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Subject: FW: AM2020/99, AM2021/63 & AM2021/65 – Work value case – Aged Care Industry

Dear Associate

Please find attached amended report of A/Prof Smith and Dr Lyons.

The amended report incorporates the amendments referred to below and confirmed by A/Prof Smith at the time of giving her evidence.

A/Prof Smith also confirmed that the report is to be read as supplemented by the updated Tables 1 and 2 referred to below. Those updated tables are also attached for your convenience.

Regards

Nick White
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From: Nick White
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Cc: Philip Gardner <pgardner@gordonlegal.com.au>
Subject: AM2020/99, AM2021/63 & AM2021/65 – Work value case – Aged Care Industry

Dear Associate and Parties,

We refer to the report of Associate Professor Meg Smith and Dr Michael Lyons at page 3372 of the Digital Hearing Book.

In accordance with the Hearing Plan, A/Prof Smith is scheduled to give evidence on Monday 2 May.

A/Prof Smith and Dr Lyons have notified us that there are a few corrections to be made to their report. These are tabulated in the document **attached**. Counsel for the ANMF will ask A/Prof Smith to confirm that the report at page 3372 of the Digital Hearing Book is to be read subject to these corrections.

Further, to assist the Commission, A/Prof Smith and Dr Lyons have produced updates to Tables 1 and 2, which appear at pages 4 and 5 of their report, so as to incorporate the most recent ABS data. Those tables are **attached**. Counsel for the ANMF will ask A/Prof Smith to confirm that her report at page 3372 of the Digital Hearing Book is to be read as supplemented by those updated tables.

If you have any queries, please let us know.

Regards

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**Aged Care Award 2010
Nurses Award 2010
Fair Work Commission matters
AM2020/99, AM2021/63 and AM2021/65
Report by Associate Professor Meg Smith and Dr Michael Lyons
School of Business
Western Sydney University
October 2021 (amended 2 May 2022)**

Preliminary

1. This report is a response to instructions from Gordon Legal, on behalf of the Australian Nursing and Midwifery Federation, in relation to Fair Work Commission (FWC) matters AM2020/99, AM2021/63 and AM2021/65. Three sets of instructions were received, the first dated 28 July 2021, the second 15 September 2021, the third 21 October 2021. The instructions are Annexures A, B and C. Appended to the set of instructions dated 15 September was a Dropbox link to the statements of Kristen Wischer and Leigh Svendsen. We have also reviewed relevant labour law, statistical data, peer reviewed research and industry and government reports. To the extent that we have relied on such material that was not supplied to us by Gordon Legal, we have explicitly cited the material in the course of this report.

2. The authors of this expert witness report, Associate Professor Smith and Dr Lyons, acknowledge they have read and understand the requirements of the Expert Evidence Practice Note including the Harmonised Expert Witness Code of Conduct, and agree to be bound it. We affirm that this report complies with the Code of Conduct. Our understanding of the findings and conclusions of relevant academic research and other studies cited in the report inform the opinions we express in the report. Where academic research made findings and/or conclusions that differ from the academic research cited and relied upon, we have noted this in the report. The opinions expressed in this report are our independent judgment within our areas of expertise. The opinions expressed in this report are the agreed opinions of Associate Professor Smith and Dr Lyons. Both Associate Professor Smith and Dr Lyons have applied their minds to the analysis and reasoning contained in this report, such that both of us adopt the whole of the reasoning and conclusions in this report as our own.

3. Our curriculum vitae are attached as Annexures D (Associate Professor Smith) and E (Dr Michael Lyons).

4. Associate Professor Meg Smith has published and presented widely in the field of employment relations with a specific interest in gender pay equity. This work has included research consultancies for state and federal government departments and agencies and the provision of expert opinion and submissions to tribunal and parliamentary inquiries. Associate Professor Meg Smith's expertise in the concept of gender undervaluation was reflected in her appointment by the FWC to complete a research-based independent report to assist parties to the proceedings under Part 2 – 7 of the Fair Work Act 2009 (Cth) (together with Professor Andrew Stewart and Dr Robyn Layton). She has previously undertaken research case studies, highlighting undervaluation, that were the basis of examination in the NSW Pay Equity Inquiry. Most recently (September 2020) she co-edited a special issue of the *Journal of Industrial Relations* assessing the application of the principle of equal pay for work of equal value, as expressed in the International Labour Organization (ILO) Equal Remuneration Convention (No.100) of 1951. Based on case studies from Australia, New Zealand and three East Asian countries (Japan, South Korea and China), the special issue examined the ways in which this principle has been given effect within different regulatory regimes, identifying limitations to its incorporation into legislation and wage-setting processes, barriers to its implementation in practice and inconsistencies in its application over time. In February 2020 Associate Professor Smith participated in a specialist workshop on aged care services and industrial relations, convened by Peter Rozen QC, Senior Counsel Assisting the Royal Commission into Aged Care Quality and Safety.

5. Dr Michael Lyons has expertise in the areas of Australian industrial relations, workplace relations, including issues of gender relations and equality and with a particular interest in the employment relations of the children's services industry. He has researched and published in these areas. His academic qualifications and research and publications details are in his annexed curriculum [REDACTED]. Dr Lyons has previously applied his expertise in identifying undervaluation of award classifications in evidence to both the Industrial Relations Commission of New South Wales (IRC of NSW) and the Queensland Industrial Relations Commission (QIRC). In both matters, the respective Full Bench accepted his evidence that undervaluation existed (see *Re Miscellaneous Workers' Kindergartens and Child Care Centres etc (State) Award* (2006) 150 IR 290 at [101-108,199]; *LHMU v Children's Service Employers Association* (2006) 182 QGIG 318).

Question 1 How is the concept of a gender pay gap (“GPG”) in Australia addressed in scholarly literature and available research studies, and what is your opinion in relation to whether such a GPG exists?

6. In addressing this question, we will initially address the concept of the gender pay gap. In our opinion the “gender pay gap” (GPG) is a ratio that converts average female earnings into a proportion of average male earnings to calculate the pay gap between the sexes. There are a number of different ways to measure the gap, with the range of these measures shaped by variables including whether the earnings measure is based on ordinary or total earnings, weekly or hourly earnings and the inclusion or otherwise of managerial earnings.
7. In Australia the most utilised measure of the GPG is the Australian Bureau of Statistics (ABS) adult full-time ordinary time average weekly earnings (AWOTE) data, as this reflects “like” earnings of adult women with “like” earnings of adult men. It is a measure that is limited to ordinary time earnings, for full-time employees and consequently excludes the earnings of part-time employees. Using other ABS data, such as average weekly earnings (AWE) or full-time adult average weekly earnings (FTAWE), or data based on hourly earnings produces different results to that of the AWOTE data.
8. Acknowledging the diversity of measures of the GPG, the measurement of the GPG in Australia is usually made by using Australian Bureau of Statistics (ABS) data. Two ABS surveys are most commonly used: the Average Weekly Earnings, Australia survey (catalogue number 6302.0) and the Employee Earnings and Hours, Australia survey (catalogue number 6306.0). These two survey were cited by the FWC in the 2019-20 Annual Wage Review as providing measures of the GPG (*Annual Wage Review 2019-20* [2020] FWCFB 3500 at [401]) Adult “full-time ordinary time average weekly earnings” (AWOTE) is more commonly used in the public domain rather than other measures of income such as adult full-time average weekly earnings (FTAWE), because AWOTE excludes earnings such as overtime payments (WGEA 2021, p. 2). Given the uncertainty about the impact of the COVID-19 pandemic, more recent data releases from the Australian Bureau of Statistics are based on seasonally adjusted data rather than trend data (ABS 2020).
9. Tables 1 and 2 provides an overview of the variety of measures used to assess the GPG.

Table 1 Measures of pay differentials between females and males from ABS Average Weekly Earnings and Employee Earnings and Hours surveys.

Measure of earnings	Females (\$)	Males (\$)	Ratio of female to male earnings
Average Weekly Earnings (AWE) survey measure (May 2021) (seasonally adjusted)			
Average weekly earnings (AWE) Average weekly total earnings of all employees	1069.10	1555.30	0.69
Average weekly earnings for full-time adults (FTAWE)	1597.80	1921.10	0.83
Average weekly ordinary time earnings (AWOTE) for full-time adults	1575.50	1837.20	0.86
Employee Earnings and Hours Survey measure (May 2018)			
Average weekly ordinary time cash earnings (AWOTCE) for full-time non-managerial employees paid at the adult rate	1458.60	1677.30	0.87
Average hourly ordinary time cash earnings (AHOTCE) for full-time non-managerial employees paid at the adult rate	38.70	43.70	0.89
Average weekly total cash earnings (AWCE) for non-managerial employees	1017.80	1451.50	0.70
Average hourly total cash earnings (AHCE) for non-managerial employees	36.30	41.60	0.87
Average weekly total cash earnings (AWCE) for all full-time non-managerial paid at the adult rate	1480.70	1788.00	0.83
Average hourly total cash earnings (AHCE) for all full-time non-managerial employees paid at the adult rate	38.90	44.30	0.88

Source: Based on Pointon, Wheatley, and Ellis et al(2012), Layton, Smith and Stewart (2013, p. 80) and updated to include more recent data from ABS Cat. No. 6302.0 (Average Weekly Earnings Survey) (ABS 2021) and from ABS Cat. No. 6306.0 (Employee Earnings and Hours Survey) (ABS 2019).

Table 2 Differing measures of the gender pay gap.

