



# DECISION

*Fair Work Act 2009*

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

## **Aged Care Award 2010**

(AM2020/99 and AM2021/63)

## **Nurses Award 2020**

(AM2021/63)

## **Social, Community, Home Care and Disability Services Industry Award 2010**

(AM2021/65)

JUSTICE HATCHER, PRESIDENT

VICE PRESIDENT ASBURY

DEPUTY PRESIDENT O’NEILL

PROFESSOR BAIRD

DR RISSE

SYDNEY, 15 MARCH 2024

*Applications to vary modern awards – work value – Aged Care Award 2010 – Nurses Award 2020 – Social, Community, Home Care and Disability Services Industry Award 2010 – Stage 3 decision.*

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## DEFINITIONS

Defined term	Definition
<i>1921 Metals decision</i>	<i>Amalgamated Society of Engineers and The Adelaide Steam-ship Company Limited</i> (1921) CthArbRp 57, 15 CAR 297
<i>1969 Equal Pay Case</i>	[1969] CthArbRp 278, 127 CAR 1142
<i>1972 Equal Pay Case</i>	[1972] CthArbRp 1420, 147 CAR 172
ABS	Australian Bureau of Statistics
<i>ACT Child Care decision</i>	<i>Re Australian Liquor, Hospitality and Miscellaneous Workers Union</i> [2005] AIRC 28, <a href="#">PR954938</a>
ACTU	Australian Council of Trade Unions
Aged Care Award	<i>Aged Care Award 2010</i> [ <a href="#">MA000018</a> ]
Aged Care Employers	Aged Care Industry Employer Associations
AIN	Assistant in nursing/Nursing assistant
AIRC	Australian Industrial Relations Commission
Amending Act	<i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i> (Cth)
ANMF	Australian Nursing and Midwifery Federation
<i>Annual Wage Review 2022–23 decision</i>	<a href="#">[2023] FWCFCB 3500</a>
AQF	Australian Qualifications Framework
<i>Archer decision</i>	<i>The Federated Clothing Trades of the Commonwealth of Australia v J A Archer and Others</i> [1919] CthArbRp 99, 13 CAR 647
<i>Basic Wage Inquiry 1949–1950</i>	[1950] CthArbRp 558, 68 CAR 698
Buckland	Buckland Aged Care Services
C10 Metals Framework Alignment Approach	Approach described in the <i>Stage 1 decision</i> at [177]–[178]
CA Commission	Australian Conciliation and Arbitration Commission
CA Court	Commonwealth Court of Conciliation and Arbitration
Clothing Trades Award	<i>Clothing Trades Award 1964</i> [1964] CthArbRp 863, 108 CAR 687
<i>Clothing Trades decision</i>	<i>Clothing and Allied Trades Union of Australia re Clothing Trades Award 1964</i> [1967] CthArbRp 406, 118 CAR 286
COE	Australian Bureau of Statistics <i>Characteristics of Employment</i> data
Department	Department of Health and Aged Care

Defined term	Definition
EEH	Australian Bureau of Statistics <i>Employee Earnings and Hours</i> data
EN	Enrolled nurse
ERO	Equal remuneration order
Food Standards	Standard 3.3.1 of the <i>Australia New Zealand Food Standards Code</i> , ‘Food Safety Programs for Food Service to Vulnerable Persons’
<i>Fruit Pickers decision</i>	<i>Rural Workers’ Union and United Labourers’ Union v Mildura Branch of the Australian Dried Fruits Association and Others</i> [1912] CthArbRp 33, 6 CAR 61
FW Act	<i>Fair Work Act 2009</i> (Cth)
<i>Harvester decision</i>	<i>Ex parte H V McKay</i> [1907] CthArbRp12, 2 CAR 1
HAS Victorian Award 1995	<i>Health and Allied Services – Private Sector – Victorian Consolidated Award 1995</i> , Print M6132
HAS Victorian Award 1998	<i>Health and Allied Services – Private Sector – Victorian Consolidated Award 1998</i> [AW783872], Print Q2805
HCW	Home care worker
HSU	Health Services Union
Interim Award	<i>Health Services Union of Australia (Victoria – Private Sector) Interim Award 1993</i> [AW783559] [1993] AIRC 1711, Print L0831
IPC	Infection prevention and control
Joint Employers	Aged & Community Care Providers Association Ltd and Australian Business Industrial
Joint Report	Exhibit HSU 102 (supplementary witness statement of Professor Sara Charlesworth and Professor Gabrielle Meagher with annexure ‘Joint 2023 Supplementary Report’, 30 October 2023)
Junor Report	Exhibit ANMF 1 (witness statement and expert report of Anne Junor, 28 October 2021, as amended on 29 April 2022 and 2 May 2022)
Labour Agreement	Aged Care Industry Labour Agreement, established by the Commonwealth in May 2023
LHMU	Australian Liquor, Hospitality and Miscellaneous Workers Union
Manufacturing Award	<i>Manufacturing and Associated Industries and Occupations Award 2020</i> (previously named the <i>Manufacturing and Associated Industries and Occupations Award 2010</i> ) [ <a href="#">MA000010</a> ]

<b>Defined term</b>	<b>Definition</b>
Metal Industry Award	<i>Metal Industry Award 1984</i> [AW819234], Print F8925, later the <i>Metal, Engineering and Associated Industries Award, 1998 – Part I</i> [AW789529], Print Q2527
<i>Metal Trades Award Work Value Inquiry decision</i>	<i>Metal Trades Employers' Association &amp; Ors re Metal Trades Award, 1952</i> [1967] CthArbRp 1144, 121 CAR 587
MOU	Memorandum of understanding
MRA	Minimum rate adjustment
<i>National Wage Case 1983</i>	[1983] CthArbRp 400, 291 CAR 3, 4 IR 429
<i>National Wage Case April 1991</i>	[1991] AIRC 281, 36 IR 120, Print J7400
<i>National Wage Case August 1988</i>	[1988] AIRC 595, 25 IR 170, Print H4000
<i>National Wage Case August 1989</i>	[1989] AIRC 525, 30 IR 81, Print H9100
<i>National Wage Case September 1975</i>	[1975] CthArbRp 1544, 171 CAR 79
<i>National Wage Cases 1967</i>	[1967] CthArbRp 504, 118 CAR 655
Nurses Award	<i>Nurses Award 2020</i> (previously named the <i>Nurses Award 2010</i> ) [ <a href="#">MA000034</a> ]
<i>Nurses Comparable Worth Case</i>	[1986] CthArbRp 64, 300 CAR 185, 13 IR 108, Print G2250
<i>Paid Rates Review decision</i>	[1998] AIRC 1413, 123 IR 240, Print Q7661
PCW	Personal care worker
<i>Pharmacy decision</i>	<i>4 yearly review of modern awards – Pharmacy Industry Award 2010</i> [ <a href="#">2018</a> ] <a href="#">FWCFB 7621</a> , 284 IR 121
PPE	Personal protective equipment
Quality Standards	Aged Care Quality Standards
RAT	Rapid antigen test
RFBI	Royal Freemasons' Benevolent Institution
RN	Registered nurse
Royal Commission	Royal Commission into Aged Care Quality and Safety, established 8 October 2018
SCHADS Award	<i>Social, Community, Home Care and Disability Services Industry Award 2010</i> [ <a href="#">MA000100</a> ]
SIRS	Serious incident response scheme
Smith/Lyons Report	Exhibit ANMF 2 (expert report of Associate Professor Meg Smith and Dr Michael Lyons, as amended on 2 May 2022)

<b>Defined term</b>	<b>Definition</b>
<i>Stage 1 decision</i>	<a href="#">[2022] FWCFB 200</a> , 319 IR 127
<i>Stage 2 decision</i>	<a href="#">[2023] FWCFB 40</a>
<i>Stage 2 reasons</i>	<a href="#">[2023] FWCFB 93</a>
<i>Teachers decision</i>	<i>Application by Independent Education Union of Australia</i> <a href="#">[2021] FWCFB 2051</a>
<i>United Voice</i>	<i>Application by United Voice and the Australian Education Union</i> <a href="#">[2018] FWCFB 177</a> , 274 IR 1
UWU	United Workers' Union
<i>Vehicle Industry Award decision</i>	<i>Re Vehicle Industry Award, 1953</i> [1968] CthArbRp 471, 124 CAR 295
Whiddon	Whiddon Aged Care

## 1. Introduction

[1] These proceedings concern three applications to vary three modern awards to increase the minimum wage rates of aged care sector employees:

- AM2020/99 — an application by the Health Services Union (HSU) and a number of individuals to vary the *Aged Care Award 2010* (Aged Care Award)
- AM2021/63 — an application by the Australian Nursing and Midwifery Federation (ANMF) to vary the Aged Care Award and the *Nurses Award 2010*, now the *Nurses Award 2020* (Nurses Award), and
- AM2021/65 — an application by the HSU to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHADS Award).

[2] These applications were originally allocated for hearing and determination to a Full Bench consisting of the former President, Justice Ross, Vice President Asbury<sup>1</sup> and Deputy President O'Neill.<sup>2</sup> An initial decision was issued by this Full Bench on 4 November 2022<sup>3</sup> (*Stage 1 decision*). On 18 November 2022, Justice Ross resigned his position with the Commission and the Full Bench was reconstituted to include Commissioner Bissett. This reconstituted Full Bench issued a further decision on 21 February 2023<sup>4</sup> (*Stage 2 decision*), made determinations giving effect to the *Stage 2 decision* on 3 March 2023, and published reasons for the *Stage 2 decision* on 18 May 2023<sup>5</sup> (*Stage 2 reasons*). The President constituted the Full Bench in its current form as an Expert Panel for pay equity in the Care and Community Sector on 15 June 2023 in accordance with ss 617(9) and 620(1D) of the *Fair Work Act 2009* (Cth) (FW Act) (which provisions took effect on 6 March 2023).

[3] In the *Stage 1 decision*, the Full Bench determined that the proceedings would be dealt with in three stages.<sup>6</sup> Stage 1, which was finalised by the *Stage 1 decision*, involved the consideration of the relevant legal principles and conceptual issues, a finding that the modern award minimum wage rates for 'direct care employees' in the aged care sector do not properly compensate for the value of the work performed,<sup>7</sup> and a determination that an interim increase of 15 per cent in modern award minimum wages for 'direct care employees' was justified by work value reasons.<sup>8</sup> It is necessary to note at this point that 'direct care employees' are comprised of personal care workers (PCWs) under the Aged Care Award, home care workers (HCWs) who work in the aged care sector under the SCHADS Award, and registered nurses (RNs), enrolled nurses (ENs), assistants in nursing (AINs) and nurse practitioners who work in the aged care sector under the Nurses Award. The *Stage 1 decision* included detailed findings as to the work of direct care employees in support of the conclusion that the interim increase was justified on work value grounds.

[4] Stage 2 involved the determination of the following issues:

- the timing of and phasing-in of the interim pay increase for direct care employees;
- whether the interim increase was necessary to achieve the modern awards objective in s 134(1) of the FW Act; and
- whether the interim increase was necessary to achieve the minimum wages objective in s 284(1) of the FW Act.

[5] In the *Stage 2 decision*, the Full Bench concluded that an interim increase of 15 per cent to minimum wages for direct care employee under the three awards was necessary to achieve the modern awards objective and the minimum wages objective and, in addition, reached the

same conclusion in respect of Head Chefs/Cooks and Recreational Activities Officers/Lifestyle Officers under the Aged Care Award.<sup>9</sup> The Full Bench determined that the interim increase for these employees would be operative from 30 June 2023.

[6] The *Stage 1 decision* contemplated that Stage 3 of the proceedings would involve:

- (1) a determination as to whether any further wage adjustments are justified on work value grounds for direct care employees granted interim wage increases in Stages 1 and 2;
- (2) a determination as to whether any wage adjustments are justified on work value grounds for aged care sector employees not dealt with in Stage 1 ('indirect care employees'); and
- (3) a more detailed consideration of the classification definitions and structures in the three Awards as they apply to aged care sector employees.<sup>10</sup>

[7] In relation to the third of the above matters, the *Stage 1 decision* identified<sup>11</sup> that a consideration of the classification structures in the awards would include the following matters:

- the appropriate classification and minimum rates of pay for PCWs, HCWs and AINs, noting the differing rates of pay in the Aged Care Award and the Nurses Award and further noting the suggestion by Aged & Community Care Providers Association Ltd and Australian Business Industrial (Joint Employers) that rewarding administering Schedule 4 medications in a residential facility and working in dedicated dementia and/or palliative care facilities may be dealt with by way of an allowance rather than the classification structure;
- the appropriateness of separating out the PCWs from other employees in the Aged Care Award and creating a new PCW classification stream;
- the appropriateness of inserting in the Aged Care Award the nursing classifications from the Nurses Award;
- the application of the C10 Metals Framework to the relevant Awards, especially in relation to the fixation of wage rates for RNs;
- the application of appropriate internal relativities within each Award; and
- in relation to the SCHADS Award, the impact on disability support workers of the increase sought for aged care employees covered by the SCHADS Award.

[8] On 7 March 2023, after the *Stage 2 decision* was issued, the ANMF filed a submission<sup>12</sup> in which it contended (for the first time) that the classification of RN, Level 1, Pay Point 1 should be aligned with classification C1(a) under the C10 Metals Framework in Stage 3 of the proceedings, consistent with the provisional view expressed in paragraph [955] of the *Stage 1 decision*.

[9] This decision deals with all the above matters and issues. In addition, for reasons which are explained below, it is also necessary for us to consider and make findings concerning whether, to the extent that modern award minimum wage rates applicable to the aged care sector do not properly compensate for the value of the work performed (as found in the *Stage 1 decision* in respect of direct care employees), this undervaluation has occurred historically because of assumptions based on gender. We will deal with this issue first.



## 2. Gender undervaluation

### 2.1 The amended statutory framework

[10] The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Amending Act) made a number of amendments to the FW Act relating to gender equality. These amendments took effect on 7 December 2022, after the *Stage 1 decision* was issued. The amendment of principal relevance to these proceedings is that s 157, which concerns circumstances in which the Commission is empowered to vary modern awards, was varied to add sub-s (2B) as follows:

(2B) The FWC’s consideration of work value reasons must:

- (a) be free of assumptions based on gender; and
- (b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.

[11] The amended s 157 applies after its commencement on 7 December 2022 in relation, relevantly, to a determination varying a modern award made under s 157 after that commencement date.<sup>13</sup>

[12] The ‘work value reasons’ referred to in s 157(2B) are those described in s 157(2A):

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

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

[13] Section 157(2B) imposes requirements as to the Commission’s ‘consideration’ of the work value reasons referred to in s 157(2A). ‘Consideration’ in this context refers to the Commission’s decision-making process. Section 157(2B)(a) requires this decision-making process to be ‘free of assumptions based on gender’. The FW Act, as amended by the Amending Act, does not define what are ‘assumptions based on gender’. This expression has its origins in academic literature concerning gender inequality and was, as a concept in connection with the assessment of work value, discussed in the *Stage 1 decision*<sup>14</sup> by reference to the expert report of Associate Professor Smith and Dr Lyons (as amended) of 2 May 2022<sup>15</sup> (Smith/Lyons Report). For present purposes, we take its meaning in the context of the consideration of ‘work value reasons’ as being subjective preconceptions and stereotypes derived from cultural and social norms about gender roles, skills and responsibilities. This may include, for example, assumptions that tasks and skills such as caregiving, manual dexterity, human relations and working with children commonly required in female-dominated occupations are inherently female characteristics and as such are of lesser work value than ‘hard’<sup>16</sup> tasks and skills performed in male-dominated occupations.<sup>17</sup> Section 157(2B)(a) requires the Commission to exclude considerations of this nature from its decision-making process.

[14] Section 157(2B)(b) requires the Commission, as part of its decision-making process, to ‘include consideration’ concerning whether ‘historically the work has been undervalued because of assumptions based on gender’. The requirement to ‘include consideration’ may be

equated in meaning to statutory requirements to consider, or take into account, or have regard to, specified matters.<sup>18</sup> A requirement of this nature means that the specified matters must, at least, be the subject of active intellectual engagement and given ‘proper, genuine and realistic consideration’.<sup>19</sup> In some circumstances, the terms, statutory context and manner of operation of a term requiring that a matter be considered may indicate a requirement that a determination be made or a conclusion formed about the specified matter.<sup>20</sup>

**[15]** The term ‘undervalued’ in s 157(2B)(b) is not defined, but the context provided by sub-ss (2) and (2A) of s 157, to which sub-s (2B) relates, makes its intended meaning apparent. Subsection (2) empowers the Commission to vary minimum award wage rates where this is justified by ‘work value reasons’ and doing so outside the annual wage review process is necessary to achieve the modern awards objective. As earlier stated, sub-s (2A) defines what are ‘work value reasons’ for the purpose of sub-s (2). It is necessarily implicit in the scheme that, where an adjustment to award rates is considered to be justified for work value reasons, the existing award wage rates do not properly reflect the value of the work to which the work applies. Where the relevant adjustment is by way of an increase to the minimum award wage rates, the existing wage rates may therefore be described as ‘undervaluing’ the work in question — that is, assigning a minimum wage rate to the work which is less than the rate which would properly remunerate the work in question in accordance with the work value considerations identified in sub-s (2A).

**[16]** In this context, s 157(2B)(b) may therefore be concerned with a requirement to consider whether any undervaluation which is found to exist is ‘historical’ in nature — that is, has arisen from some past decision, consideration, act or omission of the Commission or relevant predecessor institutions — and has occurred by reason of assumptions based on gender. This aligns with the well-understood industrial concept of gender-based undervaluation whereby the minimum rates in an award have been established based on an undervaluation of the relevant work that has occurred for gender-related reasons.<sup>21</sup>

**[17]** The amendments to s 157 concerning gender assumptions were, as earlier stated, part of a ‘package’ of amendments concerning gender equality made to the FW Act by the Amending Act. The other amendments of present relevance were:

- (1) the addition of a reference to the promotion of gender equality in paragraph (a) of the object of the FW Act in s 3;
- (2) the removal of paragraph (e) (‘the principle of equal remuneration for work of equal or comparable value’) of the modern awards objective in s 134(1), and its replacement by the following as a matter required to be taken into account by the Commission in ensuring that modern awards, together with the NES, provide a fair and minimum safety net of terms and conditions:
  - (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women’s full economic participation;
- (3) the removal of paragraph (d) of the minimum wages objective in s 284(1) (which was in identical terms to former s 134(1)(e)) and its replacement by the following

as a matter required to be taken into account by the Commission in establishing and maintaining a safety net of fair minimum wages:

- (aa) the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps;

[18] These amendments were considered by the Commission in the *Annual Wage Review 2022–23 decision*.<sup>22</sup> That decision referred to the revised explanatory memorandum for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, which identified the overall purpose of the amendments as being to place the consideration of gender equality ‘at the heart of the FWC’s decision-making’,<sup>23</sup> with the elimination of gender-based undervaluation of work being one of the means by which it is contemplated in ss 134(1)(ab) and 284(1)(aa) that gender equality may be achieved.<sup>24</sup>

[19] In the *Stage 1 decision*, the Full Bench accepted the expert evidence of Associate Professor Smith and Dr Lyons,<sup>25</sup> Professor Meagher,<sup>26</sup> Professor Charlesworth<sup>27</sup> and Associate Professor Junor<sup>28</sup> concerning the existence of gender undervaluation in the award system generally, the barrier to the proper assessment of work value in female-dominated industries and occupations caused by the alignment of feminised work against masculinised benchmarks such as the C10 Metals Framework Alignment Approach, the undervaluation of care work due to gender assumptions, and the gender basis for the undervaluation of the work of aged care sector employees.<sup>29</sup> However, although as stated the key finding in the *Stage 1 decision* was that the work of direct care employees in the aged care sector was undervalued in three awards which applied to them, the Full Bench ultimately declined to make a definitive finding that this undervaluation arose historically because of assumptions based on gender. The Full Bench said (at [47]) that ‘it is not necessary for the purposes of these proceedings that we determine why the relevant minimum rates in the 3 awards before us have not been properly fixed’, although it later went somewhat further and said (at [1048]):

... we accept that the aged care workforce is predominantly female and the expert evidence is that, as a general proposition, work in feminised industries including care work has historically been undervalued and the reason for that undervaluation is likely to be gender-based. We also accept the logic of the proposition in the expert evidence that gender-based undervaluation of work is a driver of the gender pay gap and if all work was properly valued there would likely be a reduction in the gender pay gap. While it has not been necessary for the purposes of these proceedings for us to determine why the relevant minimum rates in the Awards have not been properly fixed we accept that varying the relevant awards to give effect to the interim increase we propose would be likely to have a beneficial effect on the gender pay gap and promote pay equity. ...<sup>30</sup>

[20] In Stage 2 of the proceedings, it was necessary for the (reconstituted) Full Bench to deal with s 157(2B) of the FW Act, which had taken effect after the *Stage 1 decision* but prior to the issue of determinations giving effect to the *Stage 2 decision*. In the *Stage 2 reasons*, the Full Bench concluded in relation to s 157(2B)(a) that the consideration of the work value reasons justifying the interim increase in the *Stage 1 decision* was free of gender-based assumptions<sup>31</sup> and, in relation to s 157(2B)(b), that the Full Bench in the *Stage 1 decision* ‘actively considered the question of historical undervaluation because of gender-based assumptions’.<sup>32</sup>

[21] There is a sound basis for the proposition that the consideration required by s 157(2B) requires the making of findings or the statement of conclusions in respect of each of the matters

in paragraphs (a) and (b) of the provision. Two matters favour this conclusion. *First*, the nature of the requirement in s 157(2B)(a) that the Commission's consideration of work value be free of assumptions based on gender is such that more is required than simply an assertion in a decision that this requirement has been complied with. Section 157(2B) has given central importance to gender equality issues in the consideration of award wage increases based on work value considerations. Accordingly, we consider that a transparent process of reasoning and findings which demonstrates the way in which any gender-based assumptions have been dealt with and excluded from consideration of the outcome pursuant to paragraph (a) of the subsection is necessary to achieve the new provision's policy purpose. That would in turn suggest that the consideration required by paragraph (b) must involve an explicit finding as to whether the work in question has historically been undervalued because of gender-based assumptions. Without such findings being made, it will not be demonstrable that gender undervaluation has properly been addressed and that past assumptions about gender have been removed from consideration.

[22] *Second*, the requirements in the modern awards objective (s 134(1)(ab)) and the minimum wages objective (s 284(1)(aa)) to take into account the need to achieve gender equality by (among other things) 'eliminating gender-based undervaluation of work' will clearly, in a matter concerning award wage rate increases based on work value reasons, interrelate with the requirements of s 157(2B). Proper consideration and weighing of the elimination of gender-based undervaluation of work would require a substratum of findings upon which to proceed, and the findings called for are those to which s 157(2B) is directed. Without a finding as to whether historic gender-based undervaluation has occurred pursuant to s 157(2B)(b) and a demonstration of how the relevant assumptions have been excluded from consideration under s 157(2B)(a), it is difficult to see how the requisite consideration under ss 134(1)(ab) and 284(1)(aa) can proceed.

[23] In any event, whether we are required to do so as a matter of statutory construction or not, we consider that it is appropriate in this decision to make explicit findings pursuant to s 157(2B) of the FW Act. In this matter, the union parties have contended that the pre-existing award wage rates applicable to employees in the aged care sector are inadequate because they have historically undervalued the work in question for gender-related reasons. Their case in that respect is supported by expert evidence which the Full Bench accepted in the *Stage 1 decision*. The existence of undervaluation, likely for gender-related reasons, has likewise been accepted. In those circumstances, we propose to make findings and state our conclusions pursuant to s 157(2B).

[24] For the reasons which immediately follow, we find that the work of aged care sector employees has historically been undervalued because of assumptions based on gender. We set out later in this decision how we have excluded assumptions based on gender from our consideration of work value reasons and our determination of new award wage rates for the aged care sector.

## 2.2 *Historical gender assumptions in award wage fixation — 1907–1967*

[25] The gender undervaluation which has occurred in respect of aged care sector employees must properly be understood in the wider context of gender assumptions which have pervaded the federal industrial relations system since its inception in the early 20th century.

[26] The first sixty years of wage fixation in the federal industrial relations system following the 1907 *Harvester decision*<sup>33</sup> of the Commonwealth Court of Conciliation and Arbitration (CA Court) (Higgins J, President) involved a dual concept: a basic wage for unskilled workers and additional wage margins for skilled workers. The basic wage was, conceptually, a needs-based wage for the ‘humblest class’ of unskilled worker, whereas the margin or ‘secondary wage’ was ‘for skill and other necessary qualifications’ in addition to the basic wage.<sup>34</sup> In his seminal 1921 decision to make the first federal award for the metals and engineering industry (*1921 Metals decision*),<sup>35</sup> Higgins J said:

This Court assumes that a skilled man should, as has been the uniform practice, get more for his skill or other necessary exceptional qualifications than a mere labourer—more or better commodities, and to that end more money wages. This Court takes the basic wage for the labourer and then adds to it the extra wage without which, under present conditions, lads will not take the trouble of mastering the difficulties of a skilled trade.<sup>36</sup>

[27] This initial wage-fixing model was, from the outset, affected by gender assumptions reflective of the social and economic norms of the time. In respect of the basic wage, discrimination between genders based on their perceived social roles was explicit. The *Harvester decision*, which first conceptualised the basic wage in the federal industrial relations system, proceeded on the assumption that the typical worker of the employer in question was a male married with three children, and it was on this basis that a wage to cover the ‘normal needs of the average employee, regarded as a human being living in a civilized society’,<sup>37</sup> was assessed. In two later decisions of Higgins J, the 1912 *Fruit Pickers decision*<sup>38</sup> and the 1919 *Archer decision*,<sup>39</sup> the implications of this assumption in setting a basic wage for female workers were made clear.

[28] The *Fruit Pickers decision* concerned the making of a first award for fruit pickers and packers arising for a dispute between two unions and various fruit growers in the Mildura and Renmark regions. Higgins J set minimum wages for nearly all the workers concerned on the basis that the labour involved was unskilled in nature, with the primary consideration being the cost of living.<sup>40</sup> For fruit pickers, who were predominantly male, this meant establishing a basic wage by reference to the *Harvester decision* principle stated above. However, for fruit packers, who were predominantly female, a different approach was taken. Under the heading ‘Discrimination on the Basis of Sex’, Higgins J said:

Most of the workers concerned are men, even in the simple process of picking. In the process of packing at the factory, however, such work as wrapping citrus in paper, or trimming and laying paper in the boxes, of packing fruit in cartons, of giving a neat facing to the boxes to be exposed in shop windows, are carried out mainly—almost solely—by women or girls... Now, in fixing the minimum wage for a man, I have been forced to fix it by considerations other than those of mere earning power. I have based, it, in the first instance—so far as regards the living or basic wage—on ‘the normal needs of the average employee regarded as a human being living in a civilized community’ (see Harvester Judgmental 2 C.A.R. 3, and subsequent cases). No one has since urged that this is not a correct basis; some employers have expressly admitted that it is. I fixed the minimum, in 1907 at 7s. per day by finding the sum which would meet the normal needs of an average employee, one of his normal needs being the need for domestic life. If he has a wife, and children, he is under an obligation—even a legal obligation—to maintain them. How is such a minimum applicable to the case of a woman picker? She is not, unless perhaps in very exceptional circumstances, under any such obligation. The minimum cannot be based on exceptional cases. The employer cannot be told to pay a particular employee more because she happens to have parents and brothers and sisters dependent on her; nor can he be allowed to pay her less, because she has a legacy from her grandparents, or because she boards

and lodges free with her parents, and merely wants some money for dress. The State cannot ask that an employer shall, in addition to all his other anxieties, make himself familiar with the domestic necessities of every employee; nor can it afford to let a girl with a comfortable home pull down the standard of wages to be paid to less fortunate girls who have to maintain themselves. Nothing is clearer than that the ‘minimum rate’ referred to in section 40 means the minimum rate for a class of workers, those who do work of a certain character. If blacksmiths are the class of workers, the minimum rate must be such as recognises that blacksmiths are usually men. If fruit-pickers are the class of workers, the minimum rate must be such as recognises that, up to the present at least, most of the pickers are men (although women have been usually paid less), and that men and women are fairly in competition as to that class of work. If milliners are the class of workers, the minimum rate must, I think, be such as recognises that all or nearly all milliners are women, and that men are not usually in competition with them. There has been observed for a long time a tendency to substitute women for men in industries, even in occupations which are more suited for men; and in such occupations it is often the result of women being paid lower wages than men. Fortunately for society, however, the greater number of bread winners still are men. The women are not all dragged from the homes to work while the men loaf at home; and in this case the majority even of the fruit-pickers are men. As a result, I come to the conclusion that in the case of the pickers, men and women, being on a substantial level, should be paid on the same level of wages; and the employer will then be at liberty freely to select whichever sex and whichever person he prefers for the work. All this tends to greater efficiency in work, and to true and healthy competition—not competition as in a Dutch auction by taking lower remuneration, but competition by making oneself more useful to the employer. But in the case of the women in the packing sheds, the position is different. I have had the advantage of seeing the women performing the lighter operations of packing at a factory; and I have no doubt that the work is essentially adapted for women with their superior deftness and suppleness of fingers. The best test is, I suppose, that if the employers had to pay the same wages to women as to men, they would always, or nearly always, employ the women; and in such work as this, even if the wages for men and for women were the same, women would be employed in preference. The position is similar as to apricot cutting (or ‘pitting’). I must, therefore, endeavour to find a fair minimum wage for these women, assuming that they have to find their own food, shelter, and clothing.<sup>41</sup>

(underlining added)

[29] Four assumptions based on gender are apparent in the above passage. *First*, the basic wage for any particular category or group of workers was dependent upon the predominant gender of the category or group. *Second*, where the gender of the category or group was predominantly male, the basic wage was to be set according to the *Harvester decision* model of the cost of living which assumed the worker was a man with a dependent wife and children. This assumption was applied notwithstanding the doubtless existence of single men, or men without children, in this category. It was also applied to women in this predominantly male category in order to prevent women ‘undercutting’ men on the basis of lower wages. *Third*, where the gender was predominantly female, the basic wage was to be set on the presumption that the worker had no dependants, irrespective of the actual position. *Fourth*, it is clear that Higgins J regarded work itself, and the skills involved, as being gendered, so that certain types of work were suitable only, or more suitable, for men or for women. The reference in particular to ‘women with their superior deftness and suppleness of fingers’ is an early example of manual dexterity being treated as an inherently female trait rather than a work skill to be valued irrespective of gender.

[30] In accordance with these principles, Higgins J went on to set minimum hourly rates as follows:

I have come to the conclusion that, under the circumstances, as the minimum for men and women pickers in competition is to be fixed at 1s. per hour, the minimum for women workers in these processes, in which men are hardly ever employed, should be fixed at 9d. per hour.<sup>42</sup>

[31] Thus the female fruit packers' rate was set at 75 per cent of the (predominantly male) fruit pickers' rate.

[32] The *Archer decision* concerned a claim made by the Federated Clothing Trades Union for the establishment of minimum pay rates and conditions for employees in the tailoring industry. The principal matter required to be arbitrated was the setting of a basic wage for adult male and female workers in circumstances where the union had claimed lower rates of pay for women than for men. For men, Higgins J determined a basic wage of 65s. per week on the basis of the *Harvester decision* outcome with adjustments for subsequent changes and regional variations in the cost of living.<sup>43</sup> In respect of setting the basic wage for women, Higgins J described the task to be undertaken in the following terms:

The question of the basic wage for women is much more difficult. But before dealing with it, I wish it to be understood clearly that I am not at this stage deciding for what functions (if any) in this industry a lower minimum rate should be prescribed for women than for men. As I can deal with matters in dispute only, it is obvious that I cannot award in any case more than is claimed; and in this case the claim for females is, as to many items, less than for men. For instance, the claim for a man machinist in order tailoring is £3 15s.; the claim for the female machinist is £2 10s.; the claim for a trouser hand (female) in ready-made clothing is £2. My problem now is to find, in cases where a minimum wage has under the plaint to be prescribed for an adult female, what is, the sum per week necessary to satisfy the normal needs of an average female employee, who has to support herself from her own exertions; and on the basis of the reasonably necessary requirements of a woman living in a civilized community.<sup>44</sup>

[33] Justice Higgins went on to refer to, and elaborate upon, the principles he had stated in the *Fruit Pickers decision* as follows:

The first case in which I had to deal directly with the problem of female labour was that of the fruit pickers—the fruit pickers and packers of Mildura and Renmark. In that case I took the view that in the case of workers such as blacksmiths, as blacksmiths are usually men, the minimum rate must be a rate sufficient for a small family. Men are under an obligation—under our Statutes a legal obligation—to maintain a wife and children. But in the case of workers such as milliners, or those who trim daintily boxes for display of fruit in shop windows, the minimum rate should be that suitable for a single woman supporting herself only. It is women's work; if the employers' had to pay the same wages to women as to men, he would employ women for their superior deftness and delicacy of fingers. Then, in the intermediate case, where men and women are fairly in competition—such as the case of fruit pickers—where the employer would not usually discriminate because of mere sex, there should be the same minimum for women as for men. In that case, the basic wage for a man being fixed at 1s. per hour, the basic wage for a woman (in women's peculiar work) was fixed at 9d. per hour—or three-fourths. As I explained in my judgment, the evidence was very meagre as to the cost of living for a woman in Renmark or Mildura; and the finding was tentative. I find that Mr. B. Seebohm Rowntree, in his book published last year—'The Human Needs of Labour'—takes practically the same view, that a woman's minimum rate in women's appropriate employments should not be a family rate. As he says (p. 115)—'It is normal for men to marry and to have to support families, and provision should accordingly be made for this when fixing their minimum wages. It is not normal for women to have to support dependants.' ...<sup>45</sup>

(underlining added)

[34] In considering the amount of the female basic wage to be established, Higgins J took into account evidence concerning the cost of living for female workers (including as to the cost of board, lodging, clothes, amusements, church and ‘sundries’) and decisions of State tribunals on the subject. In the latter respect, he referred to a 1918 decision of the President of the Industrial Court of South Australia in the ‘printing trades case’ in which a ‘bedrock living wage for women’ of 27s. 6d. had been set, and quoted the following passage from this decision:

I refrain from giving precise details as to the way in which this amount is arrived at. There are obvious reasons for reticence on the part of a ‘mere man’ dealing with a problem so intricate and delicate.<sup>46</sup>

[35] The conclusion reached by Higgins J was as follows:

The claim is for £2 per week; and Mr. Carter speaking for the union, makes out his total of necessary expenditure at £2 6s. 6d. per week. I do not think, however, that it would be just to compel employers to pay 15s. per week for clothes alone, as Mr. Carter urges. If the girls will have their finery at the sacrifice of other things more necessary, that is their business; but probably it is not fair to force the employers to pay for all that a girl may fancy as being for necessary human requirements. At the same time, we must not forget the important social function of girls’ dress as a bulwark for self-respect; and it is for women who can afford it to show the way of simplicity and good taste.

