



BACKGROUND DOCUMENT 6 – THE COMMONWEALTH

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, 22 AUGUST 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.

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>
ACSA	Aged & Community Services Australia
Aged Care Award	<i>Aged Care Award 2010</i>
ACWC	Aged Care Workforce Censuses
AIN	Assistant in Nursing
ANMF	Australian Nursing and Midwifery Foundation
AQF	Australian Qualifications Framework
Charlesworth Report	Dr Sara Charlesworth, <i>Report of Sara Charlesworth: Health Services Union of NSW – Regarding work value for aged care members</i> dated 31 March 2021
Charlesworth Supplementary Report	Dr Sara Charlesworth, <i>Supplementary Report of Sara Charlesworth</i> dated 22 October 2021
CCIWA	Chamber of Commerce and Industry of Western Australia
Commission	Fair Work Commission
DoHAC	Department of Health and Aged Care
Eagar Supplementary Report	Dr Kathleen Eagar, <i>Supplementary Report of Dr Kathleen Eagar</i> dated 20 April 2022
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
Junor Report	Honorary Associate Professor Anne Junor, <i>Fair Work Commission matter AM2021/63, Amendments to the Aged Care Award 2010 and the Nurses Award 2010</i> dated 28 October 2021, as amended 5 May 2022.
Kurrle Report	Dr Susan Kurrle, <i>Report of Dr Susan Kurrle regarding work value for aged care members</i> dated 25 April 2021
LASA	Leading Age Services Australia

Meagher Report	Dr Gabrielle Meagher, <i>Changing aged care, changing aged care work: workforce and work value issues in Australian residential aged care</i> dated 31 March 2021
Meagher Supplementary Report	Dr Gabrielle Meagher, <i>Supplementary report on workforce and work value issues in Australian home care for older people</i> dated 27 October 2021
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</i> [2017] FWCFB 1001
<i>Penalty Rates Review</i>	<i>Shop, Distributive and Allied Employees Association v The Australian Industry Group</i> (2017) 253 FCR 368
<i>Pharmacy Decision</i>	<i>Four Yearly Review of Modern Awards – Pharmacy Industry Award 2010</i> [2018] FWCFB 7621
RN	Registered Nurse
SCHADS Award	<i>Social, Community, Home Care and Disability Services Award 2010</i>
Smith/Lyons Report	Associate Professor Meg Smith and Dr Michael Lyons, <i>Report by Associate Professor Meg Smith and Dr Michael Lyons</i> dated October 2021, as amended 2 May 2022
<i>Teachers Case</i>	<i>Independent Education Union of Australia</i> [2021] FWCFB 2051
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</i> (Cth)

1. Introduction

[1] On 5 August 2022, the Commission published Background Document 5 which posed a number of additional questions to the parties. In view of the range of issues canvassed in the parties' closing written submissions and the questions posed in Background Document 5, the [Directions](#) were amended as follows:

1. The Commonwealth will file written submissions by **4pm on Monday 8 August 2022**.
2. The parties will file submissions in reply to the Commonwealth's written submissions by **4pm on Wednesday 17 August 2022**.
3. By no later than **4pm on Friday 19 August 2022**, parties will file:
 - a. Submissions in reply to the closing submissions filed on 22 July 2022
 - b. Responses to the questions posed in Background Document 5.
4. The matter will be listed for oral hearing on:
 - a. **24 and 25 August 2022** for submission by the Applicants and the Commonwealth to be held in person 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.
5. Submissions to be filed in both word and PDF formats to amod@fwc.gov.au.
6. Liberty to apply.

[2] On 8 August 2022, the Commonwealth filed a [submission](#).

[3] On 17 August 2022, the parties filed submissions in reply to the Commonwealth's submissions. Submissions were received from the following:

- [Health Services Union](#) (HSU)
- [Aged & Community Services Australia \(ACSA\), Leading Age Services Australia \(LASA\) and Australian Business Industrial](#) (ABI) (collectively the Joint Employers)

[4] [The Australian Nursing and Midwifery Federation](#) (ANMF) filed both its submissions in reply to the Commonwealth, closing submissions in reply and responses to the questions posed in Background Document 5 on 17 August 2022.

[5] The UWU [advised](#) that it did not intend to file a submission in reply to the Commonwealth.

[6] This Background Document summarises the Commonwealth's submission of 8 August 2022 and sets out the parties' submissions in reply to the Commonwealth. The Commonwealth's submissions in relation to the modern awards objective are summarised in Background Document 7–The Modern Awards Objective.

2. Summary of the Commonwealth's submissions

[7] 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.

[8] At a [Mention](#) on Monday 6 June 2022, the Directions were varied to allow the Commonwealth to file a submission in the proceedings.

[9] On 8 August 2022, the Commonwealth filed a [submission](#).

[10] The Commonwealth's submissions are structured as follows:

Part A summarises the Commonwealth's position.

Part B sets out the Commonwealth's response to the request by the Commission in its statement of 20 June 2022 ([2022] FWC 102) for information regarding the aged care sector.

Part C sets out the Commonwealth's response to the provisional views of the Commission, as identified in its statement on 9 June 2022 ([2022] FWCFB 94).

Part D provides the Commonwealth's response to Questions 2, 4 and 5 posed by the Commission in Background Document 1

Part E sets out the Commonwealth's submissions on the modern awards objective.

Part F provides the Commonwealth's response to the issue of modern award classification structures.

2.1 Part A

[11] Paragraphs [3] to [9] summarise the Commonwealth's position in these proceedings. The Commonwealth supports a minimum wage increase for aged care workers¹ and submits that it will provide funding to support an increase to award minimum wages made by the Commission and says:

¹ Commonwealth submissions dated 8 August 2022 [3].

‘The Commonwealth would also welcome an opportunity to work with the Commission and the parties regarding the timing of implementation of any increases, taking into account the different funding mechanisms that support the payment of aged care workers’ wages.’²

[12] The Commonwealth says the work value of aged care workers is ‘significantly higher than the modern awards currently reflect’ and agrees with the Unions on the following:

- Strengthened regulatory demands in the aged care sector have ‘increased the expectations of the workforce to have the skills and attributes to deliver a higher standard of quality and safe care while also placing additional administrative requirements on many workers’. The Commonwealth says that this has particularly been the case for PCWs, ENs and RNs however submits that it is ‘also relevant’ to other workers including cooks, cleaners and administrative workers.³
- The undervaluation of caring work in the aged care sector has been partly driven by gender-based assumptions about the value of the work and submits that the ‘range of skills and other factors relating to the work value of aged care workers have not previously been recognised when setting the modern award minimum wages for the overwhelmingly female employees in the aged care sector.’⁴
- There has been an increase in the acuity and complexity of care requirements for aged care recipients.⁵

[13] The Commonwealth further submits that wages and conditions in the aged care sector need to ‘support the attraction and retention of sufficient workers to meet the expected growth in demand for aged care services over the next 30 years.’⁶

[14] The Commonwealth submits that it would ‘welcome the opportunity to work with the Commission and the parties regarding the timing of the implementation of any increases, taking into account the different funding mechanisms that support the payment of aged care workers’ wages’.⁷

[15] The HSU, the ANMF and the Joint Employers filed submissions in response to the Commonwealth.⁸

² Ibid [5].

³ Ibid [6].

⁴ Ibid [7].

⁵ Ibid [8].

⁶ Ibid [9].

⁷ Commonwealth submission dated 8 August 2022 [5].

⁸ See HSU [submissions in reply to the Commonwealth](#) dated 17 August 2022; Joint Employers [submissions in reply to the Commonwealth](#) dated 17 August 2022; ANMF [closing submissions in reply](#) dated 17 August 2022.

[16] The HSU broadly agrees with the Commonwealth's submissions and submit that the submissions correctly identify that the increases sought by the HSU are more than justified by work value reasons and are necessary to achieve the modern awards objective.⁹

[17] In respect of the impact of regulatory requirements on aged care workers, the HSU submits that the Commonwealth recognises that strengthened regulatory demands and associated higher standards of care have increased the work value of care workers and are relevant to 'ancillary workers'.¹⁰

[18] The HSU submits that the Commission can and should take into account the Commonwealth's submission that appropriate wages will support the attraction and retention of workers in the aged care industry in its consideration of whether wage increases will meet the modern awards objective, in particular the need to promote social inclusion.¹¹

[19] The ANMF agrees with 'many parts' of the Commonwealth's submission however notes that there are some matters that require 'qualification'.

[20] The ANMF agrees with and adopts the following Commonwealth submissions:

- the work of aged care workers is significantly higher than the modern awards currently reflect.¹²
- strengthened regulatory demands have increased the expectations of the workforce to have the skills and attributes to deliver a higher standard of care, while also imposing additional administrative requirements on AINs, PCWs, ENs, and RNs.¹³
- a range of skills and other factors relating to work value have not been previously recognised, on account of the overwhelmingly-female nature of the sector, based (in part) on gender-driven assumptions about the work value of that work.¹⁴
- average care requirements for aged care recipients have increased alongside acuity and complexity, which further contributes to the work value of aged care workers being significantly higher than the modern awards currently reflect.¹⁵
- the vast majority of direct care workers in residential and in-home aged care services identify as female (over 83 per cent) (Cth S [18]).¹⁶
- the current Aged Care Quality Standards (ACQS) "*place the consumer at the centre of every decision, ... give consumers greater control over their care,*" and there is "a

⁹ HSU submissions in reply to the Commonwealth dated 17 August 2022 p 9.

¹⁰ HSU submissions in reply to the Commonwealth dated 17 August 2022 [2]-[3].

¹¹ Ibid [8].

¹² ANMF closing submissions in reply dated 17 August 2022 [458](1).

¹³ Ibid [458](2).

¹⁴ Ibid [458](3).

¹⁵ Ibid [458](4).

