, there will need to be obviously some consideration from the Commonwealth about timing of that and we might need to be heard a little more on that, as we were last time, but it's pivotal for our clients that any further increases are funded, both in amount and in a timing sense, from the government.

PN6486

Can I just deal with two or three small issues really quickly, and I approach the first issue with some care. Your Honour the presiding member asked a question I think yesterday, but it might have been the day before, about whether or not the outcome in the SACS No 1 case was an appropriate benchmark to give some consideration to, and respectfully we say it's not. We say it's not because of the decision - - -

PN6487

JUSTICE HATCHER: So you're talking about the equal remuneration case of 2012.

PN6488

MR WARD: Yes, in that case. We'd refer the Commission to Equal Remuneration decision [2015] FWCFB 8200. It's found at [2015] 256 IR 362. That was the case, a five-member Full Bench which your Honour the presiding member, sat on. That was the case considering the application of the Equal Remuneration provisions of the statute as they then were, which were the same as they were in SACS No 1.

PN6489

I don't want to go as far as to say that the Bench said SACS No 1 was erroneously decided, because they didn't use that language, but it's clear at paragraph 290 and it's clear at paragraph 307 that the Bench formed the view that on the basis of a proper understanding of the statutory provisions, that the Bench had to depart from the reasoning in SACS No 1.

PN6490

JUSTICE HATCHER: But that was about the use of a comparator. The 2012 decision did in fact have a sort of comparator, didn't it?

PN6491

MR WARD: I think it had an insufficient comparator for the purposes of principle for the Bench in 2014, 2015. So we just simply say that the Bench needs to approach SACS No 1 with some care because of the question of how it was decided when one reflects on how the Bench in 2015 said these cases should be decided.

PN6492

JUSTICE HATCHER: That's true, but the fact is that the order that was made in the 2012 case for all intents and purposes has become the award rate.

PN6493

MR WARD: Yes, but that's an - - -

PN6494

JUSTICE HATCHER: For the part that it covers.

PN6495

MR WARD: That's an administrative matter. For nine years it was a separate amount, and once it had reached the end of its transition the parties in the SCHADS Award simply agreed that as a matter of administration it was just easier to consolidate it.

PN6496

JUSTICE HATCHER: Does the ERO still exist as an instrument?

PN6497

MR WARD: No - sorry, I withdraw that. I don't know the answer to that. I shouldn't say it doesn't exist. I do know that as a matter of administration parties agreed to simply consume it into the rate at some point.

PN6498

JUSTICE HATCHER: The rates are set. As is identified, there's a minimum weekly rate and then the ERO percentage is identified to produce a current weekly rate as if – I'm not sure that the ERO has actually lost its legal existence, but - - -

PN6499

MR WARD: Your Honour's corrected me then. My understanding is that that didn't used to appear in the award at all.

PN6500

JUSTICE HATCHER: No, that's true.

PN6501

MR WARD: Yes, so that's what I was trying to say. It's been picked up out of the order and some reference has been now included in the award for administration purposes.

PN6502

JUSTICE HATCHER: But however arrived at, the fact is that the SACS award has a certificate III rate which is, on any view, free from any gender bias in that caring type occupation.

PN6503

MR WARD: You could form that view, but if the approach that was adopted in SACS No 1 to how the statutes apply, of course, you're quite correct. You couldn't necessarily make that assumption with 100 per cent confidence.

PN6504

Can I just give you a reference to the award modernisation question about home care and residential care. It's the award modernisation statement [2009] AIRCFB 50 at 76. At 76 there's a link to the exposure draft, which you will find at some point had home care in residential care.

PN6505

I want to deal then with the two nurses issues, finishing on the AIN. Sadly, we were able to get instructions on it. There is a difference between ourselves and Mr McKenna's clients on where the EN sits. Mr McKenna, we acknowledge his client has adopted the historical relativities between an EN and an RN. We acknowledge that. We, for our part, given that the presumption was these rates weren't properly set in the first place, formed the view that given that the EN was a vocational qualification not a professional qualification, it was more appropriate to benchmark it to C5, which all the claimed qualifications that we are understand are benchmarked to.

PN6506

At the end of the day I'm not going to get too excited about that, but that is the distinction and that is the reason why we're apart on where the EN sits. There is a

difference. It's not earth-shattering, but there is a difference. That's the reasoning. You might accept our reasoning leads to an outcome, you might accept their reasoning leads to an outcome.

PN6507

JUSTICE HATCHER: The problem with that is that, if we accepted that proposition, it's a proposition which necessarily applies across the whole of the Nurses Award, not just the aged sector.

PN6508

MR WARD: I accept that, but that's the great dilemma of these types of proceedings being about a defined group. Without wanting to venture too far into that, I mean, in many ways that's what happened in Teachers, your Honour. If you recall, we were dealing with a very discrete part of a sector. That was effectively long day care, and the Commission formed the view that the award should be varied in general terms, and the Commission, to deal with the procedural fairness question, then invited all these other parties to come along and say what it wanted to say about its preliminary view. We accept that that type of proposition would have implications.

PN6509

JUSTICE HATCHER: Leaving aside what we're going to hear about operative date – and I raised this with the nurses yesterday – on one approach we could, if we were persuaded to do so, indicate a preparedness to link the base level registered nurse to C1A and then initiate some form of wider proceeding or conference to discuss how that could be implemented across the Nurses Award, rather than trying to deal with it in the context of aged care and then presenting a fait accompli to the rest of the sector.

PN6510

MR WARD: In many respects that's not a dissimilar process to ensure fairness that was adopted in Teachers, that then involved a series of further proceedings about that issue. All we can say about the registered nurses is that on day one we've held the view that it's wrongly set.

PN6511

We've articulated – I think there was some debate about whether or not it was 34 or 35 per cent. There was some mathematics changes for the annual wage review – but we've held the view from day one that, frankly, that rate was not properly set in 2008. I had remembered that the Commission, possibly in 2014, in the review, might have commented on it, but I couldn't find it so I can't say that with any confidence. But we've taken the view from day one that that had to be fixed, and we've explained why, in detail, from the beginning of this case.

PN6512

The AIN issue is a problem. It's a problem. If you take Mr Brockhaus' evidence, Mr Brockhaus employs assistants in nursing. He doesn't explain why he does that. I think I know why he does that, but it's not in evidence. Why I won't say, but he employs assistants in nursing.

PN6513

VICE PRESIDENT ASBURY: Did he say that was in one state?

PN6514

MR WARD: I think he's only in New South Wales. This is only in the Blue Mountains, your Honour. He's only in the Blue Mountains. Yes, that's right. He's only in the Blue Mountains. I suspect Mr McKenna's response as to how this comes about probably is about right, that there's sort of an industrial history in this organisations as to which one it is, but I accept the Commission's proposition that effectively the employer, by naming somebody something, can basically shop the award. We accept that. We also accept that that's not a particularly desirable state of affairs. We accept that.

PN6515

The only way you solve that would be to move somebody from something. That, bluntly, is the only way you can solve it, and that might introduce all sorts of questions about who needs to be heard on that in more detail or whatever, but we accept that the only way you could solve that is if you moved care work, for instance, from the Nurses Award into the Aged Care Award for aged care.

PN6516

Given the fact that some of our clients' members use both awards, we're trying to charter a slightly agnostic course, because they obviously have a preference for why they do that. That preference might be as much about how they position themselves in the market as anything else, but we do accept that the only way you can solve this once and for all is to have one award covering them, and respectfully, without perhaps being overly helpful, we'll say no more on that, but we accept that as a proposition.

PN6517

JUSTICE HATCHER: The ANMF has identified a list of differences in conditions, most prominent of which would be the nurses get an extra week's leave. How might we deal with that issue?

PN6518

MR WARD: Again, we're back into this question of varying modern award conditions. That's going to require probative evidence, it's going to require parties to be able to actually put proper submissions on that. With respect, that can't just be an administrative exercise. It's a bit like the home care issue. That's got to be done properly and it's got to be done in some detail.

PN6519

That might not sound helpful, but in terms of the proper processes of the Commission, respectfully, that's what would be needed, because the Commission will have to make an evaluative judgment as to how it deals with that – possibly grandparenting. It could be a whole variety of ways that might need to be dealt with which are really not able to be dealt with in the remaining four hours of this case, and in that sense, I suspect we're siding a little bit with the nurses in that. It just simply can't be an administrative exercise.

PN6520

If there's nothing else, those are our submissions – sorry. Your Honour the Deputy President asked me a question about consensus statement. There's some sensitivity around that document. I'll need to get express instructions. Can I just ask again what the question was to make sure I understand it?

PN6521

DEPUTY PRESIDENT O'NEILL: There's a particular – I think it's paragraph 22, which essentially says that indirect care staff are an integral part of the team and that they have high levels of skill compared to similar workers in other industries and compared to aged care in the past.

PN6522

MR WARD: They clearly have different levels of skill to what they did in the past. I think that can't be cavilled with. If it wasn't made clear before, it's certainly been made clear last week, hasn't it? It's been made clear last week. It's a fairly generic statement in reference to other industries, but it's also clear from the evidence of witnesses who have worked in other industries that there are a variety of different skills one needs in this industry. I'm not in a position to make an evaluative judgment of the weight of that, but, yes, we accept that as a proposition. The consensus statement says that.