I have decided to fix the basic wage for women at 35s. per week.<sup>47</sup>

[36] The above passages from the *Archer decision* make even clearer the gender-based assumptions upon which Higgins J proceeded in the *Fruit Pickers decision*, including the concept of ‘women’s work’ based on assumptions about certain female traits. The *Archer decision* also illustrates another way in which gender assumptions affected the fixation of award minimum wages. The making of awards in the federal industrial relations system was in this period (and, indeed, until 2006) a function of the settlement of interstate industrial disputes. The ‘ambit’ of such disputes was established by claims generated by what were male-dominated unions, and such claims often reflected the gender assumptions of the leadership of the unions involved. In the first passage from the *Archer decision* above, Higgins J identified that the claimant union had actually claimed lower wages for women than for men doing equivalent work. He expanded upon this when he said:

In other words, a differentiation between men’s wages and women’s wages in most tailoring work has been conceded by the very form of the claim. The territory has been abandoned to the invading army without a struggle; for it is already in that army’s possession. Let it be remembered that the differentiation is not the result of any adjudication of mine.<sup>48</sup>

[37] The female basic wage set in the *Archer decision* was 54 per cent of the basic wage for men in the same decision. The *Archer decision* established the norm for women’s basic wages until World War II, with the female rate generally being set at around 54 per cent of the male basic wage for a range of occupations and industries.<sup>49</sup> It remained the case that adult male workers were entitled to a higher basic wage rate whether or not they were married or supporting children. The rationale for this was explained by Higgins J in the *1921 Metals decision* as follows:

As matters now stand, I must follow the old lines until some course better has been devised. If some scheme for child endowment should be adopted, as suggested by Mr Rowntree and others, the basic wage payable by the employer could be reduced to meet the mere needs of the man,



or the man and wife; but in the meantime I must adhere to the practice of including some rough provision for children in the fixing of the basic wage. If the basic wage were graded according to the number of children, there would be a tendency to employ men with few children or none in preference to men with many children (as in the case of 'married couples' caretakers, &c.).<sup>50</sup>

[38] The position in relation to the fixation of margins for skill in addition to the basic wage for employees for different gender was far less transparent and consistent. Because the arbitral function of the CA Court was confined to those matters claimed which remained in dispute after conciliation, many awards were made as a result of settlements reached by the parties. In these cases, the basis for the award wage rates which resulted is usually not apparent. Most commonly, awards for particular occupations and industries developed over time through a combination of settlements and arbitrations, the complex history of which is often difficult to unravel now. The guiding principle for work performed by both men and women, as stated by Higgins J in the *Fruit Pickers decision* and nominally followed thereafter,<sup>51</sup> was that they should be awarded the same margin for skill for the same work (as well as the same basic wage). This principle, it is apparent, was established more to protect men's employment in 'men's work' than because of any notion of gender equality. However, this principle was frequently not applied in practice. An example of this is the development of what later became the *Clothing Trades Award 1964*<sup>52</sup> (Clothing Trades Award), initially established in the *Archer decision*. It is apparent from a 1950 decision of Conciliation Commissioner Findlay<sup>53</sup> concerning this award that, by the time of his decision, different margins for male and female workers performing work of the same nature and skill level had been established, since he had to consider a union claim that margins be equalised. In respect of this issue, the Commissioner said:

The tailor was the index in the male section and an index in respect of females is found in the new tailoresses classification prescribed by this award. This classification and the definition attached thereto is not objected to by the parties and arises out of evidence and inspections in respect of the work performed by employees who will appropriately be covered by this classification.

There are females working in the industry who have served the required apprenticeship in the order tailoring section and are possessed of the same high degree of skill as tailors. They are applying that high degree of skill in exactly the same manner as are tailors and are performing work identical in every regard in the making of order made coats for males but are being paid by a lesser amount of 65s. per week for the performance of such work. This lesser amount occurs by a discrepancy of 31s. per week in the marginal rate for females as compared to males; and a difference of 34s. per week in the base rate payable to adult males and to adult females.

In my opinion the rates payable to employees in this particular classification, whether males or females, should be the same. They are performing the same highly skilled work and returning to the employer by the application the same price to the customer. I am precluded from making any alteration in any rate, other than the marginal rate, therefore I cannot give effect to my conclusion, but there appear to be some grounds for fear expressed by the Union that the differential rates payable in this classification may ultimately result in the employment of females to the exclusion of males in this particular section of the industry. I intend to prescribe the same marginal rate for a tailoress, as defined, as is prescribed for a tailor and remedy to some extent the discrepancy at present occurring as between the female and her male counterpart in this section of the industry.<sup>54</sup>

[39] However, it is apparent that this decision still did not resolve all the gender-based differences in margins in the Clothing Trades Award, since the issue was considered again in a

decision of a Full Bench of the Australian Conciliation and Arbitration Commission (CA Commission) of 1967<sup>55</sup> (*Clothing Trades decision*). The position was described as follows:

The present award has some 223 classifications spread over 13 groups which range from order tailoring for males to making artificial flowers and brushed silk emblems. The margins clause has a separate section for each of the 13 groups, all of which contain rates of pay for both males and females. There are classifications with the same name but with different rates in the several groups. There are some classifications with the same name for which are prescribed the same total rate, that is, basic wage plus margin, for males and females. There are some classifications with the same name for which are prescribed the same margin for females as males but applied in the case of females to the female and not to the male basic wage. There are also classifications with the same name for which a different margin is prescribed for females from that prescribed for males and applied in the case of females to the female basic wage. ...<sup>56</sup>

(underlining added)

[40] We will return to the *Clothing Trades decision*. In relation to what was referred to as ‘women’s work’ or ‘work suitable for women’ — that is, predominantly female occupations or industries — the nominal approach was that minimum wage rates were set by fixing the basic wage ‘with such marginal additions as may be added having regard to all relevant considerations including the nature of the work, the skill and experience of the employee and the physical conditions under which it has to be carried out’.<sup>57</sup> However, notwithstanding this approach to the assessment of margins for skill was nominally the same as men, the application of gender assumptions in the fixing of marginal rates was either explicit or implicit. An example of the former concerns the fixation of rates for ‘women’s work’ in the *Metal Trades Award* before World War II, which was summarised in the 1945 *Inquiry into Female Minimum Rates* as follows:

The next award to be considered is the Metal Trades award and the industries to which it applies were prior to the outbreak of the war industries in which masculinity predominated, the employment of females being limited to work at which they were found to be adept, being work on light metals and materials requiring nimble fingers and dexterity, without calling for the skill and experience of a tradesman. They were excluded from the laborious and unskilled work of the basic wage and lower marginal classifications, their operations covering a range of work which in the case of males would include process working, third class machining and assembly and bench work of a reasonably high grade non-tradesman standard. In such circumstances their wages were fixed in 1930 at a level well above those which prevailed in industries in which femininity predominated and in which females were employed in the unskilled and lower marginal occupations.<sup>58</sup>

(underlining added)

[41] The underlined part of the passage above makes it apparent that, for work in which women were predominantly employed, the CA Court treated the skills they exercised as inherent to their gender (‘found to be adept’) rather than acquired through training and experience as in the case of the tradesman, and having lesser value as a result. Notwithstanding this, the observation in the last sentence is noteworthy: female workers performing ‘women’s work’ in a mainly masculine industry were paid well above those in ‘industries in which femininity predominated’, which were regarded as being unskilled or lower-skilled.

[42] In some awards, the skills of females performing different classifications of ‘women’s work’ were not assessed at all for the purpose of establishing differential marginal rates, but instead a flat margin (sometimes referred to as a ‘constant loading’) was applied to all female workers regardless of relative skill.<sup>59</sup> The application of gender assumptions may be inferred.

In other awards, there was obvious gender discrimination in the fixation of margins without any apparent justification. For example, when the CA Commission made the first *Shop Assistants etc. (Northern Territory) Award* in 1957,<sup>60</sup> despite finding that ‘this field of employment ... is predominantly female’,<sup>61</sup> the margin for female shop assistants was set at 75 per cent of that for male shop assistants without any rationale for this being provided.<sup>62</sup>

[43] The socio-economic norms underpinning gender distinctions in basic wage and marginal amounts were disrupted by World War II, which saw a significant expansion in the number and proportion of women in the workforce and a concomitant need to increase wages for female workers in order to attract them into, and retain them in, wartime employment. This was reflected in decisions of the Women’s Employment Board (established pursuant to reg 5 of the *National Security (Employment of Women) Regulations 1942*), which awarded rates for female workers in war-related industries from 75 to 100 per cent of the male rates of pay, and in the later *National Security (Female Minimum Rates) Regulations* which set a wartime female rate of 75 per cent of male rates in vital industries.<sup>63</sup> The implications of these developments for the existing approach to the fixation of basic wage rates were first considered by a Full Court of the CA Court in the 1943 *Munition Workers Case*.<sup>64</sup> The case concerned potential industrial unrest in small arms manufacturing, where the percentage of women employed had greatly increased during the war. Such women were paid 60 per cent of the adult male rate pursuant to a 1940 agreement, and it was contended that an anomaly arose because, by decision of the Women’s Employment Board, in other areas of arms manufacturing in which women had been employed for the first time during the war, the adult female rate was (after probation) set at 90 per cent of the male rate.<sup>65</sup> In considering this alleged anomaly, the Full Court noted that the mandate of the Women’s Employment Board had been to set wages for women in war-related industries based upon a ‘consideration of the relative efficiency and productivity of women as compared to men workers’ — an approach which was inconsistent with the method traditionally used by industrial tribunals to assess minimum wages rates (which involved the gender assumptions earlier described).<sup>66</sup> The Court described this method as follows:

... It can be said that wages for both male and female adult employees have in general been assessed by adding to a foundational amount, called the basic or living wage, whatever sum has been regarded as just and proper by way of special remuneration for such matters as skill, experience, unduly irksome or difficult conditions attending the particular work in question, intermittency of employment, unavoidable losses of working time and such like incidents of the particular occupation. For the unskilled worker whose work does not involve any such considerations, the basic or living wage has been generally deemed to be the appropriate minimum. Whilst in the assessment of the added sums, usually referred to as either loadings or margins or sometimes as secondary wages, some regard has been paid to relative work-values as between workers possessing varying degrees of skill or experience or incurring varying degrees of irksomeness, difficulty, intermittency or loss of time, &c., in their employment, work-value has not been adopted as a measure in the assessment of the foundational or primary or basic wage. This has applied in the assessment of the basic or living wage ingredient of all wages whether of men or of women.<sup>67</sup>

[44] The Full Court affirmed that the male basic wage had originally been conceptualised as a ‘family wage’ and said:

For present purposes it is necessary only to say that the basic wage ingredient of the wage rates determined by the Court was related, not to what has been termed the ‘economic wage’ theory, nor to the assessment of work value, but to an ethical standard designed to meet the necessities of the married worker and at least some of his dependants. It was never denied that it was more

than adequate to meet the normal and reasonable requirements of an unmarried unskilled worker with no dependants to support.<sup>68</sup>

[45] The Court however acknowledged that the economic circumstances of the 1930s had caused increasing attention to be paid to economic circumstances and the productive capacity of industry.<sup>69</sup> In relation to the setting of female wages, the Full Court said:

It is beyond question that the general rule adopted and followed by the Australian industrial authorities in the assessment of wages for adult women workers, engaged upon work suitable for women in which they cannot fairly be said to be in competition with men for employment, has been and still is to fix a foundational amount, calculated with reference to the needs of a single woman who has to pay for her board and lodging, has to maintain herself out of her earnings, but has no dependants to support; and to add to this foundational or basic amount such marginal amounts as may be appropriate in recognition of the particular skill or experience of the particular workers in question or as compensation for the particular conditions which they encounter in their occupations.<sup>70</sup>

(underlining added)

[46] Having regard to these matters, the Full Court determined that the wage rates for female workers in small arms manufacture were not anomalous since they were set according to the general rules of wage assessment it had identified — rules which were inconsistent with the regulatory mandate of the Women’s Employment Board. The Full Court concluded:

... The man’s basic wage is more than sufficient for his personal needs; it purports to provide him with enough to support some family. The woman’s, on the other hand, purports to be enough for her to maintain herself only. No allowance is made for the support of any dependents. The man’s wage has been measured by this Court with reference to the dominating factor of the productive capacity of industry to sustain it and with due regard consequently to what its application in industry will mean, to the marginal structure which rises above it, and to the consequent wages which will in accordance with established rules and practice be paid to women and to minors.

In the course of the hearing the Chief Judge drew attention to the necessity which would occur, if women’s rates were to be assessed on the basis that relative efficiency and productivity (as between men and women) were to constitute the dominant factor, for a review of the principles in accordance with which the basic wage has been determined. That this necessity would arise must be apparent. For the basic wage for adult males has been fixed at as high an amount as the Court has thought practicable in all the circumstances of the case, including the circumstance of the existing proportionate levels of wages for women and minors. The share of men workers in the fruits of production will need to be reduced if women are to participate therein on an equal footing, or on a better footing generally than that to which they have hitherto been held to be entitled.

It is desirable that we should indicate as clearly as possible the effect of the conclusions to which the review of the principles of wage assessment we have made has led us. It is that, so long as the foundational or basic wage for women is assessed according to a standard different from that which is the basis of the foundational or basic wage—a family wage—for men, the Court will not, in the exercise of its function of adjudicating between opposing interests, raise the general level of women’s minimum wages in occupations suitable for women, and in which they do not encounter considerable competition from men, according to a comparison of their efficiency and productivity with the efficiency and productivity of men doing substantially similar work. To do so would at once depress the relative standard of living of the family as a group, and of its individual members, as compared with that of the typical single woman wage-earner.<sup>71</sup>

(underlining added)

[47] This issue was revisited by a Full Court in the *Basic Wage Inquiry 1949–1950*,<sup>72</sup> in which unions claimed (among other things) a uniform basic wage for all adults irrespective of gender, and a different result prevailed. By majority (Foster and Dunphy JJ, Kelly J dissenting), the CA Court determined that it should establish a female basic wage set at 75 per cent of the male basic wage.<sup>73</sup> The Court rejected the claim for a uniform basic wage, and the reasons for this rejection identified by Foster J made explicit the gender assumptions involved:

- (a) the male basic wage was a social wage for a man, his wife and family;
- (b) no claim was made for a unit wage upon which equality of wages could be based. As this might have resulted in a lower male basic wage the Union's failure is easily understood, but this approach might furnish an acceptable and perhaps desirable basis for equality of reward but it means procedures which would need the aid of Parliament and is beyond the power of the Court;
- (c) 'equal pay' based on the male basic wage would put intolerable strain on the economy;
- (d) it was socially preferable to provide a higher wage for the male because of his social obligations to fiancée, wife and family;
- (e) while single females were said to be anxious to receive the higher wage their interest changed on their marriage which occurred in Australia at the average age of about 25. As married women they became concerned that their husbands should bring home the largest possible pay envelope;
- (f) the productivity, efficiency and the needs and the responsibilities etc. of females were substantially less than that of males in this community; and
- (g) lastly the re-distribution of the wage fund so that young unmarried females would receive very substantially increased spending power would disturb the economy in a manner certainly to the disadvantage of the married basic wage worker and his wife and family and probably of the whole community.<sup>74</sup>

[48] Justice Foster noted that the demand for female labour as a result of the war had led to higher actual rates as well as higher award rates, and further noted that the decisions of the Women's Employment Board had generally set female rates at about 90 per cent of the comparable male rates and that the *National Security (Female Minimum Rates) Regulations* which set a female rate of 75 per cent in vital industries.<sup>75</sup> The result was, he said:

These rates have spread widely through industry and though both the Women's Employment Board and the vital industry rates have ceased to be binding and effective, the evidence shows that 'the relatively great shortage of male labor has placed female workers in a uniquely favourable situation in the labor market,' ... so that their actual rates have not fallen back to the award rates. I believe that it would be hard to find today any adult female in Australia working on the 54 per cent, level.<sup>76</sup>

[49] Justice Foster concluded that, since the evidence was that industry was sustaining the higher actual rates for female workers, 'then it would be safe for the Court to prescribe a sum as a basic wage that would give legal sanction to existing actual rates' since this would 'enable the higher standard of living which since the war the community has become accustomed to for females to be protected by an award'.<sup>77</sup> This caused him to fix the female basic wage at 75 per cent of the male basic wage.<sup>78</sup> Justice Dunphy came to the same result, albeit for the scant reason that 'there should be an upgrading'.<sup>79</sup> The outcome they jointly reached involved a partial departure from the approach of setting the female basic wage by an assessment of the needs of a single adult female with no dependants, and appears to have represented a pragmatic assessment of the highest amount which the economy could sustain.

[50] In the 1967 *Clothing Trades decision*,<sup>80</sup> as stated above, a Full Bench of the CA Commission addressed the issue of gender inequalities in marginal rates in the Clothing Trades Award. The Full Bench made the following statement of principle:

There is no dispute between the parties that persons performing the same work should be paid the same margins for skill irrespective of sex. We endorse this agreement as to principle. It seems to us to be industrially unjust that women performing the same work as men should be paid a lower margin. This principle can be stated simply but its application presents at least two difficulties in any industry which has an existing involved wage structure and a long history of different margins for men and women for what appears to be the same work.

The first difficulty is to be sure that the work done is the same. If it is not, then the general principle stated above does not apply because the value of the work done by the woman may be different from the value of the work done by the man. If the job title found in the award is the same for both sexes then prima facie the margin may be the same. But this can be no more than a prima facie position, as our examination of this industry and this award has disclosed. For instance, both men and women are described as machinists in a number of different sections of the industry. In fact there are very few men employed as machinists, the great bulk of whom are women. The work done by most of the few men we saw working as machinists comprised many more different operations than the work done by most of the women whom we saw working as machinists. The work done by women as machinists also varied in different sections of the industry. It does not follow, therefore, that the mere similarity of description is sufficient to require the automatic application of the principle of equal margins.

As to the second difficulty, where in the past higher margins have been awarded to men than to women for work which may appear similar there is the problem whether the margin for them should be automatically preferred to the margin for women as a proper assessment of the value of the work being done. If both the male margin and the female margin have as in this case been the subject both of agreement and of arbitration over many years there can be in our view no presumption that the male margin is any better assessment of the work value than is the female margin. If in fact the work is the same but the female margin is less, then it must be a matter of judgment to decide whether or not to apply the existing female margin, the existing male margin, or some other margin.<sup>81</sup>

[51] Three matters may be noted about the above statement of principles. *First*, the statement of principle in the first paragraph was the same as that articulated by Higgins J in the *Fruit Pickers decision* some 55 years before with respect to work performed by both men and women, with its restatement being necessary because it had not in fact been applied to a wide extent. *Second*, as in the *Fruit Pickers decision*, the principles stated above were only concerned with work performed by both male and female workers, and did not address the margins set for predominantly female work or ‘women’s work’ on any basis. *Third*, the rectification process contemplated still approached comparisons of work for the purpose of assessing whether the work was the same on a gendered rather than gender-neutral basis. The result was that the new Clothing Trades Award rates of pay established by the Full Bench retained separate classifications and marginal amounts for male and female workers, with a number of female classifications having no male equivalent because the work of the classification was apparently only performed by female workers.

[52] The principles developed in the *Clothing Trades decision* were not applied more widely to marginal amounts set in other awards because, later in the same year, the system of wage-fixing based on the dual concept of a basic wage to meet employee needs and (where applicable) margins based on skill (or work value) was formally brought to an end. This system had

gradually been breaking down in the 20-year period following World War II because economic considerations such as inflation and national productivity became the primary determinant in adjusting both basic wages and margins, thus diminishing the rationale for the distinction between them. In addition, the practice developed of considering and adjusting both basic wages and margins conjointly in the same proceedings, and uniformly on a national basis, culminating in the National Wage Case procedure developed in the mid-1960s.<sup>82</sup> Finally, as a result of legislative change, the adult male minimum wage was introduced in 1966, rendering largely redundant the concept of the basic wage. In the *National Wage Cases 1967*,<sup>83</sup> the CA Commission determined to abandon the basic wage/margin concept altogether and express all award wages as a single ‘total wage’. The Commission described the new system in the following terms:

This new approach will ensure that under our awards wage and salary earners will annually have applied to them the increases for economic reasons which it is common ground they may normally expect and the increases will be applied to the whole wage instead of only to part of the wage as at present. We are sure that in work-value cases the fixation of total wages will bring to award-making both greater flexibility and greater reality. The minimum wage will give better protection to those whose needs are greatest, namely, those whose take-home pay would otherwise be below the standard assessed by the Commission and will give the Commission more flexibility in assisting them because we will have more scope to give them special consideration.<sup>84</sup>

[53] The introduction of the total wage concept meant that, in awards containing lower female basic wages, those lower wages were incorporated into a separate, and lower, total wage for females.<sup>85</sup> The 25 per cent gender differential established by the *Basic Wage Inquiry 1949–1950*, thus migrated into the new total wage system (as did any gender differences in marginal amounts). However, the abandonment of the concept of the basic wage assessed on the basis of needs fatally undermined the original rationale for lower female wages. This was implicitly recognised by the Full Bench in the *National Wage Cases 1967* when it said:

The community is faced with economic industrial and social challenges arising from the history of female wage fixation. Our adoption of the concept of a total wage has allowed us to take an important step forward in regard to female wages. We have on this occasion deliberately awarded the same increase to adult females and adult males. The recent *Clothing Trades decision* affirmed the concept of equal margins for adult males and females doing equal work. The extension of that concept to the total wage would involve economic and industrial sequels and calls for thorough investigation and debate in which a policy of gradual implementation could be considered... We invite the unions, the employers and the Commonwealth to give careful study to these questions with the knowledge that the Commission is available to assist by conciliation or arbitration in the resolution of the problems.<sup>86</sup>

(citations omitted)

### 2.3 *The unfinished business of the Equal Pay Cases*

[54] The foreshadowed ‘resolution of the problems’ occurred in the *1969 Equal Pay Case*,<sup>87</sup> which concerned union applications to vary the Meat Industry Award and certain Commonwealth Public Service determinations by providing for increases in pay ‘which would eliminate the difference in current rates represented by the difference between the former male and female basic wages’.<sup>88</sup> The premise of the unions’ case was as follows:

It was sought that the increases be applied to all females irrespective of the work which they performed. Mr Hawke, who was the principal union advocate in all cases, explained that it was

part of the policy of the trade union movement that there should be equal pay for equal work, that to accede to the present claims would be an overwhelmingly important step towards the achievement of equal pay and that any anomalies which remained after the claims had been granted could be dealt with by individual Commissioners dealing with individual awards and by the Public Service Arbitrator with individual determinations. This case, which all unions asked us to treat as a test case, would provide the foundation for ultimate complete equality of wages.<sup>89</sup>

**[55]** Importantly, the unions' case focused on the vitiation of the historic rationale for the distinction between male and female basic wages:

[Mr Hawke] related the history of wage fixation in this country to the greater significance which women now have in the workforce. He pointed to the fact that in origin the basic wages for males and subsequently for females were on the one hand for a married man with a family and on the other for an unmarried female. This concept of differing basic wages originated some 60 years ago when both the social attitudes towards women and their contribution to the economy were much different from now. He submitted that the concept of needs which had been important in these early years had become blurred, had first been disregarded in 1931 when wages were reduced for economic reasons and subsequently in post-war years had disappeared from the fixation of basic wages altogether. Once the needs basis of the basic wage had gone, he argued, the social desirability for maintaining the difference between male and female basic wages disappeared, and when the basic wage itself was abolished in 1967 the argument in favour of the differential between males and females became even more tenuous. He said that the difference in their wages is a relic of assumptions and conceptions which existed at the beginning of this century. Although the basic wage was abolished in 1967 the differential between the male and female basic wages which pre-existed could still be ascertained and until it was removed there would be no firm foundation for establishing the principle of equal pay for equal work.<sup>90</sup>

**[56]** In its consideration of the claims, the Commission described the history of the fixation of the male and female basic wages in a way largely consistent with the unions' submissions. However, it went further and also identified anomalies in the way in which margins (or 'secondary wages') for females had been fixed:

An examination of the history of the secondary wage for females produces an even more confused result. In some instances females doing the same work as males received the same secondary wage as males and in the Commonwealth Public Service this is normal. In some instances in private industry they did not. In other cases, such as the Metal Trades award, they received what might be described as a composite margin to cover a range of classifications. So that when in 1967 the Commission introduced total wages by combining the basic wage and margins the resultant money differences between the wages of males and females were due to a variety of reasons but were referable, at least in part, to the old basic wage differences. The pattern is even more confused when to this already complex situation is added the fact that in a number of awards females have for many years received the full male wage as the result of attempts to prevent what was regarded as unfair competition with men.

The most we are able to say is that there is still a relic of the concept of the family wage in most of the present total wages. It is an amount which has been arrived at for varying reasons and in varying ways, but we consider it no longer has the significance, conceptual or economic, which it once had and is no real bar to a consideration of equal pay for equal work.<sup>91</sup>

**[57]** After considering the positions of the Commonwealth and State governments (including State legislation concerning equal pay), relevant conventions and recommendations of the



International Labour Organisation and the economic effect of any decision to be made, the Commission accepted that the concept of ‘equal pay for equal work’ but identified difficulties in its implementation:

...Though we realise that the various United Nations and I.L.O. declarations and conventions must carry significant weight in a general way, we must consider how, if they are to be applied, they can be fitted into our community. We have certain values which have in part been created by our own institutions including a complex wage system. This Commission cannot escape its own history, including the history of the Court, even if it wanted to. If the arbitration system had in the past not concerned itself with a needs or family wage but had fixed a rate for a job, irrespective of the sex, marital or parental status of the worker, the probabilities are that the rate for the job would lie somewhere between the current male rate and the current female rate. This is speculation on our part but it does highlight the difficulties of finding a satisfactory solution to the issues now before us. We consider it preferable to start from a decision on principle in this case and let that principle be worked through the system.

If there were no history of wage fixation in this country and if we were starting afresh we might well not approach male and female rates as they were approached in the beginnings of the Federal arbitration system. This is in no sense intended as a criticism of the eminent Judges of the past but is merely a reflection of the fact that in our view changes have occurred in social thinking...<sup>92</sup>

**[58]** The Commission ultimately determined to implement the principle of equal pay for equal work by establishing nine principles for its implementation by application on an award-by-award basis. The most significant principles were:

- (1) the male and female employees concerned who must be adults, should be working under the terms of the same determination or award;
- (2) it should be established that certain work covered by the determination or award is performed by both males and females;
- (3) the work performed by both the males and the females under such determination or award should be of the same or a like nature and of equal value, but mere similarity in name of male and female classifications may not be enough to establish that males and females do work of a like nature;
- ...
- (5) consideration should be restricted to work performed under the determination or award concerned;
- ...
- (9) notwithstanding the above, equal pay should not be provided by application of the above principles where the work in question is essentially or usually performed by females but is work upon which male employees may also be employed.<sup>93</sup>

**[59]** Where it was determined in the case of an award that equal pay should be granted, the Commission stated that implementation should be staggered over a specified time period ending on 1 January 1972.<sup>94</sup>

**[60]** Whilst undoubtedly of historic importance, the outcome of the *1969 Equal Pay Case* was subject to significant limitations. The principles it established were carefully confined to gender differentials in pay rates *within awards only* for work of the same or like nature and of equal value *where that work was performed by both males and females*. It did not seek to address or remedy gender differentials in pay rates between different awards, or in awards where the work was predominantly performed by females. Moreover, as the Commission stated, the principles were not concerned with historical gender disparities in margins:

As we have already indicated the increases in wages of female employees which were sought in the present cases were specifically limited by the applicants to the amounts which were equivalent to differentials between the male and female basic wages when they were incorporated in the total wages in July 1967. The applications did not extend to any differences arising from the ‘marginal’ content of the total wages. Accordingly, any orders which might be made in these proceedings must be limited to the ‘basic wage’ differentials.<sup>95</sup>

[61] The application of the 1969 *Equal Pay Case* principles had the result that, by 1972, approximately 18 per cent of females in the workforce had received pay increases as a result of the decision.<sup>96</sup>

[62] The principles established in the 1969 *Equal Pay Case* were developed considerably further in the 1972 *Equal Pay Case*.<sup>97</sup> A Full Bench of the CA Commission considered events which had occurred since 1969, particularly equal pay legislation which had been introduced at the State level and overseas, and concluded:

All these changes require us to reconsider the 1969 principles and to look at them in the light of present circumstances. We have given consideration to merely amending those principles but we consider that it is better for us to state positively a new principle. In our view the concept of ‘equal pay for equal work’ is too narrow in today’s world and we think the time has come to enlarge the concept to ‘equal pay for work of equal value’. This means that award rates for all work should be considered without regard to the sex of the employee.

It was suggested that we should examine in detail the various claims before us and as a result of that examination lay down principles which would have general application. We consider that work value reviews by this full bench would be unwieldy and that a better result will be obtained if we lay down a general principle and leave its implementation to individual members of the Commission.<sup>98</sup>

(underlining added)

[63] The Full Bench accepted that the implementation of ‘equal pay for work of equal value’ would result in a substantial increase to the total wages bill for the economy, but said:

In our view the community is prepared to accept the concept of equal pay for females and should therefore be prepared to accept the economic consequences of this decision.<sup>99</sup>

[64] The Full Bench determined a maximum phasing-in period of just over two-and-a-half years — that is, by 30 June 1975.<sup>100</sup> The key aspects of the new principle which was established are captured in its first four paragraphs:

1. The principle of ‘equal pay for work of equal value’ will be applied to all awards of the Commission. By ‘equal pay for work of equal value’ we mean the fixation of award wage rates by a consideration of the work performed irrespective of the sex of the worker. The principle will apply to both adults and juniors. Because the male minimum wage takes account of family considerations it will not apply to females.
2. Adoption of the new principle requires that female rates be determined by work value comparisons without regard to the sex of the employees concerned. Differentiations between male rates in awards of the Commission have traditionally been founded on work value investigations of various occupational groups or classifications. The gap between the level of male and female rates in awards generally is greater than the gap, if any, in the comparative value of work performed by the two sexes because rates for female

classifications in the same award have generally been fixed without a comparative evaluation of the work performed by males and females.

3. The new principle may be applied by agreement or arbitration. The eventual outcome should be a single rate for an occupational group or classification which rate is payable to the employee performing the work whether the employee be male or female. Existing geographical differences between rates will not be affected by this decision.
4. Implementation of the new principle by arbitration will call for the exercise of the broad judgment which has characterised work value inquiries. Different criteria will continue to apply from case to case and may vary from one class of work to another. However, work value inquiries which are concerned with comparisons of work and fixation of award rates irrespective of the sex of employees may encounter unfamiliar issues. In so far as those issues have been raised we will comment on them. Other issues which may arise will be resolved in the context of the particular work value inquiry with which the arbitration is concerned.<sup>101</sup>

(underlining added)

**[65]** In respect of the contemplated ‘work value inquiries’, the principle went on to say (at 5(b)):

Work value comparisons should, where possible, be made between female and male classifications within the award under consideration. But where such comparisons are unavailable or inconclusive, as may be the case where the work is performed exclusively by females, it may be necessary to take into account comparisons of work value between female classifications within the award and/or comparisons of work value between female classifications in different awards. In some cases comparisons with male classifications in other awards may be necessary.<sup>102</sup>

(underlining added)

**[66]** The underlined sentence in paragraph 2 of the new principle involved an acknowledgment that, notwithstanding the closure of the ‘basic wage’ gender gap effected by the *1969 Equal Pay Case*, there remained differences between male and female rates of pay which were not justified on a work value basis and which required rectification. For awards which contained within them separate male and female classifications and pay rates for the same or similar work — that is, awards which were ‘facially’ discriminatory — the process for the rectification of this was relatively straightforward. Following the *1972 Equal Pay Case* most federal awards were amended (principally by consent and in some cases by arbitration) so that they contained no gender-based classification or pay rates (albeit for some awards this occurred later than the timeframe contemplated in the decision). The cumulative effect of the two equal pay cases over the period 1969–1974 was that average hourly wage rates for females increased by 44 percentage points more than for males.<sup>103</sup>

**[67]** However, as acknowledged in the underlined portion of paragraph 5(b) of the new principle above, the position was more complex in respect of classifications, or awards, where the work was performed ‘exclusively by females’. In this respect, there was a necessity to undertake work value comparisons with other female, or male, classifications on an intra-award or, if necessary, inter-award basis. This recognised the history of ‘women’s work’ not having been properly valued in awards. There is scant indication that this aspect of the new principle was ever implemented. In a 1986 analysis by Christine Short,<sup>104</sup> the author stated:

...There is also a noticeable absence of any work value assessments by the Commission. In only two cases ... did the Commission's officers make inspections ... It is possible that in some cases after 1972 employers or unions made such assessments themselves, but in most it would seem no assessment was made. Employers and unions merely agreed on integration of male and female classifications without specified studies to see if the work was of equal value.<sup>105</sup>

[68] In the high inflation context of the 1970s and 1980s, paragraph 5(b) of the 1972 *Equal Pay Case* principle was, for practical purposes, subsumed by the subsequent wage-fixing principles established by the CA Commission to control wages growth after the 'wages explosions' of 1973–75 and 1980–82. The Full Bench decision in *4 yearly review of modern awards – Pharmacy Industry Award 2010*<sup>106</sup> (*Pharmacy decision*) traced in detail the development of wage-fixing principles by the CA Commission, especially in respect of work value claims. Without repeating that analysis, it is worth noting its salient features. In the *National Wage Case September 1975*<sup>107</sup> the CA Commission introduced wage-fixing principles which had as their primary feature wage indexation and which sought to limit the availability of wage increases outside of this mechanism. In particular, by principle 7(a) the CA Commission sought to tightly restrict the capacity to obtain wage increases on work value grounds. The Commission made it clear that it was necessary to demonstrate '[c]hanges in work value being changes in the nature of the work, skill and responsibility required, or the conditions under which the work is performed' to justify wage increases on work value grounds.<sup>108</sup> Such changes had to be measured from a 'datum point', determined to be in most cases not earlier than the date of the last movement in award rates apart from National Wage Case and indexation increases and in no case earlier than 1 January 1970. The CA Commission rejected the proposition that the absence of any proper work value assessment in the fixation of award rates justified any earlier datum point, stating:

We do not agree that before a job has been given a work value there must have been some formal process or announcement. The mere existence of a rate in an award is evidence of the fact that the job has been valued even if only by acquiescence.<sup>109</sup>

[69] The *National Wage Case September 1975* also stated that principle 7(a) was intended to be exhaustive and did not accommodate claims based on comparative wage justice.<sup>110</sup>

[70] The wage-fixing principles established in 1975 were scrapped in 1981 because of the extent of wage claims being prosecuted outside of the wage indexation system at that time, but wage-fixing principles were re-established in the *National Wage Case 1983*<sup>111</sup> at the commencement of the Accord era of wage fixation. The new principles again sought to tightly restrict the capacity to obtain award wage increases outside of National Wage Case increases, including on work value grounds. Tellingly, in its consideration of the work value principle (principle 4(a)), the CA Commission noted and rejected submissions made by women's groups concerning the assessment of work value in female-dominated occupations:

The National Council of Women, the Union of Australian Women and the Women's Electoral Lobby contended that in female occupational areas the implementation of the Commission's equal pay decisions had not been accompanied by proper work value exercises. The WEL asked that there be provision for a re-evaluation of this work in any centralized system the Commission should introduce, such work value exercises to be carried out as the individual awards came up for variation or through an anomalies or inequities procedure. We consider that such large scale work value inquiries would clearly provide an opportunity for the development of additional tiers of wage increases, which would be inconsistent with the centralized system which we propose for the next two years and would also be inappropriate in the current state of

unemployment especially among women. Moreover, many of the problems which the WEL has raised are a matter for management, unions and governments rather than for award provision.<sup>112</sup>  
(underlining added)

[71] The work value principle which was determined contained, in effect, the same restrictions as in the 1975–81 principles, except that the datum point was changed to be the ‘last work value adjustment affecting an award but in no case earlier than 1 January 1978’.<sup>113</sup> The work value principle remained in effect in this form until 1991. The requirement in the work value principle in all its iterations from 1975 to 1991 for the demonstration of *changes* in work value *post the identified datum point* did not allow for the type of fundamental work value reassessment in female-dominated occupations and industries contemplated by the *1972 Equal Pay Case* and sought by women’s groups in the *National Wage Case 1983*. As was stated in the Smith/Lyons Report:

... this requirement for tribunals to make an adjustment to minimum rates based only on a change in work value has meant that there has been a limited capacity to address what may have been errors and flaws in the setting of minimum rates for work in female dominated industries and occupations. These limitations in the capacity of the tribunal to the proper valuation of the work arises because any potential errors in the valuation of the work, may have predated the last assessment of the work by the tribunals. Errors in the valuation of work may have arisen from the female characterisation of the work, or the lack of a detailed assessment of the work, The time frame or datum point for the measurement of work value which limit assessment of work value to changes of work value, or changes measured from a specific point in time mitigated against a proper, full-scale assessment of the work free of assumptions based on gender.<sup>114</sup>

[72] The ‘equal pay for work of equal value’ principle established in the *1972 Equal Pay Case* was never formally abolished, but it was not incorporated into the wage-fixing principles which applied from 1975 to 1981 and from 1983 to 2006. The position applied was that equal pay cases could only be prosecuted under the ‘Anomalies and Inequities’ provisions of the wage principles, which were only ever applied in exceptional cases. The position in this respect is illustrated by the 1986 *Nurses Comparable Worth Case*,<sup>115</sup> which concerned a claim made to increase the rates of pay for private nurses in the ACT by application of the *1972 Equal Pay Case* principle. The nature of the matter was described in the decision of the Full Bench of the CA Commission as follows:

Mrs J. Acton who appeared for the two Unions and also for the [Australian Council of Trade Unions (ACTU)] intervening, said the applications were in the form of a test case on the issue of equal pay for work of equal value, or, she said, ‘as it is more commonly known overseas, particularly in the United States’ comparable worth. It was submitted that nurses as a group had not had applied to them the 1972 equal pay decision, which set out the principle of equal pay for work of equal value.<sup>116</sup>

[73] The unions and the ACTU submitted that the *1972 Equal Pay Case* principle allowed, in the case of female-dominated work, for comparisons to be made with female and male classifications in other awards, and with rates outside a particular occupation where such comparisons are not available within the occupation on the basis of ‘comparable worth’. They further submitted that, although it had been envisaged that the *1972 Equal Pay Case* principle would be fully implemented by 30 June 1975, this had not occurred, but that claims pursuant to the principle could still be pursued unconstrained by the wage-fixing principle. The claim was supported by a number of women’s groups:

...The National Council of Women emphasised the importance of the 1972 Equal Pay decision in the continuing commitment of the community and the Government to the removal of discrimination between men and women and said it would be turning back the clock if the current Wage Fixing Principles were applied as a bar to the continued application of the decision.

