



BACKGROUND DOCUMENT 1

THE APPLICATIONS

Fair Work Act 2009

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

Aged Care Award 2010

(AM2020/99)

Nurses Award 2020

(AM2021/63)

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

(AM2021/65)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT ASBURY
COMMISSIONER O'NEILL

MELBOURNE, 9 JUNE 2022

This document has been prepared to facilitate proceedings and does not purport to be a comprehensive discussion of the submissions made; nor does it represent the concluded view of the Commission on any issue.

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ABBREVIATIONS

ABS	Australian Bureau of Statistics
ABI	Australian Business Industrial
<i>ACT Child Care Decision</i>	<i>Australian Liquor, Hospitality and Miscellaneous Workers Union re Child Care Industry (Australian Capital Territory) Award 1998 and Children's Services (Victoria) Award 1998 - re Wage rates - PR954938 [2005] AIRC 28</i>
Aged Care Award	<i>Aged Care Award 2010</i>
AIN	Assistant in Nursing
ANMF	Australian Nursing and Midwifery Foundation
AQF	Australian Qualifications Framework
CCIWA	Chamber of Commerce and Industry of Western Australia
Commission	Fair Work Commission
EN	Enrolled Nurse
<i>Equal Remuneration Case 2015</i>	<i>Application by United Voice & Australian Education Union [2015] FWCFB 8200</i>
FW Act	<i>Fair Work Act 2009 (Cth)</i>
HSU	Health Services Union
Joint Employers	Aged & Community Services Australia, Leading Age Services Australia, Australian Business Industrial
NES	National Employment Standards
Nurses Award	<i>Nurses Award 2020</i>
PCW	Personal Care Worker
<i>Penalty Rates Decision</i>	<i>4 Yearly Review of Modern Awards – Penalty Rates [2017] FWCFB 1001</i>
<i>Penalty Rates Review</i>	<i>Shop, Distributive and Allied Employees Association v The Australian Industry Group (2017) FCR 368</i>
<i>Pharmacy Decision</i>	<i>Four Yearly Review of Modern Awards – Pharmacy Industry Award 2010 [2018] FWCFB 7621</i>
RN	Registered Nurse
SCHADS Award	<i>Social, Community, Home Care and Disability Services Award 2010</i>
Unions	Australian Nursing and Midwifery Foundation, Health Services Union and the United Workers Union
UWU	United Workers Union
4 Yearly Review	4 yearly review of modern awards

4 Yearly Review Amending Act	<i>Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018</i>
WR Act	<i>Workplace Relations Act 1996 (Cth)</i>

1. PROCEDURAL HISTORY

[1] Three applications to vary modern awards in the aged care sector are before the Full Bench:

1. [AM2020/99](#) – an application by the Health Services Union (HSU) and a number of individuals to vary the minimum wages and classifications in the *Aged Care Award 2010* (Aged Care Award).
2. [AM2021/63](#) – an application by the Australian Nursing and Midwifery Federation (ANMF) to vary the Aged Care Award and the *Nurses Award 2010*, now the *Nurses Award 2020* (Nurses Award).¹
3. [AM2021/65](#) – an application by the HSU to vary the *Social, Community, Home Care and Disability Services Award 2010* (SCHADS Award) (the Applications).

[2] On 12 November 2020, a number of individuals made an [application](#) to vary the minimum wages and classifications in the Aged Care Award. An [amended application](#) was made on 17 November 2020 adding the HSU as an applicant (AM2020/99). The application seeks to vary the Aged Care Award by:

- (a) Increasing wages for *all* classification levels in the Aged Care Award by 25 per cent by replacing subclause 14.1 of the Award with the following:²

14.1 Minimum wages – Aged Care Employee		
Classification	Per week	
	\$	
Aged care employee – level 1	801.40	\$1001.75
Aged care employee – level 2	834.60	\$1043.25
Aged care employee – level 3	867.30	\$1084.13
Aged care employee – level 4	877.60	\$1097.00
Aged care employee – level 5	907.30	\$1134.13
Aged care employee – level 6	956.20	\$1195.25
Aged care employee – level 7	973.40	\$1216.75

- (b) Varying the classification structure in Schedule B to provide for an additional pay level for Personal Care Workers (PCW) who have undertaken specialised training in a specific area of care and who use those skills. The proposed replacement Scheduled B is outlined at **Annexure A**.

[3] On 14 December 2020, the HSU filed an [outline of evidence](#).

¹ The *Nurses Award 2010* was varied and renamed the *Nurses Award 2020* on 9 September 2021 ([2021] FWCFB 4504).

² The minimum wages in the Aged Care Award have increased since the application was made as the result of *Annual Wage Review 2020-21* (see [2021] FWCFB 3500 and PR729273).

[4] On 16 March 2021, the ANMF [wrote](#) to the Commission foreshadowing that it would be making an application to vary the minimum wages and classifications in the Nurses Award.

[5] At a [directions hearing](#) on 26 March 2021, the United Workers Union (UWU) foreshadowed an application to vary the SCHADS Award.

[6] On the 1 April 2021, submissions were received from the following parties:

- [HSU](#)
- [ANMF](#)
- [UWU \(collectively the Unions\)](#)

[7] On 17 May 2021, the ANMF made an [application](#) to vary the Aged Care Award and the Nurses Award (AM2021/63) by:

1. inserting a new Aged Care Employees Schedule into the Nurses Award , which would increase rates of pay by 25 per cent and expire after 4 years; and
2. creating a new classification structure for PCWs in the Aged Care Award (and consequentially removing them from the main ‘aged care employee’ classification structure in Schedule B) and increasing PCW rates of pay by 25 per cent

[8] The ANMF’s proposed Aged Care Employees Schedule in the Nurses Award would create a new set of minimum rates for employees who are engaged in the provision of:

- (a) Services for aged persons in a hostel, nursing home, aged care independent living units, aged care services apartments, garden settlement, retirement village or any other residential accommodation facility; and or
- (b) Services for an aged person in a private residence.³

[9] The proposed schedule applies an increased minimum wage for employees working in the aged care industry in the following classifications:

- Nursing assistant
- Enrolled nurses (including student enrolled nurse) (EN)
- Registered nurses (RN) (levels 1-5); and
- Nurse practitioner.⁴

[10] The ANMF’s application seeks a 25 per cent wage increase for all employees covered by the Nurses Award who provide services for aged persons as follows:⁵

³ ANMF Application, Annexure 1 [1].

⁴ The proposed schedule does not include the classification Occupational health nurse as set out at cl.A.6 of the Nurses Award.

⁵ The minimum wages in the Nurses Award have increased since the application was made as the result of *Annual Wage Review 2020-21* (see [2021] FWCFB 3500 and PR729289).

Classification	Per week⁶ \$
Nursing assistant	
Entry up to 6 months	1028.50
From 6 months	1045.40
From 12 months	1062.80
Experienced (the holder of a relevant Certificate III qualification)	1097.00
Enrolled nurse	
(a) Student enrolled nurse	
Less than 21 years of age	952.20
21 years of age and over	1001.80
(b) Enrolled nurse	
Pay point 1	1117.40
Pay point 2	1132.10
Pay point 3	1147.10
Pay point 4	1163.60
Pay point 5	1175.40
Registered nurse – level 1	
Pay point 1	1195.30
Pay point 2	1219.80
Pay point 3	1249.80
Pay point 4	1282.90
Pay point 5	1322.40
Pay point 6	1360.60
Pay point 7	1400.00
Pay point 8	1436.40
Registered nurse – level 2	
Pay point 1	1474.50
Pay point 2	1497.90
Pay point 3	1523.90
Pay point 4 and thereafter	1548.90
Registered nurse – level 3	
Pay point 1	1598.80
Pay point 2	1628.10
Pay point 3	1656.30
Pay point 4 and thereafter	1686.00

⁶ In their submission dated 4 March 2022, Aged & Community Services Australia, Leading Age Services Australia and Australian Business Industrial also calculate a 25% increase on the minimum rates in the Nurses Award and their calculations differ from the ANMF.

Registered nurse – level 4	
Pay point 1	1824.80
Pay point 2	1955.50
Pay point 3	2069.50
Registered nurse – level 5	
Pay point 1	1841.40
Pay point 2	1939.10
Pay point 3	2069.50
Pay point 4	2198.60
Pay point 5	2424.90
Pay point 6	2653.10
Nurse practitioner	
1 st year	1839.80
2 nd year	1894.40

[11] The ANMF’s proposes to vary the Aged Care Award by deleting ‘personal care worker’ from the definitions of aged care employee levels 2, 3, 4, 5 and 7 in Schedule B and inserting a new classification structure for PCWs as follows:⁷

Classification	Rate of pay⁸
	\$
Grade 1 – Personal Care Worker (entry up to 6 months)	1043.30
Grade 2 – Personal Care Worker (from 6 months) & Recreational/Lifestyle activities officer (unqualified)	1084.10
Grade 3 – Personal Care Worker (qualified)	1097.00
Grade 4 – Senior Personal Care Worker	1134.10
Grade 5 – Specialist Personal Care Worker	1216.80

[12] On 31 May 2021, the HSU made an [application](#) to vary the SCHADS Award (AM2021/65) by:

(1) Inserting the following new definition into clause 3.1:

Home aged care employee means a home care employee providing personal care, domestic assistance or home maintenance to an aged person in a private residence; and

⁷ The minimum wages in the Aged Care Award have increased since the application was made as the result of *Annual Wage Review 2020-21* (see [2021] FWCFB 3500 and PR729273).

⁸ In their submission dated 4 March 2022, Aged & Community Services Australia, Leading Age Services Australia and Australian Business Industrial also calculate a 25% increase on the minimum rates in the Aged Care Award and their calculations differ from the ANMF.

- (2) Inserting a new clause 17A – Minimum weekly ages for home aged care employees to provide a 25 per cent increase in wages for home aged care employees at all classification levels as follows:⁹

17A.1 Home aged care employee Level 1

	Per week
	\$
Pay point 1	1014.13

17A.2 Home aged care employee Level 2

	Per week
	\$
Pay point 1	1074.88
Pay point 2	1082.25

17A.3 Home aged care employee Level 3

	Per week
	\$
Pay point 1 (certificate III)	1097.00
Pay point 2	1130.75

17A.4 Home aged care employee Level 4

	Per week
	\$
Pay point 1 (certificate IV)	1196.88
Pay point 2	1220.75

⁹ The minimum wages in the Aged Care Award have increased since the application was made as the result of *Annual Wage Review 2020-21* (see [2021] FWCFB 3500 and PR729360).

