



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT O'NEILL
DEPUTY PRESIDENT SLEVIN
DEPUTY PRESIDENT GRAYSON**

AM2024/21

s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective

Gender undervaluation — priority awards review — Social, Community, Home Care and Disability Services Industry Award 2010

Sydney

10.00 AM, MONDAY, 27 OCTOBER 2025

Continued from 23/10/2025

PN2668

JUSTICE HATCHER: Good morning, I'll take the appearances. Mr Saunders, Mr Anwar, Ms Smith, you appear for the ASU?

PN2669

MR SAUNDERS: Yes, Your Honour.

PN2670

JUSTICE HATCHER: Mr Blewett, you appear for the HSU and the UWU?

PN2671

MR BLEWETT: Yes, Your Honour.

PN2672

JUSTICE HATCHER: Mr Scott, you appear for Australian Business Industrial, Aging Australia, New South Wales Business Chamber, National Disability Services?

PN2673

MR SCOTT: I do, thank you.

PN2674

JUSTICE HATCHER: Ms Cruden, you appear for the Australian Industry Group and the Australian Federation of Employers and Industries and Ability First Australia?

PN2675

MS CRUDEN: Yes, Your Honour.

PN2676

JUSTICE HATCHER: All right. Mr Latham, you appear for the COSS Network?

PN2677

MR LATHAM: I do, Your Honour.

PN2678

JUSTICE HATCHER: Yes. Mr Madden, you appear for the New South Wales Minister for Industrial Relations?

PN2679

MR MADDEN: I do, Your Honour.

PN2680

JUSTICE HATCHER: And on Teams, Ms Anderson, you appear for the Victorian Minister for Industrial Relations?

PN2681

MS ANDERSON: Thank you. I do, Your Honour.

PN2682

JUSTICE HATCHER: All right, is that all the appearances?

PN2683

MS COOPER: Sorry - Ms Cooper for the Commonwealth.

PN2684

JUSTICE HATCHER: Yes, thank you, Ms Cooper. All right, so just in respect of the correspondence that we received from the ASU on Friday afternoon concerning possible conferencing, we understand that represents the position jointly advanced by the ASU, the HSU, the UWU, Mr Scott's clients and the Australian Industry Group. Is that the position?

PN2685

MR SAUNDERS: That is.

PN2686

JUSTICE HATCHER: All right. Well, I think what we'll do is Deputy President (indistinct) will be made available for the purpose of a conferencing process and her chambers will communicate with the parties about the listing and any other directions for that process. Now, we received a list of objections to evidence - I think it was this morning - on behalf of Mr Scott and Ms Cruden's clients.

PN2687

MR SCOTT: Yes, Your Honour. Can I just clarify: it's less in the way of a list of objections and more in the nature of a schedule of what we say is objectionable material. But we don't formally seek to have the material struck out. We just wanted to identify that for the expert panel.

PN2688

JUSTICE HATCHER: All right. Well, if that's the case we'll simply take that account - that document into account in our assessment of the evidence. Is that sufficient?

PN2689

MR SCOTT: It is. It is, thank Your Honour.

PN2690

JUSTICE HATCHER: All right, so we published a provisional marking of the witness statements that have been filed in this matter last week. Is there any issue with that list?

PN2691

MR SAUNDERS: No issue with the list. I think we've sent Your Honour's associate a note identifying that we additionally rely on SDH13, 14 and 17, tendered earlier in the proceeding.

PN2692

JUSTICE HATCHER: Yes, well, that's a separate issue. All right, does any party have any issue with that list? All right, I won't go through it. The witness statements identified in that document will be given the exhibit markings also identified in that document.

**EXHIBIT #SCH27 WITNESS STATEMENT OF CLAIRE BAILEY
DATED 11/09/2025**

**EXHIBIT #SCH28 WITNESS STATEMENT OF PATRICIA
ABRAHAM DATED 11/09/2025**

**EXHIBIT #SCH30 WITNESS STATEMENT OF MIKAYLA
ANDERSON DATED 02/09/2025**

**EXHIBIT #SCH31 WITNESS STATEMENT OF JASON BALMER
DATED 03/11/2025**

**EXHIBIT #SCH32 WITNESS STATEMENT OF DEB BATTERHAM
DATED 03/11/2025**

**EXHIBIT #SCH33 WITNESS STATEMENT OF KATHERINE
BRADSTREET DATED 04/09/2025**

**EXHIBIT #SCH34 WITNESS STATEMENT OF ROSALINE
BRAIMA DATED 11/09/2025**

**EXHIBIT #SCH35 WITNESS STATEMENT OF JOHN BRENNAN
DATED 03/09/2025**

**EXHIBIT #SCH36 WITNESS STATEMENT OF DELISIAH
BROOKS DATED 03/09/2025**

**EXHIBIT #SCH37 WITNESS STATEMENT OF CAITLIN BYRNES
DATED 09/09/2025**

**EXHIBIT #SCH38 WITNESS STATEMENT OF SHELLEY
BUTCHER DATED 03/09/2025**

**EXHIBIT #SCH39 WITNESS STATEMENT OF NARELLE CLAY
DATED 11/09/2025**

**EXHIBIT #SCH40 WITNESS STATEMENT OF KATE COLVIN
DATED 11/09/2025**

**EXHIBIT #SCH41 WITNESS STATEMENT OF RACHEL
CONNORS DATED 10/09/2025**

**EXHIBIT #SCH42 SECOND EXPERT REPORT OF ASSOCIATE
PROFESSOR NATASHA CORTIS DATED 15/10/2025**

**EXHIBIT #SCH43 WITNESS STATEMENT OF PAUL CREEDON
DATED 15/09/2025**

**EXHIBIT #SCH44 WITNESS STATEMENT OF SAM CROCKER
DATED 12/09/2025**

**EXHIBIT #SCH45 WITNESS STATEMENT OF FIONA CROTTY
DATED 05/09/2025**

**EXHIBIT #SCH46 WITNESS STATEMENT OF JACOB CUMMINS
DATED 05/09/2025**

**EXHIBIT #SCH47 WITNESS STATEMENT OF SIMONE CZECH
DATED 11/09/2025**

**EXHIBIT #SCH48 WITNESS STATEMENT OF GENEVIEVE
DALLY DATED 09/09/2025**

**EXHIBIT #SCH49 WITNESS STATEMENT OF MARIA
DIMOPOULOS DATED 15/09/2025**

**EXHIBIT #SCH50 WITNESS STATEMENT OF MICHELLE DOAN
DATED 03/09/2025**

**EXHIBIT #SCH51 WITNESS STATEMENT OF SCOTT
DRUMMOND 11/09/2025**

**EXHIBIT #SCH52 WITNESS STATEMENT OF EDITH FAHEY
DATED 08/09/2025**

**EXHIBIT #SCH53 WITNESS STATEMENT OF KEIRNAN
FITZPATRICK DATED 12/09/2025**

**EXHIBIT #SCH54 WITNESS STATEMENT OF KAREN FLETCHER
DATED 12/09/2025**

**EXHIBIT #SCH55 WITNESS STATEMENT OF JESS FORD DATED
03/09/2025**

**EXHIBIT #SCH56 WITNESS STATEMENT OF KATIE FOX DATED
04/09/2025**

**EXHIBIT #SCH57 WITNESS STATEMENT OF ALIA GLORIE
DATED 11/09/2025**

**EXHIBIT #SCH58 WITNESS STATEMENT OF FAITH GLOVER
DATED 05/09/2025**

**EXHIBIT #SCH59 WITNESS STATEMENT OF ROBERT HABEL
DATED 04/09/2025**

**EXHIBIT #SCH60 WITNESS STATEMENT OF ANTHONY
HAMMETT DATED 26/08/2025**

**EXHIBIT #SCH61 WITNESS STATEMENT OF OLLIE HAYWARD
DATED 03/09/2025**

EXHIBIT #SCH62 WITNESS STATEMENT OF KATHERINE HILL-VINK DATED 03/09/2025

EXHIBIT #SCH63 WITNESS STATEMENT OF SIMON HOLMES DATED 04/09/2025

EXHIBIT #SCH64 WITNESS STATEMENT OF MICHELLE HOLTHOUSE DATED 08/09/2025

EXHIBIT #SCH65 WITNESS STATEMENT OF LAURA HOPKINS DATED 09/09/2025

EXHIBIT #SCH66 WITNESS STATEMENT OF RACHEL JOHNSTON DATED 03/09/2025

EXHIBIT #SCH67 WITNESS STATEMENT OF CAROLYN JONES DATED 12/09/2025

EXHIBIT #SCH68 WITNESS STATEMENT OF PHILIP JONES DATED 04/09/2025

EXHIBIT #SCH69 WITNESS STATEMENT OF MONIKA KARLSSON DATED 03/09/2025

EXHIBIT #SCH70 WITNESS STATEMENT OF TERESE KINSTON DATED 03/09/2025

EXHIBIT #SCH71 WITNESS STATEMENT OF MARTIN LAVERTY DATED 10/09/2025

EXHIBIT #SCH72 WITNESS STATEMENT OF MARIA LEEBEEK DATED 11/09/2025

EXHIBIT #SCH73 WITNESS STATEMENT OF CAROLINE LONG DATED 10/09/2025

EXHIBIT #SCH74 WITNESS STATEMENT OF FEARGUS MANNING DATED 04/09/2025

EXHIBIT #SCH75 WITNESS STATEMENT OF LIAN MCALINDEN DATED 04/09/2025

EXHIBIT #SCH76 WITNESS STATEMENT OF LEANNE MELLING DATED 12/09/2025

EXHIBIT #SCH77 WITNESS STATEMENT OF ROSSLYN MONRO DATED 10/09/2025

EXHIBIT #SCH78 WITNESS STATEMENT OF KATIA MUNOZ DATED 03/09/2025

**EXHIBIT #SCH79 WITNESS STATEMENT OF AGATA NABAGLO
DATED 04/09/2025**

**EXHIBIT #SCH80 WITNESS STATEMENT OF DANNA NELSE
DATED 04/09/2025**

**EXHIBIT #SCH81 WITNESS STATEMENT OF CEILIDH
NEWBURY DATED 04/09/2025**

**EXHIBIT #SCH82 WITNESS STATEMENT OF MALIA O'BRIEN
DATED 08/09/2025**

**EXHIBIT #SCH83 WITNESS STATEMENT OF BERNIE O'HEARN
DATED 03/09/2025**

**EXHIBIT #SCH84 WITNESS STATEMENT OF JULIE PERKINS
DATED 04/09/2025**

**EXHIBIT #SCH85 WITNESS STATEMENT OF MICHAEL PERNAR
DATED 11/09/2025**

**EXHIBIT #SCH86 WITNESS STATEMENT OF CLAIRE
RAWLINSON DATED 03/09/2025**

**EXHIBIT #SCH87 WITNESS STATEMENT OF AIMEE RHODES
DATED 03/09/2025**

**EXHIBIT #SCH88 WITNESS STATEMENT OF VICTORIA ROSE
DATED 04/09/2025**

**EXHIBIT #SCH89 WITNESS STATEMENT OF DOM ROWE
DATED 12/09/2025**

**EXHIBIT #SCH90 WITNESS STATEMENT OF JOHANN RUTH
DATED 09/09/2025**

**EXHIBIT #SCH91 WITNESS STATEMENT OF ANGELIQUE
SASAGI DATED 12/09/2025**

**EXHIBIT #SCH92 WITNESS STATEMENT OF KYLIE SHANNON
DATED 03/09/2025**

**EXHIBIT #SCH93 WITNESS STATEMENT OF GENEVIEVE
SINCLAIR DATED 12/09/2025**

**EXHIBIT #SCH94 WITNESS STATEMENT OF LISA SMAJLOV
DATED 02/09/2025**

**EXHIBIT #SCH95 WITNESS STATEMENT OF HAYLEY SMITH
DATED 04/09/2025**

**EXHIBIT #SCH96 WITNESS STATEMENT OF KERRY STAINES
DATED 11/09/2025**

**EXHIBIT #SCH97 WITNESS STATEMENT OF ELIZABETH
STARY DATED 04/10/2025**

**EXHIBIT #SCH98 WITNESS STATEMENT OF FAITHE STEELE
DATED 04/09/2025**

**EXHIBIT #SCH99 WITNESS STATEMENT OF CORINN
STRATING DATED 05/09/2025**

**EXHIBIT #SCH100 WITNESS STATEMENT OF EVELYNE
TADROS DATED 09/09/2025**

**EXHIBIT #SCH101 WITNESS STATEMENT OF KELLY THOMAS
DATED 12/09/2025**

**EXHIBIT #SCH102 WITNESS STATEMENT OF CASSANDRA
TILLEY DATED 02/09/2025**

**EXHIBIT #SCH103 WITNESS STATEMENT OF ANNETTE TOSER
DATED 04/09/2025**

**EXHIBIT #SCH104 WITNESS STATEMENT OF NICOLE VAN
OPDORP DATED 04/09/2025**

**EXHIBIT #SCH105 WITNESS STATEMENT OF ANDREW
WALLACE DATED 04/09/2025**

**EXHIBIT #SCH106 WITNESS STATEMENT OF KARYN WALSH
DATED 10/09/2025**

**EXHIBIT #SCH107 WITNESS STATEMENT OF NATASHA WARK
DATED 15//10/2025**

**EXHIBIT #SCH108 WITNESS STATEMENT OF VANESSA WOOD
DATED 09/09/2025**

**EXHIBIT #SCH109 SECOND WITNESS STATEMENT OF STEFI
CLOUGH DATED 12/09/2025**

**EXHIBIT #SCH110 WITNESS STATEMENT OF DEBRA GUNN
DATED 10/09/2025**

**EXHIBIT #SCH111 SECOND WITNESS STATEMENT OF SARAH
LENHARD DATED 11/09/2025**

**EXHIBIT #SCH112 WITNESS STATEMENT OF KLYE MOSEY
(UNDATED) FILED 15/09/2025**

**EXHIBIT #SCH113 WITNESS STATEMENT OF ZELDA RIDDELL
DATED 10/09/2025**

**EXHIBIT #SCH114 WITNESS STATEMENT OF MARGARITA
ROGERS DATED 11/09/2025**

**EXHIBIT #SCH115 WITNESS STATEMENT OF CAROLYN
SHEARER DATED 12/09/2025**

**EXHIBIT #SCH116 WITNESS STATEMENT OF MARK WHENAN
DATED 12/09/2025**

PN2693

All right, so what's going to be the order of submissions? Is there an agreement about that?

PN2694

MR SAUNDERS: I think everyone assumes that I'm going first and beyond there there's been no real discussion but it would seem sensible to deal with the effectively down the line of the front bar table and then the Commonwealth parties at the back.

PN2695

JUSTICE HATCHER: Right - does any other party have an issue with that proposed order? All right, Mr Saunders.

PN2696

MR SAUNDERS: Thank you. We sent through this morning, your Honour, three additional documents to go with the submissions. Have they made their way to the Full Bench - the expert panel, I should say?

PN2697

JUSTICE HATCHER: Not sure. Perhaps you can take us through what they are.

PN2698

MR SAUNDERS: The first is a Word document which summarises the modern award provisions to the extent they exist that deal with the concept equivalency. Email sent at 7.41 am. They're not tearingly important so - and I don't need your Honours to turn them up now so why don't I just identify what they are and why we've sent them - - -

PN2699

JUSTICE HATCHER: Just hold on a second.

PN2700

MR SAUNDERS: - - - and they can be located.

PN2701

JUSTICE HATCHER: All right, yes, we have that.

PN2702

MR SAUNDERS: Just to explain what they are: the award table takes the list of modern awards, reviews the classification structure, identifies drafting, various drafting that's been used for equivalency. The short version is with one or two exceptions, it's highly linked to qualification, unsurprisingly. There's further references to skills test for some of the plumbing awards but we weren't able to locate a handy definition of equivalent experience. The language does crop up from time to time.

PN2703

The second document is simply a copy of annexure B to the ASU's reply submissions in which we model the proposed translation amendments put forward by AIG. That is already in the written submissions. We've just supplied it in an easier to read Excel form that shows - to the extent that subtraction can be called a calculation, the calculations therein. The third document is probably most significant for today's proceeding: it's a note on essentially a very high level summary of the ASU's evidence as to specific and key roles in the sector. It really has been filed to speed up the time that I take this morning, add a bit of detail in there. Again, I don't need your Honours have read it in advance. But it's there in summary. It is important the Commission has heard significant amounts of evidence and submissions about part of the sector covered by this award, the disability sector, which is a major and important part of the SCHADS coverage. It's of course - the award, of course, however is broader than that, both in terms of the industry, the jobs it covers and the career paths and wage progression that it currently provides for, in particular, the social and community sector.

PN2704

When I say that I'm including emergency accommodation, crisis housing in there. It's a subset, notwithstanding that it's dealt with by a different schedule. What this sector involves at a very high level is the provision of a wide range of services to enhance the wellbeing and social inclusion of individuals, families and communities over a wide range of fields which are again set out in some detail in the written submissions. Mr Latham's clients, the Council of Social Services, has at appendix 1 to its submissions provided some survey - I don't need your Honours to trouble yourselves with it now but it's at page 9 of their document - some survey evidence of the breakdown of the various subsectors. It's a survey of a limited responsiveness so it has some limitations there but it is still a useful snapshot.

PN2705

Similarly, the ASU in Ms Thomas's statement surveyed - I may get the number wrong - something like 3000 - somewhere between three and four thousand employees. At the final page of that statement is a breakdown by subsector again, disability making up about 40 per cent. That data's got its limitations, of course. That would be the usual complaint about any Union survey and we don't purport for it to be representative, but it's at least an idea of what we're talking about here. That statement does have some other data points including where people are in the classification, where classifications are costed and where pay points are costed: three, four, five - pay points 2, 3, 4. Again, that's not done

perfectly and the data could be cut differently. If it does turn up, it would be useful to the expert panel to have that; sliced in a different way, we can do that.

PN2706

The range of different roles. As I've said the point of the detail note is so I don't need to trouble Your Honours particularly long with it. There are some key areas that should be highlighted and do assist what I say later about the ASU's alternative or fallback position in respect of what ought be done. Frontline case management and support is a cluster area. Here we're talking about disability support workers, treatment support, youth workers, case workers, homelessness case managers, people dealing with both acute crises and working with people in a longitudinal way. It involves direct care but also advocacy and accessing external supports.

PN2707

There are differences within these areas, role to role. They don't necessarily look the same, and there are differences as between aged care. Even the work that most closely resembles aged care work which is unsurprisingly disability support work, particularly home care work, as a fundamentally different premise, aged care involves managing and assisting a person through their inevitable decline with respect and dignity whereas disability care is premised on the client's growth and learning. It's a different focus and it's not a necessarily absolutely identical skill although of course in direct care there's significant overlap in some key areas.

PN2708

Qualifications vary across these roles to an extent that roles will require a degree but not necessarily. That varies sector to sector. Whether workers have them or whether they're required is complex. The other end, there's the specialist professional roles, solicitors which is easy enough for everyone to understand, justice advocates, counsellors and the subset of financial counsellors which is a regulated profession. Mental health, alcohol and other drug commissions this manner of work. Again, this work can require tertiary qualifications and is more likely to. It does not necessarily do so. In some sectors it's mandatory - obviously, the solicitor needs a law degree - in others it's not, financial counsellors are Certificate IV notwithstanding the extreme complexity of this work and the significant vulnerability of the client base involved.

PN2709

It's not necessarily - notwithstanding that it could be described as professional work - it's not necessarily identical to teaching work. It's different skills, different questions, different people - more often adults for one thing. And of course the career path regulation doesn't follow anything like the very specific structure that applies to teaching nationally.

PN2710

Within this cohort, one sees specialities and experts developing at high levels of seniority and high levels of responsibility in areas that we – in a way that does not necessarily attach to supervisory role. You have the concept of a sole worker which we see in the current structure at a reasonably high level.

PN2711

One of the more complex aspects of the cohort is the question of peer workers and cultural workers – always been part of SCHADS but they've become more formalised and entrenched over the last say, 15 years. What we're talking about is a critical part of the sector. Aboriginal cultural workers as a specific group but peer workers, generally people whose lived experience allows them to perform – is the critical aspect of what allows them to perform the work at the necessary level.

PN2712

Some of that lived experience obviously, one doesn't get it through a qualification, but some of it as a product means that these workers are less likely to have formal qualifications because of disruptions in earlier parts of their career. It's not recognised properly as a role in the current structure. They tend to be clustered at the lower end of the classification partly because of that lack of the newness of the role, the relative newness of the role and the lack of formal qualifications which is a path through the current SCHADS structure.

PN2713

And that is an aspect that the ASU identifies as a deficiency. It is not purely – that deficiency is not purely or even entirely about gender-based undervaluation. It's a more complex socio-political question.

PN2714

VICE PRESIDENT ASBURY: And that's why you've flagged that as a key element of the separate work value application?

PN2715

MR SAUNDERS: Correct. It's just outside the scope of this application which is dealing with an equally important but different consideration.

PN2716

VICE PRESIDENT ASBURY: But to the extent that there are difficulties at present, there's an opportunity for those to be revisited.

PN2717

MR SAUNDERS: Yes.

PN2718

VICE PRESIDENT ASBURY: In the separate application.

PN2719

MR SAUNDERS: Yes, and I raise the deficiency as it should be made clear I do say that, but it's not the scope of what we're doing today. And it's also coordination in management roles, unusually for a model award outside perhaps registered clubs all the way from team leaders all the way to CEOs, very senior managers. It's linked to the particular nature and history of the sector.

PN2720

A subset that falls sort of half-in, half-out of the professional group is the policy of research and systems analysis cohort. You've got data analysis research, sector support lawyers. This is about advocacy and submissions to Government, both

for the sector, general sector support, assisting the services performed directly, but advocating for the sector itself, because it's a funnelling sector, heavily reliant on government funding. Not solely; there is some full profit activity but it's far and away the minority aspect. There's some philanthropy in it, but a key thing is state and federal government funding for – state is more significant outside of disability, and the principle expense of course is labour costs. This is a service provided inherently by people, you don't need much of anything else. The funding tends to be tied to the award classifications.

PN2721

It's linked to the jobs that are needed, there's an agreement as to service. It's not a bucket of money that can be distributed at will. Its particular role is funded in a particular way. And very similarly to the way disability support work is classified in the NDIS, but not in any way that could be described as consistent or easy to understand.

PN2722

VICE PRESIDENT ASBURY: Right. Thank you.

PN2723

MR SAUNDERS: Conceptually, what that means is this is closer to a paid rates award than other awards one seeks in the system. To the extent there's a buffer, it's pretty limited, to the extent that there's a bargaining, it is generally limited. This is the second highest proportion of a share of or reliance in the system, but you seek bargains that are not driving significant wage outcomes. It's other benefits: leave, that kind of thing, but the rates are very much the rates.

PN2724

This matters because of an aspect that's put forward in particularly the Australian industry groups and the various people it speaks for reply in the complaint by the many issues that have been raised by employers in the sector, as to concerns about award rates going backwards. Well, if you're concerned about that, you can pay more.

PN2725

Sure, theoretically true, and it might be true if we were talking about, for example, the manufacturing award or a sector where bargaining has that drive. But it's (indistinct) here because in practice the overwhelming majority of employers don't pay above the award rates and in any serious way because they can't pay above the award rates in any serious way. And as accordingly, they won't pay above awards separate to the award rates in any serious way.

PN2726

VICE PRESIDENT ASBURY: Could it be the case that under the current structure which (indistinct) acknowledges is largely incomprehensible.

PN2727

MR SAUNDERS: Yes.

PN2728

VICE PRESIDENT ASBURY: That that provides a mechanism to essentially pay above the legal minimum because there's such a discretion to (indistinct) to identify what the appropriate classification is for an employee? Just looking at some of the witness profiles, that some of them that at first blush (indistinct) appear to perhaps be over-classified?

PN2729

MR SAUNDERS: Obviously, my client cannot accept the proposition that any one is over-classified. But what I think the phenomenon is, is there's a desire by these employees to recognise and reward their people properly. I'm not saying all of them. And my client doesn't say all of them, but as a general proposition, one sees that and if there is that desire to be able to evaluate that it's part of the problem that a number of employers have identified with the provisional views that the language that allows that isn't there in some of the drafting, but yes, there's an aspect there where the evaluative nature of - I think I can say this - the evaluative nature of a classification structure allows movement based on the employer's assessment of the true - what the job they're requiring actually is.

PN2730

JUSTICE HATCHER: Another way to put that might be that the current structure in effect allows the employer to pick the classification and then justify funding on the base that it's an award classification without any objective criteria actually applying.

PN2731

MR SAUNDERS: No, I also can't agree with that because it is not the case that the current structure is entirely unobjective, it just applies in a - it has a different focus to the provisional view and other awards, in that it uses minimum pegging rather than thresholds of requirement.

PN2732

JUSTICE HATCHER: Minimum pegging? What does that mean?