PN6523

The example was given, working in a hotel. It's not to say one's black and one's white. Working in a hotel probably has some elements that working in aged care doesn't have, but on balance, you're – for instance, in a hotel you might be dealing with people from a foreign background who don't have English as a first language, which might be challenging, but clearly the evidence about the interactions with persons with dementia and the like is a qualitative different to, say, working in a hotel.

PN6524

So I'm comfortable answering that. It's in the nature of that that we put that, and we think that the evidence provided last week provided some excellent texture in supporting that proposition. If the Commission pleases.

PN6525

JUSTICE HATCHER: Mr Chin.

PN6526

MR CHIN: May it please the Commission. We propose to confine our closing remarks to the bounds of the principal contribution of the Commonwealth to these proceedings, that is to say, the issue of funding. We have three short points to make.

PN6527

The first is state as plainly as I can the nature of the Commonwealth's funding commitment at stage 3, the second is to state the Commonwealth's position on the overall quantum of any further increases to the award at this stage, and finally, I need to make a request of the Commission for a further opportunity to address the Commission on timing and phasing in of any further increases at a time after the Commission has determined what those increases will be, either in a preliminary

or final sense. So those are the three points that I need to cover in my submissions.

PN6528

Turning to the first point, the Commonwealth's funding commitment is this. The Commonwealth will fund any wage increases determined by the Commission in stage 3 of these proceedings that the Commission considers are justified by work value reasons, including associated on-costs. We note that the Commission's funding commitment as originally made was done so in the context of the applications originally filed by the union parties seeking increases of 25 per cent on existing wage rates for all classifications.

PN6529

Touching on my second issue, or point, to the extent that the applicants or other parties now seek increases in award wages going beyond those sought in the original applications before the Commission, and, as I'll come to in a moment, it is evident that they do so to a substantial degree, the Commonwealth submits that the Commission should not award such additional wage increases at this time.

PN6530

To be clear, I'm referring here to increases above the 25 per cent of existing wage rates across all classifications, namely an overall total cost equivalent to a further increase of 10 per cent on existing rates for direct care workers, together with an increase of 25 per cent of existing rates for all relevant indirect care workers.

PN6531

JUSTICE HATCHER: So that would have, as it were, a funding envelope, and if the outcome differed slightly from that in terms of numbers up or down as would fit within the funding envelope, it would still be funded?

PN6532

MR CHIN: May I clarify directly, President, that although that's the Commission's position, that any increases above 25 per cent in that envelope - - -

PN6533

JUSTICE HATCHER: Sorry, the government's position, you mean.

PN6534

MR CHIN: The Commonwealth's position, I beg your pardon.

PN6535

JUSTICE HATCHER: Yes.

PN6536

MR CHIN: Should not be awarded at this stage, its commitment is to fund whatever increases are determined by the Commission that the Commission considers are justified by work value reasons, subject only to reserving its position on timing and phasing in, which I'll come to lastly.

PN6537

JUSTICE HATCHER: So how does that fit with the original 25 per cent claim?

PN6538

MR CHIN: The Commonwealth's commitment is to fund whatever increases are determined by the Commission based on work value.

PN6539

JUSTICE HATCHER: Right.

PN6540

MR CHIN: It's not confined by the 25 per cent envelope.

PN6541

JUSTICE HATCHER: I see.

PN6542

MR CHIN: Standing alongside that commitment is a submission I'll make asking the Commission not to award increases above that envelope, at least in these proceedings, at this stage.

PN6543

JUSTICE HATCHER: Yes, all right.

PN6544

MR CHIN: That's the funding commitment as plainly as I'm authorised to put it.

PN6545

JUSTICE HATCHER: Yes.

PN6546

MR CHIN: Before I go on, I need to emphasise two matters on what we are not addressing, what we're not expressing a view on. The first is that the Commonwealth does not express a position on the extent of any increases within that envelope, subject to what we say about increases beyond 25 per cent, and in addition, the Commonwealth makes no submission or takes no position on the intrinsic merit of the parties' stage 3 proposals either as to the application of the C10 framework or to the adjustment of internal relativities.

PN6547

May I then turn to the second of my three elements, which is on the overall quantum of any increase. The Commonwealth position in that regard, your Honours, members of the expert panel, is that the Commission, as I said, should not award increases above the original 25 per cent scope at this time, having regard to two matters. The first is the scale of the revised claims, and secondly, the potential fiscal implications for the Commonwealth, including by reference to the likely but presently indeterminate flow-on effects of those claims.

PN6548

Although it's been touched on, perhaps it's worth emphasising that it's important for the Commission to appreciate the true extent of the revised claims filed by the union parties. As regards the ANMF, your Honours will have seen the aide memoire handed up yesterday, I think, by Mr Hartley. It identifies in the Proposed column an increase in the figure of wage rates for enrolled nurses,

registered nurses and nurse practitioners of 18 per cent. Can I emphasise, of course, that that does not include the interim increase of 15 per cent already provided, so that the effect of the claim on behalf of nurses is for an actual increase, in these proceedings, of closer to 33 per cent.

PN6549

JUSTICE HATCHER: That's an increase in the minimum award rate, but the evidence suggests that that may not have any significant funding implications because nurses are already paid market rates well above the award. So unless the government wants to commit to, as it apparently did in the last round, extending increases to an above award level, there's no reason for us to assume, on the evidence, that a 33 per cent increase in the nominal minimum rate will lead to an actual increase of 33 per cent for nurses' wages, is there?

PN6550

MR CHIN: I don't have instructions on what occurred in the last round. There are some nurses, as I'm aware, employed under enterprise agreement above the award minimum, but that's not, to my understanding, a universal position. The Commonwealth position is that the increase – the difference between 25 per cent and 33 per cent is significant in terms of a funding commitment.

PN6551

JUSTICE HATCHER: But you haven't adduced any evidence of that – that is, if you want to make good that proposition we need some evidence about the market rates for nurses. The Bench has some acquired knowledge of those matters, and at least speaking for myself, as far as I understand it, the market rate for nurses is well above the minimum rate, which means that your comments about funding may not necessarily be accepted.

PN6552

MR CHIN: My comments in relation to funding in relation to the nurses' claim isn't confined to the cost implications of direct increases for minimum rates for nurses in the aged care sector, and I'll come to this. We know that there is very likely to be flow-on effects if that claim is granted to the extent that it's sought, and those flow-on effects are something we would urge the Commission to take into account as relevant to the proposition that that claim, if granted, is likely to have potentially significant – I'll withdraw that. That if granted, that claim has potentially significant fiscal implications for the Commonwealth by reason of the flow-on effects.

PN6553

JUSTICE HATCHER: What evidence supports that? We can look at state awards for nurses, which are obviously partly funded by the Commonwealth, and we can see that they're much higher than any minimum rate in our award.

PN6554

MR CHIN: Yes, but not to the degree, to my knowledge, of the extent of the claim now being put, which is 33 per cent. I don't have evidence to submit, your Honour, but I can proceed on the footing that we know from the nurses in these proceedings that not only are flow-on effects likely but that the application is presently being drafted, and that the nurses' position at least will be precisely

the same for nurses employed outside of the aged care sector as it is for those employed within the aged care sector.

PN6555

JUSTICE HATCHER: The parliament's passed amendments to the Fair Work Act which requires gender undervaluation to be placed at the heart of the Commission's consideration of minimum wages. That's now our imperative – one of our imperatives. How does that square with your submission?

PN6556

MR CHIN: It is, your Honour, and the Commission would take into account significant flow-on effects from any decision made in these proceedings. They are relevant. The Commission has, in previous cases, determined – or adopted a position of declining to grant claims which are very likely to have flow-on effects for other groups within the same award, and indeed for other groups within other awards.

PN6557

I was going to come to this later, but can I hand to your Honours a decision in the application to vary the SCHADS Award. It's [2020] FWCFB 4961. We draw attention in particular to paragraph 92 of that decision and note that by reference to the modern award objective in 134(1)(g) concerning the stability of the modern awards system, the Commission adopted a position that the state of affairs where the likelihood of granting a claim that would trigger further litigation and require the attention and resources of other industrial parties and the Commission, in circumstances where it wasn't clear on what basis such a claim could be resisted in respect of other groups, was considered as weighing against the granting of the claim.

PN6558

In that case it involved the COVID-19 allowance, which had broader application, so the Commission considered, than in respect of the isolated group of workers covered by the SCHADS Award for which it was being advanced.

PN6559

In this case the nurses' foreshadowed application for nurses outside of the aged care sector makes it complex to evaluate, in my submission, the overall fiscal implication of the nurses' proposal, especially in circumstances where other parties may be affected by those implications and who are not appearing before the Commission in these proceedings. They may include employers in non aged care nurses, including state government health authorities, depending on the state-level employment arrangements, and also private employers, such as private hospitals and clinics.

