

**SUBMISSION IN REPLY
ANNUAL WAGE REVIEW 2023–24**

29 April 2024

1. BACKGROUND

- 1.1 By a Statement issued by Justice Hatcher on 27 February 2024, the Draft Timetable for the Annual Wage Review 2023-2024 (**the Review**) was confirmed.¹ Pursuant to that timetable, parties are to file reply submissions by 29 April 2024.
- 1.2 Since the filing of initial submissions, two reports have been issued pursuant to the Draft Research Program:
- (a) “*Stage 2 report: Gender pay equity research*”, 4 April 2024 (**Stage 2 Report**); and
 - (b) “*Statistical report—Annual Wage Review 2023–24*”, version 4, 26 April 2024.
- 1.3 By this reply submission, we address the following:
- (a) should the Expert Panel make “*specific adjustments to particular modern awards*”, following the “*significant steps*” proposed by the Australian Council of Trade Unions (**ACTU**) to address gender-based undervaluation in the modern awards; and
 - (b) observations about the Stage 2 Report.

¹ [2024] FWC 278 at [9].

2. SHOULD THE EXPERT PANEL MAKE “SPECIFIC ADJUSTMENTS TO PARTICULAR MODERN AWARDS”?

Overview

- 2.1 The Expert Panel should not be persuaded to make “*specific adjustments to particular modern awards to address gender undervaluation*” (the **ACTU proposal**) in the Review.
- 2.2 Four issues arise from the ACTU proposal that necessitate caution in this Review:
- (a) **Issue 1:** The ACTU incorrectly conflate the recognised discretion of the Commission to *defer* the operation of a variation determination by reference to “*exceptional circumstances*” in s 286, with a discretion to make *disparate* variation determinations as part of the Review (i.e. “*specific adjustments to particular modern awards*”).
 - (b) **Issue 2:** The ACTU proposal promotes a slavish application of the *Stage 3 Decision*, that overlooks the specificity of the work value reasons identified by the Expert Panel as justifying the increases to award minimum rates in aged care.
 - (c) **Issue 3:** The ACTU entirely disregard the obvious limitations of the *Stage 3 Decision*.
 - (d) **Issue 4:** Sections 134(1)(ab) and 284(1)(aa) do not “*necessitate*” immediate action in this Review. Importantly, regard to sections 134, 138 and 284 demonstrate that the ACTU proposal is misguided and likely to lead the Expert Panel into error.
- 2.3 Following an overview of the ACTU proposal, each issue is addressed in turn below.

The ACTU proposal

- 2.4 The ACTU suggest that the Expert Panel has “*an historic opportunity to make significant progress towards gender pay equality by making **specific adjustments to particular modern awards to address gender based undervaluation***”.² The ACTU also contend that “[t]here is **a sound basis to intervene in rates for female dominated care work and professional work on an interim basis and to establish a process to identify interim increases for other types of female dominated work**”.³
- 2.5 That “*sound basis*” appears to be informed by the following:

² ACTU Submission to the Annual Wage Review 2023-24 (filed 28 March 2024) at [9] (**ACTU Initial Submission**).

³ Ibid [15].

- (a) the concepts and objectives of gender equality introduced by the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (Cth) (namely, sections 134(1)(ab) and 284(1)(aa));
- (b) the research set out in the Stage 1 Report⁴ and Stage 2 Report (with the latter identified as an expectation);
- (c) the recent decisions in the Work Value Aged Care Industry Case, namely, the *Stage 1 Decision* [2022] FWCFB 200 and *Stage 3 Decision* [2024] FWCFB 150.⁵

2.6 Broadly, two categories of “*specific adjustment*” are proposed:

- (a) An immediate adjustment in the form of an “*interim increase reflecting the ‘application of the new benchmark’*” to be awarded to awards covering ‘caring’ work.⁶ Curiously, whilst acknowledging the complexity associated with determining the appropriate percentage of such a ‘uniform’ increase for ‘caring’ industries and that such an increase would not be the end of the process,⁷ the ACTU contend that such factors should not impede the Expert Panel from taking steps “*available*” to it in the Review.⁸
- (b) A further adjustment for other female-dominated industries to be determined following a series of consultation sessions held as part of this Review. Despite acknowledging the necessity of work value analysis (albeit focused squarely upon gender-based undervaluation),⁹ the ACTU contend that the Review should be used as a vehicle to address gender-undervaluation throughout the modern award system. The ACTU submitted that:

“The purpose of those consultations would be to establish a consensus as to a common denominator of skills exercised but not recognised in the

⁴ “*Gender-based Occupational Segregation: A National Data Profile*”, 6 November 2023 (**Stage 1 Report**).