PN2733

MR SAUNDERS: This is the minimum entry rate for someone with a three year degree rather than you must have a three year degree to get here.

PN2734

But the difficulty is this is work that is difficult to assess in a purely mechanical way, unlike say, manufacturing work is; it's easy to say this job requires these particular skills to be used, but it's not work - it's very similar in that way to aged care work, to nursing work, that kind of thing. Identifying solely by a list of tasks misses the complexity. It's about the broader evaluation and assessment and there is a degree of fluidity necessary there. It doesn't necessarily work in precisely the same way as the ways (indistinct) in mechanised industries.

PN2735

JUSTICE HATCHER: So bargaining is occurring, it's just in an informal way and in a - at a very micro level, is it?

PN2736

MR SAUNDERS: Actually, enterprised bargaining is certainly occurring. There are a number of enterprised – there is enterprised bargaining in the sector registered enterprise agreements in force. They will of course be – they're linked to funding and they will be affected by significant change to wage rates. But in another way, there is the ability for people to negotiate and convince their employer of their correct classification.

PN2737

Your Honours would have seen, I think, this may be what Your Honour, Deputy President O'Neill's talking about. Some of the witnesses talked about being able to persuade their board to regrade them. And that's facilitated by this (indistinct) question of persuasion and justification but it can be done.

PN2738

There is a high level of consensus. We've set out in the written submissions in Annexure A - - -

PN2739

VICE PRESIDENT ASBURY: Just before you move off that overview of the categories of classes of work people - we'll get to some of it when we get to the detail and the terms of the definitions of various people - but can you just expand a bit on the difference between (indistinct) work that in perspective of the work of disability support workers and other support workers? Mental health support workers, people that might fall within a description of case worker, that there's a very (indistinct) qualifications – has some cross-over in the kinds of work that they do. And there were a few witnesses that jump out at me, which included Faith Steel, Annette Tozer, and I think Liam Macallum, and – were the three to – as examples.

PN2740

So that distinction is not quite clear to me between disability support worker and in your language, case worker, practitioner.

PN2741

MR SAUNDERS: It depends on the nature of the disability support worker, is the short answer to that. It's – that's not one unitary job. It's people providing disability support work at varying levels. That's the complexity.

PN2742

VICE PRESIDENT ASBURY: Okay.

PN2743

MR SAUNDERS: Of course there's, as far as for work – the word – actively avoiding using the word 'basic', but the lower level – highly supervised or regularised direct care work, whether they're in a home, or otherwise, versus the disability advocacy work, they can still fall within that title.

PN2744

Of course, there's overlap between the roles. We're not suggesting that one ignores these things and of course, there's overlap between that holistic view of age care work. It's just about who you're comparing to and what structure works.

PN2745

VICE PRESIDENT ASBURY: But to take the example of someone who's in – who's in out of home care in a residential facility performing in some ways some similar work, would you consider that they are the same level as a disability support worker? Or something else?

PN2746

MR SAUNDERS: It depends on the precise level that the disability support worker is performing. They can be as far as I can take it.

PN2747

Another way of putting it depends on the particular skills and competencies that are required to be exercised by that person and – which is - - -

PN2748

VICE PRESIDENT ASBURY: I think the individuals that I looked at, they had some high level qualifications, so that's why I left that to one side. The - - -

PN2749

MR SAUNDERS: It is an important point to be clear on. We're not saying that the aged care considerations, the – sorry – the aged care considerations, the rationale behind the stage 2 decision, the pharmacy, that all of this is irrelevant, this work is all its own special category about and can be compared to nothing. It's just it has its own structures, it has its own career paths. It's not quite as necessary simple.

PN2750

In that respect, there is a high level of consensus, although it is put at a high level, that the way the provisional views are presently structured, that limited descriptors – or limited is wrong – the short descriptors is more what I mean – does not reflect the diversity of the roles within the system, that it doesn't reflect the sophisticated and complex nature of the work across the board. The scaling system. Or its particular character.

PN2751

Rather than going through the employer's submissions, we've put a table in the – attached to our primary submissions that has the pinpoint references to where we say that high level of support is and that's a more sufficient way of doing it, I think. It does share similarities with aged care, with teaching work, with professionalised work in any theme and I suppose in that it's got that high use of invisible skills at whatever level. That does take me to the provisional views. I wanted to set out the ASU's understanding of effectively the non-provisional parts, the statements of principle that the Bench has espoused. And in that sense, we've been – we've been assisted by the statement on Friday and have certainly had regard to it.

PN2752

It's clarified, if I understand it correctly - which is always an if - one of the points of disagreement about what the decision means, that's arisen between the parties, as a starting principle, the expert panel, as I understand it, has concluded that the actual award rates separate to the equal remuneration order in Schedules B and C

are affected by gender-based undervaluation. To the extent that it matters, whether we agree or not, of course the ASU agrees with that. We agreed in 2010, hence the equal remuneration order. Those rates are deficient.

PN2753

Secondly, as we understand it, the expert panel has concluded that the equal remuneration order rates are not so affected, unnecessarily – have necessarily been set in a way that can be relied on to have been unaffected by biases arising from gender. It's a more nuanced position. It doesn't mean they're perfect and gender-based undervaluation was fixed forever in 2012. But the rates themselves don't have that critical defect, as we understand it.

PN2754

The bench has concluded that the classification structure in (b) and (c) is a mess. We (indistinct) resisted, given we urge that finding upon Your Honours and obviously it's visible from space that it's difficult to apply (indistinct) these difficulties. It's not impossible. It's merely very, very hard. There are translation guides, but there's reason it was a significant project to work out at – between industry, union, and government to work out precisely how to apply that award.

PN2755

It should probably not take an 18 month commonwealth funded project to work out how to apply classification structure at which as we understand it, is the fourth critical finding that classificational structures at a matter of principle should be simple to apply and understand and enforce.

PN2756

JUSTICE HATCHER: Well, applying further dimension of that which – in which we accepted the ASU's submission is that the extremely broad evaluative exercise required by the classification structure actually contributed to gender-undervaluation. That is that the ASU submitted and we accepted that as sort of the (indistinct) work value assessment carried out for every employee was something which actually led to an undervaluation.

PN2757

MR SAUNDERS: Yes, it's non – it's structural undervaluation, I suppose in the sense that it – it – while it allows the flexibility for the well-meaning employer to negotiate their employees (indistinct) it also does the opposite and it drives undervaluation in a practical sense in that way.

PN2758

We're not – the ASU's position is not that this thing should be preserved. We want to rewrite it. That question is just doing it in a way which recognises that some degree of evaluative assessment needs to be available here. It is just not possible to pinpoint this work down to a list of qualifications or a list of identified tasks.

PN2759

There is some - confusion may not be the right word - there is some disagreement between the parties as to one aspect, and I think this has been clarified by the statement. The AIG position is that the decision of the expert panel implicitly

reflects a conclusion that there needed to be some downward alignment within the structure that the gender-based undervaluation would be addressed by reducing in some ways ERO outcomes. I have to say we don't see that in the decision. The statement makes it reasonably clear at paragraph 4(5) that quantity exercise is that people are not to go backwards.

PN2760

JUSTICE HATCHER: I think it's implicit in – perhaps we should have made it more clear that in paragraph 397(2), it's put as a question. And I thought we made it clear enough that nobody was going to have their pay reduced and that would be at least ensured by the translation arrangements about which we asked the – that be used for the parties.

PN2761

MR SAUNDERS: As I say, we – that's how we read it. The point of this was to correct the issue rather than some other kind of provision, but the submission's been made. The real disagreement between AIG and the ASU is whether this is purely preserving existing employees or the structure as a whole and this statement makes it clear that the point is nobody goes backwards. That said, any major realignment of classification structures is always going to create anomalies, pockets of individuals who may be - I've never seen it happen but in theory have been overclassified and are being overpaid or are just outliers in that. The difficulty that's arising here that is significant, it's not pockets, it's not anomalous. It's a majority result. That appears to be an unintended consequence rather than the point.

PN2762

To the extent that the AIG submissions and some of their proposed amendments turn on that assumption, they rather fall away. Moving now to the proposed - Commission's proposed structure that provisional views in that respect. As I say I've dealt with this extensively in writing, really twice, so I don't propose to repeat any of those issues. I wanted to touch on some of the really key concerns, mostly to deal with things that have been raised in the AGI and ABI replies but it won't take long. I appreciate I threatened half a day but it's looking shorter than that, having worked it up over the weekend.

PN2763

The key concern with the structure is the primacy of the formal qualifications, particularly at the below new 6 level. If the Bench has the draft determination convenient, it can be done by looking at the language. If we go to page 7 of that -
- -

PN2764

DEPUTY PRESIDENT O'NEILL: The draft determination issued by the Commission staff?

PN2765

MR SAUNDERS: Yes, thank you.

PN2766

JUSTICE HATCHER: Yes, all right.

PN2767

MR SAUNDERS: Yes, so we see level 3, which - - -

PN2768

JUSTICE HATCHER: The rates or the definition?

PN2769

MR SAUNDERS: The definition, page 7.

PN2770

JUSTICE HATCHER: Yes.

PN2771

MR SAUNDERS: Leaving aside the turning into internal levels rather than subclassifications this mirrors the aged care direct care structure. One sees relevant Certificate III qualification or equivalent. That language is going to, as it stands, be interpreted as equivalent qualification. That's how it's uniformly applied across the system. The source is the (indistinct) Trades Award and as it now finds itself scattered throughout the table shows some examples. Not necessarily fixed by adding in equivalent skills or experience including lived experience: I appreciate that's what we've done and I'll come to the ASU's draft just because it is - there's limited guidance available generally but certainly either version as to what level of experience truly is equivalent to having a Certificate III.

PN2772

Views are certainly going to differ about that employer to employer, employee to employee and it becomes close to impossible and quite - potentially opening up different realms of undervaluation if we talked about lived experience because there are a range of conscious or otherwise cognitive biases that affect assessment of that skill and that value, less present in employers in this sector. There is as we've seen in the employer responses a high degree of recognition. But it's going to be inconsistently applied. The further difficulty arises at level 4. The relevant Certificate IV qualification or equivalent as a requirement for the performance of their duties by the employer: that language arose fresh, I think at least in the aged care decision.

PN2773

What that case involved was the reason for that split, as I understand the stage 2 decision is what that case involved was evidence that the Certificate III qualification for direct care workers was close to ubiquitous. Of course there was the - recent is strong but relatively recent royal commission recommendation that it be made compulsory. The Certificate IV, however, becoming increasingly as a matter of fact required but not necessarily at the level of penetration not being to the extent that it merited everyone with a Certificate IV necessarily being bumped up. The point of all that is the words, 'As a requirement for the performance of their duties by their employer', introduce a new barrier, a tertiary barrier, really.

PN2774

To reach level 3 an employee needs to have a relevant Certificate III or equivalent qualification and have a primary role that involves direct aged care work. To

reach level 4, there are now three requirements: have a Certificate IV or equivalent in fact, provide direct care aged care work and have that certificate as a requirement for the performance of their duties by the employer. The ABI deals with this at 72 of their reply. I don't need your Honours to take it up with the idea that it means can the work be adequately done without a Certificate IV and with respect, an optimistic reading of the language itself, requirement by employer is plain enough. It's a decision that the role in fact the employee is doing will need to have a Certificate IV. Anyway it's got the more fundamental difficulty, you can perform the job of being a direct care worker without a Certificate IV. You simply do it better with one. It's the same with this work. It doesn't mean people who don't - and I should be clear, I'm not saying it's a pure skills matrix. I'm talking about the notional employee with a Certificate III versus a Certificate IV.

PN2775

If the only difference between the employees is qualification the Certificate IV enhances skills. I don't want to be taken as suggesting that they're necessarily better than unqualified workers. This is complex in the sector but that's the point I'm making here. It's related to the second key issue, the issue of equivalence and how that is done. I touched on this a moment ago. The intention of the expert panel is very clear in the decision. It's recognising equivalence in two ways: professional experience and lived experience. At 3 to 5, the draft proposal, levels 3 through to level 5 the draft proposal will not be applied in a way that achieves that goal. It's clearly linked to qualifications and the individual.

PN2776

If we look at level 6, the change in language there: B.6.1: 'Or who has equivalent expertise and experience'. It does open that door for the evaluative assessment that your Honour Deputy President O'Neill was raising earlier. But there is no guidance as to how to assess or evaluate that. It leads to an unguided employer discretion which leads to inconsistent results. Not through necessarily malice or incompetence or anything like that. It's just people's minds differ on this and we see that in the way the parties have used actual examples of employees and of course ABI's helpful evidence from an HR officer explaining that it's actually quite - she's found it quite a difficult exercise to do.

PN2777

Your Honours have the ASU's - modelling is probably a big grand but we'll call it modelling for the sake of things. Close to a worst-case scenario, the spreadsheet that we've provided now with translating to the ASU's proposal as well, that does assume that the qualification is required that the employer accepts that and so worse - it could be worse. Cortis is slightly more conversative because she allows for some recognition of equivalency but it's still pretty variable outcomes. ABI has addressed this, looked at the calculations and criticised them. The criticism turns on a wholly optimistic view that everyone will certainly be recognised as having equivalent skills, that everything will certain be recognised as having - requiring a qualification. It is useful - do your Honours have the ABI reply submissions convenient?

PN2778

JUSTICE HATCHER: Yes.

PN2779

MR SAUNDERS: Yes, at page 14, paragraph 68. Yes, we see the some worked examples taking the ASU's witnesses where we say they go backwards, either as an existing employee or a new starter. Both need to be considered. We see that ABI - sorry, I forgot which one it was - disagrees but note caveats in A. We see he would almost certainly have equivalent expertise and experience: B, '(Indistinct) likely meet the threshold for being a senior specialised expert'. C, over the page, Andrew Wallace, arguably meet the threshold; D, comfortably. We seem more comfortable (indistinct) but then at 69A, Melissa Hall, even with ABI's amendments likely fall into level 3.2B, likely fall into level 4.5E.

PN2780

It's a caveat and they're right to be equivocal. This just illustrates the lack of certainty in the way that minds will differ on these points. Of course if this exercise was happening in reality the positions would likely be reversed, which is one of the oddities of these proceedings. But helpfully clarified by the AIG's proposed amendments, which are leaving existing employees aside, reveal how it's going to be applied in practice. The new translations that the AIG has very helpfully proposed indicate the advice they're going to give their members. You're a crisis accommodate worker with a Certificate IV, you go up to the Certificate IV level.

PN2781

That will be the driving force. I don't need to take your Honours to them in detail. It's the point of filing the spreadsheet. It's not a complicated modelling exercise and it just shows the shockwaves here. It does direct attention to the more foundational concern we have with this approach in how the assessment process is done. It fundamentally involves a focus on individual only, the particular worker. That in part is driven by its source, that works in the aged care structure. But this is talking about one job. So you're an aged care direct worker, what are your particular characteristics and to an extent the characteristics of your role that feed you through that structure?

PN2782

You've got a multiplicity of jobs, tasks, levels of seniority here. There needs to be - to work, this classification structure needs to address the work. I don't take it as far as the Australian Industry Group and says it's the work and only the work. Individual characteristics still matter because of that, the impact on skill and invisible skill in particular of qualifications, experience, professional experience and lived experience. Further issue is the rates. The starting point is the removal of pay points and the impact that's had and removal without preserving highest point. Again, the ABI submissions are helpful in this respect. If we return to page 13 and 14, dealing with (indistinct) objectively go backwards on the existing proposed translations. A - there may be an error, I haven't checked - B, requires refinement. We're not sure about all - that refinement involves her moving up a level. But C through F, the reason they're going backwards is because they're at the higher pay points.

PN2783

Yes, that's not an answer. They are going backwards and there is, we say, no particular reason for that. Removing the pay points leads to limited progression within grades over time. Work value in these roles we say does increase over time, steadily. It is the kind of work that to an extent you can only learn by doing. And it restricts access to the higher levels. We've dealt with this again in some detail in writing but the pay points in this award have been held previously during the restructuring process to be set on a work value basis. We accept there's not a huge amount of detail in that decision but that doesn't mean it wasn't a proper assessment properly done on the face of the award.

PN2784

They're linked to skill acquisition. There are barriers there and that's how they've been interpreted to be. They're not annual increments in the way discussed and the way that they were in the teachers' case and the way they may be in the nurses' case. Just because they involve progression within a year doesn't necessarily mean they are not linked to work value. Here the conclusion that they're not is unsafe. The other issue with the rates is the restriction on access to higher levels, that inability to move people up as their roles and skills increase. Whether it's right or not is a separate question about what is useful in the employer's submissions is you can see there's a range of different approaches being taken throughout to actually applying this, including some things that are a bit artificial.

PN2785

It's the way it's read there. That person doesn't have a degree, this is a degree role, the end. It's the attractiveness of the objectively ascertainable criteria. It's easier to evaluate. Fundamentally the problem we have with the rates is what we say is a structural misalignment. A C10 rate that's 23 per cent above the baseline metal trades C10 rate compared to a C1A rate that is set at that compressed rate leads to a degree of internal compression within the structure: that is the degree worker is being paid relatively less than her Certificate III counterpart than she would be if she was an engineer looking at a metal trades person that is not justified on the evidence. That said - - -

PN2786

JUSTICE HATCHER: Sorry, but that's the outcome produced by the ERO, isn't it? That is these rates came from the ERO.

PN2787

MR SAUNDERS: Yes, this is what I was about to say. That said, we recognise that the ERO contains that deficiency, the ERO of course drawn from a Queensland work value case that had these things. It may not have perfectly gender. It may not have perfectly fixed gender undervaluation in 2012. That's the broader point.

PN2788

JUSTICE HATCHER: I thought that the ERO case in 2012 at the end of the day involved acceptance of an agreed outcome to implement the findings, didn't it?

PN2789

MR SAUNDERS: Yes. It's one of the aspects of it that was the transparent, untransparent deal between parties that has been decried by the expert panel and it

does lead to this anomalous situation. The teachers' award of course was not the product of an agreed outcome in that respect and it appears to be what's ostensibly being used for the benchmark rate in these proceedings. We accept that the ERO contains that deficiency. It reflects that. It's like the persistent pursuit of flat rate increases by trade unions for a period which benefitted workers at the lower of the scale who were more likely to be (indistinct). It's a sins of the past question in the same way as anything else.

PN2790

The logic of the C10 scale inherently turns on relativities, internal relativities and external relativities. It creates a situation where we say the C10 rate is too low relative to its internal comparator and the rate structure is very compressed as a result. It does not provide adequate recognition for skill growth and seniority growth. Teachers' case was run differently. It was partly work value, partly a comparator case as decided on a different basis to nurses. Again this is addressed in the reply that there is some tension here.

PN2791

JUSTICE HATCHER: Well, it's not even that. I mean, before the teachers' rate apart from the ERO nobody was getting the C10 rate anyway. So most professionals still don't get it.

PN2792

MR SAUNDERS: Yes, as the expert panel observed in either this year or last year's annual wage case it's an indicia of structural undervaluation of professional work. It is not possible to fix all these things all at once, all at one time. That's the difficulty. It's a stage process and things improve. The ERO was a significant step forward but it wasn't the last step for this union. We've been clear enough I think in the application that stage 3 is dealing with a range of complex issues but we haven't excluded gender-based undervaluation from them.

PN2793

DEPUTY PRESIDENT O'NEILL: So do I take it that the separate work value case would intend to address this issue better?

PN2794

MR SAUNDERS: Yes, and I think we foreshadowed in the written submissions that we'll have another run at the compressed versus uncompressed rate, although noting this has been dealt with by the Commission on several occasions. It's (indistinct) use the C10 structure, really. Is it a whole-of-system mechanism where everything has to look the same or is it one tool in the toolkit responsive to individual competency levels and what the roles require? Those are the concerns at a high level. Again the detail is in the written submissions but that's the problem. The fundamental problem is a practical one. It does look likely that the structure as applied, as it's clearly been foreshadowed is going to be applied will send rates backward in the sector, not out the fringes, not a couple of thousand people who can be red-circled or grand-parented comfortably but a core classification. Level 4, level 5, level 6.

PN2795

Can I take Your Honours now to the ASU's proposal, if that's convenient. The amended 1 file with the reply. As I foreshadowed at the last directions hearing that I was going to amend this further. I obviously haven't. The reason for that is because the main issue that was raised is something that can be addressed orally. This is meant to over home care as well. There's no separate structure for them. And it seems likely that if practical issues are raised over the course of various submission that it would lead to further (indistinct) and it seems more convenient to do it all at once. But that was the only substantive change that we were going to do anyway.

PN2796

I've skipped a step I'm sorry. I apologise. There are two paths to the ASU's proposal. We have a – using the same document, however, the first is the ASU's primary position. Now, what we say should happen to conclude the gender-based undervaluation review, the way to do it while achieving the Commission's stated goals and also doing it efficiently. The draft determination, what it does in simple terms is consolidate the rates for Schedule B and C. Make them the ERO rates. To truly make the ERO redundant in the sense that we don't need to have two schedules of payrates in one payrate clause.

PN2797

Consolidate D and E to align disability home care with aged care rates – of course the ASU thinks it's – and maintains that it's SCHADS work but the practical effect of that is to ameliorate the underpayment issues. And it seems the simplest way.

PN2798

And then it sort of ignores family day care as someone else's problem, but I think that appears to be a general consensus anyway. What that - - -

PN2799

JUSTICE HATCHER: Well, that proposal does not give effect to the findings in the April decision, does it?

PN2800

MR SAUNDERS: It doesn't give effect to them in part. It certainly doesn't give effect to the finding that the classification structure needs to be rewritten.

PN2801

JUSTICE HATCHER: so you'd have to persuade us to depart from findings that they've already made?

PN2802

MR SAUNDERS: Yes. The finding is not a permanent departure from the findings Her Honour has made, which again, my client did urge upon the Commission to the extent that it had to be done, given it's obvious now that the classification structure needs work. The statement helpfully sets out what needs to be achieved by any structure and I accept this doesn't give all our six aspects. If Your Honours have that convenience, it does achieve Item 1 because of the similarity between the identical nature of the care and skills benchmark and Certificate III rate here.

PN2803

And the (indistinct) between the three year degree qualified rate. That's higher, in fact, than the entry level. It does not achieve point 2 in paragraph 4 of the statement because it doesn't touch the classification structure. It makes it fractionally – it makes the situation fractionally less confusing in that there's only one set of rates of pay, but it can't possibly be said to address that aspect of the decision, however there is a - - -

PN2804

JUSTICE HATCHER: Mr Saunders, I know this is a very difficult (indistinct) but I don't understand how it gets any easier 12 months or two years down the track. I mean, at some stage, this has to be done. I think everyone accepts it has to be done. And I don't know what's going to – what rabbit is going to come out of the hat in 12 months' time which is going to make it miraculously easier. It's a very hard task, but it has to be done.

PN2805

MR SAUNDERS: It has to be done and it has to be done holistically. The difficulty with this review is it's a review of the limit agreement. We can't bring in – it's just about gender-based undervaluation as we understand it. There's those broader questions of peer workers, et cetera, the complexity there that can't – can't be addressed in a gender-based undervaluation process. The conferencing process is somewhat different, once you're in a conference you're talking about whatever you like really, but it is just too complicated to be done in a gender-based undervaluation review alone. That doesn't mean it's going to become less complicated. It'd probably become harder with broader focus, but it's just – it is too ambitious.

PN2806

The third point: it achieves it to a degree. There is recognition of qualification but not in full and not in lived experience, that's very amorphous in the current structure. Four, five and six: it doesn't disturb the substantive outcome for home care workers; it does prevent anyone going backwards, which we do see is important.

PN2807

JUSTICE HATCHER: Well, it's easy if presumably (indistinct).

PN2808

MR SAUNDERS: It does make it easier. It doesn't make anyone significantly forward is the issue. And that's the problem we've been having. You'll see with the proposed structure (indistinct) that perhaps could have been fractionally more upfront and filed the comparison spreadsheet in the past. Well, we've been open but the ASU's proposal does send people moving forward some significantly. That's the way we've been able to stop them going backwards, but it's a problem of its own. And it does achieve six, which is the point.

PN2809

JUSTICE HATCHER: See I thought it was a fundamental part of the case that the ASU presented at the early stage of the proceedings that some employees were

leveraging the differences between schedules B and C and schedules E to gain a wage advantage.

PN2810

MR SAUNDERS: Yes.

PN2811

JUSTICE HATCHER: But then you propose something that doesn't resolve that.

PN2812

MR SAUNDERS: The reason I've – we've initially proposed something that we said did resolve that through the use of indicative tasks, but that's been rejected and we do have difficulty. I accept what I'm proposing is very similar to what we ask for, but we do have difficulty coming back and asking for precisely the same thing. The reason that it changes, the (indistinct) it does address that leveraging issue though because it uplifts the rates for disability home care. That's what I mean by we still say it's SACS' work but the practical reality of it's being paid at all at similar rates, the practical difficulty falls away. It removes the ability to so leverage in any sense (indistinct).

