

FAIR WORK COMMISSION

AM2021/63

THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO
AMEND THE *AGED CARE AWARD 2010* AND *NURSES AWARD 2020***

First Matter

AM2020/99

HEALTH SERVICES UNION

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO
AMEND THE *AGED CARE AWARD 2010***

Second Matter

AM2021/65

HEALTH SERVICES UNION

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO
AMEND THE *SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES
INDUSTRY AWARD 2010***

Third Matter

**AUSTRALIAN NURSING AND MIDWIFERY FEDERATION
REPLY SUBMISSIONS ON “*WAGE ADJUSTMENTS ISSUES*”**

1. These are the ANMF’s submissions filed pursuant to Order 5 made by Hatcher J on 27 October 2023, in reply to material filed by other parties in relation to “*wage adjustment issues*” (*i.e.*, issues 17 and 18 of the revised Stage 3 Issues summary published on 02 August 2023) (“**Issues Document**”).
2. Accordingly, these submissions are further to the ANMF’s primary submissions concerning wage adjustment issues dated 15 September 2023 (“**ANMF Wages [X]**”), and responsive to the submission on wage adjustment issues of:
 - (1) the UWU dated 15 September 2023 (“**UWU Wages [X]**”);
 - (2) the HSU dated 22 September 2023 (“**HSU Wages [X]**”);
 - (3) the Joint Employers dated 01 November 2023 (“**JE Wages [X]**”);
 - (4) the Commonwealth dated 31 October 2023 (“**Cth Wages [X]**”);
 - (5) various submissions by employers, being those of Uniting NSW/ACT dated 31 October 2023 (“**Uniting Wages [X]**”), Anglicare dated 01 November 2023 (“**Anglicare Wages page X**”), UnitingCare dated 01 November 2023 (“**UnitingCare Wages page X**”), and BaptistCare dated 01 November 2023 (“**BaptistCare Wages [X]**”).
3. As with the ANMF Wages submissions, these submissions will be divided into:
 - (1) Part A ([5] to [25]), dealing with COVID and infection prevention and control (“**IPC**”);
 - (2) Part B, ([26] to [39]), dealing with understaffing;
 - (3) Part C, ([40] to [83]), dealing with the level of further increase justified by work value reasons.
4. There is a one-paragraph Part D ([84]), which does no more than identify a feature of submissions made in relation to indirect care workers to which the ANMF will respond in dealing with classification and allowance issues.

A. The impact of the COVID-19 pandemic on infection prevention and control

5. The ANMF adheres to its submissions on this topic. It also agrees with the HSU's submissions (HSU Wages [62]–[72]), and the UWU's submissions (UWU Wages [31]).
6. It is noteworthy that certain employers agree with the basic tenor of the ANMF's submission. For example, Anglicare submits as follows (page 5, emphasis added):

“COVID-19 has brought its own challenges where all staff now need to have a good understanding of the use and disposal of PPE, change communication methods and infection control protocols. This should not be considered a temporary issue as our aged care homes continue to experience COVID outbreaks on a regular basis.”

7. BaptistCare's submission is similar (BaptistCare Wages [22], emphasis added):

“COVID-19 has shone a spotlight on the complexities of caring for vulnerable, elderly Australians in a highly infectious environment. While community restrictions have eased, both direct and non-direct care staff have had to deal with outbreaks of COVID-19, rhinovirus, gastroenteritis and other infectious diseases, all while providing specialised, person-centred care. These outbreaks, including COVID-19, and the associated costs incurred with outbreaks will remain part of aged care and highlights the important role that employees have in maintaining stringent infection controls.”

8. UnitingCare agrees that COVID-19 continues to impact direct carers (page 3).
9. Really, only the Joint Employers take (somewhat of) a different approach in relation to COVID-19.

A.1 Reply to JE Wages [83]–[139]

10. As the ANMF reads their submissions, the Joint Employers make three points.
11. *First*, there were, pre-COVID-19, IPC practices and protocols and dedicated employees with IPC responsibilities (JE Wages [86]–[92] in particular).
12. *Second*, COVID-19 training and guidance is now “*streamlined*”—or combined—with other IPC training and guidance, in particular in relation to influenza. The Joint Employers undertake a lengthy demonstration that IPC guidance now commonly combines COVID-19 and influenza guidance (JE Wages [93]–[109] in particular).
13. *Third*, accordingly, although COVID-19 remains a “*permanent risk*” (JE Wages [110]), the practices that obtained during the “*peak of the pandemic*” (JE Wages [119]) now, at least in many cases, no longer obtain (JE Wages [128])—except, perhaps that the

IPC Lead’s role remains larger (JE Wages [120]–[126]). Accordingly, “*the conditions under which work is done have reverted back to ‘pre-pandemic’ times,*” in the sense set out in JE Wages [132]. That is, “*we are no longer in a pandemic*” (JE Wages [134]).