¹⁶ Ibid [458](5).

greater emphasis on the individual needs of consumers under the Standards” (Cth S [29]–[30]).¹⁷

- care and service plans are signed off by RNs, which means that RNs are spending more time with residents to assess needs, goals, and preferences (Cth S [31]).¹⁸
- further, given greater acuity and complexity of care needs, the workload associated with the maintenance of care plans has increased (Cth S [31]).¹⁹
- the increased regulation on the use of restrictive practices has led to a change in the roles performed by aged-care workers, and in particular RNs (Cth S [43]–[45]).²⁰
- the QI reporting most impacts RNs (who now spend more time on mandatory reporting than previously), and that impact flows on to ENs and AINs / PCWS (Cth S [55]).²¹
- SIRS reporting likewise adds to the responsibilities of workers (Cth S [67]–[70]).²²
- the Commonwealth takes no issue with a finding that wages have not been “*properly fixed*” (Cth S [79.1]), and in any case the “*proper fixation*” of minimum rates is not a “*gateway*” to an exercise of power under section 157 (Cth S [79.2]).²³
- the C10 framework may be relevant, but is not determinative or limiting (see Cth S [98]–[106]).²⁴
- current award rates significantly undervalue the work performed by aged-care workers for reasons relating to gender (Cth S [120]).²⁵
- increases to minimum wages in the relevant awards are necessary to achieve the modern award objective (Cth S [153]), and the minimum wages objective (Cth S [157]).²⁶

[21] The ANMF submits that the ‘central tension’ between its position and the Commonwealth’s appears to be in the interpretation of s.157(2A). The ANMF notes that it has previously submitted that it ‘tempts error to import into the extremely-broad discretion created by section 157(2A) limitations or restrictions that the Commission has adopted in previous wage-fixation regimes’ and submits that a few of the Commonwealth’s submissions appear to

¹⁷ ANMF closing submissions in reply dated 17 August 2022 [458](6).

¹⁸ Ibid [458](7).

¹⁹ Ibid [458](8).

²⁰ Ibid [458](9).

²¹ Ibid [458](10).

²² Ibid [458](11).

²³ Ibid [458](12).

²⁴ Ibid [458](13).

²⁵ Ibid [458](14).

²⁶ Ibid [458](15).

involve propositions that ‘read limitations’ or import tests or frameworks that elevate some consideration over others into s.157(2A).²⁷ The ANMF argues:

‘the Commission would prefer an approach that does not read in any restrictions or limitations, and does not involve establishing tests, frameworks, or considerations of elevated status, where no such thing appear from the statute.’²⁸

[22] The Joint Employers submit that the Commonwealth ‘generally does not raise any new information or evidence that will further assist the Commission in its consideration of the Applications’ and argues that despite the Commonwealth’s generalised support for *all* aged care workers, including maintenance and administrative workers, the Commonwealth ‘does not give proper consideration to the work performed by ‘non-care roles’’.²⁹

[23] The Joint Employers submit that it ‘is pleasing to see the Commonwealth welcome the opportunity to work with the Commission and the parties regarding the timing of the implementation of any increases, should any increases be granted’. The Joint Employers submit that this ‘is a prudent course of action which is supported by the employer interests and previous work value precedents’.³⁰

2.2 Part B: The Aged Care Sector

[24] In a statement published on 20 June 2022, the Commission requested the Commonwealth provide data on the composition of the aged care workforce. Part B of the Commonwealth’s submissions address the nature of the aged care sector, including providing information the following:

- Data on the composition of the aged care workforce
- A profile of the employees employed in the aged care sector
- The Commonwealth’s regulation of the aged care sector
- The current funding model (the Aged Care Funding Instrument ACFI) and the transition to the new funding model (the Australian National Aged Care Classification (AN-ACC)).³¹

[25] The majority of data relied upon by the Commonwealth is drawn from the Aged Care Workforce Censuses (ACWC) from 2003, 2007, 2012, 2016 and 2020. The ACWCs provide a ‘point-in-time snapshot of the size of the workforce, the numbers of each type of worker, additional qualifications of workers, and some key demographic features.’³²

²⁷ ANMF closing submissions in reply dated 17 August 2022 [467]–[468].

²⁸ Ibid [468].

²⁹ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 [2.2](a)-(b).

³⁰ Ibid [2.3].

³¹ Commonwealth submissions dated 8 August 2022 [10].

³² Ibid [11].

[26] The Commonwealth acknowledges that the ACWC has some limitations, including response rates, the exclusion of aged care workers who do not work for a provider and the duplication of workers across different types of aged care however submits that the ACWC ‘provides the best quantitative descriptions of the aged care workforce over time.’³³

[27] The Commonwealth also utilises data from Department of Health and Aged Care (DoHAC) modelling that sought to estimate the cost impacts and effects of a wage increase in the aged care sector.³⁴

2.2.1 Profile of aged care employees

[28] Part B and Annexures A and B of the Commonwealth’s submissions contains information about the composition of the aged care workforce.

[29] The Commonwealth estimates that Australia has approximately 365,000 aged care workers, across both residential and in-home care.³⁵

[30] The Joint Employers refer to the data relied upon by the Commonwealth and note that the 2020 Workforce Census showed a ‘headline headcount’ of 420,000 employees in the aged care industry however the Commonwealth provided an approximate figure of 365,000. The Joint Employers suggest the Commonwealth have presumably reached this figure ‘as some employees hold dual roles’ however note that the Commonwealth ‘have not provided the reasoning as to why they have come to this position.’³⁶ In the absence of any explanation, the Joint Employers submit that ‘caution should be given to the application of this material.’³⁷

Question 1 for the Commonwealth: The Commonwealth is invited to respond to the Joint Employers’ submission (at 5.2 Joint Employers’ Reply Submissions to the Commonwealth)

[31] The Commonwealth submits that residential care workforce has grown by 77 per cent between 2003 and 2020.³⁸

[32] RNs and Nurse Practitioners account for approximately 9 per cent of the aged care workforce.³⁹ In residential care, the total number of Full-time equivalent (FTE) enrolled nurses has remained near constant between 2003 and 2020. Between 2016 and 2020, the FTE of registered nurses grew by 38 per cent.⁴⁰ In home care, the total number of enrolled nurses has remained constant between 2007 to 2020 while the total FTE of registered nurses has reduced from 2012 to 2016 and again from 2016 to 2020.⁴¹

³³Commonwealth submissions dated 8 August 2022 [12].

³⁴ Ibid [14].

³⁵ Ibid [15].

³⁶ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 [5.2].

³⁷ Ibid [5.3].

³⁸ Commonwealth submissions dated 8 August 2022 Annexure A [7].

³⁹ Commonwealth submissions dated 8 August 2022 [16].

⁴⁰ Commonwealth submissions dated 8 August 2022 Annexure A [8].

⁴¹ Ibid [9].

[33] The Commonwealth submits that PCWs are ‘now more likely than nurses to be delivering care to residential aged care recipients’⁴² and notes that PCWs make up approximately 58 per cent of the aged care workforce⁴³ with the personal care workforce in residential care increasing by 118 per cent between 2003 and 2020.⁴⁴

[34] The ANMF notes the Commonwealth’s submission that most aged care is now provided by PCWs/AINs and agrees that these workers will be providing the predominance of direct, hands-on care. However, the ANMF submits that there are certain types of care that only ENs and RNs can perform and that when AINs/PCWs provide care ‘they do so as part of a nursing team and under the direction and supervision of an EN or an RN.’⁴⁵

[35] At [6] of Annexure B the Commonwealth states:

‘Deloitte’s modelling determined that effectively no Assistants in Nursing are classified on the Nurses Award, rather they are classified as personal care workers on either the Aged Care Award or the Social, Community, Home Care and Disability Services Industry (SCHADS) Award, depending on their workplace.’

[36] In response the ANMF submits that the conclusion reached by Deloitte is not correct and advises that it has ‘many members who are classified as AINs under the Nurses Award’ and argues that the Commission cannot ‘safely proceed’ on the basis that there are effectively no AINs classified under the Nurses Award.⁴⁶

Question 2 for the Commonwealth: The Commonwealth is invited to respond to the ANMF’s reply submission regarding [6] of Annexure B.

[37] In residential care, the ratio of FTE personal care workers to nurses has increased from 1.58:1 in 2003 to 3.08:1 in 2020. Home care has also seen increases from 4.93:1 in 2007 to 8.03:1 in 2020.⁴⁷ The Commonwealth submits that the data ‘indicates a shift in the makeup of the workforce over the past 20 years, with a higher proportion of care provided by personal carers rather than nurses.’⁴⁸

[38] Approximately 65 per cent of direct care workers are employed on a permanent part-time basis.⁴⁹

⁴² Ibid [15].

⁴³ Commonwealth submissions dated 8 August 2022 [16].

⁴⁴ Commonwealth submissions dated 8 August 2022 Annexure A [10].

⁴⁵ ANMF closing submissions in reply dated 17 August 2022 [470].

⁴⁶ Ibid [466](1).

⁴⁷ Commonwealth submissions dated 8 August 2022 Annexure A [11].

⁴⁸ Ibid.

⁴⁹ Commonwealth submissions dated 8 August 2022 [16].

Table A1: Size of the Residential aged care workforce, by headcount and by FTE⁵⁰

Classification	Total workforce (headcount)				
	2020 ACWC	2016 ACWC	2012 ACWC	2007 ACWC	2003 ACWC
Whole PAYG workforce	277,261	235,764	202,344	174,866	156,823
Whole direct care workforce	208,903	153,854	147,086	133,314	115,660
Nurse Practitioner	203	386	294	22,399	24,019
Registered nurse	32,726	22,455	21,916		
Enrolled Nurse	16,000	15,697	16,915	16,293	15,604
Personal Care Worker	146,378	108,126	100,312	84,746	67,143
Allied health professional	10,604	2,210	2,648	9,875	8,895
Allied health assistant	2,992	4,979	5,001		

Classification	Total workforce (FTE)				
	2020 ACWC	2016 ACWC	2012 ACWC	2007 ACWC	2003 ACWC
Whole direct care workforce	129,151	97,920	94,823	78,849	76,006
Nurse Practitioner	163	293	190	13,247	16,265
Registered nurse	20,154	14,564	13,939		
Enrolled Nurse	9,919	9,126	10,999	9,856	10,945
Personal Care Worker	93,115	69,983	64,669	50,542	42,943
Allied health professional	4,081	1,092	1,612	5,204	5,776
Allied health assistant	1,720	2,862	3,414		
<i>FTE ratio PCW:nurses</i>	<i>3.08</i>	<i>2.92</i>	<i>2.57</i>	<i>2.19</i>	<i>1.58</i>

Table A2: Size of the In-home aged care workforce, by headcount and by FTE⁵¹

Classification	Total workforce (headcount)				
	2020 ACWC		2016 ACWC	2012 ACWC	2007 ACWC
	HCP	CHSP			
Whole PAYG workforce	80,340	76,096	130,263	149,801	87,478
Whole direct care workforce	64,019	59,029	86,463	93,359	74,067
Nurse Practitioner	60	184	53	201	n/a
Registered nurse	3,022	5,008	6,969	7,631	7,555
Enrolled Nurse	887	1,699	1,888	3,641	2,000
Personal Care Worker	56,242	47,861	72,495	76,046	60,587
Allied health professional	3,376	4,306	4,062	3,921	3,925
Allied health assistant	432	705	995	1,919	

⁵⁰ See Commonwealth submissions dated 8 August 2022 Annexure A p.3.