PN2813

Moving now to the fall back position, the amendments we've proposed to the Commission's provisional view. And we have a real apprehension that these don't fix the issues that we've raised, as Your Honours will have seen from the modelling done by Professor Cordis, some people are still moving backwards. We've got the cohort now. It tends to be clustered at the higher levels 7 and 8 and to a degree current 6. I'm sorry, I mean current 6 and 7 and to a degree, 8. That's the – the slight shift.

PN2814

JUSTICE HATCHER: So how are they moving backwards? I mean if there's – if leaving aside the whole structure, there's a rate preservation requirement applying to any translation, then by definition, nobody can literally move backwards. So what sense do you make in that submission?

PN2815

MR SAUNDERS: In isolation from the rate preservation position, which very few people have responded to, but is its own complicated proposition, the structure itself, what I'm talking about with that submission is, the structure itself viewed in isolation doesn't itself fix those problems. That's the point of the rate preservation provision we've proposed. But that itself is a complicated piece of work and it will be very complicated to apply.

PN2816

So I - - -

PN2817

JUSTICE HATCHER: Sorry, what will be complicated to apply?

PN2818

MR SAUNDERS: The rate preservation system that the ASU has proposed in respect of its proposed examination. I'm not just talking about existing employees, I'm talking about rates in the sector of employees as well which maybe, Your Honour I may be fractionally, been at cross-purposes, there.

PN2819

JUSTICE HATCHER: (Indistinct) two-tier complaint.

PN2820

MR SAUNDERS: Yes. Leaving (indistinct) and grand-parenting to one side for a moment what I meant is I'm talking about looking at the revisions to the structure. Does it, in theory protect the rates and the point I'm making is not perfectly – the amendments that we proposed are within the restrictions imposed by the Commission. We've adjusted some of the rates but not radically. Partly because we can see there's a difficulty with people moving significantly ahead and they do.

PN2821

Some of that's an anomaly of its own because of under classification, misclassification, but we have serious reservations about it, it's effectively the best we could do in the time within the restrictions we're working within.

PN2822

If Your Honour's have it convenient, it's at page 30, unhelpfully not the page numbered of the document filed with the draft determination. I was proposing to go through in part to deal with some matters that have come up in reply. So we've kept the nine level structure, which is driven by bifurcating effectively level 1. I have set out in writing the changes that we propose. The difficulty with doing it in markup is it became impossible to read but we can provide a version that is marked up for convenience. I'm just going to talk through how it would theoretically work. Level 1 is specific to administrative work and at a limited level, close direction, using established practices, procedures and instructions. It's again time limited and the idea is that they move to level 1.2 at nine rather than 12 months, which is - no, I apologise. I misspoke. The difficulty we have with - the difficulty that this addresses is keeping administrative workers stuck at a relatively low rate of pay. The 1.2 in the draft - the provisional determination is three months thereafter.

PN2823

This is three to nine months, the idea being they shift into level 2, making it truly a transitional provision - transitional moment. The rate has shifted slightly. We've upped it to align with the introductory rate for aged care clerical worker of exactly the same kind.

PN2824

DEPUTY PRESIDENT O'NEILL: Although the rates in the Aged Care Award included a 3 per cent uplift from the aged care decision on the basis that the panel were satisfied there were work value reasons relating to infection prevention and control. So what would be - how would that be analogous or applicable in this setting?

PN2825

MR SAUNDERS: Some of these workers are performing work in residential facilities. Less of them are. I accept that. And it's less significant - - -

PN2826

DEPUTY PRESIDENT O'NEILL: I'm not sure that administrative employees would be (indistinct).

PN2827

MR SAUNDERS: To a very small degree but I accept your Honour's point. It's less significant, the uplift, because of the soft barrier. So it doesn't particularly matter. Level 2 introduces an entry point for the Certificate II employee - they do exist - and clarifies at the second dot point that you come into it after nine months. It introduces pay points which are a different level to that proposed. They're longer but the rates are correspondingly higher. This is where home care was meant to come in and I can see that that actually is under performance. It's totally not there on the decision. This would be where we would say home care work starts.

PN2828

Level 3, first 3.1 identifies the staff the permit applies to: administrative activities and disability support work, a broader concept from home care. And the (indistinct) 2 qualification has changed. It's performs work related to that certificate but dot point 2, a structure that's there throughout, same or similar skills, so looking at the work, the second dot point, or looking at the skills of the particular employee. This is obviously highly evaluative in the same way but it provides that pathway for recognition and it's got a little bit more meat on it at least than the equivalent skills or experience.

PN2829

And dot point 3 is a clarification that again, it's a soft barrier up through time. We say it should be experience in the industry rather than for a particular employer for fairly obvious reasons. Not inherently opposed to the AIG approach of requiring employees to demonstrate that in some satisfactory way. Again, difficult to fully define that. This level introduces the first indicative classification, which is the disability support worker, which is a different category to a home worker, the definition thereafter. Again, one sees pay points and a soft barrier into level 4. This stops a lot of the difficulties with people either being stuck or not having access to pay progression they currently would enjoy under the award. But it's also driving a lot of the situation where people move forward because some are artificially stuck at the moment. Level 4 is the more senior - - -

PN2830

DEPUTY PRESIDENT O'NEILL: I've got a few questions about level 2 and level 3. I don't really understand why level 3 is the entry level for disability support workers given the findings of the expert panel in the decision that the work of (indistinct) equivalent to that of home care employees under the SCHADS award but it also seems that under the current schedule B structure that seems to specifically include some disability services work at level 1. So I'm struggling with that.

PN2831

MR SAUNDERS: It obviously does. I think it's F and G in the relevant definition of tasks in the current - talks about direct care personal tasks, the very basic - - -

PN2832

DEPUTY PRESIDENT O'NEILL: Also level 2M refers back to level 1 as being disability services.

PN2833

MR SAUNDERS: In the current award?

PN2834

DEPUTY PRESIDENT O'NEILL: In the current schedule.

PN2835

MR SAUNDERS: Bear with me.

PN2836

DEPUTY PRESIDENT O'NEILL: So it's level 2 (indistinct) at paragraph N.

PN2837

MR SAUNDERS: What was the paragraph, your Honour, sorry?

PN2838

DEPUTY PRESIDENT O'NEILL: N.

PN2839

MR SAUNDERS: B.2.2?

PN2840

DEPUTY PRESIDENT O'NEILL: Yes, so you see possess the appropriate qualification, et cetera, as part of the delivery of disability services as described above or in the subclause (indistinct) 1.2.

PN2841

MR SAUNDERS: Yes.

PN2842

DEPUTY PRESIDENT O'NEILL: So it seems to expressly contemplate the disability services workers performed at level 1.

PN2843

MR SAUNDERS: This is - I'm reading 2.2, I'm sorry. I may have misheard your Honour. What I understood your Honour to be talking about was B.1.2 G and H.

PN2844

DEPUTY PRESIDENT O'NEILL: That as well.

PN2845

MR SAUNDERS: Yes, that - - -

PN2846

DEPUTY PRESIDENT O'NEILL: The essential principle that why the DSWs under the proposal would come in at minimum level 3.

PN2847

MR SAUNDERS: Because that corresponds to 2.1 in terms of its rate.

PN2848

DEPUTY PRESIDENT O'NEILL: Yes, but there's also some - well, firstly the finding of the expert panel that the work is equivalent to home care work under SCHADS.

PN2849

MR SAUNDERS: I had understood the finding that the - the finding was that disability home care work was equivalent to aged care home care work but I may just have misunderstood the finding.

PN2850

DEPUTY PRESIDENT O'NEILL: (Indistinct) the one I'm thinking of is paragraph 362 of the decision.

PN2851

MR SAUNDERS: The short version is we're not deliberately cavilling with any finding of the expert panel but if we have then that's something that needs to be - -

PN2852

DEPUTY PRESIDENT O'NEILL: It might be something that can be fleshed through at conference discussions perhaps.

PN2853

MR SAUNDERS: Yes, I think this is still a useful precursor.

PN2854

DEPUTY PRESIDENT O'NEILL: So 362 is a finding that the work of employees who undertake direct personal care work for people with disabilities involves the same level of skills, responsibilities and working environments as those who undertake personal care work for the aged, including home care work - including in-home care under the SCHADS award.

PN2855

MR SAUNDERS: Yes, and this is where the draft has gone wrong and why it's important to emphasise that home care we say comes in at 2, including that aspect of disability home care. Then it translates up in the same way that direct home care does in the aged care case to level 2/near level 3. That's the intent there. So you've got that very introductory home care work at near level 2 and then the full scheme, including more advanced home care work by persons with a Certificate III moving into level 3 and the transition in overtime. So that's how we are attempting to reflect that. Yes, it's not - as I read it it does parallel the - not identical but as we say we just can't be (indistinct) broadly reflects it doesn't

necessarily mean that the classification structure can be identical across the board but that's how it's meant to operate.

PN2856

DEPUTY PRESIDENT O'NEILL: In your description - in the description of equivalency, effectively - - -

PN2857

MR SAUNDERS: Yes.

PN2858

DEPUTY PRESIDENT O'NEILL: - - - and level 3, for example, it's not entirely clear to me what the distinction is between the two limbs of the proposed definition because both involve performing work relating to the skills and knowledge obtained through the relevant qualification.

PN2859

MR SAUNDERS: There's not much in it. Really it's to do with struggling between the need for the classification structure to look at jobs to classify roles rather than people, but the individual. The point of the flexibility is to allow that flexibility, but as I say we're not pretending this thing is perfect. It's just very difficult to define equivalency. So it's there for really out of abundance of caution. I accept that it's not necessarily consistent with the ultra streamlined version, but it does capture both potential limbs. There would be significant overlap.

PN2860

DEPUTY PRESIDENT SLEVIN: So what's the difference between utilising and holding?

PN2861

MR SAUNDERS: (Indistinct).

PN2862

DEPUTY PRESIDENT SLEVIN: The dot points does have Certificate III or equivalent, but - - -

PN2863

MR SAUNDERS: It's - I'm sorry, I didn't mean to interrupt, your Honour. It's because the sentence continues as to role involves, and so utilising just doesn't make sense. It's like having a Certificate III and your role involves (indistinct) the skills. You've got equivalent skills and you do the same thing. It could be streamlined by changing 'or equivalent qualification' in the first dot point, but that I found made it a very long sentence indeed.

PN2864

DEPUTY PRESIDENT O'NEILL: Now, at the introductory description of 3.1 it's simply someone who has a certificate entries role and involves the (indistinct) work related to that certificate. Now, it just seems like broad language, although I recognise that that formulation is in the current structure at various levels.

PN2865

MR SAUNDERS: Yes.

PN2866

DEPUTY PRESIDENT O'NEILL: Was there any consideration to some other formulation there?

PN2867

MR SAUNDERS: There has been consideration to a range of different formulations, and this is the one that we've landed on as most utile. What it's meant to reflect is the difficulty with requiring a qualification in the work where you don't necessarily have to have a Certificate III to do this work in the same way that in regulated industries you might, and it turned out the existing award language was the most – well, none of this is perfect drafting, but was the easiest way to express that, and there's some merit in at least keeping some familiarity for people who had been applying this document for a long time.

PN2868

DEPUTY PRESIDENT O'NEILL: All right. I think you've explained that the reason that your proposal has essentially automatic – subject to progression issue – progression to level 4 after three years in (indistinct) levels. Now, that's probably not perfectly consistent with one of the principles that the panel set out last week and not disturbing the aged care outcomes for home care employees - - -

PN2869

MR SAUNDERS: That is a fair point.

PN2870

DEPUTY PRESIDENT O'NEILL: - - - but presumably the explanation is what you outlined earlier that it's necessary to maintain the current rates that are available by progression.

PN2871

MR SAUNDERS: Yes. That's part of the reason the hard barriers in aged care weren't a practical problem is because all the rates were being increased massively. It becomes more difficult if you're preserving an existing structure which we say does have in effect soft-ish barriers. Porous barriers may be a better way to put that, not soft-ish. There's some tension.

PN2872

I think I had finished with level 3. Level 4 is very similar, just the Certificate IV structure it mirrors the same situation, and again the progression of reclassification to level 5, diploma qualification, it's addressing that problem of requirement, that problem of what the job requires. Then it adds on the specialist field.

PN2873

DEPUTY PRESIDENT O'NEILL: Now, I wondered if that's the concept that's clearly misunderstood or warrants some definition.

PN2874

MR SAUNDERS: It probably needs a definition. It's difficult to define. One sort of knows it when one sees it and there are things understood in the industry, but the ASU's preference has always been to work these things through with industry to obtain a consensus position. We say it's clear enough to be put forward without embarrassment, but of course that can be improved.

PN2875

DEPUTY PRESIDENT O'NEILL: Do I understand the proposal correctly in that a level 5 would apply to employees across all the sectors and categories, but in relation to SACS employees other than disability support workers it wouldn't apply to anyone other than case worker practitioners in their first 12 months?

PN2876

MR SAUNDERS: Yes, there's a problem with the drafting. I'm grateful it's just been illuminated. The case worker practitioner not holding a qualification entry point is not consistent with the restriction from SACS work. It is something I will actually need to get instructions on, but it's a very limited entry point for case workers practitioners, not necessarily just in disability work I think, but - - -

PN2877

DEPUTY PRESIDENT O'NEILL: You might just have a look at that, because it appeared to me that, or the (indistinct) that I made of the current level 3 includes employees of (indistinct) skills, or delivering and coordinating service programs and the like.

PN2878

MR SAUNDERS: It doesn't map perfectly is the answer to that. Some of that's just – it is a new structure and it doesn't map perfectly. It is quite difficult to reconcile the two. But that's the idea for the limited - - -

PN2879

DEPUTY PRESIDENT O'NEILL: So then what would be a justification for confining level 5 to only that very narrow category of SACS employees?

PN2880

MR SAUNDERS: It reflects how the classifications currently actually work we say. But again it's the error, it's not clearly expressed. I do need to confirm some instructions on that point. Incidentally we're not attempting to perfectly recreate the current structure and classifications, because one can't, it's a whole new structure and if there are changes we say they're the ones that are necessary to fix existing issues or keep wages stable moving forward.

PN2881

Level 6 is everyone. And of course we rely on the evidence that we filed in that respect, although it's not perfectly applied as your Honours have seen.

PN2882

DEPUTY PRESIDENT O'NEILL: I had a couple of questions about level 6. In your proposal you've got the level 6.2 being a (indistinct) point for someone with a four year degree or with three years and one year's experience.

PN2883

MR SAUNDERS: I'm sorry, your Honour, there's usually a complaint about me, I am just having some difficulty hearing.

PN2884

DEPUTY PRESIDENT O'NEILL: So in the proposal in level 6.2 for someone with a four year degree or three years with a year's experience that carried with it under your proposal a rate of 1610.58, whereas under current schedule B the entry rate would be a level 3.4 with a 1575 rate.

PN2885

MR SAUNDERS: Yes.

PN2886

DEPUTY PRESIDENT O'NEILL: So what's the justification for that?

PN2887

MR SAUNDERS: The rationale for that is that I had to keep them ahead of 5.2, and so it is pure convenience, which I had to raise to keep people from moving backwards. I should say we. But, yes, this is an area in which the rates do not perfectly align, but absolutely accept that and it's to do with rejigging the internal structure. This is where we depart from the C1(a) benchmark rate, although it does at least hit that minimum.

PN2888

DEPUTY PRESIDENT O'NEILL: I understand under your proposal the 95 per cent first 12 months rate doesn't apply, and that comes back to the need to have the 5.2 to rife through the progression through the pay points. So I understand that.

PN2889

MR SAUNDERS: Before your Honour moves on can I just clarify what the point is there. It's partly because it is – the current rate is an entry rate for the new graduate. The award doesn't reflect what one sees in teachers and more dramatically in the Professionals Award of assuming a grad program or even a year to get up to speed. It's reflecting the current structure.

PN2890

DEPUTY PRESIDENT O'NEILL: Well, they're not current rates.

PN2891

MR SAUNDERS: No, not the current rates.

PN2892

DEPUTY PRESIDENT O'NEILL: And that has the objective in part 2, not go forwards or not go backwards unnecessarily (indistinct).

PN2893

MR SAUNDERS: Yes. We say it is necessary.

PN2894

DEPUTY PRESIDENT O'NEILL: Okay. Now, I think in perhaps the first version of the alternative proposal that the ASU filed it had expressed reference at (indistinct) level 2 as entry point for counsellors.

PN2895

MR SAUNDERS: Yes.

PN2896

DEPUTY PRESIDENT O'NEILL: I think that's gone. So I'm not quite sure now where counsellors would - - -

PN2897

MR SAUNDERS: It's back, B.7.2.

PN2898

DEPUTY PRESIDENT O'NEILL: So the entry point for someone who's a counsellor would be 7.77.

PN2899

MR SAUNDERS: Yes. I think the difficulty is it's not quite a – it's expressed slightly differently. So we've put at dot point 7.1, dot point 2, in hindsight, there should have been A and B. Identifying roles with skills and responsibility, a different expression of the earlier construction. And then we say indicative roles, but it works in the same way. Minimum entry point.

PN2900

DEPUTY PRESIDENT O'NEILL: All right. What's their current – what would a base financial counsellor currently be classified as, given it's a diploma, I think.

PN2901

MR SAUNDERS: It is a diploma, but it's a very (indistinct) specialised role.

PN2902

DEPUTY PRESIDENT O'NEILL: It is.

PN2903

MR SAUNDERS: This is one of these matters where I am 90 per cent sure I know what the answer is, but because of the various numbers involved in this, I don't want to get it wrong. Can I come back to your Honour on that question?

PN2904

DEPUTY PRESIDENT O'NEILL: Yes. Thank you.

PN2905

MR SAUNDERS: Yes.

PN2906

DEPUTY PRESIDENT SLEVIN: And how many of them are there, financial counsellors?

PN2907

MR SAUNDERS: It's a relatively small subsector.

PN2908

DEPUTY PRESIDENT SLEVIN: (Indistinct) one of the groups that could be (indistinct) you spoke about earlier?

PN2909

MR SAUNDERS: Relatively small.

PN2910

DEPUTY PRESIDENT SLEVIN: if the concern is – there's a lot of evidence about financial counsellors. We were talking earlier about, or you were talking earlier, about the anomalies.

PN2911

MR SAUNDERS: Yes.

PN2912

DEPUTY PRESIDENT SLEVIN: Whether this lends itself to be dealt with in that way. Although, your proposal may well deal with it in the way you have here at level 7.

PN2913

MR SAUNDERS: The relevant industry group for financial counsellors has suggested that they be excised entirely from this exercise. They tend to classify their employees at the higher end of the scale because of the level of responsibility involved in the work, notwithstanding the certificate 4. Can an entire cohort who work as an entire subsector be red-circled. It depends what your Honour means. If it means grandfathering the existing workforce, then no, not fairly for financial counsellors starting tomorrow.

PN2914

If it means having another schedule for financial counsellors, that kind of defeats the – that's inconsistent with this statement.

PN2915

DEPUTY PRESIDENT SLEVIN: (Indistinct.)

PN2916

MR SAUNDERS: Also, everyone else would be queuing up for their own - - -

PN2917

DEPUTY PRESIDENT SLEVIN: No, I meant before (indistinct).

PN2918

MR SAUNDERS: No. It would be – grandfathering for a cohort of that significance – it's a small part of the sector. You're talking about thousands of workers, I think.

PN2919

DEPUTY PRESIDENT SLEVIN: It's thousands (indistinct). That's why I was wondering about the number.

PN2920

MR SAUNDERS: It's not tens. It's a distinct area.

PN2921

JUSTICE HATCHER: Does the evidence disclose that they've paid in accordance with the order of above award or at some sort of market rate?

PN2922

MR SAUNDERS: It's all reliance based on the employer's submissions. They're a funded sector.

PN2923

DEPUTY PRESIDENT O'NEILL: There's a submission from the Financial Counsellor Association or Financial (indistinct) Association.

PN2924

MR SAUNDERS: Which does have - - -

PN2925

DEPUTY PRESIDENT O'NEILL: Goes through.

PN2926

MR SAUNDERS: That does have quite useful longitudinal analysis in that way. But also, the work hasn't changed. They're not – we don't say there's any evidentiary basis on which they could be flagrantly overpaid or overclassified under the award. The short answer to your Honour's question is it's possible, but it wouldn't address the issue.

PN2927

DEPUTY PRESIDENT O'NEILL: The other question I had about level 6. So the ASU proposal would have this level available to all employees in all sectors other than the home care. Have I got that right, or does it include home care?

PN2928

MR SAUNDERS: (Indistinct) meant to include home care. I accept it's a limited area of interest for a client, which is why the error is correct in – we're not excising entirely – there's some concern about (indistinct) employees who aren't the - - -

PN2929

DEPUTY PRESIDENT O'NEILL: That wasn't where I was going. It was more back in your area of interest: disability support workers.

PN2930

MR SAUNDERS: Yes.

PN2931

DEPUTY PRESIDENT O'NEILL: Could you just have a look at where in Schedule B disability support workers would currently be able to be classified at a rate of level 3.3, which is essentially the match-up of rates for a client. That wasn't apparent to me that that would be available to a disability support workers under the current structure.

PN2932

MR SAUNDERS: I'll take it on notice, given the nature of the classification structure.

PN2933

DEPUTY PRESIDENT O'NEILL: Yes.

PN2934

MR SAUNDERS: I'm told there's 1,170 financial counsellors in Australia, which we say is a significant cohort to grandparent, and indeed, red-circle. But still less than I thought there were.

PN2935

VICE PRESIDENT ASBURY: Sorry, what was that number again, Mr Saunders?

PN2936

MR SAUNDERS: 1,170 according to the Employer Association.

PN2937

DEPUTY PRESIDENT O'NEILL: And the justification for the progression after, I think it's seven years, from level 6 to level 7.

PN2938

MR SAUNDERS: Reflects the current ability to move between those levels. The timing's not precise.

PN2939

DEPUTY PRESIDENT O'NEILL: No.

PN2940

MR SAUNDERS: But they're working, and the timing has been based on the highly significant activity of how long they can keep them there before (indistinct) start to move backwards. So there's a degree of expedience in this. I'm sure everyone will be shocked; there's a degree of expedience in a lot of these decisions. It's just the nature of the task.

PN2941

DEPUTY PRESIDENT O'NEILL: Understood. Thank you.

PN2942

MR SAUNDERS: And I don't think there's anything particularly novel about 8 or 9. We've made some minor amendments in 8, and 9's identical to the Commission's proposal.

PN2943

DEPUTY PRESIDENT O'NEILL: Well, I just have a couple of kind of questions. I've got to say, it's not clear to me what types of employees are picked up and the notion of administrative/clerical employees. Whether we are talking what used to be described as perhaps secretarial basic administrative tasks, or whether they've extended to broader support functions like human resources, finance and the like.

PN2944

MR SAUNDERS: Yes, the latter.

PN2945

DEPUTY PRESIDENT O'NEILL: Okay. So it might be that a definition to make that clear might be helpful, because – well, in the same group then would people like project administrators fit into that category?

PN2946

MR SAUNDERS: There's some flexibility between the levels for that particular role, but broadly speaking - - -

PN2947

DEPUTY PRESIDENT O'NEILL: So might be case worker - - -

PN2948

MR SAUNDERS: Broadly speaking, yes.

PN2949

DEPUTY PRESIDENT O'NEILL: All right.

PN2950

MR SAUNDERS: Can I make one observation, though. We have no position to defining anything, but having too many definitions of particular roles does turn into a bit of an exercise of indicative roles within the thing. That's the only reason we've been cautious on it, but happy to embrace it as a proposition.

PN2951

DEPUTY PRESIDENT O'NEILL: Well, I've got to say, I was also curious as to why at level 7 you found the need to have indicative roles.

PN2952

MR SAUNDERS: To give guidance to the discretion that's otherwise at dot point 2 of B.7.1. And to make it clear those people are there, so they don't go backwards.

PN2953

DEPUTY PRESIDENT O'NEILL: So one of the examples you've got there is a family domestic violence worker. Can you remind me where employees in a specialised field first come in – I think it's at about level 5 under the proposal.

PN2954

MR SAUNDERS: I'm now confused. Your Honour remains in the ASU's proposal?

PN2955

DEPUTY PRESIDENT O'NEILL: Yes.

PN2956

MR SAUNDERS: Yes. Thank you.

PN2957

DEPUTY PRESIDENT O'NEILL: There's a dot point: 'Is engaged in a role involving work in a specialised field'.

PN2958

MR SAUNDERS: Yes. That's the seniority of those particular roles within the specialised fields. Not every speciality - - -

PN2959

DEPUTY PRESIDENT O'NEILL: So it might be a senior family domestic worker, or a – anyway.