14. The short answer to the submission that we are no longer in a pandemic is that yes, in fact—at least according to the World Health Organisation—we are still in a pandemic. Its declaration of COVID-19 as a worldwide pandemic is still active.¹
15. The latest data available (for 2022, published 27 September 2023) showed that COVID-19 was the third-leading cause of death in Australia. That is the first time that an infectious disease has been in the top-5 leading causes of death since 1970.² The table in the ABS’s publication entitled, “*COVID-19 mortality by age and sex, 2022,*” shows that the vast majority of deaths—8,749 out of 9,859, or 89 per cent—were amongst people aged 70 and up. 6,863 out of 9,859, or 70 per cent, were amongst people aged 80 and up.³
16. As these submissions are written, mainstream news coverage of an “*eighth wave*” is widespread and a matter about which the Commission could take judicial notice. The occurrence of this “*eighth wave*” is reflected in the Department of Health and Aged Care report from 10 November 2023, “*COVID-19 outbreaks in Australian residential aged care facilities,*” which identifies 129 new outbreaks, 18 new resident deaths and 2,002 combined new resident and staff cases of COVID-19 between 2 and 9 November 2023.⁴
17. Obviously things are not, presently, like earlier waves of COVID-19 (in particular those before widespread vaccination). Nevertheless, it would be a mistake to assume from the comparative normality of current settings in comparison with (say) 2021 that the only continuing effects of COVID-19 are unpleasant memories.
18. Accordingly—and this is the answer to the *first* and *second* points—if the Joint Employers’ submission is that IPC practices and training have entirely reverted to pre-

¹ <https://www.health.gov.au/topics/covid-19/about>, accessed 14 November 2023, last updated 20 October 2023.

² <https://www.abs.gov.au/statistics/health/causes-death/causes-death-australia/latest-release>, accessed 14 November 2023.

³ <https://www.abs.gov.au/statistics/health/causes-death/causes-death-australia/latest-release>, accessed 14 November 2023.

⁴ https://www.health.gov.au/sites/default/files/2023-11/covid-19-outbreaks-in-australian-residential-aged-care-facilities-10-november-2023_0.pdf, page 1.

pandemic levels, or have been wholly subsumed within (rather than adding to) existing IPC guidance concerning other respiratory diseases, that would not be accepted.

19. But, to be fair, the ANMF does not read the Joint Employers as going that far. Rather, the submission they seem to be making—and there is nothing in their witnesses’ evidence that is inconsistent with this submission—is that, while IPC practice is not at the level that it was during what might be called the peak of the pandemic, nor has it returned entirely to pre-pandemic levels. Rather, it has settled at a level that is higher than it was pre-pandemic, even though it is lower than it was at peak pandemic.
20. That is consistent with the ANMF’s evidence and may be accepted. It remains, however, that that increase in IPC training and skill is valuable and should be compensated. Fluctuations in the incidence of outbreaks and mortality attributed to COVID-19 in residential or home care do not equate to fluctuations in the level of skill and expertise required to be maintained in order to meet the demands of those outbreaks. Nothing in the Joint Employers’ submissions nor evidence denies this proposition. It is, accordingly, a matter for the Commission to take into account in fixing minimum award wages based on work value.
21. Finally, the ANMF wishes to say something about the two scholarly articles upon which the Joint Employers rely for their submission that the “*overwhelming majority*” of respondents to surveys reported having a documented IPC program and a dedicated employee with IPC responsibilities. These are
 - (1) Brett G **Mitchell** et al, “Organisation and governance of infection prevention and control in Australian residential aged care facilities: A national survey” (2019) 24(4) *Infection, Disease & Health* 187, and
 - (2) Ramon Z **Shaban** et al, “Scope of practice and educational needs of infection prevention and control professionals in Australian residential aged care facilities” (November 2020) 25(4) *Infection, Disease & Health* 286, 286-293.
22. Mitchell (at 189) records that of 118 staff members identified with IPC responsibilities, a minority (42.5 per cent) had a qualification in IPC. Conversely now, as the Joint Employers note, IPC Leads are required to have completed specialist IPC training (JE Wages [124]–[126]).