⁵¹ Ibid.

Classification	Total workforce (FTE)				
	2020 ACWC		2016 ACWC	2012 ACWC	2007 ACWC
	HCP	CHSP			
Whole direct care workforce	25,308	21,141	44,087	54,537	46,056
Nurse Practitioner	28	131	41	55	n/a
Registered nurse	1,241	2,298	4,651	6,544	6,079
Enrolled Nurse	357	813	1,143	2,345	1,197
Personal Care Worker	23,251	15,818	34,712	41,394	35,832
Allied health professional	766	1,834	2,785	2,618	2,948
Allied health assistant	147	249	755	1,581	
FTE ratio PCW:nurses	14.3	4.88	5.95	4.63	4.92
	8.03				

Qualifications

[39] The proportion of PCWs with a Certificate IV in Aged Care grew from 8 per cent in 2003 to 22.9 per cent of PCWs in residential care in 2016. In home care, the proportion of workers with a Certificate IV doubled from 2007 to 2016 (6.2 per cent to 12.2 per cent).⁵² In 2020, two-thirds of PCWs held a relevant Certificate III.⁵³

Table B12: Additional qualifications of personal care workers in 2003-2020 ACWC⁵⁴

Worker Classification	Minimum required qualification	Percentage with additional qualifications, reported in ACWC				
		Additional qualification description	2020	2016	2012	2007
Residential care Personal Care Worker	None	Any post-high school qualification	n/a	87.4	84.1	76.3
		A relevant Certificate III	66	n/a	n/a	n/a
		Certificate III in aged care	54.9	67.4	65.7	65
		Certificate IV in aged care	11.1	22.9	20.0	13
		Currently studying a relevant qualification	2	17.1	24.9	n/a
In-home care Personal Care Worker	None	Any post-high school qualification	n/a	85.8	83.7	76.1
		A relevant Certificate	HCP: 63 CHSP: 71	n/a	n/a	n/a
		Certificate III in aged care	n/a	50.9	48.1	48.3
		Certificate IV in aged care	n/a	12.2	13.3	6.2
		Currently studying a relevant qualification	HCP: 4 CHSP: 2	10.6	21.4	n/a

Gender and cultural and linguistic diversity

[40] Over 83 per cent of direct care workers in aged care identify as women. Two-third of indirect care workers identify as women.⁵⁵

⁵² Commonwealth submissions dated 8 August 2022 Annexure B, Table B12 p.11.

⁵³ Commonwealth submissions dated 8 August 2022 [17].

⁵⁴ Commonwealth submissions dated 8 August 2022 Annexure B, Table B12 p.11.

⁵⁵ Commonwealth submissions dated 8 August 2022 [18].

[41] The ANMF agrees and adopts the Commonwealth’s submission that the ‘vast majority’ of direct care workers in aged care identify as female.⁵⁶

[42] More than one third of direct care workers identify as culturally and linguistically diverse.⁵⁷

[43] First Nations people make up just 1.9 per cent of direct care workers in residential aged care and 2 per cent of direct care workers in home care.⁵⁸

Age of the workforce

[44] The residential care workforce became younger from 2016 to 2020; the proportion of workers aged 20-29 increased from 15 per cent to 23 per cent and those aged 30-39 increased from 19 per cent to 28 per cent. Correspondingly, the proportion of workers aged 40-49 decreased from 24 per cent to 19 per cent while those aged 50-59 decreased from 29 per cent to 18 per cent.⁵⁹

Table A7: Age profile of the Residential aged care direct care workforce⁶⁰

Classification	% of total direct care workers per age group				
	2020 ACWC	2016 ACWC	2012 ACWC	2007 ACWC	2003 ACWC
16-24	n/a	6.4	7.1	6.1	6.0
< 20	1	1*	n/a	n/a	n/a
25-34	n/a	18.8	12.3	11.4	12.4
20-29	23	15	n/a	n/a	n/a
35-44	n/a	19.5	20.7	22.3	25.5
30-39	28	19	n/a	n/a	n/a
45-54	n/a	28.0	32.7	37.6	39.2
40-49	19	24	n/a	n/a	n/a
55-64	n/a	24.3	24.5	20.8	16.1
50-59	18	29	n/a	n/a	n/a
65+	n/a	2.9	2.7	1.7	0.8
60+	10	13	n/a	n/a	n/a

Proportion of workers in each classification

[45] Annexure B of the Commonwealth’s submissions sets out modelling by DoHAC that estimates the proportion of workers allocated to each award classification by job title under the Aged Care, Nurses and SCHADS Award. Using the DoHAC modelling, the Commonwealth then estimates the number of workers on each award classification in 2022-23.

Enterprise Bargaining Coverage

⁵⁶ ANMF closing submissions in reply dated 17 August 2022 [458](5).

⁵⁷ Commonwealth submissions dated 8 August 2022 [18].

⁵⁸ Ibid [19].

⁵⁹ Commonwealth submissions dated 8 August 2022 Annexure A, Table A7 p.6.

⁶⁰ Ibid.

[46] Annexure B of the Commonwealth’s submissions sets out DoHAC modelling that estimates the scope of EBA covered in each award.

[47] The majority of the aged care workforce are covered by enterprise bargaining agreements. Modelling from DoHAC found that 76 per cent of workers covered by the Aged Care Award, 86 per cent of workers covered by the Nurses Award and 32 per cent of workers covered by the SCHADS Award are currently covered by an EBA.⁶¹

[48] However, the Commonwealth notes that the ‘vast majority’ of these EBAs have passed their nominal expiry dates and that most aged care workers are paid the award wage by default, as annual increases to the award rapidly surpass EBA rates. The Commonwealth suggests that the high proportion of nominally expired EBAs indicates that ‘aged care workers’ current bargaining power is low compared to previous years’⁶² and argues:

‘Aged care workers covered by the Aged Care Award and SCHADS Award, who have active EBAs in place, are only marginally better off than aged care workers who are award reliant. These workers are typically only paid a few per cent above award wages.’⁶³

[49] In relation to nurses, the Commonwealth submits that nurses covered by EBAs are broadly paid 15 per cent above award rates.⁶⁴

[50] The ANMF submits that pages 13-14 of Annexure B appear to indicate that approximately 70 per cent of workers classified under the Aged Care Award, 60 per cent of workers classified under the Nurses Award and about 90 per cent of workers classified under the SCHADS Award are paid award rates, even if an EBA applies to them.⁶⁵ The ANMF submits this finding is relevant because:

- ‘(a) it emphasises submissions made by the union parties (and the Commonwealth) about the needs of the low paid;
- (b) it emphasises submissions made by (at least) the ANMF about the failure of enterprise bargaining to meaningfully deal with the low wages paid in aged care;
- (c) it considerably undermines the strength of any critique advanced by the employer parties concerning expert witnesses analysing gender pay gaps based on actual pay rather than award rates (given that there is, evidently, a very large overlap between the two). The ANMF has explained above why that criticism would not be accepted in any event; but if the Commission considers that it has some force in the abstract (which the ANMF denies), that force is reduced considerably in practice, in the light of figures on pages 13–14 of Annexure B.’⁶⁶

⁶¹ Commonwealth submissions dated 8 August 2022 [20].

⁶² Ibid [22].

⁶³ Ibid [21].

⁶⁴ Ibid [22].

⁶⁵ ANMF closing submissions in reply dated 17 August 2022 [466](2).

⁶⁶ Ibid [466](2)(a)–(c).

2.2.2 Regulation of the sector

[51] The Commonwealth submits that the Commonwealth plays a ‘key role’ in regulating the aged care sector with the ‘vast majority’ of regulatory obligations imposed by the Commonwealth. Paragraphs [23] to [70] of the Commonwealth’s submissions set out the Commonwealth’s regulation of the aged care sector.

(i) Aged Care Quality Standards

[52] Paragraphs [24] to [34] set out the regulatory framework under the Aged Care Quality Standards (the Standards).

[53] The Commonwealth submits that the Standards ‘place the consumer at the centre of every decision, focus on the outcomes that each consumer experiences and give consumers greater control over their care.’⁶⁷ The ANMF agrees with and adopts this submission.⁶⁸

[54] The Commonwealth points out that the evidence before the Commission indicates that RNs are generally responsible for signing off care and service plans in residential aged care. The Commonwealth argues that the emphasis on ‘consumer directed care’ has meant aged care workers spend more time with each resident to ‘assess their needs and identify their goals and preferences’ and submits:

‘With increasing changes in acuity and care needs of residents, the requirement has led to greater complexity in care planning and has led to an increase in workloads on RNs, ENs and PCWs to maintain care plans.’⁶⁹

[55] The ANMF agrees with and adopts this aspect of the Commonwealth’s submission.⁷⁰

[56] The Commonwealth further submits that the evidence indicates that there has been an increase in auditing and reporting required by approved providers to demonstrate compliance with the standards, with providers subject to both announced and unannounced visits by assessors from the ACQS Commission to ensure compliance.⁷¹

[57] The Commonwealth argues that the evidence demonstrates the ‘practical impact of compliance with the Standards’ on aged care workers, and relies on the following lay witness evidence:

- Emma Brown, Special Care Project Manager at Warrigal at [25]–[26] of her witness statement dated 2 March 2022.

⁶⁷ Commonwealth submissions dated 8 August 2022 [29].

⁶⁸ ANMF closing submissions in reply dated 17 August 2022 [458](6).

⁶⁹ Commonwealth submissions dated 8 August 2022 [31].

⁷⁰ ANMF closing submissions in reply dated 17 August 2022 [458](7)–(8).

⁷¹ Commonwealth submissions dated 8 August 2022 [32].

- Johannes Brockhaus, CEO of Buckland Aged Care Services at PN13814 – PN13817 of the Transcript dated 12 May 2022.
- Craig Smith, Executive Leader Service Integrated Communities at Warrigal at [31]–[33] of his witness statement dated 2 March 2022.

[58] The Commonwealth emphasises that non-compliance with the Standards may trigger a response from the ACQS Commission under Part 7B of the *Aged Care Quality and Safety Commission Act 2018*, including administrative action or enforceable regulatory action to manage non-compliance.⁷²

(i) Physical or chemical restraints

[59] Paragraphs [35] to [45] of the Commonwealth’s submissions set out the requirements relating to the use of physical or chemical restraints.