Measure	GPG (%)	Main features and limitations
Average weekly earnings (AWE) Average weekly total earnings of all employees	31.3	Includes all weekly earnings for all employees but makes no adjustment that a much larger proportion of women work part-time than men – and are therefore paid for fewer working hours.
Average weekly earnings for full-time adults (FTAWE)	16.8	Includes all weekly earnings for all full-time adult employees but makes no adjustment for the fact that men are more likely to work and be paid overtime than women.
Average weekly ordinary time earnings (AWOTE) for full-time adults	14.2	Excludes overtime earnings. Part-time employees are also excluded, the majority of whom are women in lower paid occupations.
Average weekly ordinary time cash earnings (AWOTCE) for full-time non-managerial adult employees	13.0	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly ordinary time earnings thus excluding overtime.
Average hourly ordinary time cash earnings (AHOTCE) for full-time non-managerial adult employees	11.4	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on hourly earnings.
Average weekly total cash earnings (AWCE) for all non-managerial adult employees	29.9	Includes all weekly earnings for all non-managerial employees but makes no adjustment that a much larger proportion of women work part-time than men – and are therefore paid for fewer working hours
Average hourly total cash earnings (AHCE) for all non-managerial adult employees	12.7	Includes all weekly earnings for all non-managerial employees. Based on hourly earnings thus takes account, to an extent, of the larger proportion of women work who part-time.
Average weekly total cash earnings (AWCE) for full-time non-managerial adult employees	17.2	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly total earnings thus including overtime.
Average hourly total cash earnings (AHCE) for full-time non-managerial adult employees	12.2	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly total earnings thus including overtime. Based on hourly earnings,

Source: Based on Pointon, Wheatley and Ellis et al (2012), Layton, Smith and Stewart (2013, p. 80) and updated to include more recent data from ABS Cat. No. 6302.0 (Average Weekly Earnings Survey) (ABS 2021a) and from ABS Cat. No. 6306.0 (Employee Earnings and Hours Survey) (ABS 2021b).

10. In our opinion the available data indicates a persistent GPG for Australia. At the time of writing, the most recent ABS earnings data is that of May 2021, released in August 2021 (ABS 2021a, catalogue number 6302.0). This data shows the GPG in Australia was 14.2 per cent, as full-time adult male AWOTE was \$1,837.00 while full-time adult female AWOTE was \$1,575.50; an earnings gap of \$261.50 (ABS 2021a).

11. The use of earnings estimates for all employees (as with the Average Weekly Earnings measure (AWE)) results in a GPG that is about two times greater than the result of an analysis that is confined to full-time employees only (as with the AWOTE or FTAWE measures). This is because a higher proportion of working women are employed on a part-time basis to that of men and consequently women work fewer average hours each week than men (ABS 2021a¹; Feng, Gerrans and Moulang, Whiteside et al 2019). Recent analysis of the Australian labour market comparing the period 1975-2015 indicated that employment is more evenly distributed through the rise of female and part-time employment but there is also greater inequality in hours worked due to the growth of part-time employment (Borland and Coelli 2016, p. 520). Birch and Preston (2020, p. 344) observe the surge in male part-time employment from 2015. The use of hourly earnings to calculate the GPG results in a lower GPG noting that men record a higher number of paid hours than women (ABS 2021b). These matters noted, pay gaps are evident in hourly, weekly and annual wages (KPMG 2019).
12. There are variations in the GPG between states and territories and industries and the GPG is higher in the private sector compared to the public sector. The AWOTE data also shows a GPG in all Australian states and territories. Western Australia had the widest GPG at 21.9%, South Australia the lowest at 7.0%. The AWOTE data shows a different size of the GPG between public sector employment and private sector employment. The GPG in the private sector is higher than the Australian average, whereas the GPG in the public sector is lower than the Australian average. The GPG was 17.5% in the private sector and 10.8% in the public sector (WGEA 2021). Since 2001 the GPG in the private sector has varied between a low of 16.6 per cent and a high of 22.1 per cent. The variation in the GPG for the public sector over the same time period has been between 10.5 per cent and 13.5 per cent (WGEA 2021).
13. In our opinion earnings data has consistently shown a GPG in Australia. The ABS data shows variations in earnings over time which produces variations in the GPG. In February 2021, the Workplace Gender Equality Agency (WGEA) observe between May 2001 and May 2021, Australia's national gender pay gap has hovered between 13.4% and 18.5% (WGEA 2021). Similarly, Charlesworth and Smith (2018) charted the GPG from 1981 to 2018, where it swung between 14.6% and 20.2%, with fluctuation over that period. Birch and Preston (2020, p. 357) in assessing the gender pay gap between 2013

¹ For non-managerial employees paid at the adult rate of pay, the average weekly total hours paid for males was 35.6, for females 28.8.

and 2019 noted that the average growth rate for female AWOTE was 2.9%, while the average growth rate for male was lower at 2.5%, contributing to a slight convergence in the gender pay gap (to 14.9% in May 2019).

Question 2 If your opinion is that such a GPG does exist, what are the contributing factors to the GPG in Australia?

14. In the following section of this report we initially address the complexities in the research that assesses the contributory factors to the GPG in Australia.
15. The scholarship assessing the GPG often brings together international and Australian scholars as evidenced in journal special issues on the topic: in particular, a 2015 issue of the *Cambridge Journal of Economics*, a 2019 collection in *Gender, Work and Organization*, and a 2020 special issues of the *Journal of Industrial Relations* have highlighted the dynamic nature of gender pay inequalities in a range of countries, and also deepens the resources relied upon by researchers to understand the GPG. Well cited measures evaluating the GPG have been developed by international scholars and are utilised in research examining Australian earnings data.
16. In broad terms there are two approaches to assessing the contributory factors to the GPG. The first approach is known as the standard economics, orthodox economics, econometric or human capital approach. The alternative way to analyse factors influencing the GPG is known variously as the institutional, sociological, or heterodox economics approach. The orthodox economic approach assumes women make a “rational choice” to work in lower paying occupations because of their limited “investment” in human capital (education, training, and paid work experience). Men, in contrast, invest in their human capital and therefore seek employment in higher paying occupations. The result of these decisions produces gender segmentation or sex segregation of the labour market, which is a major influence on the GPG. The alternative approach focuses on institutions and social processes and not individuals. The institutional approach suggests there is an array of organisational, social and labour market factors that impact on women’s occupational choices. We will outline each of these approaches in turn.
17. We address the issue of the relationship between occupational segregation and the GPG separately as part of this assessment as this attracts significant attention in the scholarship.

Standard Economics

18. Layton, Smith and Stewart (2013) identify the key features of the standard economics approach as being to establish at an aggregate level whether women receive the same labour market rewards as men with comparable qualifications, experience and personal characteristics. These studies use decomposition or simulation econometric techniques which are, at times, also described as regression analysis. These studies identify “explained” and “unexplained” differences in earnings. These analyses may assess what proportion of earnings differences, among women and men, can be ‘explained’ by the factors included in the analysis, such as differences in the levels of education and workforce experience. Researchers have variously termed the variables that can be explained as ‘wage-related characteristics’, ‘productivity-related characteristics’ or ‘endowments’. To this data, researchers apply a ‘human capital’ or ‘endowment’ methodology in which the relative ‘returns’ to men and women in the form of earnings or income are compared against their relative ‘investments’ in education and work experience. Studies may also take account of demographic factors, job characteristics, industry and occupation (Layton, Smith and Stewart 2013; Perales 2013).

19. Within standard econometric analysis of the GPG, that portion of the GPG that cannot be explained is often termed the unexplained differences in earnings and is identified as being attributable to gender or an indication of gender discrimination. In these studies, the different returns received by men and women with the same characteristics are generally interpreted as measuring ‘discrimination’, but may also include other factors. As Cassells, Vidyattama, and Miranti et al (2009, pp. 4–5) note, the proportion of the wage gap that cannot be explained by ‘rewards’ for wage-related or productivity-related characteristics (or endowments) represents ‘the extent to which women are paid less than men once all other measurable characteristics are held constant, and may include discrimination as well as any other unobserved differences between men and women’.

20. Within the standard economics approach to assessing the gender pay gap, there is significant discussion about the research methods used, the sensitivity of the data sets used, and assumptions made in conducting the analysis. Different types of analysis can produce different results, including what influences the GPG and often the size of the gap. Providing reasons for a GPG in an industry, industry sector or occupation is complex and subject to different analytical methods and assumptions with the statistical procedures used (Romeyn, Archer and Leung 2011).

21. Cassells, Vidyattama, and Miranti et al (2009) provide an explanation of various simulation and decomposition methodologies utilised by Australian and international scholarship, noting the theoretical and empirical considerations that inform the selection of variables to include in the decomposition of the GPG being undertaken. Layton, Smith and Stewart (2013) assess those studies that have a particular focus, specifically education and labour market experience, personality characteristics, age, occupational segregation, industry segregation, firm size and income distribution.
22. The overview and evaluation of simulation and decomposition techniques provided by Cassells, Vidyattama, and Miranti (2009) is extended in one of the more recent detailed analysis in Australia, that undertaken by KPMG (2019) in partnership with a number of stakeholders including the Diversity Council of Australia and the Workplace Gender Equality Agency. There is particular attention to the following three approaches developed by international scholars; the Olsen and Walby simulation technique, the Oaxaca-Binder decomposition technique, and the Juhn-Murphy-Pierce decomposition. The KPMG analysis (2019, p. 22) utilises the Olsen and Walby simulation technique but carefully outline the limitations in modelling approaches. Reflecting the different approaches taken across econometric analysis, a 2017 report examining the gender pay gap in New Zealand (Pacheco, Li, Cochrane 2017) utilised the Oaxaca-Binder decomposition technique.
23. Layton, Smith and Stewart (2013) note the differences in data, design, methodology and changing labour market conditions of Australian studies in acknowledging that such studies have produced a range of results. There is a need for caution in directly comparing the results of any two studies. Austen, Jefferson and Preston (2013) argue different estimations of the size of the GPG are due to contrasting understandings of specific jobs and a group of jobs categorised as occupations, the meanings attached to the terms “value” and “productivity”. However, the results of the studies have been consistent over a number of years in their general finding that there is a significant, persistent, unexplained wage gap between men and women that is attributed to discrimination or other unobserved characteristics. The findings show that only a small proportion of the GPG can be attributed to differences in the productivity-related characteristics of men and women. Cassells, Vidyattama, and Miranti et al (2009, p. 5) assess that ‘overall there is substantial evidence to suggest that a combination of

discrimination or other unobserved characteristics play an important role in maintaining the wage gap in Australia’.