23. It is also noteworthy that Mitchell records (at 190) that the second-biggest challenge identified by survey respondents to effective IPC was “*a lack of interest in IPC within the facility,*” and that when asked to choose one additional resource they wanted the largest number of respondents (40 per cent) indicated “*increased access to an IPC professional.*” At 191, Mitchell records that more than three-fourths of respondents agreed that increased IPC support for their designated IPC person was a high or moderate priority.
24. Shaban’s results were similar. At 288, he notes that less than half of respondents indicated that the designated IPC professional had completed specific courses or held IPC qualifications. At 290, he reported, in regard to “*barriers to effectively meet[ing] the educational needs of [the] facility workforce*”:
- (1) a third of respondents indicated a general lack of interest in IPC in the facility (32.1 per cent);
 - (2) two-thirds of respondents reported a lack of access to IPC education (67.9 per cent);
 - (3) two-thirds of respondents reported a lack of access to IPC expert advice (67.2 per cent).
25. It would be wrong, in this light, to proceed on the basis that, because pre-COVID-19 there were IPC plans (of some description), and designated IPC staff in facilities, the level of IPC skill and training post-COVID-19 is equivalent to the level pre-COVID-19. On the contrary, what the Mitchell and Shaban articles show is that there was considerable room for improvement. COVID-19 forced that improvement. That continues to have an effect on the training of, and the skill brought to bear by, direct care employees in residential aged care facilities.

B. Understaffing

26. The ANMF adheres to its submissions on this topic. It also agrees with the HSU’s submissions (HSU Wages [73]–[80]). Once again, independent employers’ submissions, so far as they address the topic, support the ANMF’s position. UnitingCare submits, at page 3, as follows:

“While aged care providers have seen some positive impacts of the interim increase on recruitment and retention, it remains the case that providers

continue to struggle to recruit enough direct care staff to meet operational needs and new regulatory requirements, particularly the care minutes requirements. It is our view that workforce shortages are likely to remain a persistent challenge for this sector, particularly as a result of the ageing population and subsequent significant increased demand and reducing workforce supply.”

27. It remains, then, to respond to the Joint Employers and the Commonwealth.

B.1 Reply to Cth Wages [7]–[9]

28. The Commonwealth identify initiatives to increase staffing and skills in aged care (Cth Wages [7] and [8]). Those measures are welcome but must be understood in the context of the breadth and depth of the existing staffing shortage (see ANMF Wages [50] to [57]) and the huge staffing increases required to meet demand, just to maintain the *status quo* of chronic understaffing (see ANMF Wages [58]).

29. Additional Commonwealth publications, produced since ANMF Wages was filed, also inform the scope of the current and future understaffing issue, and provide context to the Cth Wages submission.

30. On 25 September 2023 the Commonwealth Treasury published the Employment White Paper, “*Working Future: The Australian Government’s White Paper on Jobs and Opportunities*”⁵ (“**White Paper, X**”). That paper identified themes relevant to the issue of workforce demand and supply in aged care, including that:

- (1) the care and support economy (across six industries, spanning early childhood education and care, residential aged care and disability and other care) is expected to grow by 22 per cent by 2033 (White Paper, 98);
- (2) employment growth in the period November 2021 to November 2026 in the health care and social assistance industry is projected to grow by 15.8 per cent (White Paper, 100);
- (3) the health care and social assistance industry is the fastest growing part of the labour market (White Paper, 106).

31. At White Paper, 107, it is observed that:

“The size of the growth of the care workforce over the coming years is therefore likely to be a significant challenge. Over the last five years, growth

⁵ <https://treasury.gov.au/sites/default/files/2023-10/p2023-447996-working-future.pdf>

in the paid care and support workforce has been three times faster than total employment across the economy. Australia’s ageing population and increased uptake of formal care services are contributing to increased demand. Analysis based on Victoria University projections indicates that the care and support workforce will grow from around 657,200 workers today to 801,700 workers by 2033. The demand for workers is likely to be higher than this. In particular, strong demand is likely for workers with Skill Level 4 qualifications, commensurate with a Certificate II or III, who already make up half the workforce ...”