17A.5 Home aged care employee Level 5

	Per week
	\$
Pay point 1 (degree or diploma)	1283.13
Pay point 2	1333.75

(3) To make such further or other amendments to the SCHADS Award as appear appropriate to the Commission in light of the evidence in the proceeding.

[13] In essence, together, the Applications seek a 25 per cent rise to the minimum wage for all aged care employees covered by the Aged Care, Nurses and SCHADS awards. The ANMF supports the wage increases sought in the HSU applications for PCWs consistent with its own application.¹⁰ While the ANMF application does not seek a wage increase for employees other than nurses and PCWs, it supports the wage increases sought by the HSU for other employees affected by those applications.¹¹

[14] The HSU and ANMF differ on their approach to Schedule B in the Aged Care Award.

[15] The ANMF submits that the work performed by Assistants in Nursing (AIN) and PCWs differs qualitatively from the work done by general and administrative services and food services workers and as a result their rates of pay should be treated separately.¹² It relies on 2 propositions:

1. If the Commission is satisfied that there should be an increase in award rates for AINs and PCWs, but is *not* so satisfied in relation to general and administrative services worker and food services workers, then a separate classification structure for AINs/PCWs is an ‘obvious drafting technique or structure to give effect to those conclusions.’¹³
2. Even if the Commission *is* satisfied that there should be an increase in award rates for general and administrative services workers and food services workers, a separate classification structure is appropriate because AINs/PCWs work as part of the ‘nursing team’ and engage in case work that is not analogous to the work performed by other aged care employees, such as gardeners.¹⁴ The current classification, which places varieties of workers who perform very different work

¹⁰ ANMF submissions dated 29 October 2021 [5].

¹¹ ANMF submissions dated 29 October 2021 [5].

¹² ANMF submissions dated 29 October 2021 [205].

¹³ ANMF submissions dated 29 October 2021 [209].

¹⁴ ANMF submissions dated 29 October 2021 [210].

into a single classification ‘carries with it the risk of stultification of development of particular terms and conditions ... which take account of those qualitative differences between work.’¹⁵

[16] On 1 June 2021, the UWU [wrote](#) to the Commission confirming that, in the circumstances, it would not be making a separate application to vary the SCHADS Award.

[17] On 24 June 2021, a [conference](#) in respect of the applications was held before Commissioner O’Neill.

[18] On 1 July 2021, a [Statement and Directions](#) were issued confirming that the Applications (AM2020/99, AM2021/63 and AM2021/65) would be dealt with jointly by one Full Bench and any evidence given in the matters would be admissible in relation to all of them.

[19] Schedule 1 to the Directions contained requests from the ANMF and the HSU for information and data from the Australian Government. The Directions provided:

4. The Australian Government is to file its response to the request for information and data, specifying what information and data it can provide and by when, by 4pm on **16 July 2021**.

5. The Australian Government is to file the information and data then available by **23 July 2021**, and any additional information and data as soon as it is available.

[20] On 16 July 2021, the Australian Government filed a [submission](#) in response to Direction 4, setting out the information it could provide and the timeframe for providing it. On 23 July 2021, the Australian Government provided a further [submission](#) in response to Direction 5 that contained the information and data requested. This submission was accompanied by an [information and data spreadsheet](#).

[21] On 31 August 2021, the Australian Government provided a [submission](#) in response to questions 1-3 of the HSU’s schedule of requested information.

[22] On 15 September 2021, the HSU [responded](#) to the Australian Government’s submissions and requested clarification and additional information. The Australian Government provided a [response](#) on 24 September 2021.

[23] On 29 October 2021, further submissions and witness statements were filed by the [UWU](#), [ANMF](#) and [HSU](#).

[24] On 17 December 2021, a [Consensus Statement](#) was received from the following stakeholders in the aged care sector:

- Aged & Community Services Australia (ACSA)
- Aged Care Industry Association (ACIA)
- Aged Care Reform Network
- ANMF

¹⁵ ANMF submissions dated 29 October 2021 [211].

- Carers Australia
- Council on the Ageing (COTA)
- Federation of Ethnic Communities' Councils of Australia (FECCA)
- HSU
- Leading Age Services Australia (LASA)
- National Seniors Australia
- Older Persons Advocacy Network (OPAN)
- UWU

[25] The Consensus Statement emerged from meetings convened by the Aged Care Workforce Industrial Council (ACWIC) of stakeholders from the aged care sector to consider the HSU and ANMF's applications. The Consensus Statement 'reflects the matters over which the parties have reached agreement but does not represent the entirety of the views of each of the stakeholders.'¹⁶

[26] The stakeholders agree that wages in the aged care sector need to be 'significantly increased' because the work of aged care workers has been historically undervalued and has not been properly assessed.¹⁷

[27] The employer interests in these proceedings are being represented by ACSA, LASA and Australian Business Industrial (ABI) (collectively the Joint Employers). On 4 March 2022, the Joint Employers made the following submissions:

- [Submission](#)
- [Witness statements and evidence](#)
- [Reference Material Document](#)

[28] The Joint Employers submit that although some decisions allude to the C10 framework, the classification structures in the awards were not based on a pre-reform award classification structure that was expressly mapped to the C10 framework and therefore that 'it does not appear that the minimum rates in [the Aged Care, Nurses and SCHADS awards] were properly set as part of the award modernisation process.'¹⁸ However, the Joint Employers oppose a 25% uniform increase to minimum wages in the Aged Care Award, Nurses Award and SCHADS Award, and submit that for *some* classifications proper alignment to the C10 framework could justify a change to minimum rates.¹⁹

[29] The Chamber of Commerce and Industry of Western Australia (CCIWA) also made a [submission](#). CCIWA opposes the HSU and ANMF applications.

[30] Submissions were also received from the following aged care providers:

- [Uniting NSW, ACT](#)
- [Uniting Care Australia](#)
- [IRT Group](#)

¹⁶ Consensus Statement, p.1.

¹⁷ Consensus Statement p.2.

¹⁸ Joint Employers submissions dated 4 March 2022 [3.10].

¹⁹ Joint Employers submissions dated 4 March 2022 [3.20]

- [Evergreen Life Care](#)
- [Tandara Lodge Community Care](#)
- [BaptistCare NSW & ACT](#)

[31] The following state governments made submissions:

- [Queensland Government](#)
- [Victorian Government](#)

[32] A [submission](#) from an individual aged care worker was also received.

[33] On 21 April 2022, submissions in reply were received from the following parties:

- [HSU](#)
- [ANMF](#)
- [UWU](#)

[34] In total, the Unions filed 6 expert witness reports and statements and 98 lay witness statements. The Unions lay witness evidence falls into 2 broad categories:

- 17 union officials
- 81 employee lay witnesses

[35] The Joint Employers filed statements of 9 lay witnesses.

[36] On 6 April 2022, a [Statement](#) directed the parties to file any objections to the evidence contained in the witness statements by Thursday 21 April 2022. The parties' responses noted that they considered that parts of the material upon which other parties proposed to rely were objectionable (including on the grounds of relevance and hearsay), but they did not propose to take any formal objection to that material.²⁰ Each of the parties reserved their right to address such matters in their closing submissions in terms of the weight, if any, to be given to parts of the witness statements. The Commission proceeded on that basis.

[37] A [Mention](#) was held on 22 April 2022. The Commission proposed that in order to facilitate the efficient use of Commission resources, the Unions' employee lay witness evidence would be heard by a single member of the Full Bench, Commissioner O'Neill. The remaining witnesses (the union officials, experts and employer lay witnesses) would be heard by the Full Bench. The parties did not object to the course proposed.

[38] Hearings of evidence were held from 26 April to 2 June 2022. Transcripts of those hearings may be found [here](#).

[39] The Unions [also proposed](#) that the Commission conduct site visits at a number of aged care facilities. Site visits were undertaken by Deputy President Asbury in Sydney on 27 April 2022 and by Commissioner O'Neill on 28 April 2022.

²⁰ ACSA, LASA and ABI [submission – objections to evidence](#) dated 21 April 2022; UWU [submission – hearing plan and evidence](#) dated 21 April 2022; HSU [submissions – hearing plan and objections to evidence](#) dated 22 April 2022; ANMF [submissions in reply](#) dated 21 April 2022.

[40] In a [Statement](#) issued on 12 May 2022, the Commission advised that it would prepare the following material and provide it to the parties on 7 June 2022:

- A draft agreed issues document (including the approach to work value cases). The document will also seek to identify the disputed matters.
- A document summarising the major contentions of the parties.
- A background paper on the relevant award(s) history.
- A background document on the residential and home aged care sector.

[41] On 2 June 2022, the Commonwealth wrote to the Commission to advise that it wished to be heard in the proceedings and anticipated that it would require additional time in order to file its submissions.

[42] At a Mention on Monday 6 June 2022, the Directions were varied as follows:

1. The parties will file closing written submissions regarding the evidence by 4pm on Friday 22 July 2022.
2. The parties will file submissions in reply regarding the evidence by 4pm on Monday 8 August 2022.
3. The Commonwealth will file written submissions by 4pm on Monday 8 August 2022.
4. The parties will file submissions in reply to the Commonwealth's written submissions by 4pm on Wednesday 17 August 2022.
5. The matter will be listed for oral hearing on:
 - a. 24 and 25 August 2022 for submissions by the Applicants and the Commonwealth to be held in person in at the Commission's Melbourne office.
 - b. 1 September 2022 (with 2 September reserved) for submissions by ABI, ACSA and LASA and reply submissions to be held in person at the Commission's Sydney office.

Question 1 for all parties: Are there any corrections or additions to section 1?

2. LEGISLATIVE FRAMEWORK

[43] Under Part 2-3 of the *Fair Work Act 2009* (the FW Act, the Commission has the power to make, vary or revoke modern awards either on the Commission's own motion or in response to an application.

[44] The Applications have been made pursuant to s.158(1) of the FW Act. Relevantly, item 1 of s.158(1) authorises a registered organisation of employees to apply for the making of a determination varying a modern award under s.157. It is uncontentionous that the ANMF and HSU have the requisite standing to make the Applications.

[45] The Applications seek to vary minimum wages in the Aged Care Award, the Nurses Award and the SCHADS Award. It is also uncontentionous that the Applications seek to vary 'modern award minimum wages' as defined in s.284 in that they seek to vary 'the rates of minimum wages in modern awards': see ss.284(3) and (4).

[46] The general provisions relating to the performance of the Commission's functions apply to these proceedings.²¹ Section 578(a) provides that in performing functions and exercising powers under a part of the FW Act, the Commission must take into account the objects of the FW Act and any objects of the relevant part.