[60] The Commonwealth summarises the amendments under *The Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Act 2021* and the *Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021* relating to the use of restrictive practices in the provision of aged care, including:⁷³

- Strengthened requirements for the use of restrictive practices in relation to care recipients in certain residential aged care settings.⁷⁴
- The types of restraints that are regulated were expanded to include environmental restraints, mechanical restraints, and seclusion.⁷⁵
- It is the responsibility of an approved provider to ensure the use of restrictive practices is only used in the circumstances set out in the Quality of Care Principles. Failure to comply may result in regulatory action by the Commissioner and inappropriate use of a restrictive practice is a reportable incident under the Serious Incident Response Scheme.⁷⁶
- Introduction of civil penalties for approved providers who fail to comply with compliance notices issued by the ACQS Commissioner in relation to a breach of restrictive practice responsibilities.⁷⁷

[61] At [40] and [41] the Commonwealth outlines the additional requirements introduced by the amendments for the use of chemical restraints, including that a medical practitioner or nurse practitioner must have:

⁷² Ibid [34].

⁷³ Ibid [35].

⁷⁴ Ibid [37].

⁷⁵ Ibid.

⁷⁶ Ibid [38].

⁷⁷ Ibid [39].

- assessed the patient as posing a risk of harm to themselves or others;
- assessed that the chemical restraint is necessary; and
- prescribed the medication.⁷⁸

[62] Further, an approved provider must:

- document in the behaviour support plan for the care recipient a number of matters including the practitioner’s decision to use the chemical restraint and the reasons the chemical restraint is necessary;
- ensure informed consent has been given by the care recipient for the prescribing of the medication in an agreed way.⁷⁹
- In a residential care setting, must assess a care recipient to determine if a restrictive practice is needed and record in the care recipient’s behaviour support plan whether this assessment has taken place and whether a restrictive practice is used.⁸⁰

[63] The Commonwealth submits that the amendments have introduced ‘increased requirements for the use of restrictive practices in residential care settings’ and that the evidence before the Commission is that the increased regulation of restrictive practices has led to a change in the roles performed by aged care workers, particularly RNs. In support of this assertion, the Commonwealth relies on the evidence of Emma Brown⁸¹ and Annie Butler.⁸²

[64] The ANMF agrees with and adopts the Commonwealth’s submission that increased regulation on the use of restrictive practices has led to a change in the roles performed by aged care workers, particularly RNs.⁸³

(i) National Aged Care Mandatory Quality Indicator Program

[65] Paragraphs [46] to [55] of the Commonwealth’s submission sets out the National Aged Care Mandatory Quality Indicator Program (QI Program).

[66] At [47] to [49] the Commonwealth summarises the development of the QI Program. From 1 July 2021, approved residential care providers have been required to collect and report information on 5 ‘quality indicators’ every three months for each residential care service it operates.⁸⁴ The 5 quality indicators are:

(i) Pressure injuries

⁷⁸ Ibid [40].

⁷⁹ Ibid [41].

⁸⁰ Ibid [42].

⁸¹ Ibid [44] referring to witness statement of Emma Brown dated 2 March 2022 [17].

⁸² Ibid [45] referring to amended witness statement of Annie Butler dated 2 May 2022 [239].

⁸³ ANMF closing submissions in reply dated 17 August 2022 [458](9).

⁸⁴ Commonwealth submissions dated 8 August 2022 [49]–[50].

- (ii) Physical restraint
- (iii) Unplanned weight loss
- (iv) Falls and fractures
- (v) Medication management.

[67] Paragraphs [51] to [54] set out the process for collecting, recording, submitting and interpreting information about the quality indicators under the QI Program.

[68] The Commonwealth relies on the lay witness evidence of Alison Curry⁸⁵ and Emma Brown⁸⁶ and submits that the QI Program has the largest impact on RNs who are required to spend more time collecting information for mandatory QI Program reporting.⁸⁷

[69] The ANMF agrees with and adopts the Commonwealth's submission that QI reporting most impacts RNs, who are required to spend more time on mandatory reporting than previously, and that impact flows on to ENs, AINs and PCWs.⁸⁸

(i) Serious Incident Response Scheme

[70] Paragraphs [56] to [70] of the Commonwealth's submissions set out the Serious Incident Response Scheme (SIRS).

[71] The SIRS commenced on 1 April 2021 for approved residential and flexible care providers and has been extended from 1 December 2022 to providers of in-home care and flexible care in a home or community setting.⁸⁹

[72] Paragraphs [58] to [66] summarises the SIRS framework. Under the SIRS, approved providers are required to report all 'reportable incidents' to the ACQS Commission. A 'reportable incident' is defined in the Aged Care Act and Quality of Care Principles and includes:

- unreasonable use of force
- unlawful sexual contact or inappropriate sexual conduct
- psychological or emotional abuse of the care recipient
- unexpected death
- unexplained absence

⁸⁵ Ibid [55.1] referring to reply witness statement of Alison Curry dated 20 April 2022 [66]–[67].

⁸⁶ Ibid [55.2] referring to witness statement of Emma Brown dated 2 March 2022 [31]–[32].

⁸⁷ Ibid [55].

⁸⁸ ANMF closing submissions in reply dated 17 August 2022 [458](10).

⁸⁹ Commonwealth submissions dated 8 August 2022 [56]–[57] referring to the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* (Schedule 4).

- stealing and financial coercion
- use of a restrictive practice other than in accordance with the Quality of Care Principles
- neglect.⁹⁰

[73] A failure to comply with the reporting obligations under the SIRS may trigger the ACQS Commission’s compliance functions and enforcement powers.⁹¹

[74] Reportable incidents are split into two categories: Priority 1 and Priority 2.

[75] A Priority 1 incident is a reportable incident that has caused or could reasonably have been expected to have caused a care recipient physical or psychological injury or discomfort requiring medical or psychological treatment; where there are reasonable grounds to report the incident to police; or is an unexpected death or unexplained absence. Priority 1 incidents are required to be reported to the ACQS Commissioner within 24 hours of the provider becoming aware of the incident.⁹²

[76] A Priority 2 incident is a reportable incident that has not been reported as a Priority 1 incident. A Priority 2 incident must be reported to the ACQS Commissioner within 30 days of the provider becoming aware of the incident.⁹³

[77] The Commonwealth submits that the SIRS ‘goes further than the previous reporting requirements as it includes both incident management and reportable incident responsibilities for providers, including through implementing and maintaining effective organisation-wide governance systems for the management and reporting of relevant incidents’.⁹⁴

[78] The Commonwealth relies on the lay witness evidence of Wendy Knights,⁹⁵ Linda Hardman,⁹⁶ Emma Brown,⁹⁷ Virginia Ellis⁹⁸ and Allison Curry⁹⁹ that reporting under the SIRS has impacted the work of RNs, PCWs and AINs.

[79] The ANMF agrees with and adopts the Commonwealth’s submission that SIRS reporting adds to the responsibilities of workers.¹⁰⁰

2.2.3 Commonwealth funding in the Aged Care Sector

⁹⁰ Ibid [58].

⁹¹ Ibid [66].

⁹² Ibid [60].

⁹³ Ibid [61].

⁹⁴ Ibid [63].

⁹⁵ Ibid [67] referring to Transcript, 9 May 2022, PN9178–PN9183.

⁹⁶ Ibid [67] referring to Transcript, 9 May 2022, PN9821–PN9828.

⁹⁷ Ibid [68] referring to witness statement of Emma Brown dated 2 March 2022 [35]–[39].

⁹⁸ Ibid [69] referring to reply witness statement of Virginia Ellis dated 20 April 2022 [55].

⁹⁹ Ibid [70] referring to reply witness statement of Alison Curry dated 20 April 2022 [77]–[78].

¹⁰⁰ ANMF closing submissions in reply dated 17 August 2022 [458](11).

[80] Paragraphs [71] to [77] of the Commonwealth’s submissions set out the funding arrangements in the aged care sector.

[81] Paragraph [71] sets out the current funding model, the Aged Care Funding Instrument (ACFI). When a new resident enters residential aged care, the initial assessment results in a resident being classified on each ACFI domain as either nil, low, medium or high need. The ACFI domains are:

- (i) Activities of Daily Living – covering nutrition, personal hygiene, mobility, toileting and continence;
- (ii) Behavioural Domain – covering cognitive skills, cognition, wandering, verbal and physical behaviour and depression; and
- (iii) Complex Health Care – covering medications and complex health care needs.

[82] The Commonwealth submits that it is ‘well recognised, including in the evidence before the Commission, that there are substantial issues with the ACFI funding model.’¹⁰¹

[83] Paragraphs [73] – [77] summarise the new Australian National Aged Care Classification (AN-ACC) Model. The AN-ACC was introduced with the *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* and will commence from 1 October 2022. The new model includes:

- (i) A new assessment tool and method for classifying and funding permanent residents
- (ii) Independent assessments to determine classification levels and care funding
- (iii) Independent analysis each year to inform changes in funding.¹⁰²

[84] The Commonwealth submits that the AN-ACC model is intended to be ‘more equitable’ particularly in relation to rural and remote locations, First Nations communities and homeless specialist services and says:

‘It aims to align care needs and cost drivers in residential aged care to better facilitate the provision of services and funds where they are needed. It is a streamlined model that is administratively simple. The Commonwealth expects that implementation of the AN-ACC funding model will address the issues with the ACFI ... and improve funding certainty for Government, approved providers and investors.’¹⁰³

[85] The Commonwealth submits the AN-ACC funding model will have the following features:

¹⁰¹ Commonwealth submissions dated 8 August 2022 [72].

¹⁰² Ibid [73].

¹⁰³ Ibid [74].

- Approved residential care providers will not make their own assessments of residents for funding purposes rather this will be performed by independent assessors. The Commonwealth submits that this will ‘deliver more reliable and stable funding assessment’ as well as ‘take pressure off approved providers’ to conduct assessments, thereby reducing the associated administrative burden.¹⁰⁴
- The Independent Health and Aged Care Pricing Authority will undertake regular analysis of cost changes and drivers with the results informing the annual changes in subsidy rates from Government.¹⁰⁵
- The ACFI assessment tool will be replaced with the AN-ACC Assessment Tool and separate funding for fixed and variable costs. The AN-ACC will not encourage particular types of care delivery for funding purposes, which the Commonwealth submits supports ‘an improved focus on care needs and also a fairer allocation of funding between approved providers.’¹⁰⁶

[86] Paragraph [76] summaries the three components of subsidy payments available under the AN-ACC: fixed, variable and one-off entry payment.