PN2960

MR SAUNDERS: Those would exist, but that's tensely (indistinct). That's through time. But they might be more apt to level 8.

PN2961

DEPUTY PRESIDENT O'NEILL: All right. Now, in level 8, I think it's paragraph 160 of the ASU's submissions. It's where you acknowledge that your alternative proposal involves an increase (indistinct) that there are better alternatives than what's in the proposal. I'm just curious as to what – that's better alternatives are.

PN2962

MR SAUNDERS: That's a classically unhelpful thing to say. The better alternative, we think, is the hideously complicated process of developing a competency standards model for this industry. That's the dream. We couldn't do it in the timeframe by ourselves, but that would be the more structured way to do it.

PN2963

DEPUTY PRESIDENT O'NEILL: All right. Now, I've also got a level of confusion between, I think, level 7 and level 8. Both refer to – level 7 refers to someone who has comprehensive knowledge and skills through post-graduate qualifications or experience.

PN2964

MR SAUNDERS: I think it just says who has obtained post-graduate – no, sorry, I'm looking at 8.

PN2965

DEPUTY PRESIDENT O'NEILL: Yes. Wel, that's kind of the point, whereas level 8 has obtained and whose role involves work.

PN2966

MR SAUNDERS: It's the who otherwise – yes, I see.

PN2967

DEPUTY PRESIDENT O'NEILL: So I think there's an inconsistency or an ambiguity there.

PN2968

MR SAUNDERS: Yes.

PN2969

DEPUTY PRESIDENT O'NEILL: Or perhaps a distinction is it's master's level at - - -

PN2970

MR SAUNDERS: That's it. Okay. How utile that remains is a question, but there is some indication in the evidence that the post-graduate qualifications other than a master's degree and at that lower AQF level do exist and are (indistinct).

PN2971

DEPUTY PRESIDENT O'NEILL: Now, some of the employer submissions concerned the descriptions in level 8, that they were under the ASU proposal at a level that might pick up quite - more junior frontline supervisors and the like. So I think the suggestion - one of the suggestions was that instead of part of a management team to have part of an executive or senior management team. Did you have a position on that?

PN2972

MR SAUNDERS: This is part of the difficulty with doing it in this kind of structure. My instructions are this is the position but we're open to that discussion.

PN2973

DEPUTY PRESIDENT O'NEILL: And (indistinct) I think there was a suggestion about a coordinator of services being either removed or redescribed as a coordinator of services across the organisation to distinguish a coordinator at a different level.

PN2974

MR SAUNDERS: It's the kind of thing we're open to discussion about, your Honour.

PN2975

DEPUTY PRESIDENT O'NEILL: All right.

PN2976

MR SAUNDERS: I should be clear: there are uplifts, there are movement in here, there are changes from the different rate. It's all explicit. Otherwise there's no attempt to sneak something in. It's there. Stuff like that, it's minor and we're open to discussion but I can't advance it further at this precise point.

PN2977

DEPUTY PRESIDENT O'NEILL: All right.

PN2978

MR SAUNDERS: There is - as I'm helpfully immediately instructed - it does reflect the different sizes of organisations. So the idea of a coordinator of services across multidisciplinary service is quite different to someone who is coordinating a service that is in a more senior role than a frontline manager. Some people are very senior and frontline because there are not very many staff in their organisation which increases their level of responsibility.

PN2979

DEPUTY PRESIDENT O'NEILL: The roles become very broad.

PN2980

MR SAUNDERS: Yes.

PN2981

DEPUTY PRESIDENT O'NEILL: All right. Now, just a couple of other questions I had about definitions and the like.

PN2982

MR SAUNDERS: Yes.

PN2983

DEPUTY PRESIDENT O'NEILL: So the definition of disability support worker isn't confined to a person with a disability. I wanted to see if that was intentional.

PN2984

MR SAUNDERS: No.

PN2985

DEPUTY PRESIDENT O'NEILL: Okay, so it kind of harks back to the discussion we were having earlier about perhaps analogous support worker roles that aren't described as disability support workers and whether an alternative might be to have a definition of support worker that includes disability support workers for example.

PN2986

MR SAUNDERS: Very open to that discussion. Our focus on disability support worker is directed at identifying - addressing the specific issue that was raised about misclassification of disability support workers. But I really want to reiterate we're not pretending this drafting is perfect in any way. It's the best we could do at the time.

PN2987

DEPUTY PRESIDENT O'NEILL: I'll just mention a couple of other things, perhaps not for response now but for consideration and the conference process. It seemed to me that the definition - well it seemed to me that one option might be to separate out home care employees and have them confined to providing support to an aged person, disability services as a separate category and then SACS employees for the balance. It just seemed to me when I was working through it might - drafting more than anything else rather than any substantive difference. And it seemed to me that there was also a need to maintain a definition of each of the sectors as well as disability support workers and the like, which I think is one of the issue that the - might be in the Ai Group or ABI raised about a fundamental shift from defining sectors to workers.

PN2988

MR SAUNDERS: Yes.

PN2989

DEPUTY PRESIDENT O'NEILL: So if I can just mention that.

PN2990

MR SAUNDERS: I can say that was - obviously we'd need to have some more detailed discussions with my client and get instructions but an initial very enthusiastic reaction to that suggestion.

PN2991

DEPUTY PRESIDENT O'NEILL: All right. It also seemed to me that the definition of case worker practitioner was pretty broad and perhaps arguably would include disability support workers. And indeed there wasn't a clear distinction in my mind at least between case worker and practitioners and the definition of council. So - - -

PN2992

MR SAUNDERS: I think those are reasonable comments. The case worker definition gives an example that appears to list everything that's already defined as SACS work so I can accept that may not be much help (indistinct).

PN2993

DEPUTY PRESIDENT O'NEILL: All right, now - - -

PN2994

MR SAUNDERS: It's difficult to pin down, these roles, which is again why the focus on skills and responsibilities - - -

PN2995

DEPUTY PRESIDENT O'NEILL: You're not shocking me at all, Mr Saunders. I'm reasonably familiar. I have no difficulty accepting that. The clause - I think it's 1.10 in the ASU proposal - this is the progression from year to year - the proposal is somewhat different than the current clause 13.3 of the award. I'm not sure what the basis for that is. The current clause seemed to provide a reasonable starting point for such an issue.

PN2996

MR SAUNDERS: We have some difficulties with the way the clause is applied, particularly subsection (b) and the high level of subjectivity there. So the idea is to create a structure that has the same intents but is more workable. It's one of those where modernising - here now modernising it so let's modernise a lot. It's not meant to be a significant departure but it does streamline it and it does we accept place obligations on employers that do not currently exist, i.e. to actually perform these performance reviews. What we say about that is not inherently unreasonable.

PN2997

DEPUTY PRESIDENT O'NEILL: Well, but with a sting in the tail if they don't is a default assumption.

PN2998

MR SAUNDERS: Yes.

PN2999

DEPUTY PRESIDENT O'NEILL: Which is new.

PN3000

MR SAUNDERS: Yes, it is.

PN3001

DEPUTY PRESIDENT O'NEILL: All right.

PN3002

MR SAUNDERS: And in that respect I think it was Ms Wyatt's first statement that there is evidence in the proceedings, I apologise if I can't identify it, about people being stuck at these pay points.

PN3003

DEPUTY PRESIDENT O'NEILL: There would always be the mechanism though of raising a dispute or escalating issues or bringing the union in. There are options for the employee to take the initiative in those settings as well.

PN3004

MR SAUNDERS: Yes, there's one Federal Circuit decision on the point which essentially concluded that it's wholly employer discretion point B and raising a dispute yes, gives one access to a highly award-dependent workforce gives one access to the extremely useful conciliation aspect of the Commission. But if you've already got an employer that doesn't want to do this that does have its limitations.

PN3005

DEPUTY PRESIDENT O'NEILL: Understood. Speaking of - there is the ABL raised a couple of decisions in their, I think reply submissions, one related to the correct classification for an employee who was an instructor in disability services. This was the decision in AEU v Yooralla. I'm raising this simply because it's just made me curious as to what under the ASU proposal would be the description and level for such an employee.

PN3006

MR SAUNDERS: I have to say that - - -

PN3007

DEPUTY PRESIDENT O'NEILL: There's an instructor in disability services. The citation is [2019] FCA 1511.

PN3008

MR SAUNDERS: I have to say that aspect of AIG's submission has passed me by. I'll need to come back to your Honour on that one.

PN3009

DEPUTY PRESIDENT O'NEILL: I think this is ABL's.

PN3010

MR SAUNDERS: Yes, in any case - - -

PN3011

DEPUTY PRESIDENT O'NEILL: By the way, it wasn't personal. All right.

PN3012

MR SAUNDERS: Whoever said it, I missed it. I'll look at the decision and come back to you.

PN3013

DEPUTY PRESIDENT O'NEILL: All right. The other thing that I would find very helpful is if you would be able to provide a note that mapped out the career progression from entry point to hard barrier for the main categories of employees concerned and compare that against the current SCHADS award.

PN3014

MR SAUNDERS: That can be done - not immediately - - -

PN3015

DEPUTY PRESIDENT O'NEILL: No, of course.

PN3016

MR SAUNDERS: If it was simple I would have done it already. But we'll continue our efforts in that respect. Can I come back to your Honour again with a timeframe for that?

PN3017

DEPUTY PRESIDENT O'NEILL: Yes, absolutely. I just thought it might be useful, in conferencing, if nothing else.

PN3018

MR SAUNDERS: The problem is the difficulties it involves and the difficulties with the current award which again we have enthusiastic (indistinct) - - -

PN3019

DEPUTY PRESIDENT O'NEILL: That's why I'm asking you, Mr Saunders, because I had a quick go over the weekend and did not come (indistinct). So I'm handing the baton to you.

PN3020

MR SAUNDERS: There must be a maintenance trade worker employed under this award somewhere and so if we can find inevitably him that might be easier.

PN3021

DEPUTY PRESIDENT O'NEILL: All right. I'm nearly there. I was also curious as to, other than the disability support workers, regardless of seniority, are there other classifications in the current schedule B that are employees providing services that would be funded by the NDIS?

PN3022

MR SAUNDERS: Inevitably, yes, but it's the nature of organisational funding, rather than direct positional funding, such that the answer isn't simple. Inevitably, yes, is the answer to that, that it'll be relevant to more - - -

PN3023

VICE PRESIDENT ASBURY: All right. I might just ask you to have a bit of a look at that, and perhaps if you can indicate some roles that might encompass - - -

PN3024

MR SAUNDERS: Yes. I'm being told that someone in the room can answer that question for me, so I can probably come back on that reasonably quickly.

PN3025

VICE PRESIDENT ASBURY: Terrific.

PN3026

MR SAUNDERS: If not necessarily comprehensively.

PN3027

VICE PRESIDENT ASBURY: I'm being given the wind-up. I think that's it.

PN3028

MR SAUNDERS: Thank you. I did want to – certainly from my perspective, it's a useful exercise. I did want to say a couple of things about B.10, which is the – although, in fact, I think we've covered that in my discussion with your Honour Deputy President O'Neill. B.11 is the equal remuneration order preservation clause. This is the one that I referred to earlier as being extraordinary difficult to apply in practice. I can't walk away from that. It is the way to ensure that the ERO rates are, within the structure, perfectly protected, and what it reflects is that I couldn't otherwise do it within this structure.

PN3029

JUSTICE HATCHER: So how would this work? Assuming we abolish schedule B, how does this work?

PN3030

MR SAUNDERS: With a high degree of difficulty. There would need to be some sort of historical, here's what schedule B was.

PN3031

JUSTICE HATCHER: So does B.11 only apply to existing employees?

PN3032

MR SAUNDERS: No.

PN3033

JUSTICE HATCHER: So that would nullify the effect of creating a new classification structure, because everyone would remain under schedule B, plus the ERO.

PN3034

MR SAUNDERS: Yes.

PN3035

JUSTICE HATCHER: Do you want to say anything further in support of that proposition?

PN3036

MR SAUNDERS: No. I've taken that as far as I can.

PN3037

JUSTICE HATCHER: All right. Thank you.

PN3038

MR SAUNDERS: What I will say is that the ASU's position is that, moving backwards, an outcome that reduces rates in the sector from the equal remuneration order is, to it, unacceptable, thus, this extraordinarily unworkable clause.

PN3039

JUSTICE HATCHER: All right. Thank you, Your Honour.

PN3040

DEPUTY PRESIDENT SLEVIN: Is that the only way that you address the question in paragraph 397(2) of the April decision?

PN3041

MR SAUNDERS: Forgive me. I have not memorised said paragraph.

PN3042

DEPUTY PRESIDENT SLEVIN: That's, the transitional arrangements should be implemented to translate employees who are in the current classification to the new structure, and ensure that no employee has their wage rate reduced because of the transition. Is this the only mechanism?

PN3043

MR SAUNDERS: There are other – two things to be said about that. We've always understood employees to be employees at large, that the idea is not moving – aside from minor anomalies, that are likely unavoidable, not moving rates backwards in the sector in the future. Making the rates higher achieves that. Structures that allow greater progression achieve that. This clause achieves that. If it is talking about grandfathering for existing – red-circling for existing employees only, that's the proposition we've put forward.

PN3044

As a matter of practicality – and it does appear to us this is how the proposed translations do it for schedule C – the way to ensure that is to link people to their – whatever classification is their highest rate. As a matter of principle, we think that's unsustainable. It creates enormous practical and industrial difficulties. But the flipside of that, the difficulty with mapping them via the classification translations leads to their notional rate being lower, them having to be preserved, their outcome becoming worse over time, real wages going backwards, and just, practically speaking, earning less than they otherwise would have.

PN3045

So it's a long-winded way of saying, that's a suggestion; there's other ways to do it. If there's still significant wage decreases as a result of any – I withdraw that – as a result of the final decision, then those problems emerge.

PN3046

VICE PRESIDENT ASBURY: It could possibly be a combination of both. So option B translation, which everyone, apart from the submission you've just made, seems to prefer, but if there are a very small number of clusters where option B doesn't arrive at a result that maintains the ERO rates, there's the translation based on rates.

PN3047

MR SAUNDERS: The problem is less existential in that respect. The instructions I have is, an outcome that involves work in this sector being paid less than it would under the equal remuneration order is not palatable to the ASU, which is about as far as I can take this. But the smaller the group that's moving backwards is obviously the less dramatic. The concern is how much they're moving back.

PN3048

VICE PRESIDENT ASBURY: Yes.

PN3049

MR SAUNDERS: Whether it's a one-year catch-up or five.

PN3050

JUSTICE HATCHER: Given the ERO operates on the existing classification structure, I'm just wondering how you say it operates as a protection in the first place. That is, it still begs the question, what does the ERO do to give the protection you're talking about, when the classification structure itself is so deficient, in the ways we have discussed already?

PN3051

MR SAUNDERS: The classification structure is not impossible to apply. The industry guides that were put before the Commission on the last substantive occasion do show that it can apply in the sector.

PN3052

JUSTICE HATCHER: Well, that's not the case you ran before us.

PN3053

MR SAUNDERS: Yes, it is. We didn't say that every single worker in the sector is misclassified. We said there is a serious problem with misclassification in the industry, and those industry guides are the way to resolve it. What isn't the case is that the ERO is inutile. It has driven major wage growth for employees in this sector over a number of years.

PN3054

JUSTICE HATCHER: Thank you. How much longer have you got to go, Mr Saunders?

PN3055

MR SAUNDERS: Once we move off the determination, 15 minutes.

PN3056

JUSTICE HATCHER: All right. Keep going.

PN3057

MR SAUNDERS: I take it there's nothing further on the ASU's alternative proposal.

PN3058

JUSTICE HATCHER: No.

PN3059

MR SAUNDERS: All right. I just need to briefly – it's less than 15 minutes, in fact – briefly address the ABI and AiG submissions at a high level. With ABI, I've said what I needed to specifically throughout this, and in particular, with the amendments. Really, they only speak to the disability sector, the aged care sector. There's general alignment in that respect, particularly with home care, but limited force with the other areas of the industry.

PN3060

AiG, the difficulty in that respect is perhaps more intense. They don't have that broad Chamber of Commerce general standing, general moral authority to speak to these things. They've let me cite their rules. The single member that's been identified, LiveBetter, filed their own submissions, contradicting the AiG position of phasing in wage decreases reasonably strongly. Ability First we accept is a disability organisation that represents 15 employers across Australia. Of those 15 members, three of them signed the CEO collaboration submission.

PN3061

Those are, as we understand it, Melba Support Services, Multicap high-need disability support, and Yooralla. It must be the company named in that Federal Court decision. A fourth put in its own submission that contradicts the AiG position; unclear why the material should be given significant weight. The major point that arises in reply – not the (indistinct) one, the other one – is that the position that's being taken is almost that they're here as a volunteer, or some sort of friend of the Commission, to assist in implementing the provisional views.

PN3062

That's not what's happening. They're an industry group. They're here on behalf of, apparently, employers in the industry. They're advocating for a particular position, which does involve wage decreases and which does involve stratification of the industry, particularly the – the particular invidious part of their suggestion is removing basic, at level 2, making that a parking spot for people who do not have a formal qualification. That's obviously what it will do. Otherwise, I don't need to address their submissions. That was a very short 15 minutes, unless there was anything further.

PN3063

JUSTICE HATCHER: What does the AEC say about issues of operative date in phasing in?

PN3064

MR SAUNDERS: Yes, we're going to be completely ambiguous in this respect. In terms of home care workers we support the position of the HSU and the UWU. This should happen as soon as possible and there's been extended warning and extended run up in terms of schedule B and C. Unusually we would say on the current provisional views unamended as long as possible and particularly the position would be not until ASU stage 3 is determined to avoid the repetition of change in the industry and the difficulties that that can cause. That's a slow implementation by any stretch of the imagination, even if it is the most efficient work value case of all time, which I accept it has not to date been but we are talking about a sector which does at least have rates that in practice apply to it even with the difficulties the expert panel has identified that are not so materially and obviously deficient as the disability home care workers.

PN3065

DEPUTY PRESIDENT O'NEILL: What's the current timeframe for the work value case?

PN3066

MR SAUNDERS: We keep seeking directions to put on our material and there currently aren't any so it sort of depends. We would need some time to put our case on and that again depends on what time of year the direction's being issued, that kind of thing.

PN3067

JUSTICE HATCHER: I thought you were ready to put it on in February or something?

PN3068

MR SAUNDERS: Ready to put the material on by December.

PN3069

JUSTICE HATCHER: The 1st?

PN3070

MR SAUNDERS: The second-last directions hearing, that's what was - I'm sorry, the last directions, what was proposed was 12 December we'd finalise our case. We can only do so many things at once and so as time moves that date moves. Of course no surprises, the substantive material that's been put on in this respect would be relied on and refiled again but there's more that needs to be done in that respect, particularly in terms of change and change focus and ideally some further expert evidence as to the industry and how it's changed and evolved rather than another (indistinct). It's dependent a bit on what the outcome of this process is, though.

PN3071

JUSTICE HATCHER: Yes, all right.

PN3072

MR SAUNDERS: Thank you.

PN3073

JUSTICE HATCHER: Thank you, Mr Saunders. Mr Blewett.

PN3074

MR BLEWETT: How I propose to address the Commission is to address firstly our support for the ASU's - what it's called its fallback position, that we've just been through. Secondly, to address the concerns re-animated the UWU and HSU more limited structure, if you like, they are the reduction in wages that would ensue from provisional structure, the over-emphasis on qualifications as a determinant of classification, the ambiguity inherent in the concept of equivalence as it's used in the structure, some translation issues and then the absence of content of structure relating to admin, administrative and support work in the provisional structure.

PN3075

Then to address the Commission on that sort of alternative structure we've identified, first by reference to really direct care work and then in respect to the effects on administrative and support work, then to come to translation and to come to implementation. There will be some coverage of some of the matters my learned friend's raised, particularly about concerns. If the Commission is finding that not helpful as I go through, I'm quite happy to move to the next topic.

PN3076

JUSTICE HATCHER: All I can say is I think those points have been articulated very well on the ASU's case and - but if you think you can put it better than Mr Saunders has - - -

PN3077

MR BLEWETT: In fact that was really going to be my first submission in respect of our support for the ASU's position, which is I am not going to dwell on that position because if Mr Saunders hasn't been able to persuade the Commission there's nothing I'm going to be able to say which is going to be able to persuade the Commission about that. But we do support that fallback position. We share the concerns that animated in particular, which is as I say the reduction in - I've used the term, 'Reduction in wages'. I should be clear, that's quite loose language. I mean it in two senses. The reduction in real wages that will occur over time for those who are protected by the red circling process - - -

PN3078

JUSTICE HATCHER: Even there we could make a provision, I suppose, that the red circle wage is to be adjusted in line with future (indistinct) wage reviews.

PN3079

MR BLEWETT: Yes. And there is a - it does raise the related issue, which is problems in terms of mobility. As I understand the current provisional structure provision it appears to relate to the position in which the employee currently occupies. That will have some effect on their ability to - or the desirability of transferring to other employment.

PN3080

JUSTICE HATCHER: Yes, but how does the existing award protect - provide any protection in that respect?

PN3081

MR BLEWETT: Existing award does have the fundamental problems which have animated the second part of the expert panel's decision, which is it relates - it gives rise to significant issues of misclassification. And so I accept your Honour's point that because of the scope for evaluation there's no great protection for employees moving between positions and if we have an example - - -

PN3082

JUSTICE HATCHER: (Indistinct) use case examples, talks about losing pay upon changing jobs.

PN3083

MR BLEWETT: Yes, in fact one of ours - I think it's Ms Rogers, Margarita Rogers, I think - obtained a Certificate IV in particular employment, not immediately but ultimately got elevated to level 2.4 and then transferred to new employers and started back down at 2.1. So I take your Honour's point. The question of maintaining that rate for the existing employees will by reference to increases, annual increases, that will protect them. The second aspect of reduction in wages that I was referring to is the reduction in the wages that a new entrant will get as compared with that which they would have got under the current structure. Again, there's the same problem that your Honour's raised, which is the scope of valuation diminishes that.

PN3084

But nevertheless if one looks at the way in which the translations are articulated in the material that's been provided by the Commission there is no doubt that there is a reduction in this sort of anticipated wage will be paid to employees who would otherwise have come into the structure particularly if there's 2.2, 2.3 and 2.4. So when I've used the term, 'Reduction in wages', I've used it in those two senses. For simplification I probably will continue to be but I understand there are nuances within that. Secondly, we share the ASU's concern that the text of the provisional structure does seem to place greater reliance on the attainment of qualification as a determinative of classification than either does the current structure or I think it's probably intended by the expert panel given its finding at paragraph 390 of the decision where it makes specific reference to experience and particularly lived experience. It doesn't seem to have found its way into the provisional structure. And thirdly, we share that concern about the reliance on the concept of equivalence as it's contained in the current structure. It does give rise to the ambiguity that I think has been identified and therefore the likelihood of dispute and continued this classification.

PN3085

It's really in our submission from the cohort that the HSU and UWW represents primarily those two things which are driving the reduction in wages that I've talked about. But what we accept is we have a much narrower scope of coverage than does the ASU: narrower in two senses. We are primarily concerned with direct care work or my clients are primarily concerned with that albeit they also have a concern with administrative and support work but that means we don't have - we don't share that concern about how the current provisional structure will impact upon the great diversity of the sector because it's not part of our remit.

PN3086

And secondly, we are primarily concerned with the lower levels of the classification: so 1 to 5, possibly 6, as opposed to 7, 8, 9. And that's really why we have a much more limited alternative, if you like, but why we recognise that the ASU model at least in principle is a superior model and one we've (indistinct). As I say, acting from, I – I don't think it's going to be helpful for me to go through that structure try and persuade the Commission about.

PN3087

If I can now address the alternative, which is really our fall back from the ASU's fallback position, as well as those three matters that I've articulated, with which we share a concern with the ASU, that is, reduction wages, overemphasizing qualifications and ambiguity inherent in the concept of equivalence, there are some particular issues in the translation arrangements which we raised and then there's the absence of substantial recognition, in the sort of nuanced way, if you like, of administrative and support work in the provisional structure. And they're the five matters which animate the structure.

PN3088

Perhaps in terms of addressing that concern in respect to reduction in wages, perhaps if I could simply give the pinpoint references to the material which demonstrate that as mentioned in paragraphs 49 to 50, we've set out the translation arrangements at levels 2.1 to 2.4 proposed by the Commission's material, which shows reductions for those two from between \$11.34 per week and \$119.61 per week. So they're significant.

PN3089

The ASU's submission at paragraphs 105 to 106, demonstrates that in a different way by looking at the progress of a theoretical Certificate III new employee in the first eight years of their career within the industry, and again shows a significant reduction that's prepared with the current structure. And then in our affidavit material, Caroline Shearer, at paragraphs 15 to 16, Deborah Garner, 14 to 15 and Zelda Rudelle at 17 to 18 all give an indication of how they would be impacted. I appreciate it's a very small sample set but it makes real it for them on what appears from the material.