The Council of Action for Equal Pay went further than either the applicants or any of the other interveners which supported the applications. In a very wide-ranging submission which went beyond the applications before us the Council argued that the principle of equal pay for work of equal value had not been implemented in the rates of pay for nurses because nursing is a predominantly female occupation for which rates had been set with an historical gender bias based on a needs concept. The work of this and other female dominated occupations has traditionally been undervalued for this reason. It argued that this should be eradicated throughout the Australian workforce and that it could only be achieved if the concept of comparable worth was implemented.<sup>117</sup>

**[74]** The Full Bench rejected the notion of ‘comparative worth’ based on gender-neutral criteria as being inconsistent with the traditional concept of work value in the Australian industrial arbitration context. It confirmed that, although equal pay claims could still be pursued, this had to occur within the framework of the wage-fixing principles as ‘anomalies’ having regard to the risk of ‘flow-on’:

As to the method of processing such claims, the existing National Wage Principles specifically state that all increases in wages other than those for prices and productivity movements should be in accordance with Principles 4–11. The equal pay claims which were dealt with during the 1975–81 Wage Fixing Guidelines were concerned with the implementation of the 1972 equal pay decision in particular awards, predominantly following an examination of the work performed under those awards. This limited the possibility for flow either to other classifications in these awards or to classifications outside. The claims did not therefore undermine the basic concepts of the centralised wage fixing system then in operation.

The situation before us is not the same. The present claims and the basis of fixation suggested in this case are much wider than that which was applied in the arbitrated cases to which we were referred. In addition, the Award before us, the Private Hospitals’ and Doctors’ Nurses (A.C.T.) Award, 1972 is a minor award for nurses, the great majority of the nursing profession being regulated by State awards. There are therefore serious implications for flow on of any increases which might be granted as a result of these applications. Indeed the applicants and the interveners supporting them made it plain that they see these proceedings as part of a wider movement to increase salaries for nurses throughout the country. The applications therefore carry great potential for undermining the current centralised wage fixing system. In these circumstances and in light of the debate which took place in the 1983 National Wage Case relating to female occupational areas generally ... we have decided that it would be appropriate that applications to have the 1972 Principle applied should now be processed in accordance with the procedures laid down in Principle 6 [Anomalies and Inequities].<sup>118</sup>

(underlining added)

**[75]** The claim on behalf of nurses was subsequently prosecuted pursuant to the Anomalies and Inequities principle in accordance with the above decision. We discuss the ultimate determination of the claim later in the context of our analysis of the history of federal wage fixation for nurses. However, it is apparent that the imposition of the requirements of the Anomalies and Inequities principle on any equal pay claims, which included that there must be no likelihood of flow-on, negligible economic cost and no reliance on any notion of comparative wage justice, operated in practice as a substantial impediment to the pursuance of

equal pay cases for female-dominated industries and occupations. As a result, the 1972 *Equal Pay Case* principle was never fully implemented.

#### 2.4 Implementation of the C10 Metals Framework Alignment Approach

[76] The framework for award wages fixation was extensively modified with the introduction and implementation of the ‘structural efficiency’ principle in the period 1988–1991. This principle was intended to modernise and rationalise awards. The history of this period of wage fixation is set out in the *Pharmacy decision*.<sup>119</sup> In the *National Wage Case August 1988*,<sup>120</sup> in which the structural efficiency principle was established, one of its objectives was said to be to ‘create appropriate relativities between different categories of workers within [each] award...’ and to ‘include[e] properly fixed minimum rates for classifications in awards, related appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments.’<sup>121</sup> The means by which the latter part of this objective was to be achieved was explained by a Full Bench of the (now) Australian Industrial Relations Commission (AIRC) in the *National Wage Case February 1989 Review*<sup>122</sup> in response to a proposal advanced by the ACTU for a new overarching framework of award fixation. The ACTU’s proposal was described in the following terms:

It submitted that the Commission should approve in principle a national framework or ‘blueprint’ which would involve restructuring all awards of the Commission to provide ‘consistent, coherent award structures’, based on training and skills acquired, and which would bear clear and appropriate work value relationships one to another. It illustrated its proposal by reference to possible restructuring results — at least as far as classification structures and training are concerned — in awards covering the building industry, metal workers, transport workers, storemen and clerks: these are key awards in the sense that their classifications arguably permeate all areas of industry.<sup>123</sup>

[77] Two things about this proposal may be noted. *First*, the key element of the ‘consistent, coherent award structures’ to be established was ‘training and skills acquired’. *Second*, the ‘key awards’ upon which this system would be founded, namely those covering the building industry, metal workers, transport workers, storemen and clerks were, except for the last, all male-dominated. In short, the award system was to be integrated on the basis of the training and skill levels of male-dominated industries and occupations.

[78] The AIRC Full Bench accepted that the federal award system as it had developed to that point was characterised by ‘irregularities in rates of pay which must be dealt with’ and accepted the principle of the ACTU’s proposed approach. It said:

The result is there exist in federal awards widespread examples of the prescription of different rates of pay for employees performing the same work but this is only part of the problem. For too long there have existed inequitable relationships among various classifications of employees. That this situation exists can be traced to features of the industrial relations system such as different attitudes adopted in relation to the adjustment of minimum rates and paid rates awards; different attitudes taken to the inclusion of overaward elements in awards, be they minimum rates or paid rates awards; the inclusion of supplementary payments in some awards and not others; and the different attitudes taken to consent arrangements and arbitrated awards.

...

The situation we have described has been tolerated for too long and it is appropriate that it be corrected at this time. The fundamental purpose of the structural efficiency principle is to modernise awards in the interests of both employees and employers and in the interests of the Australian community: such modernisation without steps being taken to ensure stability as

between those awards and their relevance to industry would, on past experience, seriously reduce the effectiveness of that modernisation.

Consequently, we endorse in principle the approach proposed by the ACTU though not necessarily the particular award relationships submitted in this case. That is a matter which we expect to be the subject of further debate in the forthcoming proceedings.

This means that minimum rates awards will be reviewed to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other minimum rates awards.<sup>124</sup>

(underlining added)

[79] The implementation of this approach was dealt with in the *National Wage Case August 1989*.<sup>125</sup> The ACTU's proposal was for specific rates of pay for benchmark classifications in five awards covering the building industry, metal industry, storemen and packers, transport workers and clerks to be used to 'provide a firm base for sustainable relationships across federal awards and thus provide a stable basis for wage fixation'.<sup>126</sup> The AIRC Full Bench accepted this proposal in part:

Subject to what we say later in this decision, we have decided that the minimum classification rate to be established over time for a metal industry tradesperson and a building industry tradesperson should be \$356.30 per week with a \$50.70 per week supplementary payment. The minimum classification rate of \$356.30 per week would reflect the final effect of the structural efficiency adjustment determined by this decision.

Minimum classification rates and supplementary payments for other classifications throughout awards should be set in individual cases in relation to these rates on the basis of relative skill, responsibility and the conditions under which the particular work is normally performed. The Commission will only approve relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards. Before that requirement can be satisfied clear definitions will have to be established.

We are not prepared to approve specific wage relativities proposed by the ACTU on behalf of the trade union movement. Nevertheless, we consider it appropriate for relativities to be established for both minimum classification rates and supplementary payments for the following key classifications within the ranges set out below:

	% of the tradesperson rate
Metal industry worker, grade 4	90-93
Metal industry worker, grade 3	84-88
Metal industry worker, grade 2	78-82
Metal industry worker, grade 1	72-76
Storeman/packer	88-92
Driver, 3-6 tonnes	88-92 <sup>127</sup>

(underlining added)

[80] The approach determined by the AIRC thus locked in as its integral element the tradespersons' rate in the male-dominated metal and building industries (and notably excluded clerks, the only non-male-dominated occupational group in the ACTU's proposal). In the new 14-level classification structure introduced into the then *Metal Industry Award 1984*<sup>128</sup> (Metal Industry Award) on 20 March 1990 pursuant to the structural efficiency principle,<sup>129</sup> the metal industry tradesperson's classification was designated as 'C10' and contained a requirement that



the employee hold a recognised trade certificate or a relevant Certificate III qualification under the Australian Qualifications Framework (AQF). All other classifications in the Metal Industry Award were assigned a percentage relativity to the C10 rate of pay. The approach of establishing across-award alignments with the C10 rate was referred to in the *Stage 1 decision* as the ‘C10 Metals Framework Alignment Approach’. The process of varying awards to establish such alignments was known as the ‘minimum rate adjustment’ (MRA) process.

**[81]** As part of this approach, the AIRC further restricted the capacity to obtain award wage increases on work value grounds. In the *National Wage Case August 1989*, it was determined that ‘structural efficiency exercises’ in awards should incorporate all past work value considerations. Subsequently, in the *National Wage Case April 1991*,<sup>130</sup> the AIRC modified the work value principle (now known as the ‘Work Value Changes Principle’) to establish new datum point requirements as follows:

- (c) The time from which work value changes in an award should be measured is, unless extraordinary circumstances can be demonstrated in special case proceedings, the date of operation of the second structural efficiency allowable under the 7 August 1989 *National Wage* case decision.
- (d) Care should be exercised to ensure that changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this principle.<sup>131</sup>

**[82]** The correct approach to setting ‘properly fixed minimum rates’ in awards was set out in the AIRC Full Bench *Paid Rates Review decision* of 20 October 1998.<sup>132</sup> This decision concerned whether the AIRC should convert a number of paid rates awards to minimum rates award pursuant to item 49, Part 2 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996* as part of the award simplification process. The Full Bench determined that all federal awards should become minimum rates awards, and the principles it determined to apply to this process notably included the following:

1. Awards requiring review under item 51(4) will be:
  - (a) awards containing rates which have not been adjusted in accordance with the minimum rates adjustment principle in the *August 1989 National Wage Case* decision; and
  - (b) awards containing rates which have been adjusted in accordance with the minimum rates adjustment principle in the *August 1989 National Wage Case* decision but which have been varied since the adjustment other than for safety net increases or pursuant to the work value change principle.
2. The rates in the award under review should be examined to ascertain whether they equate to rates in other awards which have been adjusted in accordance with the August 1989 approach with particular reference to the current rates for the relevant classifications in the *Metal, Engineering and Associated Industries Award, 1998 — Part 1* [AW789529, Print Q2527]; where the rates do not equate they will require conversion in accordance with these principles.
3. Fixation of appropriate minimum rates should be achieved by making a comparison between the rate for the key classification within the award with rates for appropriate key classifications in awards which have been adjusted in accordance with the 1989 approach.

4. In the fixation of rates the relationship between the key classification in the award and the metal industry fitter should be the starting point; internal award relativities established, agreed or determined should be maintained:...
5. Any residual component above the identified minimum rate, including where relevant incremental payments, should be separately identified and not subject to future increases.
6. If the rates are too low it is consistent with the purpose and intent of item 51(4) that the rates be increased so that they are properly fixed minima.<sup>133</sup>

[83] These principles made the application of the C10 Metals Framework Alignment Approach a condition of an award being properly fixed minimum rates award. From these principles, the AIRC Full Bench in the 2005 *ACT Child Care decision*<sup>134</sup> identified three steps in the proper fixation of minimum award rates of pay:

1. The key classification in the relevant award is to be fixed by reference to appropriate key classifications in awards which have been adjusted in accordance with the MRA process with particular reference to the current rates for the relevant classifications in the *Metal Industry Award*. In this regard the relationship between the key classification and the Engineering Tradesperson Level 1 (the C10 level) is the starting point.
2. Once the key classification rate has been properly fixed, the other rates in the award are set by applying the internal award relativities which have been established, agreed or maintained.
3. If the existing rates are too low they should be increased so that they are properly fixed minima.<sup>135</sup>

[84] As stated in the *Stage 1 decision*, the C10 Metals Framework Alignment Approach did not in principle *mandate* that wages for employees with qualifications equivalent to C10 must be equal to the C10 wage rate, nor did it require that qualifications be the only means for considering appropriate relativities.<sup>136</sup> The *National Wage Case August 1989* never expressly required cross-award alignments to be based simply on equivalent qualifications and required that ‘relative skill, responsibility and the conditions under which the particular work is normally performed’ be taken into account.<sup>137</sup> However, *in practice*, the implementation of the C10 Metals Framework Alignment Approach usually involved no more than identifying the ‘key classification’ in any award as that for which a Certificate III qualification under the AQF, or the equivalent, was required and then aligning that with the C10 classification rate in the Metal Industry Award. This was most commonly done in consent arrangements by which the structural efficiency principle was implemented in the early 1990s but, as will be demonstrated in respect of the Aged Care Award, this continued to be done up until and during the award modernisation process conducted in 2008–9. This represented the abnegation of the type of cross-award work value comparisons contemplated by the *1972 Equal Pay Case*.

[85] The Smith/Lyons report pointed to the difficulty for the proper valuation of feminised work in using ‘masculinised benchmarks’ as the lynchpin of the wage-fixing system:

... the pivotal role of the metal industry tradesperson in wage fixing is also well documented. As an example the award restructuring requirements of wage fixing principles from 1988 was ultimately designed around a set of masculinised classifications and credentials and thus offered a limited capacity to properly describe, delineate and reward work in feminised industries and occupations. Work value comparisons continued to be grounded by a male standard, that being

primarily the classification structure of the metal industry awards and to a lesser extent a suite of building and construction awards. This template rested on the relativity of masculinist classifications to the position of metal industry or building industry tradesperson. Peetz and Murray (2017) note that while the [gender pay gap] is lower for ‘award dependent’ workers in Australia, this does not mean Australian industrial tribunals are immune from stereotypical gender attitudes when they assess work value.<sup>138</sup>

[86] In fact, the masculine bias inherent in the use of the tradesperson’s rate in the Metal Industry Award as a measure of the value of women’s work was already recognised at the time of the *National Wage Case August 1989*. The rates of pay in the Metal Industry Award at the time, although originally set in Higgins J’s *1921 Metals decision*,<sup>139</sup> had their more immediate origin in the comprehensive 1967 *Metal Trades Award Work Value Inquiry decision*<sup>140</sup> of a Full Bench of the CA Commission. The assessment of work value in that decision by the majority (Gallagher J and Winter C) was based on ‘all relevant facts and circumstances’,<sup>141</sup> which were said to include the following indicia:

...qualifications, training and skill, technological changes, changed conditions, changes in metals, alterations of methods of work, increased tempo of work, responsibilities individually and as a member of a team, availability for skilled work and the length of time which has elapsed since previous fixations...<sup>142</sup>

[87] In the *Vehicle Industry Award decision* of Senior Commissioner Taylor issued the following year,<sup>143</sup> these indicia were systematised into the following list of criteria:

1. The qualifications necessary for the job;
2. The training period required;
3. Attributes required for the performance of the work;
4. Responsibility for the work, material and equipment and for the safety of the plant and other employees;
5. Conditions under which the work is performed such as heat, cold, dirt, wetness, noise, necessity to wear protective equipment etc;
6. Quality of work attributable to, and required of, the employee;
7. Versatility and adaptability (e.g. to perform a multiplicity of functions);
8. Skill exercised;
9. Acquired knowledge of processes and of plant;
10. Supervision over others or necessity to work without supervision; and
11. Importance of work to the overall operations of plant.<sup>144</sup>

[88] A 1988 analysis by Laura Bennett<sup>145</sup> characterised the above criteria as ‘systematically embody[ing] a discriminatory bias against the work that women perform’.<sup>146</sup> She referred to the following finding made in the *Metal Trades Award Work Value Inquiry decision* concerning ‘The Work of Females’ in the metals industry:

... in the field of the process worker, much of the work being done making electrical or electronic components in the miniature range—transistors, for example—was of such a nature that most males could not be expected to be able to do the work efficiently.

...This was because of the widespread capacity of females to use fingers that are very nimble and deft, hands that are dextrous and minds that may permit of continued concentration during repetitive though exacting work processes.<sup>147</sup>

[89] Bennett pointed out that if the above work value descriptions were compared with the work value criteria in the *Vehicle Industry Award decision*, ‘then it is clear that women’s work

does not rate highly’.<sup>148</sup> We also note that the above passage in the *Metal Trades Award Work Value Inquiry decision* immediately preceded a finding that ‘the female process worker usually warrants a higher wage than her male counterpart [process worker]’ because ‘[s]he is worth more to the employer’<sup>149</sup> (although that result did not pertain), but there was no consideration as to whether the skills described might be compared to the work of notionally higher-skilled male workers because of the work value assessment criteria being applied. Bennett also identified historical gender biases implicit in a number of the *Vehicle Industry Award decision* work value criteria, including qualifications and training periods, and said:

... arbitrators’ perception of work characteristics may also be coloured by unconscious prejudices against women. This would be especially important in relation to criteria three and six (quality of work and attributes required for it). Repetition at high speed and manual dexterity, for example, may be downgraded as work characteristics precisely because they are thought to be things that women are good at. Clerical, retail and process work are rarely regarded as requiring any special attributes for their performance and are not usually considered to be quality work in any sense.

The work-value criteria thus reproduce several different kinds of bias against women workers. They are imposed on a discriminatory sexual division of labour and are open to abuse because they ignore the possibility of conscious and unconscious prejudice. The work-value criteria do not represent a gender-neutral form of wage determination. They, like the wage-fixing procedures, can simply reproduce gender inequalities which are found in the workplace.<sup>150</sup>

[90] The way in which the C10 Metals Framework Alignment Approach operated to inhibit the proper valuation of women’s work may be illustrated by the *ACT Child Care decision*.<sup>151</sup> In that case, a Full Bench of the AIRC engaged in a comprehensive consideration of the work of early childhood education and care workers covered by awards applicable in the ACT and Victoria. It did so pursuant to the then-applicable Work Value Changes Principle which, as earlier stated, meant that the consideration of work value was confined to the identification of changes occurring since a datum point of 1990 and did not permit an *ab initio* assessment of the work value of early childhood education and care workers. The Full Bench found that there had been a ‘significant net addition to work requirements’ as required by the Work Value Changes Principle.<sup>152</sup> In setting new award rates of pay based on this finding, the Full Bench applied the principles for the proper fixation of minimum rates set out in paragraph [83] above based on alignments with classifications requiring equivalent qualifications in the *Metal, Engineering and Associated Industries Award, 1998 – Part I*<sup>153</sup> (Metal Industry Award). Importantly, the Full Bench said:

[182] We have considered all of the evidence and submissions in respect of this issue. In our view the rate at the AQF Diploma level in the *ACT and Victorian Awards* should be linked to the C5 level in the *Metal Industry Award*. It is also appropriate that there be a nexus between the CCW level 3 on commencement classification in the *ACT Award* (and the Certificate III level in the *Victorian Award*) and the C10 level in the *Metal Industry Award*.

[183] In reaching this conclusion we have considered — as contended by the Employers — the conditions under which work is performed. But contrary to the Employers’ submissions this consideration does not lead us to conclude that child care workers with qualifications at the same AQF level as workers under the *Metal Industry Award* should be paid less. If anything the nature of the work performed by child care workers and the conditions under which that work is performed suggest that they should be paid more, not less, than their *Metal Industry Award* counterparts.<sup>154</sup>

(underlining added)

[91] The Full Bench also said:

[372] Prima facie, employees classified at the same AQF levels should receive the same minimum award rate of pay unless the conditions under which the work is performed warrant a different outcome. Contrary to the employer's submissions the conditions under which the work of child care workers is performed do **not** warrant a lower rate of pay than that received by employees at the same AQF level in other awards. Indeed if anything the opposite is the case. Child care work is demanding, stressful and intrinsically important to the public interest.<sup>155</sup>  
(underlining added)

[92] A Full Bench of this Commission observed in *Application by United Voice and the Australian Education Union*<sup>156</sup> (*United Voice*) that the *ACT Child Care decision*, insofar as it compared the work of early childhood education and care workers and employees under the Metal Industry Award, only considered the qualifications and training required and did not purport to otherwise compare the nature of the work or the level of skill and responsibility involved in performing the work.<sup>157</sup> This is, we consider, illustrative of the way in which the C10 Metals Framework Alignment Approach constrained the proper work value assessment of female-dominated work by requiring, as at least as the *prima facie* position, alignment with the classifications for male-dominated work in the Metal Industry Award based on a bare comparison of training qualifications. The Full Bench in the *ACT Child Care decision* made it tolerably clear, in our view, that unconstrained by the C10 Metals Framework Alignment Approach it would have assessed the key classifications in the early childhood education and care awards under consideration as having higher work value than the identified equivalents in the Metal Industry Award.

## 2.5 Non-implementation of the C1 classification rate

[93] As explained in detail in the *Pharmacy decision*,<sup>158</sup> *Application by Independent Education Union of Australia*<sup>159</sup> (*Teachers decision*), the *Stage 1 decision*<sup>160</sup> and the *Annual Wage Review 2022–23 decision*,<sup>161</sup> one aspect of the C10 Metals Framework Alignment Approach which should have operated to the advantage of female workers was never properly implemented. This was outlined in the *Annual Wage Review 2022–23 decision* as follows:

[134] ...We have earlier described the process whereby across-award relativities were established by reference to the classification structure in the then Metal Industry Award. Under this structure, employees with degree qualifications were meant to be aligned with a theoretical C1 classification, with relativities to C10 in the range of 180–210 per cent. However, for most degree-qualified classifications in awards, this process was never carried through and they were never placed in the appropriate relativity to C10. For example, it was observed in the *Pharmacy Decision* that the minimum wage rate for a degree-qualified pharmacist was (at the time of the decision in 2018) less than the C3 classification rate in the Manufacturing Award payable for an employee holding an Advanced Diploma or equivalent training, with the Full Bench stating that this constituted a potential work value issue. Similarly, the Full Bench in its 2021 decision in *Application by Independent Education Union of Australia (Teachers Decision)* found that the then minimum commencement wage rate for a 4-year degree qualified teacher under the *Educational Services (Teachers) Award 2020* (Teachers Award) was equivalent only to the C4 rate in the Manufacturing Award (80 per cent towards an Advanced Diploma or equivalent), and at no level of seniority did modern award minimum wage rates for teachers reach the C1 relativity. This finding contributed to the Full Bench's conclusion that the minimum wage rates in the Teachers Award were not properly fixed minimum rates...<sup>162</sup>

(footnotes omitted)

[94] The failure to properly implement the C1 classification rate as part of the C10 Metals Framework Alignment Approach particularly disadvantaged female workers for two reasons. *First*, women are more award-reliant than men, with the proportion of female award-reliance being at its largest at higher-paid award classifications including those requiring undergraduate qualifications. *Second*, there is a considerable overlap between those awards containing classifications requiring an undergraduate degree and those applying to female-dominated industries.<sup>163</sup>

## 2.6 The award modernisation process

[95] The regime of wage-fixing principles which had endured, with one break in the early 1980s, since 1975, came to an end in 2006 when the *Workplace Relations Amendment (Work Choices) Act 2005* commenced and the AIRC was consequently stripped of its minimum wage-fixing functions. The current modern award system was established via the award modernisation process conducted in 2008–9 pursuant to Part 10A of the *Workplace Relations Act 1996* (Cth), as amended by the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (Cth). The award modernisation process was not constrained by the previous wage-fixing principles and, in theory, could have involved a full *ab initio* work value assessment of any female-dominated occupation or industry that was to be the subject of a modern award. However, in practice, this was not possible because the statutorily-mandated process required the consolidation and streamlining of thousands of former federal and State awards into what ultimately became 122 modern awards by the end of 2009. The Full Bench in *United Voice* described award modernisation as ‘a pragmatic process in which it was necessary to achieve the ambitious outcomes mandated by Pt 10A of the [Workplace Relations Act 1996 (Cth)] in a short period of time’.<sup>164</sup> In practice, the classifications and rates of pay in most major modern awards were based on a precursor federal award, or in some cases a State award, and where the C10 Metals Framework Alignment Approach had previously been applied, this was retained. In some cases, as we discuss below, it was applied for the first time. This meant that, to the extent that gender biases had historically been embedded in federal awards for all the reasons we have earlier discussed, this generally migrated into the modern award system.

## 2.7 Historical development of the Aged Care Award 2010

[96] It is in the context of the above history of the permeation of gender assumptions into the industrial arbitration system that the origins and development of the Aged Care Award must be considered.

[97] Before the Aged Care Award was made as part of the award modernisation process in 2009, employment in private sector residential aged care was regulated by a range of federal and State awards. The principal federal award was the *Health and Allied Services – Private Sector – Victorian Consolidated Award 1998*<sup>165</sup> (HAS Victorian Award 1998). This award had its origins in the abolition of the Victorian arbitration and award system following the enactment of the *Employee Relations Act 1992* (Vic), which had the effect that Victorian awards which applied to the Victorian health and allied services sector, including residential aged care, ceased to have effect. This caused relevant unions to seek federal award coverage in lieu.

[98] On 11 December 1992, the AIRC (Riordan SDP) made a finding of a dispute between the HSU and various health sector employers, including employers in aged care.<sup>166</sup> On 9 August 1993, the AIRC (Riordan SDP) made a dispute finding between the Australian Liquor,

Hospitality and Miscellaneous Workers Union (LHMU, as the United Workers' Union (UWU) was then named) and various aged care employers.<sup>167</sup> On 10 December 1993, the AIRC declined to revoke its earlier dispute finding concerning the HSU, and made a further finding of dispute.<sup>168</sup> On 20 December 1993, the AIRC made, largely by consent, a number of interim awards.<sup>169</sup> These included the *Health Services Union of Australia (Victoria – Private Sector) Interim Award 1993*<sup>170</sup> (Interim Award) which included in its list of respondents a large number of residential aged care employers (generally described as retirement villages or nursing homes) located in Victoria. The main effect of the Interim Award was to require the respondent employers to apply to their employees the terms of a number of Victorian awards which had ceased to have effect from 1 March 1993, including the *Health and Allied Services Award* and the *Residential Care Workers Award*. The only contested issues determined by the AIRC in making the Interim Award concerned annual leave loading and public holiday entitlements. It is therefore apparent that the making of the interim award involved no assessment of work value, nor did it apply the principle established in the *1972 Equal Pay Case*.

[99] In a decision issued on 29 August 1995,<sup>171</sup> the AIRC (Hingley C) made the *Health and Allied Services – Private Sector – Victorian Consolidated Award 1995*<sup>172</sup> (HAS Victorian Award 1995), together with two other awards applicable to the Victorian health and allied services sector. This award was made by consent, and again necessarily did not involve any work value assessment by the AIRC nor any explicit application of the *1972 Equal Pay Case* principle beyond a general finding that the consent awards 'are consistent with the Principles of this Commission and contain nothing that this Commission cannot or should not approve.' The HAS Victorian Award 1995 applied to respondents in Victoria across a wide range of health sector settings, including in relation to 'a hostel giving residential care, a nursing home, a geriatric home or centre, ... a convalescent home, a retirement home, lodge or village'. The classification structure in the award contained 11 pay levels (described as 'Wage/Skill Groups'), with each level containing a wide range of functions given the scope of the award's coverage, including direct care and support employees. For relevant purposes, Wage/Skill Group 3 contained the function of 'Personal Care Worker Grade 1', Wage/Skill Group 9 contained 'Personal Care Worker Grade 2' and Level 11 contained 'Personal Care Worker Supervisor/Co-ordinator'. Appendix A to the HAS Victorian Award 1995 contained the following definitions of 'Personal Care Worker':

Personal Care Worker Grade 1

(15) Means a person employed within Hostels and supported residential services to provide personal care for Aged or disabled persons. Such a person will assist with all personal and developmental needs under general supervision.

Personal Care Worker Grade 2

(16) Means a person employed within hostels and supported residential services who in addition to the duties of a Personal Care Worker Grade 1 has successfully completed a recognised TAFE Advanced Certificate or equivalent qualifications or experience.

Personal Care Supervisor/Co-ordinator

(17) A person employed within hostels and supported residential services to perform the duties of a Grade I Personal Care Worker and who undertakes additional responsibility via administrative duties and/or the supervision of staff. Such a person may deputise for the Administrator in his or her absence.

[100] On 30 June 1998, as a result of the award simplification process mandated by item 49 of Part 2 of Schedule 5 to the *Workplace Relations and Other Legislation Amendment Act 1996*, the AIRC (Hingley C) made the HAS Victorian Award 1998 by consent.<sup>173</sup> The HAS Victorian Award 1998<sup>174</sup> contained an extensively-modified classification structure which separated aged care from hospitals, and further separated both the hospital and aged care classifications into four streams each: Administrative/Clerical, General Services, Food Services, and Technical, Clinical and Personal Care. The classification structure was integrated however to the extent that all classifications remained aligned to the same 11 ‘Wage/Skill Group’ levels which had existed in the HAS Victorian Award 1995. In the Technical, Clinical and Personal Care stream for aged care, the roles of Personal Care Worker Grade 1 and Personal Care Worker Grade 2 remained at Levels 3 and 9 respectively, with the role of Personal Care Supervisor/Co-ordinator also remaining at Level 11. For aged care employees in other streams, the classifications included:

Laundryhand	Level 1
Cleaner	Level 1
Food and domestic services assistant	Level 1
Laundry Operator	Level 2
Cook Employed Alone	Level 3
Receptionist	Level 6
Maintenance/handyperson – trade	Level 7
Gardener – trade	Level 7

[101] It is important to note that it is apparent that the C10 Metals Framework Alignment Approach had *not* fully been applied to the classification structure. The Level 3 pay rate of \$452.90 per week, at which the Personal Care Worker Grade 1, without any formal qualifications, was classified, broadly aligned with the then-C10 rate of \$451.20 rather than the lower C11, C12 or C13 rates in the Metal Industry Award. The maintenance and gardening tradespersons were assigned a pay rate significantly higher than the C10 rate (\$484.60) which would have applied to them under the C10 Metals Framework Alignment Approach. The advanced TAFE-certificate qualified Personal Care Worker Grade 2 (i.e. with an AQF Level 4 qualification) had a pay rate of \$506.20, somewhat lower than the then-C7 rate of \$513.80 in the Metal Industry Award (also requiring a AQF Level 4 certificate).

[102] The Personal Care Worker classifications were modified as a result of a consent variation made to the HAS Victorian Award 1998 by the AIRC (Blair C) on 22 December 1998 in an *ex tempore* decision. In the award variation order,<sup>175</sup> the Personal Care Worker classifications were restructured as follows:



Personal Care Worker Grade 1 No formal qualification required.	Level 3
Personal Care Worker Grade 2 Required aged care-specific TAFE Certificate	Level 6
Personal Care Worker Grade 3 Required aged care-specific advanced TAFE Certificate	Level 8
Personal Care Worker Grade 4 Additional administrative or supervisory duties	Level 11

**[103]** This new classification structure remained unaligned with the C10 Metals Framework Alignment Approach. The Grade 1 rate remained broadly aligned with the C10 rate and the Grade 2 rate (which required, like the C10 rate, an AQF Level 3 qualification), was positioned between the C9 and C8 rates. Without any explicit justification the Grade 3 rate requiring an advanced certificate was placed at Level 8, whereas its previous Grade 2 equivalent had been at Level 9. This meant that this grade further lost relativity with its C7 equivalent. This of course occurred without any work value assessment having occurred. The relativities of the HAS Victorian Award 1998 classifications with those in the Metal Industry Award remained substantially the same thereafter, with the Certificate III-level Personal Care Worker Grade 2 having a relativity of 104.9 per cent to the C10 classification.

**[104]** The process by which the Aged Care Award was made during the award modernisation process required the making of a single new award against a background of a number of existing federal and State awards. As earlier stated, the dominant federal award was the HAS Victorian Award 1998, but a number of State awards had an equivalent level of coverage. The first step in the process was that the HSU and the Aged Care Industry Employer Associations (Aged Care Employers) filed drafts of their proposed modern awards during 2008. In addition to this, and unusually, an extensive joint submission concerning the aged care industry was filed by the National Pay Equity Coalition, the Women’s Electoral Lobby and the National Foundation for Australian Women. In brief summary, this submission called for the AIRC to conduct, as part of the award modernisation process, a ‘contemporary assessment of work value and classification structures and rates of pay’.<sup>176</sup> It was further submitted that:

... the Aged Care workforce is a female dominated industry in which some occupations which are dominated by women are low paid:- That there are many part-time workers:- That the work performed by these women is underpaid as many of the skills performed are undervalued and unrecognised because of gendered concepts of work value:- That changes in work in the industry and change in composition of the workforce requires contemporary assessment of classification structures and rates of pay.<sup>177</sup>

**[105]** The submission also pointed to the ‘invisible’ or unrecognised skills involved in aged care work which were not recognised by formal qualifications and not properly valued because they were seen as ‘natural’<sup>178</sup> to women in the context of a female-dominated workforce. There is no indication that this submission was ever considered.

[106] On 23 January 2009, the AIRC published an exposure draft of the proposed modern award to apply to the aged care industry for comment.<sup>179</sup> This exposure draft contained a nine-level classification structure (albeit that the top two levels were reserved for management-level employees) which integrated PCWs and other aged sector employees. The exposure draft contained four classifications of PCW, as had the HAS Victorian Award 1998, but had no specific definitions of their qualifications or responsibilities at each level (beyond generic classification descriptors). Of most significance is that the relativities with the classification scale in the modern award equivalent of the Metal Industry Award, the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award) were significantly altered, with the Personal Care Worker Grade 3 classification, which ‘may require formal qualifications at trade or certificate level’, being placed at a Level 5 pay rate the same as the C10 rate in the Manufacturing Award.