[87] Fixed funding will be determined by the characteristics of a residential aged care facility, such as location or specialisation. The Commonwealth submits that ‘this recognises that some facilities, for example, those in rural and remote locations, may require additional funding than those in metropolitan areas.’¹⁰⁷

[88] Variable funding is determined by an independent assessment of each aged care resident’s needs, which are aligned with one of the AN-ACC case mix classifications which in turn determine the amount of funding allocated to an aged care resident. The AN-ACC funding model will also cover those receiving respite care in residential aged care facilities.¹⁰⁸

[89] A one-off entry payment will be made each time a resident enters a residential aged care facility. The Commonwealth submits that the payment ‘aims to cover one-off costs related to transitioning into a new care environment’ and ‘recognises that there are additional care needs when someone first enters care.’¹⁰⁹

[90] The HSU submits that the Commonwealth’s suggestion that the forthcoming move from an ACFI to AN-ACC funding model will reduce the administrative burden on staff is at this point speculative, and to the extent it is put as a submission that this reduces the complexity and skill required of aged care workers it should not be accepted.¹¹⁰

¹⁰⁴ Ibid [74.1].

¹⁰⁵ Ibid [74.2].

¹⁰⁶ Ibid [74.3].

¹⁰⁷ Ibid [76.1].

¹⁰⁸ Ibid [76.2].

¹⁰⁹ Ibid [76.3].

¹¹⁰ HSU submissions in reply to the Commonwealth dated 17 August 2022 [9].

[91] The ANMF similarly submits that the Commission cannot take into account the effect on work value of changes to funding arrangements that have not yet been made, and argues that whether administrative workload will be reduced is ‘a matter for speculation.’¹¹¹ The ANMF notes that the amount of work required to prepare for an independent assessment is not yet known, nor is it known whether the changes will in fact reduce one kind of work and replace it with a different kind of work. The ANMF submits that the Commission should ‘proceed on the basis of the evidence as to the existing funding model’ [ANMF’s emphasis].¹¹²

[92] In relation to the AN-ACC funding model, the Joint Employers note that approved providers will no longer undertake their own assessments and submit this will ‘inevitably’ change the work performed by RNs, ENs and PCWs who will no longer be involved in the ACFI assessment process.¹¹³ The Joint Employers maintain that, as the future processes are unclear, the extent and impact of the change cannot be determined,¹¹⁴ and note:

‘There is also a level of concern among the industry regarding whether the new AN-ACC model will actually provide sufficient funding (regardless of the outcome of this case) for the care that is to be provided given the new funding model and external assessment process.’¹¹⁵

2.3 Part C: Commonwealth response to *Provisional Views*

[93] Based on the material in Background Documents 1 and 2, the Full Bench expressed the following *provisional views*:¹¹⁶

1. The relevant wage rates in the Aged Care Award 2010, the Nurses Award 2020 and the Social, Community, Home Care and Disability Services Industry Award 2010 have *not* been properly fixed.
2. It is not necessary for the Full Bench to form a view about why the rates have not been properly fixed.
3. The task of the Full Bench is to determine whether a variation of the relevant modern award rates of pay is justified by ‘work value reasons’ (and is necessary to achieve the modern awards objective), being reasons related to any of s.157(2A)(a)-(c) the nature of the employees’ work, the level of skill or responsibility involved in doing the work and the conditions under which the work is done.

[94] The Commonwealth submits that it ‘does not make submissions contrary to the provisional views.’¹¹⁷

¹¹¹ ANMF closing submissions in reply dated 17 August 2022 [471].

¹¹² *Ibid.*

¹¹³ Joint Employers submissions in reply to the Commonwealth dated 17 August 2022 [4.1].

¹¹⁴ *Ibid* [4.2].

¹¹⁵ *Ibid* [4.3].

¹¹⁶ [2022] FWCFB 94.

¹¹⁷ Commonwealth submissions dated 8 August 2022 [79].

[95] In response to Provisional View 1, the Commonwealth says ‘it appears to be common ground between Unions and the Joint Employers that the minimum rates of pay in the Awards have not been properly fixed in accordance with the method stated in the *ACT Child Care Case*’ and submits that it ‘takes no issue with the Commission proceeding on the basis that this issue is not in dispute.’¹¹⁸

[96] The Commonwealth agrees with Provisional View 2 and submits that contrary to the submissions of the Joint Employers, the ‘proper fixation’ of award rates in accordance with the approach in the *ACT Childcare Case* ‘should not be considered a necessary precursor or a ‘gateway’ to the Commission’s exercise of its powers under s 157’.¹¹⁹

[97] The Commonwealth further submits that the approach taken to the fixation of rates in the *ACT Childcare Case* was relevant to the exercise of the AIRC’s powers and functions under the *Workplace Relations Act 1996*,¹²⁰ and argues:

‘While consideration of whether the rates in the relevant awards were set in accordance with historical approaches to work value assessments can be a relevant consideration in determining whether a variation of the relevant modern award rates of pay is justified by ‘work value reasons’, it is not necessarily the first step in doing so.’¹²¹

[98] The Commonwealth agrees with the identification of the task in Provisional View 3 however submits that ‘assuming the Commission is satisfied that any variation is justified – the Commission will then need to go on to consider *what* variation is justified.’¹²²

[99] The ANMF agrees with the Commonwealth’s submission that wages in the relevant awards have not been properly fixed and that, in any event, the proper fixation is not a ‘gateway’ to an exercise of power under s.157.¹²³ However, the ANMF notes the Commonwealth’s submission that historical approaches to wage fixing can be a relevant consideration in determining whether a variation is justified by work value reasons but is not ‘necessarily the first step’ in doing so and submits that the Commission should ‘not treat earlier approach as any kind of “step,” whether first, last or middle.’¹²⁴ [ANMF’s emphasis]

[100] The ANMF further submits that while some of the principles in the *ACT Child Care Decision* can be ‘safely applied’, many cannot and the application of some of those principles, such as those using the language of significant net addition, ‘will lead into error’¹²⁵ and argues:

¹¹⁸ Ibid [79.1].

¹¹⁹ Ibid [79.2].

¹²⁰ Ibid [79.3].

¹²¹ Ibid [79.4].

¹²² Ibid [79.5].

¹²³ ANMF closing submissions in reply dated 17 August 2022 [458](12).

¹²⁴ Ibid [472].

¹²⁵ Ibid [473].

‘It is undesirable to overlay statutory expressions with a multiplicity of expositions, functioning as “tests,” which might carry the consequence that the words of the statute are overlaid and forgotten.’¹²⁶

[101] The ANMF argues that the ‘only question at this stage of the analysis’ is for the Commission to determine whether work value reasons exist that justify an increase in modern award minimum wages and submits that the statute does not contain any words of limitation, such as significant net addition, and to import any such limitations would ‘artificially narrow the broad scope’ of the Commission’s discretion.¹²⁷

[102] In respect of the issue of properly fixed rates, the HSU agrees with the Commonwealth’s contention that the *ACT Child Care Case* need not be strictly applied in the present case nor is it an appropriate starting point for an analysis of whether the increases at issue are justified by work value reasons.¹²⁸

2.4 Part D: Responses to questions posed in Background Document 1

[103] Background Document 1 posed a series of questions to parties with an interest in the proceedings. Paragraphs [80] to [102] set out the Commonwealth’s responses to some of the questions posed in Background Document 1.

[104] The ANMF submits that s.157(2A) ‘exhaustively defined 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.’¹²⁹ Parties were invited to comment on the ANMF’s submission.

[105] The Commonwealth agrees with the ANMF submission that s.157(2A) exhaustively defines work value reasons ‘in the sense that there are no other express provisions which inform the meaning of s 157(2A).’¹³⁰

[106] At [84] of its submission the Commonwealth submits:

‘The Commonwealth also agrees with the observation made by the Full Bench in the *Pharmacy Decision* that the three limbs of s 157(2A) are sufficiently broad so as to import the fundamental criteria used to assess work value changes under the wage fixing principles which operated from 1975 to 1981 and 1983 to 2006.¹³¹ There is nothing to indicate that the legislature, in enacting the FW Act, intended to change the meaning of ‘work value’ as a core concept.’¹³²

¹²⁶ Ibid [474].

¹²⁷ Ibid [475] [ANMF’s emphasis].

¹²⁸ HSU submissions in reply to the Commonwealth dated 17 August 2022 [13].

¹²⁹ ANMF submissions dated 29 October 2021 [23].

¹³⁰ Commonwealth submissions dated 8 August 2022 [83].

¹³¹ *Pharmacy Decision* [166].

¹³² Commonwealth submissions dated 8 August 2022 [84].

[107] The ANMF notes paragraph [84] of the Commonwealth’s submissions and submits that it is ‘necessary to approach this submission with caution.’¹³³ The ANMF refers to the *Pharmacy Decision* and submits that where the Full Bench referred to ‘fundamental criteria’ from previous approaches to wage fixation ‘they meant, and meant only, 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’ and submit that the Full Bench went on to say that s.157(2A) ‘does not import any of the additional requirements from previous wage-fixing approaches’¹³⁴ and accordingly:

‘what the *Pharmacy Decision* (2018) 284 IR 121 at 181 [166] means is that the language used in section 157(2A) picks up, as work value reasons, three things (and three only) that were fundamental in earlier approaches, but does not pick up any other limitation or restriction.’¹³⁵ [ANMF’s emphasis]

[108] The Commonwealth argues that the Commission should continue to have regard to relativities in award minimum rates but that these considerations ‘should not be determinative’ and the Commission ultimately has ‘discretion as to whether it should vary modern award minimum wages where the criteria in s 157(2) are met.’¹³⁶

[109] Referring to the Commonwealth’s submissions in relation to the comparison of relativities between and within modern awards, the ANMF submits that insofar as the Commonwealth means that a comparison of relativities is necessary, or part of a stepped process, this submission should be rejected and submits:

‘[i]t means that they might sometimes be relevant, and might other times be irrelevant, and that nothing in section 157(2A) requires that any kind of relativity analysis be performed.’¹³⁷

Question 3 for the Commonwealth: Does the Commonwealth contend that a comparison of relativity is a necessary process?

[110] The ANMF notes that if the Commission’s approach to determining an increase in wages for work value reasons resulted in ‘huge disparities, between awards, for work of similar value’ then this may indicate that the Commission’s approach to the evaluation of work value had ‘miscarried.’¹³⁸

[111] 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:

¹³³ ANMF closing submissions in reply dated 17 August 2022 [476].

¹³⁴ *Ibid* [477] referring to *Pharmacy Decision* [138], [142] at principle 7(a), [148] at principle 4(a) [ANMF’s emphasis].