24. Analysis of the GPG in 2019 is one of the most recent econometric analysis of the Australian GPG (KPMG 2019). This study replicated the econometric methodology and techniques favoured in standard economics and human capital approaches. Namely the study estimated the factors that impacted wages (2017 data) and simulated the changes that would arise if women’s levels of these attributed were in line with men Australia (KPMG 2019, p. 18). The results of this approach showed that the most significant component contributing to the GPG in Australia was gender discrimination, accounting for 39% in 2017 (KPMG 2019, p. 25)

Occupational segregation

25. Within standard economics and human capital examinations of the Australian GPG there is a particular focus on the relationship of occupational segregation to the GPG. This relationship is an area of complex and contested engagement in the available scholarship.
26. Occupational sex segregation refers to the variance in distribution of women and men between occupations in the labour market, where some occupations are dominated by men and other occupations are dominated by women (while some occupations have a relatively even distribution of the two sexes). The ABS Australian and New Zealand Standard Classification of Occupations (ANZSCO) (catalogue number 1220.0) is a skill-based classification used to classify all occupations and jobs in the Australian and New Zealand labour markets.² The structure of ANZSCO has five hierarchical levels – major group, sub-major group, minor group, unit group and occupation. The classifications at the most detailed level of ANZSCO are termed “occupations”. These are grouped together to form “unit groups”, which in turn are grouped into “minor groups”. Minor groups are aggregated to form “sub-major groups” which in turn are aggregated at the highest level to form “major groups”. One, two, three, four and six-digit codes are assigned to the major, sub-major, minor and unit groups, and occupations respectively. For example, the six-digit code for the occupation “Registered Nurse (Aged Care)” is 254412, they are part of the four-digit unit group “registered nurses” 2544, which are

² ANSCO 2019 (Version 1.3) introduced some flexibility in skill levels. So an Aged Care Personal Care Worker (423111) could be skill level 4 or level 3. We note this issue in response to Question 8. It is anticipated that ANSCO 1.4 will be released in November 2021.

part of the three-digit minor group “midwifery and nursing professionals” 254, which are part of the two-digit sub-major group “health professionals” 25, which are part of the one-digit major group “Professionals” 2. There are eight major groups in this classification.

27. Of the eight major groups, women in Australia constitute a notable majority – 60 per cent or more – in three occupational groups (Clerical and administrative workers, Community and personal service workers, and Sales workers); men constitute a notable majority in four occupational groups (Managers, Labourers, Technicians and trades workers, and Machinery operators and drivers); while one occupational group (Professionals) has a more even gender distribution (WGEA 2019).

Table 3: ANZSCO major occupational groups, by percentage female

<i>Occupational group</i>	<i>Female %</i>
Clerical and administrative workers	75.6
Community and personal service workers	71.4
Sales workers	60.6
Professionals	55.4
Managers	36.3
Labourers	34.7
Technicians and trades workers	15.1
Machinery operators and drivers	9.5
All occupations / All persons	47.0

Source: WGEA (2019)

28. Coelli’s (2014) research reaffirms the debate in the academic literature over the influence of gender-based occupational segregation on the GPG. Coelli (2014) provides a comprehensive analysis of the different findings that have merged from the scholarship assessing the relationship between occupational segregation and the GPG. In short, some studies conclude that occupational differences do not contribute to the gap with some studies concluding that occupational segregation has the opposite effect, so that if occupations were desegregated and no longer had unequal representations of men and women, women’s pay would be lower, not higher. Other studies conclude the feminisation of an occupation was related to significantly lower wage rates (see Coelli 2014, pp. 44-45 for review of studies).
29. Coelli’s assessment (2014) is that the disparate findings are linked to the level of occupational data used. Using broad occupational classifications (e.g. ANZSCO major

group – “one-digit” level and sub-major group “two-digit” level) tend to find lower GPGs, and suggest the gap is “explained” by individual human capital and demographic characteristics. Studies using more detailed occupational classifications (e.g. ANZSCO minor group – “three-digit” level and unit group – “four-digit” level) find higher GPGs, much of which is “unexplained” by work-related characteristics (Coelli 2014; see also discussion of the importance of disaggregated occupational data in Borland and Coelli 2016).

30. The studies that conclude occupational segregation has only a minor influence are criticised because they measure occupations “quite coarsely”; at either the ABS ANZSCO “one-digit” or “two-digit” level (Coelli 2014, p. 45). Using the one-digit classification generates only a maximum of nine occupational groups, and using the two-digit classification generates only a maximum of 50 occupational groups. Whereas using the four-digit classification generates 474 occupational groups (Coelli 2014, p. 60, endnotes 1 and 15). Coelli’s (2014, p. 50) explains the shortcomings of using the ANZSCO two-digit level:

“Moving to more disaggregated occupational groupings is vitally important to understanding differences across genders in occupations and wages. For example, it is only by breaking occupations down to the three-digit level that one is able to take account of women being over-represented among less well-paid nursing, while men are over-represented among the very high-paying medical practitioners group. Both occupations are within the ‘health professionals’ two-digit occupational category.”
31. Reasons for the different findings from these studies are partly due to lack of detail in the broad occupational data. For instance, women are relatively well represented in the ANZSCO major group 2 Professionals (see Table 3). Yet there are differences in the representation of women and men across the more detailed occupational classifications of the major group Professionals.
32. Coelli’s (2014) analysis of the Household, Income and Labour Dynamics in Australia (HILDA) survey data by disaggregating occupations to the three and four digit levels shows the influence of gender-based occupational segregation is much more evident, and increases the more disaggregated occupational groupings become (Coelli 2014, p. 49, Table 1). However, the extent of the influence varies depending on the statistical estimation method applied (i.e. linear or non-linear) and if various “industry controls” are applied, and was found to “explain” between 12 per cent and 51 per cent of the GPG. Notwithstanding the variations in the results of his analysis, Coelli (2014, p. 54) concludes: “occupational differences do indeed contribute to the gender wage gap”.

33. In summary, it is our opinion that female dominated occupations tend to be paid less than male dominated occupations, taking into account educational requirements and other factors that can influence worker “productivity”. As women increase their share of an occupational workforce, relative pay rates decline. The impact of occupational segregation on the GPG is more apparent when disaggregated occupational data is relied upon. In our opinion, this means gender differences in occupational workforce composition is an important contributing factor on the size of the GPG.

Institutional, Sociological Approaches

34. There is considerable interest in international and Australian research to broaden the explanatory framework for the GPG (Milner, Pochic and Scheele et al, 2019; O’Reilly, Smith and Deakin et al, 2015). Research addresses the factors that may contribute to the unexplained gap in earnings identified by econometric analysis, in addition to the factors that may contribute to differences in productivity-related characteristics between women and men.
35. Rubery and Grimshaw (2015) provide a comprehensive review of research following 40 years of a policy commitment to equal pay. The review identifies sociologically-themed research that addresses the labour market impact of women’s socially determined domestic, caring and family roles, the role of gender relations in shaping male breadwinner models of wage fixing and the determination of work value, and processes of social closure and exclusion. Institutional perspectives on gender pay equality focus on regulatory frames, rules and norms, and institutional stakeholders, while organisational perspectives address workplace pay practices. These approaches to understanding the GPG incorporate a range of research disciplines and perspectives not readily included in statistical analyses, and thus allowing for better understanding of the factors that contribute to GPGs (Jefferson and Austen 2015, pp. 126-127). This research frequently examines the practices of setting wages and not just wage levels.
36. Preston and Yu (2015) note alternative explanations for wage outcomes to those of “orthodox” economics. Specifically, normative or non-economic perspectives emanating from sociological research that acknowledge certain jobs are undervalued. Such jobs tend to be filled by women (Preston and Yu 2015, p. 28). Austen and Jefferson (2015) are critical of methods used in orthodox economics to explain the GPG. They contrast the

econometric or human capital approach (i.e. mainstream economics) with institutional (i.e. sociological) analysis of gender-related patterns of pay and work.

37. Austen and Jefferson (2015) are also critical of the units of analysis applied in mainstream analysis, as it focuses on either the individual worker or a person's job. Hence, "the notion that particular work undertaken within specific occupations might be under-valued cannot be accommodated". Conversely, undervaluation can be accommodated by institutional analysis because it recognises that wage outcomes are influenced by "specific social structures" (Austen and Jefferson 2015, pp. 411). Austen and Jefferson (2015, pp. 409-410) conclude the mainstream economics approach disregards the influences of gender-based occupational segregation.
38. Romeyn, Archer and Leung's (2011) report reproduces Table 3.4 of the International Labour Organization report, "Equality at Work" (ILO 2007), which summarises how the GPG is contributed to by undervaluation of work. In addition to the effects of worker, industry and workplace characteristics on the GPG, the table also highlights "indirect" influences: undervaluation of the skills, competencies and responsibilities associated with "female" jobs; gender biases in job evaluation methods; gender biases in job classification and job grading systems; and gender biases in job remuneration systems (Romeyn, Archer and Leung 2011, p. 49, Table 3.1).
39. In summary, the research that assesses institutional and sociological determinants of the GPG identify the importance of the following factors:
 - differences in the types of jobs held by men and women and the method of setting pay for those jobs
 - structures and workplace practices which restrict the employment prospects of workers with family responsibilities
 - the ongoing undervaluation of feminised work and skills (Romeyn, Archer and Leung 2011, p. 60) Pointon, Wheatley and Ellis et al 2012, pp. 3–4; Layton, Smith and Stewart 2013).
40. In addressing the contributory factors to the GPG we have reviewed contrasting research approaches to the resolution of this question, namely standard economics, or human capital approaches, and approaches that place a focus on institutional and sociological explanations. In our opinion the GPG cannot be fully explained by differences in human capital and productivity related characteristics and there are limitations in human capital

explanations for the GPG. Analysis of the GPG requires analysis of the social structures that impact on the setting of wages.

41. The research that applies institutional and social aspects of employment and labour market behaviour are better able to detect reasons for the GPG, as they do not have the behavioural assumptions and methodological limitations of other approaches. In our opinion the GPG arises from the intersection of the following factors: differences in the returns received by women, compared to men, for productivity related characteristics; occupational segregation and the undervaluation of feminised work. In referring to the term 'feminised' as a descriptor we note that this term reflects two influences. This includes in relation to an occupation a description of an occupation that is predominantly made up of women and an equating of particular areas of work as extensions of traditional female gender roles, especially related to domestic labour, care-giving and reproduction.