[47] Sections 157 and 158 are in Part 2-3 of the FW Act. The objects of Part 2-3 are expressed in the modern awards objective in s.134, which applies to the performance or exercise of the Commission's modern award powers. The modern awards objective requires the Commission to ensure that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions, taking into account certain social and economic factors. The minimum wages objective in s.284 also applies to the performance or exercise of the Commission's powers under Part 2-3 so far as they relate to, relevantly, varying modern award minimum wages: s.284(2)(b). The object of the FW Act is set out in s.3.

[48] The modern awards objective and minimum wages objective are considered later in this Background Paper.

[49] In determining the Applications, the Commission is not confined to the terms of the Applications and may, subject to according interested parties procedural fairness, determine the matter other than in the terms sought by the HSU and the ANMF (see s.599 of the FW Act).

[50] The capacity of the Commission to vary minimum wages in a modern award is constrained by s.135 of the FW Act. Section 135(1) of the FW Act provides that, apart from variations pursuant to ss.160 or 161, modern award minimum wages cannot be varied under Part 2-3 of the FW Act unless the Commission is satisfied that the variation is justified by work value reasons (as referred to in s.157(2)). Section 135(2) provides that, in exercising powers to set, vary or revoke modern award minimum wages under Part 2-3, the Commission 'must take into account the rate of the national minimum wage as currently set in a national minimum wage order'.

²¹ See FW Act ss.577 and 578.

[51] The Applications seek variation determinations ‘outside the system of annual wage reviews’. Section 157(2) of the FW Act provides:

(2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:

- (a) the variation of modern award minimum wages is justified by work value reasons; and
- (b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

[52] The Explanatory Memorandum to the *Fair Work Bill 2009* (Cth) (EM) provides, in relation to s.157(2):

‘FWA may also vary modern award minimum wages outside the system of 4 yearly reviews, where it is satisfied that: the variation is justified by work value reasons (that is, by reasons justifying the amount that employees should be paid for doing a particular kind of work relating to: the nature of the work; the level of skill or responsibility involved in doing the work; or the conditions under which the work is done); and making the variation ... is necessary to achieve the modern awards objective (subclause 157(2)).’²²

[53] The meaning of the expression ‘work value reasons’ is considered below.

[54] It follows from the foregoing that, in order to exercise the power in s.157 to vary the minimum wages as sought in the Applications, in whole or part, the Commission needs to:

1. be satisfied that the variation to minimum wages is justified by work value reasons
2. be satisfied that the variation outside the system of annual wage reviews is necessary to achieve the modern awards objective
3. be satisfied that the variation is necessary to meet the minimum wages objective, and
4. take into account the rate of the national minimum wage as currently set in a national minimum wage order.²³

Work value reasons

[55] As mentioned earlier, s.157(2) provides that the Commission may vary modern award minimum wages if it is satisfied that the variation is ‘justified by work value reasons’. Section 135(1) is expressed in similar terms.

²² Explanatory Memorandum to the *Fair Work Bill 2009* (Cth) [613].

²³ *Re IEU* [2021] FWCFB 2051 [217].

[56] The Dictionary in s.12 of the FW Act defines the term ‘work value reasons’ as ‘see subsection 157(2A)’. Section 157(2A) provides:

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

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

[57] The ANMF submits that s.157(2A) ‘exhaustively defines work value reasons as being reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to: (a) the nature of the work; (b) the level of skill or responsibility involved in doing the work; and (c) the conditions under which the work is done.’²⁴

Question 2 for all other parties: What do you say in response to the ANMF submission?

[58] The HSU submits that the specific items in s.157(2A) should be interpreted as follows:

1. ‘The “nature of the work” includes the nature of the job and task requirements imposed on workers, the social context of the work and the status of the work.
2. Assessing “skills and responsibilities” involved in the work includes:
 - (i) Consideration of initial and ongoing required qualifications, professional development and accreditation obligations, surrounding legislative requirements and the complexity of techniques required of workers;
 - (ii) The level of skill required, including with reference to the complexity of the work and mental and physical tasks required to be undertaken; and
 - (iii) The amount of responsibility placed on the employees to undertake tasks;
3. The “conditions under which work is performed” refers to “the environment in which work is done.”²⁵

Question 3 for the HSU: What is meant by ‘the social context of the work and the status of the work’ and how are these matters relevant to the assessment of work value?

Question 4 for all other parties: What do you say in response to the HSU submission?

[59] Section 157(2A) was inserted into the FW Act by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (the 4 Yearly Review Amending Act).

[60] The 4 Yearly Review Amending Act repealed s.156 of the FW Act, which required the Commission to conduct 4 yearly reviews of modern awards, effective from 1 January 2018

²⁴ ANMF submission dated 29 October 2021 [23].

²⁵ HSU submissions dated 1 April 2021 [38].

(subject to transitional arrangements). As s.156(4) was repealed, the definition of ‘work value reasons’ in s.156(4) was inserted into s.157 as s.157(2A).²⁶

[61] Relevant to these proceedings, ss.156(3) and (4) provided:

Variation of modern award minimum wages must be justified by work value reasons

(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

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

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

[62] The EM provides:

‘605. Subclause 156(3) ensures that FWA may only vary wages as part of a 4 yearly review where it is satisfied that the variation of minimum award wages is justified by work value reasons. The annual wage review is the main way in which wages will be set and varied by FWA. Variation of minimum award wages in a 4 yearly review for work value reasons is a limited exception to this approach.

606. The term work value reasons is defined in subclause 156(4) as reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following: the nature of the work; the level of skill or responsibility involved in doing the work; the conditions under which the work is done.’

[63] The Full Bench in *Four Yearly Review of Modern Awards – Pharmacy Industry Award 2010*²⁷ (the **Pharmacy Decision**) noted: ‘[t]he fixation of award wages based on an assessment of the value of the work performed has been a feature of the industrial arbitration system in Australia from its earliest days’.²⁸

[64] The *Pharmacy Decision* traced the genesis and development of the concept of fixing wages based on ‘work value’ from 1921 to the ‘Work Value Changes’ principle established in the National Wage Case April 1991.²⁹ The Work Value Changes principle set out, under 9 points, when award wages could be adjusted ‘pursuant to work value changes,’ without the variation application being regarded as a claim for wages above or below the award safety net. [Emphasis added] In particular, the principle provided that:

‘(a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed ... The strict test for an alteration in wage rates is that the change in the nature of the work should

²⁶ See the Explanatory Memorandum to the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2018* (item 13 of Schedule 1).

²⁷ [2018] FWCFB 7621.

²⁸ Ibid [131].

²⁹ (1991) 36 IR 120 [160]-[161].

constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.

...

(d) The time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the August 1989 National Wage Case decision (August 1989 National Wage Case) [Print H9100; (1989) 30 IR 81].³⁰ [Emphasis added]

[65] The *Pharmacy Decision* Full Bench noted that:

‘The Work Value Changes principle established in the *National Wage Case April 1991* remained unchanged until wage fixing principles became redundant when the AIRC was stripped of its minimum wage-fixing functions by the *Workplace Relations Amendment (Work Choices) Act 2005*. The concept of work value then played no part in wage fixation until the enactment of the FW Act in 2009.’³¹

[66] Against that historical background, the *Pharmacy Decision* Full Bench then stated 7 propositions in relation to the proper construction of ss.156(3) and (4) of the FW Act. While the *Pharmacy Decision* was dealing with the meaning of ‘work value reasons’ in s.156(4), the propositions set out below are applicable to the current proceedings because ‘subsections 157(2) and (2A) ... are in terms relevantly identical to subsections 156(3) and (4)’.³²

1. The effect of s.156(3) is to establish a jurisdictional prerequisite for the exercise of power to vary minimum wages in a modern award in the conduct of a 4 yearly review of modern awards, namely the reaching of a state of satisfaction on the part of the Commission that the variation is ‘justified by work value reasons’.³³
2. Because the jurisdictional prerequisite is expressed in terms of the Commission’s ‘satisfaction’ concerning whether a variation is ‘justified’ by the prescribed type of reasons - a requirement which involves an element of subjectivity and about which reasonable minds may differ - it requires the formation of a broad evaluative judgment involving the exercise of a discretion.³⁴
3. The definition of ‘work value reasons’ in s.156(4) requires only that the reasons justifying the amount to be paid for a particular kind of work be ‘related to any of the following’ matters set out in paragraphs (a)-(c). The expression ‘related to’ is one of broad import that requires a sufficient connection or association between 2 subject matters. The degree of the connection required is a matter for judgment depending on the facts of the case, but the connection must be relevant and not remote or accidental.³⁵ The subject matters between which there must be a sufficient

³⁰ *Safety Net Review - Wages May 2004* - PR002004 [\[2004\] AIRC 430](#)

³¹ [2018] FWCFB 7621 [162].

³² *Re IEU* [2021] FWCFB 2051 [218].

³³ *Ibid* [163].

³⁴ *Ibid* [164].

³⁵ *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at 387 per McHugh, Gummow, Kirby and Hayne JJ.

connection are, on the one hand, the reasons for the pay rate and, on the other hand, any of the 3 matters identified in paragraphs (a)-(c) – that is, any one or more of the 3 matters.³⁶

4. Although the 3 matters identified - the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done - clearly import the fundamental criteria used to assess work value changes under the wage fixing principles which operated from 1975 to 1981 and 1983 to 2006, the legislature in enacting s.156(4) chose not to import the additional requirements contained in those wage fixing principles:

‘For example, as was observed in the *Equal Remuneration Case 2015*,³⁷ ... s 156(4) does not contain any requirement that the work value reasons consist of identified changes in work value measured from a fixed datum point.

...

Likewise, s.156(4) did not incorporate the test in the wage-fixing principles that the change in the nature of work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification. In substance, section 156(3) and (4) leave it to the Commission to exercise a broad and relatively unconstrained judgment as to what may constitute work value reasons justifying an adjustment to minimum rates of pay similar to the position which applied prior to the establishment of wage fixing principles in 1975.’³⁸

5. It would be open to the Commission to have regard, in the exercise of its discretion, to considerations which have been taken into account in previous work value cases under differing past statutory regimes. For example, although s.156(4) contains no requirement for the measurement of work value changes from a fixed datum point, it is likely the Commission would usually take into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way (that is, in a way which is free of gender bias and any other improper considerations) in assessing wages in the relevant modern award or its predecessor in order to ensure that there is no ‘double counting’.³⁹
6. The considerations referred to in [190] of *Child Care Industry (Australian Capital Territory) Award 1998* (the **ACT Child Care Decision**)⁴⁰ may be of relevance in particular cases, as may considerations in other authoritative past work value cases.⁴¹
7. Even if the jurisdictional prerequisite in s.156(3) is satisfied, it remains the case that the Commission must, as required by s.138, ensure that the inclusion of the varied minimum wages term in the relevant modern award would be necessary to achieve the modern awards objective and the minimum wages objective.