⁵ See ACTU Initial Submission at Section 5.

⁶ Ibid at [387]-[388]. These include, but are not limited to, the following awards: *Animal Care and Veterinary Services Award*, *Children’s Services Award*, *Educational Services (Schools) General Staff Award*, *Health Professionals and Support Services Award*, *Nurses Award*, *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award* and *SCHADS Award*.

⁷ Ibid at [389].

⁸ Ibid at [390].

⁹ Ibid at [387].

classification structures of the relevant awards. Once that common denominator is identified, it can be valued conservatively and that value added to the key classification in the relevant stream, then other classifications in that stream adjusted according to their existing internal relativities. This process would constitute an interim step in the Review toward fully addressing undervaluation.”¹⁰

2.7 It is suggested that the above “*significant steps*” are “*necessitated*” by s 134(1)(ab) and s 284(1)(aa).¹¹

Issue 1: The discretion of the Expert Panel

2.8 The ACTU’s suggestion that ss 285 and 286 provide a basis for the Expert Panel to make disparate variation determinations in this Review is erroneous and misguided.¹² *First*, it ignores the central requirement of s 285. *Second*, assuming the Commission has a discretion to grant “*specific adjustments*” on an award-by-award basis in the Review,¹³ the foundation for such a discretion is not sourced in s 286. *Third*, exercise of such a discretion could not be engaged without compliance with requirements set out in Part 2-3 of the *Fair Work Act 2009* (Cth) (**FW Act**).

The central requirement of s 285

2.9 Section 285 mandates that the Commission “*must **conduct and complete** an annual wage review in **each financial year***”. That provision establishes that the Commission has a finite time to complete the Review (i.e. by the end of June 2024).

2.10 By contrast, neither the ACTU or the Commission (of its own motion if it were minded to do so) are confined in the timeframe they choose to commence applications to vary modern awards to achieve the modern awards objective.¹⁴ The ACTU proposal, in this respect, creates an unnecessary artifice of urgency.

¹⁰ Ibid at [397].

¹¹ Ibid at [399].

¹² Ibid.

¹³ See *Annual Wage Review 2019–20* [2020] FWCFB 3500 at [128].

¹⁴ *Fair Work Act 2009* (Cth) ss 157, 158.

The discretion in section 286

- 2.11 Section 286 is concerned with “**when** annual wage review determinations varying modern awards come into operation” (emphasis added).
- 2.12 It is true that there have been occasions in which the Commission has found “*exceptional circumstances*” exist to justify the operation of an outcome at a later date. However, that proposition of deferral of outcome is very distinct from the proposal advanced by the ACTU. Further, historically, the Commission has shown a stern reluctance to adopt differential treatment of awards as part of the annual wage review.¹⁵
- 2.13 The ACTU are advocating for the setting of disparate rates between modern awards based on ‘categories’ (or groupings) of modern awards (e.g. all ‘caring’ industries or other “*highly feminised occupations*”). That is an entirely separate notion to setting a different operative date as is contemplated by s 286.

The statutory framework

- 2.14 Whilst s 285 does refer to the discretion of the Commission to “*make one or more determinations varying modern awards*”, that discretion does not operate in a vacuum without consideration of the statutory framework in the FW Act, in particular the provisions in Pt 2-3.
- 2.15 As to the discretion to “*vary some*” modern award minimum wages, the observations of the Panel in the *Annual Wage Review 2019-20* are instructive:

*“The Act does not compel the variation of modern award minimum wages in all modern awards. The Panel has a discretion to vary some or all modern award minimum wages in the context of a Review. **However, in exercising that discretion considerations of fairness and stability tell against varying the quantum of any adjustment to modern award minimum wages on an award by award basis.** As the Panel observed in the *Annual Wage Review 2012–13 decision (2012–13) Review decision*:*

‘If differential treatment was afforded to particular industries this would distort award relativities and lead to disparate wage outcomes for award-reliant

¹⁵ See *Annual Wage Review 2013–14* [2014] FWCFB 3500 at [514]-[518], [562]. See examples of the Panel rejecting arguments for differential treatment in *Annual Wage Review 2013–14* [2014] FWCFB 3500 at [535]: rejection of CCIQ submission because “*there is insufficient material to warrant a finding of exceptional circumstances*”; at [558]: reasons for rejecting the AHA, AAA, MGA and R&CA argument for special consideration included the matters raised “*generally relate more broadly to the award-reliant sectors and do not support differential treatment for the modern awards that have been raised with the Panel*” and so form part of consideration in relation to “*the economy... more generally*”.