PN6560

As your Honour's noted, the Commonwealth is a substantial provider of funding of public hospital services, and on that footing it's really more than merely a procedural fairness issue. The real gravamen of this state of affairs, in my submission, your Honours, members of the expert panel, is that more than simply triggering a likely subsequent application, we know in these proceedings that one is imminent and similar considerations arise.

PN6561

JUSTICE HATCHER: So what's imminent?

PN6562

MR CHIN: A further application by the nurses to apply the C10 alignment to nurse classifications beyond those in aged care.

PN6563

JUSTICE HATCHER: Regardless of whether that application is made or not, this issue was squarely flagged in the annual wage review decision as necessarily flowing from the amendments made to the Act to require us to deal with gender undervaluation – that is, this is on the agenda, Mr Chin.

PN6564

MR CHIN: Yes, your Honour, I appreciate that. Our submission is that this is not the proceedings to determine the matter, for the reasons that I've given, that it has broader implications for the health sector beyond aged care nurses, with potentially broader implications for the Commonwealth fiscal position, and whatever the intrinsic merits of the nurses' proposed alignment of the C10 framework, about which we don't express a position, my submission is that these proceedings are inapt for the Commission to finally resolve that issue.

PN6565

JUSTICE HATCHER: So what proceeding would be apt to finalise issue?

PN6566

MR CHIN: We would be in the Commission's hands as to that. I don't have instructions to propose an alternative to your Honour, but that's the Commonwealth's position. May I turn to the HSU's internal relativities claim?

PN6567

JUSTICE HATCHER: Yes.

PN6568

MR CHIN: Your Honour will see in tab 40 of the hearing book, page 454, the articulation of the resulting rate increases based on the HSU's claim for the adjustment of internal relativities for direct care employees under the Aged Care Award.

PN6569

In the final column the percentage changes identified, may I say again, similar to the nurses' chart, or aide memoire, capture the percentage increases of the rates claimed without taking into account the 15 per cent interim increase already awarded, so that it's apparent that the scale of the HSU's claim ranges from, for the proposed residential care level employees, 1 to 7, from 25 per cent up to 48 per cent for the residential care level 7 classification.

PN6570

Similarly, on page 456, for those employees presently under the SCHADS Award the adjustment to their rates range, taking into account the interim increase, from 25 per cent for level 1 up to a high point of 42 per cent or thereabouts for level 5.1

once the interim increase is taken into account. Your Honours, members of the expert panel, have heard that the nature, driving force behind the application to adjust internal relativities is to decompress those relativities in the interests of recognition of work value.

PN6571

All I will submit in relation to that, your Honours, is that your Honours would have regard to the observations of the Full Bench in the Teachers case, that the decompression of internal relativities in these particular awards in isolation touches on an issue of the compression of internal relativities as a systemic issue across the modern awards system and that that compression, to a substantial degree, was the result of safety net review and annual wage review decisions over a period from the early nineties to 2010 to award flat rate amount wage increases to improve the relative position of lower-paid workers and to depress that of higher-paid workers.

PN6572

Can I invite the Commission to have regard to the observations of the Full Bench in the Teachers case. It's found in the HSU list of authorities at tab 15 and proceeds from paragraph 648 to 650, starting on page 775. At 648 your Honours will see the Full Bench in the Teachers case extracted remarks of the Full Bench in the Pharmacy Award decision at 191 and 192, and I draw attention in particular to the comments in paragraph 192 over on page 776.

PN6573

VICE PRESIDENT ASBURY: Sorry, 776?

PN6574

MR CHIN: Yes, page 776. That's of the – I'm sorry, I should use the – decision page 263 on the bottom right-hand corner.

PN6575

VICE PRESIDENT ASBURY: But it's 776 in the bundle.

PN6576

MR CHIN: Yes.

PN6577

VICE PRESIDENT ASBURY: Yes, thanks.

PN6578

JUSTICE HATCHER: What paragraph?

PN6579

MR CHIN: It's at the top of the page, 192, That's an extract from the Pharmacy Award case.

PN6580

JUSTICE HATCHER: What paragraph of the decision?

PN6581

MR CHIN: 648.

PN6582

VICE PRESIDENT ASBURY: 648.

PN6583

MR CHIN: It points to the problematic nature of seeking to decompress relativities in isolation. Decompressing internal relativities in isolation of particular awards, as noted by the Full Bench, runs counter to the historical efforts to improve the relative position of lower-paid workers and invite flow-on consequences for other modern awards. So we point to the prospect of flow-on consequences of decompression recognised by the Full Bench in the Teachers case and the Pharmacy Award case as being applicable in these proceedings.

PN6584

That approach was rejected in the Teachers case, and I make the observation that in the Teachers case it doesn't appear to us to be distinguishable, on the footing that what was sought there was decompression for its own sake. As with the HSU's claim in these proceedings, the IEU in that case sought to justify the decompression on the basis that the compressed salary scale in that case didn't properly reflect skill levels and work value.

PN6585

Your Honours will see that in that decision in paragraphs 210 and 233. I won't take you there, but that's the articulation of the IEU's case in that case, and invite the Commission to compare that with the HSU's position in its 1 November submissions at paragraph 17. That's at the hearing book at tab 41, page 464. I won't take the Commission there, but I hasten to add, we say nothing about the intrinsic merits of the decompression being proposed by the HSU in this case, but we do invite the Commission to have regard to the reasoning in the Teachers case in considering really the appropriate context or forum for determining this issue.

PN6586

JUSTICE HATCHER: So shall we follow the approach in the Teachers case in respect of the nurses' claim?

PN6587

MR CHIN: The difference, I think, is with respect to the nurses' claim relativities are sought to be maintained and not decompressed.

PN6588

JUSTICE HATCHER: That is, they seek the compressed relativity, not the decompressed relativity.

PN6589

MR CHIN: Yes. The problematic flow-on consequences for the nurses' claim, in my submission, are slightly different, and they're for the reasons that I previously referred to.

PN6590

May I lastly come to the issue of phasing in and the request which I need to make. Can I preface it by emphasising that the Commonwealth's position in these proceedings has consistently been that the precise extent of its funding support

would be subject to a decision, government decision, made after the Commission had determined, in a preliminary or final sense, the extent of any increase to modern award minimum wages in this case.

PN6591

JUSTICE HATCHER: You mean the government decision about timing.

PN6592

MR CHIN: Yes. Originally also in respect to the precise extent of the funding commitment as to whether or not it relates to on-costs. So at stage 1 that was still a live issue.

PN6593

JUSTICE HATCHER: But it's not anymore.

PN6594

MR CHIN: It's not, but timing is.

PN6595

JUSTICE HATCHER: So we can proceed on the basis that there's a government decision. We can proceed on the basis of funding, subject to a further decision about timing.

PN6596

MR CHIN: Correct. Timing and phasing in.

PN6597

JUSTICE HATCHER: And phasing in. Is there any broad indication you can give us as to what time frame we're working in?

PN6598

MR CHIN: I can.

PN6599

JUSTICE HATCHER: Yes.

PN6600

MR CHIN: If I can put it this way, without being overly presumptuous. If the Commission were to indicate before Christmas, either in a preliminary or final sense, what - - -

PN6601

JUSTICE HATCHER: Well, I can stop you right now. We're not going to be indicating anything before Christmas.

PN6602

MR CHIN: I'll go on to my next hypothetical then, your Honour. If we were to receive, respectfully, such an indication, either preliminary or final, in 2024, the Commonwealth would require about eight weeks to formulate its position on implementation and any necessary phasing in, noting that the Commonwealth's annual budget process culminates in cabinet consideration of quantified expenditure proposals in the period February to April each year, and that will be

the same for 2024. I can't assist beyond that, the Commission, with the position on operative date, but that will be the subject of the further deliberation on decision of government as to phasing in or timing.

PN6603

JUSTICE HATCHER: I just want to explore that. So if, for argument's sake, we can issue a decision which indicates the parameters of the outcome say by mid-February, would that allow that to be properly considered in the budget process and then for you to come back and talk about operative dates?

PN6604

MR CHIN: Yes, it would. We estimate a period of eight weeks. We're not advancing necessarily an elaborate stage 4, as it were, to the proceedings. We'd be content to indicate the position in writing, but we would need some time, as I've indicated, to formulate that position and to make that decision.

PN6605

VICE PRESIDENT ASBURY: What's the outer end of your eight weeks to be within the budget timing consideration?

PN6606

MR CHIN: I don't have one. I suspect it would be informed by – I withdraw that.

PN6607

VICE PRESIDENT ASBURY: So eight weeks from mid-February.

PN6608

MR CHIN: Eight weeks - - -

PN6609

VICE PRESIDENT ASBURY: What's the outer window?

PN6610

MR CHIN: Eight weeks from any time next year that we get a preliminary indication or final indication from the Commission.

PN6611

VICE PRESIDENT ASBURY: But to be within the budget consideration it would have to be the end of April, wouldn't it?