³⁶ [2018] FWCFB 7621 [165].

³⁷ [2015] FWCFB 8200, 256 IR 362.

³⁸ [2018] FWCFB 7621.

³⁹ *Ibid* [168].

⁴⁰ [2005] AIR 28. Paragraph [190] of this decision is extracted at [73] of this Paper.

⁴¹ *Ibid* [168].

[67] The *Pharmacy Decision* Full Bench noted that in the *4 yearly review of modern awards - Real Estate Industry Award 2010* the Full Bench said that where the wage rates in a modern award have not previously been the subject of a proper work value consideration, there can be no implicit assumption that at the time the award was made its wage rates were consistent with the modern awards objective.⁴²

[68] The *Pharmacy Decision* was dealing with the meaning of ‘work value reasons’ in s.156(4) but the propositions set out above are applicable to the current proceedings because ss.156(3) and (4) ‘are in terms relevantly identical to subsections 157(2) and (2A).’⁴³

Question 5 for all parties: Are any of the propositions from the Pharmacy Decision contested?

[69] Propositions 4 and 5 above are to the effect that while it would be open to the Commission to have regard to considerations taken into account in previous work value cases under differing past statutory regimes, in enacting s.156(4) the legislature chose to only import the fundamental criteria used to assess work value changes contained in earlier wage fixing principles, not the additional requirements contained in those principles.

[70] The Full Bench in the *Equal Remuneration Case 2015* said:

‘We see no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s 156(3) or s 157(2). Those provisions allow the variation of such minimum rates for “work value reasons”, which expression is defined broadly enough in s 156(4) to allow a wide-ranging consideration of any contention that, for historical reasons and/or on the application of an indicia approach, undervaluation has occurred because of gender inequity. There is no datum point requirement in that definition which would inhibit the Commission from identifying any gender issue which has historically caused any female-dominated occupation or industry currently regulated by a modern award to be undervalued. The pay equity cases which have been successfully prosecuted in the NSW and Queensland jurisdictions and to which reference has earlier been made were essentially work value cases, and the equal remuneration principles under which they were considered and determined were likewise, in substance, extensions of well-established work value principles. It seems to us that cases of this nature can readily be accommodated under s 156(3) or s 157(2). Whether or not such a case is successful will, of course, depend on the evidence and submissions in the particular proceeding.’⁴⁴
[Emphasis added]

[71] Proposition 6 above is that the considerations referred to in [190] of the *ACT Child Care Decision* may be of relevance in particular cases, as may considerations in other authoritative past work value cases.

[72] In the *ACT Child Care Decision*, the Full Bench found that there had been a ‘significant net addition’ to work requirements since the 1990 datum point such as to satisfy the requirements of the then Work Value Changes principle. The Full Bench also decided, based on the Australian Qualifications Framework (AQF), that minimum pay alignments should be

⁴² Ibid [170], citing [2017] FWCFB 3543 [80].

⁴³ *Re IEU* [2021] FWCFB 2051 [218].

⁴⁴ [2015] FWCFB 8200, (2015) 256 IR 362 [292], referred to in the *Pharmacy Decision* [165].

established between the child care awards under consideration and the *Metal Industry Award*, between classifications with equivalent training and qualification levels:

‘[181] A central feature of this case is the alignment of the Child Care Certificate III and Diploma levels in the *ACT* and *Victorian Awards* with the appropriate comparators in the *Metal Industry Award*.

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

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

[73] The *ACT Child Care Decision* continues:⁴⁵

‘Previous decisions of the Commission suggest that a range of factors may, depending on the circumstances, be relevant to the assessment of whether or not the changes in question constitute the required “*significant net addition to work requirements*”. The following considerations are relevant in this regard:

- Rapidly changing technology, dramatic or unanticipated changes which result in a need for new skills and/or increased responsibility may justify a wage increase on work value grounds.⁴⁶ But progressive or evolutionary change is insufficient.⁴⁷
- An increase in the skills, knowledge or other expertise required to adequately undertake the duties concerned demonstrates an increase in work value.⁴⁸
- The mere introduction of a statutory requirement to hold a certificate of competency does not of itself constitute a significant net addition to work requirements. It must be demonstrated that there has been some change in the work itself or in the skills and/or

⁴⁵ [2005] AIRC 28 [190].

⁴⁶ *Graphic Arts Award*, (1978) 213 CAR 146; *Fire Brigade Employees (ACT) Award (1981)* 255 CAR 476; *General Motors Holden Ltd (Pt 1) General Award 1982* (1986) 301 CAR 555; *Aluminium Industry (Comalco Bell Bay Companies) Award*, Print G5474, 15 October 1986 per Leary C.

⁴⁷ *Graphic Arts Award* (1978) 213 CAR 146; *General Motors-Holden Ltd (Pt 1) General Award 1982* supra; *Municipal Officers (Glenorchy City Council) Award 1981* (1986) 302 CAR 203; *Printing and Kindred Industries Union v The Public Service Commissioner for the NT*, Print G6607, 5 March 1987 per Palmer C; *State Electricity Commission of Victoria v The Federated Ironworkers' Association of Australia*, Print G7498, 22 May 1987 per Coldham J, Cohen J and Griffin C.

⁴⁸ *Alcoa of Australia (Vic) Award*, Print G3738, 15 July 1986 per Boulton J; *Brass, Copper and Non-Ferrous Metal Industry Consolidated Award* (1986) 302 CAR 568; *Austral Pacific Fertilisers Ltd (Agricultural Chemical Industry) Award 1984*, Print G6405, 4 February 1987 per Leary C; *Australian Public Service Assn v Public Service Commissioner of NT*, Print G6934, 1 April 1987 per Griffin C.

responsibility required.⁴⁹ However, where additional training is required to become certified and hence to fulfil a statutory requirement a wage increase may be warranted.⁵⁰

- A requirement to exercise care and caution is, of itself, insufficient to warrant a work value increase.⁵¹ But an increase in the level of responsibility required to be exercised may warrant a wage increase on work value grounds.⁵² Such a change may be demonstrated by a requirement to work with less supervision.⁵³
- The requirement to exercise a quality control function may constitute a significant net addition to work requirements when associated with increased accountability.⁵⁴
- The fact that the emphasis on some aspects of the work has changed does not in itself constitute a significant net addition to work requirements.⁵⁵
- The introduction of a new training program or the necessity to undertake additional training is illustrative of the increased level of skill required due to the change in the nature of the work.⁵⁶ But keeping abreast of changes and developments in any trade or profession is part of the requirements of that trade or profession and generally only some basic changes in the educational requirements can be regarded, of itself, as constituting a change in work value.⁵⁷
- Increased workload generally goes to the issue of manning levels not work value.⁵⁸ But, where an increase in workload leads to increased pressure on skills and the speed with which vital decisions must be made then it may be a relevant consideration.⁵⁹

⁴⁹ *The Hydro Electric Commission of Tas v The Australian Workers Union*, AIRC, (Boulton J), 9 September 1987, Print G9199; *ICI Australia Metal Trades Unions Botany Site Agreement*, Print G7632, 29 May 1987 per Paine C.

⁵⁰ *The National Building Trades Construction Award - Laser Operation Allowance Case*, AIRC, (Bennett C), 30 July 1987, Print G8697.

⁵¹ *Queensland Alumina Limited Agreement (1976)* 175 CAR 894; *Aluminium Industry (Commonwealth Aluminium Corporation Ltd – Qld) Award (1978)* 207 CAR 852.

⁵² *Brass, Copper and Non-Ferrous Metals Industry Consolidated Award*, Print G5798, 26 November 1986 per Leary C; *Austral Pacific Fertilisers Ltd (Agricultural Chemical Industry) Award*, Print G6405, 4 February 1987 per Leary C; *Aircraft Industry (Domestic Airlines) Award*, Print G8270, 3 July 1987 per Paine C; *Australian Public Service Assn v Public Service Commission of NT* AIRC, Print G6934, 1 April 1987 per Griffin C. *Qantas Airways Ltd v Transport Workers' Union of Australia*, Print K2423, 24 April 1992 per McDonald C.

⁵³ *Brass, Copper and Non-Ferrous Metals Industry Consolidated Award (1986)* 302 CAR 568.

⁵⁴ *Vinidex Tubemakers Pty Ltd, Smithfield NSW Industrial Agreement 1981*, Print H4342, 2 September 1988 per Munro J.

⁵⁵ *Professional Engineers (Local Governing Authorities Tas) Award (1986)* 302 CAR 203.

⁵⁶ *Foreman and Related Supervisory Categories (Australia Public Service) Award 1985 (1986)* 301 CAR 82; *Determination No 519 of 1979 (1986)* 301 CAR 273; *Gasfitters (Gas and Fuel Corp of Vic) Award 1982 (1986)* 301 CAR 539; *Ship Painters and Dockers Award 1969 (1986)* 302 CAR 220; *Dispute between Carlton and United Breweries (N.S.W.) Pty Ltd and Federated Clerks Union of Australia*, Print G6216, 18 December 1986 per Nolan C; *Railway Metal Trades Grades Award 1953*, Print G6473, 4 February 1987 per Cross C; *Locomotive Enginemen's Award (1986)* 302 CAR 188; *Tomogo Aluminium Company Pty Ltd Award (1986)* 302 CAR 570; *Alcoa of Australia (WA) Award*, Print G6032, 11 December 1986 per Connell C; *State Rail Authority of NSW v Australian Railways Union*, Print G6666, 20 February 1987 per Riordan DP; *The National Building Trades Construction Award Laser Operation Allowance*, Print G8697, 30 July 1987 per Bennett C.

⁵⁷ *Dispute between the Printing and Kindred Industries Union and Nationwide News Pty Ltd (1986)* 301 CAR 221; *State Electricity Commission of Vic v The Australian Institute of Marine and Power Engineers*, Print H1180, 26 February 1988 per Brown C.

⁵⁸ *Nursing Staff ACT Rates of Pay Award 1970 (1976)* 177 CAR 1141; *Transport Workers (Oil Companies) Award*, Print H3686, 22 July 1988 per Leary C.

⁵⁹ *Private Hospitals' and Doctors' (ACT) Award (1977)* 198 CAR 379; *Municipal Officers (Clarence Council) Award*, Print G7083, 1 May 1987, per Sheather C.

[74] The ANMF contends that these considerations fall into 2 categories:

1. Statements of matters which *are* likely to constitute or evidence a change in work value; and
2. Statements of matters which *are not*, by themselves, likely to constitute or evidence such a change.