employees with similar or comparable levels of skill ... It is also relevant that in establishing and maintaining the minimum wages safety net, the Panel must take into account the principle of equal remuneration for work of equal or comparable value. Such a principle supports the determination of consistent minimum rates for work of equal or comparable value. The maintenance of consistent minimum wages in modern awards and the need to ensure a stable and sustainable modern award system would be undermined if the Panel too readily acceded to requests for differential treatment.”¹⁶

- 2.16 Putting aside arguments about the source of the discretion, if the Expert Panel were to go down the track proposed by the ACTU, the mere identification that certain awards may feature ‘caring’ work or are impacted by gender-based undervaluation is not enough to enable the Expert Panel to identify the “*extent*” of the rate increase needed to achieve the modern awards objective and the minimum wages objective.¹⁷ It is entirely unclear how the ACTU expect the Expert Panel to answer that question without the benefit of evidence for each sector falling within the particular modern award “*groupings*”.
- 2.17 The ability to “*group*” (or link) different modern awards by reference to classifications that engage in “*caring*” work (the distinction of which may be part art and science) does not negate the requirement for the Commission to ensure that any proposed variation to the minimum award wages of each individual award are based on work value and provide a fair and relevant minimum safety net of terms and conditions, taking into account the items listed in s 134(1) and s 284(1).
- 2.18 Sectorial considerations are essential because alongside gender-based undervaluation the Commission would need to be assured that work value is properly considered and that the modern awards objective is being met (along with the minimum wages objective) and this will play out differently in individual industries subject to the economics, demographics and commercial setting of those industries, as well as the role those industries may or may not play in the broader economy.
- 2.19 There would also be a serious question to be asked about whether expanding the Review to make such a decision about an “*interim increase*” for a select number of awards (or further “*specific adjustments*” following a period of highly truncated consultation sessions),

¹⁶ *Annual Wage Review 2019–20* [2020] FWCFB 3500 at [128] (emphasis added), quoting *Annual Wage Review 2012–13* [2013] FWCFB 4000 at [77].

¹⁷ *Fair Work Act 2009* (Cth) s 138.

in light of the requirement to “**complete**” the Review within the financial year, would afford affected parties the requisite “*reasonable opportunity*” to make submissions.¹⁸

2.20 No part of ss 134, 138, 284 or 285, mandates that the Commission must use the Review to eliminate gender-based undervaluation from a selection of modern awards.

2.21 There is simply insufficient time for the Commission to properly inform itself to the requisite level to satisfy the requirements under ss 134, 138 or 284.

2.22 In those circumstances, considerations of fairness and stability tell against varying the quantum of any adjustment to modern award minimum wages on an award by award basis.¹⁹

Issue 2: The fault in the slavish application of the Stage 3 Decision

2.23 The notion that the *Stage 3 Decision* has set a new benchmark rate for Certificate III employees that can be automatically applied as a form of comparative wage justice is at best *naïve* and at worse in error. The same may be said about the ACTU suggestion that the Commission may determine an appropriate “*interim increase*” by reference to the *Stage 1 Decision* and/or *Stage 3 Decision*.

2.24 The error in that approach is twofold:

(a) *First*, the new benchmark rate for the Certificate III qualified personal care worker (PCW), assistant in nursing (AIN) and home care worker (HCW) in aged care has been set in large measure because of very particular work value issues associated with the aged care sector – rather than a series of generalised gender assumptions that have been imputed upon the basis that the work is performed by a higher percentage of women.

(b) *Second*, to assume the work value findings for one category of worker in the aged care sector (i.e. the personal care worker) are automatically transferrable to all “*caring*” or female-dominated industries, without regard to the industry or occupation specific evidence, is not only an oversimplification of the highly considered approach taken by the Expert Panel in the *Stage 3 Decision* but would, again, fall foul of the statutory requirements in the FW Act.

¹⁸ See *Fair Work Act 2009* (Cth) s 289(1) and (5).

¹⁹ See *Annual Wage Review 2019–20* [2020] FWCFB 3500 at [128] (emphasis added), quoting *Annual Wage Review 2012–13* [2013] FWCFB 4000 at [77].