32. On 4 October 2023, Jobs and Skills Australia published the Annual “*Jobs and Skills Report 2023*” providing an initial assessment of the national skills system and Australia’s current, emerging, and future skills needs (“**JS Report, X**”).⁶
33. JS Report, 48, recognised Aged and Disabled Carer to be the largest employing occupation to have a skills shortage. Further, despite initiatives to increase staffing and skills in aged care, the shortage of Community and Personal Services Worker occupations rose to 24 per cent in 2023, from the 20 per cent observed in 2022. Within this group, the occupations of Aged and Disabled Carer, Personal Care Assistant and Child Care Worker were recognised as in persistent shortage (JS Report, 53). These figures, attributed to the *Jobs and Skills Australia, Survey of Employers who Recently Advertised 2020–2023*, provide contrast to the submission at Cth Wages [9.1] regarding a closing of the workforce gap for aged care workers in residential aged care from 2022 to 2023.
34. The JS Report also recognised registered nurses and aged and disabled carers as amongst the top twenty occupations in demand. Registered nurses are there identified within a skills shortage category involving a “*longer training gap*” and aged care and disability care workers as within a skills shortage involving a “*retention gap*” (JS Report, 61). Regarding this “*retention gap*” the JS Report, 61, found:

“For shortages where there is a retention gap there is limited value in lifting supply and throughput in the VET and higher education systems because of the low probability of retaining workers in the occupation. Rather, employers should consider improving the attractiveness of their job offer, for example, by changing remuneration and other workplace conditions to attract applicants, for it is likely that applicants are working in other occupations which can offer more amenable arrangements.”

⁶ <https://www.jobsandskills.gov.au/publications/towards-national-jobs-and-skills-roadmap>

35. Applying this finding, the reported enrolments in fee-free TAFE, including for courses specifically in the aged care sector, identified at Cth Wages [9.2], may be of limited value.
36. At Appendix D, the JS Report provides occupational profiles by shortage type. Addressing “*Aged and Disabled Carers: Retention gap*”, research is cited identifying a projected growth of worker number of 29.1 per cent over the 10 years to 2033. This research also recognises that this workforce shortage could impact the provision of services to the Australian community if not addressed (JS Report, 148).
37. The JS Report at appendix D identifies various measures being taken to address the shortage of aged care and disability carers. The identified measures include the Commonwealth investing to fund the 15 per cent pay increase for aged care workers within the scope of the Commission’s decisions in this proceeding to date, and other measures as are identified at Cth Wages [7]. The JS Report concludes the occupational profile for “*Aged and Disability Carers: Retention Gap*” by observing that:

“Further action by employers to address working conditions and workplace culture, workforce development and career pathways will also be necessary to improve retention rates. More action may be needed to encourage workforce supply in thin markets, such as providing better training pathways for people in regional areas” [citation omitted]

B.1.1 Reply to JE Wages [140]–[147]

38. As to the submissions of the Joint Employers, the work of direct aged care employees has intensified for a number of reasons and in a number of ways. Contrary to JE Wages [147], work intensification related to understaffing are not being conflated with the increased work demands identified at JS Wages [145(a)]–[145(e)]. As is expressly identified at ANMF Wages, [41], the task now is for the Commission to:
 - (1) identify evidence regarding understaffing which has not been taken into account; and
 - (2) determine whether evidence regarding understaffing discloses a permanent work intensification or a transitory phenomenon which will abate when staffing levels increase.
39. As identified in ANMF Wages and for the reasons set out above, the Commission would find the chronic understaffing across the aged care sector which has contributed to

increasing workloads and work intensity is a permanent feature of the work in question, constituting work value reasons justifying an increase to award wages. For the reasons identified in ANMF Wages, additional staffing and care time that is achieved in the sector would be absorbed by the provision of care that was previously missed.

C. The level of further increase that is justified by work value reasons

40. The ANMF adheres to the position articulated at ANMF Wages [67], as follows:

“For the reasons identified in the ANMF Closing and the ANMF Reply, the interim increase does sit comfortably below the level of the increase that would be determined on a final basis. The work value reasons arising from the material that was taken into account by the Commission in Stage 1 justify:

- (1) a further increase of 10 per cent to the award rates for AINs under the Nurses Award and PCWs under the Aged Care Award; and
- (2) a further increase for EN, RN and NP classifications under the Nurses Award, to the point where RNs level 1, pay point 1 are aligned with level C1(a) of the Metals Framework, with existing relativities as between these classifications then maintained.”