[107] In response to this exposure draft, the Aged Care Employers submitted that an additional entry-level Personal Care Worker classification should be added at Level 2, and that the certificate III-qualified Personal Care Worker should be placed at Level 4. In its decision finalising the modern award to apply to the aged care industry,<sup>180</sup> the award modernisation Full Bench made no reference to the issue of classifications. However, in the initial Aged Care Award which was published on 3 April 2009, it is apparent that the Full Bench largely adopted the approach urged by the Aged Care Employers. In the classification structure which was adopted, the Certificate III-qualified Personal Care Worker Grade 3 was placed in the Level 4 classification alongside the trade-qualified maintenance/handyperson and gardener, and the rate of pay was set at the C10 level. Other Personal Care Worker classifications were placed at pay levels above and below this, without classification definitions apart from the generic descriptors applicable at each level.

[108] Although not explicitly stated, the approach described clearly involved the application of the C10 Metals Framework Alignment Approach, in circumstances where this had not been done before in the primary pre-modern federal award, the HAS Victorian Award 1998. This occurred without any work value assessment then, or ever, having been undertaken, and resulted in a depreciation of the position of Personal Care Workers relative to the C10 rate compared to the HAS Victorian Award 1998. The approach taken involved the gender assumptions embedded in the C10 Metals Framework Alignment Approach earlier described — in particular, the assumption that the performance of personal care work by (primarily) women in the aged care sector at the Grade 3 level was of the same work value as that of the masculinised C10 classification in the Manufacturing Award because of the bare equivalence of training qualifications, without any account being taken of the skills and responsibility involved in aged care work and the particular environment in which it is performed. This position prevailed in the Aged Care Award until immediately before the award variations resulting from the *Stage 2 decision*.

## 2.8 SCHADS Award — Home care workers

[109] The development of the rates of pay for HCWs in the SCHADS Award may be described briefly. In the award modernisation process, the source of the classification structure and rates of pay for aged care and disability HCWs was the *Home and Community Care Award 2001*. This is disclosed in a statement published by the AIRC award modernisation Full Bench on 25 September 2009<sup>181</sup> at the time of the publication of an exposure draft for the SCHADS Award:

[105] Home care employees covered by the exposure draft provide care and support for aged persons or persons with a disability in their own home. The *Aged Care Award 2010* also covers the provision of care for aged persons in their home. Whether this draft modern award or the *Aged Care Award 2010* covers a particular employee will depend on the industry of the employer.

[106] The wage rates and classification definitions for home care employees are based on the federal *Home and Community Care Award 2001*. The wage rate for a Certificate III qualified home care employee (grade 3) is the same rate as for a similarly qualified aged care employee (level 4) in the *Aged Care Award 2010*.

[110] The *Home and Community Care Award 2001* was an award which applied to only a single employer. It was initially made in 1995 by consent following the finding of a dispute, and the rates of pay never involved any work value assessment. As the Full Bench statement above indicates, the benchmark rate was that for a Certificate III-qualified employee, which was same rate as for Level 4 in the *Aged Care Award* — that is, the C10 rate. This involved the same automatic application of the C10 Metals Framework Alignment Approach as described above for the *Aged Care Award* to a female-dominated occupation without any further consideration of the skills, responsibilities and working environment involved.

## 2.9 Historical development of the Nurses Award 2010

[111] The federal industrial regulation of nurses historically proceeded on a piecemeal basis and in the shadow of awards made by State industrial tribunals applying to the large majority of nurses who were employed in the various State hospital systems. The first federal instrument which applied specifically to nurses appears to have been *The Hospital Employees (Professional Staff) (Commonwealth Employees) (ACT) Determination No 11 of 1946*.<sup>182</sup> Its rates were, by agreement, aligned with those of Victorian nurses.<sup>183</sup> The rates of pay in this determination were the subject of extensive reconsideration by the CA Commission (Findlay C) in 1958.<sup>184</sup> In the decision, the marginal rate for trained nurses (also referred to ‘sisters’) was significantly increased to align with that of a tradesperson in the ACT and to account for the performance of continuous shift work. The CA Commission said:

Whilst there is no measuring rod which scientifically ascertains the relative value of skilled labour in this industry, in comparison with a variety of other skilled industries and/or callings, I think it reasonable in all the circumstances to liken a trained nurse to the group of employees completing apprenticeships in the respective trades in the Australian Capital Territory. In recent years wage-fixing authorities have closely associated each trade for the purposes of wage fixation and for some years the standards in the Australian Capital Territory have been recognised in terms of awards as of comparable value in the respective spheres of application.

I have concluded, therefore, that the trained nurse—an employee of standing and exceptional talent in this industry—is equal in specialised status to the painter, the carpenter, and/or the mechanical fitter who all, in terms of their respective awards and/or determinations, are paid a marginal wage of 82s. 6d. per week. In addition ... [it] is reasonable ... to incorporate in the marginal wage of a trained nurse an amount of 12s. 6d. per week to cover the incidence of a continuous shift-work system associated with employment at the Hospital.<sup>185</sup>

[112] In the same decision, the CA Commission considered the work value of a range of higher nursing positions and set rates for them with an appropriate relativity with the ‘index classification’ of trained nurse.<sup>186</sup> These rates were incorporated in a new *Hospital Employees (Nursing Staff - ACT) Award, 1958*. The classification structure in this award, by its use of

gendered classifications such as ‘Deputy Matron’, ‘Tutor sister’, ‘Ward sisters-in-charge’ and ‘Sisters’, appears to have contemplated a female-only occupation, yet it specified that the prescribed marginal rates were payable in addition to either a specified basic wage for adult males or a basic wage for adult females set at 75 per cent of the male wage.

[113] The marginal rates in the 1958 award were reconsidered by the CA Commission (Findlay C), and further increased, in a decision issued in 1966.<sup>187</sup> The decision noted the alignment of margins as between trained nurses and tradespersons which had been established in 1958 but concluded that further increases to the margins for nurses were justified having regard to, among other things, the education requirements for trained nurses. The CA Commission said:

Since that point of time [1958] the marginal wages for tradesmen have not moved on any work value ground. But, be that as it may, it has now been well established by the Federation that on distinct work value grounds within the industry as such and then, in any comparison at all with the value of work performed by the general run of employees in transport and other public utilities which satisfy public needs on a seven-day-week basis; tradesmen in industry generally; and white collar workers on the administrative staff—as per Commonwealth Public Service standards in the same industry—as fixed by awards of the Commission, the qualifications arising from the period of training in the nursing profession and the application of those qualifications in the everyday activity of a qualified nurse necessitates marginal movements at this point of time.

The weight of the considerable and expert evidence together with inspections and all the other material advanced to the Commission in these proceedings clearly shows that a qualified nurse in all stages of her career is entitled to a salary fixation above that presently prescribed in the Australian Capital Territory award or prescribed by any State or federal award or determination operating in the same kind of industry at the present time. The educational qualifications requisite to the academic type of syllabus applied during the intensive resident training period and the high qualifications subsequently arising therefrom justify the prescription of a marginal standard in the index classification, namely, sister Grade 1, at certainly no lesser level than that sought in terms of the application, namely \$16.00 per week.<sup>188</sup>

[114] The above conclusion meant that entry level nurses were awarded a *higher* marginal rate than for a tradesperson in the ACT. The CA Commission went on to make the new *Hospital Employees Etc (Nursing Staff – ACT) 1966* incorporating the higher marginal rates it had set. The situation remained whereby these margins were payable in addition to the separate basic wages for adult males and females. When the 1966 award was varied to adopt the total wage structure in 1967, it set separate adult male and female rates by adding the existing margins to the separate basic wage amounts for males and females. This led to the odd result whereby there were male, as well as female, rates for classifications such as ‘Matron’, ‘Deputy matron’, ‘Tutor sister’ and ‘Sister’ (grades 1, 2 and 3).

[115] Following the *1969 Equal Pay Case*, the work value of nurses covered by the 1966 award together with those covered by another ACT instrument<sup>189</sup> were considered by a Full Bench of the CA Commission following unions claims for pay increases based upon equal pay and work value. In its decision issued in 1970,<sup>190</sup> the Full Bench first considered a claim that the rates of female nurses in the 1966 award should be raised to the level of the male nurse rates. The Full Bench found that only a small minority of the nurses were covered were male and, on that basis, refused the claim. It referred to the ninth principle stated in the *1969 Equal Pay Case* and stated:

It is clear that in the light of the above statement the awarding of male rates to female nurses would not be justified on the basis of the decision in the Equal Pay Case. In our opinion, it would be illogical to raise the wages of some 700 people to the level paid to approximately 7 (i.e., 1 per cent) merely on the ground that equal pay should be provided for equal work. Indeed, in some classifications no males at all are currently employed.<sup>191</sup>

[116] However, the Full Bench noted that, by agreement, the award had been the subject of an interim variation whereby female rates had been increased and male rates reduced to produce equal rates of pay, and determined not to disturb this, but said:

We therefore find ourselves in the unusual position of being asked by all parties to fix equal rates for males and females in respect of work which is essentially and usually performed by females. In our view, in such circumstances, if we started off on the premise that we should fix male rates or 90 per cent of male rates for females we would be rejecting the whole concept of the recent Equal Pay Case. Nevertheless, had we been asked to proceed on the traditional basis of fixing separate female rates for tasks essentially or usually performed by females the relevant comparisons could have caused us to fix somewhat lower rates than those which we have awarded in the circumstances.<sup>192</sup>

(underlining added)

[117] The Full Bench went on to say that it considered that the ‘correct course’ was to:

... assess what we consider to be appropriate rates for the work where it is performed taking into account all factors, including the type of employees performing the work and also the fact that the majority of them are females, and this is what we propose to do.<sup>193</sup>

[118] In its fixation of wages for a Grade 1 ‘Sister’, the Full Bench noted that in 1966 the marginal rate for the first year of service had been set above that of a tradesman under the *Metal Trades (ACT) Determination*, for whom the current total minimum rate was \$57.80 per week. However, the subsequent *total* rate for the Grade 1 ‘Sister’ had been below that of the male tradesman due to the lower basic wage for females. The Full Bench assessed the work value of the nursing classification in the following way:

Another factor to be kept in mind is that since 1966, the period of training for a nurse at the Canberra Community Hospital has been reduced from 4 to 3 years although the number of compulsory study hours has not been significantly altered. This is to be compared with 4 or 5 years for a tradesman. On the other hand, the training given to a student nurse is intensive and once qualified as a sister she is required to undertake considerable responsibilities, not only for the well-being and comfort of her patients, but also for the work and training of the staff working under and with her. She works on day, evening, or night shifts as required— although she now receives the shift premiums to which we have previously referred. Bearing in mind the nature of the nursing procedures adopted by the hospital she also has a particularly responsible relationship with her patients who are sometimes almost entirely reliant on her care, attention and skill for their comfort and well-being. It must be remembered that as part of her normal nursing duties, a sister grade 1 is not only required to attend to the expected medical and personal needs of the patients entrusted to her care, but she must also be able to cope with any emergency which might arise. The fact that she is dealing with human beings, most of whom are sick in some way or weak, means that she should exercise particular care and attention as well as the clinical application of her nursing skills. It is inevitable that in addition to the other strains associated with her work, the emotional and mental stresses must at times be very great.<sup>194</sup>

(underlining added)

[119] It may be noted that the underlined sentences above may be understood as touching upon the exercise of what are referred to in the *Stage 1 decision* as ‘invisible’ skills – a matter we discuss in greater detail below. The above analysis might be understood as at least equating the work value of the nursing classification being considered with that of the male tradesperson. However, the Full Bench went on to say:

In our opinion a sister grade 1 is, at the Canberra Community Hospital, exercising a skill and responsibility no less than that of the average ‘tradeswoman’ particularly having regard to the nature of her responsibilities towards the patients.<sup>195</sup>

(underlining added)

[120] The theoretical ‘tradeswoman’ referred to was one to whom the lower basic wage for females had applied. The Full Bench went on to say:

In assessing the appropriate salary scale for sisters grade 1 (and indeed for sisters grades 2 and 3) we have, amongst other factors, given consideration not only to the wages payable to nurses elsewhere and to tradesmen, but also to other categories of employees particularly at the Canberra Community Hospital and, to a lesser extent, elsewhere in Canberra. As this is a predominantly female occupation, we have been more greatly influenced by the rates payable to other classifications of females than those payable to males. The fact that all parties sought the same rates for males and females had the effect of bringing into the comparisons we have made the rates paid to certain females who benefited by the Equal Pay decision. The result of this has tended to cause us to award somewhat higher rates for females than we would have prescribed otherwise.<sup>196</sup>

[121] The minimum rate ultimately fixed for a Grade 1 ‘Sister’ was \$55.50 per week — that is, a rate *below* that of the male tradesperson. In short, notwithstanding that the entry-level nurse had been assessed as having higher work value than the male tradesperson in 1966, and thus being awarded a higher margin for skill, the implementation of principle 9 of the *1969 Equal Pay Case* led to such nurses being awarded a lower total minimum rate than the male tradesperson in 1970 because of the predominantly female nature of the occupation.

[122] The rates of pay in the ACT award were the subject of further consideration in respect of changes in work value in 1976<sup>197</sup> and 1982.<sup>198</sup> The 1982 decision introduced a more contemporary classification structure which included more contemporary classifications for RNs and ENs and took into account rates fixed by State tribunals in assessing and determining pay rates. In 1983, a Full Bench of the CA Commission heard further claims in respect of the ACT award and, in addition, determinations covering nurses employed in Commonwealth repatriation hospitals and other health institutions. In its decision,<sup>199</sup> the Full Bench fixed new rates of pay for RNs and ENs having regard to the rates for nurses set in the various States and general wage movements. In doing so, it aligned the rates of pay for RNs and ENs across all the instruments under consideration.

[123] The 1986 *Nurses Comparable Worth Case*,<sup>200</sup> to which we have earlier referred, concerned an application to vary a different award, the *Private Hospitals’ and Doctors’ Nurses (ACT) Award 1972*, which covered private sector nurses in the ACT and contained the same rates as the public sector award. As earlier stated, a Full Bench of the CA Commission declined to allow this claim to be advanced as an equal pay claim based on ‘comparative worth’ and required it to be considered pursuant to the ‘Anomalies and Inequities’ principle of the wage-fixing principles. The claim, as subsequently advanced pursuant to this principle, involved all federal nurses’ awards and determinations, which generally applied to Commonwealth-

employed and Territory nurses, including nurses covered the ACT public and private sector awards and the *Nurses (Northern Territory Public Service) Award 1980* and the *Doctors' Nurses (Northern Territory) Award 1985*. The claim advanced by the Royal Australian Nursing Federation (RANF) (anfas the ANMF was then named) sought a single salary and career structure to apply to all nurses covered by these federal awards and determinations, with the rates to be equivalent to those of other professional employees within the health sector.<sup>201</sup> The latter part of the claim was characterised as one for 'professional rates'.

[124] In relation to the equal pay aspect of its claim, the RANF contended that:

... the rates of pay of registered nurses have been fixed having regard to the fact that the vast majority of nurses are female, that this sex bias has served to depress the level of wages, and that it has never been corrected.<sup>202</sup>

[125] The RANF referred to the 1970 decision concerning the ACT public sector award, and submitted that the other federal awards and determinations had generally reflected or followed the rates of pay in that award. In its decision issued in 1987, the Full Bench accepted this submission, stating:

Notwithstanding these submissions we are satisfied that the RANF has made out its basic contention that the rates for Commonwealth nurses were assessed in 1970 prior to the 1972 Equal Pay decision on the basis that nursing is a predominantly female occupation; that this assessment has caused the rates to be depressed, and that there has been no subsequent adjustment to fully redress the situation... All of the indications however point to a situation of no positive application of the 1972 decision in any of the consent settlements in the Commonwealth area. An examination of wage rates within the ACT, for example, indicates no advance since 1972 by nurses as compared with male tradesmen. In our opinion all that has happened is that differences between male and female rates within nurses' awards have been eliminated, but the original sex bias caused by assessment on the basis of a predominantly female rate remains. As the wage history of all Commonwealth nurses reveals a link with the fixation for ACT nurses in 1970 the non-application of the 1972 Equal Pay decision applies in respect of all the awards and determinations before us.<sup>203</sup>

[126] The Full Bench accepted that this constituted an anomaly within the scope of the wage-fixing principles. It also accepted that there had been work value changes, and changes to the qualifications and training required for nurses. In the latter respect, it noted that hospital-based training of nurses had ceased in NSW, the ACT and the Northern Territory and that training was being transferred to Colleges of Advanced Education by way of a three-year diploma. However, the Full Bench rejected the proposition that nurses should as a result receive pay rates aligned with those of university degree-qualified health professionals or that the rectification of the failure to apply the *1972 Equal Pay Case* should involve a comparison with such professionals. The Full Bench said:

The RANF submitted that we should view the preparation required of nurses for their work in similar terms to that required of a scientist who does a basic three year degree course. comparative rates of pay of nurses and Australian Public Service science and technical grades were tendered. We were also furnished with an exhibit which contained wage comparisons and a number of duty statements of employees within the fields of physiotherapy and medical technology. However we consider this material to be of no assistance in respect of work value comparison and we are unable to make any analysis of the type contemplated by the 1972 Equal Pay decision. Nor are we in any position to measure the worth or status of the UG2 nurses diploma in relation to the academic qualification of a hospital scientist or technician.

We also express some doubt as to whether the non-application of the 1972 Equal Pay Principle can be used to justify the lifting of the wage rates of nurses to a professional level. The basis of the RANF's claim in respect of equal pay in this case was that the fixation of the rates for Commonwealth nurses going back to 1970 suffered from a sex bias which has never been corrected. The RANF's final claim however seeks not merely to correct the sex bias but to lift the rates for all nurses male and female to a new level on the ground that nurses should now be accorded the professional status which hitherto has been denied them. This appears to us to go well beyond the application of the 1972 decision.

The granting of professional rates on the basis of the change in nurses education also presents problems. The change to full time CAE education is in the process of taking place and will not be fully completed until 1993. At this stage it is difficult to relate the nurses CAE qualifications to those obtained by science or technical or other employees with whom comparisons were sought to be made. As we have already stated the basic award of UG2 diploma cannot be equated with the UG1 degree, and we have no means of comparing the worth of the diploma with the qualifications obtained by other professional employees operating within the health care industry. In its decision of 23 January 1987 the Victorian Industrial Relations Commission stated that the ACTU had made out a case for the need to move to professional rates at an appropriate time in the future. However it indicated that it did not have the material to enable it to fix professional rates and it set down a date for further hearing on 13 October 1987 for the purpose of dealing with professional rates. In the proceedings before us the representative of the Victorian Government submitted that we should not pre-empt this enquiry by fixing professional rates in our decision.

We have already found that an Anomaly exists with respect to the rates of pay for the Commonwealth nurses who are subject to the awards and determinations which are before us. We fully recognise the fact that Commonwealth nurses rates are depressed, and that their training and skill are relevant factors in determining the appropriate level of rates to be awarded. However we have not been convinced by the RANF or the ACTU in these proceedings of the need to move to professional rates, whatever that term may mean. Nor have we been given any information or material which would justify a fixation of rates beyond the levels of the rates for nurses which have been assessed by recent decisions of State tribunals.<sup>204</sup>

**[127]** The Full Bench established new classification structures and rates of pay for the ACT and NT awards, and for the determinations covering Commonwealth hospitals, which were largely aligned with each other and reflected rates of pay for hospital nurses in the States.

**[128]** The issue of professional rates for nurses soon arose again after the Industrial Commission of New South Wales and the Victorian Industrial Relations Commission had awarded rates for RNs in public hospitals comparable to those of hospital scientists, with the increases being phased in from 1988 to 1990. Following these decisions, a Full Bench of the Western Australian Industrial Relations Commission granted equivalent rates for RNs on the same basis effective from 1 July 1989. These rates were imported into the federal system when public sector nurses in Western Australia were brought within federal award regulation on 30 August 1989.<sup>205</sup> The Australian Nurses Federation (ANF) (as the RANF was now named) thereupon made a claim for a national pay structure for nurses to be implemented in all federal awards based on the NSW and Victorian rates. In a decision issued in 1989, an AIRC Full Bench again rejected the claim for professional rates on the same basis as in the 1987 decision. However it agreed in principle with the concept of a national career and pay structure, and, as a first step towards that objective, determined to grant an entry-level rate for RNs in the ACT, NT and South Australia which was equal to that determined for NSW and Victorian Nurses, with the percentage increase at this level being applied to the rates of pay at all other



classification levels.<sup>206</sup> The Full Bench issued a supplementary decision in 1990 in which it again rejected any notion of professional rates based on alignment with hospital scientists.<sup>207</sup> Its reasons for this conclusion included that the minimum educational standards for RNs and hospital scientists were not the same.

[129] The issue of national rates for nurses was revisited further in another Full Bench decision issued in 1990,<sup>208</sup> which took into account that public sector nurses in Tasmania, South Australia and Western Australia had by now entered the federal system. In this decision, nationally consistent rates for RNs at Level 1, 2 and 3 were determined, with the rates for Levels 4 and 5 being determined in a subsequent 1991 decision.<sup>209</sup> The Full Bench also considered, and determined, a claim advanced by the ANMF for a higher rate of pay to apply to a nurse with an undergraduate degree qualification rather than a diploma:

In addressing the question of advancement through the structure, the ANF sought a provision for one year's advancement for level 1 nurses who possess a UG1 degree in nursing or a qualification possession of which entitles a nurse to registration in another branch of nursing or on another nursing register; or a qualification, successful completion of which requires enrolment in a post-registration course of 12 months or more. We support such a principle and will approve accordingly.<sup>210</sup>

[130] In 1992, after receiving extensive evidence, an AIRC Full Bench set nationally-uniform rates for ENs.<sup>211</sup> The rates set, applicable to each of years 1–5 of service, had a relativity range of 91–99 per cent of the entry rate for a diploma-qualified RNs. An issue arose in the proceedings whereby the ANF contended that because the diploma qualification for nurses would shortly become obsolete, the relativities for ENs should be set by reference to the entry rate for the degree-qualified nurse, and that the work value of ENs would increase in the future when their training became college-based rather than hospital based. However, the Full Bench based its decision on the existing education arrangements.

[131] By 1993–4, after the restructuring of the tertiary education sector, the entry-level qualification for a RN had become a three-year bachelor's degree from a university or a post-graduate nursing qualification. The C10 Metals Framework Alignment Approach, if applied to federal nursing awards, should on a *prima facie* basis have resulted in an alignment with the C1 rates in the Metal Industry Award. However, this was never considered. The opportunity to seek such an alignment (prior to the FW Act) effectively disappeared after the *Paid Rates Review decision*.<sup>212</sup> This decision concerned whether the AIRC should convert a number of paid rates awards, which included the *Nurses (South Australian Public Sector) Award 1991* and the *Nurses (ANF - South Australian Private Sector) Award 1989*, to minimum rates awards. We have earlier set out the principles established by the Full Bench by which this was to occur. These principles required, in effect, consideration as to whether the C10 Metals Framework Alignment Approach had been applied to the award under consideration, and a comparison with the Metal Industry Award if it had not. The principles also allowed for *increases* to the award rates of pay if such a comparison indicated that the rates were too low.

[132] The submissions before the Full Bench disclosed that the rates of pay for ENs and RNs in the two awards 'as a percentage of the fitter's rate, had a range of 117.3% to 148.6%'.<sup>213</sup> That plainly did not accord with the C10 Metals Framework Alignment Approach in respect of degree-qualified RNs. However, the Full Bench determined:

We accept the submissions that although the rates contained in the awards [...] have been treated as paid rates awards in the past, they are nevertheless properly fixed minimum rates with rates

for the relevant classifications being within the acceptable range of relativities [...]. We are also satisfied that the incremental salary levels for nurses and enrolled nurses within the classification structures of the two nursing awards form part of the work value assessment of nurses rates of pay conducted by Full Benches of the Commission in the development of professional rates for the nursing profession in federal awards. Accordingly, they are not affected by our decision.<sup>214</sup>

[133] The Full Bench did not explain what ‘the acceptable range of relativities’ for a professional occupation were. The approach it took was applied to the other federal nursing awards. The result was that, by the time the award modernisation process was conducted in 2009, the entry rate for a degree-qualified nurse covered by the South Australian public and private sector awards was \$713.42 per week, compared with the entry-level rate of \$813.96 in the *Private Hospital Industry Nurses’ (State) Award* (NSW) and \$824.22 in the *Nursing Homes, & C., Nurses’ (State) Award* (NSW).

[134] When it made the Nurses Award, the AIRC award modernisation Full Bench essentially replicated the *Nurses (ANF – South Australian Private Sector) Award 2003*, except that the AIN classification structure was derived from the *Nurses Private Employment (ACT) Award 2002* and the *Nurses’ Aged Care Award – State 2005* (Queensland) (noting that the large majority of federal nursing awards had not to that point included AIN classifications). The Full Bench struck the entry-level rate for a three-year degree-qualified nurse at \$697.00 per week in the Nurses Award<sup>215</sup> — a rate which was *less than* the existing rate in federal nurses’ awards (at Level 1 Year 2) and also *less than* the C7 rate in the Manufacturing Award applicable to a Certificate IV-qualified engineering tradesperson. The rate for a Certificate III-qualified AIN was set at the C10 rate without any further examination of work value. The method by which the Full Bench determined the other rates of pay in the Nurses Award, including for ENs, is not disclosed in the decision, but it appears that existing relativities were simply maintained.

[135] This history confirms what is apparent on the face of the Nurses Award, as set out in paragraphs [942]–[955] of the *Stage 1 decision*.<sup>216</sup> The rates of pay for degree-qualified nurses in the Nurses Award are not properly fixed minimum rates because the principles set out in the *Paid Rates Review decision*<sup>217</sup> and the *ACT Child Care decision*<sup>218</sup> (see paragraphs [82]–[83] above) were never properly applied. It is apparent that nursing has undergone a revolutionary transformation from an occupation which in 1958 was equated to a trade to a recognised profession for which a university degree is required for entry. However, the federal award system has failed to set minimum award rates of pay which properly recognise the addition to work value effected by this transformation and, in the context of this being a female-dominated occupation, this can only be characterised as historic gender undervaluation.

### 3. Final assessment of work value — direct care employees

[136] As was made clear in the *Stage 1 decision*,<sup>219</sup> the 15 per cent interim increase determined for direct care employees was never intended to represent the final monetary assessment of the work value changes and other work value reasons identified in that decision. As the Full Bench said in that decision: ‘Nor are we suggesting that the 15 per cent interim increase necessarily exhausts the extent of the increase justified by work value reasons in respect of direct care workers’.<sup>220</sup> The Full Bench also said that it had not, in determining the interim increase, taken into account ‘the impact of the COVID-19 pandemic or the issues arising from understaffing’,<sup>221</sup> and whether these had given rise to permanent changes to work was to be considered in Stage 3 of the proceedings. It is therefore necessary that we consider these two

issues before moving to a final conclusion concerning the remuneration outcome for direct care employees.

### *3.1 Infection prevention and control*

[137] The evidence before us has demonstrated that permanent changes to the work of direct care employees in respect of infection prevention and control (IPC) have resulted from the aged care sector's experience of the COVID-19 pandemic. Evidence adduced in Stage 1 of the proceedings, at a time closer to the COVID-19 pandemic, described the IPC measures which at that time were prevalent in the sector. The expert report of Professor Kurrle<sup>222</sup> pointed to the fact that the pandemic had led to an increased emphasis on the implementation of IPC measures, which required a corresponding increase in the skills and knowledge of direct care employees in respect of understanding basic IPC methods and the use and disposal of personal protective equipment (PPE). A number of union witnesses in Stage 3 also gave evidence of the changes in work arising from the pandemic including the prevalence of the required use of PPE (including goggles, hats, masks and gloves), the use of technology to communicate with residents and families rather than communicating in person, compulsory use of rapid antigen tests (RATs), enforcement of IPC measures in facilities amongst residents and visitors, and the redesign of activities to be COVID-19 safe. In addition, a number of employer witnesses gave evidence to similar effect, and of particular note was the evidence of Mark Sewell (CEO of Warrigal)<sup>223</sup> that the lessons of the pandemic would be incorporated in operational policies and practices in the future irrespective of what happens to COVID-19 in the coming years.<sup>224</sup>

[138] The evidence adduced before us in Stage 3 of the proceedings by both the unions and the Joint Employers has demonstrated that many of these changes have become permanent as the aged care sector has moved to implement IPC measures at a higher level and on a more consistent basis than existed before the COVID-19 pandemic. The permanence of IPC measures in aged care facilities, and the need for employees to have the additional knowledge and skills to apply this higher level of IPC measures (as appropriate to their respective roles), is evidenced by IPC training now being made a mandatory requirement of employees by employers. The mandating of IPC training was noted by employers such as Johannes Brockhaus, the CEO of Buckland Aged Care Services (Buckland).<sup>225</sup>

[139] Associate Professor Bennett<sup>226</sup> is a senior IPC nurse employed at the Victorian Healthcare Associated Infection Surveillance System Coordinating Centre, where she is the State Coordinator of the Aged Care Infection Indicator Program, and at the National Centre for Antimicrobial Stewardship, both located at the Peter Doherty Institute for Infection and Immunity. Associate Professor Bennett provided an expert report concerning the impact of the COVID-19 pandemic on the aged care sector. She referred to the finding of the Royal Commission into Aged Care Quality and Safety (Royal Commission) that IPC practices in residential aged care facilities are often substandard, and to the recommendation (subsequently made a condition of Commonwealth funding) that all such facilities have a trained infection control officer (or 'lead') as a condition of accreditation in order to increase IPC standards. Associate Professor Bennett identified the following major changes to work as having been implemented in the aged care sector as a result of the COVID-19 pandemic:

- Incorporation of enhanced IPC risk assessments and as a consequence increased implementation of standard precautions for all daily care activities.
- Increased electronic or hard copy documentation of infection signs and symptoms and any necessary IPC actions.

- Increased use of screening (clinical and diagnostic) tools to reduce delays in recognition, diagnosis and subsequent transmission of infection in older people.
- Proactive monitoring, documenting and external reporting of infections and vaccination compliance.
- Rapid implementation as necessary of comprehensive outbreak management plans.
- Instigation of alert and flagging systems (e.g. vaccination due dates) as part of consumers clinical health records.
- Regular IPC education and training for all staff and if possible, consumers, their care representatives and visitors.
- Improved IPC communication with all staff, consumers, their care representatives, visitors and other services, such as transferring and receiving hospitals.
- Amplified monitoring of personal health and not presenting for work when unwell with infectious symptoms, including fever, chills, headache, cough, sore throat, shortness of breath or runny/stuffy nose.<sup>227</sup>

[140] Associate Professor Bennett said that these changes have led to permanent work value changes that included a requirement for many aged care employees to upgrade their IPC skills and responsibilities, an increased emphasis on aged care employees performing risk assessments and IPC duties competently, and the need for direct care employees to learn how to identify and report subtle changes in residents that warranted clinical investigation. Specifically in relation to employees nominated as IPC Leads, they had been assigned many new duties related to all IPC program components. Additional training required to implement measures resulting from the COVID-19 pandemic included the use of newly-available online IPC short courses, including the Department of Health and Aged Care's (Department's) COVID-19 focused modules, and the addition of new topics in the Australian Commission on Safety and Quality in Health Care Basics of IPC in Aged Care course such as management of acute respiratory infections in an aged care setting and staff health and safety. Associate Professor Bennet also said that some aged care employers had begun auditing staff IPC behaviour to measure competence.

[141] The Stage 3 employer evidence confirmed the permanence of changes to work arising from the enhancement of IPC measures since the pandemic. Mr Brockhaus<sup>228</sup> gave evidence concerning changes which had occurred at Buckland since the pandemic in 2020–21. The principal permanent change he identified was the appointment of two RNs as IPC leads who were responsible for the delivery of IPC education and on-the-spot training and education. He said that they observed and monitored all employees' IPC practices to ensure that they were following their training and meeting the requisite standard. He described a move away from the practices of entire-facility lockdowns, mandatory mask-wearing and frequent IPC training adopted during the pandemic to a more targeted approach. However, mask-wearing protocols continued to operate during outbreaks of infection, and IPC training had been standardised to comprise two formats annually, namely online modules together with a 20-minute face-to-face training session led by the IPC lead.

[142] Chris Mamarelis, the CEO of Whiddon Aged Care (Whiddon),<sup>229</sup> similarly gave evidence that, although IPC measures had not been maintained at the same level of intensity as they were during the pandemic, a number of pandemic measures had become permanent. These included employees taking RATs every 72 hours (at home prior to attending for work), updated mandatory infection control training, retention of the IPC lead role, the maintenance of updated protocols to deal with outbreaks, and protocols which employees are required to follow if they

have COVID-19 or have been in contact with someone that does. Louanne Riboldi, the Chief of Operations at Royal Freemasons' Benevolent Institution (RFBI),<sup>230</sup> said that RFBI now treats COVID-19 as an 'airborne' outbreak as part of its standard protocol for managing outbreaks but continues to train staff with respect to IPC and outbreak management, including an annual training module for 'donning and doffing' PPE and continues to employ IPC leads in each of its villages.

[143] A number of direct care employees — Virginia Ellis,<sup>231</sup> Catherine Evans,<sup>232</sup> Susan Digney,<sup>233</sup> Paul Jones,<sup>234</sup> Heila Brooks,<sup>235</sup> Stephen Voogt<sup>236</sup> and Hazel Bucher<sup>237</sup> — gave evidence about current additional and, in some respects, more complex skill requirements and changes to training requirements and the working environment resulting from the implementation of enhanced IPC measures since the pandemic. Such changes were not uniform across all the workplaces they described, but generally most, if not all, of the following applied to direct care employees at all such workplaces:

- undertaking RATs at regular intervals or at least if the employee is symptomatic;
- complying with IPC requirements at entry and exit of facilities including signing declarations that the employee is not symptomatic and having temperature and a photograph taken;
- administering RATs to symptomatic residents;
- a focus on all direct care employees being able to identify signs of a deteriorating resident and detect potential COVID-19 cases, and training in this respect;
- taking more regular and detailed progress notes in relation to symptoms of possible COVID-19 infection;
- wearing masks, either all the time, or in the presence of residents or during outbreaks, or when entering the home of a homecare client, causing discomfort and making the performance of work more difficult;
- administering limited lockdowns in areas of infection, with requirements to wear full PPE and deal with all residents 'one-on-one' as to activities, dining, socialising and exercise;
- wearing full PPE (including hand sanitiser, N95 masks, goggles, sanitising wipes, gloves, gowns, bibs, apron, shoe covers and hair nets) in various specified circumstances including where an outbreak occurs or if a particular resident or homecare client is infected;
- asking screening questions and assessing the responses before entering homecare clients' homes;
- completion of additional IPC training modules concerning personal safety, families and visitors, outbreak management procedures, PPE use and donning and doffing procedures, what to do if you suspect a case of COVID-19, hand washing, and hygiene;
- screening of visitors for infection;
- ensuring visitors are complying with any applicable IPC measures in place including wearing masks or PPE, and de-escalating situations with visitors which may arise in this respect; and
- isolating where employees test positive for COVID-19, requiring the use of leave balances to cover paid working time lost.

[144] Specifically in relation to RNs and ENs, Stephen Voogt and Hazel Bucher gave evidence concerning:

- additional skills required in performing clinical assessment of residents with symptoms;
- applying IPC protocols including administering RATs, taking swabs and arranging for a pathology test, reporting to the resident's general practitioner with relevant information, communicating with management and family, isolating residents where necessary, putting additional PPE procedures in place and checking on PPE and medication stocks;
- increased use of telehealth equipment and services to minimise hospital transfers; and
- the need for the IPC lead to train new staff in IPC and otherwise undertake their role in addition to their usual duties.