- 2.25 Whilst the ACTU fall short of suggesting a number for the purported “*interim increase*” that the Expect Panel should set in the Review to address gender-based undervaluation, it is plain they consider such a course to be appropriate and available to the Commission.
- 2.26 To highlight the folly in that approach, we identify the multitude of sectorial and occupation specific work value factors that informed the increases to award minimum rates set by the Commission in the *Stage 1 Decision* and *Stage 3 Decision*.
- 2.27 A notable absence from the granular of those findings is that the Expert Panel at no stage made a decision to attribute a specific percentage of the work value increase to either historical gender undervaluation or specific gender assumptions. All that can be concluded is that such reasons formed part of the multitude of work value reasons identified. Further, as the decisions make clear, certain work value reasons attracted greater or lesser primacy subject to the specific classification and the work being performed.²⁰

Stage 1 Decision: the work value reasons justifying a 15% increase for direct care employees

- 2.28 Turning first to the findings in the *Stage 1 Decision*, the Full Bench was “*satisfied that the variation of the minimum wages of the direct care aged care classifications in the Aged Care and SCHADS Awards to provide for an interim increase of 15 per cent is plainly justified by work value reasons*”.²¹
- 2.29 The work value reasons identified included the following:
- (a) The workload of nurses and personal care employees in aged care has increased, as has the intensity and complexity of the work;²²
 - (b) The acuity of residents and clients in aged care has increased. People are living longer and entering aged care later as they are choosing to stay at home for longer and receive in-home care. Residents and clients enter aged care with increased frailty, co-morbidities and acute care needs;²³

²⁰ See *Stage 1 Decision* [2022] FWCFB 200 at [891], [966]; [789], [890]-[892].

²¹ *Ibid* at [967].

²² *Ibid* at [551], [789], [965].

²³ *Ibid*.

- (c) The proportion of residents and clients in aged care with dementia and dementia associated conditions has increased;²⁴
- (d) Home care is increasing as a proportion of aged care services;²⁵
- (e) Since 2003, there has been a decrease in the number of Registered Nurses (**RN**) and Enrolled Nurses (**EN**) as a proportion of the total aged care workforce. Conversely, there has been an increase in the proportion of PCWs and AINs;²⁶
- (f) RNs have increased duties and expectations, including more administrative responsibility and managerial duties;²⁷
- (g) PCWs and AINs operate with less direct supervision. PCWs and AINs perform increasingly complex work with greater expectations;²⁸
- (h) There has been an increase in regulatory and administrative oversight of the Aged Care Industry;²⁹
- (i) More residents and clients in aged care require palliative care;³⁰
- (j) Employers in the aged care industry increasingly require that PCWs and AINs hold Certificate III or IV qualifications;³¹
- (k) The philosophy or model of aged care has shifted to one that is person-centred and based on choice and control, requiring a focus on the individual needs and preferences of each resident or client. This shift has generated a need for additional resources and greater flexibility in staff rostering and requires employees to be responsive and adaptive;³²

²⁴ Ibid.

²⁵ Ibid at [551], [789].

²⁶ Ibid at [551], [789], [890]-[892].

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid at [551], [789], [890]-[892], [965].

³¹ Ibid at [551], [789], [890]-[892].

³² Ibid at [551], [789], [890]-[892], [965].

- (l) Aged care employees have greater engagement with family and next of kin of clients and residents;³³
 - (m) There is an increased emphasis on diet and nutrition for aged care residents;³⁴
 - (n) There is expanded use and implementation of technology in the delivery and administration of care;³⁵ and
 - (o) Aged care employees are required to meet the cultural, social and linguistic needs of diverse communities including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and members of the LGBTQIA+ community.³⁶
- 2.30 As to those findings, the Full Bench made the following observation: *“they would not necessarily apply consistently across classifications or universally in every instance to all employees concerned.”*³⁷
- 2.31 The work value reasons found in the *Stage 1 Decision* also included evidence about *“invisible skills”* (informed by the evidence of Professor Junor).³⁸
- 2.32 As to indirect care employees working in aged care, the *Stage 1 Decision* observed that *“the evidence in respect of support and administrative employees is not as clear or compelling and varies as between classification”*.³⁹ In making that observation that Full Bench also said: *“unlike the position in respect of RNs, ENs and AINs/PCWs, no ‘Spotlight skills’ analysis was undertaken in respect of the support and administrative employees employed in the aged care sector”*.⁴⁰

³³ Ibid.

³⁴ Ibid at [551], [789], [890]-[892].

³⁵ Ibid.

³⁶ Ibid at [551], [789], [890]-[892], [965].