41. As may be seen, the ANMF’s position relies on both the evidence and submission already made in relation to changes of the work value of Nurses and AINs / PCWs, as well as upon its submissions in relation to the proper fixation of wages by reference to the Metals Framework. Obviously, these two things are not entirely unrelated.

42. The latter of these two issues (proper fixation) will be addressed in the ANMF’s reply in relation to classification and allowance issues, to be filed on 23 November 2023. In relation to the former, there is little more to say in reply. All parties seem largely to have (COVID-19 and understaffing apart) rested on the submissions they made in advance of the decision in *Aged Care Award 2010* (2022) 319 IR 127; [2022] FWCFB 200 (“**Stage 1 Decision**”).

43. There are, however, a few things to say in reply to the Joint Employers. There are some miscellaneous observations to be made immediately below, followed by a separate sub-part in relation to the Joint Employer’s submissions concerning financial stability and ss 157(2)(b) and 134(1)(f) of the *Fair Work Act 2009* (Cth) (“**FW Act**”).

44. The Joint Employers at JE Wages [15] refer to early, anecdotal evidence that the interim wage increase for direct care workers is assisting the industry to attract and retain direct care staff and improving the morale of the aged care sector.

45. The Commission would not give any weight to such “*early, anecdotal evidence.*”
46. Further, as stated in the *Stage 1 Decision* at [255]–[288], attraction and retention will only be a relevant consideration in the assessment of work value where a long-term shortage of employees has a consequential effect on the work value of the employees performing the work arising. To the extent that the submission at JE Wages [15] is directed towards an assessment of work value, the ANMF relies upon ANMF Wages [33]–[64], and the submissions above at [26] - [39] in Part B above.
47. To the extent that the submission at JE Wages [15] is directed towards achieving the modern awards objective (and/or minimum wages objective), it is acknowledged that better attraction and retention of staff is relevant to the promotion of social inclusion through workforce participation and the existence of a fair and relevant minimum safety net of terms and conditions in accordance with sections 134(1)(c) and 284(1)(b) of the FW Act.
48. Also at JE Wages [15], it is said that the Joint Employers have since the commencement of the matter advocated for an increase of 34 per cent for RNs. The ANMF welcomes the position of the Joint Employers, which aligns with that aspect of the ANMF’s *Nurses Award* draft determination, filed 15 September 2023.
49. At JE Wages [16], the Joint Employers refer to “*anecdotal evidence*” regarding an impact on cultural harmony arising from a lack of increase of wages for indirect care staff. Here again, the Commission would not give any weight to such “*anecdotal evidence*”. A further reference to “*cultural harmony*” is made at JE Wages [17(b)]. These submissions do not identify how such “*cultural harmony*” would be a work value reason for the purpose of s 157(2A), or would otherwise be relevant to the modern awards objective or minimum wages objective.
50. In respect of the submission that any increases to minimum wages must be fully funded and aligned to funding (JE Wages [17(a)]), the ANMF makes three points:
51. *First*, the Joint Employers opened their case on the basis that they made no “*capacity to pay*” argument relevant to the setting of minimum rates. Rather, it was said that “*the affordability issue for [the employer parties] might very well concern operative date,*

phasing, those types of issues, but it's not a relevant consideration to the actual setting."⁷ The ANMF has conducted its case on this basis.⁸

52. *Second*, the ANMF would respectfully adopt the observation of Ross J made during the proceeding on 26 April 2022 speaking about the "*affordability*" of a minimum wage variation, that:

"It seems to me that's fundamentally a result of a work value assessment and the application of the statutory framework. I mean, to reach a different view would, it seemed to me, to be almost delegating our function to the government of the day based on whatever funding they want to provide."⁹

53. *Third*, to the extent that this submission is directed towards section 134(1)(f) of the modern award objective (and/or section 284(1)(a) of the minimum wages objective) or the timing of any increase, the ANMF relies upon its submission at Part C.1.3 below ([76] – [83]).

C.1 Financial stability

54. At JE Wages [19(y)]–[19(z)], and at JE Wages [150]–[155], the Joint Employers make submissions about the sustainability of the aged care industry absent Government funding. In support of its submissions, it relies on the report of Stuart Hutcheon of StewartBrown. The punchline of its submission is that:

- (1) the aged care industry is economically more parlous than it was than in November 2022;
- (2) accordingly, any further wage increases should be tied to funding.