[145] Joanne Purdue, the Senior Professional Officer of the ANMF,<sup>238</sup> also gave evidence that the existing unit concerning IPC in the Certificate III in Individual Support (Ageing) has been replaced with a new unit (HLTINF006 — *Apply basic principles and practices of infection prevention and control*) since the COVID-19 pandemic began. The new unit contains expanded criteria which must be met to demonstrate IPC competency and focuses on implementation of IPC measures to nationally accredited standards rather than mere compliance with the employer's policy, an emphasis on personal responsibility and accountability, and a focus on IPC best practice and understanding the chain of infection.

[146] We are satisfied that the matters set out, encompassing the exercise of additional skills and responsibilities, requirements for additional training and changes to the working environment, constitute an increase in the work value of direct care employees covered by the Aged Care Award, the SCHADS Award and the Nurses Award which is not comprehended by the current rates of remuneration in those awards.

### 3.2 *Staff shortages and work intensification*

[147] As explained in the *Stage 1 decision* at paragraphs [216]–[224] and [263]–[269], the need to attract and retain staff is not relevant to the identification and assessment of 'work value reasons' as defined in s 157(2A), and the issue of staff shortages will only sound in work value where this has caused a permanent increase in workload and work intensity. While acknowledging that the demographic trend of an ageing population will increase demand for aged care employees and is contributing to current forecasts of staff shortages in future years, the picture disclosed by the Stage 3 evidence concerning the implication of staff shortages for work intensification is sufficiently mixed such as to prevent us being satisfied that this independently constitutes a *permanent* change in work value.

[148] It is reasonably clear that, *at the current time*, understaffing remains an issue for the aged care sector and that this is affecting the workload and work intensity of direct care employees. In the *Stage 1 decision*, the Full Bench found (as at November 2022) that '[t]he evidence before us paints a picture of chronic understaffing across the aged care sector which has contributed to increasing workloads and work intensity'.<sup>239</sup> The Stage 3 evidence of direct care employees makes it apparent that this situation has far from abated notwithstanding the end of the COVID-19 pandemic, particularly in relation to RNs. For example, Ms Bucher and Ms Brooks both described the increase in workloads that continues to be caused by an insufficiency of RNs at their workplaces.

[149] The Stage 3 employer evidence refers to the continuation of staff shortages amongst permanent staff, but this is of much less difficulty once account is taken of the capacity to source supplementary labour. Ms Riboldi gave evidence that RFBI is experiencing staff shortages in all areas, particularly in relation to RNs, but is able to supplement its permanent workforce with agency workers, exploring different migration pathways to locate alternative labour sources and providing internal scholarships for existing staff who wish to obtain nursing qualifications. Mr Mamarelis similarly reported that staffing shortages, particularly for nurses, remained a significant issue for Whiddon, and that the problem was most acute in regional areas, but that Whiddon was able to supplement its workforce with agency staff. Mr Brockhaus said that Buckland was likewise experiencing a staffing shortage with respect to permanent employees, but that supplementing the workforce with agency staff, while costly, meant that Buckland always had sufficient staff to meet the care needs of its residents.

[150] There is significant evidence indicating that there has been some improvement in the supply of labour to the aged care and some consequential mitigation of staff shortages sector arising from the interim pay increase for direct care employees. The Commonwealth referred to modelling undertaken by the Department in 2022 which estimated that in 2023–24 there would be a workforce gap of 26,670 direct care workers in residential aged care. The most recent update to this workforce modelling, which included data from the Department’s financial reporting on the aged care sector for the fourth quarter of 2022–23 — that is, after the interim increase was determined and announced, but before it actually came into effect — estimated the workforce gap as 17,437. This showed that the gap has reduced by an estimated 9,233 workers. This indicates that while there is still an insufficiency of labour, the magnitude of this is not static. This was broadly confirmed by the evidence of Christopher Friend, the HSU’s Divisional Secretary, Aged Care & Disability, NSW/ACT/Qld Branch, who said:

[30] In discussions with employers, I have been told that recruitment has increased slightly since the 15% increase was paid to direct care workers from 30 June 2023 and that resignations have reduced.<sup>240</sup>

[151] It is also necessary to take into account a range of other measures that have been announced by the Commonwealth to improve the supply and retention of labour in the aged care sector. These include:

- support for an additional 500 Pacific Australia Labour Mobility Scheme workers to complete a Certificate III in Individual Support (Ageing) in 2023;
- the establishment in May 2023 of the Aged Care Industry Labour Agreement (Labour Agreement) to provide a streamlined pathway for aged care providers to access direct care employees from overseas where standard visa programs are not available;
- additional fee-free TAFE places for aged care sector qualifications and university places for nurses;
- establishment of the Workforce Advisory Service, which is a free, independent and confidential service to support residential and home care service providers with workforce advice;
- the Aged Care Registered Nurse Bonus Payment, which provides a lump sum payment to RNs delivering aged care who work for the same employer for six or 12 months;
- the Home Care Workforce Support Program to attract and train 13,000 new aged care workers for the home care sector;

- the Aged Care Transition to Practice Program to attract and retain up to 740 new aged care nurses with training and professional development;
- the Clinical Placements Program, which will provide up to 5,250 quality clinical placements for nursing students in the care and support sector; and
- the Rural Locum Assistance Program stream to support aged care providers in rural and remote locations affected by workforce shortages to access a temporary locum workforce and permanent relocation payments and annual retention bonuses.

[152] There is some indication that the above measures have already borne some fruit. The Commonwealth pointed to there having been 51,000 new enrolments in fee-free TAFE courses for the care sector since January 2023. Mr Friend gave evidence that, following the announcement of the Labour Agreement in May 2023, the HSU had been approached by approximately 60 aged care providers to enter into a memorandum of understanding (MOU) in order for them to access the program. These providers range from major aged care companies employing thousands of staff, to small and regional providers employing 20–30 staff. Mr Friend said that he had held meetings with approximately 30 providers to examine their staff shortages and how the Labour Agreement might redress this, and that the HSU had signed 12 MOUs and was in ongoing negotiations with another 15 employers. Mr Brockhaus also said that Buckland was exploring the avenue of migration pathways and had partnered with a university in the Philippines to develop a training program and supply staff.

[153] We consider it more likely than not that the supply of direct care labour to the aged care sector, and the retention of direct care employees, will continue to improve over the medium term. The interim 15 per cent pay rate increase will operate, we consider, as an ongoing incentive for workers to enter into and stay in the sector, and this will be further enhanced by the additional wage increases which, as discussed below, we propose to award to direct care employees. The full effect of wage increases will take some time to flow through to the sector since new workers who are attracted by higher pay rates will need to obtain the qualifications necessary to enter the sector and, if not locally based, to navigate the immigration pathways into Australia. We anticipate that the measures announced by the Commonwealth to boost the supply of labour in the sector will be of further benefit in coming years. The current softening in the labour market may also assist with retention.

[154] We accept that, in respect of RNs, award wage increases may have a lesser effect because the evidence suggests that the market rate for nurses exceeds the Nurses Award minimum rates even taking into account the interim 15 per cent increase, and the market rate may remain in excess of the award rates even if those rates are further increased as discussed later in this decision. However, we do not consider, and no party suggests, that minimum award rates can be set on the basis of the prevailing market rate for labour. We also note that, while the evidence plainly suggests that recruitment and retention of RNs remains the principal labour supply difficulty which aged care employers face, the Commonwealth has identified that the average RN care minutes per resident per day had increased since the 2020–21 reporting period from 30 to 35 minutes as at March 2023 and that the percentage of facilities which reported having a RN on-site ‘24/7’ had increased from 86 per cent to 88.16 per cent between July and September 2023.

[155] For the above reasons, we do not find that staff shortages have caused or will independently cause a permanent increase in workload and work intensity such as to constitute a separate ‘work value reason’ for the purpose of s 157(2)(a) of the FW Act. However, we



emphasise that this conclusion is not intended to diminish the finding already made in the *Stage 1 decision* that the workload and work intensity of direct care employees has increased for reasons independent of any consideration of staff shortages.<sup>241</sup>

### 3.3 *Final work value assessment of direct care employees*

[156] In respect of all direct care employees covered by the Aged Care Award, the SCHADS Award and the Nurses Award, we are satisfied, for the purpose of s 157(2)(a) of the FW Act, that there are ‘work value reasons’ (as defined in s 157(2A)) for the minimum award rates of pay for such employees to be increased substantially beyond the 15 per cent interim increase determined in the *Stage 1 decision*. As earlier stated, the Full Bench made it clear in the *Stage 1 decision* that the interim increase was not intended to exhaust the extent of the increase justified by work value reasons, and further stated that the quantum of the interim increase was fixed having regard to the necessity that it sit ‘comfortably below the level of increase we may determine on a final basis’.<sup>242</sup> A further substantial increase is warranted in our view having regard to the following work value reasons:

- (1) Our historical analysis of the federal award rates of pay for PCWs, HCWs and AINs shows that that they have never been the subject of a work value assessment by the Commission or its predecessors. The pay rate alignment at the Certificate III level in the Aged Care Award, the SCHADS Award and the Nurses Award with the C10 classification in the Metal Industry Award structure 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<sup>243</sup> (Junor Report), the conclusions of which were discussed, and ultimately accepted, at paragraphs [759]–[857] and [893]–[896] of the *Stage 1 decision*. These skills of interpersonal and contextual awareness, verbal and non-verbal communication, emotion management and dynamic workflow coordination were effectively disregarded by the simplistic use of the masculinised C10 benchmark as the basis for the award pay structures for PCWs, HCWs and AINs. This represents a continuation of the history we have earlier outlined of treating the skills exercised in female-dominated industries and occupations as merely feminine traits and not representative of work value in the traditional, narrowly-defined sense. This mischaracterisation and disregard of ‘invisible’ skills lies, as was stated in the *Stage 1 decision*, ‘at the heart of the gendered undervaluation of work.’<sup>244</sup> The result is that, even leaving aside the issue of changes in work value, the starting-point award rates for direct care employees were not properly set in the first place.
- (2) Although the work of nurses has been the subject of previous work value assessments at the federal level historically, this process 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. The rates set for undergraduate degree-qualified RNs were never aligned with the C1 rate as contemplated by the C10 Metals Framework Alignment Approach, with the result that the starting rate for a degree-qualified RN in the modern Nurses Award made in 2009 was less than the C7 rate in the Manufacturing Award for a person qualified with an advanced certificate at AQF level 4. This represented historic gender-based undervaluation of nurses’

work which likewise rendered unsound the starting-point award rates in the Nurses Award.

- (3) The 16 findings made in the *Stage 1 decision*<sup>245</sup> concerning changes in the work of direct care employees in aged care represent a fundamental change in the work value of such employees independent of the matters identified in (1) and (2) above.
- (4) In addition to these 16 findings, we have found in this decision that enhanced IPC 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.

[157] Having regard to the complex issues outstanding from the *Stage 1 decision* identified in paragraphs [6] and [7] above, it is not possible to determine the matter before us simply by awarding a uniform percentage increase in pay rates. The appropriate course in respect of PCWs, HCWs and AINs, we consider, is 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, consistent with the approach outlined in paragraph [965] of the *Stage 1 decision*. The same course is generally appropriate for nurses in aged care but, for reasons we explain below, there are wider considerations which render it inappropriate to deal with the issue of aged care nurses' rates to finality in this decision.

#### 3.4 Fixing a benchmark rate for PCWs, AINs and HCWs

[158] We consider that the key classifications for which a benchmark rate should be fixed are those applying to Certificate III-qualified PCWs, AINs and HCWs. We note that in the Stage 1 proceedings, all parties proceeded on the basis that this was the key classification (see paragraphs [348]–[349], [816]–[817], [874]–[875], [929] and [958]–[961] of the *Stage 1 decision*). In addition, as the Full Bench found in the *Stage 1 decision*, a large majority of such employees hold the Certificate III qualification, employers were increasingly requiring employees to hold this qualification, and the Royal Commission had recommended that the Aged Care Certificate III become a mandatory minimum qualification for employment in the aged care sector.<sup>246</sup>

[159] The benchmark rate which we set must be one which is justified by work value reasons, as required by s 157(2)(a), and our determination of this rate must be free of assumptions based on gender in accordance with s 157(2B)(a). Within these statutory constraints, we also consider it desirable to establish a rate which is consistent with minimum rates for like work and which will be conducive to a stable award system which, while free of gender bias, does not encourage leapfrogging.

[160] In respect of this last consideration, there is a difficulty in that much of our earlier analysis as to how historic gender assumptions have vitiated the proper fixation of award rates based on work value for the aged care sector is also likely to equally apply to award rates for other types of female-dominated 'caring' work. This makes problematic the search for an award comparator. Certainly, an appropriate comparator is not to be found in the C10 classification framework currently found in the Manufacturing Award.

**[161]** The exception to this is the minimum rate established by the SCHADS Award operating in conjunction with the equal remuneration order (ERO) applicable to Certificate III-qualified social and community service employees. Such employees are classified as Level 2 under the SCHADS Award, and clause 15.2 of the award prescribes the minimum starting rate (Pay Point 1) as \$995.00 per week. This rate is the same as the C10 rate in the Manufacturing Award and was, prior to the interim 15 per cent pay increase for direct care employees in aged care, the same as for the Certificate III-qualified classifications of Aged Care employee level 4 under the Aged Care Award, Home care employee level 3, pay point 1 under the SCHADS Award and an Experienced Nursing assistant under the Nurses Award. However, this rate is not the minimum rate which may legally be paid under the FW Act, since the ERO applicable to Level 2 social and community service employees under the SCHADS Award requires an additional 23 per cent amount to be paid. The ERO is given legal effect by ss 305 and 306 of the FW Act. The effective minimum rate is therefore \$1,223.85 per week.

**[162]** The ERO applying to social and community service employees emanated from two decisions made by a Full Bench of Fair Work Australia in the exercise of its equal remuneration jurisdiction under Pt 2-7 of the FW Act as it then was. The first decision was made on 1 May 2011,<sup>247</sup> and concerned an application for an ERO made by five unions. The application was brought on the basis that the industry in which social and community service employees worked was female-dominated (88.1 per cent female), the work in the industry was undervalued, and that these characteristics were causally related. The applicant unions sought an ERO which, for the most part, replicated 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.<sup>248</sup>

**[163]** The Full Bench found that the industry was subject to gender-based undervaluation. It stated:

[253] We have already recorded our view that the workforce is predominantly female. We deal next with the female characterisation of work. There is much to be said for the view that work in the industry bears a female characterisation. In our view the applicants have established the following propositions:

- (a) much of the work in the industry is ‘caring’ work
- (b) the characterisation of work as caring work can disguise the level of skill and experience required and contribute, in a general sense, to a devaluing of the work
- (c) the evidence of workers, managers and union officials suggests that the work, in the [social, community and disability services industry throughout Australia], again in a general sense, is undervalued to some extent, and
- (d) because caring work in this context has a female characterisation, to the extent that work in the industry is undervalued because it is caring work, the undervaluation is gender-based.

[254] These conclusions are consistent with the evidence of academics and others in this case and with similar conclusions in the Queensland Equal Remuneration decision.<sup>249</sup>

**[164]** The Full Bench declined to make a finding that the applicable minimum rates in the SCHADS award were not properly based on the value of work, saying:

[261] We deal first with the applicants' submission that the minimum wages in the modern award do not properly reflect the value of the work. Given the basis on which minimum rates are fixed, it is not possible to demonstrate that modern award wages are too low in work value terms by pointing to higher rates in enterprise agreements, or in awards which clearly do not prescribe minimum rates. In order to succeed in their submission it would be necessary for the applicants to deal with work value and relativity issues relating to the classification structure in the modern award and potentially to structures and rates in other modern awards. No real attempt has been made to deal with those important issues.<sup>250</sup>

**[165]** The Full Bench did however find that social and community employees were relatively low paid and that a large proportion of them were paid at or quite near the award rate, with collective bargaining having had only a limited effect in rates of pay and over-award payments not being of great significance.<sup>251</sup> The ultimate conclusion reached by the Full Bench was that 'for employees in the [social and community services] industry there is not equal remuneration for men and women workers for work of equal or comparable value by comparison with state and local government employment'.<sup>252</sup> In respect of remedy, the Full Bench rejected the applicants' submission that the ERO should reproduce the classification structure in the Queensland award:

[283] In our view the applicants have not made out a case for adoption of a classification structure in the equal remuneration order different from that in the modern award. It would be undesirable to have parallel but different classification structures, one in the award and the other in an equal remuneration order. It is preferable that if there are to be alterations in the classification structure they should be reflected in the award itself rather than in a separate equal remuneration order. Also, there is no single classification structure which could be adopted, as there are many differences between the classification structures in the awards and agreements with which comparisons could be made. In the circumstances we do not think that the achievement of equal remuneration for work of equal or comparable value will be compromised if classification structures are dealt with at the award level rather than in an equal remuneration order.<sup>253</sup>

**[166]** The Full Bench invited further submissions on the terms of the order to be made having regard to the conclusions it had stated, including as to whether 'the quantum in any equal remuneration order could or should be included in the modern award having regard, amongst other things, to the operation of the better off overall test'.<sup>254</sup> It also indicated the primary consideration in determining the terms of the orders as follows:

...in order to give effect to the equal remuneration provisions, the proper approach is to attempt to identify the extent to which gender has inhibited wages growth in the [social and community services] industry and to mould a remedy which addresses that situation.<sup>255</sup>

**[167]** In its second decision issued on 1 February 2012,<sup>256</sup> the Full Bench (by majority) eschewed any notion of establishing a nexus between the ERO to be made and market rates or facilitating claims for parity with the public sector.<sup>257</sup> It ultimately accepted a joint submission from the applicant unions and the Commonwealth as to the outcome to be determined, which involved the addition of percentage amounts to the SCHADS Award pay rates for social and community service employees and, in doing so, the Full Bench said:

[63] We note the reliance placed on caring work as a proxy for gender-based undervaluation. Attempting to identify the proportion of work which is caring work at the various classification levels is consistent with one of the principal conclusions in the May 2011 decision. ...<sup>258</sup>

(citations omitted)

**[168]** The Full Bench made the ERO on the basis that its implementation would be introduced in nine equal instalments in each year from 2012 to 2020.<sup>259</sup> Significantly, the Full Bench said that the ERO ‘would ensure that for the employees to whom the order will apply, there will be equal remuneration for work of equal or comparable value’.<sup>260</sup>

**[169]** The ERO was made as a ‘stand-alone’ instrument<sup>261</sup> separate from the SCHADS Award, although it was referred to in a note in the minimum pay rates clause in the award. In 2021, after the ERO had been fully implemented, a Full Bench of the Commission considered whether the ERO rates should be incorporated into the SCHADS Award.<sup>262</sup> The Full Bench determined that the appropriate course was to add a note to clause 15 of the SCHADS Award which set out the ERO rates.<sup>263</sup> The note which currently appears in clause 15.8 of the SCHADS Award sets out the minimum award weekly wage for each social and community services employee classification, the final ERO percentage, and a calculation of the ‘current weekly wage’ and the ‘current hourly wage’. The ‘current weekly wage’ for a Level 2 employee at entry specified in the note is the amount of \$1223.85 to which we have earlier referred, and the ‘current hourly wage’ is \$32.21. The note states: ‘The ‘current hourly wage’ and ‘current weekly wage’ in the tables below form employees’ ordinary rates of pay for all purposes...’.

**[170]** We consider that the rate of \$1223.90 per week (rounded to the nearest 10 cents) is appropriate to serve as the benchmark rate for Certificate III-qualified PCWs, AINs and HCWs. Prior to the making of the ERO there was, as earlier stated, a pay alignment between these classifications and the entry rate for a Certificate III qualified social and community services employee under the SCHADS Award, and that provides a proper basis for the use of the SCHADS Award Level 2 classification as a comparator in the current circumstances. The basis upon which the ERO rates were determined closely parallel the work value reasons upon which we are proceeding in this matter: the high female composition of the industry in question, the significance of the work being ‘caring’ work, the disguising of the level of skill and experience required to perform the work, the gender-based undervaluation of the work, and the need to remedy the extent to which assumptions on the basis of gender had inhibited wages growth.

**[171]** Although the ERO rates were not made in the exercise of the award making and variation powers under the FW Act, the way in which the rates were set, for the reasons explained, essentially proceeded on what may be characterised as work value grounds within the meaning of s 157(2A). We also note that, despite the ERO having made pursuant to the Commission’s powers under Pt 2-7 of the FW Act, the ERO was not intended to match market rates in the social and community services industry and thus may be characterised as operating as a minimum rate. For all functional purposes, the ERO rates operate in the same way as minimum award pay rates for employees to whom the SCHADS Award applies.

**[172]** Most importantly for our purposes, the ERO rates have been authoritatively determined to be rates which ensure equal remuneration for work of equal or comparable value. They can therefore be relied upon as being free of assumptions based on gender. We are satisfied that, in our consideration of the work value reasons set out in paragraph [156] above, the adoption of \$1223.90 per week as the benchmark rate for Certificate III-qualified PCWs, AINs and HCWs will be demonstrative of compliance with the requirement in s 157(2B)(a). The total wage increase which will be produced by the adoption of this benchmark rate, inclusive of the interim increase, will be 23 per cent. This is in our view a wage rate which is appropriately justified by the work value reasons which we have identified and will ensure that aged care sector

employees at the Certificate III level have an entitlement to a minimum award wage rate which properly reflects the value of their work, including their exercise of ‘invisible’ skills, and which has been assessed on a gender-neutral basis.

[173] We anticipate, having regard to what was said concerning gender undervaluation in paragraphs [124]–[139] of the *Annual Wage Review 2022–23 decision*<sup>264</sup> and in the *Stage 1 decision*,<sup>265</sup> and our analysis and conclusions in this decision, that there is likely to be further consideration of the question of whether female-dominated ‘caring’ work covered by other modern awards has been the subject of gender undervaluation. In that context, our identification of a benchmark rate for Certificate III-level PCWs, AINs and HCWs in aged care which aligns with the Certificate III level starting rate in the ERO applying to social and community services employees provides appropriate guidance as to the rectification of historic gender undervaluation in respect of female-dominated ‘caring’ work. The adoption of such a benchmark rate for work of this nature, in replacement of the C10 rate, would provide a stable anchor point for a modern award system which ensures gender equality in the valuation of work.

### 3.5 *Classification structure for PCWs, AINs and HCWs*

[174] Having identified an appropriate benchmark classification and rate for PCWs, AINs and HCWs, the next task is to determine 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.

[175] The parties provided various proposals as to the design of such a classification structure. The HSU’s proposal involves a separate seven-level structure for PCWs and HCWs, with HCWs being moved out of the coverage of the SCHADS Award and into the Aged Care Award. In respect of residential aged care, the HSU’s proposal seeks to integrate PCWs and other indirect care employees into a single structure with aligned pay rates. This would reflect the position which applied before the award of the interim increase. The premise of this aspect of its proposal is that direct and indirect care employees perform, at equivalent qualification/experience levels, work of equal or comparable value. The HSU’s proposal attaches to each classification a detailed classification descriptor which, the HSU contends, accurately describes the requirements and challenges at each level, contains sufficient detail and precision to ensure employers can locate their employees at the correct classification level, includes relevant detail regarding the required qualifications and experience, accountability and extent of authority, judgement and decision-making, and specialised knowledge and skills applicable to distinct levels, and acknowledges the distinctive physical, environmental conditions and emotional demands of aged care work.

[176] As part of its case in Stage 3 of the proceedings, the HSU filed a joint experts’ report prepared by Professor Sara Charlesworth and Professor Gabrielle Meagher (Joint Report). The Joint Report recommended a modified version of the HSU’s proposal for adoption, including supplemented classification descriptors.

[177] The UWU supported the HSU’s proposal with the qualification that it needed to be amended to comprehend more fully the skill set of gardener and maintenance staff in residential facilities.

[178] In Stage 3 of the proceedings, the ANMF advanced its own proposal for a classification structure for PCWs under the Aged Care Award and AINs under the Nurses Award. These two proposed classification structures are aligned in respect of the six identified levels, classification descriptors and rates of pay, save that the employees are referred to as ‘Personal care workers’ under the Aged Care Award and as ‘Aged care nursing assistants’ under the Nurses Award. For each classification in each structure, there is a requirement that the employee is ‘subject to the supervision, delegation and direction of an RN’.

[179] The Joint Employers propose a distinct classification structure for PCWs under the Aged Care Award, to be known as the ‘direct care stream’. This would contain an introductory classification and then five classification levels, with the Certificate III-qualified employee graded at Level 3 and with the highest grade being for a Certificate IV-qualified employee. The Joint Employers’ proposal does not include a supervisory-level classification because, they contend, the evidence suggests that supervision is undertaken by an EN or RN in residential facilities. They also contended that, although HCWs should remain under the SCHADS Award, they should not be distinguished in respect of rates of pay. However, they submitted that Schedule E of the SCHADS Award required review in that it contained classifications definitions which did not distinguish between HCWs servicing aged care clients and those servicing disability clients.

[180] We do not propose to deal in detail with all the differences between the respective proposals and their intricacies but, instead, to state our view with respect to the five main issues which arise from those proposals.

[181] *First*, there is the question of whether there should be a single integrated classification structure for all employees under the Aged Care Award, as proposed by the HSU. For the reasons which we set out in part 4 of this decision, we consider that there is a fundamental difference in the work value of direct care employees as compared to other employees engaged in residential aged care, in that the latter perform to a substantially lesser degree or not at all the ‘invisible’ skills which are described in detail in the *Stage 1 decision*<sup>266</sup> and referred to above. That fundamental difference makes it impossible for all practical purposes to design a classification structure which integrates PCWs and other aged care employees undertaking support functions. Accordingly, we consider that a discrete classification structure for PCWs should be developed for the Aged Care Award (continuing the position established by the award of the interim increase as a result of the *Stage 1 decision*<sup>267</sup>).

[182] *Second*, we do not accept the proposition that any new classification structure should contain classifications descriptors which essay a complete description of the skills, duties, responsibilities and working environment of PCWs. This proposition was advanced by the HSU on the basis that the inadequate description of skills and job requirements in award classification descriptors is itself an indicator of deficient work value assessment and gender undervaluation and that this requires remedy in order to ensure gender neutral minimum wage fixation. The proposition substantially proceeds on the basis of the expert evidence. For example, the *Stage 1 decision*<sup>268</sup> (at [822]) cites the Smith/Lyons Report as stating:

The classification structures may lack relevant description and information of what is required in jobs, including the detailed specifications of the skills required at different skill levels. These omissions are critical as it means that the work undertaken is not properly described, recognised and valued. Weaknesses in classification structures may also mean that there is no mechanism to recognise additional skills.

**[183]** Similarly, in expressing their general support for the HSU's proposed classification structure, the authors of the Joint Report stated:

The proposed 'unpacked' levels in the HSU Draft Determination in relation to the Aged Care Award in the home care worker classification structure and the residential care classification structures recognise the diversity of clients/residents and the impact of their various physical, cognitive and psychosocial needs on the complexity of the work undertaken at different levels. ...the content the HSU Draft Determination includes under these headings provides far more relevant and accurate detail ... about the required level of qualifications and experience, accountability and extent of authority, judgement and decision making, and specialist knowledge and skills at different levels. Importantly at the beginning of each classification level there is a brief description of the distinctive nature of the work to be performed at that level. This is consistent, as noted above, with good classification practice. In particular, these descriptions acknowledge the unique nature and scope of the work to be performed at different levels within the context of formal aged care services.<sup>269</sup>

**[184]** We consider, with respect, that this evidence involves at least to some extent a misconception of the function of classification descriptors in modern awards. They are not 'position descriptions' of the type which might apply to individual employment arrangements. Their purpose is to identify to which categories of employees the minimum pay rates prescribed by the award are payable. They are the means of expressing the legal prescription of the minimum pay obligations of employers and entitlements of employees. Except insofar as it is necessary to serve this purpose, there is no need for classification descriptors to give a total description of the skills, duties and incidents of the jobs to which they apply. Indeed, it is undesirable for this to be attempted. The changing nature of modern work means that a classification descriptor of this nature would rapidly become outdated. Further, the type of comprehensive description contemplated would be excessively lengthy and require complicated judgments to be formed as to how each employee is to be classified and paid, thus constituting an onerous regulatory burden on employers. This is illustrated by the descriptor proposed for the Certificate III-qualified classification in the Joint Report, which is some four pages long. This degree of complexity does not aid award compliance. The proper assessment of work value, including the proper recognition of the 'invisible' skills that characterise these female-dominated jobs, is not to be found in the award classification descriptor for a position but rather in its minimum rate of pay. Whether that rate of pay represents a proper assessment of work value can be determined from the Commission decision which fixed that rate of pay.

**[185]** *Third*, we do not consider that coverage of HCWs should be moved from the SCHADS Award to the Aged Care Award. Although, as the HSU submits, there is some evidence of employers in the aged care sector operating both residential and home care services, the evidence of employees performing a mix of such functions is minimal. There is equally evidence of employers and their employees performing a mixture of aged and disability home care services, thus rendering it, on balance, undesirable in our view to alter the award coverage status quo. However, there should still be, as far as possible, an alignment in classification structures and rates of pay for PCWs and HCWs under their respective awards. The Joint Report acknowledges some differences in the nature and organisation of work between PCWs and HCWs, but concludes:

[16] However, on balance, it is our view it is sensible to align the classification structures for non-nursing qualified employees in both home care and residential aged care work as far as possible. We recognise that in practice, the average staffing profile across the home care



classification structure may be more weighted towards the middle of that structure, while the staffing profile across the residential classification structure may be more weighted towards the upper end of that structure. At the same time, given the increasing complexity of client groups in home care, there is growing potential to assign more complex personal care work to specific home care workers than there is in residential aged care where most residents are very frail, ill and many have moderate to profound cognitive decline (as set out in the Meagher Report) so that the majority of employees will be involved in, or supporting, their care.<sup>270</sup>

**[186]** We agree with the Joint Employers that the retention of HCWs in the SCHADS Award with a different classification structure means that a wider review of the classifications in that award is required although, having regard to the conclusions that we have reached in this decision, that review may need to be more fundamental in nature than contemplated by the Joint Employers. On one view, having separate classifications and minimum rates of pay for aged and disability HCWs is an untenable situation given the functional overlap to which we have referred. There is also likely to be implications for the other categories of employees covered by the SCHADS Award. This will however need to be dealt with in future proceedings and we need not consider it further here.

**[187]** *Fourth*, we do not accept the ANMF's proposition that there should be aligned classification descriptors and pay rates for PCWs under the Aged Care Award and AINs under the Nurses Award. Throughout these proceedings, the parties have proceeded on the basis that the roles of PCWs under the Aged Care Award and AINs working in aged care under the Nurses Award are indistinguishable in terms of work value. The ANMF submitted, in its response to background document 10:

[39] The ANMF's position is and has been that the work value of AINs and PCWs is the same. This means that the ANMF agrees that no material difference in the skills or qualifications acquired by the respective employees. That does not mean, however, that the roles are functionally the same.

[40] In particular, the work of an AIN is immediately referable to a registered nurse in circumstances where pursuant to the definition of 'Nursing Assistant' at Schedule A.1 to the Nurses Award 2020:

- (1) they are under the direct control and supervision of an RN; and
- (2) their employment is solely to assist an RN.<sup>271</sup>

**[188]** We do not accept the distinction proffered by the ANMF. The evidence does not disclose any differences in modes of supervision as between PCWs and AINs. A RN will usually be the person with ultimate supervisory responsibility in either case. Further, we note that the alleged distinction is inconsistent with the ANMF's proposed classification structure for PCWs under the Aged Care Award which, as earlier noted, provides that at each level the PCW works under the supervision, delegation and direction of a RN. Evidence adduced by the ANMF itself contradicts its position; for example, Annie Butler, the Federal Secretary of the ANMF, gave the following evidence in Stage 3 of the proceedings:

[71] Personal care is, by its nature, nursing care. The two are not distinguishable. In all aspects of care, AINs/PCWs bring a level of skill and training to the activities involved with caring for a person. So for example, showering a resident or client provides the opportunity to assess how a person is moving, feeling and responding at that time. It is also the opportunity to see if any conditions, such as wounds have improved or deteriorated, or pain levels have fluctuated.

[72] The level of assessment occurs on a continuum with the AIN or PCW making observations and assessments as to what to report to the enrolled nurse or registered nurse on duty. Equally, an enrolled nurse makes observations and assessments and reports to the registered nurse.

[73] The registered nurse may make further assessments based on what is reported, or observed. The registered nurse has the qualifications to then make adjustments to care plans, make further inquiries if needed, and to provide direction to other registered nurses, enrolled nurses, AINs or PCWs as to how to respond to any new or altered care needs. This is done within the legislative and policy frameworks referred to below in relation to delegation of decisions and standards of practice.

[74] When seen together, this illustrates how a nursing team operates to deliver nursing care...<sup>272</sup>

[189] Ms Butler also gave evidence that the ANMF ‘has long advocated’<sup>273</sup> for both AINs and PCWs to be the subject of registration with the Nursing and Midwifery Board of Australia.

[190] Accordingly, we find that PCWs and AINs in aged care are functionally indistinguishable. In this circumstance, we do not consider that there is any justification for them to be covered by two different awards. Apart from the nomenclature used to describe them, there is currently no objective basis to determine which award covers any particular employee performing the work of a PCW/AIN. The ANMF was unable to advance any persuasive rationale for a continuation of the current position, or for the position for which it contends whereby two awards would contain the same classification structure and minimum rates of pay for the same employee.

[191] For the above reasons, the coverage of AINs in aged care will be excised from the Nurses Award so that the Aged Care Award will solely cover the work of PCWs and AINs in aged care. We consider that the requirement in s 163(1) of the FW Act, namely that the Commission must not vary a modern award so that certain employees stop being covered by the award unless satisfied that they will be covered by another award that is appropriate for them, is met in this case. The Aged Care Award already covers PCWs performing the same work as AINs and, as we propose to vary that award by this decision, is plainly appropriate in that context to cover AINs. There are some differences in conditions of employment as between the Nurses Award and the Aged Care Award, but the only difference of major significance is that employees covered by the Nurses Award are, by clause 22.2, entitled to an additional week’s annual leave. We will vary the Aged Care Award to ‘grandparent’ this benefit for any existing employee who is entitled to it.

[192] *Fifth*, we consider that the classification structure should include a supervisory level, contrary to the submissions of the Joint Employers. There is some evidence that non-nursing PCWs may be assigned supervisory functions equivalent to those of the EN.

[193] Having regard to these matters, we propose to establish a separate six-level classification structure for PCWs under the Aged Care Award. This will apply to ‘aged care employees—direct care’, to be defined as follows:

**aged care employee—direct care** is an employee whose primary responsibility is to directly provide:

- (a) personal care services to residents under the supervision of a registered or enrolled nurse, or

(b) recreational/lifestyle activity services to residents;

including but not limited to undertaking the following duties:

- assisting with daily living activities;
- attending to personal hygiene, physical, administrative and cognitive needs;
- providing emotional care and social support;
- assisting with participation in social and recreational activities; and
- assisting with clinical care and provision of medical treatments and procedures.