Question 3 How is the concept of gender-based undervaluation in Australia addressed in scholarly literature and available research studies, and what is your opinion in relation to whether there is such gender-based undervaluation?

42. In responding to Question 3, the following topics are discussed: the interchangeable use of the term gender-based undervaluation with other related terms, the meaning given to gender-based undervaluation and the processes through which it may occur. In answering this question we primarily exclude reference to that literature that assesses the use of the term in industrial proceedings, which we address in our response to Question 5.
43. The terms "gender-based undervaluation" is utilised in both research and industrial assessments of women's wages and employment. At times the term "undervaluation on a gender basis" is used in comparable research and industrial assessments. The terms are used interchangeably and in the context of women's wages and employment, the explicit use of the term "gender" is often omitted in favour of a simple reliance on the term undervaluation.
44. Grimshaw and Rubery (2007, p. v) define undervaluation as "a higher quality of labour for a given wage". In practice, this means employees may offer a higher level of effort, skill or commitment for a given wage level, or the job itself may require a higher level of effort or skill than might be reasonably expected at that wage level. They argue undervaluation of women's work is a thread which links together the three causes of the

gender pay gap: occupational segregation, discrimination and women's unequal share of family responsibilities. Similarly, Perales (2013, p. 601) describes gender-based undervaluation of work occurring when "[a] higher value is attributed to jobs or occupations typically carried out by men or associated with male-stereotyped skills, and so discrimination does not take place against individuals but against the types of jobs that they do". In other words, male-dominated occupations, or stereotypical male tasks, are rewarded more highly than "women's work".

45. Grimshaw and Rubery (2007, pp. 7-13) suggest undervaluation of work, tasks and occupations can occur in several ways. Firstly, payments for a given job or occupation are weighted towards rewarding characteristics most likely to be found among men. For example, higher pay is given to jobs requiring the use physical strength, and/or lower pay is given to jobs requiring high tolerance of repetitive, but demanding, work. Secondly, women are employed in jobs or occupations which are themselves undervalued. For example, female secretarial staff are paid at a lower rate than male manual workers, even though the former were required to have higher qualifications and undertake more complex work than the latter. Thirdly, undervaluation can be due to an historical legacy. That is, the low status of many tasks performed by female-dominated work still reflects gender-based attitudes of skill that prevailed in previous decades. These attitudes were a reflection of men being the family "bread winner", and hence deserving of a "family wage". The historical evolution of the skill level attached to the work and tasks in female-dominated occupations is important, for once jobs become "sex typed", a complex process of institutional "discrimination" denies equal occupational opportunities for the sexes.
46. Grimshaw and Rubery (2007) suggest a number of reasons for the undervaluation of female-dominated work in the United Kingdom. Firstly, they refer to an assumption that women are not the primary income earners for their household, and the concomitant presumption that men require a "family wage". The result is that the sex of the worker shapes wage outcomes, so that women's work is assessed by applying social norms rather than the demands of the job tasks (Grimshaw and Rubery 2007, pp. 22-23). Secondly, they refer to the sex segregation of occupations and the "invisibility" of skills. As sex segregation makes it much more difficult to directly compare the relative skills or contributions of employees in gender-skewed occupations, undervaluation can become embedded in seemingly gender-neutral pay and grading hierarchies within firms, and in wage differentials between sectors and organisations. For instance, most female-dominated work produces a service and not a good. Hence, it can be difficult to

distinguish between work-related skills and social behaviour required to relate to other humans outside the workplace (especially children, or the ill, infirmed or aged). The result is that the skills applied in female-dominated jobs are not always visible when work value is assessed. Thirdly, even when skills are recognised, they can still become undervalued because “soft skills” (e.g. communication, emotional labour, relationship building and the like) are “devalued” when compared with traditional male-type skills (e.g. technical expertise, physical strength, responsibility for financial and capital resources). When undervaluation is “institutionalised” in these ways, the effects are magnified if there are few opportunities for promotion or pay advancement in the occupational wages structure (Grimshaw and Rubery 2007, pp. 59-60).

47. In examining the processes underpinning undervaluation, Bender and Pigeyre (2016, pp. 268-270) contend that undervaluation occurs when work value is assessed with gender-biased assumptions. In a specific study of job evaluation, Bender and Pigeyre (2016) found the job evaluation process undervalued the job demands at the bottom of the hierarchy (archetypical female work) and overvalued job demands at the top of the hierarchy (archetypical male work). The former was partly due to a failure to recognise the degree of problem solving involved, including anticipating conflict situations and other problems, and acting before they occur. The latter was partly due to the evaluation criteria focusing on financial and business demands.
48. Koskinen Sandberg (2017, p. 158) notes that undervaluation is not necessarily a result of deliberate actions, as it is often systemic and inadvertent:
“Institutionalized undervaluation refers to how the undervaluation of women’s work is embedded in the formal structure of wage determination, such as collective agreements. Institutionalized undervaluation originates in the gendered understandings of appropriate wages for work conducted by men and women – that is, wages as a social practice. However, it has become a part of the formal structure and the gendered nature of the structure often remains invisible and unrecognized.”
49. Rather than being by way of conscious, deliberate action, wages are influenced by “cultural understandings” of jobs and employee groups, and she argues the “intertwining inequities” of gender segregation, cultural gendered valuations attached to jobs, and other social power influences are “mutually enforcing mechanisms”. These influences create a “gender-neutral legitimacy”; absences of gender-related considerations deny the importance of socially constructed understandings of gender. Koskinen Sandberg (2017, p. 158) further argues gender neutrality “hides the underlying gendered valuations that are present in job classifications and the hierarchy (re)produced by job evaluation”.

50. Bender and Pigeys (2016) show how social norms about paid work can influence job evaluation systems, to the disadvantage of female-dominated work. Koskinen Sandberg (2017, p. 168) likewise found organisational job evaluation and pay systems often do not correctly reflect the actual demands of work or performance on the job, as they can be part of a complex gendered process that attaches a lower value to work performed by women.
51. Researchers adopting the institutional approach have made some progress toward understanding how work, tasks and occupations become undervalued. David Peetz (2015; 2017) argues undervaluation is partly explained by “social norms”. Social norms are the attitudes or values that shape behaviour of individuals and groups about what is desirable, and also perceptions about what is appropriate behaviour in a given context; “the way we do things around here” (Peetz (2017, p. 5). Hence, norms are subjectively determined. In the employment context, norms influence how work is valued.
52. Peetz (2015) examines the impact of stereotypical gender attitudes of skill, and notes they are more subjective than objective. Peetz (2015) argues sex-based stereotyping can be a major reason for the undervaluation of jobs and tasks performed primarily by women or work perceived as intrinsically “feminine” in nature. The tasks performed by, and skills applied in, female-dominated occupations – such as care-giving, manual dexterity, human relations skills, and working with children – are often viewed as being of lesser value than the tasks and work performed in male-dominated occupations. If there is a resemblance between the activities women historically perform in households and the work of a female-dominated occupation, norms holding that domestic unpaid labour is unskilled can influence how the paid labour is valued (Peetz 2017, p. 12). For example, women have a “natural” predilection for communication and caring due to their role as mothers (Grimshaw and Rubery 2007, p. 60).
53. Price and Colley (2017) examined how gendered attitudes can apply in the Australian public sector. They looked at professional librarians in the Queensland public service, and found “systemic gendered” influences are evident. In assessing the skill in the setting, Price and Colley (2017, pp. 142-43) critiqued the application of the Queensland public service job evaluation system. The system has three dimensions: expertise, judgement, and accountability. Price and Colley (2017) contend, despite an “aura of objectivity”, women in professional grades in the Queensland public service are

disadvantaged relative to men as the more male-dominated a professional classification becomes so does the greater proportion of workers in higher-level grades. Price and Colley (2017, p. 148) comment:

“These patterns suggest that there was something particular about female domination of a profession that made it tend toward bunching in the lower classifications. The range of skills and experiences of librarians and other female-dominated professionals did not appear to be adequately recognized or rewarded in the career structure, in comparison with the wages that male professionals enjoyed.”

54. Therefore, social notions of skill influence classification profiles, which are themselves influenced by the gender profile of the classification. The three elements of skill – skill in the workers, skill in the job or work, and skill in the setting – are not mutually exclusive if any one of these is shaped by gender-biased attitudes (Price and Colley 2017, p. 151).
55. In our opinion gender-based undervaluation and related terms refer to work value practices that are impacted by gender and which contribute to a failure to recognise work value in assigned wages. The relation between gender and the valuation of work is multi-dimensional as evident in both industrial and research assessments of undervaluation. Industrial assessments of undervaluation and its relation to gender have placed weight on inadequacies in the description and classification of work, the absence of work value assessments, incomplete or inadequate work value assessments and the impact of normative assumptions about feminised areas of work on the industrial value of the work. Research assessments of undervaluation examine how male-dominated occupations, or stereotypical male tasks, are rewarded more highly than highly feminised work or stereotypical feminised tasks. This research identifies the contribution of socially constructed understandings of gender on the assessment of skill and work value.
56. In our opinion there is evidence of gender-based undervaluation of work. The valuation of work is influenced by social expectations and gendered assumptions about the role of women as workers. In turn these social practices influence institutional and organisational practices. These assumptions are impacted by women’s role as parents and carers and undertaking the majority of primary unpaid caring responsibilities. The disproportionate engagement by women in unpaid labour contributes to the invisibility and the under recognition of skills described as creative, nurturing, facilitating or caring skills in paid labour.

Question 4 If your opinion is that there is such gender-based undervaluation, what are the contributing factors to gender based undervaluation in Australia?