PN6612

MR CHIN: Ideally, yes, but my instructions are somewhat more flexible than that. The need for this subsequent determination arises for a couple of reasons. Firstly, if I can give the Commission some idea of the likely scale of the expenditures involved. That's the first matter. The second matter is that at this stage of the proceedings, why we are asking for that opportunity is because it's no longer a matter of hypothetical modelling, it's a matter of feeding into the actual budget process concrete proposals for actual expenditures

PN6613

To give the Commission some idea of what the scale of the expenditures that are involved here, in respect of the 15 per cent interim increase for direct care

workers, the Commonwealth has budgeted over \$11.3 billion over four years, so that one can expect that for every additional 5 per cent increase in wage rates that may be awarded by the Commission for direct care workers alone, funding in the order of 3.5 to four billion over a four-year period would be required, and that obviously doesn't take into account the impact of wage increases, if any, for indirect care workers in these proceedings. Unless there's anything further, those are my submissions.

PN6614

JUSTICE HATCHER: All right. I think the appropriate course is to take a slightly earlier lunch, and we'll resume at 1.45. So obviously in terms of reply submissions it will only be necessary for parties to reply to those persons who spoke after their submissions, and I don't expect to hear replies to replies either.

PN6615

Mr McKenna and Mr Hartley, you probably know this off the back of your hand, but could you give us some indication about the relationship between your claimed rate for a registered nurse year 1 compared to rates that might be applicable in the various state public hospital systems?

PN6616

MR McKENNA: Your Honour, one of the issues I was proposing to do by way of reply, there have been questions asked of, I think, each of the representatives, and asked of me, about the difference between award rates and rates paid to aged care EBAs, and, as your Honour now raises, the issue of rates paid in public sector. There is some evidence of this, and I alluded to it with no specific - - -

PN6617

JUSTICE HATCHER: All right. If you could take us to that, that would be - - -

PN6618

MR McKENNA: I propose to do that.

PN6619

JUSTICE HATCHER: Particularly contemporary evidence which is based on the current rate.

PN6620

MR McKENNA: The evidence that we have pertains to 1 July 2021, I believe, so it is slightly out of date and it pre-dates the interim increase.

PN6621

JUSTICE HATCHER: Yes. What I want to see is a date which allows us to make a direct comparison between your claimed rate for registered nurse 1.1 and the current equivalent in other health systems. I mean, you can take us to the marketplace stuff, that's another thing, but particularly having regard the Commonwealth's submissions, I just want to see whether there's any significance for that.

PN6622

MR McKENNA: The ANMF does keep a quarterly record of what's called the Nurses and Midwives Pay Check, which is based upon enterprise agreements filed and approved by the Commission. As I say, the most up-to-date pay check information that is currently in evidence is that that pertains to 1 July 2021.

PN6623

JUSTICE HATCHER: This is a matter of Googling the relevant state instruments, isn't it? What's the instrument which applies to Victorian nurses?

PN6624

MR McKENNA: There is a public sector multi-employer enterprise agreement, and it will have a rate and I can take the Full Bench to that rate.

PN6625

JUSTICE HATCHER: If you could just, for example, Google that and tell us what that says, that would be useful.

PN6626

MR McKENNA: If the Commission pleases.

PN6627

JUSTICE HATCHER: Mr Ward?

PN6628

MR WARD: Your Honour, sorry, I had a family matter arise this week. Could I have leave possibly to be a little late getting back. Ms Rafter will be here, but I just need to attend to something.

PN6629

JUSTICE HATCHER: Yes, certainly. All right. We'll resume at 1.45.

LUNCHEON ADJOURNMENT **[12.51 PM]**

RESUMED **[1.48 PM]**

PN6630

JUSTICE HATCHER: Mr Gibian.

PN6631

MR GIBIAN: Yes. Thank you, your Honour and members of the Bench. I'll endeavour to deal with the matters basically in the order that they fell, starting yesterday afternoon and following, although there's obviously a certain degree of overlap between some of the matters, particularly raised by the AMNF and by the joint employers.

PN6632

Can I initially just deal with three brief matters and then more of my submissions in reply will be dealt with the classifications and wage rates issues. Firstly, your Honour the President asked me a question about 157(2B) at the start or earlier in the proceedings. We agree with the approach that the Full Bench adopted in the stage 2 decision at paragraph 180 to 183.

PN6633

And I don't need to say any more than that unless – that is essentially to the effect that the question of what that provision requires is the Commission to consider a particular matter, namely whether – or particularly subparagraph (b), whether there's been historic undervaluation on gender grounds, whether that requires it to make an express finding about that. Whether it's done that task is a matter to be assessed in light of the whole of the reasons and the materials before the Commission. And we agree that the Commission did do that in this case.

PN6634

Secondly, as to attraction and retention the finding the Full Bench made in the stage 1 decision at paragraph 269 that attraction and retention in itself is not a matter that goes to work value reasons is a matter which we also accept in the submissions that we endeavoured to advance in relation to the staff shortages. And the impact upon work intensity and responsibility of existing staff were intended to be distinct from that.

PN6635

The third short matter was that some questions were raised in relation to what material there was before the Commission in relation to the number or proportion of residents who die in residential care over – or the change in that respect. There was some material in Professor Meagher's first report in stage 1 of the proceedings, particularly and it's at page 13 in that document to the effect that between 55 and 58,000 older people living in permanent residential care pass away each year, that representing about a quarter of the residents.

PN6636

And also reference being made to the average length of stay going forward. The data source that was referred to there was a report. It goes only as far as 2019 but if it's useful there's a report prepared for the Australian Health Review by Dianne Gibson entitled, 'Who uses residential aged care now and how it has changed and what does it mean for the future,' which was the source of the material in Professor Meagher's first report. If I can hand a copy of that up that would assist in relation to that.

PN6637

And in particular, no doubt maybe all of that information is potentially of interest but on page 822 at the top of the page there's a table, table 1 with the recording and breaking down by age and gender demographics, the number of persons living in residential aged care, and at the most simple level of the line at the bottom of table 1, in aggregate terms, reflects the increase in total overall numbers in the period between 2009 and 2019 from something like 158,000 to 182,000.

PN6638

That was relevant to a question that was asked by the Professor about the bar graph table that was in Professor Meagher and Charlesworth's more recent report. Because that was a table that reflected the number of persons per one thousand of population, that was a relatively stable (indistinct) composition between home and residential care changing. But that was obviously of a population. So the overall number is going up over that period if that explains that.

PN6639

There's then further down that page, information relating to admissions and exit at the bottom of the left of the right-hand column, 'Length of Stay,' which goes over the page and records the type of information which is relevant to the Commission that is asked.

PN6640

Can I then deal with some of the things that were said by both Mr Hartley and Mr McKenna again today by Mr Ward and we'll revisit it by way of subject matter today by Mr Ward in relation to both the changes that are proposed by the HSU to the classifications in the Aged Care Award, both the descriptors and an attempt to build in a meaningful progression, so far as increase in rates is concerned.

PN6641

Can I initially in that respect emphasise, as I've tried to do in the oral submission, why we've embarked upon this exercise. It's because of the evidence that was put before the Commission both from the experts, from the Royal Commission and indeed raised the Commonwealth directly that the classifications were inadequate both because they didn't meaningfully describe the differentiation between the classifications because they failed to meaningfully reward and incentivise increases in skills and capacities and responsibilities.

PN6642

And because the difference in rates between the classifications was so small that there was no incentive either to have any debate about the what the appropriate classification was, or to endeavour to take any steps to move up the classification level. That seemed to be a generally held view by everyone who came before the Commission to give evidence on that.

PN6643

Can I just specifically note in that respect without going to it that the ANMF filed a report of Associate Professor Smith and Dr Lyons which commences at page 7553 of the court book from the first stage of the proceedings, and particularly at paragraphs 119 to 125. Those experts looked at the classifications and debated the question as to whether they properly reflected the work and the work value, and concluded that they did not and needed to be looked at.

PN6644

Despite that the ANMF did not propose anything meaningful by way of change of the classifications to descriptors or structure, or anything meaningful in terms of changing the rates in a manner which would allow meaningful progression. But rather, together with the approach that the employers adopt, propose to do something that we think would really entrench undervaluation and the access of career progression within the Aged Care Award.

PN6645

We say that both because addressing undervaluation both requires looking at the absolute rates and having an appropriate increase in that respect but also as endeavour to identify in recognising that there can be progression in skill and differentiation in that respect and which would be meaningfully recognised and rewarded.

PN6646

And in that respect can I also add reference to the Commonwealth's position advanced today which appeared to be to put off any consideration of that matter to some unspecified time in the future. In relation to the nurses classification issues and the broader increase sought for registered nurses, particularly, that at least seemed to be a submission that ought be put off for some time which is contemplated to occur. That is an application that's the ANMF has contemplated in that respect.

PN6647

So far as the Aged Care Award was concerned we didn't understand when it was proposed that that issue be put off to be considered. And in that respect can I just note that the Commonwealth in fact made submissions to the Full Bench almost 18 months ago by submissions dated 8 August 2022 in which it specifically pointed to the evidence in this respect in this respect at paragraph 210 and following of those submissions, and from paragraph 220 expressly said that having regard to the findings of the Aged Care Royal Commission and other evidence before the Commission it would be open to the Commission to vary the classification structure in the Aged Care Award beyond that sought by the HSU at that time at least, to provide further opportunities for career progression for aged care workers.