[194] The new classification structure we prefer (with weekly amounts rounded to ten cents) is as follows:

<b>Classification</b>	<b>Description</b>	<b>Relativity to Level 3</b>	<b>\$ per week</b>
<b>Level 1 – Introductory</b>	An employee whose primary role is to provide direct care to residents and who has less than 3 months' industry experience as a direct care employee.	90%	1101.50
<b>Level 2 – Direct Carer</b>	An employee whose primary role is to provide direct care to residents and who has more than 3 months' industry experience as a direct care employee.	95%	1162.70
<b>Level 3 – Qualified</b>	An employee whose primary role is to provide direct care to residents and who has obtained a Certificate III in Individual Support (Ageing) or equivalent.	100%	1223.90
<b>Level 4 – Senior</b>	An employee whose primary role is to provide direct care to residents and who has obtained a Certificate III in Individual Support (Ageing) or equivalent and has obtained 4 years' post-qualification industry experience as a direct care employee.	104%	1272.90
<b>Level 5 – Specialist</b>	An employee whose primary role is to provide direct care to residents and who has obtained a Certificate IV in Ageing Support or equivalent as a requirement for the performance of their duties by the employer.	108%	1321.80
<b>Level 6 – Team Leader</b>	A direct care employee who has obtained a Certificate IV in Ageing Support or equivalent as a requirement for the performance of their duties by the employer and is required to supervise and train other direct care employees.	112%	1370.80

[195] In the above classification structure, Level 1 is an entry-level classification. Level 2 applies to direct care employees who have no AQF qualification relevant to aged care. Level 3 is, as earlier discussed, the benchmark classification for Certificate III-qualified employees. Level 4 applies to Certificate III-qualified employees who have at least four years of post-qualification industry experience. This recognises that such a period of industry experience carries with it an enhancement in work value through the on-the-job acquisition of additional

skills, experience, responsibilities and judgment. Level 5 applies to employees who, as a requirement for the performance of their duties by the employer, have acquired the Certificate IV qualification which, the evidence indicates, is increasingly desired and needed by aged care employers. Level 6 is a supervisory classification. Under the above classification structure, an employee who has not completed a Certificate IV qualification but has completed the Certificate IV unit of competency ‘Administer and Monitor Medications’ (HLTHPF007) and/or ‘Provide Support to People Living with Dementia’ (CHCAGE005) and/or ‘Deliver Care Services Using a Palliative Approach’ (CHCPAL003), or equivalents, shall be classified at Level 3 or Level 4 dependent upon years of industry experience.

**[196]** The relativities between classifications have been designed to properly reflect the acquisition of additional skills and responsibilities rather than to attempt (as the HSU’s proposal did) to ensure a minimum, uniform pay increase for employees at each existing pay level. We will establish special arrangements in the Aged Care Award for the translation of existing employees to the new classification structure. These translation arrangements will, in particular, provide that:

- (1) For the purpose of the new Level 4 classification, the requirement for four years’ post-qualification industry experience applies only to industry experience acquired after the operative date of the variations to be made to the Aged Care Award. This means that Certificate III-qualified employees currently at Level 4 will translate to the new Level 3 even if they currently have more than four years’ post-qualification industry experience.
- (2) However, any employee currently classified at Level 5 who does not have a Certificate IV qualification will translate to Level 4, even if they do not have four years’ post-qualification industry experience.

**[197]** On this basis, the translation of existing PCWs under the Aged Care Award to the new classification structure, and the total pay increases they will receive as a result of this work value process, inclusive of the interim 15 per cent increases, will be as follows:

<b>Existing PCW classification – Aged Care Award</b>	<b>New direct care employee classification – Aged Care Award</b>	<b>Pay increase (inclusive of interim increase)</b>
Level 1	Level 1	20.9%
Level 2	Level 2	22.8%
Level 3		18.2%
Level 4	Level 3	23%
Level 5 (without Certificate IV)	Level 4	23.7%
Level 5 (with Certificate IV)	Level 5	28.5%
Level 6		21.9%
Level 7	Level 6	24.2%

**[198]** The translation of existing AINs under the Nurses Award to the new classification structure under the Aged Care Award, inclusive of the interim 15 per cent increases, will be as follows:

<b>Existing AIN classification – Nurses Award</b>	<b>New classification – Aged Care Award</b>	<b>Pay increase (inclusive of interim increase)</b>
1 <sup>st</sup> year if less than 3 months' experience	Level 1	17.9%
1 <sup>st</sup> year, after 3 months' experience	Level 2	24.5%
2 <sup>nd</sup> year		22.6%
3 <sup>rd</sup> year		20.6%
Experienced	Level 3	23%
-	Level 4	-
-	Level 5	-
-	Level 6	-

**[199]** In respect of HCWs servicing aged care clients under the SCHADS Award, we propose to adopt a modified version of the new classification structure for PCWs/AINs under the Aged Care Award as follows:

<b>Classification</b>	<b>Description</b>	<b>Relativity to Level 3</b>	<b>\$ per week</b>
<b>Level 1 – Introductory</b>	An employee whose primary role is to provide direct care to aged care clients and who has less than 3 months' industry experience as a direct care employee.	90%	1101.50
<b>Level 2 – Home Carer</b>	An employee whose primary role is to provide direct care to aged care clients and who has more than 3 months' industry experience as a direct care employee.	95%	1162.70
<b>Level 3 – Qualified</b>	An employee whose primary role is to provide direct care to aged care clients and who has obtained a Certificate III in Individual Support (Ageing) or equivalent.	100%	1223.90
<b>Level 4 – Senior</b>	An employee whose primary role is to provide direct care to aged care clients and who has obtained a Certificate III in Individual Support or equivalent and has obtained 4 years' post-qualification industry experience as a direct care employee.	104%	1272.90
<b>Level 5 – Specialist</b>	An employee whose primary role is to provide direct care to aged care clients and who has obtained a Certificate IV in Ageing Support or equivalent as a requirement for the performance of their duties by the employer.	108%	1321.80
<b>Level 6 – Team Leader</b>	A direct care employee who has obtained a Certificate IV in Ageing Support or equivalent as a requirement for the performance of their duties by the employer and is required to supervise and train other home care employees – aged care.	112%	1370.80

**[200]** As for existing Aged Care Award employees, the Level 4 classification above will only apply to existing employees in respect of industry experience post the operative date of the variations to the SCHADS Award, except that employees currently graded at Level 4 who do not hold a Certificate IV qualification will move to the new Level 4 regardless of their industry experience. The translation of employees in the existing classification structure in the SCHADS Award to the new classification structure will therefore be as follows:

Existing HCW classification – SCHADS Award	New HCW classification – SCHADS Award	Pay increase (inclusive of interim increase)
<b>Level 1</b>		
Less than 3 months’ experience	Level 1	19.5%
After 3 months’ experience	Level 2	26.1%
<b>Level 2</b>		
Pay point 1	Level 2	19.3%
Pay point 2	Level 2	18.4%
<b>Level 3</b>		
Pay point 1	Level 3	23%
Pay point 2	Level 3	19.3%
<b>Level 4 (without Certificate IV)</b>		
Pay point 1	Level 4	17.3%
Pay point 2	Level 4	15.0%
<b>Level 4 (with Certificate IV)</b>		
Pay point 1	Level 5	21.8%
Pay point 2	Level 5	19.4%
<b>Level 5</b>		
Pay point 1	Level 6	17.8%
Pay point 2	Level 6	13.3%

**[201]** Where, as a result of the award of the 15 per cent interim increase, an existing employee will translate to a new award rate of pay which is lower than their current rate of pay, the existing employee will retain an entitlement to the additional amount, but it will be absorbed into any future award rate increases.

**[202]** As we discuss at the end of this decision, we will issue draft determinations setting out the variations to the Aged Care Award, the Nurses Award and the SCHADS Award which we propose and allow the parties an opportunity to comment.

### 3.6 *Registered and enrolled nurses*

**[203]** As explained in paragraphs [942]–[955] of the *Stage 1 decision*,<sup>274</sup> the rates for undergraduate degree-qualified RNs have never properly been fixed in accordance with the C10 Metals Framework Alignment Approach and, as explained in paragraphs [111]–[135] of this decision, we consider this constitutes gender undervaluation of the work of such nurses. That by itself constitutes a significant work value reason for the adjustment of rates of pay for RNs beyond the interim increase already awarded, since that interim increase did not remedy the undervaluation. In addition, we consider that the changes in the value of the work performed by RNs found to have occurred in the *Stage 1 decision* justify some degree of wage increases in excess of the interim increase.

[204] The current minimum rate for a four-year degree qualified RN in aged care under the Nurses Award is \$1301.90 per week. The proper application of the C10 Metals Framework Alignment Approach in a manner free from gender assumptions and consistent with the principles stated by the Full Bench in the *Teachers decision*<sup>275</sup> (see paragraph [955] of the *Stage 1 decision*)<sup>276</sup> would result in this rate being set at \$1470.80 per week, with this becoming the benchmark rate for the fixation of minimum wages for RNs in aged care. We consider that this is a rate justified by the work value reasons identified in the *Stage 1 decision* and this decision. Having regard to our earlier discussion concerning the ERO applicable to social and community services employees under the SCHADS Award, the fixation of this rate could confidently be regarded as one free from gender assumptions since it approximately equates to the rate (\$1466.77 per week) for a four-year degree-qualified social and community services employee under the ERO.

[205] We also consider, having regard to the work value reasons identified in the *Stage 1 decision*<sup>277</sup> and this decision, that the rate for an EN in aged care who has responsibility for supervising other PCWs should be set at the same rate which we propose for a Level 6 direct care employee (Team Leader) with supervisory responsibilities, namely \$1370.80 per week.

[206] We do not propose to transfer coverage of RNs and ENs in aged care from the Nurses Award to the Aged Care Award. Unlike AINs in aged care, nurses in aged care retain a distinct occupational identity which makes it appropriate for them to remain within the coverage of the occupational award covering nurses.

[207] Beyond stating the above conclusion, we will not in this decision finalise the classification structure for nurses in aged care, for the following reasons:

- (1) We do not consider that the proper application of the C10 Metals Framework Alignment Approach necessarily involves simply increasing all rates of pay for aged care nurses in the existing classification structure by the same percentage amount as for the benchmark rate. The Nurses Award contains a classification structure in which each classification allows for automatic annual increments in pay. In the *Teachers decision*,<sup>278</sup> classification structures of this type were described as not properly reflective of ‘the essential elements of qualifications, displayed competence and acquired experience and responsibility’ and ‘an anachronism in the context of the current statutory regime for the fixation of minimum wage rates’.<sup>279</sup> We do not consider that this issue has been properly addressed by the parties by way of evidence and submissions. Nor have other issues which would necessarily arise in any reform of the classification structure been properly addressed to date, including the appropriate pay relativity between a three-year and a four-year degree-qualified RN.
- (2) The analysis in paragraphs [942]–[955] of the *Stage 1 decision* and paragraphs [111]–[135] of this decision would indicate that the work of all RNs and ENs covered by the Nurses Award, not just those employed in the aged care sector, have been subject to a failure to properly apply the C10 Metals Alignment Framework and gender undervaluation. There would therefore be a risk that the finalisation of a new classification and pay structure for aged care nurses only in this proceeding would establish a *fait accompli* in respect of all other nurses, and their employers, covered by the Nurses Award, without other interested parties being given an opportunity to be heard.

- (3) On 9 February 2024, the ANMF filed an application (AM2024/11) for a determination varying the Nurses Award, in respect of employees other than aged care employees, to increase the minimum rate of pay for a Registered Nurse Level 1, Pay Point 1 to \$1472.60 per week (virtually the same as the benchmark rate we propose for a four-year degree-qualified RN), and to increase the rates of pay for all other classifications and pay points of RNs, ENs, student ENs, nurse practitioners and occupational health nurses by a proportionate amount. The application also seeks that the minimum rates for Nursing Assistants be increased by 26.5 per cent. The application is advanced on the grounds that the minimum rates for nurses, midwives and AINs under the Nurses Award were never properly fixed and involve historical undervaluation because of assumptions based on gender, and that the minimum rates have not increased commensurately with changes over the past several decades in the nature of the work, the level of skill and responsibility involved in doing the work, and the conditions under which the work is done. The overlap of the subject matter of the ANMF's application with the matters arising for consideration here concerning RNs and ENs in aged care makes it desirable to at least explore with interested parties in the first instance whether they should be determined together.

[208] Having regard to these matters, we consider that the appropriate course is to finalise the classification structure and pay rates for RNs and ENs in conjunction with the ANMF's application in matter AM2024/11. The next step to be taken in this course is identified at the end of this decision.

### 3.7 *Modern awards objective and minimum wages objective*

[209] Section 157(2)(b) of the FW Act requires that, in order to make a determination varying modern award minimum wages, the Commission must be satisfied that making determination outside the system of annual wage reviews is necessary to achieve the modern awards objective in s 134(1). More generally, s 138 relevantly provides that a modern award may include terms that it is permitted to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective in s 284(1). The minimum wages objective relevantly applies to the exercise of the Commission's performance and exercise of the functions and powers under s 157 so far as they relate to the setting and variation of modern award minimum wages.

[210] Insofar as we have stated conclusions earlier in this decision concerning proposed variations to the pay rates and classification structures in the Aged Care Award, the Nurses Award and the SCHADS Award, and a proposed variation to the coverage of the Nurses Award, we will express our *provisional* conclusions concerning the modern awards objective and the minimum wages objective. We will confirm, or otherwise, these conclusions when we make determinations varying these awards.

[211] We are satisfied that the proposed variations are necessary to achieve the modern awards objective. In reaching this conclusion, we have taken into account the considerations specified in s 134(1) in the following way (using the paragraph designations in the subsection):

*Paragraph (a):* Using the measure of 'low paid' as being two-thirds of median adult ordinary-time earnings for full-time employees, the 'low paid threshold' may be



calculated as \$1066.67 per week (using the Australian Bureau of Statistics (ABS) *Characteristics of Employment* (COE) data for August 2023) or \$1131.33 per week (using the ABS *Employee Earnings and Hours* (EEH) data for May 2023). Notwithstanding the 15 per cent interim increase, direct care employees at Level 1 of the Aged Care Award on the COE measure and at Levels 1–3 on the EEH measure remain below the low paid threshold. To the extent that the further minimum pay increases proposed in this decision will improve the remuneration for employees graded at these levels and their relative living standards, this weighs in favour of the variations.

*Paragraph (aa):* The Commonwealth has, subject to the appropriate determination of operative date and any phasing-in period, made a commitment to funding the pay increases that may arise from this decision. Having regard to these commitments, we are satisfied that the pay variations will not endanger the security of employment for direct care employees in the aged care sector. This is therefore a neutral consideration.

*Paragraph (ab):* For the reasons earlier set out in this decision, the pay variations will ensure equal remuneration for work of equal value and eliminate gender-based undervaluation of work and will thereby provide workplace conditions that facilitate women's full economic participation and contribute towards achieving gender equality. This weighs heavily in favour of making the variations.

*Paragraph (b):* As stated in the *Stage 1 decision*<sup>280</sup> (at paragraph [1028]) and the *Stage 2 reasons* (at paragraph [445]),<sup>281</sup> it is difficult to predict the effect increasing minimum wages will have on collective bargaining in the aged care sector. We accordingly treat this as a neutral factor.

*Paragraph (c):* As we have set out in paragraph [150] above, there is material which indicates that the interim pay increase resulted in increased participation in the aged care workforce, and there is some reason to believe that this will continue if further increases are granted. Accordingly, this weighs in favour of the variations. It may also be the case that improving the capacity for the aged care sector to attract and retain staff, and thereby provide more places and services as required by the community, will support the fuller economic participation and social inclusion of some unpaid carers for whom caring responsibilities currently inhibit their own paid labour force participation.

*Paragraph (d):* We do not consider that this is a relevant consideration in this matter.

*Paragraph (da):* We do not consider that this is a relevant consideration in this matter.

*Paragraph (f):* The variations will have a significant direct impact on employment costs for aged care employers, but this will be wholly or substantially ameliorated by the Commonwealth's funding commitment. It is possible that if the wage adjustments proposed lead to a greater capacity to recruit and retain directly-employed staff, this may result in savings due to a lower degree of labour hire utilisation which, the evidence demonstrates, have significantly higher costs to the employer than directly-employed staff. Lower turnover of employees may also lead to reductions in recruitment and training costs. An improved capacity to attract and retain staff could also improve the capacity for employers to operate at a higher occupancy rate, which might enhance their financial viability. The employer cost aspect of the consideration weighs against the variations but not to a significant degree because of the Commonwealth's funding

commitment and the potential offsetting effects. The other aspects of the consideration are not relevant.

*Paragraph (g):* The removal of the coverage of aged care AINs from the Nurses Award will remove the existing overlap in coverage between the Aged Care Award and the Nurses Award. The other aspects of this consideration are not relevant.

*Paragraph (h):* There is no evidence before us to indicate that the variations will have any material effect upon the national economy. We will therefore treat this as a neutral factor. However, we acknowledge, because of its funding commitment, the decision is likely to come at a significant direct cost to the Commonwealth budget. The Commonwealth has indicated that it will be necessary for it to calculate the cost of this commitment once it has the benefit of this decision and will make further submissions as to operative date and phasing-in once it has undertaken this task. The Commonwealth will have the opportunity in this context to provide us with any material indicating that the cost to the budget will have implications for the national economy.

[212] We likewise consider that the variations are consistent with the achievement of the minimum wages objective. In respect of the considerations in ss 284(1)(a), (aa), (b) and (c), we make the same findings as in relation to ss 134(1)(h), (ab), (c), and (a) respectively. Section 284(1)(e) is not relevant to this matter.

#### **4. Assessment of work value — indirect care employees**

##### *4.1 The issues and the evidence*

[213] In this part of the decision, we deal with whether an increase to the minimum wages of indirect care employees covered by the Aged Care Award is justified by work value reasons and is necessary to achieve the modern awards objective.

[214] The application by the HSU and several individuals to vary the Aged Care Award seeks to increase the minimum wages of all employees covered by that award by 25 per cent, including all indirect care employees. Indirect care employees comprise employees in the classification structure set out in Schedule B to the award who fall within the ‘General and administrative services’ stream or the ‘Food services’ stream. The General and administrative services stream covers employees engaged at varying levels in laundry, cleaning, clerical and administrative, driving, maintenance/handyperson and gardening work. The Food services stream covers employees engaged at varying levels as food services assistants, cooks and chefs. With the exception of chefs, drivers, gardening staff and maintenance workers, all categories of indirect care employees in aged care are predominantly female.<sup>282</sup>

[215] The application is supported by the UWU. The ANMF made no submissions about the quantum of any increase for indirect care employees. The Joint Employers did not express a view on the quantum of any increase but said that ‘any increase to [the wages of indirect care] workers on work value grounds would also be welcomed by the industry’.<sup>283</sup> Submissions were also received from several not-for-profit aged care providers who supported an increase in minimum wages to indirect care employees, provided they were fully funded. Broadly, such increases were sought on the basis that indirect care employees are an indivisible part of the care team, as a matter of equity, to aid attraction and retention, and for workplace cohesion reasons. Submissions from an individual aged care worker and the Victorian and Queensland

Governments were also supportive of increases to minimum wages in the aged care sector. The Australian Industry Group did not express a position on an increase for indirect care employees.

**[216]** The application by the HSU to vary the SCHADS Award similarly seeks to increase the minimum wages for all HCWs providing personal care, domestic assistance or home maintenance to an aged person in a private residence. The application is supported by the Australian Municipal, Administrative, Clerical and Services Union. The application to vary the Nurses Award is not relevant, as it only covers direct care employees. The Joint Employers again took a neutral position in respect of this application.

**[217]** As indicated at the outset of this decision, the Full Bench in the *Stage 1 decision* deferred consideration of indirect care employees in residential facilities under the Aged Care Award, except that it determined to give further consideration as to whether to provide an interim increase for ‘Head Chefs/Cooks’, after directing the parties to confer on the issue.<sup>284</sup> However, the interim increase was awarded to *all* HCWs in aged care covered by the SCHADS Award.<sup>285</sup> In the *Stage 2 decision*, the Full Bench also granted the interim increase to the most senior Food services stream employee at each facility.<sup>286</sup> The minimum wage rates for such employees are now separately specified in clause 14.2 of the Aged Care Award.

**[218]** In the *Stage 1 decision*, while the Full Bench was satisfied that the existing minimum wage rates for direct care employees did not properly compensate employees for the value of the work performed, it said in relation to indirect care employees that ‘the evidence in respect of support and administrative employees is not as clear or compelling and varies as between classification[s]’.<sup>287</sup> The Full Bench also observed that no ‘Spotlight skills’ analysis was undertaken in respect of these employees, unlike direct care employees, meaning that there was no expert evidence identifying that such employees exercised the ‘invisible’ skills that were fundamental to the Full Bench’s findings concerning direct care employees.<sup>288</sup>

**[219]** The 16 findings made by the Full Bench in the *Stage 1 decision*<sup>289</sup> which served as the factual foundation for the interim increase awarded to direct care employees were characterised as ‘general in their character and ... would not necessarily apply consistently across classifications or universally in every instance to all employees concerned.’<sup>290</sup> As part of Stage 1 of the proceedings, the Full Bench received a ‘Consensus Statement’ developed by the Aged Care Workforce Industrial Council to consider the HSU and ANMF applications. The statement is set out in Attachment C to the *Stage 1 decision*.<sup>291</sup> Paragraph 22 of the statement, which concerned indirect care employees, ultimately proved to be controversial in the proceedings. It stated:

The changes in the characteristics of aged care consumers (increased acuity, frailty and incidence of dementia) mean the conditions under which work is done are more challenging for employees providing indirect care support services (such as food services, cleaning or general/administrative work). These workers are an important part of the aged care team. Their work necessitates higher levels of skill when compared to similar workers in other sectors, or to aged care in the past.

**[220]** The Joint Employers submitted at the close of the Stage 1 proceedings:

We do [not] believe that the evidence in this case supports the view that those people in the support functions should be considered to be on a par with the personal care workers. We think the evidence is, with respect to my friends, very clear on that particularly the evidence from the people who work in the laundry, the gardening, some of the people who were undertaking jobs

that I think were colloquially described as sort of handy people. It seems to us to be very clear that, with one exception which I will come to, those people had not been exposed to the great majority of things that all parties seem to have acknowledged about personal care workers. So, we think the evidence does distinguish that group. To the extent that that submission is at odds with paragraph 22, we accept that.<sup>292</sup>

[221] Notwithstanding that the Full Bench in the *Stage 1 decision* stated that it accepted the factual assertions in the Consensus Statement other than where there was reason to doubt their correctness,<sup>293</sup> we consider that the views of stakeholders expressed in the Consensus Statement cannot displace our consideration of whether the evidence led in this matter supports such a finding.

[222] A substantial amount of evidence was provided by indirect care employees covered by the Aged Care Award. This consisted of witness statements made by 16 food services and catering employees, eight laundry employees, five cleaning employees, three gardening employees, three maintenance employees and five administrative employees. There was no evidence adduced from any driver covered by the Aged Care Award. In addition, Ms Carolyn Smith, the Director of Aged Care for the UWU, gave evidence of the results of an online survey of direct and indirect care employees relating to the claim advanced on behalf of indirect care employees. The survey responses, of which there were in excess of 800, described each employee respondent's work, how it had changed, how they worked as a team with other aged care employees and why they believed that indirect care employees in aged care deserved a wage increase. Not surprisingly, the responses overwhelmingly supported such an increase.

[223] The evidence concerning indirect care employees engaged in home care under the SCHADS Award was more limited. Two supervisory employees,<sup>294</sup> an employee who provides domestic and personal support but not personal care,<sup>295</sup> and three witnesses who perform a mix of personal care and domestic shifts,<sup>296</sup> gave evidence.

#### 4.2 *Is there equality in work value between indirect care employees and PCWs/AINs/HCWs?*

[224] The HSU's applications, which seek the same level of pay increases for indirect care employees in residential aged care as for PCWs and AINs, presuppose an equality in work value. The HSU submitted that, whilst indirect care employees have less personal and significantly less physical contact with residents than direct care employees do, there is no basis upon which to distinguish them in respect of the change in their work value because:

- they are nevertheless performing care work of a kind as well as their substantive role;
- the work they do perform requires different, specialised skills because of the particular needs of aged care residents and home care clients;
- their work is similarly subject to a high level of regulation and a corresponding level of skill;
- employees engaged in indirect care roles are also required to apply person-centred approach; and
- the work is performed in the same environment, with the same unique and taxing physical and psychological risks.<sup>297</sup>

[225] However, we consider that such a proposition is, on the evidence, unsustainable. A straightforward comparison between the personal care work involving the exercise of the ‘invisible’ skills the subject of the evidentiary findings in the *Stage 1 decision*<sup>298</sup> which is performed by PCWs, AINs and HCWs, and the work of indirect care employees, readily demonstrates this.

[226] The evidence demonstrates that the typical duties of a PCW include:

- observing, monitoring and documenting residents’ care and behaviour;
- monitoring residents for skin wounds, lesions and bruises and reporting these to the supervisory RN or EN where necessary;
- continence management;
- medication rounds (where competent);
- performing blood pressure checks, blood sugar levels, and weighing residents;
- monitoring bowel movements and urination, collecting a urine or stool sample if necessary, and reporting to the RN where necessary;
- turning residents to avoid pressure sores;
- assisting residents with toileting, showering and dressing;
- assisting residents to the dining area for meals, including serving meals and beverages, and feeding residents (ranging from supervising the dining room to actual feeding);
- monitoring fluid intake;
- undertaking fluid rounds;
- undertaking cleaning duties including bed making and dealing with incontinence by stripping beds and disposing of incontinence pads;
- keeping residents occupied with activities and entertainment;
- managing behaviours (for example when residents become violent or distressed);
- resettling residents when they wake during the night, or are distressed, crying or in need of support;
- observing emotional and mental health;
- responding to enquiries about residents from families; and
- completing administrative tasks.<sup>299</sup>

[227] For PCWs and AINs, the duties described above are performed for nearly the entire duration of their shifts, every shift. Nearly all of the above duties involve, to a very large degree, the exercise of the ‘invisible’ skills described in the Junor Report.

[228] 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. In relation to administrative employees, the evidence shows that they typically perform the following duties:

- administration and receptionist duties such as answering telephone and front desk enquiries, dealing with mail and email, filing, managing visitor bookings and sign-in processes;
- assisting staff and residents with any administration requests;
- rostering of employees;
- ordering stock, such as stationery (but not medication or food);
- liaising with family members regarding non-clinical issues;

- maintaining the client management system;
- arranging and recording onsite and offsite visits for family members, residents, allied services workers and any other visitors;
- logging and monitoring requests for minor maintenance (such as broken blinds, light globes);
- invoicing, receipting, paying bills, payroll and banking;<sup>300</sup>
- processing admissions and discharges;<sup>301</sup> and
- acting as the first point of contact for residents' families.<sup>302</sup>

[229] Additionally, some administrative staff are responsible for escorting visitors or potential residents on tours of the facility,<sup>303</sup> and may also be responsible for screening visitors entering the facility<sup>304</sup> and ensuring RATs are undertaken.<sup>305</sup>

[230] The typical duties of kitchen and food services employees include:

- preparing and cooking meals for clients (predominantly lunch and dinner);
- organising the meals for breakfast service;
- preparing meals to meet special dietary requirements, including allergies/intolerances and texture modified meals;
- serving food to residents;
- maintaining a high standard of food hygiene and safety;
- maintaining a clean kitchen and service area;
- managing kitchen staff, depending on the size of the facility;
- assessing and maintaining stock levels;
- completing food safety audits and dealing with the regulators on food safety;
- completing relevant documentation for the Food Safety Program; and
- completing stock ordering when required.<sup>306</sup>

[231] Their roles also include monitoring food temperatures, completing audits and documentation for food safety programs and adhering to dietary requirements in accordance with the International Dysphagia Diet Standardisation Initiative guidelines for food texture and consistency requirements.

[232] Some important incidents of the work performed by kitchen and food services employees do, however, vary substantially across facilities. A witness from one facility said that serving food to residents generally involves putting the meal out in front of residents who are having their meal in the dining room, and would rarely involve actually feeding the resident, other than where the kitchen employee is a qualified personal carer.<sup>307</sup> However, that same witness gave evidence that kitchenhands at their facility are employed as 'care service employees', so they are expected to interact with residents every day.<sup>308</sup> In some facilities, catering staff deliver meals in a trolley to the relevant dining room, and the PCWs take the food to the residents.<sup>309</sup> Where residents choose to eat in their rooms, in some cases direct care employees load up the meals on a trolley and take it to their rooms,<sup>310</sup> while in other cases it is the food services employees who deliver the meals to residents in their rooms.<sup>311</sup> Employees serving food to residents can be expected to monitor and report to RNs any observed changes to residents' eating patterns,<sup>312</sup> such as if residents are not eating their meals.

[233] Cleaning work in residential facilities is generally split between PCWs, as identified in the overview of their duties above, and dedicated cleaning employees. The cleaning tasks

performed by PCWs to which we have earlier referred may be characterised as more personal and intimate in nature. Dedicated cleaners' duties include dusting, sweeping, mopping floors and surfaces in rooms, cleaning bathrooms and communal areas, disposing of rubbish around the facility, and infection control of touch points such as disinfecting hand railings.<sup>313</sup> Cleaning duties can sometimes be directly responsive to the behaviours of residents; for example, one cleaner gave evidence concerning an incident in which a resident with dementia walked into another resident's room and urinated on the floor, which she was required to clean up.<sup>314</sup>

**[234]** Laundry work at residential facilities may be done entirely in-house or with the assistance of a contracted laundry service. Where there is a contracted laundry service, this commonly deals with bed linen and towels and the like, with residents' personal clothing being laundered within the facility by laundry employees. Direct laundry employees broadly follow a daily routine of collecting laundry (from bedrooms, dining rooms and residents' personal clothing), sorting, washing and drying the laundry (including some ironing of clothing), and returning the laundry to the relevant area. This may in some cases include returning items to directly to each resident's room.<sup>315</sup> The equipment used by employees is largely industrial equipment, and heavily soiled and infectious items are generally placed into dissoluble coloured bags.<sup>316</sup>

**[235]** Gardening work, where performed by direct employees, significantly varies depending on the size and nature of the residential facility. Typical gardening maintenance duties include watering, weed control, lawn control, rubbish collection, pest control, cleaning spaces such as courtyards, garden design (with a focus on resident needs), plant care and ordering and receiving deliveries.<sup>317</sup> There is generally a high focus on safety and risk management given the vulnerability of residents.<sup>318</sup> Design considerations can include plant selection, presence of allergens or irritants, accessibility and mobility. Beyond these considerations, the evidence does not suggest that the work performed by gardeners in aged care differs significantly from similar work performed in other domestic or commercial settings.

**[236]** Maintenance employees, where directly engaged, undertake a diverse range of preventative and routine maintenance tasks and attending to jobs that arise such as blown light globes, faulty call buzzers and other equipment. A contractor may be engaged if specialist work is involved. Typical maintenance duties include:

- performing various maintenance tasks in the grounds and buildings, such as fixing room buzzers, broken beds, lights, hanging pictures, painting, cleaning solar panels, fixing thermostats, commercial ovens, mixers, dishwashers and cool rooms;
- servicing mobility aids such as wheelchairs, wheelie walkers and mobility scooters;
- testing and tagging electronic equipment and checking emergency exit signs to assist the facility to meet accreditation requirements;
- organising for an external contractor to perform certain jobs such as air-conditioning work where necessary;
- providing recommendations on contractor quotes to management;
- purchasing new parts with approval from the supervisor;
- conducting health and safety assessments, including Job Hazard Analysis sheets before performing jobs;
- looking out for health and safety risks such as trip hazards, and isolating the area and reporting them to the supervisor when necessary; and

- relaying information to carers, RNs and the receptionist about maintenance jobs and seeking clarification on jobs they have logged in the system.<sup>319</sup>

[237] 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.

[238] Our overview of the above categories of indirect care employees treats them as distinct, but it is necessary to observe that there is some evidence of indirect care employees performing overlapping roles. In some of the residential facilities described in the evidence, the work of cleaning and food service is combined, with staff being required to undertake both duties in the same shift rather than having dedicated staff for each role. Such staff, for example, may be required to distribute breakfasts to residents’ rooms and the dining room and then resume cleaning duties.<sup>320</sup> However, we do not consider that this changes the overall character of the work for the purpose of the assessment of work value relative to PCWs and AINs.

[239] There was also evidence from a small number of indirect care employees that they sometimes undertake direct care work. For example, Anita Field, in relation to her role as a chef, gave evidence that she also acts as a PCW and is the only person at the facility where she works until 10:00 am.<sup>321</sup> Another witness described changing and showering a resident who was faecal incontinent and had an accident while she was taking them back to their room after a meal because the direct care employees were busy.<sup>322</sup> However, these witnesses were generally also trained as PCWs.<sup>323</sup> In some facilities some indirect care employees are required to also be PCWs.<sup>324</sup> For example, at one residential facility described in the evidence, all employees (including those in the kitchen, food services and the laundry) are required to obtain a Certificate III and are required to be available to perform care work.<sup>325</sup> These specific circumstances do not justify any general reassessment of the value of the work of indirect care employees, and are appropriately accommodated by the application of the ‘principal purpose’ test to determine how the employee should be classified<sup>326</sup> and/or the higher duties provisions in clause 27 of the Aged Care Award.

[240] Accordingly, we reject the HSU’s claim, supported by the UWU, that indirect care employees covered by the Aged Care Award should be the subject of a common classification structure with common pay rates alongside PCWs and AINs. That of course does not conclude our work value consideration of indirect care employees, and we will next consider whether indirect care employees have been the subject of work value changes or undervaluation of work (either generally or in respect of particular categories) that constitute work value reasons for any adjustment to their rates of pay.

[241] In respect of home care work covered by the SCHADS Award, the position is different. In the *Stage 1 decision*, the Full Bench drew no distinction between direct and indirect care work for the purpose of the award of the interim increase to HCWs,<sup>327</sup> and we see no reason to depart from that position in this decision. The (somewhat limited) evidence suggests that even where HCWs engage in work that is strictly classified as ‘domestic care’ rather than ‘personal care’ (noting that some do a mix of personal and domestic care shifts)<sup>328</sup>, it is still necessary for the employee to conduct their duties in the client’s home and engage closely with the client in a way that requires the exercise of ‘invisible’ skills. Jennifer Wood, a HCW who provides



‘domestic and personal support’, but not personal care as such, gave evidence in Stage 1 of the proceedings that she performs the following services during a typical 1–2 hour visit to a client:

- domestic assistance in the client’s home (changing bed linen, doing laundry, vacuuming and mopping and cleaning bathrooms);
- transportation services (to and from medical appointments, for example);
- shopping,
- community access,
- social support (such as taking a client for a walk and speaking and looking at photos with a client), and
- meal preparation.<sup>329</sup>

[242] The effective performance of such duties in close liaison with clients plainly requires the exercise of skills of interpersonal and contextual awareness, verbal and non-verbal communication and emotion management. This makes a distinction between direct and indirect care work in the home care context inutile for the purpose of the work value assessment of HCWs. Therefore, the classifications and rates of pay set out in paragraph [199] above will apply to all HCWs covered by the SCHADS Award.

#### 4.3 *General work value changes — IPC and dementia and other training*

[243] The evidence satisfies us that there have been work value changes of general applicability to indirect care employees covered by the Aged Care Award in two areas. The first concerns IPC changes affecting work which have become permanent in the wake of the COVID-19 pandemic. We have earlier described how these changes have affected the work of PCWs, AINs and HCWs such as to constitute an increase in work value that is not comprehended by the current award rates of pay. We consider that the same conclusion applies to indirect care employees.