57. In our answer to Question 3 we have assessed that there is gender-based undervaluation of work. In our address of Question 4 we assess the contributing factors to gender based undervaluation in Australia. Wage determinations in the early twentieth century institutionalised a “needs-based” family wage that solidified male breadwinner/female carer divisions in line with prevailing gender norms. The deeply gendered assumptions about divisions of paid and unpaid labour manifest in the family wage were reflected in understandings of the value of work undertaken by women, producing interrelated constraints on women’s wages (Whitehouse and Smith, 2020). These assumptions have impacted the way in which work is described, classified, and valued in wage setting arrangements.
58. Since the NSW Pay Equity Inquiry of 1998 (Glynn 1998a; 1998b) econometric analysis has not provided any new insights that help explain why female-dominated occupations have lower earnings than male-dominated occupations. Coelli’s (2014) analysis of more finely detailed occupational data (major group and unit group occupational classifications of ANZSCO) does provide insights into the influence of sex segregation of occupations on pay outcome. His finding that up to 51 per cent of the GPG is due to the gender distribution of the Australian workforce is a notable advance, yet the reasons for this outcome remain inconclusive (Coelli 2014, pp. 54-55).
59. In our opinion gender-based undervaluation of work in Australia arises from social norms and cultural assumptions that impact the assessment of work value. The impact of these social structures on the valuation of work is exacerbated by Australia’s pattern of occupational segregation. While social norms and cultural assumptions may arise from historical legacies, they have not been remedied by contemporary work value assessments or they remain unaddressed by a failure to conduct gender neutral work value assessments.
60. In our opinion, undervaluation of work refers to labour being supplied at a higher quality than the given wage rate. Therefore, gender-based undervaluation and/or undervaluation on a gender basis in the employment context means the skill level of occupations, work or tasks is influenced by subjective notions about gender and gender roles in society. Skills of the job occupant are discounted or overlooked because of gender. Skills required to perform work tasks are discounted or overlooked because of gender. Skills of

the occupation (e.g. proficiency, complexity, responsibilities, and the conditions under which work is performed) are discounted or overlooked because of gender. Skills are devalued or overlooked because of norms, ascribed gender roles, and gendered stereotypes that prevail in the wider social environment. Work becomes “sex typed” when a job or occupation is viewed as being socially appropriate for women to perform, often because of the similarity of the work and tasks of the job to the activities women historically undertake in the domestic (unpaid) environment. Consequently, the work is perceived as “women’s work”. Therefore, the work undertaken by women in such jobs or occupations is considered to be less valuable and can be paid less than work undertaken by men that has no obvious similarity to the activities men historically undertake in the domestic (unpaid) environment. For example, primary responsibility for children is a stereotypical role of women and mothers in the domestic (unpaid) sphere. Working with children in the market (paid) sphere is an extension of women’s household roles, and is an ascribed undertaking due to their nurturing roles in the domestic household (Orupabo 2018). This process of devaluation is partly shaped by the “male breadwinner model” and the gender division of paid and unpaid labour (Aboim 2010).

61. Norms and regulation overlap, shaping each other. For example, the 1907 Harvester judgment and other Australian industrial tribunal decisions on female pay in the twentieth century reflected and reinforced the dominant social norms about women and paid work (Peetz 2017, p. 9). Indeed, even in the 1990s the QIRC held working with children involved “attributes” and was not skilled (Peetz 2017, p. 12) and the work was “simple” (*Miscellaneous Workers’ Kindergartens and Child Care Centres etc (State) Award* (2006) 150 IR 290 at [104]). If there is a resemblance between the activities women historically perform in households and the work of a female-dominated occupation, norms holding that domestic unpaid labour is unskilled can influence how the paid labour is valued (Peetz 2017, p. 12). For example, women have a “natural” predilection for communication and caring due to their role as mothers (Grimshaw and Rubery 2007, p. 60).
62. It is our opinion that such gender-based valuations are not done explicitly (i.e. indicative of direct discrimination), but rather reflect the influence of gender stereotypes, social norms, and historical legacies. The outcome is that the work and tasks performed by female dominated occupations are so performed at a level above their rates of remuneration. In our opinion, reasons for gender-based undervaluation in Australia include the continuation of occupational segregation, the weaknesses in job and work

valuation methods and their implementation, and social norms, gender stereotypes and historical legacies.

63. There are multiple dimensions of gender-based undervaluation. In their research report on equal remuneration principles for Fair Work Australia, Romeyn, Archer and Leung (2011, p. 47) noted that the determinants of the GPG are complex, and studies suggest some employers base their employment decisions on social norms and stereotypes, which shape their perceptions of worker productivity.

64. The Australian scholarship assessing the contributing factors to gender based undervaluation has considered the frameworks for analysis adopted in international scholarship, including the impact of institutional, social and organisational practices on the valuation of work, including stereotypical female and male tasks. Different dimensions of undervaluation can contribute to pay inequity in an additive and cumulative way, including whether there has been undervaluation due to women being over-represented in lower-paid areas of an industry or occupation or whether particular features of an industry or occupation have influenced the value of the work. This is in addition to examining whether sufficient weight has been placed on the skills and responsibilities required of the work (Smith, Layton and Stewart 2017). In our view we agree that gender-based undervaluation explains differences in earnings between women and men that cannot be accounted for by differences in human capital or productivity-related differences between women and men.

Question 5 What, if any, have been the barriers and limitations to the proper assessment of work values in female dominated industries and occupations by industrial tribunals in Australia?

65. We address this question initially with reference to the assessment of work value in proceedings where applications exilify reference equal pay or equal remuneration principles or legislative provisions. This review is followed by our consideration of the assessment of work values by industrial tribunals in Australia recognising that that this assessment is not confined to equal remuneration proceedings.

66. As an introductory point we note that work value in the Australian wage-setting system has been focused specifically on characteristics of the work and the context in which it is undertaken. Assessing work value exercised by industrial tribunals in the setting of rates of pay for classifications of work, and in explicit applications that are seeking a revaluation of work. It has provided a basis for the prosecution of equal value claims and

at times been specifically reaffirmed as the means through which claims to equal pay or equal remuneration would be assessed. By way of the principle of work value, assessments of comparable work have been an accepted feature of the wage-fixing principles adopted by Australia's industrial tribunals (Smith and Stewart 2017).

67. We also note that work value equivalence is a relative measure that requires the exercise of judgment by the industrial tribunals. A number of evaluation techniques have been applied for various purposes and with various outcomes *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries* (1998) 94 IR 129 at [18]. Although individual members, have, at times, identified the type of factors that they rely on in reaching determinations of work value, this list is not binding or determinative, nor is a particular weighting given to any particular criteria. Moreover, this flexibility and indeterminacy has been advantageous to the tribunal, allowing it to take into account a range of circumstances (Bennet 1988, pp. 535-538). Although a matter of significant contest among the industrial parties, work value applications have also featured instances where tribunals, in determining new rates of pay, have taken a broad view of the scope of work comparisons relevant to its consideration *Re Crown Employees (Legal Officers — Crown Solicitor's Office) Award* [1972] AR (NSW) 376 at 391–2.

Work Value and Equal Remuneration Proceedings in Australia

68. Our consideration of work value in equal remuneration proceedings is set against the objective of equal pay measures in Australia which were initially introduced to address institutionalised sex discrimination in wage fixation. Wage determinations in the early twentieth century institutionalised a “needs-based” family wage that solidified male breadwinner/female carer divisions in line with prevailing gender norms. The deeply gendered assumptions about divisions of paid and unpaid labour manifest in the family wage were reflected in understandings of the value of work undertaken by women, producing interrelated constraints on women's wages (Smith and Whitehouse 2020, p. 534).
69. Within this context, Smith and Whitehouse (2020) note that it would be anticipated that deep seated gender norms impeded the effective implementation of the principle of equal pay for work of equal value. Relevant also were the countervailing pressures on women's wages. The family wage and assumptions about the value of women's work operated in parallel with a system that provided a level of protection to the low paid through the

regulated award system and required attention to ‘work value’ as a concept independent of market value to an employer.

70. Within the literature a number of studies examine industrial assessment of work value primarily through analysis of regulatory approaches to the address of the objective or principle of equal pay and equal remuneration (see for example Smith and Stewart 2010; Smith and Stewart 2014; Charlesworth and Macdonald 2015; Smith and Stewart 2017; Smith and Whitehouse, 2020). In assessing tribunals’ assessment of work value, there is also correspondingly research attention to the address of gender-based undervaluation. Layton, Smith and Stewart (2013) provide an extensive overview of relevant cases in the period 1904-2013 (see Appendices 1 and 2 of that report). Smith and Whitehouse (2020) assess that there are four epochs in equal remuneration regulation. A summary of these epochs follows.

1969 and 1972 Principles and 1986 Comparable Worth proceedings

71. The first epoch commenced with the introduction of equal pay principles into Australia’s federal system of wage fixation and includes their application in subsequent decades. In 1969, the Commonwealth Conciliation and Arbitration Commission (CCAC) heard a claim lodged by unions and supported by women’s organisations for a flat rate wage increase for women designed to eliminate the ‘needs based’ gender differences that had been embedded in wage-setting (*Australasian Meat Industry Employees Union v Meat & Allied Trades Federation of Australia (Equal Pay Case)* (1969) 127 CAR 1142 at 1147). The Commission’s view was that equality of work must first be determined, and to this end adopted a principle of equal pay for equal work that applied where ‘work performed by men and women was of the same or a like nature’ (at 1158) and a specific exclusion applied to work predominantly undertaken by women (at 1159). This construction limited the available remedies to women who worked in identical jobs to men but received lower award wages than their male counterparts.
72. The wider construction of equal pay for work of equal value was introduced by the Commission in 1972 (*National Wage and Equal Pay Cases 1972* (1972) 147 CAR 172). As a result of the 1972 principle, the effective exclusion of female-dominated industries from the ambit of the 1969 principle was lifted. The decision provided the opportunity for the Commission to reassess the value of feminised work, utilising the concept of work value as historically applied by Australian tribunals. Although differentially

applied, this concept took into account the skills and qualifications required for the work as well as the conditions under which it was performed. While in principle this could have involved comparisons of work value across awards, and the decision did nominally provide for this (at 180), the Commission thought that comparisons would be made mainly between classifications in the same industry or occupational award.