PN6648

This could include adding additional classification levels and making additional pay points available within a classification level. We have endeavoured to take up that challenge and we don't understand why the Commonwealth would now come 18 months later and say that that is not a step that ought be investigated and pursued having made that submissions earlier in the proceedings.

PN6649

As to the classification proposals advanced by the other parties can I just refer briefly to the document Mr Hartley handed up which was the ANMF proposed classification structure headed, 'ANMF Proposed Classification Structure,' with each grade marked up against the previous grade. Can I just note that there is also, and helpfully at I think page 1033 in the court book, a version of this proposal which is marked up as against the current award which is obviously an additional thing to what this document that was handed up in oral submissions was has endeavoured to achieve.

PN6650

All I wanted to note about it is it really continues the current – or it makes very minimal changes to the current position or the current descriptors described by the evidence of the ANMF itself, filed as not adequately reflecting the work and work value of persons in residential aged care.

PN6651

There were just two observations I wished to make at them having been identified, is that at level 4 the senior personal care worker, the reference to basic knowledge of digital technology or the requirement to use a digital device on a regular basis kicking in at that level doesn't seem – well, it partly might embrace it because it

seems that the evidence was everyone uses – basically everyone uses some form of digital device.

PN6652

And whilst we don't accept everything that Mr Ward said about – essentially it would seem to be the effect that there was not a skilled element in that – we don't accept that at all but that seems to be a problem. Can I then just – the second matter is that what they call grade 5, the qualification level in what's now ultimately the final dot point has been changed from what used to be a reference to an advanced certificate or associate diploma, to a Certificate IV such that the maximum qualification referred to is only a Certificate IV.

PN6653

There was a degree of evidence of persons who had other and higher qualifications – well, there's two problems with that. The one is the existing structure refers to an advanced certificate or associate diploma or equivalent. So, it allows for consideration of equivalence which is now remove essentially downgrading the degree of qualification and skill recognised at that level.

PN6654

There is also evidence of workers with higher level qualifications and in that respect there is evidence in relation to a Gina Ward, Lorri Seifert, Julie Kupke, for example who had diploma level qualifications or additional qualifications outside Certificate IV who are now gaining no recognition in the qualification level. The same difficulty arises with respect to the join employer proposal which seeks to remove level 7 in the current classification structure entirely.

PN6655

Can I turn then to the criticism that were made of the endeavour by the HSU to separate out the – import meaningful gaps between the classifications in terms of rates. Mr McKenna said that there were clear difficulties with the approach, or made two criticisms to the approach that the HSU adopted.

PN6656

The first of those is it was said that we didn't follow the three step process in the ACT Childcare decision. That submission misunderstands what we were endeavouring to do at this stage of the proceedings. That was an issue that was dealt with at the first stage of the proceedings, or maybe the first and second combined, in the sense that the Commission identified a key classification, got to step 3 and identified that the rate did not adequately compensate the work value at that level.

PN6657

What we are endeavouring to do at this stage of the proceedings having regard to that finding is to take up the challenge to look at the classification structure and building meaningful career progression. The second criticism was that we endeavoured to use a benchmark – each classification against a level in the metals trade – in the metals scale and that that wasn't the approach in ACT Childcare.

PN6658

Again that misunderstands the exercise that we were engaged in here which was to try and use the learnings, albeit not in the exact – accepting not in an exact way but to use the learnings within that structure to build in an appropriate classification structure that can recognise an award, progressive increase in skills and responsibilities in a manner which produces a career structure or aids career progression.

PN6659

Mr McKenna said that that approach wasn't appropriate because the Aged Care Award didn't perfectly match the metals scale which I think was precisely what Ms Saunders said in the submissions that were advanced on that subject, and what we endeavoured to do was identify an equivalent, not in any exact way but the appropriate level, not really on a pure qualification basis but looking at the work in the broad sense that the Commission has heard about in these proceedings to produce an appropriate level of increase between classifications justified on work value grounds.

PN6660

The other parties, both the ANMF and the joint employers don't endeavour to do that at all, and seek to entrench becomes unsatisfactory progressive – opportunities for progression to exist. And if you look at both of their classifications for both classification structures, if we get to a situation where Certificate III becomes a compulsory or mandatory qualification for care workers, at least, they would all be at level 4 in our classification or level 4 as it currently is.

PN6661

And the most progression that could be obtained by any care worker throughout their career no matter what additional skills, additional qualifications or additional responsibilities they take on would be 11 per cent. That would be the most that they could ever go from the start to the end. I'm sorry, I'm – Ms Saunders corrects me – on the employers' case it's only 9 per cent, on the ANMF's proposal to 11 per cent.

PN6662

That is precisely the problem that the Commonwealth identified its earlier submissions of August last year, and that all of the experts and the Royal Commission identified as a problem, which we were trying to address. And the suggestion made today by Mr Ward that the effect of the proposal that the HSU advanced was to seek a work value increase, and then on top of that a classification based increase which was not based upon work values, at all, that we were seeking to achieve.

PN6663

We do say that a meaningful jump between the classifications to recognise the improving in skills responsibilities, and responsibilities is appropriate on work value grounds. And when one looks at what – and I don't need to go back to any reply but we do say that for example, where one goes from level 4 in our classification to level 5 that what we were endeavouring to capture was a medication competency and use of that competency at that level, an increased role

in mentoring, supervising and instructing other staff, that that is a work value increase which justifies a different rate.

PN6664

JUSTICE HATCHER: So, Mr Ward referred to evidence concerning workplace training in at least assisting in giving medication signed off by a registered nurse and contended that if that occurs then under your structure they jump to the 109 per cent relativity and plus gain an immediate 34 per cent increase. So, what do you say about that?

PN6665

MR GIBIAN: We align that with being required to use that competency, not really – well, perhaps there's two things. One is there was a debate about whether or not the evidence as to the process that was applied by employers to satisfy themselves that a worker was competent to undertake that task fit within the competency in the Certificate III or Certificate IV. We'd understood that that was the intent of the training that was provided in that respect.

PN6666

The second is in that respect we regard a level 5 is being applicable in the circumstance where a care worker is required to utilise that, not really possessing it and not required to utilise it. But yes, we do say that that is one of the appropriate differentiating factors between level 4 and level 5.

PN6667

JUSTICE HATCHER: So, do you accept the proposition that that would result in persons currently at level 4 getting a 34 per cent increase, counting the interim increase?

PN6668

MR GIBIAN: Yes. It justifies a 9 per cent differential from the level 4, a Certificate III, yes.

PN6669

JUSTICE HATCHER: So, do you accept the proposition?

PN6670

MR GIBIAN: Yes, I do.

PN6671

JUSTICE HATCHER: So, you say it justifies a 34 per cent increase?

PN6672

MR GIBIAN: Well, not that factor alone, obviously. There's an increase that we say is generally applicable as a result of all of the evidence. But that is a factor which is additional responsibility and skill required of the worker, which is appropriate to differentiate them from the – a differentiation factor with the appropriately set the classification structure, yes.

PN6673

And the evidence about that in the stage 1 proceedings did emphasise the weighty responsibility involved in that task. And so we don't say that lightly. That is, it is a responsible task. It does require initial training and competency to undertake it. It was something being done by experienced and trusted personal care workers. And we do think that that type of differentiation is important in creating a career progression structure.

PN6674

In that respect I think I had a couple of other documents I wanted to hand up just to answer questions that the Commission had raised. I have to say Mr Saunders primarily has prepared a note in relation to the sources of the classification structure in the Nurses Award in relation to it by reference to the cases which are in our list of authorities. I wasn't going to speak to it other than to provide it.

PN6675

Your Honour the President asked a question about the mathematics of increasing the relativity below the Certificate III classification and whether that would send anyone backwards. I think your Honour was right. It doesn't send anyone backwards in an absolute sense but if there was an increase as we've asked for of an additional 10 per cent, but they do receive a lesser increase obviously enough at the lower levels by amounts between 3 and 4 per cent lesser of an increase, obviously depending on the degree of further increase awarded by the Commission in addition to the interim increase.

PN6676

Then so far as the AIN issue is concerned can I just say the complaints Mr McKenna made of a procedural fairness basis ought not be accepted. The HSU throughout the proceedings has submitted that persons performing care work in aged care facilities, even if they're called AIN's, don't fit within the classification descriptor of a nursing assistant in the Nurses Award.

PN6677

JUSTICE HATCHER: So just to be clear about your position, you don't propose any variation to the Nurses Award? You simply say they're not covered by the Nurses Award because they don't fall within the classification descriptor for a nursing assistant in the Nurses Award?

PN6678

MR GIBIAN: Yes. That's the position we've adopted on that basis, not thought it necessary to vary the Nurses Award as such. If that were to be done for clarity then so be it but – and we think really - - -

PN6679

JUSTICE HATCHER: But the problem is the grant of the interim variation to the Nurses Award is inconsistent.

PN6680

MR GIBIAN: Suggests they are.

PN6681

JUSTICE HATCHER: It implies at least non acceptance of that proposition.

PN6682

MR GIBIAN: I'm not sure it was considered. At least there was no express consideration of it.