PN3090

Then if I could turn to what I say are the two related issues – overemphasis on qualification as a determinate and the ambiguity and the concept of equivalence. Again, I don't want to traverse ground that Mr Saunders has traversed, but (indistinct) two or three points. First is as expressed in the provision structure, equivalent does seem to the most natural and ordinary way of construing that would be equivalent formal qualification. It's very difficult to see how it would not be read in that way. Now, that can be addressed by provisions, but that's a – that's an issue as it's currently structured. But the second issue – the (indistinct) homeowners much more substantial and that is the absence of guidance as to how one makes that evaluative decision and that becomes even more complicated when one is including life experience as well as professional experience. There's no guidance as to how that's evaluated in the provisional structure. And I think everyone's identified concerns of that basis on – and it's a concern shared by the ADI, AIG and I think many of the employer submissions.

PN3091

And in our view, even if one inserts guidance and there are various submissions which try to insert guidance as to what is to be comprehended by this equivalent experience and some guidance as to how to evaluate that. There are still big problems of subjectivity of evaluation and problems of individuality of that evaluation because these are very subjective characteristics of an employee. They're lived experiences, very - obviously personal to them. How one goes about that evaluative exercise is always going to be difficult. (Indistinct), people are going to have different views about the relevance or the level of that personal experience and professional experience.

PN3092

And so there will be inconsistent results across the sector but also potential for both disputation and misclassification and really that's why (indistinct) structure between level 2 and level 3 we've advocated for a 12 month experiential progression point as opposed to this evaluative exercise.

PN3093

In terms of the translation arrangements which are referred to, they tend to cause a reduction in real wages in the way that I've suggested but also they indicate how non-current new employees will be treated by the structure and therefore the reduction in wages that are – they will have vis-à-vis that which they might have if properly classified under the current structure.

PN3094

And I think in terms of the current structure, I mean because I think qualifications are so clearly expressed in the current structure, at a practical level, employers will go to the qualification. You have it, you don't have it. There'll be lots of employees classified by reference to that qualification. And I think as the translation documents provided by the Commission indicate, that will have this effect of a reduction in wages. And there's a particularly good example of that at level 2.4. Level 2.4 is the current sort of top level foray disability support worker who is not a supervisory part or training employee. I mean, because of the definitional structure, it's impossible to be concrete in absolute about that, but that seems to be the level.

PN3095

The equivalent in the provisional structure seems to be level 4, that's the – beyond level 4 one gets into supervisory training work as a disability support worker or some specialised work.

PN3096

And so in our submission, level 2.4 should simply translate over to level 4 as opposed to what's proposed in the translation structure. And it's a good demonstration of where in this translation from the existing regime to the provisional structure there will be reductions affected, both as I say, for existing employees, but for their new employees who otherwise have got to that point.

PN3097

And then the last of the sort of five issues for the UWU and HSU, is the really absence of recognition for admin and support work. In the provisional structure

it's really only recognised at levels 1 and level 3. It's intuitively unlikely that that will be the only levels of capacity equality of administrative and support work.

PN3098

It's not the way that the current structure operates. One can see at each of levels 1.2, 2.2, 3.2 and 4.2 of the current structure. Administrative work and support work is recognised at those levels. And really, just in the circumstance where because of the nature of this case there was no focus upon the administrative and support work in the primary decision. It seems that the genesis of really the absence of content relating to administrative and support work is the schedule F arising from the aged care decision because that makes no express provision for administrative and support work. And in turn, because that may have been driven by the pre-existing schedule E where administrative and support work is expressed in respect of level 3 and level 4 to some extent but doesn't find expression in levels 1 and level 2. Then of course the focus of the aged care decision was on aged care home care as opposed to the supporting arrangements. So that seems to be how we've got to the point we've got.

PN3099

The provisional structure has addressed that to some extent by inserting some administrative and support criteria at level 1 to level 3 but it does seem - and I think there's consensus, at least at the front of the bar table - that's a deficiency. There's one issue that arises in respect of administrative support work and that is as I understand in particular the submissions from the Ai Group, its submission is effectively it's a deliberate exclusion. Administrative and support work has never been a part of home care work and therefore when coming to this structure administrative and support work should be confined to non-home care work, I think is how that's articulated.

PN3100

That seems to have no attraction I would have thought in trying to get a classification structure that comprehensively deals with this sector, the idea that administrative and support work in respect of one stream of coverage would be carved out from the balance of the award.

PN3101

JUSTICE HATCHER: I thought they said it was already under another award.

PN3102

MR BLEWETT: I think they - I think the Ai Group articulates that it's under the Clerks Award. We've addressed that in our reply. The evidence for that seems thin, with respect. As I've said, in schedule E as it currently is and how it was before the aged care decision administrative and support work was recognised expressly at levels 3 and 4, not recognised expressly at levels 1 and 2 but there were quite broad criteria and one would have thought that administrative and support work fitted within that - those criteria. It then just simply wasn't addressed in the aged care decision but I don't - I think it's a leap to go from there to say, 'It has never been part of the home care structure, it has always been part of the Clerks Award'. I think the one decision that's cited by the ABI in respect of - it takes a slightly different position. I think it starts from the same position, which is it's not been part of the home care sector but it I think favours an option about

bringing it in to the sector. It cites one decision which is a decision in respect of schedule F following the aged care decision which indicates that that work is not covered by - sorry, the administrative and support work - I think the decision cited by ABI is in respect of the Children's Services Award, not a great parallel for here.

PN3103

But in any event, my submission is it seems - sorry, it's an ambitious argument that administrative and support work was not included in home care. It doesn't seem to be reflected in the schedule. It certainly wasn't that which the aged care Full Bench understood that it was doing and we've referred to the implementation decision of June 2024 decision Re Aged Care Award [2024] FWCFB 298. At paragraph 42 of that decision the Full Bench addresses a submission in relation to translation that it should make specific reference to administrative and support work. It rejects that submission but does so in terms which clearly indicate that it understood administrative and support work was covered by its schedule F and that's at paragraph 42 of that decision.

PN3104

That's a longwinded way of saying the Commission ought not accept the proposition that involving administrative and support work in relation to home care sector is affecting some change. With that, if I could then take the Commission to our proposed - - -

PN3105

DEPUTY PRESIDENT O'NEILL: Just before you do - because you make a similar kind of suggestion around the treatment of senior managers, senior employees is how you put it, and whether they are currently covered in the home care sector, whether they're covered by an award or not. I think the submission from the employer is not necessarily senior employees but senior managers. Do you maintain that senior managers are covered by the current home care schedule?

PN3106

MR BLEWETT: In respect of home care, I think we do. It's not - because my clients aren't - they don't have coverage in respect of senior managers, it's not something that particularly exercises them but I think our position that we've expressed in reply is that we don't accept that senior managers in home care not part of the existing award. And again, we do make the point that it seems inconsistent with the exercise that we're undertaking to carve out particular groups of employees because they belong to a particular sector. So senior managers in disability support work in, senior managers in home care work out.

PN3107

DEPUTY PRESIDENT O'NEILL: It might not be ideal but it might be what the Act requires if we're expanding award coverage to people who have not historically been covered by it.

PN3108

MR BLEWETT: Yes, I think the relevant language is, 'If they've not traditionally been covered'. I'm not quite sure if traditionally means covered - traditionally being covered is slightly different from haven't been covered at least in recent

times. But I suppose I can't put it any higher than if that were the view that the Commission put it would be inconvenient and undesirable. It seems again that the basis for the assertion that it hasn't traditionally been covered is thin and so we don't take that as the starting point and thereby avoid the inconvenience that arises from carving out a particular group of employees.

PN3109

I was proposing to move to the structure itself unless there are other questions about that preamble. And I was proposing to do that by reference to first sort of direct care work first and then come back and so the same thing with administrative work because it might be more straightforward doing it in those two parts. Does the Commission have the draft determination that was attached to our initial set of submissions?

PN3110

JUSTICE HATCHER: Yes.

PN3111

MR BLEWETT: And at page 5 of that draft determination, the structure commences. Obviously which you will have noted that ASU's structure is really an alternative structure to that which the Commission provided (indistinct). This is simply some amendment, alteration to the provisional structure. No change to level 1 in our structure. In terms of level 2, there are two changes and they're related. The first is to remove the reference to basic in the structure. That's a different position from the one the ASU adopts. The second is to put a time limitation there consistent with that which we do in level 3, which is not less than - and less than 12 months' relevant industry experience. In respect of the word, 'basic' - - -

PN3112

JUSTICE HATCHER: Sorry, just to be clear: so after 12 months experience, you progress from 1.2 to 2.1?

PN3113

MR SAUNDERS: Taking them to - - -

PN3114

JUSTICE HATCHER: So I'm just talking about level 1. 1.2 is three months or more, and then they progress how?

PN3115

MR SAUNDERS: Level 1 is administrative and clerical only.

PN3116

JUSTICE HATCHER: Yes.

PN3117

MR SAUNDERS: And they progress by reference to the alternative in B2.1, the nature of the work that they're undertaking as opposed to a time limitation. But for direct care work, there's a progression from level 2 to level 3 after 12 months.

PN3118

JUSTICE HATCHER: I still might follow up. With administrative employees, they start at 1.

PN3119

MR SAUNDERS: Yes. Yes.

PN3120

JUSTICE HATCHER: And then 1.2 is three months or more.

PN3121

MR SAUNDERS: Yes.

PN3122

JUSTICE HATCHER: So I'm just trying to work out when do they - - -

PN3123

MR SAUNDERS: There's not a time-based progression for administrative employees. They've progressed by reference to the final paragraph of 2.1, by reference to the nature of the work.

PN3124

JUSTICE HATCHER: The limited initiative criteria, yes.

PN3125

MR SAUNDERS: Yes.

PN3126

JUSTICE HATCHER: All right.

PN3127

MR SAUNDERS: So that's why I thought it might be simpler to deal with direct care work and then come back to administrative work.

PN3128

JUSTICE HATCHER: Sorry, yes, right.

PN3129

MR SAUNDERS: I think it sort of muddies the waters. So returning to direct care work, two changes: one is the regular basic, the second is the time limitation of 12 months. In our submission, the difficulty we're facing is – I think that which the expert panel identified in the primary decision, which is tasks can be similar. The work can be comprised of similar tasks here. What really differentiates much of the direct care work is the manner in which those tasks are undertaken and the empowerment of the individual where more experienced workers are able to provide the capacity to understand nonverbal cues (indistinct).

PN3130

Those sorts of things. So distinguishing between that work, which basic, and that work, which is non-basic, becomes difficult. And further, might provide a barrier to progression, or at least some to the disputation between employers and employees as to whether in fact they are continuing to perform basic work. It

becomes less problematic if the Commission accepts the time-based progression, because then whether or not there's an argument whether work is basic after 12 months, there will be an automatic progression.

PN3131

But it did seem that it's a slightly illusory difference in the context of the work undertaken in the sector. But obviously the more significant change that we suggest is this 12-month progression, based on 12 months of relevant industry experience. And it ties in with that which we suggest at level 3, which is that after 12 months in direct care, one becomes a level 3 employee.

PN3132

And this is really a response to those concerns about the overemphasis on qualifications and the ambiguity and uncertainty in evaluating experience. It becomes a very simple test. I accept it's a little bit crude, but it's a simple test: does one have 12 months' relevant industry experience or not. But it does do away, at least at levels 2 to 3, of complications involved in evaluation of someone's lived experience, professional experience, and it's equivalence to certificate training.

PN3133

It also makes at level 2(b): (indistinct), as the title indicates that is. That does suggest that at some point it ceases to become introductory. It's not an ongoing classification. And also makes sense in the context that level 3 appears to be, at least for direct care work, the sort of key level for direct care work. It's the care benchmark rate. It appears to have been envisioned by the expert panel and just becomes the sort of fundamental level for disability support workers after a period of introduction.

PN3134

And so for those reasons, albeit that a 12-month progression is perhaps crude, it makes sense. I think I do need to address a couple of issues in respect of it. The first is the concern about automatic progression based upon time arising out of the teacher's case (indistinct) and the nurse's case of that decision. The teacher's case of course dealt with the circumstance of seven annual increments.

PN3135

There was no evidence that correlated the progression of work value in a linear fashion each year over those seven years. And as the Full Bench in the teacher's decision identified at paragraph 391, it's intuitively unlikely that there would be such a constant and linear progression year on year over seven years. And the aged care nurse's decision arrived at very much a similar point, I think at paragraphs 57 and 58.

PN3136

I think I might have misstated the paragraph in the teacher's decision. That's paragraph 647, I apologise. It's referred to at paragraph 391 of the primary decision by the expert panel. And that's not the type of progression that here is in issue, the one of progression from level 2 to level 3 after 12 months. And really contrary to that, which animated the teacher's decision, it is intuitively likely that

in the first 2 months of employment working in this industry that there would be a significant increase in work value.

PN3137

It's the very time when someone is most likely to progress from where they were at the beginning of the year, having no involvement in the industry, to where they are at the end of the year. Progression thereafter might slow down in parts, it might accelerate in parts depending on other aspects, but it is the time at which one would expect a work value increase by reference to experience.

PN3138

JUSTICE HATCHER: Perhaps the bigger problem is that it would disturb the aged care outcome. And specifically it seems to give rise to the possibility that employees without a certificate 3 in aged care would nonetheless be able to progress to the benchmark (indistinct).

PN3139

MR SAUNDERS: Yes, it would. And I think – I mean, that arises, really, from two or three (indistinct). I'll come back to the home care problem, but I mean, we have evidence of quite a significant number of – sorry. We have evidence of employees who have no certificate training but are significantly experienced and they are performing complex work.

PN3140

JUSTICE HATCHER: In disability (indistinct), yes.

PN3141

MR SAUNDERS: In disability, yes. We've given evidence of Mr Mosey(?) in this case. And was (indistinct) from Mr Mosey at 21 to 22 and 26 to 27 of his statement. It was (indistinct) at paragraphs 12 to 18. They're relatively recent entrants, so can talk about the development of their experience in ways that people with much longer experience might find it more difficult to quite articulate what they learnt in the – or how they developed in the first year.

PN3142

So there doesn't seem to be any doubt that there is a progression of work value in the early stages of a career. It would enable employees without certificate 3 to get to level 3. But in part, that reflects the fact that certificate 3 is just not ubiquitous, and it hasn't been regarded as a requirement for a relatively complex work in this sector up until now.

PN3143

JUSTICE HATCHER: Well, that might all be reasonably accepted with respect to disability work. But the point remains, that your structure would also apply to aged care and – because that would be to disturb the outcome, and arguably to provide some people with further wage increases, above what was determined in the stage 3 aged care decision.

PN3144

MR BLEWETT: It may, but I mean, the alternative is that we are driven back to this evaluative exercise of lived experience and professional experience, which is

also very difficult. We're trying to find a way to avoid that difficulty. But I accept that there's likely to be some disturbance. But otherwise, one would be effecting a reduction, really, for a number of – for existing employees who don't have that level of experience. And interestingly – I don't take too much comfort from this – I do note that the Ai Group, in its articulation of how one would give guidance as to evaluation of experience, it uses 12 months as the guide. I think it says, 'What experience one would ordinarily gain in 12 months of employment'.

PN3145

The final point, to address your Honour's point about effecting an increase for those in home care who might not otherwise have one. There still remains 13(3)(a), which, in our submission, makes this a barrier, because one still has to obtain the relevant – one has to perform satisfactorily. And if that needs to be tidied up, in order to ensure that it doesn't just affect increment within levels, as opposed to progression, that's presumably something that can be done. On a related point to that which your Honour has raised, I think the ABI has put against that proposition that it would disincentivise the obtaining of Certificate III.

PN3146

In my submission, that's unlikely to be the case. It assumes that the attraction of a Certificate III is the relevant classification level that arises from obtaining a Certificate III. That's unlikely, in relation to the current structure, because there's no particular primacy given to the obtaining of a Certificate III. But also, the far more likely rationale for people obtaining a Certificate III is employability, rather than a level within the classification structure. One would have thought that that's the primary driver for people outside of the sector to obtain a Certificate III, in order to be employable in the sector.

PN3147

And probably the primary driver for those within the sector without Certificate III is to make themselves more employable, as opposed to (indistinct) based on them trying to get to the next classification level. So it is put against us, but in my submission, I think it involves a level of speculation. Your Honour, that was really – I've moved between levels 2 and 3, in respect of the classification structure. Turning, then, to level 3 itself, there is that 12-month relevant industry experience qualifier.

PN3148

The second change we propose, delete the word 'qualified' from the heading. It's partly because of our concern to deemphasise the primacy of qualification in this structure. But also, it helps articulate that level 3 is the sort of key level for disability support work; that it becomes the level, rather than the level 4 qualified employees. And we think that that being the sort of key level for disability support workers or direct care workers was the intention of the expert panel.

PN3149

VICE PRESIDENT ASBURY: But Mr Blewett, why would you want to remove 'qualified' when the very next paragraph gives equivalence to qualification for people with relevant experience, and whose primary role is to do those things? It's saying that it's equivalent to having the Cert III.

PN3150

MR BLEWETT: Well, I think what it does is emphasise having a Cert III, as opposed to having equivalent experience, or, in our case, having 12 months' relevant industry experience. How we see it playing out is – particularly if the Commission is against us in seeking the 12-month progression point, how it will play out is, it will result in far more employees being likely to remain at level 2, because their employer and they see that they are not qualified. The only other change I think we made to level 3 is to add an additional increment and to alter the time periods between increments from four years to two years.

PN3151

The third increment, we place at 106 per cent relativity of the caring benchmark rate. That is precisely the same approach that's being proposed by the ABI. And I think it really effects two purposes, I think; well, certainly, from our perspective. The first is, frankly, just to address the significant reductions in wages, as I've identified in relation to the sort of higher levels of 2.4, those reductions, of up to \$119, the addition of an increment, and the reduction in time periods between increments, from four years to two years, reduces both the significance of those reductions and also the longevity of those reductions.

PN3152

But it does have a justification in work value grounds. As, I think, the ABI puts it, an employee at this level for three and a half years is likely to be working at a higher value level than an employee with only six months' experience at this level. And without taking the Commission to them, the evidence of Stephy Pluff, at paragraphs 11 to 19, where she takes the Commission through her acquisition of skills in dealing with Huntington's disease, in a way which just does make manifest the increase in work value acquired over time, by dealing with some of these complex conditions.

PN3153

But also, Zelda Rudelle, at paragraphs 49 to 55; Sarah Lenard, at paragraphs 27 to 31, and then 39, where, again, she articulates some of the more complicated skills she's developed; and Margaret O'Rogier, at paragraphs 36 to 40. All of them ought give the Commission – again, I accept it's a small sample size, but they ought give the Commission comfort that there is this continued increase in work value over time, even once one is qualified with a Certificate III. And the additional increment at level 3 is not – sorry, I withdraw that.

PN3154

I think the provisional structure itself recognises increased work value acquired through experience. There are levels 1, 1.1, 1.2 and there was 2.1 and 2.2, 3.1 and 3.2, 6.1 and 6.4, 7.1 and 7.2. So it's not completely out of kilter with the balance of the structure and it does deal with, I think one of the key problems with the provisional structure from my class perspective is that translation from levels 2 to (indistinct).

PN3155

Then turning to level 4 and there are two fundamental changes. First is to address the issue of qualification and equivalence. The second is a sort of modest increase to the rate. That first issue really has two dimensions. It addresses the relevance

of a qualification and then secondly addresses the issue of equivalent experience. And the issue of the relevance of the qualification is referred to by Mr Saunders. What I mean by that is that the provisional structure provides that it applies to employees obtained a relevant certificate IV qualification or equivalent as a requirement for the performance of their duties by the employer. That is, it's the employers requirement that determines the relevance of the qualification.

PN3156

Obviously we accept the fundamental principle that the qualification has to be relevant to the work that's been formed, that our concern is that reference to the requirement by the employer. We – I note that the ABI disagrees with us, but we construe that as ultimately limiting the relevant qualification to that which is required by the employer. That seems to be the language or the natural meaning of the language and we are fortified in that by the AIG really embracing the level 4 language and applying it to levels 3 and throughout.

PN3157

So it certainly takes the view that this is putting the determinant of relevance of qualification in the hands of the employer and we think that is the natural language and once these (indistinct) we think the danger of that approach in Margaret O'Roger's experience which she articulates at paragraph 16-20 which I think I've touched on, where she obtained her Certificate IV with an employer and got to level 2.4, transferred into employment and she's back at level 2.1 and level 2.2. Now, we can argue about whether that's a valuation exercise or not, but that's that which has occurred and that is that which we are concerned will occur if relevance of a certificate is left in the determination of the employer.

PN3158

But also, we think that sits oddly with the structure more generally. And the nature of the interaction of skills and knowledge acquired through a Certificate IV with the work that's undertaken. In terms of the logic of the structure, that assumes that Certificate III gives us sufficient work value increase to qualify an employee at level 3. That logic ought also follow for Certificate IV.

PN3159

Really the training in the greater appreciation of the rights of clients, the greater sense of a need to empower clients, the greater emphasis on assisting our clients to reach independence, that seems a hallmark of certificate four training. And the next qualification description for qualification (indistinct) to the effort, the statement of Mr Wenham and the qualification description that he captures those things that I've just identified. It's:

PN3160

To reflect employees who provide support in a manner that empowers people with disabilities to achieve greater levels of independence, self-reliance, community and participation and well-being. They promote – workers promote a person-centred approach, et cetera.

PN3161

And that's backed up by the core subjects and the elective subjects that are also comprised in the certificate. They're not skills that can be unapplied in care

work. One can't deal with client A on a particular basis when one brings all those skills to bear and then move to client B and not do those things. And that seems to be really a dissonance with the idea that whether the qualification is relevant. Ought be determined by the employer.

PN3162

And it becomes all the more complicated when one is talking about an equivalent that is not a qualification. That is an equivalent that is professional experience or lived experience or – it's difficult to conceive how one can evaluate an employee's evaluation as to whether that experience is relevant to the employment that their engaging someone to do in this direct care sector. And so we've – what our proposal is, rather than to make the relevance of the qualification dependent upon the determination of the employer, it's to make it determined by reference to the performance of the duties.

PN3163

They've obtained – it was obtained, a relevant Certificate IV qualification or equivalent and who is required to use the skills and knowledge acquired through the acquisition of the qualification in the performance of their duties. So that's how we deal with relevance by relating to (indistinct) to performance of duties. The ASU has a different and broader proposition which is related to the performance of the duties. I'd accept that's a superior articulation than ours and so I'm not advocating for ours in lieu of the ASU one. So that's - - -

PN3164

DEPUTY PRESIDENT GRAYSON: So do you adopt the ASU's approach to yours as more of a relevant industry skills approach in the (indistinct) might call it a gradual approach of the ASU?

PN3165

MR BLEWETT: Yes.

PN3166

DEPUTY PRESIDENT GRAYSON: Adopt the ASU approach and (indistinct) preference.

PN3167

MR BLEWETT: Well, if the Commission adopts the ASU approach, broadly ours falls away, but in this particular matter, it occurs to me that the notion of requirement for which we had a problem with when it's in the hands of the employer, it's not that much better in terms of the practicum working out of the classification if requirement is associated with performance of duties. Whereas, having a qualification related to the performance of duties, probably addresses our concerns in terms of relevance in (indistinct).

PN3168

DEPUTY PRESIDENT GRAYSON: So actually doing them, establishing - you're actually doing them as opposed to (indistinct) enquiries.

PN3169

MR BLEWETT: Yes, absolutely. Thank you.

PN3170

VICE PRESIDENT ASBURY: The formulation that you've proposed seems pretty clear. Did you just form that or does it come from some other source?

PN3171

MR BLEWETT: I'm trying to recall. It must have come from somewhere.

PN3172

VICE PRESIDENT ASBURY: Right.

PN3173

JUSTICE HATCHER: Don't undersell yourself, Mr Blewett.

PN3174

MR BLEWETT: I'll perhaps by the end I will - - -

PN3175

VICE PRESIDENT ASBURY: Remember.

PN3176

MR BLEWETT: - - - I'll try to identify. I think it might be a process of going back. Anyway, I'll try to identify for the Commission.

PN3177

VICE PRESIDENT ASBURY: Thanks.

PN3178

MR BLEWETT: So that's really about the relevance of the qualification, the second issue that we attempted to deal with in the same paragraph is equivalence. And the formula that we've developed and I think this is bespoke and I don't think this part of the clause came through anywhere:

PN3179

The employee has substantial relevant industry experience and is required to undertake work timelessly, under broad supervision and which may involve working with clients with high complex needs.

PN3180

VICE PRESIDENT ASBURY: Sorry, where are you now?

PN3181

MR BLEWETT: It's in the – if Deputy President, you have the paragraph immediately under heading B4. The first part of the underlined portion of the paragraph is dealing with that relevance question I've just been articulating. But after the comma on the third line.