³⁷ Ibid at [891]; [789], [890]-[892].

³⁸ Ibid at [896].

³⁹ Ibid at [900].

⁴⁰ Ibid at [901].

Stage 3 Decision: the work value reasons justifying further increases

2.33 Turning then to the *Stage 3 Decision*, the Expert Panel (as reconstituted) made further distinct findings of work value reasons with respect to “*direct care*” and “*indirect care*” employees in the aged care industry.

Direct Care Employees

2.34 In respect of direct care employees, those findings included:

- (a) PCWs, HCWs and AINs have never been the subject of a work value assessment by the Commission or its predecessors;⁴¹
- (b) the pay rate alignment of PCWs, HCWs and AINs to the C10 classification “*has meant that the award rates of pay for PCWs, HCWs and AINs have never properly comprehended the exercise of the ‘invisible’ skills involved in aged care work identified in the expert report of Associate Professor Anne Junor*”;⁴²
- (c) whilst nurses had been subject to previous work value assessments, those processes “*did not properly take into account either the professionalisation of the nursing occupation which occurred during the 1990s or the ‘invisible’ skills exercised in the aged care sector identified in the Junor Report*”;⁴³
- (d) the “*16 findings*” made in the *Stage 1 Decision* (see above at paragraph 2.29);⁴⁴ and
- (e) “*enhanced IPC [infection prevention and control] measures have become a permanent and important part of work requirements within aged care facilities since the COVID-19 pandemic, and this has involved the exercise of additional skills and responsibilities by direct care employees, additional training, and changes to their working environment. This itself constitutes an increase in the work value of direct care employees*”.⁴⁵

⁴¹ *Stage 3 Decision* [2024] FWCFB 150 at [156(1)].

⁴² *Ibid.*

⁴³ *Ibid* at [156(2)].

⁴⁴ *Ibid* at [156(3)].

⁴⁵ *Ibid* at [156(4)].

- 2.35 Importantly, in making those findings about direct care employees, the Expert Panel also held “*it is not possible to determine the matter before us **simply by awarding a uniform percentage increase in pay rates***”.⁴⁶
- 2.36 In the context of the *Stage 3 Decision*, including with reference to the specific work value reasons found, the Expert Panel decided upon the following course to address the increase to award minimum rates:
- (a) For PCWs, HCWs and AINs in aged care, the Expert Panel decided the appropriate course was to “*identify a benchmark pay rate for a key classification and then construct a new and uniform classification structure on the basis of that benchmark rate*”.⁴⁷
 - (b) Having identified an “*appropriate benchmark classification and rate*”, the Expert Panel decided upon “*an appropriate classification structure which encompasses the various levels of skill and responsibility exercised by such employees, sets rates which bear an appropriate relativity to the benchmark rate **and properly value the work in question free of assumptions based on gender, and provides for a career path accompanied by skills development***”.⁴⁸
 - (c) For nursing employees in aged care, the Expert Panel observed that “*the same course is generally appropriate... but... there are wider considerations which render it inappropriate to deal with the issue of aged care nurses’ rates to finality in this decision.*” Those “*wider considerations*” included:
 - (i) the fact that the *Nurses Award* include “*annual increments*”, which the parties had not properly dealt with in submissions or evidence before the Expert Panel; and
 - (ii) an issue as to the appropriate pay relativity between a three-year and a four-year degree-qualified RN.⁴⁹

⁴⁶ Ibid at [157] (emphasis added).

⁴⁷ Ibid.

⁴⁸ Ibid at [174] (emphasis added).

⁴⁹ Ibid at [207(1)].

Accordingly, beyond some observations as to the “*benchmark rate for the fixation of minimum wages for RNs in aged care*” and the ENs in aged care, the determination for nurses was held over.⁵⁰

Indirect care employees

2.37 As to the findings for indirect care employees under the *Aged Care Award*, the Expert Panel relevantly observed:

- (a) Notwithstanding the “*consensus*” reached by stakeholders in the Consensus Statement, that agreement “*cannot displace our consideration of whether the evidence led in this matter supports such a finding*”.⁵¹
- (b) “*On a review of the typical duties of the various categories of indirect care employees, it is readily apparent that **they do not exercise either to the same degree or at all the skills and responsibilities of PCWs and AINs***”.⁵²
- (c) “*Without diminishing the importance of the work of indirect care employees in the above categories for the proper functioning of residential aged care facilities, it would **depreciate the value of the ‘invisible’ skills of PCWs and AINs** and vitiate the analysis of those skills in the Stage 1 decision and this decision **to conclude that the above employees perform work of equivalent value justifying equal rates of pay***”.⁵³

2.38 Those observations highlight the important role played by evidence in establishing work value reasons in relation to the specific classifications under examination. Factors such as the aged care industry is “*female dominated*” or that direct care employees in the sector have identifiable work value reasons was not sufficient to justify a work value increase for all aged care employees.