¹³⁵ *Ibid* [478].

¹³⁶ Commonwealth submissions dated 8 August 2022 [86]–[87].

¹³⁷ *Ibid* [479].

¹³⁸ *Ibid* [480].

- (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.”¹³⁹

[112] Parties were invited to comment on the HSU’ submission.

[113] The Commonwealth ‘broadly agrees’ with the HSU’s submission and submits that if the Commission considers the social value of the work ‘it would be alert to ensuring that its assessments are not affected by the perceived prestige of the work’. The Commonwealth goes on to note ‘the recognition of the importance of frontline workers, including aged care workers, during the COVID-19 pandemic’.¹⁴⁰

[114] In response the ANMF submits:

‘At Cth S [91], the Commonwealth seems to turn that submission on its head—suggesting that there is a risk of overvaluing aged-care work because people presently recognise, in the COVID-19 era, the importance of that work. In the ANMF’s submission, there is no realistic risk of overvaluation on this basis. The fact that, for a short period in time, the community is aware of (does not overestimate; is simply aware of) the importance of aged-care work does not give rise to any risk that the Commission would be swayed somehow into overestimating, itself, the importance of the work.’¹⁴¹

Question 4 for the Commonwealth: What does the Commonwealth say about the ANMF’s response to [91] of its submission?

[115] The HSU notes that the Commonwealth has recognised that the pandemic and the Royal Commission have both led to an increased recognition of the complexity and skill required in aged care work.¹⁴²

[116] In response, the HSU submits that the Commonwealth appears to have confused its submissions on what should be taken into account, ‘social utility’, with the different concept of ‘social value’, and agrees with the proposition that the later should not inform the Commission’s decision.¹⁴³

¹³⁹ HSU submissions dated 1 April 2021 [38].

¹⁴⁰ Commonwealth submissions dated 8 August 2022 [91].

¹⁴¹ ANMF closing submission in reply dated 17 August 2022 [482].

¹⁴² HSU submissions in reply to the Commonwealth dated 17 August 2022 [17].

¹⁴³ Ibid [15].

[117] The ANMF notes the HSU’s submission at [41] of its closing submissions and submits that it was an appropriate ‘warning against undervaluing aged care work based on gendered assumptions about the “*prestige*” (or value, or whatever) of that work.’¹⁴⁴ However, the ANMF submits that the Commonwealth appears to suggest that ‘there is a risk of overvaluing aged care work’ in light of the increasing recognition of the importance of aged care work due to the COVID-19 pandemic and argues:

‘The fact that, for a short period in time, the community is aware of (does not overestimate; is simply aware of) the importance of aged-care work does not give rise to any risk that the Commission would be swayed somehow into overestimating, itself, the importance of the work.’¹⁴⁵ [ANMF’s emphasis]

[118] Paragraphs [63] – [68] of Background Document 1 set out the main propositions from the *Pharmacy Decision*.

[119] The Commonwealth does not contest any of the propositions identified in the *Pharmacy Decision* and submits that, in accordance with principle 5, ‘it is 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.’¹⁴⁶

[120] The Commonwealth further submits that it agrees with the HSU’s submission that the Commission may exercise a ‘broad and relatively unconstrained judgment as to what may constitute work value reasons justifying an adjustment to minimum rates of pay’¹⁴⁷ and maintains that principle 3 in the *Pharmacy Decision* identifies the limits on what the Commission may take into account.¹⁴⁸

[121] Paragraphs [97] to [102] of the Commonwealth’s submissions set out the origins of the wage fixing approach referred to the *ACT Child Care Decision* of setting award rates relative to appropriate key classifications in awards, with the C10 level in the *Metal Industry Award 1984* as a starting point. The Commonwealth submits that this approach ‘**did not** mandate that wages for employees with qualifications equivalent to C10 must be set so as to be equal to the C10 wage rate’¹⁴⁹ and also ‘did not require that qualifications be the only means for considering appropriate relativities.’¹⁵⁰

[122] The Commonwealth further argues:

‘There was never a barrier to setting wages for particular employees higher than those of metal industry employees with equivalent qualifications. The Commission’s predecessors were open to considering whether there were factors such as the conditions

¹⁴⁴ ANMF closing submissions in reply dated 17 August 2022 [481] [ANMF’s emphasis].

¹⁴⁵ ANMF closing submissions in reply dated 17 August 2022 [482] [ANMF’s emphasis].

¹⁴⁶ Commonwealth submissions dated 8 August 2022 [94].

¹⁴⁷ Ibid [95] citing HSU submissions in reply dated 21 April 2022 [13].

¹⁴⁸ Ibid [96].

¹⁴⁹ Ibid [103] [Commonwealth’s emphasis].

¹⁵⁰ Ibid [104].

under which the work is performed that would justify such an outcome. This broad approach to assessing work value is reflected in the work value factors in s 157(2A).¹⁵¹

[123] The ANMF agrees with the Commonwealth’s submission that the C10 framework is relevant but is not ‘determinative or limiting’.¹⁵²

The Commission’s approach to work value

[124] The Commonwealth submits that the Commission’s approach to work value should rectify undervaluation of work for gender-related reasons.¹⁵³

[125] Paragraph [109] sets out the ‘indicia approach’ to identifying gender-based undervaluation as developed by the NSW industrial Relations Commission in its Pay Equity Inquiry. The Commonwealth characterises the indicia approach as ‘identifying a number of elements which, prima facie, could indicate the possibility, or even probability, of undervaluation of work based on gender.’¹⁵⁴

[126] The Commonwealth notes that PCWs, home care workers and nurses are ‘overwhelmingly female’ and the majority are considered ‘low paid’ and submits that ‘while the reasons for the low pay of aged care workers are complex, the evidence before the Commission is broadly consistent with the indicia of undervaluation identified in pay equity inquiries.’¹⁵⁵

[127] The Commonwealth submits that the expert evidence demonstrates that aged care workers, in particular PCWs, AINs and EN, ‘exercise skills that have not been properly recognised in work value assessments.’ Paragraphs [111] to [116] set out the expert evidence relied upon in support of this assertion.

[128] The Commonwealth relies on the evidence of Associate Professor Smith and Dr Lyons and submits that they identify the following barriers to a proper assessment of work value in female dominated industries:

- ‘changes in the regulatory framework for equal pay and equal remuneration applications and the interpretation of that framework
- procedural requirements such as the direction in wage-fixing principles that assessment of work value focus on changes in work value and tribunal interpretation of this requirement.
- conceptual including the subjective notion of skill and the “invisibility” of skills when assessing work value in female-dominated industries and occupations.’¹⁵⁶

¹⁵¹ Ibid [106].

¹⁵² ANMF closing submissions in reply dated 17 August 2022 [458](13).

¹⁵³ Commonwealth submissions dated 8 August 2022 p.20.

¹⁵⁴ Ibid [109].

¹⁵⁵ Ibid [109] – [110].

¹⁵⁶ Ibid [112] citing Expert Report of Associate Professor Meg Smith and Dr Michael Lyons [93].

[129] The Commonwealth submits that the evidence of Dr Sara Charlesworth identifies the followings causes for the low pay of aged care workers:

- ‘the failure of collective bargaining to provide an effective option for addressing low remuneration and poor working conditions in aged care;’¹⁵⁷
- options to address low remuneration in aged care, both in awards and collective bargaining, being “entirely dependent on federal government commitment and action”,¹⁵⁸
- historical as well as an ongoing undervaluation of work performed by PCWs in residential aged care.’¹⁵⁹

[130] The Commonwealth further states that Dr Charlesworth’s evidence is that the problems with collective bargaining in residential care ‘are amplified in in-home care’ due to isolation of workers located in private homes.¹⁶⁰

[131] The Commonwealth also cites the expert report of Honorary Associate Professor Anne Junor and submits that her evidence reveals that the work of aged care workers is under-recognised on the basis of gender.¹⁶¹

[132] At paragraph [117], the Commonwealth submits:

‘there is cogent evidence before the Commission to support the proposition that the application of ‘invisible’ skills, broadly describable as social and emotional and interpersonal skills, that have not been fully assessed in previous work value exercises, justifies the conclusion that the work value of aged care workers is significantly higher than the modern awards currently reflect, particularly for those employed in personal care (including in in-home age care), AIN and EN roles.’¹⁶²

[133] The Commonwealth ‘agrees with the conclusions reached’ in the Junor Report, and characterise her findings as demonstrating that ENs, AINS and PCWS exercise skills which have not been taken into account in assessing their work value and the reason for this under-recognition is ‘fundamentally gender-based.’¹⁶³

[134] Referring to the Commonwealth’s submissions in relation to the Junor Report and the identification of ‘invisible skills’, the ANMF notes that the Commonwealth refers to these skills being utilised by AINs, PCWs and ENs but not RNs. The ANMF submits that it ‘understands that the absence of a reference to RNs is oversight rather than deliberate and the

¹⁵⁷ Ibid [113.1] referring to Expert Report of Dr Sara Charlesworth [34].

¹⁵⁸ Ibid [113.2] referring to Expert Report of Dr Sara Charlesworth [39].

¹⁵⁹ Ibid [113.3] referring to Expert Report of Dr Sara Charlesworth [42]-[46].

¹⁶⁰ Ibid [114] referring to Expert Report of Dr Sara Charlesworth [48], [58].

¹⁶¹ Ibid [115] referring to Expert Report of Honorary Associate Professor Anne Junor.

¹⁶² Ibid [117].

¹⁶³ Ibid [118].

Commonwealth's position is that it supports Hon Assoc Prof Junor's analysis in relation to RNs as well.¹⁶⁴

Question 5 for the Commonwealth: Is the omission of a reference to RNs in [111], [115] and [117] of the Commonwealth submission an oversight?

[135] The Commonwealth further submits that the lay witness evidence demonstrates that aged care workers frequently exercise invisible skills as a result of:

- 'changes to staffing levels and skills mix;
- regular interactions with residents' and community care clients' families;
- observation and assessment to identify potential underlying health issues, manage behaviour and provide care;
- the application of a high-level of interpersonal skills, such as empathy, communication, positive mental attitude, time management and the ability to handle criticism;
- the physically, mentally and emotionally taxing and stressful work;
- the need to deal with behaviours and aggression in residents, including strategies such as distraction and de-escalation.¹⁶⁵

[136] The Commonwealth argues that based on the evidence, the Commission should find 'that the current award rates significantly undervalue the work performed by aged care workers, for reasons related to gender.'¹⁶⁶ The ANMF agrees with and adopts this submission.¹⁶⁷

[137] The Commonwealth disagrees with the Joint Employers' submission that the expert evidence is of 'limited utility' and submits that the submission 'does not recognise the award dependence of the sector' or the 'failures of collective bargaining in the sector.'¹⁶⁸

[138] Paragraphs [122] to [125] of the Commonwealth's submissions discuss the relevance of the objects of the Fair Work Act to the approach to work value:

'Section 15AA of the *Acts Interpretation Act 1901* requires that the construction that would promote the purpose or object of the FW Act is to be preferred to one that would not promote that purpose or object. The Commission is also specifically required to take into account the objects of the FW Act when performing functions or exercising powers under the FW Act.'¹⁶⁹

¹⁶⁴ ANMF closing submissions in reply dated 17 August 2022 [459].