PN3182

VICE PRESIDENT ASBURY: I see.

PN3183

MR BLEWETT: This is really to deal with the equivalence issue as opposed to relevance. And so it has a number of integers. The first being substantial

relevance industry experience. And then the second three aspects of the work. Working autonomously, working under broad supervision, and it may involve working with clients with higher complex needs. I'm not quite sure when your Honour was proposing to rise.

PN3184

JUSTICE HATCHER: How much longer have you got to go?

PN3185

MR BLEWETT: There's no need to hurry, but I probably have about 20 minutes, I think.

PN3186

JUSTICE HATCHER: All right. Well, we'll adjourn now and resume at 2 pm.

LUNCHEON ADJOURNMENT [12.57 PM]

RESUMED [2.05 PM]

PN3187

JUSTICE HATCHER: Mr Blewett?

PN3188

MR BLEWETT: Thank you, Your Honour. Before the break, I was at part way through the explanation of the change at level 4 to be proposed. But just before I do, I wonder if I might return to a matter that Your Honour raised with me about receiving home care.

PN3189

JUSTICE HATCHER: Yes.

PN3190

MR BLEWETT: And as a result of the 12 month progression that we articulated at level 2 or 3, we did make the point that any recognition of equivalent experience will disturb the position that's been reached in respect of aged care home care which confines equivalence to an equivalent qualification and the change being contemplated by I think all parties to acknowledge experience would enable if applied to aged care home care, a worker to get to level 3 without a Certificate III. I accept that's not as – not likely to be as widespread as a 12 month progression, but it does raise the question whether it is in fact desirable to distinguish in some respects home care age care employees from disability care, recognising that notwithstanding the broad equivalents of them, they are in fact different and probably have different regulatory backgrounds.

PN3191

Really, if the idea of a 12 month progression has merit in itself, in respect of disability care then that might be a way to deal with not disturbing the home care, age care result.

PN3192

Can I then return to level 4. I think before the break I'd explained the position in respect of relevance. And Deputy President O'Neill, I haven't been able to track

down the source of the language, and I'd seek leave to provide a short note when I finally do, if I do.

PN3193

Turning then to dealing with this concept of equivalence, the fundamental point that we've made on a number of times, so far is that the evaluating that which is equivalent experience, (indistinct) life experience is an ambiguous and difficult concept. So what we've tried to do here is to provide some sort of integers to guide that evaluation. The first of those is having substantial experience. Now, obviously (indistinct) point uses the word substantial, there's an evaluative element to it. It does mean, given levels 2 and 3, the one he's talking about at least 5 to 6 years' experience. That couldn't be less than. And then there are these other integers that were identified working autonomously under broad supervision and may work with prior to high complex needs.

PN3194

It's again to try and put a little more guidance around the evaluation process other than simply equivalent experience which is the alternative model, I guess. And those particular integers are chosen because they do articulate with the key elements of Certificate IV training. I read that introductory paragraph of the Certificate IV description:

PN3195

Enabling employees to work in a range of settings without direct supervision and working according to and continue to (indistinct) a plan.

PN3196

Suggests that level of sort of autonomy empowering clients, building the independence of those clients, person-centred care (indistinct) indicates some – again a level of autonomy but also working with clients with high and complex needs. And there of course, both core elements and specific electives which are designed to set out in that – Annexure B to Mr Wenham's affidavit – Wenham's statement which identified that working with clients with high and complex needs is an element of the training.

PN3197

And we'd rely on some evidence of Ms Cluff at paragraphs 11 to 19 and 22, O'Rogers, paragraphs 36 to 40, Ms Leonard at paragraph 28 but then in particular 30 – sorry, paragraph (p), (q), (r), and (t).

PN3198

It would still require evaluation as to the elements of different applications in different places, but less so than an unguided discretion as the attempt that we try to – try to make.

PN3199

Then lastly in respect of level 4, in our submission as we've suggested a modest adjustment to the rate, so that the rate corresponds with the current level 2.4 rate. That's \$1133.81 in lieu over \$1490.40. I accept that that will be a further disturbance of the home care of provision. I note that the ABI really proposes a different solution to what we may have identified as a similar problem. And that

is by proposing an additional increment at level 4 and we've supported that increment and if the Commission were to adopt that then it largely addresses the rate issue that we'd raised. Again, that would still disturb that then reaching in respect of (indistinct) aged care (indistinct).

PN3200

At least in some respects there is a distinction made between these – those employees. There are some changes to levels 5 and 6 which we propose (indistinct) in respect of direct care work, they just reflect the arguments we've made in respect of level 4 about the relevance of qualification and also the equivalence of experience as slightly altered.

PN3201

Can I then turn to the structure as it affects administrative and support work and like Mr Saunders, I think I would say that it's not perfect. What we've attempted to do is graft a differentiated structure for administrative support work from levels 1 to 5. Trying to draw from the language of the existing schedule B. But quite frankly, there's a smorgasbord of words to choose from in respect of administrative and support work in schedule B and so I think we've identified language that we think works, other parties who identified to a different language, but if I could just explain what we've sought to do is differentiate at the different levels by reference to complexity or responsibility of work, the scope for judgment initiative in that work and the level of supervision or autonomy associated with that work. They're the three things we've chosen.

PN3202

That leaves level 1 in respect of administrative work the same. That is basic administrative work, no change there. In respect of level 2, we've adopted the terminology of level 3:

PN3203

To identify the type of work that is past employees whose primary role is to provide administrative or support activities.

PN3204

That's the way in which administrative and support work is identified at level 3, so we just use that phrase at levels 2 and 4 and 5.

PN3205

And then in terms of differentiating between level 2 and level 1 in the first instance, it's non-basic work. That's one of the most critical distinctions.

PN3206

But it requires an exercise of limited initiative and/or judgment under close direction and within clearly establish guidelines or procedures.

PN3207

Then differentiating that from level 3 'in lieu of exercising limited initiative or judgment' with – use the phrasing:

PN3208

Involving exercising initiative or judgment in lieu of close direction, general direction, in lieu of – within clearly established guidelines or procedures (indistinct) the application of established procedures and support guidelines.

PN3209

And then in respect of level 4, we've used the phrase:

PN3210

Involving the applicant of skills and knowledge that are appropriate to the work and under broad supervision.

PN3211

We accept that that's quite ambiguous language. It does need to be seen in the context of that which is – have been articulated in the earlier levels and again more from the current wording.

PN3212

And then level 5 is equally broad wording. In respect of administrative and support work, the ABI propositions essentially keep level 1 as it is, level 2 becomes really the standard or key classification for administrative work. Level 3 is for specialised administrative work and there's nothing beyond that. We say that doesn't really reflect how administrative work is articulated in the current structure and it does involve a reduction in value of that work it seems to us. And similarly, the AI – sorry, not similarly - the AIG, I don't think it contemplates anything at level 2, so one jumps from 1 to 3, and then, at level 4, it articulates the criteria as that which requires a high degree of judgment, initiative, confidentiality and sensitivity. We just make the observation that that's a very evaluative judgment about four different characteristics, but we accept that that, too, is drawn from the language within schedule B. It's the product of having a lot of language about these aspects. As I say, we don't suggest that that's a perfect structure, but it is a more nuanced structure, a more differentiated structure than the provisional structure.

PN3213

Then can I just turn to the issue of translation very briefly. We have really dealt with that in the way of articulating the reductions in wages with that (indistinct). There are only sort of three changes we propose to the translation structure in the Commission document: the first is just to remove the reference to 'basic work' in respect of level 2, consistent with the submission we have put; secondly, to put additional translations to cater for the additional increment at level 3, which I think are the same translations as ABI has included, and we've identified at level 4 translating employees at level 2.4 direct to level 4 on the basis that I think I articulated earlier, which is they are, in effect, at the top of the tree of direct care work and should translate to that level.

PN3214

Does the Commission need me to address the proposition from AiG that there should be a reduction in actual dates arising from the decision? We oppose it, but
- - -

PN3215

JUSTICE HATCHER: I think we can safely assume you oppose that.

PN3216

MR BLEWETT: Then, lastly, implementation. There are two issues in respect of implementation. The first is commencement and the second is phasing in. In respect of commencement, we've suggested the standard be applied, that is, 1 July next year. In the absence of any other order, that would be the standard time under section 166.

PN3217

We have noted the anticipation, at least, of the Commission, or the aspiration of the Commission, to finalise these proceedings by the end of the year. That would give six months. That seems consistent with the Commonwealth submission, and we think that's an appropriate length of time.

PN3218

As we note, the Expert Panel doesn't anticipate that this will produce rates significantly increased from the existing rates. That would be one reason - - -

PN3219

JUSTICE HATCHER: That's apart from the gender undervaluation implementation.

PN3220

MR BLEWETT: Yes, but, of course, the very purpose here is the gender undervaluation, which has existed for a long time, needs to be remedied, but that's in respect of commencement of implementation. That seems to be an appropriate time.

PN3221

In respect of phasing in, because there's some real uncertainty about quite where we're going, it's perhaps a bit premature to be talking about phasing in. We have in our submissions opposed phasing in for existing schedule B employees on the basis that there's unlikely to be a significant increase, and in respect of the schedule E employees, it is remedying what has been found to be a significant undervaluation, but it is, as I say, a bit premature to be talking about that given the uncertainty about quite where the Commission's going to land.

PN3222

Unless there is anything further you want from me, those are my submissions.

PN3223

JUSTICE HATCHER: Thank you. Mr Scott.

PN3224

MR SCOTT: Thank you, your Honour.

PN3225

JUSTICE HATCHER: Can you move that microphone a bit closer, Mr Scott.

PN3226

MR SCOTT: Is that okay? I will start by just indicating that my clients have filed two sets of submissions in the matter. The first is 12 September of this year and the second is a reply submission of 15 October. Accompanying the first submission is also a draft determination, which effectively picks up the Fair Work Commission's draft determination but tracks our proposed amendments to it. At attachment B to that submission, there's also correspondence from the Fair Work Ombudsman that goes to the question of award coverage for clerical and administrative employees operating in the home care sector.

PN3227

Can I start by acknowledging the findings made by the Expert Panel in the decision of 16 April, and in particular the findings that the minimum rates in schedules B, C and E do not properly reflect the value of the work, and that's at 376. Secondly, that the rates of pay applying to classifications in schedules B, C and E are not the product of any proper work value assessment, and then, thirdly, at 377, that the ERO rates are broadly indicative of what the SCHADS Award rates would be if they were properly based on a gender-neutral assessment of work value.

PN3228

We acknowledge and we welcome the finding of the current set of, I think it's five streams and separate sets of classifications and rates of pay in the current award are not fit for purpose, unnecessarily complex and are also conducive to disputation.

PN3229

Turning to the provisional views, my clients are supportive of the proposal to consolidate the streams and classification structures into a single structure and common set of rates of pay. We see this as a worthy goal. In our view, and the feedback we have from providers in this space is that the SCHADS Award is one of the most complicated awards in the modern awards system. It imposes a significant administrative burden on employers, many of whom are not-for-profits operating in a challenging regulatory environment, doing important work, but in a sector where the government funding often does not cover their costs.

PN3230

In that context, employers welcome any proposal that simplifies the award, removes ambiguity and makes compliance a straightforward exercise, rather than the current environment of providers effectively doing their best and hoping that it's good enough.

PN3231

Having regard to the primary decision, we understand that the Expert Panel intends to create a consolidated classification structure and set of rates of pay that are broadly equivalent to the ERO rates, and that's at paragraph 394 of the April decision. My clients are supportive of that proposal, in essence, that there be a single set of classifications and a single set of rates of pay that are broadly equivalent to the ERO rates.

PN3232

As is apparent, there's some complexity associated with that. What we say, though, is it's also critically important that where rates of pay are to be increased, there must be two things that happen: firstly, funding at least equivalent to the increase be provided to employers, and then, secondly, that an appropriate time period be provided for employers to prepare for the changes and to allow funding to flow through. At this point, to our knowledge, there's no funding commitments from either the Commonwealth or any state or territory government in that respect. That obviously creates a degree of anxiety for many providers in the industry if rates of pay are to be increased.

PN3233

I have indicated that, as we understand it, the intent of the Expert Panel is to set rates of pay that are broadly equivalent to the ERO. In that respect, for schedules B, C and schedule F, which was recently dealt with, the anticipation is that there's not significant increases to rates of pay, but the Commission's discussion paper released in May, I think, of this year demonstrates that obviously there are swings and roundabouts in terms of moving people from the current system to a new consolidated set of rates. Some of them are upwards of 15 per cent increases. Separately, there's been the schedule E stream, the home care disability, where the rates of pay are proposed to be increased by upwards of 20 per cent.

PN3234

Employers are supportive of that single classification structure, but to the extent that rates are increased, it's really important that funding flow through, and so that informs our view as to the deferred operative date that we propose.

PN3235

JUSTICE HATCHER: Which is 1 July 2027?

PN3236

MR SCOTT: That's right, for the reasons indicated in our submissions, but also in respect of the disability sector, the NDIA price changes often come out effective 1 July, but I think, just for clarity, initially we had proposed 1 January 2027. Also conditional on the timing of when the proceedings are finalised, when a final decision comes out, that was put at a time when there was no ASU proposal on foot as well, which probably slightly complicates the matter, but, yes, 1 July is the position.

PN3237

JUSTICE HATCHER: So would that date also apply to people covered by schedule E, that is, they would pay the full amount on that date?

PN3238

MR SCOTT: So we seek a deferred operative date of 1 July 2027 certainly in respect of schedule E, so home care disability. We would, in addition, seek phasing in of those increases, and I think we've proposed over three years.

PN3239

JUSTICE HATCHER: All right. Thank you.

PN3240

MR SCOTT: Yes. Turning to the Fair Work Commission's proposed structure, we view it as an improvement on the current sets of classification structures, certainly in terms of its simplicity. I think, on my count, some 40 pages of classification descriptors are reduced to about three or four. That said, and unsurprisingly with such a significant change of something like consolidating streams, there's obviously a number of teething issues that arise through that, which is apparent on all the material that's been put.

PN3241

In our submission of 12 September, we've done our best to propose what we've described as 'refinements' or 'amendments' to the proposed structure. Our position is, with those refinements, with those amendments – sorry, I'll rephrase that. Without those refinements and without those amendments, my clients do not support the proposed structure being implemented.

PN3242

The amendments that we seek are set out in our written submissions, summarised at page 7 of our first submission of 12 September. From our perspective, there's really two issues with the proposed structure, or two key issues. The first is around the operation of the principle of equivalency and how that applies in practice, and the second relates to issues of coverage that we say need to be rectified before the proposal be implemented.

PN3243

As to the question of rates, as I said before, it's clear that the rates do not perfectly align to the ERO rates. I'll say two things about that. The first is the rates are not as bad as what the ASU have made out. The ASU have relied heavily on a report of Professor Cortis, which asserts that 73 per cent of workers will go backwards. Now, that report is based on flawed methodology and the flawed use of the incorrect operational definitions. We have done our best to critique that report in our reply submission, which can be found at paragraphs 28 to 61.

PN3244

In short, the modelling does not hold up to scrutiny in respect of proposed levels 5, 6, 7, 8 or 9. The modelling appears to be less fluid in relation to levels 1 through to 4, and so we don't contend that no one goes backwards or there's no pockets where the rates go backwards, but that report has been relied on, bandied around, quoted in the media, subject to, obviously, a voluminous amount of material that's been filed from lots of stakeholders calling for the Commission to pause, to go back to the drawing board, et cetera - I understand there were rallies last week – all of which is based around this 73 per cent of people go backwards. The report, with respect, the operational definitions are just wrong. I am happy to go to that part of the reply submission, but it's all laid out.

PN3245

Secondly, and separately, your Honour indicated earlier in the submissions of Mr Saunders that, of course, there's also the rate preservation proposal, which is that no existing worker will go backwards. Now I understand Professor Cortis prepared that report quite quickly. I think it was filed in about May before the conferences before Deputy President O'Neill. I think your Honour indicated

earlier that perhaps the decision might have been slightly clearer on that respect, but it appears that that also has infected the findings of the Cortis report.

PN3246

Turning to the issue of equivalency - so the two key issues we see are equivalency and coverage. Sorry, can I take a step back. On the question of rates, I said there were two points. The first was the Cortis report and what I've said about that. The second thing I say about the rates is we have proposed a range of amendments in an effort to address the issues that we've identified, and so, for example, we've proposed additional pay points at levels 3, 4 and 5, and that's set out in section R of our submission.

PN3247

We've proposed refinement to the classification definitions at part N of our submission. That includes refining the timing for progression in some respects and also changes to how administrative workers are classified in terms of levels 1, 2 then 3. It also involves amendment to the structure to recognise equivalent experience at levels 3, 4 and 5. Under the current proposed structure, at level 6, there's a reference to 'equivalent experience and expertise'. That's not found at the earlier levels 3, 4 and 5. It simply says 'qualification or equivalent'. We have proposed to give effect to the third fundamental proposal in the decision, which is the recognition of equivalent experience, and we have effectively built that into level 3, 4 and 5.

PN3248

Those proposed amendments are set out in the draft determination that we filed, but, in short, what we say is there are issues in terms of how the rates migrate across and that there are pockets where people would go backwards, new employees or hypothetical. It's nowhere near as bad as what the Cortis report makes out. We have then made refinements effectively to address that issue. I don't say that we've addressed absolutely every issue, but we say it goes a long way to resolving the issues that have been identified.

PN3249

If I turn to equivalency, I have indicated that we have built equivalent experiences into those levels 3, 4 and 5 to give effect to the provisional views. That said, there is a general concern about how equivalency will be applied in practice. It's one thing for the award to say, you know, 'a particular qualification or equivalent experience'. As the ASU have indicated, how that applies in practice is somewhat unclear. I think Mr Saunders critiques some of the wording in the ABI submission around - we looked at some of their witnesses, Mr Barma(?) and others, and we said - well, on our view we disagree with how the ASU have modelled Mr Barma because while he doesn't have formal qualifications or he doesn't have a degree, we say that with 10 or 15 years' experience, we say, I think almost certainly, or highly likely, to be at a level 6.

PN3250

Now, the wording might be slightly legalistic in the sense that we try never to be definitive as lawyers, and so we say 'highly likely' or 'arguably', et cetera, but that is our best endeavour to express a view as to how we think the proposed structure would play out in practice, but the fact remains that there will be differences of

opinion, reasonable minds will differ about whether someone with a Certificate IV and five years' experience, well, is the five years' experience equivalent to a diploma, or a degree, or something else? Some might say 'Yes', some might say 'No', and I think that is one of the real challenges with the proposed structure.

PN3251

Now, I don't have any easy answers, other than to build it in further into levels 3, 4 and 5 to give effect to the provisional views, but what we would say is if the Commission was minded to implement the proposed structure, employers would certainly be assisted by some guidance from the Expert Panel about how equivalent experience is intended to be applied, because otherwise employers will be kind of looking at years' experience and trying to make that assessment as to, 'Well, is this equivalent to that?' The ASU have raised that and we don't fundamentally disagree with it. It is a challenge.

PN3252

JUSTICE HATCHER: I suppose one possibility with us doing what you just said is that, whatever the operative date is going to be, that we should perhaps build in some bespoke dispute-settling process so that these issues can be sorted out before the implementation date. So, for example, an employer might be required to give their indicative view as to somebody's classification and provide some means by which that might be brought to the Commission if there's an issue about it.

PN3253

MR SCOTT: I think that's an option available. I'm minded – I think I read something in workplace experience recently about the Commission's annual report and the overwork and the number of applications. Whether your Honour would want that jurisdiction or not, I'm not sure and, you know, maybe cynically, I'd say, 'Well, if I was an employee and there's a mechanism to have a crack at getting a higher level', you might be flooded with inquiries and applications.

PN3254

JUSTICE HATCHER: Maybe we need a funding commitment just like you do.

PN3255

MR SCOTT: You'll hear from the Commonwealth soon. In saying that, if we're looking at a 1 July 2027 commencement date, that does two things. Firstly, it may well allow the ASU's work valuation application to run its course in 2026. The second thing it does is potentially for the Commission or for industrial parties to work together to come up with some kind of guidance material. I think Mr Saunders refers to the manufacturing industry a lot and the material there around competencies, et cetera. There may be some logic or some merit in that, but I think, in full candour – in full candour – I think the difficulty is that you are trying to value an employee's level of experience. Is the employee full time, part time, casual? Does the employee only work with one client or two clients, or do they work with 25 clients? Two people who've worked for two years may have massively different skill developments, skill acquisition over that two-year period, depending on what they've done, so I think it is difficult.

PN3256

I appreciate what I'm putting to the Expert Panel is we don't like a classification structure that is solely qualification-based. We support the notion of recognising equivalent experience. What I am saying is I think there's difficulties with how that is going to play out in practice. I don't have a solution to that. Whilst the SCHADS Award classification structures go on for something 40 pages, you know, going back to basics with classification structures, often they talk about skills, qualifications, level of supervision, level of initiative or judgment, et cetera, et cetera, and there might be some work that can be done by the parties in conferencing around looking at some of those things, but I just want to make the point equivalency is an issue of concern for the industry as to how experience is recognised.

PN3257

The second key issue that we say relates to the proposed structure is issues relating to coverage. Now they are confined to the home care sector, but, in short, there are two issues. Firstly, we say clerical and administrative workers in the home care sector are not covered by the SCHADS Award, they're covered by the Clerks Private Sector Award. The second is that by consolidating the two sets of structures or the multiple sets of structure, the unintended consequence of that is that senior employees within the home care sector appear to be caught up in the proposed structure in a way that they are not currently covered by the award, and the reason for that is schedule B has obviously very senior classifications, but schedule E and schedule F don't, and never have.

PN3258

DEPUTY PRESIDENT O'NEILL: Just on that, Mr Scott, the senior management proposition seems to, at least for me, be reasonably clear, but I'm less certain about the clerical employees, and if you look at, for example, the current schedule E, that seems to, under the heading of 'Specialist knowledge and skills', include a number of essentially clerical and administrative tasks, computer and other office skills, maintain mail register and records, sort, process and record invoices and correspondence, et cetera.

PN3259

MR SCOTT: You're right, Deputy President. To some extent, it does. I think, naturally, the starting point for schedule E is level 1.

PN3260

DEPUTY PRESIDENT O'NEILL: I accept there's nothing in level 1 and level 2, but - - -

PN3261

MR SCOTT: Yes. So there's nothing in level 1, there's nothing in level 2. There is reference to what I would typically refer to as administrative tasks at level 3, but I think the classification structure, or the definitions, need to be read in totality. Level 3, if you look at the – I was going to say 'indicative roles' – so at 'specialist knowledge and skills' at level 3, there are things like overseeing the provision of domestic services, coordinating work, scheduling work programs, schedule maintenance work programs, develop, plan and coordinate diversional therapy programs. What we say is, read in totality, given that it's level 3 and there's no reference to any clerical or administrative work at level 1 or 2, what we

say is level 3 is really talking about coordinator-type roles, and so the references there to doing administrative-type things like computer and other skills, et cetera, is really intended to be read in that context.

PN3262

JUSTICE HATCHER: Level 1 does have a reference to banking and account payment. I can't imagine that that would be a function of a direct care employee, would it?

PN3263

MR SCOTT: Yes, and I had the same question, your Honour. At level 1, that reference is to providing that service for aged or disability clients. So a home care worker will go in, they will assist with shopping, there might be some cleaning, preparation and cooking of meals, defrosting refrigerators, lots of different weird and wonderful things, and one is assisting a client with banking, bearing in mind banking has probably come a fair way in 15 years, but, yes, many home care workers on the phone to the Commonwealth Bank trying to sort out financial affairs for clients, or at least to assist them through that.

PN3264

I referred earlier to attachment B to our submission, which is correspondence from the Fair Work Ombudsman. I didn't realise this was quite as controversial, but what this correspondence shows – effectively, we wrote to the Fair Work Ombudsman because, for at least the last decade, they had guidance material on their website telling everyone that clerical workers in the home care sector are covered by the Clerks Award. In these proceedings, I went looking for that because I thought that might be relevant and I couldn't find it. I wrote to the Fair Work Ombudsman and they indicated that the library article was removed on 26 March 2025 following feedback and stakeholder engagement about it. So it's effectively under review, but what they indicated was that they had a library article published on their website from 9 September 2016 until 26 March 2025, so I'll call that nine years, that effectively said what I'm saying, that the Clerks Award covers clerical employees in the home care sector.

PN3265

Now that's been the understanding of many, many providers out there, maybe not all, but many providers out there, that was the Fair Work Ombudsman's publicly stated position for at least, well, close to the last decade. I'm not sure what their position was prior to 2016. We say legally that's the correct position, and we have articulated why we say that in our submission.

PN3266

The reality is we haven't taken a hard line stance in these proceedings to say, well, these people must – they're covered currently by the Clerks Award, they must stay there. What we've said is they are currently covered by the Clerks Award, but it raises a few options for the Commission in terms of how we deal with that.