55. The ANMF makes three points in reply in addition to the matters at paragraphs [51]–[53] above, as set out in separate sub-parts below.

C.1.1 The StewartBrown material should be given little or no weight

56. It remains unsafe to rely upon the StewartBrown material, for nearly all of the reasons advanced in the ANMF's submissions dated 16 February 2023 and entitled, "*[ANMF] submissions in relation to the weight to be given to employer evidence*" ("**ANMF**

⁷ Transcript 26 April 2022, PN 464 and PN 465.

⁸ Closing Submissions of the Australian Nursing and Midwifery Federation at [846]; Closing Submissions in Reply of the Australian Nursing and Midwifery Federation at [200].

⁹ Justice Ross, Transcript 26 April 2022, PN 458.

Weight Submissions”). In those submissions, the ANMF gave five reasons why the evidence of Mr Corderoy (also of StewartBrown) should be given little or no weight.

57. Mr Corderoy had accountancy expertise, but that did not enable him to express admissible opinions about statistical or economic matters (see ANMF Weight Submissions [6(1)]–[6(2)]). The same is true of Mr Hutcheon, who (with no disrespect to him) possesses no statistical or economic training (see [3] of his statement). Whether his data is representative, or what would be the effect of certain economic inputs, is not something about which he can admissibly opine.
58. At [7]–[10] of the ANMF Weight Submissions, the ANMF drew attention to weaknesses in an assertion in the then-current StewartBrown survey that the sample group had a “*low standard deviation and margin of error.*” Notably, neither the now-current StewartBrown survey (annexed to Mr Hutcheon’s report), nor Mr Hutcheon’s report itself, makes any such assertions. That avoids the criticism about using inapt statistical terminology; it does not, however, avoid the criticism that the Commission has no way of knowing whether the StewartBrown data is statistically representative.
59. The second point made in the ANMF Weight Submissions was that, “*lots of work has gone on in the background prior to the actual reporting of the survey results, but the Commission is substantially in the dark as to what that work was, and what its parameters were*” (see at [11]). That remains the case.
 - (1) It remains that “*outlier aged care facilities*” are excluded from survey results, and only an incomplete list is given of what are outliers (see red page 30 in Mr Hutcheon’s report). Notably, after the ANMF referred to the inclusion in an earlier list of exclusion criteria of, “[*r*]evenue and expense lines that are out of range with supporting explanation,” that criterion has been removed from the list. It is not suggested, however, that that has ceased to be an exclusion criteria.
 - (2) It remains that who determines that a figure is an outlier, and based on what sort of analysis, is not fully explained.
60. The third point made in the ANMF Weight Submissions was that the purpose of the StewartBrown report was benchmarking, rather than seeking to convey a statistically accurate depiction of the industry at large (see at [14]–[18]). That remains the case. At red page 30 of Mr Hutcheon’s report, he says this:

“As noted above, the primary purpose of the Survey is for participating Providers to benchmark individual aged care facility and home care programs against similar de-identified comparators using a range of metrics. To ensure accurate and relevant benchmark comparisons, all outlier aged care facilities and home care programs are excluded from the Survey results.”

61. As the ANMF has previously submitted, there is nothing wrong with producing a report for that purpose, and obviously StewartBrown’s subscribers find that information useful; but that does not make it useful in this proceeding. The purpose of benchmarking is different from the purpose of seeking to analyse the industry as a whole. It makes sense to exclude “*outliers*” if one’s purpose is to enable subscribers to figure out if their turnover and expenses align with the main line of residential aged care providers. It does not make sense to exclude “*outliers*,” as long as their data is accurate, if one wishes instead to understand the position of the industry as a whole.
62. The fourth point made in the ANMF Weight Submissions was that the StewartBrown data undergoes an opaque “*data cleansing*” process (at [19]–[20]). That remains the case (see red page 29 in Mr Hutcheon’s report). It suffices to repeat that submission:

“One of the steps in this process (step 7) is that, “[t]he software program performs a further cleansing process.” What software program? What cleansing? Why is this done? How is it done, and by reference to what criteria? Another step in the process (step 9) is that, “[a]ll results outside the range that have abnormal results are excluded.” What range? Who determines that a result is “abnormal,” and by reference to what criteria?”
63. The ANMF has been making this criticism of the StewartBrown data since its submissions dated 22 April 2022 (see [152] of those submissions). Still the information necessary to enable the Commission (or any other party) to scrutinise the dataset is not produced or explained.
64. The fifth and final point made in the ANMF Weight Submissions was that Mr Corderoy had given bottom-line figures as to the impact on industry of unfunded wage increases which were not supported by any calculation at all, or explanation of how figures were reached, and hence that the figures were inscrutable and in the nature of a bare *ipse dixit*. Exactly the same is true in relation to Mr Hutcheon.
65. Mr Hutcheon gives estimates of the effect of unfunded wage increases in Tables 1–3 on red pages 33–35 of his report. He summarises those tables in bullet points that follow. He provides no explanation of how those figures were reached. He provides no calculations to support them. It is impossible to test whether he is right or wrong.