PN6683

JUSTICE HATCHER: As I said, it implies. I mean if you're right we could just take away the increase and forget about it.

PN6684

MR GIBIAN: Indeed. And obviously we accept that it might be better if it was cleared up in a way which is obviously clear, indeed. But we really do think that the submissions that the ANMF has advanced in this stage of the proceedings really involves an acceptance that that's right. That is, Mr McKenna said in so many words that in a residential aged care persons are employed solely to assist an RN employee and that direct control is not a way to describe the work that is performed.

PN6685

And relevant to the procedural fairness point but also just generally, it was only in the draft determinations that were filed in September that the ANMF sought a variation to the Nurses Award which would entirely mimic what they say should happen, or entirely replicate what they say would happen for the personal care worker classification and produce with – with respect it's a proposition that there would be two identical classification structures for identical work in identical workplaces in two different awards.

PN6686

JUSTICE HATCHER: So, you say the ANMF variation would produce overlap that doesn't currently exist?

PN6687

MR GIBIAN: Well, it would endeavour to introduce an express entire overlap between the two classifications. The current position is not ideal either. As I say, we think it's clear on the evidence in these proceedings that even if all AIN's people don't fit within the classification descriptor for a nursing assistant to be in the Nurses Award, obviously we accept there are people in practice who are called AIN's in residential aged care and that has the potential to cause confusion and already has the unsatisfactory circumstance that the employer can – or it appears, believe they can by choosing a title, determine a question of award.

PN6688

Now whether that's a correct legal position that's another question but employers appear to work on the basis that they can choose to call people AIN's or personal care workers and thereby determine the award coverage.

PN6689

In respect of the conditions issues, perhaps the thing that was lost in the debate earlier is that the ANMF proposal here is to – that the current rates for AIN's stop at a lower point than the rates for personal care workers. So they are seeking to add an additional pay classification that doesn't exist at present for (indistinct)

aged care nursing assistants and thereby replicating the position for personal care workers in aged care.

PN6690

And the suggestion that clause 4.7 of the Aged Care Award, that is the overlap provision in modern awards is an answer, that provision perhaps really highlights the difficulty it has in the approach that the ANMF proposes to put into practice in the sense that it is positive upon there being an assessment of the nature of work.

PN6691

That is that work might look different as covered between two classifications and one can compare the work actually performed, the environment in which it's performed and decide which classification and which award is appropriate if the work is the same in the two classifications then it really flounders upon the whole concept of having the award overlay provision.

PN6692

As I said in the earlier submissions, we would not doubt say that the outcome in all cases if one then had to turn to environment would be that the Aged Care Award would apply because the environment is a residential aged care facility. But perhaps the ANMF would have a different view on that. The point is really that that provision contemplates that the two classifications being prepared would be different so that one could assess which is appropriate.

PN6693

Can I then turn to some things that Mr Ward said yesterday afternoon in relation to indirect care workers, and particularly the submission that was advanced that there was some relevant and significant difference in the degree of involvement that different categories of indirect care workers have with residents in terms of their interactions and involvement in social support and the like.

PN6694

The suggestion was the cleaners and food services employees perhaps on the one hand have a relatively high degree of that work in their role but it was asserted that there was a lesser degree for laundry, gardening, maintenance and then administrative workers, it was said.

PN6695

This among other submissions that Mr Ward made that seemed to sort of float issues but not make clear what it is said on his client's part, or to be done with those issues, today it was clarified by way of lack of clarity, perhaps, in the sense that it was said, well, the Commission should consider this matter but we don't actually that there should be different rates or different increases for different groups of indirect care employees.

PN6696

To the extent that what was raised is that that matter ought give rise to a different work value assessment for cleaners and food services workers on the one hand, and the other classes on the other, that should not be accepted in our submission. And there's a number of points to be made in that respect. The first is that the submission went to one aspect of the work alone and that is the social

interaction aspect, and didn't address the other aspects of the indirect care employees and other aspects in which it's changed.

PN6697

For example, the evidence in relation to the administrative employees and the extent to which changes in the regulatory arrangements in aged care and increased complexity and stringency of those arrangements, as well as change to community and internal expectations to those roles. So, it seeks to isolate one aspect of it.

PN6698

Secondly, the evidence is and Mr Ward accepted that all categories of indirect employees are required to and do have a role in providing social support and interaction to residents, both in the matter in which they give effect to their occupational tasks but also separately are expected to, and do develop relationships with residents as part of providing a social environment and social support.

PN6699

All those categories are required to have and to regularly exercise the skills to do so. All of the indirect care employees are required to undertake the same training and are subject to the same standards and requirements in that respect, training in relation to dementia and challenging behaviour, incident response, restrictive practices, regulatory arrangements including the aged care quality and safety standards, accreditation requirements, the SIRS scheme, the aged care code of conduct and the like.

PN6700

The highest the submission could go was that the frequency and perhaps duration of the interactions potentially was somewhat less for some classes of employees than others, not that they don't have to have those skills and exercise them on a regular basis, but they not trained to and are not subject to standards requiring them to give effect to personal centred care and relationship based care or relationship based support.

PN6701

Where those skills are required regulation and training are the same. We don't think the assertion that a frequency of its exercise might be somewhat less in a relatively speculative way as something that would lead to a different work value assessment for the different classes. Obviously were that the outcome you would have the potentially undesirable workplace effects that Mr Mamarelis was concerned had already occurred in respect to the difference between direct and indirect care. There was a different increase for cleaners as opposed to laundry staff within the same type of facility.

PN6702

Can I turn then briefly to a few things that Mr Ward said today. I think I felt – Mr Ward said very stridently the Commission must not award a work value increase and then a further increase on classification grounds, on the base of a classification change which was not justified by work value. That submission wrongly assumed that that was what we were asking the Commission to do. We are not.

PN6703

It seemed to be suggested that there was something, and indeed Mr Hartley perhaps hinted at something similar that my client was not plain about the effect of the classification changes to which it sought. At pages 454 and 455 of the court book there is the tables that we filed which identified the effect of the increases that were a consequence of both the further 10 per cent that was sought or the 25 per cent for indirect care employees and the classification changes. It's plain all along that that is what we were seeking.

PN6704

The second thing that Mr Ward said that the Commissioner should not do is to make any reference to the degree of care needs or characteristics of residents in a classification structure. Can I just make two observations about that. Firstly, the joint employers' proposal itself includes or continues what exists at the present in the home care classifications, references to the degree of care needs of residents at the (indistinct) level 5's - in that case, I should say, in the differentiating the classification structure. So, he seems only not concerned as a matter of principle in that respect.

PN6705

The second is although we accept it could be done in different ways, we do think that the basic proposition or approach that we endeavoured to adopt in the classification structure was that we have endeavoured to identify and recognise where there is differentiation in skill and responsibility involved in work.

PN6706

And we think the evidence is plain that where there are higher care needs the degree or skill and responsibility involved in the provision of care work is increased and that ought be recognised in the appropriate way in the classification structure rewards and incentivised increase in skill and responsibility.

PN6707

As to the medication and specialist dementia care or palliative care aspects of the classification structure the suggestion that simply because all aged care workers will need to deal with persons who experience dementia in some form or another, that there isn't any basis upon which to identify it and wish to in a classification structure, reward and recognise specialist skills in those areas – and palliative care, as well, in those areas flounders on two aspects.

PN6708

One, we did in our classification endeavour to make reference not merely to the presence of people suffering from dementia but worked in a specialist role or specialist unit. Can I just note in that respect there was evidence in stage 1 of the proceedings in that respect.

PN6709

There's no doubt more but two examples that I identified from the lay witness report at paragraph 37 there was reference to the evidence of Ms Goh working in a dementia care specialist team. And Ms Schmidt at paragraph 74, similarly recognises what is needed in a specialist dementia team. There was also reference to palliative care teams in the evidence.

PN6710

So far as the joint employers' proposal for direct care workers at least is concerned it is in some way more developed in the ANMF's proposal than the current structure in the sense that it allows for progression from what they call grade 3 to grade 4 upon three years of post-Certificate III experience. We think the evidence of the three years was fairly described by Mr Waters but not particularly strong. But we would agree with that and it seems an excessive period.

PN6711

The main point that we would make about it is that it doesn't make any other attempt to recognise improvement in skills or authorisation for responsibility other than the three years and pure qualification basis. So, a Certificate III plus three years, you end up level 5 Certificate IV and then it stops. There's no attempt to recognise or build any differentiation in the level of skill required or the work performed.

PN6712

And the other aspect is the removal of level 7. I think in my earlier submissions I've said that that is not an option having regard to section 163 of the Act which doesn't allow – unless there's another award that would apply to people on that level and there's no capacity for the Commission to delete that classification even if it was otherwise appropriate unless the intended effect of the joint employers' proposal is that people currently on level 7 would go back to what's currently level 6, level 5 on their proposal, to go backwards in rates of pay.

PN6713

The final topic that I want to deal with at any length, at least, is the home care issue. The relatively strong opposition as we read it, to our proposal to move aged home care to the Aged Care Award as an industry award. Again there was a procedural fairness concern raised. That's also with respect not a matter we would accept.