PN3267

In our submissions, we set out three potential options for that. Just bear with me. This appears at section G of our submission. Mr Blewett earlier – I think he described this position as 'ambitious', despite the Fair Work Ombudsman having

told everyone this is the position for nine years, and he referred to a decision that was cited in our submission that relates to the Children's Services Award, and that appears on page 20 of our submission and that's a decision of Deputy President Sams.

PN3268

My learned friend seemed to ignore that on page 19 of our submission, there's a reference to a decision of Deputy President O'Neill from earlier this year, which is directly on point and does relate to the home care sector and the issue of clerical positions. Now that decision was an approval of an enterprise agreement, but, in short, and the Deputy President will correct me if I misquote the decision, in short, the view was, for the purpose of the BOOT test, clerical staff in a home care business were underpinned or covered by the Clerks Award, not the SCHADS Award.

PN3269

In terms of a way forward, we suggested – well, we didn't suggest three options, but we outlined the fact that there appear to be three options, and this is at para 51 of our submission: either option 1, retain the existing award coverage rules and leave clerical staff in the home care businesses covered by the Clerks Award, i.e. maintain the status quo; the second is to do the opposite and effectively move them all across to the SCHADS Award, and then the third is to implement some form of middle ground compromise position.

PN3270

We considered whether or not and how feasible that was in terms of can we dissect or distinguish between employees undertaking administrative tasks that directly relate to the provision of care versus those who don't. In all candour, we thought that was introducing a level of complexity that is not helpful, and so what we've indicated at page 23 is that option 2 is worthy of further exploration.

PN3271

We have suggested how that might be able to be done. Now, obviously, the Expert Panel will need to consider section 163 in terms of moving people around from one award to the other, but we have mapped out a possibility in terms of clerical employees coming from the Clerks Award to the SCHADS Award. We've mapped them into levels 1, 2 and 3 and effectively looked at the rates and to what extent they broadly align. Now, at level 1 and level 2, I think they do broadly align. Level 3 is where it becomes more difficult because you're traversing level 3, 4 and 5 of the Clerks Award into level 3 of the SCHADS Award. It does result in wage increases. Whether or not that's justified by work value reasons is a matter for the Commission, but we have endeavoured to be constructive in terms of a potential way forward for that cohort.

PN3272

JUSTICE HATCHER: So employees - clerical staff in the Clerks Award, what classification would most commonly be paid?

PN3273

MR SCOTT: The short answer is I don't know the answer to that question. I suspect it would be varied between level 1 - probably not up to level 5 of the

Clerks Award because I think, as your Honours have correctly indicated, higher within the home care stream, so higher within the schedule E classifications. There is talk about coordinating work programs, et cetera, so I suspect that the higher level administrative work is probably already covered by or paid as per levels 3, 4 and 5 of the SCHADS Award under schedule E, but those - if you're a receptionist or an office admin type person, I suspect they'd be at level 1 or 2 of the Clerks Award. I also do think it depends on level of experience under that award.

PN3274

We say it is feasible to migrate them across, if the Commission is minded to do that, without huge wage increases, but it does result in a wage increase, but at the end of the day, clerical staff in SACS organisations or in the disability sector are covered by the SCHADS Award.

PN3275

DEPUTY PRESIDENT O'NEILL: Would you be able to provide just a note of that translation and the impact into a restructure?

PN3276

MR SCOTT: Of course. The second coverage issue relates to senior employees, and the short point is schedule E and F of the SCHADS Award effectively top out at team leaders or coordinators, and beyond that, schedule E has not had classifications for more senior employees. This is set out in our primary submission at section H. I think we went through the entire alphabet in that submission. I think we got to Z.

PN3277

Section 143(7) is an issue for that cohort. Those employees have never been regulated by an award. We say the Commission is prohibited from regulating them, and we've proposed some drafting amendments to the structure at those higher levels to effectively carve them out.

PN3278

DEPUTY PRESIDENT O'NEILL: I think there's a slight difference between the ABI's position and Ai Group's position about where that excision point should be. I think one is level 6 to 9 and the other is 7 to 9. Have I got that right?

PN3279

MR SCOTT: I don't know that my thinking went anywhere beyond, in a home care business, anyone above team leader and coordinator is award-free. Where that fits within the Commission's proposed structure, I don't know. Our draft determination started carving them out at level 6. So we've proposed that level 6, say, for example, level 6 applies to an employee in the SACS sector or the crisis sector who has obtained – so, in other words it's not going to cover the home care sector.

PN3280

DEPUTY PRESIDENT O'NEILL: I take the point about the senior managers, but in relation to level 6, the current schedule E does seem to contemplate a degree-qualified position.

PN3281

MR SCOTT: So my drafting might have been hasty and not bullet-proof, it's now occurred to me. I've just tried to effectively create a carve-out for that cohort that we say are award-free. The alternative drafting, for example, is to have a standalone provision somewhere that says, 'These people are not covered by the award.' That could potentially be done.

PN3282

DEPUTY PRESIDENT O'NEILL: These people being senior managers?

PN3283

MR SCOTT: Well, any role that is more senior than a team leader or coordinator within a home care business, so managerial role. I'd have to take on notice what other roles would be in a home care business that are more senior than a team leader. Presumably home care businesses would have CFOs and all sorts of other people.

PN3284

DEPUTY PRESIDENT O'NEILL: But a coordinator with a degree would potentially be - - -

PN3285

MR SCOTT: We've got no difficulty with them. Our view is coordinators, whether they have a degree or not, are currently regulated and should continue to be, but we're simply trying to maintain the status quo.

PN3286

JUSTICE HATCHER: So you say that E.5.4, which refers to 'management skills', is describing the work of a coordinator only?

PN3287

MR SCOTT: E.5, a position in this level includes care coordinator, foreperson and maintenance supervisor, so at the get go, we say that's indicative of the intention in terms of who it's intended to cover. It then sets out the characteristics, coordinating resources, et cetera. Sorry, your Honour, I missed the - - -

PN3288

JUSTICE HATCHER: E.5.4.

PN3289

MR SCOTT: Yes, yes. So we'd say that on a proper read in totality, that cannot be read as being therefore everyone in a management role is suddenly covered. Now, these positions require skills in managing time, setting priorities and planning. That sounds like a team leader or a coordinator to me. Now, if I'm wrong about that and there's some creep to some slightly more senior roles, that's one thing. But to suggest that E.5.4 means that the intention of the AIRC in making this award was to apply similar scope or similar coverage to the SAC sector where there are decisions of this Commission that say CEOs are covered, we say that's not a proper interpretation.

PN3290

Now, we can take that on notice. Presumably the home care stream came from the - I think it came from the Victorian HAC award. We could go and have a look at what that covers and I think it is actually - whether it was a submission this year or whether it was last year - probably wasn't last year because there was no proposal for it - we've done that work and the pre-reform awards that led to the making of the SCHADS award, the home care stream. We've looked at it. They stop at effectively attendant carers or home carers. There's no pre-reform award that has the scope or the coverage of the kind that the SACS Queensland pre-reform award had.

PN3291

And the difficulty for the Commission is the Fair Work Act prohibits you from making an award that captures people that historically are traditionally not covered.

PN3292

JUSTICE HATCHER: Of course there'll be a seniority. It's a bit more nuanced than that.

PN3293

MR SCOTT: Yes, I accept I'm paraphrasing this decision to the Full Bench in the Fair Work Commission on this point. It can't just be glossed over as my friends appear to kind of conveniently do. So that was what I wanted to say about the Fair Work Commission proposed structure unless there's any questions. I'll turn to the ASU's primary position and then alternate position. In terms of the ASU's primary position, very quickly the fundamental issue with it is that it does not give effect to the findings of the decision from April. It's proposal to consolidate schedules E and F are not overly objectionable to my clients. But it otherwise appears to re-agitate proposals that were considered last year and rejected last year. In terms of the ASU's alternate proposal we've addressed that in our reply submission at paragraphs 76 to 101. What we say is it's substantially different to the commission's proposed structure. It also appears to produce rates that are not reflected of the expert panel's findings or intention. What I mean by that is we understand the decision and the intent of the expert panel is to create rates that broadly align to the ERO. The ASU freely acknowledge that their proposal goes beyond that.

PN3294

So it's not consistent with the findings or the provisional view. The current - at least the current ASU alternative proposal doesn't encompass home care so it also in that respect doesn't give effect to the provisional views or the intention of the Commission. We've done our best to work through that structure and provide some feedback. Now, it's reasonably high level. What I said earlier, Your Honour, was that if the Commission was seriously entertaining that proposal it would assist if there was some kind of discussion paper that allowed us to look at the rates.

PN3295

Now, I get the impression the Commission is not going to do that at that late stage, this late stage, which is fine but all I say is our response or our submissions on the ASU alternative structure is not to the same detail that we've been able to

go into with the Fair Work Commission proposal because we've had that for a longer period of time. Deputy President O'Neill made a comment earlier or asked a question earlier about disability support workers and where they sit in the classification structure and raised the Federal Court decision of *AEU v Yooralla*. We've called that out in our submissions. Now, in short there appears to be a fundamental misalignment between my clients and the ASU as to where disability support workers sit in the current structure.

PN3296

Now, there seems to be a consensus that must disability support workers would sit within level 2. Where we depart is that the ASU's position is that no disability support worker can fall within level 1 of the current structure and we say with respect that's not right and the Federal Court decision of *Yooralla* goes directly to that point. There is also other decisions. There's the decision of DP Saunders involving a Northcote enterprise agreement that I've cited as well. The ASU alternative seems to provide for what I call auto progression, not just up through the pay points but from level to level. That seems to be quite a significant change to what the SCHADS award currently provides, at least. And that's all the way up to level 7. We've got some concern about employees moving up levels without the nature of the job or their role changing. So ordinarily employees might move up pay points but to move up to another level all together generally involves a promotion or a change in job. Under the ASU's proposal, someone could start at level 2 and through the passage of time, despite doing effectively the same work, the same job, the same duties, they will end up on level 7.

PN3297

Now, another thing that strikes me with the ASU alternate proposal is it seems to kind of group cohorts of employees into a few different groups. There's administrative workers, there's disability support workers, there's then case workers or other SACS workers and as I think, Deputy President, you identified, there's no definition of administrative worker. Administrative worker I think under their structure goes all the way up to level 5. Now, it's not apparent to me what the distinction between someone who might be an administrative worker up towards the more senior level, how that is different to a SACS employee. And so we've got some concerns.

PN3298

There's no definition of administrative worker. I don't think there's a definition of SACS employee, other than case worker, counsellor, et cetera. And so it strikes us as being slightly - I don't say this critically, I know it was put together in a short period of time - but it strikes us as being slightly oversimplified in terms of grouping cohorts into four or five buckets. The expert panel has already ruled on indicative job titles in the earlier - in the April decision. Indicative roles can be instructive, can be useful for employers in trying to work out where to classify people. But the conceptual challenge we have with indicative roles is it only has merit where the role or the job title - where there's a level of homogeneity or uniformity to the role.

PN3299

So if you say all case workers must be level 6, well, there might be merit in that if all case workers do the same thing. But my clients are not convinced that that is

the case. Case worker is often a title, it's a position title. It's effectively a label that may not identically define what the duties and responsibilities are. So the proposition that all case workers do the same thing or broadly the same thing, that seems to be what's put forward in terms of the proposal. And so we think there might need to be a more nuanced approach to that. Pay point progression, we also have concerns with that. It appears on the ASU's proposal that people just automatically move up every 12 months. I might just take a moment to go to it so I don't misspeak.

PN3300

JUSTICE HATCHER: Sorry, before you do that I just want to go back to indicative job titles. So I'm just looking at the finding at 385. I'm not sure this is broadly expressed as you might have indicated. That is the OT's proposal was not supported by evidence which explained those roles and where they fitted, and some of the job titles themselves were in broad terms, but I'm not sure if some consensus could be reached about that, whether we turn our face away from it.

PN3301

MR SCOTT: I would be optimistic if we could. Our position in December last year was that lots of job titles are labels. Now, whether it's DSW or a HCW is not used uniformly across the sector in the same way that other industries might have uniformity. Now, I might have read the decision as being a complete acceptance of all the submissions I put on that occasion. To the extent that it's not – I don't propose to advance it anywhere beyond 386, and I think my submissions really today are effectively echoing 386.

PN3302

JUSTICE HATCHER: Yes. Thank you.

PN3303

MR SCOTT: What we've said about pay point progression – so schedule B10 of the ASU alternate proposal has the pay point progression provision. It doesn't appear to us at least, and I will stand corrected, but it doesn't appear to have much work to do, because it requires employers to review and appraise the performance of each employee covered by this award every 12 months to determine whether the employee has demonstrated competency. Where an employee has been assessed as having demonstrated satisfactory performance at a point within a classification of at least 12 months they will progress to the next pay point within that classification.

PN3304

Now, as I went through the proposal, and this may be one of the – and I don't say this critically – but one of the various drafting errors littered throughout the proposal. At each level there is an automatic progression to the next pay point after 12 months. Unless I'm missing something there's no need to assess their suitability, because even if you don't think they're suitable they still get it.

PN3305

What we say additionally is that it has the features that your Honour Deputy President O'Neill identified in terms of imposing a significant and administrative

burden on employers doing this. It in many cases won't be consistent with their existing practices.

PN3306

We agree with your Honour about the ERO preservation issue. If the ERO rates are preserved and continue to receive the annual wage review increases the ERO rates will be preserved forever and a day and the proposed structure really just won't, to rub our point, hit the road at least for existing employees.

PN3307

That's all I wanted to say about the ASU's primary position and the alternate proposal. If I turn to the HSU and the UWU. We've responded to the HSU and UWU matters raised in our reply submission which is at paragraphs 102 to 155. Now, pleasingly there's a significant degree of common ground between my clients and the HSU and UWU. In some respects including identical proposals there's a pay point somewhere where we both suggested an additional pay point. We have both changed the relativities. It was like - and we might have discussed it beforehand, which we haven't, but that was nice.

PN3308

We've made some refinements to the translations. Mr Blewett I think indicated that there were some issues with level 2, particularly the higher pay points and whether they should translate to level 4. We in our draft determination have fleshed out the translations at level 2 to give a more nuanced translation in that respect. I won't go through line by line all of the issues, but there is consensus in relation to some of them. Where there's not we've indicated why we say our proposal is more appropriate in the circumstances.

PN3309

I would agree with Mr Blewett in relation to the disturbance of the aged care structure. There was a discussion earlier about level 3, level 4 and whether by building an equivalent experience that will disturb the findings of the aged care work value decision. I think the reality is that's the case.

PN3310

My clients have also proposed disturbance on the basis that it gives effect to the fundamental principle around the recognition of equivalent experience. I think the only key difference between the parties in that respect is that the HSU propose a time-based threshold for advancement of 12 months, whereas my clients utilise that notion of equivalent experience.

PN3311

Unless there's any questions I will turn to operative date and transition, but I've let the cat out of the bag. We propose an operative date of 1 July 2027. From an efficiency perspective to the extent possible employers are seeking to have to go through a change management process once rather than twice, or twice rather than three times, to the extent that a decision can be handed down in this matter.

PN3312

If an operative date of 1 July 2027 or something similar is determined practically what that does is allows the Commission to deal with the ASU's work value

application; presumably hear that matter and issue a decision about it. To the extent that changes what the Commission has ordered it to come into effect by 1 July 2027 practically for employers it means that they have to navigate one change rather than implementing something next year only for further changes to potentially arise.

PN3313

I have indicated transitional - our proposal. What we seek, certainly in respect of home care disability is a 20 per cent wage increase to be phased in over three years in a similar way to the aged care proceedings. Unless there's any questions those were the matters that I wanted to raise.

PN3314

JUSTICE HATCHER: Sorry, just going back to home care does the phasing in have to wait until the commencement of the new structure? If for argument sake we accept what you say about implementing the new structure could we not begin phasing in wage increases based on the old structure even before then?

PN3315

MR SCOTT: I think the answer is you could. Given the time of year the absolute earliest that we would say any increase should be phased in would be 1 July next year. There's been a lot of discussion in the proceedings about the difference between home care and disability, what's funded under the NDIS and what's not.

PN3316

The reality is parts of home care work is funded under the NDIS, and I took Dr McDonald last December or November to those parts of the price guide that although the DSW costs more and provides an hourly rate of about \$70 an hour there's line items in the NDIS price guide at \$59 an hour, which we say is the work that's done by home care workers.

PN3317

To the extent that any increase comes in there would need to be an update to the NDIS pricing structure. I would imagine the earliest that would happen is 1 July next year. So I think the position, with candour, is without instruction, but with candour is, yes, you could do it because our position all along has been the schedule E rates should be aligned to the schedule F rates and so if you wanted to provide a longer deferral but to get the ball rolling in that respect, it's open to you.

PN3318

JUSTICE HATCHER: Thank you. Ms Cruden. Can you just move that microphone a bit closer, Ms Cruden?

PN3319

MS CRUDEN: Is that better?

PN3320

JUSTICE HATCHER: Thank you.

PN3321

MS CRUDEN: Thank you. Thank you, Your Honour. At the outset, our group continues to rely upon its submissions filed in this matter on 12 September and 15 October and we intend to supplement those in four areas. First to make some high level comments regarding matters that go to Australian District Groups overarching position in this matter, our interest in the sector and our intention to engage with the closed conference in process following the conclusion of this hearing. Second, we respond to various aspects of the ASU position in this matter including a its primary position and the alternate classification structure that it's advanced. Third, we will respond to various aspects of the HSU, UWU's reply submission and other remarks made today. The fourth and final area in respect of which we made very brief submissions, concerns the witness evidence filed in these proceedings.

PN3322

So as I indicated, the first of three matters we'll address by way of opening go to some of the fundamental aspects of our overarching position in this matter. At the outset, AI Group is not urging the expert panel to adopt the classification structure that was in its 16 April decision. As we made clear in our reply submission, we're not opposed to an outcome of this hearing being that the finalisation of classification structure may be deferred. Where the resultant outcome may be a greater level of certainty, a lesser impact for employers and other safe holders arising from any new classification structure, however it is our position that if the expert panel is inclined to proceed to finalise the provisional classification structure, that we would urge the expert panel to adopt a number of employment changes and those are changes as either proposed by Australia Industry Group, in our submission in chief, dated 12 September in which it reflected in our draft determination following the same date.

PN3323

Or the additional aspects that have been proposed by other parties and of which we were supportive in our reply submission following 15 October and a couple of examples of those additional aspects raised by other parties that we have expressed support for is, for example, the expansion of administrative or clerical aspects within a structure and also the inclusion of some additional potential pay point within the structure.

PN3324

We (indistinct) and we intend to engage with the conferencing process following the conclusion of the hearing and in the event it may be possible to produce a better outcome still, but that's able to be advanced on a consent basis by the parties of the expert panel then obviously we see merit in that and to participate with a view to endeavouring to achieve that. Our position in this matter has been mischaracterised by the ASU, but both in its submissions and in what is frankly a high profile campaign that is running against not only Australian Industry Group but also the Commission in these proceedings. And given that, we do feel it's imperative to make clear our position in these proceedings in respect of three further matters. The first is in relation to suggestions that have been made both in the context of our submissions in these proceedings but also by way of commentary publicly in our position that AI Group is pushing for rate cuts in these proceedings.

PN3325

AI Group has identified in its draft determination classification translations from the existing structure to the expert panels proposed structure that there are possible translations that are lower than what the expert panel had identified in its draft determination. But in this regard, we're not alone. The ASU has itself identified similarly adverse translation outcomes, including in some cases outcomes that are even worse for employees than what we can identify. And it's materials filed earlier in these proceedings immediately following the 16 April decision and in connection with the conferencing process of - for example where those outcomes were identified by it.

PN3326

Indeed, in its reply submission, the ASU states that on the current text of the Commission's draft determination, our proposals, that is AI Group's proposals with respect to translations are arguably correct. Now, Mr Saunders has made the submission that what we're saying is that implicitly there needs to be downward realignment of employees paid in the award, but what needs to be clarified is that we're not calling for employees to be translated to lower rates of pay. It's simply that we have identified what appears to be the consequence of the existing proposal. We're not, as ASU stated in its reply submission proposing a rate to pay reduce for a range of jobs in the future. We're sought to constructively engage with the provisional views of the expert panel. We've identified the outcomes of the structure which places emphasis on the recognition of acquisition of qualifications at each level. We note that in the 24 October statement the expert panel states the new structure should appropriately recognise formal qualifications and equivalent experience and training and an employee should not go backwards.

PN3327

These are both areas which we've sought and we continue to seek through any conferencing process to constructively engage with and to advance proposals into it in terms of addressing those potential outcomes. The second aspect I'll make in terms of overarching comment on our position is in relation to our non-support of the grandfathering of rates and the suggestion that in so doing or not supporting grandfathering that we're somehow pushing for employees rates of pay to be reduced.

PN3328

In reality our position is far more nuanced than what the ASU is acknowledging. We've identified difficulties for both employees and employers that would flow from any sort of simplistic red-circling approach and we note that the Commission has rejected that approach in past proceedings including in respect of this award. However, what we have tried to do is constructively propose an alternate transitional arrangement that is designed to ameliorate and potentially negate adverse impacts on parties covered by the award.

PN3329

We've also observed that the vast majority of submissions filed in this manner identify issues that make clear that any simplistic grandfathering arrangements are likely to be unsuitable. But what the vast majority of submissions do not do is identify any other potential alternatives to grandfathering. It's well and good to point out the floors of a particular approach but where is that taking us in terms of

alternatives. Now, we note that the ASU has advanced an alternative which is largely in the form of a blanket uplift in pay across the classification structure and I'll come back to that.

PN3330

The Australian Industry Group's proposed alternate model of phasing in small increments so over multiple years effectively minimises and potentially completely avoids rate reductions for employees. And I would say that the extent of any decreases may still be addressed in material ways, for example, via concepts of equivalence being a further adjusted and recognised within the structure. And the approach that we suggested is not a new one, it was used by the Commission to phase in wage increases and decreases when modern awards were introduced in 2010.

PN3331

In its reply submission, the ASU states that a consequence of that approach would be that thousands of workers would experience a wage cut. We don't accept that. Our approach to phasing over several years would create potential for any wage reductions arising from Commission proposed variations to be offset by annual wage review increases if the Commission were to proceed with implementing its changes to the classification structure.

PN3332

And it would avoid the obvious downside of the grandfather approach which has been raised earlier today, that employees who are new to the sector or who leave a job to which their grandfather rate of pay attaches would immediately drop to the new and lower rate of pay. The third point I wanted to make by way of overarching comment is in relation to our support for removal of the ERO from schedules B and C of the award.

PN3333

Our position again, has been mischaracterised, as one whereby we're seeking to strip the ERO rates from the award which is simply not true. And I would seek to emphasize the clarified position of the Australian Industry Group in our reply submission. As we said in that submission, the purpose of the gender-based undervaluation review is to eliminate gender-based undervaluation of work and ensure equal remuneration of work for equal or comparable value. So once the Commission makes a decision on the new SCHADS award classification structure and minimum pay and these come into effect, the ERO will be redundant and we note that in the revised principles that were contained in the Commission statement from the 24 October, it states again that the ERO rates will be required to be incorporated into the SCHADS award. In circumstances where this outcome has been mandated by the expert panel, we maintain our submission that it should not be necessary to separately maintain the ERO. Next, I wanted to address the comments that have been made regarding Australian Industry Group's interest in the sector and flowing from that aspersions cast regarding the weight of our submissions and involvement with the matter, specifically referring to paragraph 38 of the ASU's reply submission, and in particular its statement there that there's a serious question as to whether any weight should be given to Ai Group's submissions at all or whether its proposed amendment should be seriously entertained.

PN3334

I note that those were comments that were further elaborated on by Mr Saunders today. It's our position that that submission should not be given any weight. In response firstly we submit that we have a significant and growing membership in this sector. We are appearing for other organisations with a significant, relevant interest in this sector. For obvious reasons we are not going to disclose to the ASU who those employers are. In relation to Mr Saunder's comments - remark about our rules, we don't understand that to be any proposition that we don't have standing to be involved in these proceedings.

PN3335

But regardless, we would observe that it's the logical and industrial merit of our submissions and those of other parties that we say should be considered regardless of any dispute over the size of our membership or indeed that of other parties. To the extent that we advance any factual assertions that were doing so on a proper basis, that in most instances we doubt would be contentious. For example we doubt that any party would seriously cavil with assertions that implementing a new classification structure would necessitate the adoption of various costly and time-consuming processes.