[244] In addition to the general evidence concerning post-pandemic IPC measures to which we have already referred, specific evidence given by indirect care employees demonstrates the way in which such IPC measures have similarly affected the skills, training and work environment of indirect care employees. That evidence shows that, to the extent that residential aged care employers have imposed requirements, whether on an ongoing basis or for particular periods or in particular parts of their facilities, for staff to wear PPE (involving the range of protocols concerning donning and doffing PPE) or undertake RATs, this applies equally to direct and indirect care employees. In addition, IPC training requirements<sup>330</sup> and protocols for when an employee contracts COVID-19 apply equally to indirect care employees. The IPC training is often delivered online and each module takes around 30–60 minutes to complete.<sup>331</sup>

[245] In addition, other IPC measures have affected indirect care employees more specifically. For example, Catherine Watson, an administrative employee, gave evidence of having additional duties with additional screening requirements for visitors, and assisting family and friends who are visiting the facility put on full PPE, which is a requirement if they are visiting a COVID-19 positive resident.<sup>332</sup>

[246] For cleaning staff, the greater focus on IPC has had a particular impact, with more rigorous and extensive requirements and protocols around cleaning such as the frequency of high touch-point areas, and protocols when an outbreak occurs. Rhonda Jones, a cleaner, gave evidence of stricter IPC protocols arising from COVID-19, including different chemicals for

cleaning, and segregating off a resident's room after they have tested positive, and a requirement for anyone entering the room, including cleaning staff, to wear full PPE (face masks, face shields and gowns). She also gave evidence that she is required to wear a N95 mask at all times on shift, which makes communicating with residents more difficult. She is also required to undertake a RAT before every shift.<sup>333</sup>

[247] Carina Moll, a laundry and cleaning employee, also gave evidence that when a resident contracts COVID-19, their laundry is required to be washed separately which adds to the workload.<sup>334</sup> She also said that, if a resident becomes infected, the special IPC protocols apply equally to her such that she is required to don and doff full PPE when entering/leaving their room, including when delivering or collecting laundry or cleaning their room.<sup>335</sup> Materials such as cloths and mops used for cleaning the resident's room must be segregated and separated into different coloured laundry bags that indicate contamination, and additional cleaning, disinfecting and sanitising is required.<sup>336</sup>

[248] The second area of work value consideration concerns generally-applicable requirements for dementia training and other specific types of training applicable to any interactions with residents. The evidence indicates that employers now require indirect care employees to undertake training on the Aged Care Quality Standards<sup>337</sup> (Quality Standards) and that most indirect care employees undertake dementia training. Catherine Watson, an administrative coordinator,<sup>338</sup> Fleur Collins, head of housekeeping and cleaning,<sup>339</sup> Michelle Giaquinto, a catering assistant,<sup>340</sup> Karen Marshall, in hospitality services,<sup>341</sup> Jessica Hood, a housekeeper and gardener,<sup>342</sup> Julie Holmes, a food services assistant,<sup>343</sup> Bianca Wren, also a food services assistant,<sup>344</sup> and Heather Pumpa, a hospitality assistant,<sup>345</sup> all gave evidence concerning the general applicability of a requirement to undertake dementia training at prescribed intervals. Mr Mamarelis similarly gave evidence that all classes of employees at Whiddon are required to undertake 'Dementia; an introduction' as a compulsory training module.<sup>346</sup> This training requires employees to have a basic understanding of the challenging behaviours of residents with dementia and to apply this in the performance of their duties where any interaction with residents is required. This is to be understood in the context of the higher levels of dementia now occurring in residential facilities, as found in the *Stage 1 decision*.<sup>347</sup>

[249] Other resident-oriented forms of training are commonly required of indirect care employees. Training in the serious incident response scheme (SIRS) for indirect care employees is now widespread. Ms Riboldi<sup>348</sup> and Mr Mamarelis<sup>349</sup> both gave evidence that all their indirect care employees are required to undergo SIRS training. Under SIRS, *direct* care employees are required to document, investigate and manage incidents and near misses. However, *any* employee who finds a reportable incident is required to complete the first part of the mandated report, with nursing staff completing the remainder.<sup>350</sup>

[250] In some facilities, all employees are required to have a First Aid Certificate.<sup>351</sup> Many employers require significantly more mandatory training in areas such as elder abuse, customer service, mandatory reporting, feedback complaint handling, responding to incidents, interaction with residents, interaction with families and manual handling.<sup>352</sup> Much of the mandatory training is required to be undertaken annually, and the need for ongoing mandatory training has increased following the Royal Commission.

[251] These two facets of the work of the various categories of indirect care employees in aged care distinguish them from their equivalents in other industry sectors and are not comprehended by the current award rates of pay. To that extent, the award rates of pay do not

properly reflect the work value of indirect care employees. We consider that a modest adjustment in the rates of pay for indirect care employees is sufficient to compensate for this and, accordingly, the rates of pay set out in clause 14.1 of the Aged Care Award shall be increased by three per cent.

#### 4.4 *Specific work value considerations — food service, cleaning and laundry employees*

[252] As we have earlier found, it is apparent that indirect care employees do not perform work of equivalent value to direct care employees because they do not exercise the ‘invisible’ skills identified in the Junor Report as a fundamental aspect of their roles. However, the evidence does indicate that some categories of indirect care employees exercise similar or analogous skills at least to some degree.

[253] As a general proposition, the evidence is that indirect care employees are encouraged, if not required, to interact with residents and their families, and they do so in varying ways and to varying degrees across classifications. All employees are expected to, and do, engage with residents in a respectful and caring manner in the course of their work. This partly reflects a shift to a resident-focused and holistic approach to care and an awareness that the employees are working in residents’ ‘homes’. The interactions are not just task-related, and form part of the broader social support residents receive. As an employer witness, Ms Riboldi said that the interaction may be small ‘but it can make a real difference to the quality of a resident’s day’.<sup>353</sup> Many of the employee witnesses gave evidence about having regular interactions with residents’ and community care clients’ families, with several giving evidence that family expectations and the level of engagement with families required of care staff have increased.

[254] However, we do not consider that this aspect of indirect care employees’ work rises to the level of an across-the-board work value reason for an increase to minimum remuneration. For many categories of indirect care employees, interactions with residents do not form a significant part of their duties, with most of their duties being performed out of contact with residents. Where contact does occur, the interactions are not generally at the level regularly required on the part of a direct care employee. Similarly, interactions with residents’ family are generally incidental engagement and informal conversation such as giving a general update or observation about the resident rather than part of their formal role. It is not generally the responsibility of indirect care employees to communicate formally with residents’ families.<sup>354</sup> Requests of a clinical nature are expected to be referred to direct care employees.<sup>355</sup>

[255] It may be accepted that indirect care employees may be confronted with difficult interactions with residents from time to time. For example, Eugene Basciuk, a maintenance tradesperson, gave evidence of a violent incident he experienced where a resident began thrusting her walker into his back aggressively.<sup>356</sup> Lynette Flegg, an administration worker, gave evidence of being grabbed on the wrist by a resident<sup>357</sup> and confined to an office unable to leave while a resident was throwing a chair around. Similarly, Jane Wahl, a gardener, described her need to defuse the aggressive behaviour of a resident with dementia,<sup>358</sup> and administration officer Catherine Watson described occasions when a resident picked up a table and rammed it towards her, picked up and threatened to throw a vase at her, and the need to try to talk calmly to the resident and distract or divert them with something else.<sup>359</sup> However, the evidence does not suggest that incidents like these are embedded into the daily duties of employees and, in any event, such incidents are mostly demonstrative of the application of the skills acquired in dementia training for which we already propose to award an increase in minimum remuneration.

[256] However, for three categories of indirect care employees — food services assistants, cleaning staff and laundry staff — we consider that the evidence demonstrates that 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. We take into account in this context that these groups of employees are overwhelmingly female, at 81.4, 88.3 and 88.4 per cent respectively.<sup>360</sup> These proportions are substantially higher than for the same occupations outside of the aged care sector.

[257] In respect of food services assistants — classified after the first three months’ of employment at Level 2 — the evidence demonstrates substantial and frequent interaction between such employees and residents, although the way in which this occurs varies across facilities. Most commonly, the interaction occurs in a planned way (serving food to residents) and incidentally (when walking around the facility) and in the dining area. As residents are not allowed in the kitchen, interaction with residents occurs commonly when walking around the dining room or elsewhere in the facility where residents come up and ask for help, have an enquiry or request or ‘just for a chat’.<sup>361</sup> One food services assistant witness, Alison Guevara, gave evidence that she spends the ‘majority of my time with the residents through my shift (morning or afternoon) as their entire day is centred around meals.’<sup>362</sup> Ms Guevara also explained that because of the high interaction with residents, she ‘needs to be aware of [their] needs especially when it comes to eating to ensure their quality of life and safety. I need to identify any signs of illness so I can notify the RNs for assistance or if the illness isn’t included in their care assessment.’<sup>363</sup> Another such witness, Heather Pampa, explained that over time more residents are having their meals in their rooms, and this means that she spends more time in residents’ rooms serving breakfast, moving about the facility and interacting with residents than in the past.<sup>364</sup>

[258] The type of higher-level interactions that may occur with residents in the course of serving them with food was described by Carol Austen, a kitchenhand/cook, as follows:

I need to closely observe the residents. I need to learn their personal habits and personality in order to maximise their experience at Uniting. I need to have emotional intelligence to recognize what is wrong and what will be a reasonable solution.

Often this is a matter of calming people down before they become very upset. So, it is important to be able to recognise the subtle changes in a person's disposition and respond to those in anticipation of risk of deterioration in their mood or being triggered into more serious upset. Noticing emotional vulnerabilities and deescalating is an essential skill. The de-escalation is especially difficult as it is often in the circumstance of various stages of dementia or other cognitive impairment.

There is a real risk of violence. This includes violence by residents against other residents and the risk of violence to staff. This is a sad reality of dementia. It makes de-escalation skills all the more important. From time to time this level of serious agitation does still happen. We try in these circumstances to remove the resident from the person they are attacking. We try to calm them down by talking to them away from the other residents. Once separated the calming is relatively easy, by contrast to the preventative action, as someone at that stage of illness will in-part be calmed by the memory loss once out of the situation.

We have one resident, a woman with dementia, who does not like sitting at a table with men. We do not know why that is, but she will become violent towards them and [it is] very distressing if she does. So we need to be alert and proactive. We will suggest, ‘Oh [name redacted] would

you like to sit with you.’ [W]e have been trying to help her develop a pattern of bringing her in and sitting her at a table with other ladies. We bring her in and sit her down at the same table every day. Through developing a regular and stable pattern, she is starting to self-direct to that table.

We also have one resident who likes her own seat. Residents may unwittingly sit in her spot. She becomes very upset when that happens and the resident who has sat there may refuse to move. We try to keep an eye out to avoid this. If that happens, I talk to her, and tell her that we will keep a closer eye out for that particular resident in the future. I apologise and try to encourage her to sit somewhere else, with her friends or people she is comfortable with. This will work sometimes and other times she will return to her room and be served there.

Many residents respond poorly to change. We have had to move from the dining room to the hall temporarily for renovations and many residents will arrive shaking and distressed. It takes a great deal of effort, care and skill to calm them down and reassure them.

We have one resident who comes in for each meal service. She will come in and loudly say things like ‘oh him - he’ a bloody idiot.’ If she comes in early, it is an indicator that she is having a good day. If she comes in later, it is a sign that she is having a bad day. She will sometimes arrive with three sets of clothes on, because she has become flustered and upset while getting dressed. This is a sign that she is having a particularly bad day. If I think she is having a bad day, I will approach her and have a gentle conversation and try to calm her down. Spending time with her in that way calms her down. Some other residents are very offended by what she says.

These skills of dealing with residents has been a part of my job since I first started. It is not something that I learned just because of my care duties. It is a necessary part of the job in aged care that involves direct interaction with residents.<sup>365</sup>

**[259]** There was some evidence that some food services assistants are expected to attend the morning hand-over meeting at which the RN provides updates on each resident’s condition and are instructed to adjust their interactions with residents based on the updates provided.<sup>366</sup> This may involve, for example, ‘keeping an eye out for a certain resident who may not be feeling well or being especially attentive and providing additional support to resident with a recent cancer diagnosis who is feeling upset’.<sup>367</sup>

**[260]** Cleaning employees, who are also classified at Level 2, are expected to, and do, engage with residents when cleaning their room and move around the facility, and see it as part of their role to create a ‘homely atmosphere’.<sup>368</sup> In performing their role, they are likely to be around residents to a higher degree than other indirect care employees. Ms Riboldi gave evidence that, at RFBI, the residents ‘love their cleaners’.<sup>369</sup> Rhonda Jones gave an example in her evidence of a particular resident who always wanted to hold her hand and tell her stories when she entered their room to clean, and she considered it an important part of her role to provide emotional support for residents.<sup>370</sup> This occurs in a context where cleaning employees are conscious that they are in the resident’s home and need to respect their space. Mr Brockhaus said that his expectation as an employer was that cleaners would engage with the residents when cleaning their rooms and more generally around the facility through general conversation or helping them getting a glass of water.<sup>371</sup> Mr Brockhaus’ evidence was that, at Buckland, cleaning staff are required to meet with their manager at the start of the day. This will involve discussing the residents they will encounter in order to prepare and update the cleaners as to what they may see, such as a resident in palliative care, so they can approach the resident with care. Training in palliative care and elder abuse is provided to assist them.<sup>372</sup> The evidence generally indicates

that cleaning employees engage with residents whenever cleaning their rooms and other communal areas, which can be most of their shifts.

[261] Laundry employees, who are likewise classified at Level 2, primarily engage with residents when collecting and returning personal laundry to residents' rooms.<sup>373</sup> For example, one employer witness gave evidence that at the end of the shift, laundry staff distribute the resident's clothing and 'have a chat with the resident'.<sup>374</sup> However, engagement with residents may rise to a higher level than this. One laundry employee, Mitchell Wood, gave evidence that the diversional therapist at his facility has asked him and other laundry employees to allow a particular resident help them in their duties 'in ways that are safe', and that they do so in order to make the resident happy.<sup>375</sup> Another laundry worker, Carolyn Moorfield, gave evidence of the need to be aware of the behaviours of residents with dementia, and the strategies she adopts in response to a resident who can shout and be aggressive when she is delivering laundry to their room, to make them as comfortable as possible with her presence.<sup>376</sup> The distinction to be made between this and the incidents involving administrative, maintenance and gardening employees described earlier is that interactions with residents in their own rooms is a daily feature of laundry employees' work.

[262] This type of daily contact with residents, and the degree of familiarity carried with it, may be emotionally demanding. Laundry worker Teresa Laidlaw gave evidence of her experience in visiting rooms of palliating residents and speaking to them, being upset when a resident passes, and it being very difficult to 'switch off'.<sup>377</sup> This evidence is to be weighed in the context of the findings made by the Full Bench in the *Stage 1 decision* that more residents and clients in aged care require palliative care.<sup>378</sup> Professor Kathleen Eagar's expert evidence in Stage 1 of the proceedings was that approximately one-third of residents die each year, and she described the impact of these deaths on aged care workers.<sup>379</sup>

[263] More generally, laundry employees are expected to be responsive to individual residents' needs in the sense that if, for example, a resident has a particular preference for how their clothes are washed and folded, the temperature of the wash, or particular items they want ironed, they are expected to meet that preference.

[264] Arising from the type of interactions with residents described above, indirect care employees in the above categories commonly reported that an important part of their role is reporting concerns or observations about residents to direct care employees.<sup>380</sup> This is recognised as an important aspect of their work and part of the caring environment for residents.<sup>381</sup> For example, Mr Brockhaus' evidence was that indirect care employees get to know a resident and build up some familiarity and, if they observe something to be 'off' with a resident, such as a mood change, they are expected to raise it with direct care employees.<sup>382</sup> Similarly, Ms Riboldi's evidence was that the continuous and ongoing relationships formed with residents enables indirect care employees to observe changes in residents' behaviour and escalate them to direct care employees where appropriate; for example, catering staff may notice if a resident is not eating, or having trouble doing so.<sup>383</sup>

[265] Because of their degree of proximity to residents, cleaning staff, laundry staff and particularly food services staff may be present when residents have falls or incidents of a similar nature occur. Clear processes are in place identifying the expectations and bounds of indirect care employees responding to incidents.<sup>384</sup> In relation to a resident who falls, this consistently involves immediately calling for the appropriate direct care employees and remaining with the

resident until they arrive. They may seek to reassure a resident and keep them calm but are trained to not operate outside the scope of their role and to not touch the resident.<sup>385</sup>

[266] One food services assistant witness recounted using her skills to persuade a resident who was moving and at risk of falling to sit back down to avoid a fall.<sup>386</sup> She also described occasions where, if residents have been refusing to take their medication, the RN has asked her to give the medication to the resident under their supervision because of the rapport she has with that resident.<sup>387</sup> There was also evidence from a cleaning employee that the RNs would occasionally ask him to supervise the dining room for short periods of time while they take a break,<sup>388</sup> and evidence from a different cleaning employee that ‘there have been occasions when I am required to assist with personal care work’, including helping a resident with dementia undress and enter the shower when the resident refused to have a nurse do so.<sup>389</sup>

[267] The evidence summarised above demonstrates to our satisfaction that food services assistants, cleaning staff and laundry staff have, as a regular and fundamental part of their daily duties, a need to interact with residents in a way that requires the exercise of the skills of interpersonal and contextual awareness, verbal and non-verbal communication and emotion management described in the Junor Report. These skills are exercised in the context of the move to person-centred care referred to in the *Stage 1 decision*<sup>390</sup> and adherence to the Quality Standards. This distinguishes the work they do from that of their equivalents outside the aged care setting, who do not generally have to deal with persons with dementia, or who are in palliative care, or who are otherwise vulnerable, frail and dependent. We consider that this constitutes a work value reason for an adjustment to their minimum rates of pay in the Aged Care Award in addition to the general increase we propose for all indirect care employees. However, in reaching this conclusion we emphasise again that these employees do not exercise these ‘invisible’ skills anywhere near to the degree and extent that PCWs, HCWs and AINs do and, accordingly, the appropriate wages adjustment will be modest. We discuss the quantum of this adjustment and how it will be effected below.

#### 4.5 *Most senior food service employees*

[268] As we have earlier outlined, the Full Bench in the *Stage 2 decision* determined that the interim 15 per cent increase should be extended to Head Chefs/Cooks graded at Levels 4 to 7 in the Aged Care Award<sup>391</sup> (that is, trade-qualified senior cooks, chefs, senior chefs and chef/food services supervisors) where they are the most senior food services employee in the residential facility.<sup>392</sup> This was a matter that was agreed by the parties to the proceedings on the basis that it would be funded by the Commonwealth.<sup>393</sup> The Full Bench said in the *Stage 2 reasons* that ‘we are satisfied that the increase for Head Chefs/Cooks is justified on work value grounds’<sup>394</sup> without further specifying what those grounds were. Unlike for PCWs, AINs and HCWs in the *Stage 1 decision*, the Full Bench did not indicate in the *Stage 2 reasons* that any further consideration of the work value of Head Chefs/Cooks was required.

[269] In the *Stage 1 decision*, one of the 16 agreed contentions the Full Bench adopted as its findings was that there is an increased emphasis in residential aged care on diet and nutrition for aged care residents.<sup>395</sup> The evidence in Stage 1 of the proceedings indicated that this has been in part driven by the consumer-directed care focus of the Quality Standards as well as the greater acuity of residents, with a corresponding higher proportion of residents requiring specialised diets.<sup>396</sup> This has meant that food services employees are expected to provide greater choice, including alternative meals when residents are not satisfied with the food provided, and listen and respond to resident and family feedback.<sup>397</sup>

**[270]** The need to meet these requirements means that chefs in aged care facilities have responsibilities beyond those in the general hospitality industry. The proportion of residents with special dietary requirements has increased, with one chef witness in Stage 1, Mark Castieau, stating that 50 per cent of residents now require modified diets.<sup>398</sup> Another Stage 1 chef witness, Darren Kent, gave detailed evidence as to how the Quality Standards have affected his work:

Some of the ways that the Standards affect my work include:

Standard 1 — Consumer dignity and choice

(a) The effect of this Standard is that residents are entitled to expect more choices in their menu.

(b) When I started at the Aranda Facility, menus were smaller and more basic. Now, there is a requirement to offer a wider variety of more complex meals, including for snacks, morning tea and afternoon tea.

(c) Residents expect more ‘home style’ cooking and so more meals are cooked in[-]house, rather than being purchased and brought into the facility.

(d) The effect of this is that more skills are needed to cook the dishes on offer to the residents, and as Head Chef I need to make sure my team and I have the skills to deliver that.

Standard 2 — Ongoing assessment and planning with consumers

(e) Residents now have a greater say in the menus offered to them.

(f) At the Calwell Facility, menus must be approved by residents. This involves meeting the residents to discuss and negotiate proposed meal plans for their approval.

Standard 6 — Feedback and complaints

(g) There is a greater focus on treating feedback and complaints from residents seriously. When I receive a complaint from a resident or their family, I need to act on the complaint and be able to show that it has been dealt with.

(h) The action I take in response to a complaint could be changing the menu or providing a new or additional meal option for the resident.

(i) There is a complaints process in place with forms for residents or families to provide feedback or raise issues with the food.

(j) I acknowledge any complaints received and take action to try to resolve the complaint and satisfy the resident.

(k) Also, it is not simply a matter of waiting to see if you get a complaint. When I supervise meal service I actively walk around to talk to residents and ask for their feedback about the food.

(l) This is very different to when I first started working in aged care. Back then, feedback was not really sought or given. If feedback was given, it was unlikely that it would be actioned in a meaningful way.<sup>399</sup>



[271] Mr Castieau also gave evidence that Standard 3.3.1 of the *Australia New Zealand Food Standards Code*, ‘Food Safety Programs for Food Service to Vulnerable Persons’ (Food Standards), introduced in 2011, allowed for resident choice and are stricter and harder to comply with.<sup>400</sup> He also observed an increased frequency and formality of food safety audits.<sup>401</sup>

[272] The evidence demonstrated that the greater focus on meeting the Quality Standards and the Food Standards affects the work of chefs by requiring direct and regular engagement with residents to plan menus, providing residents with greater choices in their menu, and a greater focus on seeking and responding to feedback and complaints. For example, a chef witness gave evidence that he attends regular formal meetings with the Care Manager or dietitian to discuss and resolve concerns about a resident’s diet.<sup>402</sup> He also gave evidence that he monitors and reports to RNs about residents’ eating habits, such as not eating and returning plates of food. Such feedback is documented, investigated and, where necessary, the relevant resident’s care plan is amended.<sup>403</sup>

[273] These work value changes are plainly significant and justified the award of the 15 per cent increase to Head Chefs/Cooks in the *Stage 2 decision*. However, we are not satisfied that the evidence adduced in Stage 1 of the proceedings demonstrates any work value reasons for the award of any further increase, and there was little additional evidence concerning the work of Head Chefs/Cooks in Stage 3. There is nothing which suggests that Head Chefs/Cooks in aged care have been the subject of gender undervaluation, noting that the occupational data shows that they are majority male (59 per cent).<sup>404</sup> Nor did the evidence demonstrate that Head Chefs/Cooks exercise the type of ‘invisible’ skills which have constituted the primary basis for the award of additional pay increases to PCWs, AINs and HCWs. There was some limited evidence that Head Chefs/Cooks sometimes perform duties related to personal care of residents. One witness gave evidence that the chef is responsible for supervising residents in the dining room, as a PCW is not always present, and if an incident occurred such as a resident choking, he would press an alarm to call a PCW.<sup>405</sup> However, the evidence did not suggest that this is generally the case for Head Chefs/Cooks and, in any event, this witness’ evidence makes it clear that the primary responsibility for the welfare of residents in the dining room remained with PCWs. Another witness engaged as a chef gave evidence that, during part of her shift, she acts as an AIN performing medication rounds, which she is qualified to do.<sup>406</sup> However, this does not appear to be a usual situation applicable to chefs and is one which we consider would properly be addressed by the higher duties provision in clause 27 of the Aged Care Award.

[274] For the above reasons, we are not satisfied that there are work value reasons justifying any additional award pay rate increases for Head Chefs/Cooks. They will remain separately classified as ‘most senior food services employee[s]’ in clause 14.2 and retain their current rates of pay.

#### 4.6 *Modifications to classification structure in the Aged Care Award for indirect care employees*

[275] As earlier stated, we have decided to establish a separate classification structure for PCWs/AINs under the Aged Care Award, with the consequence that indirect care employees (other than ‘most senior food services employees’) will likewise be placed in their own classification structure. We do not consider that, in order to give effect to the conclusions we have reached concerning the work value of indirect care employees, any wholesale change to the existing classification structure provided for in clause 14.1 of and Schedule B to the Aged Care Award is required. The three per cent increase to the minimum rates for all indirect care

employees which we contemplate can obviously be effected simply by varying the wage rates specified in clause 14.1. In respect of those categories of indirect care employees for whom we consider a higher increase is justified on work value grounds, we think the appropriate course is to alter their placement within the existing classification structure. The classification structure in Schedule B sets out, for each classification, a broad description of the skills, responsibilities required, and then specifies a number of ‘indicative tasks’. These ‘indicative tasks’ generally comprise a short job descriptor so that, for example, the indicative tasks for Level 1 (less than three months’ work experience in the industry) are General Clerk, Laundry hand, Cleaner and Assistant gardener (under the column heading ‘General and administrative services’) and Food services assistant (under the heading ‘Food services’). In practice, the specified indicative tasks are the prime determinant of the classification of indirect care employees. In order to give effect to our work value conclusion, we will move the ‘indicative tasks’ of Laundry hand, Cleaner and Food services assistant, which are currently placed in Level 2 for employees with at least three months’ work experience in the industry (clause B.1.2) to Level 3 (clause B.1.3). This will result in a total increase for employees in these roles of 6.96 per cent, inclusive of the three per cent increase we award to indirect care employees generally.

[276] We consider that the additional minimum rate increases resulting from the above adjustments to the classification structure are justified by the work value reasons we have earlier identified. 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, result are free of assumptions based on gender.

#### 4.7 *Modern awards objective and minimum wages objective*

[277] We are satisfied that the proposed variations to the classifications and rates of pay for indirect care employees are necessary to achieve the modern awards objective. In respect of the matters specified in s 134(1) of the FW Act which we are required to take into account, we make the same findings concerning paragraphs (a), (aa), (b), (d), (da), (f) and (h) of the subsection as in paragraph [211] above for direct care employees. In relation to paragraph (ab), we consider that insofar as we propose to increase minimum pay rates for those categories of indirect care employees who, to some degree, exercise gendered ‘invisible’ skills, this will assist in ensuring equal remuneration for work of equal value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women’s full economic participation, and thus will assist in achieving gender equality. This weighs in favour of the variations. As to paragraph (c), it is a realistic possibility that award wage increases for indirect care employees will result in greater participation in the indirect aged care workforce, and this weighs at least to some degree in favour of the variations. We regard paragraph (g) as a neutral consideration.

[278] We are also satisfied that the variations are consistent with the achievement of the minimum wages objective. We make the same findings concerning ss 284(1)(a), (b), (c) and (e) as we do in respect of direct care employees as set out in paragraph [212] above. In relation to paragraph (aa), we make the same finding as for s 134(1)(ab) immediately above.

### 5. **Next steps**

[279] There are a number of further steps that need to be taken to finalise this matter. *First*, the terms of the substantive award variations identified in this decision need to be finalised. For

this purpose, we publish together with this decision draft determinations varying the Aged Care Award, the Nurses Award and the SCHADS Award intended to give effect to this decision (exclusive of any issues of operative date and phasing in). We will then provide the parties with a period of six weeks from the date of this decision, to **4:00 pm (AEST) on Friday, 26 April 2024**, to file any written submissions commenting upon the draft determinations.

[280] *Second*, in respect of the operative date and any phasing in of the increases, the Commonwealth by correspondence to the Commission dated 7 February 2024 has requested a period of four weeks to formulate its position about this as part of its budget process. Accordingly, we will allow the Commonwealth a period of four weeks from the date of this decision, to **4:00 pm (AEST) on Friday, 12 April 2024**, to file submissions concerning operative date and phasing in, and we will allow the other parties a further period of four weeks, to **4:00 pm (AEST) on Friday, 10 May 2024**, to file any submissions in response. We note that the rate increases, and new minimum rates, identified in this decision are based on the existing rates of pay in the Aged Care Award, the SCHADS Award and the Nurses Award, but this is not to be taken as meaning that we necessarily intend to have the rates come into effect before any pay rates adjustments which might arise from the upcoming Annual Wage Review 2023–24. All the amounts will need to be adjusted if the operative date is later than this.

[281] *Third*, as earlier stated, the outstanding issues concerning RNs and ENs will separately be dealt with in conjunction with the ANMF’s application in matter AM2024/11.

[282] Once all submissions are filed pursuant to the first two steps above, we will determine whether any further hearing is required to finalise the variation determinations, including in relation to operative date and any phasing in. In relation to the third step, a conference of interested parties has been listed before Justice Hatcher at 2:00 pm on Thursday, 4 April 2024 in person in Melbourne to consider the issues concerning nurses outstanding from this decision and the ANMF’s application in matter AM2024/11.



PRESIDENT

*Appearances:*

*M Gibian SC* with *L Doust*, counsel and *L Saunders*, counsel for the Health Services Union, Mark Castieau, Virginia Ellis, Sanu Ghimire and Paul Jones.

*J McKenna*, counsel and *J Hartley*, counsel for the Australian Nursing and Midwifery Federation.

*L Harrison* for the United Workers’ Union.

*N Ward and A Rafter* for the Aged & Community Care Providers Association and Australian Business Industrial.

*D Chin SC* with *D Fuller*, counsel for The Commonwealth of Australia.

*Hearing details:*

2023.

Sydney with video links using Microsoft Teams:  
4, 5, 6, 7, 8, 12, 13, 14 December.

*Final written submissions:*

Aged & Community Care Providers Association and Australian Business Industrial: 14 December 2023.

Australian Nursing and Midwifery Federation: 8 March 2024.

Health Services Union: 11 March 2024.

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<sup>1</sup> Then Deputy President.

<sup>2</sup> Then Commissioner.

<sup>3</sup> [\[2022\] FWCFB 200](#), 319 IR 127.

<sup>4</sup> [\[2023\] FWCFB 40](#).

<sup>5</sup> [\[2023\] FWCFB 93](#).

<sup>6</sup> [\[2022\] FWCFB 200](#), 319 IR 127 at [50]–[54].

<sup>7</sup> *Ibid* at [899].

<sup>8</sup> *Ibid* at [957] and [967].

<sup>9</sup> [\[2023\] FWCFB 40](#) at [16]–[17].

<sup>10</sup> [\[2022\] FWCFB 200](#), 319 IR 127 at [1095]–[1098].

<sup>11</sup> *Ibid* at [902].

<sup>12</sup> [ANMF submissions, 7 March 2023](#) at [53]–[56].

<sup>13</sup> *Fair Work Act 2009* (Cth) Sch 1 item 58(1).

<sup>14</sup> [\[2022\] FWCFB 200](#), 319 IR 127 at [42].

<sup>15</sup> Exhibit ANMF 2.

<sup>16</sup> Exhibit ANMF 1 (witness statement and expert report of Anne Junor, 28 October 2021, as amended on 29 April 2022 and 2 May 2022) at [254].

<sup>17</sup> Exhibit ANMF 2 (expert report of Associate Professor Meg Smith and Dr Michael Lyons, as amended on 2 May 2022) at [45]–[46] and [52].

<sup>18</sup> *He v Minister for Immigration and Border Protection* [2017] FCAFC 206, 255 FCR 41 at [53].

<sup>19</sup> *Ibid* at [52]–[53].

<sup>20</sup> *Ibid* at [53].

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- <sup>21</sup> *Equal Remuneration Decision 2015* [2015] FWCFB 8200, 256 IR 362 at [292]; *Annual Wage Review 2022–23* [2023] FWCFB 3500 at [37]–[38].
- <sup>22</sup> [2023] FWCFB 3500.
- <sup>23</sup> *Ibid* at [24].
- <sup>24</sup> *Ibid* at [37].
- <sup>25</sup> [2022] FWCFB 200, 319 IR 127 at [42], [741]–[745] and [822]–[824].
- <sup>26</sup> *Ibid* at [751]–[756], [821].
- <sup>27</sup> *Ibid* at [757].
- <sup>28</sup> *Ibid* at [43], [46], [746]–[750], [759]–[819] and [829].
- <sup>29</sup> *Ibid* at [758].
- <sup>30</sup> *Ibid*.
- <sup>31</sup> [2023] FWCFB 93 at [182].
- <sup>32</sup> *Ibid* at [183].
- <sup>33</sup> *Ex parte H V McKay* [1907] CthArbRp12, 2 CAR 1.
- <sup>34</sup> *Amalgamated Society of Engineers and The Adelaide Steam-ship Company Limited* (1921) CthArbRp 57, 15 CAR 297 at 303–304.
- <sup>35</sup> *Ibid*.
- <sup>36</sup> *Ibid* at 303.
- <sup>37</sup> [1907] CthArbRp12, 2 CAR 1 at 3.
- <sup>38</sup> *Rural Workers’ Union and United Labourers’ Union v Mildura Branch of the Australian Dried Fruits Association and Others* [1912] CthArbRp 33, 6 CAR 61.
- <sup>39</sup> *The Federated Clothing Trades of the Commonwealth of Australia v J A Archer and Others* [1919] CthArbRp 99, 13 CAR 647.
- <sup>40</sup> *Rural Workers’ Union and United Labourers’ Union v Mildura Branch of the Australian Dried Fruits Association and Others* [1912] CthArbRp 33, 6 CAR 61 at 69.
- <sup>41</sup> *Ibid* at 70–72.
- <sup>42</sup> *Ibid* at 73.
- <sup>43</sup> [1919] CthArbRp 99, 13 CAR 647 at 690–691.
- <sup>44</sup> *Ibid* at 691.
- <sup>45</sup> *Ibid* at 691–692.
- <sup>46</sup> *Ibid* at 694–695.
- <sup>47</sup> *Ibid* at 695.
- <sup>48</sup> *Ibid* at 700.
- <sup>49</sup> *Equal Pay Cases* [1969] CthArbRp 278, 127 CAR 1142 at 1152.
- <sup>50</sup> *Amalgamated Society of Engineers and The Adelaide Steam-ship Company Limited* (1921) CthArbRp 57, 15 CAR 297 at 305.
- <sup>51</sup> See, e.g. *Australian Workers’ Union v Allen and Company Limited and Others* [1917] CthArbRp 54, 11 CAR 113 at 117; *Commonwealth General Division Telephone Officers Association and The Public Service Commissioner of The Public Service of The Commonwealth & Ors* [1917] CthArbRp 78, 11 CAR 295 at 306.
- <sup>52</sup> *Clothing Trades Award 1964* [1964] CthArbRp 863, 108 CAR 687.
- <sup>53</sup> *Clothing and Allied Trades Union of Australia v A H Abbott and Co & Ors* [1950] CthArbRp 208, 66 CAR 481.
- <sup>54</sup> *Ibid* at 484.
- <sup>55</sup> *Clothing and Allied Trades Union of Australia re Clothing Trades Award 1964* [1967] CthArbRp 406, 118 CAR 286.
- <sup>56</sup> *Ibid* at 287.
- <sup>57</sup> *Inquiry into Female Minimum Rates* [1945] CthArbRp 195, 54 CAR 613 at 619 per O’Mara J.
- <sup>58</sup> *Ibid* at 623.
- <sup>59</sup> *Ibid* at 619.