2.39 Further, the fact that stakeholders are able to reach an agreement about certain issues, again, does not negate the need for the Expert Panel to consider whether the evidence before it “*supports such a finding*”. To the extent the ACTU suggest that a consensus about invisible skills amongst industry stakeholders could enable the Expert Panel to determine

⁵⁰ Ibid at [204].

⁵¹ Ibid at [221].

⁵² Ibid at [228] (emphasis added); [228]-[237].

⁵³ Ibid at [237] (emphasis added).

an appropriate “*adjustment*” to minimum rates or otherwise displace the fundamental role played by evidence,⁵⁴ that proposal should be approached with real caution.

2.40 Returning to the specific work value reasons for indirect care employees working in aged care, the Expert Panel identified two categories of “*general work value changes*” as relevant:

(a) “*IPC changes affecting work which have become permanent in the wake of the COVID-19 pandemic*”, this included changes to “*the skills, training and work environment of indirect care employees*”;⁵⁵ and

(b) “*generally-applicable requirements for dementia training and other specific types of training applicable to any interactions with residents*”, examples of the “*other specific types*” includes Aged Care Quality Standards, serious incident response scheme, elder abuse, etc.⁵⁶

2.41 On the basis of the evidence before it, the Expert Panel was also able to make a specific finding with respect to food services assistants, cleaning staff and laundry staff. Namely, that as to those classifications, “*their degree of interaction with residents is at a significantly higher level of regularity and does involve to a limited degree the exercise of the ‘invisible’ skills described in the Junor Report*”.⁵⁷

2.42 Having regard to those specific findings, the Expert Panel did not consider “*any wholesale change to the existing classification structure*” was required.⁵⁸ That is, they did not consider the approach taken with respect to the classification structure of the direct care employees should be taken in the context of indirect care employees in the *Aged Care Award*. Accordingly, the *Stage 3 Decision* made increases to the award minimum rates by 3% and, as to the specific finding regarding food services assistants, cleaning staff and laundry staff, altered their placement within the existing classification structure.⁵⁹

2.43 Having made those adjustments, the Expert Panel held:

⁵⁴ ACTU Initial Submission at [397].

⁵⁵ *Stage 3 Decision* [2024] FWCFB 150 at [243]-[244].

⁵⁶ *Ibid* at [248].

⁵⁷ *Ibid* at [256]; [256]-[267].

⁵⁸ *Ibid* at [275].

⁵⁹ *Ibid* at [275].

*“The new minimum rates thereby established properly reflect the degree to which indirect care employees performing the above tasks exercise ‘invisible’ skills of the type fundamental to our assessment of the work value of PCWs and AINs and, accordingly, **results are free of assumptions based on gender.**”⁶⁰*

- 2.44 If the result reached for both direct care employees and indirect care employees are contrasted, it is clear that achieving a result *“free of assumptions based on gender”* was not achieved by applying a singular uniform increase.
- 2.45 The approach sought by the ACTU is simply not possible as it would require the Expert Panel to make a determination without the benefit of industry specific submissions and evidence. Without such information before the Commission, it is difficult to see how the Expert Panel could identify a proposed *“uniform”* variation that does not fall foul of sections 134, 138 and 284.
- 2.46 The ACTU proposal represents an unbridled response to the recent amendments to the FW Act and the recent observations of the Expert Panel in the *Stage 3 Decision*.

Issue 3: The obvious limitations of the Stage 3 Decision

- 2.47 In many respects, the key lifting in relation to identification of historical *“gender-based undervaluation of work”* is now authoritatively set out in the *Stage 3 Decision* at [10]-[94]. That stated, there are two key limitations to be highlighted in light of the ACTU proposal.

Limitation 1: Findings are not immediately transferable

- 2.48 While some of the work value findings in the *Stage 3 Decision* might have application to the notion of caring in the context of institutionalised health care of various forms, they have little or no transferability beyond this.
- 2.49 As set out above, issues such as dementia, requirements for dementia training, comorbidities, infection prevention and control, and aged care specific training etc are not relevant (or are of very little relevance) in, for example, the childcare sector, in a hairdressing salon or in a retail shop.
- 2.50 What the *Stage 3 Decision* tells us is that remediation of award minimum rates related in part to gender could span between 3% and 28.5% depending on the work, the qualifications, the experience and the nature and level of human interaction skills required with the customer or client.