73. The 1972 principle had a less than straightforward application. There was a limited number of applications and those filed had been resolved by consent without arbitration and extended consideration, in the context of an application, of equal value. This context underpinned contested comparable worth proceedings in 1986 (*Re Private Hospitals' and Doctors' Nurses (ACT) Award 1972* [1986] 13 IR 108) when nursing unions, led by the Australian Council of Trade Unions, sought a series of in-principle rulings, including one that the Commission apply the 1972 principle via the concept of comparable worth. Comparable worth was not explicitly defined by the applicants other than to identify it as an alternative to work value as a potential means of assessing work equivalence; the implicit argument being that comparable worth would yield greater success in deploying the 1972 principle to address the undervaluation of feminised work. Although the applicants did not define comparable worth specifically, the tribunals assessed comparable worth through its application internationally, based on material submitted by the Commonwealth government, concluding that it 'refers to the value of the work in terms of its worth to the employer' (at 113). The Commission rejected the application of comparable worth to Australian labour law and affirmed the concept of work value as the means of assessing whether the requirements of the 1972 principle was met (at 114).

A Legislative Right to Equal Remuneration, 1993-2008

74. The second epoch in federal equal pay for work of equal value initiatives began with the introduction of a legislative entitlement to equal remuneration for work of equal value in the federal jurisdiction in 1993-94. The new measures provided the Australian Industrial Relations Commission with the capacity to issue equal remuneration orders where the legislative entitlement to equal remuneration was found to be breached. The provisions explicitly referred to ILO 100, stating that rates of remuneration be established without discrimination based on sex. In line with the broad definition of 'remuneration' in ILO 100, they also widened the concept of 'equal pay' embedded in the 1972 principle to 'equal remuneration', which enabled consideration of payments over the minimum rate, or 'over-award' earnings (Layton, Smith and Stewart 2013, p. 143). The provisions would, in turn, be included largely unchanged in subsequent labour law legislation

introduced in 1996, the Workplace Relations Act 1996 (Cth), but were amended by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth) in a key area, one critical to the construction and assessment of equal remuneration regulation: applicants were required to cite explicit reference to a comparator group of employees, defined in the legislation as the ‘employees whom the applicant contends are performing work of equal value to the work performed by the employees to whom the application relates’ (s 622). These amended provisions were not ever tested by way of application.

75. There was a low rate of applications under the 1993 provisions (as amended) and no equal remuneration orders were made under those provisions (Layton, Smith and Stewart 2013, p. 138). The one case that proceeded to extended arbitration followed a union application focusing on differences in the wage structures of female and male workers at HPM Industries: women employed as process workers and packers and engaged in repetitive, dexterous work and lacking consistent access to overaward payments; men employed in heavier general hands and stores work but with access to significant overaward payments (*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries Pty Ltd* (1998) 94 IR 129). A key contest in the proceedings was the reliance by unions on competency standards to demonstrate that the work was of equal value (at 137-138). The application was refused and a subsequent application settled without to the need for final arbitration. The Commission’s interpretation of the legislative provisions was that applicants must demonstrate that the work was of equal value and that the disparities in earnings had a discriminatory cause (at 159) (see also, *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and David Syme & Co Ltd* (1999) 97 IR 374). The HPM proceedings demonstrated the complexity in demonstrating that earnings disparities arose from a discriminatory cause. Direct discrimination was not found because the work of the classifications cited in the application was sufficiently dissimilar, such that the remuneration differences between men and women was not found to exist in the same circumstances. Indirect discrimination was not determined because no requirement or condition was found to account for the remuneration differences between men and women workers (*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries* (1998) 94 IR 129 at 165).
76. In the small number of subsequent applications lodged under the provisions, the Commission confirmed that applicants should make their case on the basis of work value (*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and HPM Industries* 94 IR 129 at 161-162) but also indicated work value was a relative

measure involving judgement by the Commission, where the choice of the method of demonstrating work value fell to the applicant (*Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v HPM Industries* Australian Industrial Relations Commission, Print Q1002, 19 May 1998 at [17] - [18]); *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v David Syme & Co Ltd* Australian Industrial Relations Commission, Print R5199, 26 May 1999 at [20])).

Equal Remuneration Regulation Initiatives in New South Wales (NSW) and Queensland (1997-)

77. The third epoch was the phase in which state jurisdictions explicitly introduced and addressed the concepts of undervaluation and gender-based undervaluation as part of a wider consideration of pay equity and equal remuneration regulation. Through a series of industrial proceedings and pay equity inquiries, most notably in the state jurisdictions of New South Wales (Glynn 1998a; 1998b) and Queensland (Queensland Industrial Relations Commission, 2001) and following these inquiries through new equal remuneration principles, *Re Equal Remuneration Principle* (2000) 97 IR 177 (NSW); *Equal Remuneration Principle* (2002) 114 IR 305 (Queensland). The meaning afforded to undervaluation and gender-based undervaluation in the New South Wales industrial context can be drawn from previous tribunal assessments (Layton, Smith and Stewart 2013).

78. These differences aside, equal remuneration principles in both NSW and Queensland place emphasis on gender-based undervaluation as the threshold to establishing whether there is the basis for an equal remuneration claim. A central feature is that the test of undervaluation does not revert routinely to a male standard, in fact comparisons within and between occupations and industries are not required in order to establish undervaluation of work. Male ‘comparators’ might be used for illustrative purposes but are not an evidentiary precondition. In establishing the Equal Remuneration Principle (ERP) in 2000, the Full Bench of the Industrial Relations Commission of New South Wales indicated – in general terms – how gender-based undervaluation of work, tasks and occupations are produced: The ERP is designed to ensure there are no “artificial barriers created to a proper assessment of wages on a gender neutral basis”. It is directed also to address those instances where it is demonstrated that “the rate of pay hitherto fixed does not represent a proper valuation of the work and that any failure is related to factors associated with the sex of these performing the work” (*Re Equal Remuneration Principle* (2000) 97 IR 177 at [71]).

79. There are distinctions between the two state approaches, namely the equal remuneration principle in NSW is confined to minimum award rates of pay, whereas the Queensland principle is not (Layton, Smith and Stewart 2013, p. 164). Additionally, the Queensland Equal Remuneration Principle specifically directs industrial tribunals to consider whether there has been adequate weight placed on the typical work performed and the skills and responsibilities exercised by women, as well as the conditions under which the work is performed. It also notes that aspects of women's labour market participation may have influenced the valuation of their work. These included the degree of occupational segregation, the disproportionate representation of women in part-time or casual work, women's low rates of unionisation and their low representation in workplaces covered by formal or informal work agreements.
80. In cases taken under the equal remuneration principles in the NSW and Queensland jurisdictions tribunals were able to fix new rates of pay for heavily feminised occupations - child care workers, librarians, dental assistants, social and community service workers - on the basis that rates of pay did not reflect the value of their work. There was consideration of historically embedded gender bias in industrial instruments, including whether earlier rates had been set incorrectly due to assumptions about the nature and value of work undertaken by women. Applicant parties were not required to demonstrate that the rates had been set incorrectly because of sex discrimination (Smith and Whitehouse, 2020; Smith and Stewart 2017 – see *Re Crown Librarians, Library Officers and Archivists Award Proceedings – Applications under the Equal Remuneration Principle* (2002) 111 IR 48; *Re Miscellaneous Workers Kindergartens and Child Care Centres (State) Award (NSW)* (2006) 150 IR 290; *Liquor Hospitality and Miscellaneous Union of Employees Queensland Branch, Union of Employees v Australian Dental Association (Qld Branch)* (2005) 180 QGIG 187; *Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees v Children's Services Employers Association* (2006) 182 QGIG 318; *Queensland Services Industrial Union of Employees v Queensland Chamber of Commerce and Industry Ltd* (2009) 191 QGIG 19.

Equal Remuneration under the Fair Work Act 2009

81. The fourth epoch concerns equal remuneration provisions in federal labour legislation introduced in 2009: the Fair Work Act. The provisions embodies a broader conception of equal remuneration than under the equivalent provisions in Division 3 of Part 12 of the

Workplace Relations Act 1996, and before that Division 2 of Part VIA, which was added in 1993 to what was then the Industrial Relations Act 1988. The equal remuneration provisions in that legislation conferred a discretion on the Commission¹ to issue an order to ensure that, for the employees to whom the order will apply, there will be ‘equal remuneration for men and women workers for work of equal or comparable value’ (s302(1)). The first case under the provisions arose from an application by unions for equal remuneration orders in the social and community services sector. Fair Work Australia handed down the first of the two major decisions in May 2011 (*Re Equal Remuneration Case* (2011) 208 IR 345). The central features of this first decision were the tribunal’s finding that the work was undervalued on a gender basis, and its direction to the parties to make further submissions on remedy. The finding of gender-based undervaluation involved a set of linked conclusions. The tribunal found that much of the work is caring work; that such a characterisation can contribute to the undervaluation of work; that work in the sector was indeed undervalued; and, given that caring work has a female characterisation, that the undervaluation was gender-based (at [253]). Fair Work Australia determined that it was not a prerequisite for applicants to rely on a male comparator although applicants were required to demonstrate that the remuneration paid had been subject to gender-based undervaluation (at [233]). The parties were required make further submissions on remedy, specifically the extent to which the undervaluation was gender-based (at [286]). The applicants’ submissions on remedy relied on identifying the proportion of caring work in each social and community services sector classification, relevant to the classification, as a proxy for gender-based undervaluation. In February 2012, a majority decision of the FWC largely accepted the use of care work as a proxy for gender-based undervaluation and agreed that it should be remedied *Re Equal Remuneration Case* (2012) 208 IR 446 at [63]). The resultant equal remuneration order provided for increases of between 19% and 41% to the minimum award rates in addition to a 4% loading, to recognise ‘impediments to bargaining in the industry’ (*Re Equal Remuneration Case* (2012) at [68]).