¹⁶⁵ Commonwealth submissions dated 8 August 2022 [119].

¹⁶⁶ Ibid [120].

¹⁶⁷ ANMF closing submissions in reply dated 17 August 2022 [458](14).

¹⁶⁸ Commonwealth submissions dated 8 August 2022 [121].

¹⁶⁹ FW Act s 578.

This necessarily includes assessing whether variations to modern awards are justified by work value reasons.¹⁷⁰

In *Mondelez Australia Pty Ltd v Australian Manufacturing Workers Union*,¹⁷¹ a majority of the High Court found that:

the stated objects show that the Act is intended to provide fairness, flexibility, certainty and stability for employers and their employees. ‘Fairness’ necessarily has a number of aspects: fairness to employees, fairness between employees, fairness to employers, fairness between employers, and fairness between employees and employers.

The legislative objects of the FW Act have also been considered by Expert Panels during the Annual Wage Reviews.

In this context, it has been noted that there is a degree of overlap between the matters specified in the modern awards objective, minimum wages objective, and objects of the FW Act.¹⁷²

The Expert Panel has also commented that the range of considerations required to be taken into account calls for the exercise of broad judgment, rather than a mechanistic approach to minimum wage fixation.¹⁷³

In the *Annual Wage Review 2016-17 decision*, the Expert Panel noted that the object of the FW Act speaks to multiple legislative purposes, and plainly seeks to strike a balance between competing interests.¹⁷⁴

Assessing work value in a manner which continues, as a starting point, to align rates of pay in one modern award with classifications in other modern awards with similar qualification requirements would support a system of fairness, certainty and stability in assessing the relative value of work between awards. However, a strict alignment of award relativities based on qualifications, without proper consideration of the true work value of the cohort of employees in question, would result in award minimum rates of pay which could not be said to be fair or relevant.¹⁷⁵

[139] The Commonwealth submits that in assessing whether variations to modern awards are justified by work value reasons, a construction that promotes the purpose or objects of the FW Act is preferred,¹⁷⁶ and relies on *Mondelez Australia Pty Ltd v Australian Manufacturing*

¹⁷⁰ FW Act s 157(2).

¹⁷¹ *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818 [14].

¹⁷² *Annual Wage Review 2011-12* [2012] FWAFB 5000, [359].

¹⁷³ *Annual Wage Review 2011-12* [2012] FWAFB 5000, [359].

¹⁷⁴ *Annual Wage Review 2016-17* [2017] FWCFB 3500.

¹⁷⁵ Commonwealth submission dated 8 August 2022 [122] – [125].

¹⁷⁶ *Ibid* [122].

*Workers Union*¹⁷⁷ and previous Annual Wage Review decisions¹⁷⁸ to support this proposition.¹⁷⁹

[140] The Commonwealth submits that while assessing work value by aligning rates of pay in one modern award with classifications in other modern awards is a ‘starting point’ and would support a system of fairness, certainty and stability’, a ‘strict alignment of award relativities based on qualifications, without proper consideration of the true work value of the cohort of employees in question, would result in award minimum rates of pay which could not be said to be fair or relevant.’¹⁸⁰

Relevance and Application of the Australian Qualifications Framework

[141] Paragraphs [126] to [142] set out the Commonwealth’s submissions on the relevance and application of the Australian Qualifications Framework (AQF). The Commonwealth submits that while it does not consider that qualifications should be the only basis for award relativities, they ‘provide a useful indicator of the level of skill involved in particular work for the purposes of s.157(2A)(b).’¹⁸¹

[142] The Commonwealth maintains that the AQF provides a ‘relatively objective point of comparison’ across industries and occupations and submits that it has ‘particular value’ for those employed in occupations with a clear hierarchy of skills and formal qualifications.¹⁸² The Commonwealth suggests that nursing may be one such occupation.¹⁸³ However, the Commonwealth submits that the AQF should not be the ‘sole indicator’ of skills in the workforce as its limited focus on formal qualifications ‘does not take into account skills which may be developed outside of formal education.’¹⁸⁴

[143] Paragraphs [131] to [133] of the Commonwealth’s submissions set out history and purpose of the AQF.

[144] Paragraphs [134] to [140] of the Commonwealth’s submissions outline the 2019 expert panel review of the AQF (the AQF Review).

[145] The AQF Review was commissioned to ensure that AQF structure ‘was still able to correctly reflect the knowledge, skills and capabilities required by the current and future workforce.’¹⁸⁵

¹⁷⁷ *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 94 ALJR 818 [14].

¹⁷⁸ *Annual Wage Review 2011-12* [2012] FWAFB 5000, [359]; *Annual Wage Review 2016-17* [2017] FWCFB 3500.

¹⁷⁹ Commonwealth submissions dated 8 August 2022 [122] – [124].

¹⁸⁰ *Ibid* [125].

¹⁸¹ *Ibid* [126].

¹⁸² *Ibid* [127], [129].

¹⁸³ *Ibid* [129].

¹⁸⁴ *Ibid*.

¹⁸⁵ *Ibid* [134] referring to *Review of the Australian Qualification Framework Final Report 2019*, 17, Appendix 1 (Terms of Reference).

[146] The Commonwealth argues that the AQF Review found that, since the inception of the AQF, workplaces have ‘changed considerably’ and sets out the Review’s findings as follows:

- Employers are requiring more skills and expertise, resulting in employees upskilling and training for specific roles with some roles requiring consistent training and progression.¹⁸⁶
- Workers are transitioning to different roles more quickly than previously, with employees managing multiple career changes throughout their working lives, achieved through continuous learning and development.¹⁸⁷
- Employees are choosing short, more purpose driven and flexible courses to achieve their qualifications and upskill (both within and outside traditional education).¹⁸⁸
- Stakeholders have criticised the AQF for failing to meet its key objective to ‘clarify for the general public the options from which they may choose to achieve their learning and employment goals’.¹⁸⁹
- The AQF structure has also been criticised for being unnecessarily complex, without providing any meaningful guidance on the skills and knowledge attained at each level and for ‘poor differentiation between some qualification types, and descriptions of skills and knowledge that do not reflect existing practice, let alone meet future requirements’.¹⁹⁰
- The AQF is too rigid and overly hierarchical. Too much weight is placed on the ‘artificial and arbitrary’ distinction between the levels.¹⁹¹
- The AQF Review recommended reducing the number of knowledge levels from 10 to 8 and skills levels to 6 and renaming them as ‘bands’ to enable them to be flexibly applied across qualification types. The Review also recommended revising the ‘knowledge’, ‘skills’ and ‘skills applicable’ descriptors so they were not locked into a single AQF level for each qualification type.¹⁹²
- The current approach to describing graduate outcomes as part of qualification types is problematic, as it assumes that all qualifications with a qualification type are equally likely to lead to employment at a certain hierarchical level.

¹⁸⁶ Ibid [135].

¹⁸⁷ Ibid [136] referring to *Review of the Australian Qualifications Framework* (Final Report, 24 October 2019) 7.

¹⁸⁸ Ibid [136] referring to *Review of the Australian Qualification Framework* (Final Report, 24 October 2019) 7, 8.

¹⁸⁹ Ibid [137] referring to *Contextual Research for the Australian Qualifications Framework Review* (5 June 2018) as referred to in *Review of the Australian Qualification Framework Report 2019* (Final Report, 24 October 2019) 23.

¹⁹⁰ Ibid [137] referring to *Review of the Australian Qualifications Framework 2019* (Final Report, 24 October 2019) 8.

¹⁹¹ Ibid [138] *Review of the Australian Qualifications Framework 2019* (Final Report, 24 October 2019) 8.

¹⁹² Ibid [138].

- Classifications do not currently match across qualifications with the same work value with the AQF requiring significant reform to address this disparity.¹⁹³

[147] Paragraphs [141] and [142] set out the Commonwealth’s submissions on the application of the AQF in these proceedings:

‘The AQF can be a useful means of assessing the skill involved in work and differentiating between the work at different levels when designing award classification structures. The Commonwealth endorses the HSU’s submission (at [71] of its outline of closing submissions) that the AQF is a ‘useful starting point’.

There are likely to be aspects of the skill involved in performing work that are not captured by the AQF. Therefore, the Commonwealth submits that the Commission should not rely on the AQF as the only means to assess these matters.’¹⁹⁴

[148] The Commonwealth submits that the AQF ‘can be a useful means of assessing the skill involved in work and differentiating between the work at different levels when designing award classification structures’ and endorses the HSU’s submission that the AQF is a ‘useful starting point.’¹⁹⁵ However, the Commonwealth concludes:

‘There are likely to be aspects of the skill involved in performing work that are not captured by the AQF. Therefore, the Commonwealth submits that the Commission should not rely on the AQF as the only means to assess these matters.’¹⁹⁶

[149] Referring to the Commonwealth’s submission regarding the AQF, the ANMF submits that the Commission ‘would not use the AQF as a “starting point”’ as this ‘elevates the AQF in a way that is not justified by the language of the statute.’¹⁹⁷ The ANMF notes that, in determining the level of skill involved in doing the work, the Commission can take into account qualifications but submits that this should not be a ‘starting point’ rather it is ‘one of many points, none of which has special status, going to demonstrate the skill involved in doing the particular work.’¹⁹⁸

[150] Paragraphs [143] to [152] set out the Commonwealth’s submissions regarding the ‘anomaly’ in the rates of degree qualified nurses compared with the classification structure in the Manufacturing Award.

[151] Paragraphs [143] to [146] set out the procedural history of the Commission’s review of awards with classifications requiring undergraduate degrees.

[152] Paragraphs [147] and [148] summarise the Full Bench’s decision in the *Teachers Case*:

¹⁹³ Ibid [140] referring to *Review of the Australian Qualifications Framework 2019* (Final Report, 24 October 2019) 8, 12.