One could not give Mr Hutcheon's report to another expert accountant, economist, statistician, *etc.*, and ask them to identify whether his calculations are accurate.

66. Just to take one example, Mr Hutcheon asserts (at red page 33) that "Figure 4 *shows that for residential aged care the FY23 average operating deficit of \$16.54 per bed per day would deteriorate to a deficit \$29.98 per bed day.*" That is correct in the strictly-literal sense that that is what the numbers on the bar graph in Figure 4 say. However, the Commission will find it impossible to understand why that is what the numbers on the bar graph say. Presumably some process of reasoning and calculation went into the production of that number (and comparable numbers in other figures and tables). But it is simply impossible to scrutinise. The Commission, and the parties, cannot check the calculations. They cannot ask their own expert to check the calculations.
67. This sort of material is simply not admissible.
68. At [22] of the ANMF Weight Submissions, the ANMF submitted that the Commission needs the detailed reasoning in support of opinions to be in a position to scrutinise whether an opinion can be accepted. It set out the following principle by way of supporting authority:¹⁰
- "It is necessary to avoid the insidious risk that the trier of fact will simply accept the opinion without careful evaluation of the steps by which it was reached, and hence the evidence must state the criteria necessary to enable the trier of fact to evaluate that the expert's conclusions are valid. The evidence must reveal the expert's reasoning – how the expert used expertise to reach the opinion stated. It is not enough for evidence tendered under s 79 merely to state the expert's qualifications in a field of expertise and the conclusion."
69. Mr Hutcheon's report does not clear this threshold. The Joint Employers ask the Commission to accept his opinion not on the basis of the strength of his expert reasoning or calculation in support of those opinions, but on the bare basis that he is an expert and he says so—an *ipse dixit*. That is not a proper approach to expert evidence.
70. The approach taken to Mr Hutcheon's evidence also puts the union parties in an invidious position. It is next to impossible to cross-examine a person as to the accuracy of their opinion without understanding how that opinion was reached. And if Mr Hutcheon gives a proper explanation for his opinions for the first time in the witness

¹⁰ *Illawarra Hotel Company Pty Ltd v Walton Construction Pty Ltd* (2013) 84 NSWLR 410 at 428 [101] (Barrett JA, Meagher and Ward JJA agreeing), quoting *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 604 [37] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) at 638 [129] (Heydon J).

box, then the cross-examiner is prejudiced as a result of having had no notice of what that explanation would be (and therefore no proper ability to test it). The purpose of requiring the filing of statements is precisely that parties should have that notice.

71. For these reasons, Mr Hutcheon's evidence would be given little or no weight.

C.1.2 Mr Hutcheon's opinions do not address the real question for the Commission

72. Even if Mr Hutcheon's evidence were given some weight, a further difficulty with the use of that evidence is that it is addressed to questions that may be of marginal relevance. The structure of the questions is that, in relation to each of direct care workers, indirect care workers, and nursing employees, Mr Hutcheon is asked, on the assumption that the relevant awards are varied as sought by the union parties:

- (1) what will be the economic impact on the aged care sector;
- (2) will there be any difference in impact between residential care and home care (this question is not asked in respect of indirect care workers);
- (3) will any part of the aged care sector (*e.g.*, private, not for profit, large, small) be impacted more than others;
- (4) what is the ability for the aged care sector to "*tolerate*" the increase if it is not "*fully funded*" by the Federal Government?

73. As outlined above, Table 1 (which purports to answer this question in relation to direct care workers) is totally inscrutable. For example, the impact for residential care facilities in not-for-profit sector is said to be \$512M. But there is no calculation, at all, explaining why that is the effect. It is inadmissible.