82. The second major test of the provisions in the Fair Work Act arose from an application for equal remuneration orders in the early childhood education and care sector. The Commission deferred hearing the substantive application, and following submissions handed down a decision in November 2015 on legislative and conceptual issues (*Equal Remuneration Decision 2015*). In its decision the tribunal rejected gender-based undervaluation as a means of women claiming equal remuneration under the equal remuneration provisions of the Fair Work Act, thereby dismissing the reasoning that had been relied on in the preceding social and community services case. The Commission

determined that for an equal remuneration order to be made in favour of a group of female employees, an applicant must identify a group of male employees, doing work of equal or comparable value, who were receiving higher remuneration (at [242]-[243]). To assess the comparison of jobs, the Commission indicated that it would rely on concepts of work value, as it was understood in industrial proceedings, although other criteria may also be relevant (at [279]-[280]). On the question of remedy, the Commission found that if a lack of equal remuneration was established between the two (explicitly gendered) groups, there is no warrant for ‘discounting’ any remedy to exclude pay differences that are not gender-related (Smith and Stewart 2017).

83. In addressing its rejection of the concept of gender-based undervaluation as the basis of a claim for equal remuneration, the Commission determined that it is insufficient also for applicants to base their claim on the proposition that the current rates of remuneration did not reflect the intrinsic value of the work (at [290]), although it is open for applicants to file a work value claim seeking to vary the minimum rates of pay in a modern award on the basis that rates of pay undervalue the work for gender-related reasons [at 292].

Summary of the Consequences of Epochs in Equal Remuneration Proceedings

84. In Australia the adoption of what Whitehouse and Smith (2020 p. 521) identify as equal pay (or equal remuneration) for work of equal value (or equal and comparable value) principles sought to redress gender pay inequalities in work that extended beyond a formal ‘like with like’ equality. These principles had a wider objective than extending equal pay or equal remuneration beyond those instances where women and men were performing the same work. Addressing equal value required approaches to wage setting and work value assessment that were able to accommodate women and men undertaking different work.
85. The regulatory framework to address the broader principle of equal pay for work of equal value, and the principle of equal remuneration for work of equal or comparable value, has highlighted changes, including contradictory changes, in the regulatory framework and interpretation of that framework. In our opinion this transitory framework contextualises the assessment of work value in the context of Part 2-7 and predecessor provisions, including limitations in the proper assessment of work value.

86. The 1972 equal pay for work of equal principle, with its explicit focus on equal value and lack of explicit need for a male comparator, was limited through the Commission's unwillingness to extend comparisons beyond similar work. The extension to a legislated entitlement to equal remuneration for work of equal value in 1993 was limited in practice by constraints on the capacity to demonstrate equal value, including the Commission's interpretation of the requirement to 'prove' that disparate rates of pay arose from discrimination and the individualisation of comparison that this test imposed. The model that emerged in state jurisdictions from NSW and Queensland pay equity inquiries in the late 1990s and early 2000s, embedded in equal remuneration principles for establishing gender-based undervaluation that did not require comparators or proof of discrimination. The subsequent expansion of the federal jurisdiction has precluded further application of the NSW and Queensland principles in the private sector. More recently the interpretation of the federal equal remuneration provisions in the Fair Work Act as undergone a significant change, such that the concept of gender-based undervaluation cannot be utilised in support of equal remuneration claims. This is evident most recently in the requirement for a binary and gendered comparator, and emphasised in the Commission's acknowledgment that applications for equal remuneration orders will be more straightforward when the workers are performing similar work under similar conditions. In our view this limits the capacity for the tribunals to assess whether there have been weaknesses in past assessments of work value and whether current rates of pay are not in accord with the tribunal's contemporary assessment of the value of work (Smith and Stewart 2017).
87. The Commission's shift in reasoning from the social and community services case to the early childhood education and care case has continued the transitory and contested nature of Australian equal remuneration regulation. The Commission's current reasoning and requirement for a binary and gendered comparator in Part 2-7 proceedings has reaffirmed the place of masculinised benchmarks in federal equal remuneration regulation. This requirement needs to be read alongside the Commission's acknowledgment that applications for equal remuneration orders will be more straightforward when the workers, featured in the application, are performing similar work under similar conditions. Such a requirement favours an individual woman or a small group of women claiming equal pay for work of equal value on the basis of a comparison with a male worker or workers in a single workplace (Smith and Whitehouse 2020). These issues have highlighted complexities within equal remuneration and work value discourses in addressing equivalences across different areas of work (Smith and Stewart 2017, pp. 133-34).

Capacity for and Conduct of Work Value Assessments

88. So far in our answer question 5 have we observed barriers and limitations to the proper assessment of work value in female industries and occupations in equal remuneration proceedings. In this section of our response Question 5 to this question we address the capacity of tribunals to vary minimum rates on work value grounds. Our response is confined to statutory provisions and wage fixing principles and guidelines prior to the Fair Work Act. We address the assessment of work value under the Fair Work Act in our response to Question 6.
89. Outside of explicit equal pay or remuneration proceedings, the idea of a work value adjustment to minimum wage rates was an accepted part of the wage fixing principles of both federal and state tribunals, while claims concerning ‘anomalous’ or ‘inequitable’ assessments could also be addressed through the ‘anomalies and inequities’ provisions of those principles (Stewart 2020). It was typically the practice of industrial tribunals in minimum wage determination that claims for an adjustment required evidence that there had been change in the ‘nature of the work, skill and responsibility required or the conditions under which work is performed’, since the last time that the work in question had been formally assessed by the tribunal. This practice can be seen through the address of work value in wage fixing principles or guidelines that have shaped tribunal practice to minimum wage determination, consistent with its statutory obligation, for example:
- introduction of two-tier wage system - *National Wage Case March 1987* (1987) 17 IR 65 at 100
 - Award restructuring and structural efficiency *National Wage Case August 1988* (1988) 25 IR 170 at 179; *National Wage Case August 1989* (1989) 30 IR 81 at 102
 - *Safety Net Review – Wages, June 2005* (2005) 142 IR 1 at 125.
90. In our opinion this requirement for tribunals to make an adjustment to minimum rates based only on a change in work value has meant that there has been a limited capacity to address what may have been errors and flaws in the setting of minimum rates for work in female dominated industries and occupations. These limitations in the capacity of the tribunal to the proper valuation of the work arises because any potential errors in the valuation of the work, may have predated the last assessment of the work by the tribunals. Errors in the valuation of work may have arisen from the female characterisation of the work, or the lack of a detailed assessment of the work, The time frame or datum point for the measurement of work value which limit assessment of work

value to changes of work value, or changes measured from a specific point in time mitigated against a proper, full-scale assessment of the work free of assumptions based on gender.

91. The absence of work value assessments or restraints in work value assessments can contribute to limitations in the skills classifications in awards relevant to feminised industries and occupations. The classification structures may lack relevant description and information of what is required in jobs, including the detailed specifications of the skills required at different skill levels. These omissions are critical as it means that the work undertaken is not properly described, recognised and valued. Weaknesses in classification structures may also mean that there is no mechanism to recognise additional skills (Charlesworth and Smith 2018).
92. The capacity to address the valuation of feminised work has also been limited by the requirement to position that valuation against masculinised benchmarks. This requirement for a comparator has been a feature of equal remuneration proceedings has been noted but the pivotal role of the metal industry tradesperson in wage fixing is also well documented. As an example the award restructuring requirements of wage fixing principles from 1988 was ultimately designed around a set of masculinised classifications and credentials and thus offered a limited capacity to properly describe, delineate and reward work in feminised industries and occupations. Work value comparisons continued to be grounded by a male standard, that being primarily the classification structure of the metal industry awards and to a lesser extent a suite of building and construction awards. This template rested on the relativity of masculinist classifications to the position of metal industry or building industry tradesperson. Peetz and Murray (2017) note that while the GPG is lower for “award dependent” workers in Australia, this does not mean Australian industrial tribunals are immune from stereotypical gender attitudes when they assess work value (Peetz 2015, pp. 351-354).
93. In summary it is our opinion that barriers and limitations to the proper assessment of work value in female dominated industries and occupations include:
 - 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.

Question 6 If your opinion is that there have been barriers and limitations to the proper assessment of work values in female dominated industries and occupations by industrial tribunals in Australia, how have these impacted upon the setting of award minimum rates.

94. In this section of our response we address specific requirements under the Fair Work Act by which minimum rates may be varied, with an explicit focus on work value, or equal remuneration. We address the Minimum Wages and Modern Award objectives of the Fair Work Act and the capacity for the Commission to vary the minimum rates in modern awards for work value reasons. We exclude reference to Part 2-7 of the Fair Work Act as we have addressed those provisions in our address of Question 5. For completeness we noted however under an equal remuneration order is not concerned merely with award rates of pay, whereas an application for a work value adjustment of the type contemplated by s 157(2)(a) must by definition be limited to a variation to the rates set by a modern award. An equal remuneration order is capable of operating regardless of whether some of those employees are covered by enterprise or transitional agreements, where an award adjustment may not. Importantly too, as we have emphasised, any work value changes must still operate within a framework of award rates that set a minimum safety net for enterprise-level bargaining, whereas Part 2-7 is not so constrained. In the exercise of its powers under Part 2-7, while the FWC is required to have regard to the wage-fixing principles established by its own Minimum Wage Panel, it is not constrained by either the modern awards objective in s 134 or the minimum wages objective in s 288, neither of which apply in their terms to an exercise of power under Part 2-7 (Smith and Stewart 2014). The main significance of this interpretation is that the Commission need not conceive of an equal remuneration order as being part of the ‘safety net’ of minimum terms and conditions under the Fair Work Act.
95. In addressing this question, we note the importance of instruments of wage determination to gender pay equity outcomes. The relevance of wage systems for gender pay equality outcomes is well-recognised (Rubery, Grimshaw and Figueiredo, 2005). Features that are important to this relation include the capacity for broad comparisons and remedies and systematic means of assessing work value. capacity for equal pay claims where coverage of collective bargaining is reduced (Rubery and Grimshaw, 2015, p. 338).