PN3336

We'd also emphasise that our submissions have been made on behalf of the Australian Federation of Employers and Industries, which is a state peak council in New South Wales and it has significant membership of employers covered by the award and a long history of involvement in proceedings concerning the award. And they're also made on behalf of Ability First Australia, which is an alliance of 15 registered and longstanding not-for-profit disability service providers. Now, the point that Mr Saunders made earlier in relation to the fact that some members of Ability First appear in the schedule to the CEO's submission, we have in fact made extensive reference to the CEO's submission in our reply submission filed in these proceedings and we see in fact significant points of alignment between vast number of aspects of that submission and the submission that we've made. As some members of the expert panel would be aware our group has had in recent years extensive, significant involvement in Commission matters concerning the SCHADS award, including the four-yearly review of modern awards, the recent sleepover proceedings and the 2023/2024 (indistinct) review.

PN3337

We've been selected by the Fair Work ombudsman to be a member of its reference group for the disability support sector and indeed we serve on that with the ASU and the ASU is aware that the Fair Work ombudsman has appointed us because of our demonstrated engagement with employers in the sector. So our submissions made in this matter are the product of engagement at length, with employees in the sector. They are underpinned by our experience of the sector drawn both from involvement in the above processes and that consultation. As to the ASU's assertion in its reply submission that we have a raft of unidentified members again in the context of a national campaign, being waged by the ASU publicly against both Ai Group's involvement in these proceedings and the positions that they've inaccurately attributed to us during these proceedings, it's hardly surprising that

employers are not seeking to stick their head above the parapet in order to participate in these proceedings.

PN3338

Finally in terms of over-arching comment, I just wish to briefly refer to the planned conferencing in this matter following the conclusion of the hearing. Ai Group is intending to and has agreed to participate in conferencing as per the joint position advanced to the Commission on Friday. We've already taken steps to organise to undertake to consult with our employer members and in fact we've already got nearly 100 registrations who signed up to be part of our consultation process in anticipation of that conferencing process about to commence. However, we doubt that that process will be able to be productive if it's occurring whilst the ASU continues to wage a public campaign against Australian Industry Group because of the positions that it claims that we take in these proceedings.

PN3339

I do foreshadow that we intend to advance some proposals regarding the conduct of the conferencing, which we've happy to do so directly to Deputy President O'Neill once the arrangements are being made for that conferencing. But I would foreshadow in particular that we will seek that it would be done on a without-prejudice and confidential basis in order for it to be productive. Turning now to the second of the four matters that I foreshadowed I'd address, which is the ASU's position in this matter. Now, we have addressed this in some detail in our reply submissions so I will just touch on some key points. Starting firstly with its primary position and that's being that the proposed structure should not be implemented: as his Honour's been clear this hearing is listed to determine the award variations to give effect to the 16 April decision. The ASU has variously sought that the provisional structure be abandoned or at least insofar as it applies to schedules B and C classifications.

PN3340

With its reply submission ASU has filed a draft determination to reflect its primary position to firstly consolidate the SACS and cash rates, so the schedule B and C rates, at ERO rates, to secondly consolidate schedules E and F and thirdly, defer any alterations relating to family day care. Now, we agree with the proposal regarding family day care and we've set out the reasons for that in our submissions filed earlier. We are opposed to the consolidation of schedules E and F and we have some reservations regarding the proposal around the consolidation of the ERO rates and I'll just expand now on the basis of that opposition and concern.

PN3341

So firstly in relation to the consolidation of schedules E and F, presumably the expert panel may consider it appropriate and certainly we submit it would be necessary and appropriate for there to be some transitional arrangements regarding the implementation of what would be very significant increases to the rates in schedule E and that would result in employers covered by schedule E having to commence the work of increasing the rates in circumstances where they're likely to be subject to further changes that may arise in the future, whether that be from the ASU's long foreshadowed work value claim or other proceedings that may be initiated by the Commission concerning the classification structure.

PN3342

JUSTICE HATCHER: What's the latter reference?

PN3343

MS CRUDEN: Sorry, Your Honour?

PN3344

JUSTICE HATCHER: What does that mean?

PN3345

MS CRUDEN: That the - sorry, our concern would be that employers who are covered by schedule E would start the work of having to change their pay systems, communicate with employees, start the work of implementing changes to the schedule E rates in circumstances where on the ASU's proposal that would seem that - that's not the end game. There's going to be - - -

PN3346

JUSTICE HATCHER: I understand the reference to the ASU but you made some reference to some future Commission initiated proceeding. I'm just wondering what that's about?

PN3347

MS CRUDEN: Apologies, your Honour. My recollection is that there was a submission - I think it may have been part of the ASU's submissions. I may be - could be wrong with that. Perhaps the Commission could initiate proceedings on its own initiative to deal with it if the provisional view were abandoned in this proceeding.

PN3348

JUSTICE HATCHER: All right, okay.

PN3349

MS CRUDEN: I'm not suggesting, your Honour, that the Commission has suggested it's doing that. So our overarching concern is that the employers would be impacted by the schedule E adjustments in circumstances where they may be further impacted by other changes in future and ultimately the ASU's proposal there takes us no closer to remedying the overall issues associated with the classification structure in the award. In relation to the ASU's proposal to consolidate the ERO into the schedule B and C rates, look, we acknowledge we don't seek to quibble with the expert panel's finding that the rates in schedules B, C and E are affected by gender undervaluation.

PN3350

But we do note that in the ASU's draft determination it hasn't identified what it would propose - what the proposed standard rate would be if its consolidation of the rates were to be implemented and nor has it inserted any proposed provisions in its draft determination that would have the effect of revising the percentage of the standard rate used to calculate the various allowances. So at least one concern we would have about that consolidation - again notwithstanding the fact it also doesn't take us closer to remedying the issues with the length and the complexity

of schedules B and C - is that it would have impact on the calculation of the standard rate for the purposes of allowances.

PN3351

They are currently calculated by reference to a rate that excludes the ERO. And it's our position as set out in detail in our written submissions that there is no basis or no basis has been established in these proceedings for the value of our allowances increased by reference to the standard rate due to those being - due to the standard rate being impacted by the inclusion of the ERO. So turning now to the secondary position of the ASU which is in its proposed alternate classification structure, it had been foreshadowed, as Mr Saunders has covered, that there was to be a further version of that. Obviously, we've had some entree to the potential inclusion of the home care classifications today, but it's, on our submission, not possible to meaningfully deal with, you know, how those home care aspects may potentially look, and so we're otherwise largely content to rely upon the detail we've included in our written submission in relation to the ASU alternate proposal in relation to that.

PN3352

I would just draw attention to a couple of key areas of our reply submission in relation to the ASU proposal. The first is in relation to the ASU's conceptualisation of equivalency. We set out our concerns regarding this at paragraph 129 of our reply submission. Fundamentally, we have concerns, which is based on strong feedback from the employers we have consulted with, regarding the workability of a classification structure that's designed to classify workers as opposed to the role in which the worker is engaged. It's our submission that it's imperative that the structure operates as a mechanism to assign minimum rates of pay to the work required at a particular level, including the skill, the experience and/or the qualification that's required at that level, rather than to attempt to base a classification on the characteristics of an individual who is performing work.

PN3353

VICE PRESIDENT ASBURY: Well, Ms Cruden, can I just say, having gone through that the first time, that is at least – it was almost a 10-year exercise to do that with trades people who already had a trade qualification, and that took long enough to identify all the competencies they were using. That's a massive exercise to do that.

PN3354

MR CRUDEN: I understand, and I'm not necessarily advocating for a competency-based structure, which is a very long and detailed process.

PN3355

VICE PRESIDENT ASBURY: How else would it work? If you don't have equivalency and qualifications, how else will it work?

PN3356

MR CRUDEN: Well, our proposal, the draft determination we've advanced is based on either the qualification that's required for the role or the assessment of equivalency for that role based on the determination by the employer of the role

that they are wanting to recruit and assign an employee to. So it's based on the assessment of the work that is going to be required at that particular role. The difficulty that we say exists where it's about the characteristics of an individual performing the work is that there's difficulties where employees hold, for example, qualifications or perhaps hold skills that they don't need to hold for that particular work and which, you know, there's no basis to pay at that level - there may not be funding for it to be paid at a particular level – where the role itself does not require the qualification or does not require the level of experience that someone may have.

PN3357

I mean it may be that someone, you know, is overqualified for a role, it may be that they have qualifications they held for a different role that aren't required for one that's being taken. In our submission, it's the requirements for the work at a particular level that should determine the basis for - - -

PN3358

JUSTICE HATCHER: So that might focus, for example, on the job description for the role in assessing equivalency?

PN3359

MR CRUDEN: Yes, it would be as assessed by the employer in terms of – I believe the conceptualisation we have used in our draft determination 'as reasonably determined by the employer', so we have deliberately required the imposition of reasonableness so that if an employer is acting unreasonably, firstly, there is the resort to the disputes procedure in the award to remedy that, and obviously, if it's unreasonable, then it's a potential contravention of the award and would expose the employer to penalties and potential underpayments, so there's quite some motivation there for an employer to ensure that it is acting reasonably in its assessment of how it will determine equivalence.

PN3360

We have also endeavoured in our draft determination to assign some parameters to the amount of experience that someone may have. So we've cascaded that from one year, two years, three years, four years. Our feedback from employers was that it was useful to have some broad parameters for them to get a sense of where it might be reasonable to place an employee in light of the number of years of relevant experience that they have.

PN3361

JUSTICE HATCHER: Just going back to my question, if, as you say, it needs to be assessed by reference to the role and not the individual's personal qualities or qualifications or experience, why couldn't that be done generally by reference to the job description for the role?

PN3362

MR CRUDEN: Well, I would expect it likely would be reflected in the job description of the role.

PN3363

The second of the three comments I wanted to emphasise on the ASU's classification structure is in relation to its proposals regarding pay points. These were also concerns that were identified by Mr Scott. We do have a real concern in relation to the ability for employees to progress through pay points and, in doing so, to also jump up to new levels and work their way from level to level in a classification structure based on pay point progression. That is not a current feature of the SCADS Award. Whilst pay points allow an employee to progress through a level, they don't allow for progression through levels as it presently stands, and our understanding is that, again whilst this is a matter for perhaps the Commonwealth and the States to address, that may give rise to additional complexity.

PN3364

Our understanding is that pay points give rise to complexity in funding modelling and that if there was to be movement, not just within a level but between levels from pay points, that that would be an additional consideration that would be addressed, although, as I mentioned, I don't profess to be able to speak to the actual implications of that, other than employers have raised it as a concern.

PN3365

We have also made a number of comments regarding the ASU proposal at paragraph 162 of our reply submission. If I can just emphasise those. Firstly, the ASU's proposal addresses the concern that no employee's pay goes backwards, but, in doing so, creates a large uplift in rates that are applicable to large cohorts in these sectors, and it's not apparent how those increases are justified on work value grounds.

PN3366

Another point we have identified is that it does appear to result in the compression of a large and diverse range of work types into essentially just three classification levels, being levels 6, 7 and 8, with the lower levels largely being confined to admin and disability support workers, with the exception of, I think, one pay point for case workers at the top of level 5. While we do note there's additional pay points in the ASU proposal that attempts to address that, it does seem difficult to reconcile that approach with concerns that have been articulated in relation to the classification structure amongst the many employer submissions that have been filed in the matter regarding the importance of progression pathways for employees.

PN3367

Thirdly, the Expert Panel did arrive at its proposed new classification structure on the basis that it wasn't intending to significantly increase funding or intending to increase the current ERO rates. The ASU proposal would have the effect obviously of significantly increasing labour costs for employers and appears to result in an outcome that was contrary to what the Expert Panel had envisioned.

PN3368

Lastly, and critically, even to the extent that employers may be supportive of a general uplift across the sector, it remains the case that no funding commitment has been made in relation to any cost increases for employers that arise from the proceedings and, as I seek to emphasise, we're not saying there should be rate

cuts, but we're also saying in respect of rate increases that there's a real question about how that can be a sustainable outcome from these proceedings having regard to the magnitude that the ASU's proposal may have in the absence of a funding commitment having been made.

PN3369

The third and the fourth areas I wanted to cover in my submissions is in response to the HSU and UWU's reply submission. There are seven matters that arise from those submissions.

PN3370

The first matter concerns clerical employees and, in particular, the HSU's reply submissions, which state that Ai Group submits, therefore, that the provisional structure be amended, so as to confine administrative and support work to the social and community services sector.

PN3371

Now, our submission in that regard was on the basis that the previous (indistinct) position, being the position published by the Fair Work Ombudsman for some nine years, was that clerical staff were not covered by the home care or the cash streams of the SCHADS award. I'm mindful Mr Scott has already spoken about this. The fact that this was the subject of guidance from the Fair Work Ombudsman since 2016 until very recently suggests that at least some employers, if not many employers who may have received that advice, could well be adopting a position where they've been classifying their employees from those streams under the Clerks Award.

PN3372

So I think there's a real issue that if our position is not correct, as the union, in particular the HSU, UWU position is that clerical admin employees should have been in there all along, then, even if that were to be correct, it still seems quite possible that there's going to be significant disruption to employers arising from that if they've been following the previously published guidance for nearly a decade. On the other hand, if that position that has been published is the correct one, then we are in a position of a real potential issue of scope creep, in terms of the application of the award.

PN3373

So to the extent that there now appears to be a live controversy, we're mindful that the submission made by Mr Scott included potentially looking at this issue in more detail, in terms of not just the current state of play, but substantively considering, should clerical employees be incorporated properly and consideration given to how that would be done, without materially increasing or decreasing terms and conditions. And our position, as articulated in our reply at paragraph 154, was that we would suggest this matter may best be dealt with outside the scope of these proceedings.

PN3374

If it was to be a matter that may be able to be discretely dealt with, for example, such as is proposed in respect to the family day care issue, that that may be one way in which that could potentially be addressed. Now, just in terms of - - -

PN3375

JUSTICE HATCHER: Sorry, but are we going to hear anything more about it than we haven't already heard?

PN3376

MS CRUDEN: That's where I was proposing to lead that one.

PN3377

JUSTICE HATCHER: No, but you mentioned a discrete proceeding about it. I'm just wondering what the point of that would be.

PN3378

MS CRUDEN: Well, your Honour, I understand that if clerical and administrative employees were to go in there, it may be that the issue of whether or not they have been properly – of whether they should form part of that classification structure could be considered in more detail. It may be that further detail is potentially able to be gathered regarding what the current practices are in relation to that.

PN3379

And it may be that issues – if there was to be scope creep, then the relevant provisions of the Act would need to be grappled with, and I believe it's Mr Scott's submission in relation to the need to consider whether or not it would be appropriate for there to be any material increases or decreases in respect of clerical employees being included in more detail. So I would envision that, given the issues that have been raised, that may be the nature of the matters that might be deal with.

PN3380

JUSTICE HATCHER: Thank you.

PN3381

MS CRUDEN: The second matter we'll address, from the HSU and UWU's reply submission, is at its paragraph 15, which suggests that the difficulty in removing the descriptor of 'basic' at level 1 means that there's no way of distinguishing administrative and support work at this level from that of level 2. We would say that that's inaccurate, for two reasons. And at the outset, yes, we did propose that the word 'basic' be removed from level 1 and level 2.

PN3382

Insofar as the word 'basic' is currently in the descriptors for both levels 1 and 2, we would say that that doesn't, on its own, provide any assistance currently, distinguishing between levels 1 and 2, so we would seek the removal from both levels 1 and 2. It's a net zero issue there, as opposed to removing it from one level and not another. The distinction between the proposed descriptors for level 1 and 2 is tied to the nature of the work, with the descriptor for 1 capturing clerical and admin work, and level 2 capturing home care and SACS work. So we would say that the presence or absence of the 'basic' qualifier in the descriptor wouldn't change that.

PN3383

In the reply submission at paragraph 16, it's said that the expert panel purposely intended for level 1 to be an introductory level. Nothing about our proposed wording would exclude new entrants to the sector, just to be clear. We still envision that it could well be an introductory level, but our position is that the classification structure does not need a dedicated level exclusively for new entrants – sorry, that the classification structure doesn't need a dedicated level just for new entrants, and it should recognise that some basic work of an ongoing nature may be needed to be accommodated as an enduring feature of the award.

PN3384

VICE PRESIDENT ASBURY: So how would that work if – so you haven't got any – because you've got – sorry, I'm just looking at 1.1 versus 1.2.

PN3385

MS CRUDEN: Yes.

PN3386

VICE PRESIDENT ASBURY: So you go from 1.1 to 1.2 after three months, essentially.

PN3387

MS CRUDEN: Yes.

PN3388

VICE PRESIDENT ASBURY: And then, there's no – so would you enter at 2.1, possibly, or at 1.1? Is there a movement from – how does it work, moving from 1.2 to 2.1, or doesn't it?

PN3389

MS CRUDEN: In the version of the classification structure contained in the draft determination we've advanced, we have left it as it was originally drafted by the expert panel, which is that level 1 is for administrative and clerical employees only; level 2 is for home care and social and community service employees; and then level 3 is the level after that. So the way that our structure is contained in the draft determination is that a level 1 clerical or administrative employee would move to level 3, and they would bypass level 2, level 2 being the initial level for a home care, social community services worker.

PN3390

We did also wish to address the HSU and UWU reply submission at paragraph 19, which states that our proposed requirement for the relevant industry experience, to be the equivalent of full-time industry experience, is substantially the same as the submission made by the joint employers in respect of the aged care decision, and which was rejected by the Full Bench. We note that the Full Bench in that case rejected that approach on three grounds, and we would say one of those grounds is an important distinction here.

PN3391

The third ground for which the Full Bench rejected that approach was on the basis that it was inconsistent with the classification structure based on qualifications and skills required to be exercised by employees, and incentivising employees to

obtain a qualification to progress. The distinction, we say, here is that the expert panel intends for the qualification structure to make allowance for the recognition of equivalent experience and training, including lived experience. And we submit that in those circumstances, it cannot be said that the amount of time over which that experience has been gained is not relevant or appropriate to have regard to.

PN3392

JUSTICE HATCHER: How much longer will you be, Ms Cruden?

PN3393

MS CRUDEN: Perhaps 15 to 20 minutes.

PN3394

JUSTICE HATCHER: All right. Are the parties happy to proceed at the end of this submission? Yes. All right. We'll keep on going.

PN3395

MS CRUDEN: Thank you, your Honour. The third matter addressing from that HSU/UWU submissions concern our proposed level 3, and they oppose the proposition that equivalent experience should be defined as that ordinarily obtained over not less than a one-year full-time period, and that equivalence should be as reasonably determined by the employer. And it's objected to on the basis that it's ripe for disputation and creates a penumbra. The unions have proposed a 12-month qualifying period, but haven't attempted at all to grapple with whether and how this can or should be verified.

PN3396

And whilst we acknowledge our approach may not be perfect – it may be that it needs some further thought – we would emphasise that a penumbra is better than the complete lack of parameters, based on an undefined concept of equivalency. And I would emphasise, when we were consulting with the employers on this, they did indicate that some parameters, in terms of how much experience they should be having regard to for particular levels, was considered to be very useful, in terms of the approach.

PN3397

In relation to level 4 of our proposal the HSU and UWU reply submission suggests at paragraph 37 that our proposed requirements for a high degree of judgment initiative, confidentiality and sensitivity seems likely to lead to disputation. Again, we don't accept that characterisation of those four items as being overly problematic and we would note that they are taken from the existing classification structure. So our intent would be to endeavour to preserve the classification as closely as possible to the existing situation under the award. In relation to our proposed levels 5 and 6, the union's reply submissions at paragraph 40 appear to accept that the necessary support of a complex nature could be included at levels 5 and 6 and go furthest by suggesting that they should not be limited to support of senior employees.

PN3398

But what they haven't provided any indication of is what kind of role they're envisaging here. And without that detail we're not able to properly consider

whether that would involve any change to the scope of coverage of the award. In relation to the HSU/UWU reply submission at paragraph 43, that under the provisional view an employee at current level 1.3 would translate to proposed new level 3.1 where as on our draft determination it would have the effect that the current level 1.3 employee would translate to proposed level 2.2. We wanted to clarify that point, that we acknowledge that completed 24 months experience may be but may not necessarily be equivalent to a Certificate III.

PN3399

I have earlier made comments in relation to Ai Group's position in relation to the proposed translation approach. Now, we don't seek to quibble with the intention to finalise the classification structure on the basis that no employee goes backwards but we do see that there's some difficulty of achieving that in a manner that's not overly burdensome for employers and the difficulty there I think cannot be understated. I just wanted to make by way of the fourth area of submissions some brief comments in relation to the witness evidence. Firstly, in relation to the first Cortis report that was filed by the ASU in these proceedings, we see Mr Scott's already made some remarks in that regard.

PN3400

What we would say about that is that is based on a version of the Fair Work Commission's proposed structure without any modifications that may have since been considered or that have been the subject of submissions in these proceedings. In circumstances where it seems that alteration of the fundamental premise on which that first Cortis report is based, which is any changes to the provisional structure then that report we say can no longer be taken as accurate or meaningful in terms of any altered form of the Commission's proposed classification structure. In relation to the second Cortis report that has been filed, the first concern we'd note there is that there are some aspects of the opinion of Associate Professor Cortis that appear not to align with the ASU proposals. So it appears to us, for example, that some of the definitions that have been applied for the purpose of that translation analysis are not aligned with the classification definition set out in schedule B of the ASU's proposal.

PN3401

So just by way of two examples: Associate Professor Cortis's definition of level 1 applies to employees within their first year of experience whereas under the ASU proposal level 1 only extends up to the first nine months of experience. In relation to level 5.2, Associate Professor Cortis's definitions indicate that this can include an employee other than a DSW or admin with less than one year experience and in our observation that is not accurate in terms of the ASU's proposal for level 5.2 for three reasons. Firstly, the chapeau to level 5 is clear that level 5 does apply to an employee who is performing admin activities or disability work but not other SACS work.

PN3402

Item B.5.3 makes it clear that administrative or DSW employees classified at 5.1 can progress to 5.2. There is also nothing in item B.5.4 of the ASU's proposal which indicates that level 5.2 does not apply to employees in administrative roles. So it's our submission that those definitional issues mean it's difficult to properly assess the accuracy of the translation analysis prepared by Associate

Professor Curtis. In relation to the scope of analysis in the second Curtis report, she has expressly clarified that it's been prepared in relation to the ASU's proposed classification structure and minimum rates and acknowledges that it's based on an early draft which has not undergone wide consultation and needs to be further refined.

PN3403

Again, for that reason the second Curtis report is only relevant to the extent the Commission is minded to adopt the ASU proposal without any modification or amendment which we respectfully submit seems unlikely, including because we have sought material modification to aspects of that proposal and the Commission is also likely to propose its own amendments and modifications given that it must be satisfied that the variations are necessary to achieve the modern awards objectives. In relation to the lay evidence filed in these proceedings, again we have filed a joint list of areas which we say are of objectionable content, not that we object with a view to not having that evidence admitted. I will just briefly touch on the nature of those objections for the purposes of the expert panel's consideration of those aspects. Firstly there are a number of areas where there are expressions of non-expert opinions in circumstances where the witness has not demonstrated the requisite knowledge experience or qualifications to express the opinion.

PN3404

Secondly, we've identified areas where those opinions traverse into statements as to what outcomes in this proceeding would lead a worker to feel valued, which we submit is not a relevant consideration in the context of modern awards objectives of the minimum wages objective. Thirdly we have identified as objectionable content in the statements that is speculative as to the potential impacts of possible outcomes of this proceeding on workers and/or the broader sector and lastly, we've noted that many of the statements contain what is more appropriately characterised, including a submission, including argumentative content. For those reasons it's our submission that the expert panel should be cautious in assigning weight to those areas in which these joint concerns have been advanced.

PN3405

Your Honour, that's the conclusion of my submissions unless I can be of further assistance to the panel.

PN3406

JUSTICE HATCHER: No, all right, thank you.

PN3407

MS CRUDEN: Thank you.

PN3408

JUSTICE HATCHER: All right, well, I think that's as far as we can take it today. Mr Latham, it's probably appropriate that you go next in the morning before we turn to the government entities. Am I right in assuming we should comfortably finish within tomorrow? All right, so we can proceed to vacate Wednesday, yes. All right, we'll now adjourn and we're resume at 10 am in the morning.

ADJOURNED UNTIL TUESDAY, 28 OCTOBER 2025

[4.02 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

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EXHIBIT #SCH41 WITNESS STATEMENT OF RACHEL CONNORS DATED 10/09/2025	PN2692
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EXHIBIT #SCH111 SECOND WITNESS STATEMENT OF SARAH LENHARD DATED 11/09/2025	PN2692

**EXHIBIT #SCH112 WITNESS STATEMENT OF KLYE MOSEY
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**EXHIBIT #SCH113 WITNESS STATEMENT OF ZELDA RIDDELL
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**EXHIBIT #SCH114 WITNESS STATEMENT OF MARGARITA ROGERS
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**EXHIBIT #SCH115 WITNESS STATEMENT OF CAROLYN SHEARER
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**EXHIBIT #SCH116 WITNESS STATEMENT OF MARK WHENAN
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