[75] The ANMF submits that:

‘the FWC may safely rely upon and apply category (1) matters, so far as they are relevant (though they are not exhaustive). But, reliance upon or application of category (2) matters would tend to lead into error. At the time that the Full Bench set out those principles, it was still necessary to show a, “*significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.*”⁶⁰ Now, it is not necessary so to demonstrate.

Because it is not necessary so to demonstrate, principles stated in terms of whether a particular change in work, “*in itself constitute[s] a significant net addition to work requirements*” (e.g., principle (f) from the *ACT Child Care Decision* quoted above), are addressed to the wrong question.

And even those principles that do not expressly call up the “*significant net addition*” test will tend to lead into error. The only question that the FWC now needs to consider is whether reasons related to any of the nature of the work, the level of skill or responsibility involved in doing the work, and the conditions under which the work is done, justify payment of a particular amount.’⁶¹

Question 6 for all other parties: What do you say in response to the ANMF submission? In particular, do parties agree that the Commission may vary modern award minimum wages under s.157(2) (and subject to s.157(2)(b)) if it is satisfied, for reasons that relate to any of the nature of the employees’ work, the level of skill or responsibility involved in doing the work or the conditions under which the work is done, that a variation to the amount that the employees should be paid is justified?

[76] The re-enactment presumption is a principle of statutory interpretation.⁶² The High Court has stated:

‘There is abundant authority for the proposition that where the Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning already “judicially attributed to [them]” ... although the validity of that proposition has been questioned ... But the presumption is considerably strengthened in the present case by the legislative history of the [Industrial Relations] Act [1988 (Cth)].’⁶³

[77] More recently, the High Court has observed:

⁶⁰ See *ACT Child Care Decision* [2005] AIRC 28 [186], [189].

⁶¹ ANMF submission dated 29 October 2021 [34]-[36].

⁶² *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26 [17] (per Kiefel CJ, Keane and Gleeson JJ).

⁶³ *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at p.106, per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. See also *Electrolux Home Products P/L v Australian Workers’ Union* (2004) 221 CLR 309 at pp.346-347 (per McHugh J) and *Brisbane City Council v Amos* (2019) 266 CLR 593 [45] (per Gageler J).

‘Where Parliament repeats words which have been judicially construed, it can be taken to have intended the words to bear the meaning already judicially attributed to them. The so-called "re-enactment presumption" has a long history, though its application has become more discerning as "parliamentary processes [have become] more exposed to examination by the courts". Applied to a consolidating statute enacted in a legislative context in which periodical consolidation is practised, for example, the presumption can be "quite artificial". In specialised and politically sensitive fields, where legislation is often amended and judicial decisions carefully scrutinised by those responsible for amendments, in contrast the presumption can have "real force". In such areas, it is "no fiction" to attribute to the designated Minister and Department and, through them, Parliament, knowledge of court decisions dealing with their portfolio. Even outside specialised and politically sensitive fields, the presumption may be applicable because the legislative history shows an awareness by Parliament of a particular judicial interpretation. That awareness may be indicated by a specific legislative response that "followed upon an expert review of the law and presumably the case law" including reports of law reform commissions and subject-specific advisory committees. Temporal proximity between a decision and an enactment may also be relevant. Express reference to a particular judicial decision in the parliamentary debates at the time of enactment may assist, although the presumption can apply despite the absence of explicit parliamentary reference to the decision in question.’⁶⁴ [References omitted]

Question 7 for all parties: *What is the relevance of the re-enactment presumption to the construction of ss.157(2) and (2A)?*

Question 8 for all parties: *As noted in the Pharmacy Decision, while not part of the Commission’s statutory task [now under ss.157(2) and (2A)], it is likely the Commission would usually take into account whether any feature of the nature of work, the level of skill or responsibility involved in performing the work or the conditions under which it is done has previously been taken into account in a proper way.*

It appears to be common ground between the HSU, ANMF and ABI that the minimum rates of pay in the Aged Care Award, the Nurses Award and the SCHADS Award have not previously been properly set.⁶⁵ In these circumstances, do parties agree that the Commission’s statutory task under ss.157(2) and (2A) is to fix the amount that employees should be paid for doing a particular kind of work based on the value of the work as it is currently being done, and that to undertake that task it is not necessary to measure changes in work value from a fixed datum point or to identify any ‘significant net addition’ to work requirements?

Modern awards objective

[78] As mentioned earlier, modern award minimum wages may only be varied ‘outside the system of annual wage reviews’ if the Commission considers that such a determination is ‘necessary to achieve the modern awards objective’ (s.157(2)(b)). The modern awards objective is in s.134 and states:

‘What is the modern awards objective?’

⁶⁴ *Director of Public Prosecutions Reference No 1 of 2019* [2021] HCA 26 [51] (per Gageler, Gordon and Steward JJ).

⁶⁵ Transcript, 26 April 2022, PN377.

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.’

This is the **modern awards objective**.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC’s **modern award powers**, which are:

- (a) the FWC’s functions or powers under this Part; and
- (b) the FWC’s functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).’

[79] The modern awards objective is very broadly expressed.⁶⁶ A ‘fair and relevant minimum safety net of terms and conditions’ is a composite phrase within which ‘fair and relevant’ are adjectives describing the qualities of the minimum safety net to which the Commission’s duty

⁶⁶ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 [35].

relates. This composite phrase requires that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’, taking into account the matters in ss.134(1)(a)–(h) (the s.134 considerations).⁶⁷ As the Full Court observed in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (the *Penalty Rates Review*):

‘Those qualities are broadly conceived and will often involve competing value judgments about broad questions of social and economic policy. As such, the FWC is to perform the required evaluative function taking into account the s 134(1)(a)-(h) matters and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance. It is entitled to conceptualise those criteria by reference to the potential universe of relevant facts, relevance being determined by implication from the subject matter, scope and purpose of the Fair Work Act ... As discussed “fair and relevant”, which are best approached as a composite phrase, are broad concepts to be evaluated by the FWC taking into account the s 134(1)(a)-(h) matters and such other facts, matters and circumstances as are within the subject matter, scope and purpose of the Fair Work Act. Contemporary circumstances are called up for consideration in both respects, but do not exhaust the universe of potentially relevant facts, matters and circumstances.’⁶⁸

[80] The HSU submits that in the context of minimum wages the phrase ‘fair and relevant’:

‘should be interpreted as referring to rates which properly remunerate workers for the value of their work, taking into account all surrounding factors, and are not so low compared to general market standards as to have no relevance to the industry, for example in the context of bargaining.’⁶⁹

Question 9 for all parties: What do you say in response to the HSU submission?

[81] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.⁷⁰ No particular primacy is attached to any of the s.134 considerations⁷¹ and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[82] It is not necessary for the Commission to make a finding that an award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.⁷² Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated — many of them may be characterised as broad social objectives.⁷³ In giving effect to the modern awards objective, the Commission is performing an evaluative function taking into account the s.134 considerations and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

⁶⁷ 4 *Yearly Review of Modern Awards – Penalty Rates* [2017] FWCFCB 1001 [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) FCR 368 [41]–[44].

⁶⁸ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* (2017) FCR 368 [49]; [65].

⁶⁹ HSU submission in reply dated 21 April 2022 [65].

⁷⁰ *Edwards v Giudice* (1999) 94 FCR 561 [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 [81]–[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 [56].

⁷¹ *Penalty Rates Review* (2017) 253 FCR 368 [33].

⁷² *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 [105]–[106].

⁷³ See *Ibid.*

[83] While the considerations in ss.134(a)- (h) inform the evaluation of what might constitute a ‘fair and relevant minimum safety net of terms and conditions’, they do not necessarily exhaust the matters which the Commission might consider to be relevant to the determination of a fair and relevant minimum safety net. The range of relevant matters ‘must be determined by implication from the subject matter, scope and purpose of the’ FW Act.⁷⁴

[84] Fairness in the context of providing a ‘fair and relevant minimum safety net’ is to be assessed from the perspective of the employees and employers covered by the modern award in question. As the Full Court observed in the *Penalty Rates Review*:

‘it cannot be doubted that the perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances within a permissible conception of a “fair and relevant” safety net taking into account the s.134(1)(a)-(h) matters.’⁷⁵

[85] Further, in the *4 Yearly Review of Modern Awards – Penalty Rates*⁷⁶ (the *Penalty Rates Decision*), the Full Bench rejected the proposition that the reference to a ‘minimum safety net’ in s.134(1) means the ‘least ... possible’ to create a ‘minimum floor’:

‘the argument advanced pays scant regard to the fact the modern awards objective is a composite expression which requires that modern awards, together with the NES, provide ‘a fair and relevant minimum safety net of terms and conditions’. The joint employer reply submission gives insufficient weight to the statutory directive that the minimum safety net be ‘fair and relevant’. Further, in giving effect to the modern awards objective the Commission is required to take into account the s.134 considerations, one of which is ‘relative living standards and the needs of the low paid’ (s.134(1)(a)). The matters identified tell against the proposition advanced in the joint employer reply submission.’⁷⁷

[86] Section 138 of the FW Act emphasises the importance of the modern awards objective in considering applications under s.157; it states:

‘A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.’

[87] There is a distinction between what is ‘necessary’ and what is merely ‘desirable’. Necessary means that which ‘must be done’; ‘that which is desirable does not carry the same imperative for action’.⁷⁸

[88] What is ‘necessary’ to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances of the particular modern award, the terms of any proposed variation and the submissions and evidence.⁷⁹ Reasonable minds may

⁷⁴ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39–40. Also see *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 [48].

⁷⁵ (2017) 253 FCR 368 [53].

⁷⁶ [2017] FWCFB 1001.

⁷⁷ *Ibid* [128].

⁷⁸ *Shop, Distributive and Allied Employees Association v National Retail Association (No. 2)* (2012) 205 FCR 227 [46].

⁷⁹ See generally: *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161.

differ as to whether a proposed variation is necessary (within the meaning of s.138), as opposed to merely desirable.⁸⁰

[89] The following observations may be made with respect to the s.134 considerations.

s.134(1)(a): relative living standards and the needs of the low paid

[90] Section 134(1)(a) requires that we take into account ‘relative living standards and the needs of the low paid’. This consideration incorporates 2 related, but different, concepts. As explained in the *2012–13 Annual Wage Review decision*:

‘The former, relative living standards, requires a comparison of the living standards of award-reliant workers with those of other groups that are deemed to be relevant. The latter, the needs of the low paid, requires an examination of the extent to which low-paid workers are able to purchase the essentials for a “decent standard of living” and to engage in community life. The assessment of what constitutes a decent standard of living is in turn influenced by contemporary norms.’⁸¹

[91] In successive annual wage reviews, the Expert Panel has concluded that a threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid’, within the meaning of s.134(1)(a).