⁶⁰ Ibid at [276] (emphasis).

- 2.51 The notion that it is safe to simply grab a number from the *Stage 1 Decision* or *Stage 3 Decision* and say it should apply to classes of work in other sectors that may have some form of caring element is therefore misguided.
- 2.52 The *Stage 3 Decision* provides the Expert Panel with little (if any) assistance to determine an appropriate “*interim increase*” to address gender-based undervaluation that could apply uniformly to awards that include “*caring*” work.⁶¹

Limitation 2: The new benchmark was chosen in light of the work value findings

- 2.53 The Expert Panel set two new aged care benchmarks for both Certificate III qualified PCWs, AINs and HCWs and degree qualified RNs (putting aside the 3-year and 4-year degree issue) said to be “*free of gender bias*”.⁶²
- 2.54 However, the providence of both rates is from the public sector (namely, the wage rates and classification structure of the Queensland State award applicable to public sector social and community service employees, which had itself been subject to an equal remuneration decision of the Queensland Industrial Relations Commission in 2009).⁶³
- 2.55 Those rates may or may not have been the subject of various distortions over the years associated with public sector wages policy. That is not said to suggest that the Expert Panel acted outside of its discretion in selecting those rates in the *Stage 3 Decision*, but rather to promote some caution in supporting those clamoring for a simple and unsophisticated push to raise minimum wages in other awards by pointing to them.

Issue 4: Sections 134(1)(ab) and 284(1)(aa) do not “necessitate” immediate action

- 2.56 The ACTU proposal concerningly puts significant weight on the introduction of paragraphs (ab) and (aa) into sections 134 and 284, respectively. An approach that is not supported by reference to either the FW Act or authorities.
- 2.57 Both s 134(1)(ab) and s 284(1)(aa) introduce new text into the FW Act, that replaces the former reference to the principle of “*equal remuneration for work of equal or comparable value*”. The Revised Explanatory Memorandum notes that principle of “*equal remuneration*”

⁶¹ The awards identified by the ACTU include: *Animal Care and Veterinary Services Award*, *Children’s Services Award*, *Educational Services (Schools) General Staff Award*, *Health Professionals and Support Services Award*, *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award*, etc.

⁶² *Stage 3 Decision* [2024] FWCFB 150 at [159].

⁶³ *Ibid* at [162].

has not been deleted from the consideration, instead it is now captured within the new formulation of paragraphs (ab) and (aa), respectively.⁶⁴

- 2.58 The new formulation emphasises the connection between “*gender equality*” and “*equal remuneration for work of equal or comparable value*”. Accordingly, paragraph (aa) solidifies the requirement of the Commission to take into account “*the need to achieve gender equality*” when setting minimum wages.⁶⁵
- 2.59 Notwithstanding the new formulation (and re-ordering) of the ‘new’ matters, the need to take into account “*eliminating gender-based undervaluation of work*” is only one of the several factors the Commission is required to consider under ss 134 and 284. No limb has more work to do or primacy than any other and it is simply one matter to have regard to in formulating the safety net for employees and employers.⁶⁶
- 2.60 Returning to the ACTU proposal for specific adjustments to particular awards, as mentioned, this would require a careful sector-by-sector consideration. This is because the impact of a “*uninform*” increase across all or some “*caring*” or “*highly-feminised*” industries would be far from uniform. The mere identification of similar features by reference to the broad nature of the work performed or the workforce does not provide insight into that impact.
- 2.61 For example, consider and contrast two “*highly-feminised*” industries: childcare and hair and beauty. Childcare is a funded sector, hair and beauty is private. Any increase to wages in the childcare sector will have a direct and material impact upon families that engage and rely upon childcare services. This is because an increase in wages would necessitate an increase in childcare fees. If neither the childcare provider, nor the consumer of the services can afford the impact of the increase – this will impact performance within the industry and the national economy.⁶⁷
- 2.62 Another critical factor that the Commission must consider, which is again dependent upon the specific sector, is whether the sector pays above award. For example, nursing is known

⁶⁴ *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 – Revised Explanatory Memorandum* at [343].

⁶⁵ *Ibid* at [332].