74. But the point made in this sub-part is that, even if the material is admissible, Mr Hutcheon's answers to the questions he has been asked appear to assume that: (1) every worker in aged care is on the minimum award rate; or (2) percentage increases will be paid to workers who are above the award rate, for example on the basis of an enterprise agreement with higher rates (*i.e.*, above-award wages will not be absorbed into any percentage increases).

75. Of course, the ANMF's position is that funding from the Commonwealth should enable all workers (including those on above-award wages) to receive the percentage increases

sought, on condition that that funding in fact be passed on to such workers. But if that were not to occur, then it is highly unlikely that employers would of their own volition pay to above-award workers the same percentage increase as they would pay to on-award workers. In that event, Mr Hutcheon's calculations do not reflect reality.

C.1.3 In any case, financial stability is one criterion among many

76. The Joint Employers' submission that any further funding increases should be tied to funding has the effect of elevating financial stability to a dominant consideration. That is not the correct approach. Financial stability is one consideration amongst many. It is not dominant; it is not primary. Accordingly, the ANMF continues to (respectfully) agree with the approach taken by the Commission in the *Stage 1 Decision* [2022] FWCFB at [911]–[914].¹¹
77. As for the suggestion that the timing of wage increases should be linked with funding, the ANMF substantially repeats its submissions at [30]–[36] of its 20 January 2023 (Stage 2) submissions. Those are set out below (for ease of reference) so far as relevant, and updated for the present context.
78. Aligning increases with whatever the Commonwealth agrees to fund, whenever it agrees to fund it, would not be the preferable application of relevant principles. That is principally because the primary hypothesis on which the analysis must proceed is that the current wage settings do, and historically they have, very significantly undercompensated aged care employees for the work that they do (having regard to the work value of that work).
79. Putting that another way, for a long time, aged-care employees have been subsidising the profit margins of their employers, subsidising the Commonwealth's budget, subsidising the taxpayer, or some combination of these three.
80. The submission of the Joint Employers is to the effect that this subsidy by employees should continue—by being undercompensated for the value of the work that they perform—unless and until the Commission is satisfied that increases would not

¹¹ This was the ANMF's position at the time of the stage 2 hearings as well—see its submissions dated 20 January 2023 at [98].

detrimentally affect aged-care employers, at all (*i.e.*, Commonwealth funding meets all increased wages and on-costs).

81. That is not justice. That is inconsistent with equity, good conscience, and the merits of the matter. It is not fairness as assessed from the perspective of both the employees and employers. All of these considerations demand that aged-care employees, as soon as possible, be adequately compensated for the work that they do. The Joint Employers' approach would not "*reasonably balance*" the interests of employers and employees; it would subordinate the interests of aged-care employees to those of their employers.
82. Employers have been on notice of the wage increases sought by the union parties in these proceedings for years now. Even the possibility of a 35 per cent increase for nursing employees under the *Nurses Award* has been a real possibility since at least as early as July 2022 (as to this, see [48] of the ANMF's submissions dated 01 November 2023 on classification and allowance issues).
83. For these reasons, although of course the Commission would consider the financial stability of aged-care employers, it would not permit that consideration to act as an effective veto on wage increases. Nor would it give it dominant or primary weight.

D. Indirect care workers

84. The ANMF has no substantive submission to make in relation to the quantum of increase to minimum award rates for indirect care workers (ANMF Wages [1(1)]). There are aspects of other parties' submission, however, which are to the effect that a difference in wages as between direct and indirect care workers would be administratively difficult. The ANMF understands this principally to be a matter that is relevant to "*Classification and allowance issues*," and hence will respond to those submission in its submissions in relation to that topic, due on 23 November 2023.

E. Conclusion

85. For reasons identified above and in the ANMF's earlier submissions regarding "*wage adjustment issues*", and having regard to the Commission's state of satisfaction that the 15 per cent increase already awarded sits "*comfortably below the level of increase [it] may determine on a final basis*,"¹² the Commission would:

¹² *Stage 1 Decision* [2022] FWCFB 200 at [938], see also [967].

- (1) be satisfied that changes in IPC, resulting from the COVID-19 pandemic but which remain extant today (and will so remain into the future), constitute work value reasons justifying an increase in award wages;
- (2) be satisfied that chronic understaffing and resulting increased workloads and work intensity constitute work value reasons justifying an increase in award wages;
- (3) grant a level of further increase to modern award minimum wages that is justified by work value reasons, consistent with the draft determinations filed by the ANMF on 15 September 2023.

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17 November 2023

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