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- <sup>60</sup> *North Australian Workers' Union v Allen Bros (Darwin) Pty Ltd & Ors* [1957] CthArbRp 211, 87 CAR 673.
- <sup>61</sup> *Ibid* at 677.
- <sup>62</sup> *Ibid* at 679, 684; see also the consent *Retail Shop Employees (Australian Capital Territory) Award* [1962] CthArbRp 311, 100 CAR 470 at 472.
- <sup>63</sup> *Equal Pay Case* [1969] CthArbRp 278, 127 CAR 1142 at 1152.
- <sup>64</sup> *Arms Explosives and Munition Workers Federation of Australia v Director-General of Munitions* [1943] CthArbRp 379, 50 CAR 191.
- <sup>65</sup> *Ibid* at 192–195.
- <sup>66</sup> *Ibid* at 200–201.
- <sup>67</sup> *Ibid* at 201.
- <sup>68</sup> *Ibid* at 205.
- <sup>69</sup> *Ibid* at 205–208.
- <sup>70</sup> *Ibid* at 211.
- <sup>71</sup> *Ibid* at 213.
- <sup>72</sup> [1950] CthArbRp 558, 68 CAR 698.
- <sup>73</sup> *Ibid* at 840.
- <sup>74</sup> *Ibid* at 816–817.
- <sup>75</sup> *Ibid* at 817.
- <sup>76</sup> *Ibid* at 818.
- <sup>77</sup> *Ibid*.
- <sup>78</sup> *Ibid* at 819.
- <sup>79</sup> *Ibid* at 839.
- <sup>80</sup> [1967] CthArbRp 406, 118 CAR 286.
- <sup>81</sup> *Ibid* at 290.
- <sup>82</sup> See *Basic Wage, Margins and Total Wage Cases 1966* [1966] CthArbRp 368, 115 CAR 93 at 107 per Wright J, 129 per Gallagher J and 229 per Winter C.
- <sup>83</sup> [1967] CthArbRp 504, 118 CAR 655.
- <sup>84</sup> *Ibid* at 658.
- <sup>85</sup> *Ibid* at 660.
- <sup>86</sup> *Ibid*.
- <sup>87</sup> [1969] CthArbRp 278, 127 CAR 1142.
- <sup>88</sup> *Ibid* at 1147.
- <sup>89</sup> *Ibid*.
- <sup>90</sup> *Ibid* at 1147–1148.
- <sup>91</sup> *Ibid* at 1153.
- <sup>92</sup> *Ibid* at 1156.
- <sup>93</sup> *Ibid* at 1158–1159.
- <sup>94</sup> *Ibid* at 1159.
- <sup>95</sup> *Ibid* at 1158.
- <sup>96</sup> *National Wage and Equal Pay Cases 1972* [1972] CthArbRp 1420, 147 CAR 172 at 177.
- <sup>97</sup> *Ibid*.
- <sup>98</sup> *Ibid* at 178.
- <sup>99</sup> *Ibid*.
- <sup>100</sup> *Ibid* at 180.
- <sup>101</sup> *Ibid* at 179.
- <sup>102</sup> *Ibid* at 180.

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- <sup>103</sup> John Pitchford, ‘Australian Inflation’ in Lawrence B. Krause and Walter S. Salant (eds), *Worldwide Inflation: Theory and Recent Experience* (The Brookings Institution, 1977). Also contributing to this was the *National Wage Case 1974* [1974] CthArbRp 661, 157 CAR 293, which replaced the adult male minimum wage with a minimum wage applying to all adults, male and female.
- <sup>104</sup> Christine Short, ‘Equal Pay – What Happened?’ (1986) 28(3) *Journal of Industrial Relations* 315.
- <sup>105</sup> *Ibid* at p.324.
- <sup>106</sup> [\[2018\] FWCFB 7621](#), 284 IR 121 at [131]–[162].
- <sup>107</sup> [1975] CthArbRp 1544, 171 CAR 79.
- <sup>108</sup> *Ibid* at 83.
- <sup>109</sup> *Ibid* at 83–84.
- <sup>110</sup> *Ibid* at 83.
- <sup>111</sup> [1983] CthArbRp 400, 291 CAR 3, 4 IR 429.
- <sup>112</sup> *Ibid* at 453.
- <sup>113</sup> *Ibid* at 454, 473.
- <sup>114</sup> Exhibit ANMF 2 (expert report of Associate Professor Meg Smith and Dr Michael Lyons, as amended on 2 May 2022) at [90].
- <sup>115</sup> *Royal Australian Nursing Federation & Anor re Private Hospitals’ and Doctors’ Nurses (A.C.T.) Award, 1972* [1986] CthArbRp 64, 300 CAR 185, 13 IR 108, Print G2250.
- <sup>116</sup> *Ibid* at 185.
- <sup>117</sup> *Ibid* at 188.
- <sup>118</sup> *Ibid* at 191.
- <sup>119</sup> [\[2018\] FWCFB 7621](#), 284 IR 121 at [150]–[156].
- <sup>120</sup> [1988] AIRC 595, 25 IR 170, Print H4000.
- <sup>121</sup> *Ibid* at 175.
- <sup>122</sup> [1989] AIRC 345, 27 IR 196, Print H8200.
- <sup>123</sup> *Ibid* at 199–200.
- <sup>124</sup> *Ibid* at 200–201.
- <sup>125</sup> [1989] AIRC 525, 30 IR 81, Print H9100.
- <sup>126</sup> *Ibid* at 93.
- <sup>127</sup> *Ibid* at 94.
- <sup>128</sup> AW819234, Print F8925.
- <sup>129</sup> [1990] AIRC 239, Print J1935.
- <sup>130</sup> [1991] AIRC 281, 36 IR 120, Print J7400.
- <sup>131</sup> *Ibid* at 183.
- <sup>132</sup> [1998] AIRC 1413, 123 IR 240, Print Q7661.
- <sup>133</sup> *Ibid* at 256.
- <sup>134</sup> [2005] AIRC 28, [PR954938](#).
- <sup>135</sup> *Ibid* at [155].
- <sup>136</sup> [\[2022\] FWCFB 200](#), 319 IR 127 at [179].
- <sup>137</sup> [1989] AIRC 525, 30 IR 81 at 94.
- <sup>138</sup> Exhibit ANMF 2 (expert report of Associate Professor Meg Smith and Dr Michael Lyons, as amended on 2 May 2022) at [92].
- <sup>139</sup> [1921] CthArbRp 57, 15 CAR 297.
- <sup>140</sup> *Metal Trades Employers’ Association & Ors re Metal Trades Award, 1952* [1967] CthArbRp 1144, 121 CAR 587.
- <sup>141</sup> *Ibid* at 677.
- <sup>142</sup> *Ibid*.
- <sup>143</sup> *Re Vehicle Industry Award, 1953* [1968] CthArbRp 471, 124 CAR 295.

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<sup>144</sup> Ibid at 308.

<sup>145</sup> Laura Bennett, 'Equal Pay and Comparable Worth and the Australian Conciliation and Arbitration Commission' (1988) 30(4) *Journal of Industrial Relations* 533 ('*Equal Pay and Comparable Worth*').

<sup>146</sup> Ibid at 536–537.

<sup>147</sup> [1967] CthArbRp 1144; (1967) 121 CAR 587 at 888 (Winter C).

<sup>148</sup> *Equal Pay and Comparable Worth* (n 145) at 538.

<sup>149</sup> [1967] CthArbRp 1144; (1967) 121 CAR 587 at 888 (Winter C).

<sup>150</sup> *Equal Pay and Comparable Worth* (n 145) at 539.

<sup>151</sup> [2005] AIRC 28, [PR954938](#).

<sup>152</sup> Ibid at [366].

<sup>153</sup> AW789529, Print Q2527.

<sup>154</sup> [2005] AIRC 28, [PR954938](#).

<sup>155</sup> Ibid.

<sup>156</sup> [\[2018\] FWCFB 177](#), 274 IR 1.

<sup>157</sup> Ibid at [35].

<sup>158</sup> [\[2018\] FWCFB 7621](#), 284 IR 121.

<sup>159</sup> [\[2021\] FWCFB 2051](#).

<sup>160</sup> [\[2022\] FWCFB 200](#), 319 IR 127.

<sup>161</sup> [\[2023\] FWCFB 3500](#) at [132]–[136].

<sup>162</sup> Ibid.

<sup>163</sup> Ibid at [136].

<sup>164</sup> [\[2018\] FWCFB 177](#) at [42].

<sup>165</sup> AW783872.

<sup>166</sup> *HSU v Strathgordon Medical Centre & Ors* [1992] AIRC 1395, Print K5884.

<sup>167</sup> *Australian Liquor, Hospitality and Miscellaneous Workers Union v Aged Care Services Association of NSW & Ors* [1993] AIRC 926, Print K8752. This dispute finding was varied on 11 October 1993: [1993] AIRC 1198, Print K9212.

<sup>168</sup> *HSU v Strathgordon Medical Centre & Ors and Adahai Nursing Home & Ors* [1993] AIRC 1573, Print L0442.

<sup>169</sup> Print L0674.

<sup>170</sup> AW783559, [1993] AIRC 1711, Print L0831.

<sup>171</sup> [1995] AIRC 1737, Print M4442.

<sup>172</sup> Print M6132.

<sup>173</sup> Print Q2510.

<sup>174</sup> Print Q2805.

<sup>175</sup> Print R0710.

<sup>176</sup> [National Pay Equity Coalition, Women's Electoral Lobby and National Foundation for Australian Women joint submissions, May 2008](#) at 7.

<sup>177</sup> Ibid at 8.

<sup>178</sup> Ibid at 14, but see generally 12–14.

<sup>179</sup> See [2009] AIRCFB 50 at [75]–[76].

<sup>180</sup> [2009] AIRCFB 345.

<sup>181</sup> [2009] AIRCFB 865.

<sup>182</sup> See [1949] CthArbRp 459, 65 CAR 212; (1987) 20 IR 420 at 429.

<sup>183</sup> See [1958] CthArbRp 413, 90 CAR 360 at 362.

<sup>184</sup> *Hospital Employees Federation of Australasia v The Canberra Community Hospital & Anor* [1958] CthArbRp 413, 90 CAR 360.

<sup>185</sup> Ibid at 363.

<sup>186</sup> Ibid.



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- <sup>187</sup> [1966] CthArbRp 272, 114 CAR 422.
- <sup>188</sup> Ibid at 424–425.
- <sup>189</sup> *The Canberra Mothercraft Society (Nursing Staff) Award 1964*.
- <sup>190</sup> [1970] CthArbRp 444, 132 CAR 459.
- <sup>191</sup> Ibid at 467.
- <sup>192</sup> Ibid at 468.
- <sup>193</sup> Ibid.
- <sup>194</sup> Ibid at 471.
- <sup>195</sup> Ibid.
- <sup>196</sup> Ibid.
- <sup>197</sup> [1976] CthArbRp 1457, 177 CAR 1141.
- <sup>198</sup> [1982] CthArbRp 24, 269 CAR 66.
- <sup>199</sup> [1983] CthArbRp 373, 290 CAR 324, 5 IR 389.
- <sup>200</sup> [1986] CthArbRp 64, 300 CAR 185, 13 IR 108.
- <sup>201</sup> (1987) 20 IR 420 at 424.
- <sup>202</sup> Ibid at 429.
- <sup>203</sup> Ibid at 432.
- <sup>204</sup> Ibid 446–447.
- <sup>205</sup> [1989] AIRC 1012, 32 IR 170 at 171.
- <sup>206</sup> Ibid at 172.
- <sup>207</sup> [1990] AIRC 49, Print J1288.
- <sup>208</sup> [1990] AIRC 862, Print J4011.
- <sup>209</sup> [1991] AIRC 630, Print J8402.
- <sup>210</sup> [1990] AIRC 862, Print J4011.
- <sup>211</sup> [1992] AIRC 680, Print K3662.
- <sup>212</sup> [1998] AIRC 1413, 123 IR 240, Print Q7661.
- <sup>213</sup> Ibid at 7.
- <sup>214</sup> Ibid at 20.
- <sup>215</sup> [2009] AIRCFB 50 at [79].
- <sup>216</sup> [\[2022\] FWCFB 200](#), 319 IR 127.
- <sup>217</sup> [1998] AIRC 1413, 123 IR 240, Print Q7661.
- <sup>218</sup> *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* [2005] AIRC 28, [PR954938](#).
- <sup>219</sup> [\[2022\] FWCFB 200](#), 319 IR 127
- <sup>220</sup> Ibid at [56], [968].
- <sup>221</sup> Ibid at [973].
- <sup>222</sup> Exhibit HSU 34 (witness statement and report of Professor Susan Kurrle, 26 April 2021).
- <sup>223</sup> Exhibit JE 3 (witness statement of Mark Sewell, 3 March 2022).
- <sup>224</sup> Transcript, 12 May 2022 (cross-examination of Mark Sewell) at PNs 12900–12901.
- <sup>225</sup> Exhibit JE 21 (witness statement of Johannes Brockhaus, 31 Oct 2023) at [17].
- <sup>226</sup> Exhibit ANMF 28 (report of Associate Professor Noleen Bennett, ‘Independent Infection Prevention and Control Expert Opinion’, filed 15 September 2023).
- <sup>227</sup> Ibid at [73].
- <sup>228</sup> Exhibit JE 21 (third witness statement of Johannes Brockhaus, 31 October 2023).
- <sup>229</sup> Exhibit JE 22 (witness statement of Chris Mamarelis, 1 November 2023).
- <sup>230</sup> Exhibit JE 17 (witness statement of Louanne Riboldi, 31 October 2023).
- <sup>231</sup> Exhibit HSU 101 (supplementary witness statement of Virginia Ellis, 20 September 2023).

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- <sup>232</sup> Exhibit HSU 85 (third witness statement of Catherine Evans, 19 September 2023).
- <sup>233</sup> Exhibit HSU 90 (witness statement of Susan Digney, 15 September 2023).
- <sup>234</sup> Exhibit HSU 88 (witness statement of Paul Jones, 20 September 2023).
- <sup>235</sup> Exhibit ANMF 33 (witness statement of Heila Brooks, 15 September 2023).
- <sup>236</sup> Exhibit ANMF 31 (further witness statement of Stephen Voogt, 15 September 2023).
- <sup>237</sup> Exhibit ANMF 30 (second witness statement of Hazel Bucher, 15 September 2023).
- <sup>238</sup> ANMF 32 (witness statement of Joanne Purdue with annexures JP-1 and JP-2, 15 September 2023).
- <sup>239</sup> [\[2022\] FWCFB 200](#), 319 IR 127 at [216].
- <sup>240</sup> Exhibit HSU 94 (witness statement of Christopher Friend with annexures CF1 to CF3, 22 September 2023).
- <sup>241</sup> [\[2022\] FWCFB 200](#), 319 IR 127 at [890(1)].
- <sup>242</sup> Ibid at [938].
- <sup>243</sup> Exhibit ANMF 1 (witness statement and expert report of Anne Junor, 28 October 2021, as amended on 29 April 2022 and 2 May 2022).
- <sup>244</sup> [\[2022\] FWCFB 200](#), 319 IR 127 at [848].
- <sup>245</sup> Ibid at [551].
- <sup>246</sup> Ibid at [685]–[694].
- <sup>247</sup> [\[2011\] FWAFB 2700](#).
- <sup>248</sup> [2009] QIRComm 33.
- <sup>249</sup> [\[2011\] FWAFB 2700](#).
- <sup>250</sup> Ibid.
- <sup>251</sup> Ibid at [239].
- <sup>252</sup> Ibid at [285].
- <sup>253</sup> Ibid.
- <sup>254</sup> Ibid at [292].
- <sup>255</sup> Ibid at [291].
- <sup>256</sup> [\[2012\] FWAFB 1000](#).
- <sup>257</sup> Ibid at [58].
- <sup>258</sup> Ibid.
- <sup>259</sup> Ibid at [67], [69] and [73].
- <sup>260</sup> Ibid at [73].
- <sup>261</sup> [PR525485](#); see [\[2012\] FWAFB 5184](#) at [5].
- <sup>262</sup> [\[2021\] FWCFB 2383](#) at [1235]–[1260].
- <sup>263</sup> Ibid at [1256]–[1257].
- <sup>264</sup> [\[2023\] FWCFB 3500](#).
- <sup>265</sup> [\[2022\] FWCFB 200](#), 319 IR 127.
- <sup>266</sup> [\[2022\] FWCFB 200](#), 319 IR 127.
- <sup>267</sup> Ibid.
- <sup>268</sup> Ibid.
- <sup>269</sup> Exhibit HSU 102 (supplementary witness statement of Professor Sara Charlesworth and Professor Gabrielle Meagher with annexure ‘Joint 2023 Supplementary Report’, 30 October 2023).
- <sup>270</sup> Ibid.
- <sup>271</sup> [ANMF submissions, 7 March 2023](#) at [39]–[40].
- <sup>272</sup> Exhibit ANMF 37 (further witness statement of Annie Butler with annexures AB 9 and AB 10, 1 November 2023) at [71]–[74].
- <sup>273</sup> Ibid at [48].
- <sup>274</sup> [\[2022\] FWCFB 200](#), 319 IR 127.

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- <sup>275</sup> [\[2021\] FWCFCB 2051](#) at [653]–[657].
- <sup>276</sup> [\[2022\] FWCFCB 200](#), 319 IR 127.
- <sup>277</sup> *Ibid*.
- <sup>278</sup> [\[2021\] FWCFCB 2051](#).
- <sup>279</sup> *Ibid* at [647].
- <sup>280</sup> [\[2022\] FWCFCB 200](#), 319 IR 127.
- <sup>281</sup> [\[2023\] FWCFCB 93](#).
- <sup>282</sup> Exhibit A (spreadsheet, ‘ABS Census 2021 – Aged care industry – Occupation analysis’, sent to parties 14 December 2023).
- <sup>283</sup> [Joint Employers submissions \(wage adjustment issues\), 1 November 2023](#) at [16].
- <sup>284</sup> [\[2022\] FWCFCB 200](#), 319 IR 127 at [935].
- <sup>285</sup> *Ibid* at [931].
- <sup>286</sup> [\[2023\] FWCFCB 40](#) at [16]–[17].
- <sup>287</sup> [\[2022\] FWCFCB 200](#), 319 IR 127 at [49]; see also [900] and [922].
- <sup>288</sup> *Ibid* at [899]–[901].
- <sup>289</sup> *Ibid* at [557]–[739].
- <sup>290</sup> *Ibid* at [739].
- <sup>291</sup> *Ibid* attachment C; see also [558]–[559].
- <sup>292</sup> Transcript, 1 September 2022 at PNs 15661–15662.
- <sup>293</sup> [\[2022\] FWCFCB 200](#), 319 IR 127 at [546].
- <sup>294</sup> Exhibits HSU 55 (witness statement of Peter Doherty, and HSU 79 (witness statement of Lorri Seifert, 6 October 2021).
- <sup>295</sup> Exhibit HSU 51 (witness statement of Jennifer Wood, undated, filed 20 May 2022).
- <sup>296</sup> Exhibits HSU 39 (witness statement of Susan Digney, 27 October 2021) and HSU 90 (witness statement of Susan Digney, 15 September 2023); exhibits HSU 56 (witness statement of Catherine Evans, 26 October 2021), HSU 57 (witness statement in reply of Catherine Evans, 20 April 2022) and HSU 75 (third witness statement of Catherine Evans, 19 September 2023); exhibit HSU 76 (witness statement of Susanne Wagner, 28 October 2021).
- <sup>297</sup> [HSU submissions, 22 September 2023](#) at [8].
- <sup>298</sup> [\[2022\] FWCFCB 200](#), 319 IR 127 at [846]–[848].
- <sup>299</sup> *Report to the Full Bench* (O’Neill C, as she then was), 20 June 2022 (‘*Lay Witness Report*’) at [104].
- <sup>300</sup> *Ibid* at [184].
- <sup>301</sup> Exhibit HSU 20 (witness statement of Pamela Little, 30 March 2021) at [28(d)].
- <sup>302</sup> Exhibit HSU 53 (witness statement of Lynette Flegg, 30 March 2021) at [18(c)]; exhibit HSU 63 (reply statement of Charlene Glass, 12 April 2022) at [13(g)].
- <sup>303</sup> Exhibit HSU 18 (witness statement of Fiona Gauci, 29 March 2021) at [33(v)]; exhibit HSU 20 (witness statement of Pamela Little, 30 March 2021) at [28(d)]; exhibit HSU 65 (witness statement of Kathleen Sweeney, 1 April 2021) at [24].
- <sup>304</sup> Exhibit HSU 53 (witness statement of Lynette Flegg, 30 March 2021) at [18(h)].
- <sup>305</sup> Exhibit HSU 96 (witness statement of Catherine Watson, 21 September 2023) at [57].
- <sup>306</sup> *Lay Witness Report* at [202].
- <sup>307</sup> Transcript, 29 April 2022 (cross-examination of Mark Castieau) at PNs 1146–1156.
- <sup>308</sup> Exhibit HSU 7 (reply witness statement of Mark Castieau, 20 April 2022) at [29]; see also exhibit HSU 22 (witness statement of Carol Austen, 29 March 2021) at [18(e)], [18(w)] and [27]–[36].
- <sup>309</sup> Exhibit JE 4 (witness statement of Kim Bradshaw, 4 March 2022) at [86].
- <sup>310</sup> Exhibit HSU 6 (witness statement of Mark Castieau, 29 March 2021) at [58].
- <sup>311</sup> Exhibit UWU 30 (witness statement of Heather Pumpa, 15 September 2023) at [25]–[36].
- <sup>312</sup> Exhibit HSU 6 (witness statement of Mark Castieau, 29 March 2021) at [32]; exhibit HSU 22 (witness statement of Carol Austen, 29 March 2021) at [18(c)] and [18(w)].
- <sup>313</sup> Exhibit UWU 10 (witness statement of Ross Heyen, 31 March 2021) at [12]; exhibit HSU 82 (witness statement of Tracy Roberts, 23 March 2021) at [34]–[36].

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- <sup>314</sup> Exhibit HSU 89 (witness statement of Rhonda Jones, 20 September 2023) at [21].
- <sup>315</sup> *Lay Witness Report* at [222]–[224].
- <sup>316</sup> See, e.g. exhibit HSU 98 (witness statement of Carina Moll, 21 September 2023) at [45].
- <sup>317</sup> *Lay Witness Report* at [234].
- <sup>318</sup> Exhibit UWU 7 (witness statement of Jane Wahl, 21 April 2022) at [13]–[14]; exhibit HSU 75 (witness statement of Kevin Mills, 30 March 2021) at [24] and [27]; [Joint Employers submissions \(wage adjustment issues\), 1 November 2023](#) at [19(a)].
- <sup>319</sup> Exhibit HSU 77 (witness statement of Eugene Basciuk, 28 May 2022) at [16]–[31], [51] and [56]–[57].
- <sup>320</sup> Exhibit UWU 10 (witness statement of Ross Heyen, 31 March 2021) at [33]–[34]; exhibit HSU 82 (witness statement of Tracy Roberts, 23 March 2021) at [31]–[50].
- <sup>321</sup> Exhibit HSU 70 (witness statement of Anita Field, 30 March 2021) at [29(a)]–[29(e)].
- <sup>322</sup> Exhibit HSU 96 (witness statement of Catherine Watson, 21 September 2023) at [74].
- <sup>323</sup> *Ibid* at [14] and [74]; exhibit HSU 62 (witness statement of Charlene Glass, 29 March 2021) at [2] and exhibit HSU 63 (reply witness statement of Charlene Glass, 12 April 2022) at [14] and [74]–[76]; exhibit HSU 82 (witness statement of Tracy Roberts, 23 March 2021) at [11], [27] and [29].
- <sup>324</sup> See, e.g. exhibit HSU 96 (witness statement of Catherine Watson, 21 September 2023) at [14], [68]–[75].
- <sup>325</sup> Exhibit HSU 22 (witness statement of Carol Austen) at [8].
- <sup>326</sup> See *Carpenter v Corona Manufacturing Pty Ltd* [2002] AIRC 1562, (2002) 122 IR 387 at [9].
- <sup>327</sup> [\[2022\] FWCFCB 200](#), 319 IR 127 at [15] and [933].
- <sup>328</sup> Exhibits HSU 56 (witness statement of Catherine Evans, 26 October 2021), HSU 57 (witness statement in reply of Catherine Evans, 20 April 2022) and HSU 75 (third witness statement of Catherine Evans, 19 September 2023); exhibit HSU 76 (witness statement of Susanne Wagner, 28 October 2021).
- <sup>329</sup> Exhibit HSU 51 (witness statement of Jennifer Wood, undated, filed 20 May 2022) at [46]–[48].
- <sup>330</sup> Exhibit HSU 20 (witness statement of Pamela Little, 30 March 2021) at [21]–[23]; exhibit HSU 75 (witness statement of Kevin Mills, 30 March 2021) at [9]–[10]; exhibit UWU 7 (witness statement of Jane Wahl, 21 April 2022) at [22]; exhibit UWU 10 (witness statement of Ross Heyen, 31 March 2021) at [8]; ; exhibit JE 17 (witness statement of Louanne Riboldi, 31 October 2023) at [13(c)]; exhibit JE 21 (witness statement of Johannes Brockhaus, 31 Oct 2023) at [16]–[22]; exhibit JE 22 (witness statement of Chris Mamarelis, 1 November 2023) at [22]–[27].
- <sup>331</sup> Exhibit JE 17 (witness statement of Louanne Riboldi, 31 October 2023) at [13(c)(i)]; exhibit JE 22 (witness statement of Chris Mamarelis, 1 November 2023) at [26].
- <sup>332</sup> Exhibit HSU 96 (witness statement of Catherine Watson, 21 September 2023) at [57] and [98]–[100].
- <sup>333</sup> Exhibit HSU 89 (witness statement of Rhonda Jones, 20 September 2023) at [37]–[41].
- <sup>334</sup> Exhibit HSU 98 (witness statement of Carina Moll, 21 September 2023) at [45]–[46].
- <sup>335</sup> *Ibid* at [40] and [47(a)].
- <sup>336</sup> *Ibid* at [47(c)]–[47(e)].
- <sup>337</sup> ‘Quality Standards’, *Aged Care Quality and Safety Commission* (Web Page) <<https://www.agedcarequality.gov.au/providers/quality-standards>>.
- <sup>338</sup> Exhibit HSU 96 (witness statement of Catherine Watson, 21 September 2023) at [15].
- <sup>339</sup> Exhibit HSU 97 (witness statement of Fleur Collins, 22 September 2023) at [32]–[33]; transcript, 4 December 2023 at PNs 801–816, 843.
- <sup>340</sup> Exhibit HSU 99 (witness statement of Michelle Giaquinto, 21 September 2023) at [13]; transcript, 4 December 2023 at PNs 1002–1013.
- <sup>341</sup> Transcript, 5 December 2023 at PNs 1108–1109.
- <sup>342</sup> Exhibit UWU 26 (witness statement of Jessica Hood, 28 November 2023) at [46]; transcript, 5 December 2023 at PNs 1389–1400.
- <sup>343</sup> Exhibit UWU 27 (witness statement of Julie Holmes, undated, filed 15 September 2023) at [71]; transcript, 5 December 2023 at PNs 1604–1610.
- <sup>344</sup> Exhibit UWU 29 (witness statement of Bianca Wren, 15 September 2023) at [21]–[23] and annexure BW-2; transcript, 6 December 2023 at PNs 2783–2788.

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- <sup>345</sup> Exhibit UWU 30 (witness statement of Heather Pumpa, 15 September 2023) at [106], [124] and [138]; transcript, 6 December 2023 at PNs 2951–2966.
- <sup>346</sup> Exhibit JE 22 (witness statement of Chris Mamarelis, 1 November 2023) at [22]–[27] and annexure CM-1; transcript, 8 December 2023 at PNs 4452–4469.
- <sup>347</sup> [\[2022\] FWCFCB 200](#), 319 IR 127 at [602]–[612] and [739].
- <sup>348</sup> Exhibit JE 17 (witness statement of Louanne Riboldi, 31 October 2023) at [13].
- <sup>349</sup> Exhibit JE 22 (witness statement of Chris Mamarelis, 1 November 2023) at [22]–[27] and annexure CM-1.
- <sup>350</sup> Exhibit ANMF 8 (witness statement of Lisa Maree Bayram, 29 October 2021) at [65]; transcript, 6 May 2022 (cross-examination of Lisa Maree Bayram), PNs 8148–8158; exhibit JE 6 (witness statement of Emma Brown, 2 March 2022) at [35]–[39].
- <sup>351</sup> Exhibit JE 17 (witness statement of Louanne Riboldi, 31 October 2023) at [39].
- <sup>352</sup> Exhibit JE 21 (witness statement of Johannes Brockhaus, 31 October 2023) at [17]; exhibit JE 17 (witness statement of Louanne Riboldi, 31 October 2023) at [13].
- <sup>353</sup> Exhibit JE 17 (witness statement of Louanne Riboldi, 31 October 2023) at [34].
- <sup>354</sup> Exhibit JE 6 (witness statement of Emma Brown, 2 March 2022) at [78(b)].
- <sup>355</sup> Exhibit JE 21 (witness statement of Johannes Brockhaus, 31 October 2023) at [44].
- <sup>356</sup> Exhibit HSU 77 (witness statement of Eugene Basciuk, 28 May 2022) at [44].
- <sup>357</sup> Exhibit HSU 53 (witness statement of Lynette Flegg, 30 March 2021) at [26]; transcript, 5 May 2022 (cross-examination of Lynette Flegg) at PNs 5939–5945.
- <sup>358</sup> Exhibit UWU 7 (witness statement of Jane Wahl, 21 April 2022) at [36].
- <sup>359</sup> Exhibit HSU 96 (witness statement of Catherine Watson, 21 September 2023) at [29].
- <sup>360</sup> Exhibit A (spreadsheet, ‘ABS Census 2021 – Aged care industry – Occupation analysis’, sent to parties 14 December 2023).
- <sup>361</sup> Exhibit HSU 6 (witness statement of Mark Castieau, 29 March 2021) at [77]; transcript, 29 April 2022 (cross-examination of Mark Castieau) at PNs 1131–1136.
- <sup>362</sup> Exhibit HSU 95 (witness statement of Alison Guevara, 21 September 2023) at [71].
- <sup>363</sup> Ibid at [72].
- <sup>364</sup> Exhibit UWU 30 (witness statement of Heather Pumpa, 15 September 2023) at [25]–[36].
- <sup>365</sup> Exhibit HSU 22 (witness statement of Carol Austen, 29 March 2021) at [29]–[36].
- <sup>366</sup> Exhibit UWU 24 (witness statement of Emily Lipps, 14 September 2023) at [19]; exhibit UWU 30 (witness statement of Heather Pumpa, 15 September 2023) at [43]–[46].
- <sup>367</sup> Exhibit UWU 30 (witness statement of Heather Pumpa, 15 September 2023) at [46].
- <sup>368</sup> Exhibit UWU 10 (witness statement of Ross Heyen, 31 March 2021) at [12]–[13].
- <sup>369</sup> Transcript, 7 December 2023 (cross-examination of Louanne Riboldi) at PN 3472.
- <sup>370</sup> Exhibit HSU 89 (witness statement of Rhonda Jones, 20 September 2023) at [30].
- <sup>371</sup> Exhibit JE 8 (witness statement of Johannes Brockhaus, 3 March 2022) at [136].
- <sup>372</sup> Ibid at [132]–[134].
- <sup>373</sup> Exhibit JE 4 (witness statement of Kim Bradshaw, 4 March 2022) at [118]; exhibit JE 8 (witness statement of Johannes Brockhaus, 3 March 2022) at [129].
- <sup>374</sup> Exhibit JE 8 (witness statement of Johannes Brockhaus, 3 March 2022) at [129].
- <sup>375</sup> Exhibit UWU 22 (witness statement of Mitchell Wood, 27 November 2023) at [27].
- <sup>376</sup> Exhibit HSU 84 (witness statement of Carolyn Moorfield, 19 September 2023) at [49].
- <sup>377</sup> Exhibit HSU 92 (witness statement of Teresa Laidlaw, 14 September 2023) at [98]–[100].
- <sup>378</sup> [\[2022\] FWCFCB 200](#), 319 IR 127 at [673]–[684] and [739].
- <sup>379</sup> Exhibit HSU 73 (witness statement of Kathleen Eagar, 29 March 2021) annexure KE-1 at 12.
- <sup>380</sup> See, e.g. Catherine Watson’s evidence that if she notices a resident who ‘seems a bit off’, she reports this to the (direct) care employees: exhibit HSU 96 at [76]; see also evidence of Mark Castieau and Carol Austen, above n 312.
- <sup>381</sup> [Joint Employers submissions \(wage adjustment issues\), 1 November 2023](#) at [54].
- <sup>382</sup> Exhibit JE 21 (witness statement of Johannes Brockhaus, 31 October 2023) at [33].

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- <sup>383</sup> Exhibit JE 17 (witness statement of Louanne Riboldi, 31 October 2023) at [33]–[37].
- <sup>384</sup> Exhibit JE 6 (witness statement of Emma Brown, 2 March 2022) at [79] and annexure EB-12, exhibit JE 21 (witness statement of Johannes Brockhaus, 31 October 2023) at [34]–[37]; exhibit JE 17 (witness statement of Louanne Riboldi, 31 October 2023) at [38]–[40], exhibit JE 22 (witness statement of Chris Mamarelis, 1 November 2023) at [55]–[59].
- <sup>385</sup> Exhibit JE 17 (witness statement of Louanne Riboldi, 31 October 2023) at [38]; exhibit JE 21 (witness statement of Johannes Brockhaus, 31 October 2023) at [34]–[36]; exhibit HSU 92 (witness statement of Teresa Laidlaw, 14 September 2023) at [70] and [72]; exhibit UWU 18 (witness statement of Lynnette Hutchinson, 15 September 2023) at [42].
- <sup>386</sup> Exhibit UWU 24 (witness statement of Emily Lipps, 14 September 2023) at [70].
- <sup>387</sup> *Ibid* at [76].
- <sup>388</sup> Exhibit UWU 10 (witness statement of Ross Heyen, 31 March 2021) at [34].
- <sup>389</sup> Exhibit HSU 89 (witness statement of Rhonda Jones, 20 September 2023) at [34].
- <sup>390</sup> [\[2022\] FWCFCB 200](#), 319 IR 127 at [695]–[707] and [739].
- <sup>391</sup> *Aged Care Award 2010* [MA000018] clauses B.1.4 to B.1.7.
- <sup>392</sup> [\[2023\] FWCFCB 40](#) at [16]–[17].
- <sup>393</sup> [\[2023\] FWCFCB 93](#) at [32].
- <sup>394</sup> *Ibid* at [74].
- <sup>395</sup> [\[2022\] FWCFCB 200](#), 319 IR 127 at [716]–[724] and [739].
- <sup>396</sup> *Ibid* at [716].
- <sup>397</sup> See, e.g. exhibit HSU 67 (witness statement of Darren Kent, 31 March 2021) at [91] and [93]–[96]; exhibit HSU 7 (reply witness statement of Mark Castieau, at [17]–[18].
- <sup>398</sup> Exhibit HSU 6 (witness statement of Mark Castieau, 29 March 2021) at [50].
- <sup>399</sup> Exhibit HSU 67 (witness statement of Darren Kent, 31 March 2021) at [107].
- <sup>400</sup> Exhibit HSU 6 (witness statement of Mark Castieau, 29 March 2021) at [40].
- <sup>401</sup> *Ibid* at [69]–[70].
- <sup>402</sup> Exhibit HSU 7 (reply witness statement of Mark Castieau, at [17]–[18].
- <sup>403</sup> Exhibit HSU 6 (witness statement of Mark Castieau, 29 March 2021) at [32]–[36].
- <sup>404</sup> Exhibit A (spreadsheet, ‘ABS Census 2021 – Aged care industry – Occupation analysis’, sent to parties 14 December 2023).
- <sup>405</sup> Transcript, 29 April 2022 (cross-examination of Mark Castieau) at PNs 1157–1162.
- <sup>406</sup> Exhibit HSU 70 (witness statement of Anita Field, 30 March 2021) at [29(b)].