⁶⁶ *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1; [2017] FWCFB 1001 at [115]. Additionally, to the extent of any contest over the proper construction (or primacy) of the new text in s 134(1)(aa) in relation to the references to “*secure work*”, we rely on the views expressed in the Modern Awards Review 2023-24 in the job security stream: See [BNSW and ABI Response to Discussion Paper Job Security: Modern Awards Review 2023-24 - AM2023/21](#) (5 February 2024) at [11]-[88].

⁶⁷ *Fair Work Act 2009* (Cth) ss 134(1)(h), 284(1)(a).

for paying well-above award minimum rates, with enterprise agreements including rates 40% (and higher) above the award minimum wage for some classifications. By contrast, the childcare industry is typically award reliant.⁶⁸

- 2.63 We are living in an inflationary environment well above the Reserve Bank of Australia's preferred measure for price change. Other factors that are relevant include workforce participation and the cost of living. If rates are raised too quickly and/or too high, this may have a negative impact on work force participation by decreasing the number of opportunities available. In female dominated industries such as childcare, a decrease in workforce participation would impact women more materially than men.⁶⁹
- 2.64 The diverse economic circumstances of the differing sectors means the impact of an increase upon one sector can be materially different to another. The Expert Panel cannot properly inform itself of that potential impact without submissions and evidence specific to each sector.

How can the gender-based undervaluation be approached?

- 2.65 Having regard to the findings in the *Stage 3 Decision* and the award histories set out in the Stage 2 Report, it does appear that certain awards within the modern awards system have rates that are not properly set, infected by gender-based undervaluation and the slavish application of the C10 framework.
- 2.66 If the Commission of own motion established an inquiry into each modern award (or in tranches), in the understanding that there may be some ground for agreements on some matter, we would consider this to be a sensible approach to adopt outside of the confines of the Review. That is not to say the process must necessarily be protracted. Subject to programming and scope, such a process could very well be dealt with in a period of 6-12 months.
- 2.67 As part of such a process, the minimum rates in any identified award would need to be subject to sufficient inquiry such that the minimum rates are properly set and also meet the modern awards objective and minimum wages objective.

⁶⁸ *Fair Work Act 2009* (Cth) ss 134(1)(f), 134(1) (h), 284(1)(a).

⁶⁹ *Fair Work Act 2009* (Cth) ss 134(1)(c), 284(1)(b).

3. OBSERVATIONS ABOUT THE STAGE 2 REPORT

- 3.1 The Stage 2 Report appears to provide a reasonable summary of award history.
- 3.2 As mentioned, that history supports a view that in many modern awards minimum rates have not been set properly given gender considerations. That proposition should be said with less confidence in relation to the *Educational Services (Teachers) Award 2020*, which has been subject to recent work value adjustment. The Stage 2 Report also implicitly suggests that some awards warrant work value reconsideration.
- 3.3 What can be concluded from the Stage 2 Report, consistent with the *Stage 3 Decision*, is that the slavish application of the C10 framework to various work performed in female dominated industries may have restrained the setting of minimum wage outcomes.
- 3.4 Importantly, the research set out in the Stage 2 Report does nothing to inform by *how much* or *why*, outside of the proposition that the minimum rates have not been properly set, because they are affected by some historical gender consideration. That is even more pressing where the gender balance is more equal such as retail. That assessment will necessarily require a sector-by-sector evaluation. So much is also required by operation of s 138 of the FW Act.
- 3.5 Respectfully, the observation that a modern award was not “*properly set*” is not enough for to enable the Expert Panel to conclude “*gender-based undervaluation*” is the primary cause and, accordingly, vary all awards that have a majority female workforce. Such an approach absent a proper work value consideration, could not be done in full satisfaction of the s 138 requirements.
- 3.6 This is because “*gender-based undervaluation*” is one factor that the Commission may take into consideration when considering whether it is necessary to vary the award minimum rates. Other factors that may contribute to award minimum rates not being properly set include:
- (a) slavish application of the C10 framework;
 - (b) historical gender-based undervaluation;
 - (c) historical consent arrangements; and
 - (d) public sector wage setting practices.
- 3.7 Additionally, the award histories summarised in the Stage 2 Report provide very little information about the indicators within the pre-modernisation and/or award modernisation context that support conclusions that assumptions based on gender infected any Tribunal’s consideration of work value reasons. Rather, at times, the report preferred the view that

whilst such conclusions could not necessarily be made – they could equally not be ruled out.⁷⁰

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⁷⁰ See example, Stage 2 Report at [319].