PN6714

It was an issue raised by the Commission and at least since the start of this year is a position that we have affirmatively adopted in the proceedings in all of the documents that have been made public.

PN6715

Secondly, Mr Ward referred to the award modernisation process and acknowledged that there had at some point in that process been a draft prepared of the Aged Care Award which would have included aged home care. I took the Full Bench in the submissions the other day to the ultimate decision in which that was withdrawn. I think everyone agrees that there was no real explanation as to how or why that occurred.

PN6716

Secondly, as to the existence of what Mr Ward referred to as the home care sector, he said it had three aspects. One was the one example where there's a retirement village and Mr Brockhaus gave evidence as to the provision of care to its residents. As I understood that evidence that was still home care. That is, it was home care funded by either a home care package or the Commonwealth Home

Support Program. And they had chosen to do it for persons living independently within the retirement village they operated it in as an initial measure. But that didn't fall, through its nature as being home care. And so really these first two categories are really the same category.

PN6717

The third was, what is said was true home care where there was disability support and aged care provided. There was relatively little evidence about that in these proceedings. The employer who gave evidence in that respect was a Ms Cudmore who worked Alliance. Her evidence, and I'm now referring to evidence she gave orally on 12 May 2022, around PN13720 was that they had only recently taken on any home care work.

PN6718

It was mainly disability support. They had only recently taken on any home care work involving aged persons and it was a small part of their business and only in New South Wales. Mr Ward referred to a number of individual witnesses who said that they had done both or other work. Some of that again was in very minor respects. I think there was evidence that said she had done work with a couple of NDIS clients in addition to a large number of aged care workers.

PN6719

To the extent it was suggested there was some difficulty for those employers in dealing with multiple awards, they already of course deal with multiple awards necessarily. There is also the issue in relation to schedule E and schedule B of the SCHADS Award which is the subject of fertile debate and that they have to deal with on a day to day basis, and that there are already different rates of pay for aged home care work and disability home care work.

PN6720

We think the simplicity and ease of application is in fact aided by moving aged home care workers to the Aged Care Award.

PN6721

As to the conditions issues that were raised in relation to the draft determination when it was filed, my client did make clear that the intention was only to replicate those conditions which were distinctive and to maintain those. I'm not being critical of Mr Ward in this respect but that document was filed in September, obviously and if they didn't look at it, so be it. But they did look at it only in the last day or two and brought in issues to our attention only yesterday afternoon.

PN6722

But my client has made its intent clear. If there were difficulties with the draft it would be in that subject that we've indicated that we're perfectly happy to address and would be appropriate to be addressed to avoid any of the consequences that Mr Ward suggested might occur. Finally, just in respect of the home care classification structure the joint employers' proposal in that respect really is primarily a reorganisation in a way out sense of the existing classification structure and doesn't do more than that.

PN6723

It does nothing to address the difficulties that have been identified with that structure, particularly the very limited progression available for direct care workers really only up to grade 3, and no possibility of progression beyond that stage on any basis, whatever qualifications are obtained unless they move into some form of administrative or supervisory role.

PN6724

JUSTICE HATCHER: Do home care workers administer medication? I'm seeing some nods in the background.

PN6725

MR GIBIAN: Yes, there was some evidence to that effect. I think there was some debate about the type of medication and the extent of it but there was some evidence of it, certainly.

PN6726

PROF BAIRD: My recollection is that a lot of that was described as prompting, the assisting medication and - - -

PN6727

MR GIBIAN: There was a debate about – and maybe the difference is not incredibly clear between administration and assisting, but yes, there was suggested it was more in the nature of prompting than administering. But again, that's perhaps a spectrum rather than a sharp distinction.

PN6728

JUSTICE HATCHER: All right. Thank you. Ms Harrison.

PN6729

MS HARRISON: Your Honour, I didn't intend to make any reply submissions.

PN6730

JUSTICE HATCHER: Thank you. Mr McKenna?

PN6731

MR McKENNA: If the Full Bench pleases. I think shortly after the luncheon adjournment or perhaps during the luncheon adjournment a document has been emailed to the associates of the members of the Full Bench. I understand that there is an error in that which is currently being addressed. There are a couple of other points that I wish to make by way of reply, so I might park that and it might be that by the time I come to it there's a fresh document and if not it might be that
- - -

PN6732

JUSTICE HATCHER: Was the first version sent to the other parties?

PN6733

MR McKENNA: It has.

PN6734

JUSTICE HATCHER: All right.

PN6735

MR McKENNA: And it was, I think, helpfully the representative for the HSU who identified an error, so he – can I start by addressing a point by Mr Chin for the Commonwealth, the reliance on the COVID allowance case and paragraph 92 to which the Full Bench was taken. I make three observations about that and the reliance on it. Well, perhaps four.

PN6736

Firstly, as I understand the Commonwealth's position it's not said that the matters and the potential flow on of costs are in any way relevant to the identification of work value but limited to the modern award objective, the minimum wages objective, in particular, 134(1G). And in our submission the COVID allowances case is distinguishable in circumstances where the Full Bench there observed the circumstances raised by the applicant unions in support of COVID allowances here appear be indistinguishable from those other employees who are required to provide care and support to persons who have contracted COVID 19 or suspected of having done so.

PN6737

It is of course accepted that it's been made clear that there are substantial overlapping issues between this application, and a subsequent application that will be brought by the Federation. But it is not the case that those will be indistinguishable. There will be multiple issues in a subsequent case that will be specific and relevant only to that. And those points have been made and I won't repeat them.

PN6738

More generally, as to the concept of stability and any negative impact upon stability to your Honour, the President's point, the issue of gender undervaluation is squarely in issue. It's squarely an issue that is being dealt with and must be dealt with by the Commission by reasonable legislative amendments. And the response is otherwise open. It is not the case that the proceeding before the Commission is somehow affecting stability in a negative way in and of itself.

PN6739

And the third point that we would make is of course that having regard to the factors in section 314, there'll be factors that will need to be balance. And we have already made submissions and again I won't repeat them, but made submissions as to the need to achieve general equality which is obviously another relevant factor.

PN6740

There were some questions yesterday from the Bench and I think it might have come from Your Honour, Vice President about the required qualifications for IPC leads. The answer to that question can be found in a number of places. Firstly, in the expert report of Professor Bennett, paragraph 82 which is at page 661 of the digital hearing book, and also helpfully in a document identified in a footnote to the joint employers' submissions at paragraph 19 which can be found at page 2490 of the hearing book.

PN6741

If I can just briefly refer to what's contained in that reference because it sets it out quite simply. There is a document that has been published by the Department of Health & Aged Care pertaining to infection prevention and control leads, in respect of about IPC leads, and about IPC leads it provides that IPC leads must be a nurse who has completed or initially is in the process of completing the required specialist infection protection control training.

PN6742

And as to what that training is, the training requirements are specialist staff as they're trained in COVID-19 training modules which require a focus in IPC and are specified at the level of a QF8, so honours, a graduate diploma, graduate certificate level. Then then I think does bring me back to the – if I can deal first, I think there are two particular issues in relation to a comparison of Nurses Award rates and costing issues.

PN6743

One issue is the comparison between enterprise agreement rates in aged care and award rates. And the other, as I understand your Honour the President's question before lunch, goes to the issue of a comparison between current Nurses Award rates and the public sector agreement rates. It's that issue that is addressed in the spreadsheet that we sent around and that issue that I'll park for the moment.

PN6744

But as to the other issue, it's addressed in the statement of Ms Wischer which is contained – and I don't anticipate that the Full Bench will have access to this now – it is in the stage 1 digital court book at tab 222, page 13355.

PN6745

JUSTICE HATCHER: Just hold on a sec. What was the page number again?

PN6746

MR McKENNA: 13355.

PN6747

JUSTICE HATCHER: 13355.

PN6748

MR McKENNA: And Ms Wischer in her statement refers to as identified before lunch, a document produced by the AMF called the Nursing Industry Pay Check(?). It was previously produced already. I understand it is now produced twice in here. What that does is that collects data of the department agreements approved by the Commission and does so with respect to aged care, and then provides a simple average of those rates.

PN6749

So, that as I understand there's no weighting of the rates but it just – every single enterprise agreement covering an aged care facility, it takes out rate (indistinct) and identifies it by the entire number. What Ms Wischer's statement identifies at paragraph 17 that's also relevant is that 86.2 per cent of aged care facilities have their entire direct care workforce covered by enterprise agreements. And there are

8.9 per cent of facilities who are totally award reliant and 4.9 per cent who have partial coverage. So, to the extent that - - -

PN6750

JUSTICE HATCHER: Can't we segregate registered nurses from that?

PN6751

MR McKENNA: Not at this level, no.

PN6752

JUSTICE HATCHER: I assume there's a more recent version of that, isn't there?

PN6753

MR McKENNA: So, the last version pay check was produced in 1 July this year.

PN6754

JUSTICE HATCHER: That's not in evidence.

PN6755

MR McKENNA: That's not in evidence.

PN6756

JUSTICE HATCHER: Yes, we'll give you leave to provide that version plus - - -

PN6757

MR McKENNA: As the Full Bench pleases. Would the Full Bench be assisted at all in me addressing what is in evidence? It dates to 1 July 2021.