[92] The most recent data for the ‘low paid’ threshold is set out below:⁸²

Two-thirds of median full-time earnings	\$/week
Characteristics of Employment survey (Aug 2021)	1,000.00
Employee Earnings and Hours survey (May 2021)	1,062.00

s.134(1)(b) the need to encourage collective bargaining

[93] Section 134(1)(b) requires that the Commission takes into account ‘the need to *encourage* collective bargaining.’ [Emphasis added]

[94] In a number of annual wage reviews, the Expert Panel has pointed to the ‘complexity of factors which may contribute to decision making about whether or not to bargain’ and that complexity has led the Expert Panel to conclude that it is ‘unable to predict the precise impact [of its decisions] on collective bargaining with any confidence.’⁸³ Further, various annual wage review research reports have examined factors that may have influenced changes in the collective agreement coverage of employees.⁸⁴

⁸⁰ 4 Yearly Review of Modern Awards –Penalty Rates [2017] FWCFB 1001, [136], citing *Shop, Distributive and Allied Employees Association v National Retail Association (No. 2)* (2012) 205 FCR 227 [46].

⁸¹ [2013] FWCFB 4000 [361].

⁸² MA000028; Australian Bureau of Statistics, *Characteristics of Employment, Australia, August 2020* (Report, 11 December 2020); Australian Bureau of Statistics, *Employee Earnings and Hours, Australia, May 2018* (Report, 22 January 2019).

⁸³ [2016] FWCFB 3500 [540].

⁸⁴ Peetz D & Yu S (2017), *Explaining recent trends in collective bargaining*, Fair Work Commission, Research Report 4/2017, February; Peetz D & Yu S (2018), *Employee and employer characteristics and collective agreement coverage*, Fair Work Commission, Research Report 1/2018, February.

s.134(1)(c) the need to promote social inclusion through increased workforce participation

[95] In the context of s.134(1)(c), the Full Bench in the *Penalty Rates Decision* noted that obtaining employment is the focus of s.134(1)(c).⁸⁵ The Commission has also observed that ‘social inclusion may also be promoted by assisting employees to *remain in employment*.’⁸⁶ Further, in the *Annual Wage Review 2015–2016 decision* the Expert Panel observed that ‘social inclusion’ requires more than simply having a job. The Expert Panel endorsed the proposition that a job with inadequate pay can create social exclusion if the income level limits the employee’s capacity to engage in social, cultural, economic, and political life.⁸⁷

s.134(1)(d) the need to promote flexible modern work practices and the efficient and productive performance of work

s.134(1)(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

[96] It is convenient to discuss ss.134(1)(d) and (f) together.

[97] Section 134(1)(d) requires the Commission to take into account ‘the need to promote flexible modern work practices and the efficient and productive performance of work’. Section 134(1)(f) is expressed in very broad terms and requires the Commission to take into account the likely impact of any exercise of modern award powers ‘on business, including’ (but not confined to) the specific matters mentioned, that is; ‘productivity, employment costs and the regulatory burden’.

[98] ‘Productivity’ is not defined in the FW Act but given the context in which the word appears it is apparent that it is used to signify an economic concept. The conventional economic meaning of productivity is the number of units of output per unit of input. It is a measure of the volumes or quantities of inputs and outputs, not the cost of purchasing those inputs or the value of the outputs generated. As the Full Bench observed in the *Schweppes Australia Pty Ltd v United Voice – Victoria Branch*:⁸⁸

‘... we find that “productivity” as used in s.275 of the Act, and more generally within the Act, is directed at the conventional economic concept of the quantity of output relative to the quantity of inputs. Considerations of the price of inputs, including the cost of labour, raise separate considerations which relate to business competitiveness and employment costs.

Financial gains achieved by having the same labour input – the number of hours worked – produce the same output at less cost because of a reduced wage per hour is not productivity in this conventional sense.’⁸⁹

⁸⁵ *Penalty Rates Decision* [179].

⁸⁶ *4 yearly review of modern awards: Family and domestic violence leave* [2018] FWCFB 1691 [282].

⁸⁷ *Annual Wage Review 2015–2016* [2016] FWCFB 3500 [467].

⁸⁸ [2012] FWAFB 7858.

⁸⁹ [Ibid [45]–[46].

[99] While the above observation is directed at the use of the word ‘productivity’ in s.275 of the FW Act, it has been held to be apposite to the Commission’s consideration of this issue in the context of s.134(1)(f).⁹⁰

s.134(1)(da) the need to provide additional remuneration for employees [in the specified circumstances]

[100] Section 134(1)(da) requires the Commission to take into account the ‘need to provide additional remuneration’ for: ‘(i) employees working overtime; or (ii) employees working unsocial, irregular or unpredictable hours; or (iii) employees working on weekends or public holidays; or (iv) employees working shifts’.

s.134(1)(e) the principle of equal remuneration for work of equal or comparable value

[101] Section 134(1)(e) requires that the Commission take into account ‘the principle of equal remuneration for work of equal or comparable value’.

[102] The ‘Dictionary’ in s.12 of the FW Act states, relevantly:

‘In this Act: equal remuneration for work of equal or comparable value: see subsection 302(2).’

[103] The expression ‘equal remuneration for work of equal or comparable value’ is defined in s.302(2) to mean ‘equal remuneration for men and women workers for work of equal or comparable value’.

[104] The appropriate approach to the construction of s.134(1)(e) is to read the words of the definition into the substantive provision such that in giving effect to the modern awards objective the Commission must take into account the principle of ‘equal remuneration for men and women workers for work of equal or comparable value’.⁹¹

s.134(1)(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards

[105] Section 134(1)(g) requires the Commission to take into account ‘the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards’.

[106] The Commission has observed that ‘the effectiveness of any safety net is substantially dependent upon those who are covered by it being able to know and understand their rights and obligations.’⁹² A ‘stable’ modern award system implies that the variation of a modern award be supported by a merit argument. The extent of the argument required will depend on the circumstances.⁹³

⁹⁰ *Horticulture Award 2020* [2021] FWCFB 5554 [512].

⁹¹ *Equal Remuneration Decision 2015* [2015] FWCFB 8200 [192].

⁹² See *4 yearly review of modern awards—Annual leave* [2015] FWCFB 3406 [168].

⁹³ *Penalty Rates Decision* [253] and *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 [23].

s.134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy

[107] The requirement to take into account the likely impact of any exercise of modern award powers on ‘the sustainability, performance and competitiveness of the national economy’ (emphasis added) focuses on the aggregate (as opposed to sectorial) impact of an exercise of modern award powers.

Question 10 for all parties: Are any of the observations about the modern awards objective (at [89] to [107] above) contested?

Question 11 for all parties: Is it common ground that the consideration in s.134(1)(da) is not relevant in the context of the Applications?

Minimum wages objective

[108] The minimum wages objective is set out in s.284, as follows:

284 The minimum wages objective

What is the minimum wages objective?

- (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
 - (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
 - (b) promoting social inclusion through increased workforce participation; and
 - (c) relative living standards and the needs of the low paid; and
 - (d) the principle of equal remuneration for work of equal or comparable value; and
 - (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the ***minimum wages objective***.

When does the minimum wages objective apply?

- (2) The minimum wages objective applies to the performance or exercise of:
 - (a) the FWC’s functions or powers under this Part; and
 - (b) the FWC’s functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the modern awards objective also applies (see section 134).

Meaning of ***modern award minimum wages***

- (3) ***Modern award minimum wages*** are the rates of minimum wages in modern awards, including:

- (a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and
- (b) casual loadings; and
- (c) piece rates.

Meaning of setting and varying modern award minimum wages

- (4) **Setting** modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award. **Varying** modern award minimum wages is varying the current rate of one or more modern award minimum wages.’

[109] As noted by the Expert Panel in the *2019-20 Annual Wage Review decision*,⁹⁴ there is a substantial degree of overlap in the considerations relevant to the minimum wages objective and the modern awards objective, although some are not expressed in the same terms. Both the minimum wages objective and the modern awards objective require the Commission to take into account:

- promoting social inclusion through increased workforce participation⁹⁵
- relative living standards and the needs of the low paid⁹⁶
- the principle of equal remuneration for work of equal or comparable value, and⁹⁷
- various economic considerations.⁹⁸

[110] In giving effect to the modern awards objective, the Commission must also take into account ‘the need to encourage collective bargaining’ (s.134(1)(b)). While the minimum wages objective does not refer to the need to encourage collective bargaining, the object of the FW Act in s.3 is to be met through an emphasis on enterprise-level collective bargaining, and it is appropriate to take this into account in considering minimum wage orders.⁹⁹

⁹⁴ [2020] FWCFB 3500 [204].

⁹⁵ FW Act s.284(1)(b) and s.134(1)(c).

⁹⁶ Ibid s.284(1)(c) and s.134(1)(a).

⁹⁷ Ibid s.284(1)(d) and s.134(1)(e).

⁹⁸ Ibid s.284(1)(a) and s.134(1)(d), (f) and (h).

⁹⁹ *Re Annual Wage Review 2019-20* (2020) 297 IR 1 [207]. Section 3 ‘Object of this Act’ provides as follows:

‘The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia’s future economic prosperity and take into account Australia’s international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

[111] As with the modern awards objective, the Commission’s task in s.284 involves an ‘evaluative exercise’ which is informed by the considerations in ss.284(1)(a)–(e).¹⁰⁰

[112] A safety net of ‘fair minimum wages’ includes the perspective of employers and employees, and the Commission is required to take into account all of the relevant statutory considerations,¹⁰¹ but those expressly listed in s.284(1) do not necessarily exhaust the matters which the Commission might properly consider to be relevant.¹⁰²

[113] Finally, we note that no particular primacy attaches to any of the s.284(1) considerations, and a degree of tension exists between some of these considerations.¹⁰³

Question 12 for all parties: Are any of the observations about the minimum wages objective (at [109] to [113]) contested?

Question 13 for all parties: Are any of the considerations in s.284(1) not relevant in the context of the Applications?

-
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
 - (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
 - (g) acknowledging the special circumstances of small and medium-sized businesses.’

¹⁰⁰ *Re Annual Wage Review 2019-20* (2020) 297 IR 1 [208]; *Re IEU* [2021] FWCFB 2051 [221], citing *Re Annual Wage Review 2017-18* (2018) 279 IR 215 [14].

¹⁰¹ *Re Annual Wage Review 2019-20* (2020) 297 IR 1 [208]; *Re IEU* [2021] FWCFB 2051 [221], citing *Re Annual Wage Review 2017-18* (2018) 279 IR 215 [17].