¹⁹⁴ Commonwealth submission dated 8 August 2022 [141] – [142].

¹⁹⁵ Ibid [141] referring to HSU closing submissions dated 22 July 2022 [71].

¹⁹⁶ Ibid [142].

¹⁹⁷ ANMF closing submissions in reply dated 17 August 2022 [483] [ANMF’s emphasis].

¹⁹⁸ Ibid [484].

‘On 19 April 2021, the Full Bench issued a decision on the IEU’s application (**the IEU Decision**).¹⁹⁹ The Full Bench accepted that the EST Award rates had not properly been set, found that there had been significant increases in the work value and proposed a new classification scale that would reflect the work value. The new classification scale was anchored on the Australian Professional Standards for Teachers.²⁰⁰

In the *IEU Decision*, the Full Bench stated that the ‘key classification’, around which award minimum wages for other classifications in the EST Award would be set, was a Proficient Teacher who has a degree and has obtained registration. The Full Bench aligned Proficient Teacher with Level C1(a) in the Metals Industry classification structure. The Full Bench decided to align the rate for a Graduate Teacher with Level C2(b) in the Metal Industry classification structure.²⁰¹

[153] At paragraph [149], the Commonwealth outlines the ANMF submission that if the Commission considers it necessary to identify a ‘key classification’ to the comparable classification in the Manufacturing Award, the key classification is Registered Nurse Level 1 Grade 1. The result of aligning RN Level 1 Grade 1 with C1(a) would be a 35 per cent wage increase across all levels of the Nurses Award.²⁰²

[154] At paragraph [150], the Commonwealth submits that the Joint Employers have observed that the minimum rates in the Nurses Award ‘do not correspond to the minimum qualifications of the positions when compared against the AQF’ and have submitted that the RN classification should align with C1.²⁰³

[155] In line with the submissions of the ANMF and the Joint Employers, the Commonwealth submits:

‘a comparison to rates in the Metal Industry classification structure with equivalent qualification levels may be of some assistance when the Commission is dealing an application under s 157 of the FW Act to vary modern award minimum wages on work value grounds but is not a complete answer. In addition to the level of skill involved in doing the work, s 157 requires the Commission consider whether there are work value reasons related to the nature of the work, the level of responsibility involved in doing the work and the conditions under which the work is done.’²⁰⁴

[156] The Commonwealth concludes that while it would be open to the Commission to align modern award rates with equivalent AQF qualification levels, there may be reasons justifying different rates for employees despite their having attained an equivalent AQF qualification, such as different levels of responsibility, performing work of a different nature, performing

¹⁹⁹ *Independent Education Union of Australia* [2021] FWCFB 2051.

²⁰⁰ *Ibid* [653].

²⁰¹ Commonwealth submission dated 8 August 2022 [147] – [148].

²⁰² Commonwealth submissions dated 8 August 2022 [149] referring to ANMF submissions in reply dated 21 April 2022 [58]–[59].

²⁰³ *Ibid* [150] referring to Joint Employers submissions dated 4 May 2022 [24.10], [22.16], 196.

²⁰⁴ *Ibid* [151].

work under different conditions or ‘factors other than qualification that have a bearing on the level of skill involved in doing the work.’²⁰⁵

[157] The HSU agrees with the Commonwealth that external award relativities have never been a hard barrier in setting wages, and while qualifications in some cases provide a useful indicator of at least part of the skill involved in a job, the AQF framework is neither “the final answer in this respect and nor is skill the only, or even predominant consideration”, as recognised by the Commonwealth.²⁰⁶

[158] The HSU continues that an AQF-only focus, with an over-reliance on the C10, as it submits the ABI submissions urge, is obviously wrong. The HSU submits that the Commission would exercise real caution before giving the AQF significant weight in the context of the aged care industry, and refers the Commonwealth’s submissions as to the deficiencies introduced into the AQF since the structural efficiency principle was developed.²⁰⁷

[159] The ANMF submits that while it may be ‘descriptively correct’ that it is open to the Commission to align modern award rates with AQF levels, if what is being suggest is that the Commission should start with the AQF and only depart if ‘some good reason were shown for doing so’ this approach ‘may involve error’ as it would give the AQF a significance not attributed to it by the statute.²⁰⁸

2.5 Part E: Modern Awards Objective

[160] Section E sets out the Commonwealth’s submissions in relation to the modern awards objective. These submissions are summarised in Background Document 7—the Modern Awards Objective.

2.6 Part F: Amendments to classification structure

[161] This part of the Commonwealth’s submissions addresses amendments to the classification structures in the Aged Care, Nurses and SCHADS Awards.

[162] Paragraphs [210] to [212] set out findings from the Royal Commission on the need to ‘professionalise the personal care workforce’ and ‘review and modernise occupational and job structures’ so classification levels reflect competency, qualifications and complexity of the work.²⁰⁹

[163] Paragraphs [213] and [214] summarise expert evidence in relation to the classification structures. The Commonwealth note that Dr Charlesworth argued that the current classification structure is ‘rudimentary and compressed’ and any increase in minimum wages needs to be

²⁰⁵ Ibid [152].

²⁰⁶ HSU submissions in reply to the Commonwealth dated 17 August 2022 [19].

²⁰⁷ Ibid [21].

²⁰⁸ ANMF closing submissions in reply dated 17 August 2022 [485].

²⁰⁹ Commonwealth submissions dated 8 August 2022 [210], [212].

accompanied by a comprehensive skill and classification structure tied to training.²¹⁰ The Commonwealth further submit that the evidence Professor Smith and Dr Lyons argued that the Aged Care Award classification structures ‘lack relevant description and information, with the result that the work undertaken is not properly described and recognised in value.’²¹¹

[164] Paragraphs [215] and [216] describe the Aged Care Workforce Industry Council, which the Commonwealth notes is ‘currently working on a project to design the future structure of the aged care workforce.’²¹²

[165] Paragraphs [217] to [221] set out the classification changes sought by the HSU.

[166] The Commonwealth characterises the classification changes sought by the HSU as follows:

- ‘limit the application of Level 2 of the classification structure to PCWs with up to 6 months experience;
- describe PCWs at Level 4 as ‘Senior Personal Care Workers’ and specify that they may be required to assist residents with medication and hold the relevant unit of competency;
- recognise Specialist Care Workers, within level 6.’²¹³

[167] The Commonwealth notes that the Aged Care Award does not currently contemplate PCWs being employed at Level 6 and emphasises that employees at Level 6 exercise greater autonomy and responsibility compared to employees at Level 5, with the wage rate approximately 5.4 per cent higher than Level 5.²¹⁴ The Commonwealth further notes that the HSU’s application seeks to vary the classification definitions to include ‘Specialist Personal Care Workers’ and ‘Senior Recreational/Lifestyle activities officers’ within the Level 6 definition,²¹⁵ giving PCWs access to an additional level in the Award, with associated career progression and higher pay.²¹⁶

[168] The Commonwealth supports the HSU’s proposed variations and submits that due to increases in complexity in the clinical care needs of aged care recipients, more specialised personal care roles will be required, noting that the number of Australians living with dementia is projected to double from approximately 400,000 in 2021 to approximately 850,000 by 2058. The Commonwealth argues that ‘[e]stablishing a ‘Specialist Personal Care Worker’ role would

²¹⁰ Ibid [213] citing Expert Report of Dr Sara Charlesworth at Charlesworth, [13]; Supplementary Report of Dr Sara Charlesworth [16], [62].

²¹¹ Ibid [214] citing Expert Report of Associate Professor Meg Smith and Dr Michael Lyons [91].

²¹² Ibid [215].

²¹³ Ibid [217].

²¹⁴ Ibid [218].

²¹⁵ Ibid [219].

²¹⁶ Ibid [220].

recognise the increased need for direct care workers in aged care with specialised skills to manage the complexities of these care needs and remunerate them accordingly.²¹⁷

[169] The Commonwealth supports a classification structure that aligns with the AQF and any additional skills and training workers undertake over time, and submits that Certificate III and IV should be recognised as well as additional training undertaken in specific areas, such as units of competency.²¹⁸

[170] In paragraphs [222] to [229] the Commonwealth makes submissions on further classification variations that are open to the Commission.

[171] The Commonwealth submits that ‘it is open to the Commission to vary the classification structure of the Aged Care Award beyond what is sought by the HSU, to provide further opportunities for career progression of aged care workers’ and suggests this could include additional classification levels or additional pay points within a classification level.²¹⁹

[172] The Commonwealth notes that the definition for a Level 6 aged care employee currently states that it ‘...may require formal qualifications at post-trade or Advanced Certificate or Associate Diploma level and/or relevant skills training or experience’ and that the HSU’s application seeks to vary this definition to replace ‘Advanced Certificate’ with ‘Certificate IV’ and replace ‘Associate Diploma’ with ‘Diploma’. In contrast, the Commonwealth points out that the ANMF’s application includes a reference to Certificate IV within Level 5.²²⁰

[173] The Commonwealth emphasises that currently rates of pay for home care workers and residential care workers are ‘set by very different classification structures, despite doing similar work’ and submits that the Commission may wish to consider variations to the classification structure for home care workers in the aged care sector.²²¹

[174] The Commonwealth further submits that the Commission may consider other variations to the classification structures of the Awards if it is satisfied that variations are justified on work value grounds and necessary to achieve the modern awards and minimum wages objectives²²² and emphasises:

‘Qualifications would not be the only available reference point. The Commission’s predecessor tribunal has stated that the range of work functions performed, and the skills required should determine the appropriate number of levels in a classification structure.²²³ The Commission ultimately has broad discretion in this regard.’²²⁴

²¹⁷ Ibid.

²¹⁸ Ibid [221].

²¹⁹ Ibid [222].

²²⁰ Ibid [225] – [226].

²²¹ Ibid [227].

²²² Ibid [228].

²²³ *National Wage Case February 1989 Review Decision* (1989) 27 IR 196.

²²⁴ Ibid [229].

[175] In regards to the Commonwealth’s submissions on classification structure, the ANMF refers to its closing submissions in reply at [B.11] and [B.12] and says:

‘where in Cth S [226], the Commonwealth submits that, “*the ANMF’s application to vary the Aged Care Award would include reference to Certificate IV within Level 5,*” that should be understood as meaning reference to Certificate IV within Grade 5, which is the equivalent of Level 7.’²²⁵

Question 6 for all parties: Are there any corrections or additions to Background Document 6? Is it common ground that the material set out in Background Document 6 is uncontentious?

²²⁵ ANMF closing submissions in reply dated 17 August 2022 [488].