PN6758

JUSTICE HATCHER: No, I think it's sufficient. You've given us the reference. We'll have a look at that. But at this stage the Commonwealth hasn't really amplified this flow on or funding point, so it's a bit – I don't want to go down an unnecessary rabbit hole.

PN6759

MR McKENNA: I'm instructed that it there's some complications in correcting the figures in the document that's been provided and it will take some 10 minutes. I can address the document that we have, notwithstanding that the fact that it will contain some incorrect errors. In large part the document speaks for itself.

PN6760

What we have attempted or what we have done is extract the table, the current rates for aged care nurses in the Aged Care Award for enrolled nurses at the first pay point, registered nurses at the first pay point, and nurse practitioners at the first pay point. And then set out what is proposed from the ANMF proposed increase, and then the public sector rates for those three classifications in New South Wales, Victoria, South Australia and Western Australia.

PN6761

JUSTICE HATCHER: I mean there's some difficulties in having a like to like comparison because I think that some of them have different numbers of pay points and those sort of things.

PN6762

MR McKENNA: There is. Which is why we looked at what we have – this is a revised version of the document. Earlier versions of the document had other classifications so we didn't have any confidence that we were comparing apples with apples. But when one looks at entry level – the first pay point for an enrolled nurse, the first pay point for a registered nurse and the first pay point for a nurse practitioner, we have a reasonably high degree of confidence that that that does allow a like to like comparison.

PN6763

JUSTICE HATCHER: Yes. But it won't, by itself, tell us much about any funding implications without examining where everyone else fits.

PN6764

MR McKENNA: That's so. That's right.

PN6765

VICE PRESIDENT ASBURY: Do you mean you've done that in the Nurses Award, that comparison? I thought you just said the Aged Care Award.

PN6766

MR McKENNA: I'm sorry, I think I did. But no, yes, of course.

PN6767

VICE PRESIDENT ASBURY: The Nurses Award?

PN6768

MR McKENNA: We're talking about the Nurses Award.

PN6769

VICE PRESIDENT ASBURY: Just checking.

PN6770

MR McKENNA: Thank you, Vice President. Two final matters, very briefly. Your Honour has indicated that you won't hear a reply to a reply, so I realise that - - -

PN6771

JUSTICE HATCHER: No, I was going to ask you about that definition of nursing assistants in the Nurses Award if that's bothering you. So, again because I've come late to the proceedings, how does a nursing assistant in aged care satisfy the definition in A.1 of the Nurses Award, particularly the requirement if the employment is solely to assist the RN or enrolled nurse and provision of nursing care persons?

PN6772

MR McKENNA: The first thing I'd say about that, your Honour, is that it hasn't been in dispute that – it hasn't been an issue squarely in dispute that AIN's aren't meeting this.

PN6773

JUSTICE HATCHER: It was in the HSU's further submissions.

PN6774

MR McKENNA: If we turn to the evidence that is provided there is – the Full Bench doesn't have the benefit of evidence from AIN's saying I'm under the direct control of an RN, in A, B, C respects.

PN6775

JUSTICE HATCHER: I'm not talking about the element of control. I talking about the element that says the employment but be solely to assist an RN or enrolled nurse and the provision of nursing care persons. I have trouble understanding how that applies to a personal care worker, however described in aged care. That is, I don't think on the evidence the role could be described as solely to assist the RN or enrolled nurse.

PN6776

MR McKENNA: Well, in my submission we say that that's not the preferable characterisation for what they're doing because the preferable characterisation of what they're doing is assisting the resident. But their role in assisting the resident is in accordance with the direction, supervision and delegation of the registered nurse.

PN6777

JUSTICE HATCHER: Sure. So that still doesn't address the issue. That is, it's a separate requirement in the definition that the employment must be solely to assist an RN or enrolled nurse in the provision of nursing care.

PN6778

MR McKENNA: Yes.

PN6779

JUSTICE HATCHER: I don't see on the evidence how that element of the definition would be satisfied.

PN6780

MR McKENNA: Well, in my submission that is what a PCW and an AIN does. They are working as part of a care team delivering nursing care which is overseen by a registered nurse.

PN6781

VICE PRESIDENT ASBURY: So you would say when they're undertaking tasks such as showering, dressing, they're looking for pressure points, they're looking for skin tears, changes in the residents - - -

PN6782

MR McKENNA: Yes.

PN6783

VICE PRESIDENT ASBURY: I understand the argument, yes.

PN6784

MR McKENNA: And there is a substantial body of evidence about that exact point from Ms Butler in her statement.

PN6785

VICE PRESIDENT ASBURY: Except you say that's nursing and others would say that's personal care that – that's the - - -

PN6786

MR McKENNA: I don't think Ms Butler was challenged upon her evidence that it is nursing. It might also be it is also personal care. But her evidence is that that is nursing care. There's a definition of nursing care that she refers to. And so she says that AIN's effectively are providing nursing care. The difficulty that we have with the definition is that it puts the emphasis on the wrong person.

PN6787

The PCW/AIN, their role is there to care for the aged person. In practice they'll be doing that under the direction and controlled supervision of a registered nurse. In our submission what they are doing does fit in the current definition. And the current definition could be and should be improved.

PN6788

JUSTICE HATCHER: Where does the definition of 'Nursing Care' in 8.2 come from? It seems hardly adequate to describe what a nurse does.

PN6789

MR McKENNA: 8.2 of the award? I don't have the award in front of me.

PN6790

JUSTICE HATCHER: Sorry, 8.2 of the Nurses Award.

PN6791

MR McKENNA: Yes. Sorry, bear with me.

PN6792

JUSTICE HATCHER: That's all right.

PN6793

MR McKENNA: Yes, I'm just going try and find it in the digital - so, the definition of nursing care meaning, 'giving assistance to a person who has because of a disability – is unable to maintain the – that's the point, your Honour?

PN6794

JUSTICE HATCHER: Well, yes. I mean, so it says, 'to assist an RN or enrolled nurse in providing nursing care'. So, I suggest they're assisting the RN in providing nursing care. And then you have this definition which perhaps the third dot point carries the weight of it, but it's a fairly confined definition of what nurses do, I would have thought.

PN6795

VICE PRESIDENT ASBURY: Is it intended to apply to the AINs? From memory it relates to the AINs and then - - -

PN6796

MR McKENNA: As your Honour points out, 8.5 is the work of the RN. But the reference to carrying out tasks which are directly related to the maintenance of a person's bodily needs is in my submission a broad category. Giving assistance to a person because of a disability who is unable to maintain their bodily needs is, as well, and assisting a registered nurse to carry out their role in its entirety.

PN6797

JUSTICE HATCHER: So, what was the other issue you wished to address?

PN6798

MR McKENNA: The Full Bench has been provided an HSU note re Nurses Award classification structure. I've reviewed it briefly and I don't take particular issue with any aspect of it. The point is that we don't understand the relevance of it. The HSU doesn't have an application on foot with respect to the Nurses Award.

PN6799

There is a body of material already before the Full Bench about the history of the Nurses Award in the statement from Ms Wischer. There is the background document too. In those circumstances I don't understand what work this document should do or what weight should be given to it. There's one other very narrow point, as well about a submission made about witnesses to the proceeding having diploma level qualifications.

PN6800

The diploma level qualifications are set out in the schedule to the lay evidence report. I understand none of the PCW/AIN's had a diploma or the qualification in the direct care in terms of the evidence. There is none aside from the enrolled nurse qualification. If the Full Bench pleases.

PN6801

JUSTICE HATCHER: Mr Ward?

PN6802

MR WARD: Your Honour, I'll just make two very quick points I think to the Commonwealth. And can I just for an abundance of caution say that there's been a phrase used called 'stage 4.' I just think it's important that we say this, that we would hope the Commission will hear from the Commonwealth on timing and phasing, and then hear the parties on the question of operative date. Because that became an issue last time which blew up a bit, so I just want to be conscious about that.

PN6803

JUSTICE HATCHER: What I broadly envisage is that we'll issue a decision which will have with it a draft determination to allow the parties to make

submissions about the final terms and determination. As I said, the operative date would arise in that context.

PN6804

MR WARD: If the Commission pleases, we'd be content with that. And just, hopefully I don't misquote the Commonwealth's submissions. It appears the Commonwealth's commitment goes to wages. It doesn't go to the cost of conditions. And I just note what was said about the possible cost change and conditions in relation to home care. If the Commission pleases, that's all we have to say.

PN6805

JUSTICE HATCHER: Anything further from you, Mr Chin?

PN6806

MR CHIN: No, your Honour.

PN6807

JUSTICE HATCHER: All right. Just give me a second. We're just going to send the parties some data which has come to our attention. It's the ABS census 2021 of the aged care industry which we understand is not in evidence. It gives some disaggregated gender make up of occupations within the industry. I don't think it could be controversial but if any parties wishes to comment upon it we'll allow 21 days to do so. If there's nothing further, we thank the parties for their submissions and we, subject to that matter, reserve our decision.

ADJOURNED INDEFINITELY

[3.00 PM]