¹⁰² *Re Annual Wage Review 2019-20* (2020) 297 IR 1 [209]; *Re IEU* [2021] FWCFB 2051 [221], citing *Re Annual Wage Review 2017-18* (2018) 279 IR 215 [14].

¹⁰³ *Re Annual Wage Review 2019-20* (2020) 297 IR 1 [210].

3. MAIN CONTENTIONS

[114] The Unions contend that there have been considerable changes in the nature of the work, the level of skill or responsibility involved in the work, and the conditions under which the work is done in both residential and home care aged care.¹⁰⁴

[115] The Joint Employers submit that the work undertaken by Registered Nurses, (Cert III) Care Workers and Head Chefs and Head Cooks has ‘significantly changed over the past two decades.’¹⁰⁵

[116] There seems to be, at least between the Unions and the Joint Employers, some agreement on the changing nature of work in aged care. The following propositions appear to be uncontentious:

1. The workload of nurses and personal care employees in aged care has increased, as has the intensity and complexity of the work.¹⁰⁶
2. The acuity of residents and clients in aged care has increased. People are living longer and entering aged care later as they are choosing to stay at home for longer and receive in-home care. Residents and clients enter aged care with increased frailty, co-morbidities and acute care needs.¹⁰⁷
3. There is an increase in the number and complexity of medications prescribed and administered.¹⁰⁸
4. The proportion of residents and clients in aged care with dementia and dementia-associated conditions has increased.¹⁰⁹
5. Home care is increasing as a proportion of aged care services.¹¹⁰
6. Since 2003, there has been a decrease in the number of Registered Nurses (RN) and Enrolled Nurses (EN) as a proportion of the total aged care workforce.¹¹¹ Conversely,

¹⁰⁴ ANMF submissions dated 29 October 2021 [15]; HSU submissions dated 1 April 2021 [21];

¹⁰⁵ Joint Employers submissions dated 4 March 2022 [3.19].

¹⁰⁶ ANMF submissions dated 29 October 2021 [79]; HSU submissions dated 1 April 2021 [51]; Joint Employers submissions dated 4 March 2022 [19.5](d).

¹⁰⁷ Joint Employers submissions [3.18](d), [19.3](a); ANMF submissions dated 29 October 2021 [79]–[80]; HSU submissions dated 29 October 2021 [13], [31]; UWU submissions dated 29 October 2021 [25](a).

¹⁰⁸ Consensus Statement [8]; ANMF submissions dated 29 October 2021 [99]; UWU submissions dated 29 October 2021 [24](a)(iv).

¹⁰⁹ Consensus Statement [2]; Joint Employers submissions dated 4 March 2022 [11.5]–[11.7]; ANMF submissions dated 29 October 2021 [141]; HSU submissions dated 1 April 2022 [23]; HSU submissions dated 29 October 2021 [34]; UWU submissions dated 29 October 2021 [24](a)(v).

¹¹⁰ ANMF submissions dated 29 October 2021 [81]; HSU submissions dated 29 October 2021 [11]; Consensus Statement [4]; Joint Employers submissions dated 4 March 2022 [21.5](a).

¹¹¹ Joint Employers submissions [3.18](c); Consensus Statement [14]; ANMF submissions dated 29 October 2021 [83]; HSU submissions dated 1 April 2021 [26]; UWU submissions dated 29 October 2021 [24](d).

there has been an increase in the proportion of Personal Care Workers (PCW) and Assistants in Nursing (AIN).¹¹²

7. Registered Nurses have increased duties and expectations, including more administrative responsibility and managerial duties.¹¹³
8. PCWs and AINs operate with less direct supervision.¹¹⁴ PCWs and AINs perform increasingly complex work with greater expectations.¹¹⁵
9. There has been an increase in regulatory and administrative oversight of the Aged Care Industry.¹¹⁶
10. More residents and clients in aged care require palliative care.¹¹⁷
11. Employers in the aged care industry increasingly require that PCWs and AINs hold Certificate III or IV qualifications.¹¹⁸
12. The philosophy or model of aged care has shifted to one that is person-centred and based on choice and control, requiring a focus on the individual needs and preferences of each resident or client.¹¹⁹ This shift has generated a need for additional resources and greater flexibility in staff rostering and requires employees to be responsive and adaptive.¹²⁰
13. Aged care employees have greater engagement with family and next of kin of clients and residents.¹²¹
14. There is an increased emphasis on diet and nutrition for aged care residents.¹²²
15. There is expanded use and implementation of technology in the delivery and administration of care.¹²³

¹¹² Joint Employers submissions [3.18](c); Consensus Statement [16]; ANMF submissions dated 29 October 2021 [83]; HSU submissions dated 1 April 2021 [26]; UWU submissions dated 29 October 2021 [24](d).

¹¹³ Joint Employers submissions [3.18](b); Consensus Statement [14]; ANMF submissions dated 29 October 2021 [66].

¹¹⁴ Joint Employers submissions [3.18](c); Consensus Statement [16].

¹¹⁵ Consensus Statement [16]; ANMF submissions dated 29 October 2021 [95]; HSU submissions dated 1 April 2021 [27].

¹¹⁶ Joint Employers submissions [3.18](a); HSU submissions dated 1 April 2021 [14]–[19]; HSU submissions dated 29 October 2021 [23]–[28]; Consensus Statement [23]; ANMF submissions dated 29 October 2021 [15], [197].

¹¹⁷ Joint Employers submissions [3.18](d); ANMF submissions dated 29 October 2021 [100]; Consensus Statement [3].

¹¹⁸ Joint Employers submissions [3.18](f); ANMF submissions dated 29 October 2021 [94].; HSU submissions dated 1 April 2021 [25]; HSU submissions dated 29 October 2021 [41]–[42].

¹¹⁹ Consensus Statement [9]; Joint Employers submissions [3.18](h); HSU submissions dated 1 April 2021 [54]; UWU submissions dated 29 October 2021 [24](b), ANMF submissions dated 29 October 2021 [85].

¹²⁰ Joint Employers submissions [3.18](h); ANMF submissions dated 29 October 2021 [85]; HSU application [13](e).

¹²¹ Joint Employers submissions [3.18](i); ANMF submissions dated 29 October 2021 [106]; UWU submissions dated 29 October 2021 [24](b), HSU submissions dated 1 April 2021 [52]

¹²² Joint Employers submissions [3.18](j); HSU application [21], [24].

¹²³ ANMF submissions dated 29 October 2021 [98]; HSU application [13](l); HSU submissions dated 29 October 2021 [19](f); UWU submissions dated 29 October 2021 [24](e); Joint Employers submissions dated 4 March 2022 [12.15].

16. Aged care employees are required to meet the cultural, social and linguistic needs of diverse communities including Aboriginal and Torres Strait Islander people, culturally and linguistically diverse people and members of the LGBTQIA+ community.¹²⁴

Question 14 for all parties: do the parties agree that the propositions above are uncontentious?

[117] The Joint Employers and the Unions disagree on the extent of changes to work in the aged care sector, in particular the classes of workers affected by those changes.

[118] The HSU application argues for a 25 per cent wage increase for *all* workers covered by the Aged Care Award, including general, administrative, maintenance and food services workers. The HSU submits that the ‘provision of care is the central role and purpose of *all* workers covered by the Award, regardless of stream’¹²⁵ [emphasis added].

General, administrative and maintenance workers

[119] The HSU submits that there have been ‘significant changes’ in the nature of the work performed by employees in the general and administrative services stream in the Aged Care Award arising due to:

- a. ‘Changes in the acuity levels of aged care residents (with an increase in those with higher needs requiring a higher and more diverse range of paperwork and assessments to be performed prior to joining a facility, whilst in care or while maintenance, driving and other functions are being performed);
- b. Increased skills required in the administering of resident choice-centred care and assessing, planning and implementing same;
- c. Introduction of additional duties not previously performed including (without limitation – financial management, oversight of outsourced providers, dealing with external auditors and compliance officers, human resource functions, managing accreditations and ensuring compliance, visitor, regulator and staff liaison);
- d. Changes to infection control procedures;
- e. Increased use and implementation of technology in aged care facilities (including Customer Relationship Management systems, Human Resources and payroll systems, file management systems, financial and billing software and systems, Health record management systems) and ensuring that policies and protocols regarding same are complied with such as data security and confidentiality requirements;
- f. Increased delegation of more sophisticated work, once associated with specialist management roles, such as procurement, human resources/employee relations, finance, governance, regulatory and compliance and facilities management;

¹²⁴ HSU submissions dated 29 October 2021 [19](c) and [19](d); Consensus Statement [10]-[11];

¹²⁵ HSU submissions dated 1 April 2021 [49].

g. Increased mentoring, supervisory and performance management responsibilities at a senior level, and/or

h. Other related productivity measures.¹²⁶

[120] The Joint Employers submit that when considering change to work performed by aged care employees, a distinction should be drawn between PCWs and RNs and work performed by general and administrative employees.¹²⁷

[121] The Joint Employers submit that the work of administration, maintenance, gardening, laundry and cleaning employees in aged care has not changed significantly in the previous 2 decades. The Joint Employers argue that while there has been a shift for *all* aged care employees, including administrative workers, to integrate consumer focused thinking into their work,¹²⁸ this has not resulted in a change to the work performed.¹²⁹

Food services workers

[122] The HSU submits that there have been significant changes in the work performed by all food services employees in aged care and submits that food services roles have become increasingly complex and require greater skills due to increased regulation, greater responsibility for nutritional and dietary needs, greater prevalence of high acuity residents and high expectations.¹³⁰

[123] The Joint Employers acknowledge that regulatory change, the increasing number of high care residents and improved regulation of food safety has impacted the level of responsibility for chefs in aged care¹³¹ and agrees that the role of Head Chefs and Head Cooks has significantly changed over the past 2 decades.¹³² However, the Joint Employers submit that the role of other food services employees has merely ‘evolved over time’ with these workers ‘still performing the same roles which have existed for the past two decades.’¹³³

Question 15 for the Joint Employers: There does not appear to be a classification called ‘Head Chef’ or ‘Head Cook’ in the Aged Care Award. The Joint Employers are asked to clarify which of the classifications in the award they are referring to?

Enrolled Nurses

[124] The Joint Employers submit that while the work of ENs has been impacted by aged care residents and clients having high care and/or complex needs and increased regulation of the

¹²⁶ HSU application AM2020/99 [31].

¹²⁷ Joint Employers submissions dated 4 March 2022 [19.35].

¹²⁸ Joint Employers submissions dated 4 March 2022 [19.18].

¹²⁹ Joint Employers submissions dated 4 March 2022 [19.19].

¹³⁰ HSU application [21]–[26].

¹³¹ Joint Employers submissions dated 4 March 2022 [19.30](a).

¹³² Joint Employers submissions dated 4 March 2022 [3.19].

¹³³ Joint Employers submissions dated 4 March 2022 [19.34].

sector, this has not amounted to a ‘significant net addition to work requirements.’¹³⁴ They maintain that ENs are ‘still performing the same role which has existed for the past 2 decades, providing nursing care under the supervision of a RN’¹³⁵ and argue:

‘If a residential aged care facility is being headed by an EN absent any form of supervision that presents a serious issue with respect to staffing levels. An EN is not qualified as a RN and does not have the same level of clinical care expertise. It is not a work value issue, but rather a concerning issue related to staff shortages and the adequacy as to the provision of care.’¹³⁶

[125] The ANMF submits that ENs perform increasingly complex duties and have more responsibility, including the administration of medications, complex wound care, and team leadership.¹³⁷ The ANMF maintains the ENs are increasingly rostered to work without the support of a RN.¹³⁸

Nurse practitioner

[126] The Joint Employers further submit that there is insufficient evidence about the number of Nurse Practitioners (NP) who work exclusively in aged care and as a result, the Commission cannot be satisfied ‘as to the existence of any significant net addition requirements’ to the work of NPs working in aged care.¹³⁹

Home Care Workers

[127] The HSU submits that the work of aged care home care workers has ‘become more demanding in recent years’¹⁴⁰ including changes in the ‘nature of the skills required’ due to ‘funding and shifts in community expectations about the type and quality of care available.’¹⁴¹ It submits the skill and responsibility required has increased due to:

- a. ‘The diminution in nursing staff, requiring care workers to work at a higher level of skill and responsibility than before;
- b. Increasingly vulnerable clients – in particular with higher and more complex physical, clinical and psychosocial needs; and
- c. Changes in regulatory regimes, with steadily increasing compliance and reporting requirements, increasing expectations about the level and quality of services.’¹⁴²

[128] The Joint Employers submit there has been ‘no significant net increase to the level of responsibility of home care workers’ rather the major change is that staffing levels have not

¹³⁴ Joint Employers submissions dated 4 March 2022 [20.8].

¹³⁵ Joint Employers submissions dated 4 March 2022 [20.13].

¹³⁶ Joint Employers submissions dated 4 March 2022 [20.12].

¹³⁷ ANMF submissions dated 29 October 2021 [91], [198](1).

¹³⁸ ANMF submissions dated 29 October 2021 [91].

¹³⁹ Joint Employers submissions dated 4 March 2022 [20.26].

¹⁴⁰ HSU submissions dated 29 October 2021 [78].

¹⁴¹ HSU submissions dated 29 October 2021 [82].

¹⁴² HSU submissions dated 29 October 2021 [84].

kept up with the increasing demand for home care workers.¹⁴³ They maintain that while there are some similarities between home care workers and PCWs, there are important distinctions between the 2 roles including:

- Working alone rather than as part of a team¹⁴⁴
- The nature of supervision¹⁴⁵
- Home care work is more aligned to domestic residential duties, as opposed to care¹⁴⁶
- Some clients in home care are older than would have historically been the case however, there is a distinction between the ‘concentrated nature’ of clients increasingly found in residential aged care, which has an older age profile and higher propensity to comorbidity and dementia.¹⁴⁷

Question 16 for the Unions and Joint Employers: Do the matters set out at [117] – [128] encapsulate the issues in contention, insofar as the work value claim is concerned?

[129] The CCIWA submits that the Unions have been unable to identify the extent to which the nature, conditions, skills and responsibilities of work across all classifications in the aged care sector have changed.¹⁴⁸

Question 17 for the CCIWA: Noting that the CCIWA did not participate in the evidentiary phase of the hearings who do the CCIWA represent in the proceedings?

—END—

¹⁴³ Joint Employers submissions dated 4 March 2022 [21.9].

¹⁴⁴ Joint Employers submissions dated 4 March 2022 [21.10](a).

¹⁴⁵ Joint Employers submissions dated 4 March 2022 [21.10](b).

¹⁴⁶ Joint Employers submissions dated 4 March 2022 [21.10](c).

¹⁴⁷ Joint Employers submissions dated 4 March 2022 [21.10](d).

¹⁴⁸ WACCI submissions dated 4 March 2022 [31.3].

ATTACHMENT A—HSU application

Schedule B—Classification Definitions

B.1 Aged care employee—level 1

Entry level:

An employee who has less than three months' work experience in the industry and performs basic duties.

An employee at this level:

- works within established routines, methods and procedures;
- has minimal responsibility, accountability or discretion;
- works under direct or routine supervision, either individually or in a team; and
- requires no previous experience or training.

Indicative ~~roles~~ tasks performed at this level are:

General and administrative services

General clerk
Laundry hand
Cleaner
Assistant gardener

Food services

Food services assistant

B.2 Aged care employee—level 2

An employee who has more than three months' work experience in the industry or is an entry level employee (up to 6 months) in the case of a Personal Care Worker.

An employee at this level:

- is capable of prioritising work within established routines, methods and procedures;
- is responsible for work performed with a limited level of accountability or discretion;
- works under limited supervision, either individually or in a team;
- possesses sound communication skills; and
- requires specific on-the-job training and/or relevant skills training or experience.

Indicative ~~roles~~ tasks performed at this level are:

General and administrative services

General clerk/Typist (between 3 months' and less than 1 year's service)

Food services

Food services assistant

Personal care

Personal care worker
~~grade 1~~

General and administrative services

Laundry hand
 Cleaner
 Gardener (non-trade)
 Maintenance/Handyperson (unqualified)
 Driver (less than 3 ton)

Food services**Personal care**

(entry- up to 6 months)

B.3 Aged care employee—level 3

An employee at this level:

- is capable of prioritising work within established routines, methods and procedures (non admin/clerical);
- is responsible for work performed with a medium level of accountability or discretion (non admin/clerical);
- works under limited supervision, either individually or in a team (non admin/clerical);
- possesses sound communication and/or arithmetic skills (non admin/clerical);
- requires specific on-the-job training and/or relevant skills training or experience (non admin/clerical); and
- In the case of an admin/clerical employee, undertakes a range of basic clerical functions within established routines, methods and procedures.

Indicative ~~roles~~ tasks performed at this level are:

General and administrative services

General clerk/Typist (second and subsequent years of service)
 Receptionist
 Pay clerk
 Driver (less than 3 ton) who is required to hold a St John Ambulance first aid certificate

Food services

Cook

Personal care

Personal care worker
~~grade 2~~ (from 6 months)
 Recreational/Lifestyle activities officer (unqualified) (entry- up to 6 months)

B.4 Aged care employee—level 4

An employee at this level:

- is capable of prioritising work within established policies, guidelines and procedures;
- is responsible for work performed with a medium level of accountability or discretion;
- works under limited supervision, either individually or in a team;
- possesses good communication, interpersonal and/or arithmetic skills; and

- requires specific on-the-job training, may require formal qualifications and/or relevant skills training or experience.
- in the case of a personal care worker, holds a relevant Certificate 3 **III** qualification (or possesses equivalent knowledge and skills) and uses the skills and knowledge gained from that qualification in the performance of their work.

Indicative **roles** ~~tasks performed~~ at this level are:

General and administrative services

Senior clerk
 Senior receptionist
 Maintenance/Handyperson (qualified)
 Driver (3 ton and over)
 Gardener (trade or TAFE Certificate III or above)

Food services

Senior cook (trade)

Personal care

Personal care worker
~~grade 3~~ **(qualified)**
Recreational/Lifestyle activities officer (from 6 months)

B.5 Aged care employee—level 5

An employee at this level:

- is capable of functioning semi-autonomously, and prioritising their own work within established policies, guidelines and procedures;
- is responsible for work performed with a substantial level of accountability;
- works either individually or in a team;
- may assist with supervision of others;
- requires a comprehensive knowledge of medical terminology and/or a working knowledge of health insurance schemes (admin/clerical);
- may require basic computer knowledge or be required to use a computer on a regular basis;
- possesses administrative skills and problem solving abilities;
- possesses well developed communication, interpersonal and/or arithmetic skills; and
- requires substantial on-the-job training, may require formal qualifications at trade or certificate level and/or relevant skills training or experience.
- **in the case of a Senior Personal Care Worker, may be required to assist residents with medication and hold the relevant unit of competency (HLTHPS006), as varied from time to time.**

Indicative **roles** ~~tasks performed~~ at this level are:

General and administrative services

Secretary interpreter (unqualified)

Food services

Chef

Personal care

Senior personal care worker ~~grade 4~~

B.6 Aged care employee—level 6

An employee at this level:

- is capable of functioning with a high level of autonomy, and prioritising their work within established policies, guidelines and procedures;
- is responsible for work performed with a substantial level of accountability and responsibility;
- works either individually or in a team;
- may have the responsibility for leading and/or supervising the work of others;
- may require comprehensive computer knowledge or be required to use a computer on a regular basis;
- possesses administrative skills and problem solving abilities;
- possesses well developed communication, interpersonal and/or arithmetic skills; and
- may require formal qualifications at post-trade or ~~Advanced~~ Certificate **IV** or ~~Associate~~ Diploma level and/or relevant skills training or experience.
- in the case of a Specialist Personal Care Worker, provides specialised care and may have undertaken training in specific areas of care (e.g. Dementia Care, Palliative Care, Household Model of Care).

Indicative ~~roles~~ tasks performed at this level are:

General and administrative services

Maintenance tradesperson (advanced)

Gardener (advanced)

Food services

Senior chef

Personal care

Specialist Personal Care
Worker

Senior

Recreational/Lifestyle
activities officer

B.7 Aged care employee—level 7

An employee at this level:

- is capable of functioning autonomously, and prioritising their work and the work of others within established policies, guidelines and procedures;
- is responsible for work performed with a substantial level of accountability and responsibility;
- may supervise the work of others, including work allocation, rostering and guidance;
- works either individually or in a team;
- may require comprehensive computer knowledge or be required to use a computer on a regular basis;
- possesses developed administrative skills and problem solving abilities;
- possesses well developed communication, interpersonal and/or arithmetic skills; and
- may require formal qualifications at trade or Advanced Certificate or Associate Diploma level and/or relevant skills training or experience.

Indicative ~~roles~~ tasks performed at this level are:

General and administrative services

Clerical supervisor
Interpreter (qualified)
Gardener superintendent
General services supervisor

Food services

Chef /Food services
supervisor

Personal care

~~Personal Care
Supervisor
Personal care worker
grade 5~~