96. Pay equity reform has been most effective in Australia when its remedies have been integrated into labour law and tied to instruments of wage determination. This point assumes added importance given that a significant minority of women have their terms and conditions regulated by such awards and average rates of pay for award-reliant employees are lower than those evident for employees whose pay is set by other instruments.
97. Section 285 of the Fair Work Act provides for an Expert Panel of the FWC to conduct an annual review of the minimum wage rates set by modern awards. In doing so, it must take account of the 'minimum wages objective' set out in section 284(1). This provision establishes a 'minimum wages objective' which is to guide the Commission in setting and adjusting minimum wage rates, whether as part of modern awards or through national minimum wage orders. There is reference, among a number of factors, to 'the principle of equal remuneration for work of equal or comparable value' in section 284(1). The Commission is required to consider the principle, as one of a number of factors, in establishing and maintaining 'a safety net of fair minimum wages'.
98. The FWC's Expert Panel has recently indicated that while issues of gender pay equity are germane to the assessment of minimum wages, the scope and focus of the panel's review in determining the issue of a minimum wage increases across modern awards means that the proceedings of the Expert Panel are "of limited utility in addressing any systemic gender undervaluation of work". *Annual Wage Review 2017-18* (2018) 279 IR 215 at [35]; see more recently *Annual Wage Review 2019-20* [2020] FWCFB 3500 at [399].
99. The 'modern awards objective' is established in section 134(1) that frames the Commission's authority in exercising various functions or powers relating to modern awards. The overall objective is to 'ensure that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions'. Among multiple requirements, the Commission must take into account '(e) the principle of equal remuneration for work of equal or comparable value'. The Fair Work Act set down the circumstances under which a modern award may be varied, which includes on work value grounds.
100. The concept of work value adjustments is formally recognised in the Fair Work Act. Section 157(2) expressly allow modern award minimum wages to be varied outside the

annual wage review. The phrase ‘work value reasons’ is defined in s 157(2A) to mean ‘reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following: (a) the nature of the work; (b) the level of skill or responsibility involved in doing the work; (c) the conditions under which the work is done’.

101. As we noted in our response to Question 5, the concept of work value adjustments to minimum wage rates has been an accepted part of the wage-fixing principles adopted by Australian industrial tribunals. As noted it was the practice that claims for such an adjustment usually required evidence that there had been a change in the ‘nature of the work, skill and responsibility required or the conditions under which work is performed’, since the last time that the work in question had been formally assessed.
102. There is no reference in the current legislation to any requirement that a particular *change* in work value be established. The Commission by way of its decision in the early childhood education and care case *Equal Remuneration Decision 2015* and its rejection of gender based undervaluation, as the basis for assessing applications filed under Part 2-7, indicated that it saw ‘no reason in principle why a claim that the minimum rates of pay in a modern award undervalue the work to which they apply for gender-related reasons could not be advanced for consideration under s 156(3) or s 157(2)’ at [292].
103. For completeness we note that the FWC was previously also required by section 156 to conduct a four-yearly review of all modern awards. The four yearly review reviews were the final stage in a process of award modernisation that comprised three stages. The first stage concerned the processes that resulted in the creation of 122 modern awards – this represented a reduction from 1500 federal and state awards. This stage also dealt with the issue of transitional provisions in modern awards, these being a process of phasing out and reconciling the differences in wages and conditions that were evident in the aggregation of former federal and state instruments. This was effectively completed by December 2009. The second stage arose from a legislative requirement to review whether modern awards were operating effectively and without anomaly and took place 2012-13 (the transitional review). The third phase comprises a four-year review of modern awards which commenced in 2014.
104. The current capacity for the federal tribunal to consider gender-based undervaluation as part of sections 156, 157 and 158 proceedings has been tested rarely. Explicit

considerations of work value were not a feature of early award modernisation proceedings (Macdonald and Charlesworth 2013). In April 2021 a Full Bench of the FWC partially concluded long-running equal remuneration proceedings in the early childhood and care sector ([2021] FWCFB 2051). The Full Bench decision rejected an application for an equal remuneration order but assessed that an adjustment to the minimum rates of teachers was justified on work value grounds [at 645]. The decision provided a foundation for wage increases of between 5-10 per cent for early childhood teachers, noting also the Full Bench's requirement for further on the operative date of any award variation, phasing in arrangements, and the capacity of Commonwealth and state governments to assist in funding the wages of early childhood teachers. The Full Bench also called for submissions as to how the pay structure favoured by the Full Bench addresses the minimum rates and modern award objectives of the Fair Work Act. The Full Bench determined that increases in the work value of early childhood teachers, was not recognised by the minimum rates in the Education Services (Teachers) Award. The Bench noted the "exercise of professional skills and judgment, and the overall work value, involved in early childhood teaching" [629] was the same or equivalent to that of school teachers. It also considered that teachers' rates under the award and its federal predecessors "have never been fixed on the basis of a proper assessment of the work value of teachers nor are they properly fixed minimum rates" [645].³

105. More recently the Full Bench of the Commission ([2021] FWCFB 6021) considered that a variation to the Education Services (Teachers) Award to implement a new remuneration structure was required to meet the modern awards objective in s.284(1) of the Fair Work Act [at 84]. The Full Bench assessed also that the variation was consistent with the minimum wages objective.
106. We note the observations of the Full Bench and also the absence of the requirement in the current work value provisions in the Fair Work Act for applications, based on work value, to be confined to changes in work value. What is less clear is whether the application of work value by tribunals routinely includes the assessment of whether previous work value assessments were influenced by gendered norms and historical legacies, or whether areas of work have been characterised by an absence of

³ We note that since the decision of the Full Bench in 2015 in this matter, the Commission rejected the suitability of nominated comparators by an applicant union ([2018] FWCFB 177) and rejected a further application under Part 2-7 as the conditions required by s 302(5) were not met ([2021] FWCFB 2051 at [208]. In doing so the Commission noted that the 'conditions under or environment in which work is performed is a major element of the assessment of work value' [at 195].

comprehensive work value assessments (*Miscellaneous Workers Kindergartens and Child Care Centres (State) Award* (2006) 150 IR 290 at [154], [203], [210]). There has been a rarity of cases explicitly testing the valuation of work in female dominated industries and occupations. Relevant also is the challenge of assessing work value in a bias-free manner: objectivity is an elusive goal, and comparisons across different types of work require complex and contested decisions (Whitehouse and Smith, 2020).

107. In our opinion there have been barriers to the proper assessment of work value in female dominated industries and occupations by industrial tribunals in Australia. Addressing the undervaluation of work through the adjustment of minimum rates on work value grounds in female dominated industries and occupations has been impacted by constraints in historical wage fixing principles. These constraints have limited the assessment of work value to changes in work tasks rather than assessing if the value of work is properly set. This constraint in the assessment of work value is not evident in the work value provisions of the Fair Work Act but there has been limited evidence that award modernisation provided the framework for the assessment of work value.

Question 7:

Based on an analysis of the history of the setting of pay rates for registered nurses, enrolled nurses, and assistants in nursing, is there, in the Nurses Award 2010 and/or in respect of personal care workers in the Aged Care Award 2010, a gender-based undervaluation of the work done by:

- (a) registered nurses;*
- (b) enrolled nurses;*
- (c) assistants in nursing (or personal care workers)?*

108. In responding to Question 7 we discuss general undervaluation of work and gender-based undervaluation of work. In our response to Question 5 we noted that these two concepts are related. In considering general undervaluation of work, we focus on employees covered by the Aged Care Award 2010 and the Nurses Award 2010 working in residential aged care facilities (RACFs); partly to make the analysis manageable and partly because of the pertinence of the Royal Commission into Aged Care Quality and Safety inquiry and report.
109. In March 2021 the Royal Commission released its final report. Volume 2 (The Current System) notes that 87 per cent of the RACF workforce are women (Royal Commission into Aged Care Quality and Safety 2021a, Volume 2, p. 29). Chapter 4 of Volume 2 makes the several noteworthy comments. There is a shortage of nurses, partly due to

employers replacing higher paid nurses with personal care workers. Both nurses and personal care workers are paid comparatively less than their counterparts in other health and social service sectors.

110. Chapter 12 of Volume 3A of the Royal Commission’s report (The New System) discusses the industry workforce and makes specific recommendations regarding employees and the work they perform. Comments regarding the Aged Care Award 2010 include: “Now is the right time to review and modernise occupational and job structures [... there] is a need to understand, standardise and define jobs” (Royal Commission 2021b, Volume 3A, p. 385). Commissioner Briggs highlights many of the deficiencies with the Aged Care Award classification descriptions we discuss in this report (Royal Commission 2021, Volume 3A, p. 388), including:
- inconsistency and variable quality in the way jobs are classified and defined;
 - the value of the personal care worker role is underestimated; and
 - progression for personal care workers in the classification structure downplays the value of behavioural and technical competencies acquired and developed on the job.

Aged Care Award 2010 (MA000018)

111. The Aged Care Award 2010 (MA000018) was made by an order of a Full Bench of the Australian Industrial Relations Commission (AIRC) on 3 April 2009 (PR986539). Clause 3 of the Aged Care Award 2010 defines the “aged care industry” to be residential aged care facilities. The classifications of the award were set out in “Schedule A”. A subsequent order of an AIRC Full Bench on 11 September 2009 inserted a new Schedule A and transposed the award classification definitions from Schedule A to “Schedule B” (PR988396).
112. The award classification definitions in Schedule B contains “aged care employee” from level 1 to level 7. Within the aged care employee classifications “indicative tasks to be performed” lists several occupations or jobs titles. Within aged care employee levels 2, 3, 4, 5 and 7 the position or job title of “personal care worker” is included in the indicative tasks lists. Personal care workers (PCWs) are graded from 1 to 5 respectively:
- aged care employee level 2 includes PCW grade 1;
 - aged care employee level 3 includes PCW grade 2;
 - aged care employee level 4 includes PCW grade 3;
 - aged care employee level 5 includes PCW grade 4; and
 - aged care employee level 7 includes PCW grade 5.

Are PCWs low paid?

113. Low rates of pay are indicative of undervaluation of work. Undervaluation of the work of a female dominated occupation is, therefore, indicative of gender-based undervaluation. In May 2011 a Full Bench of Fair Work Australia (FWA) considered an application for a low-paid authorisation under s.242 of the Fair Work Act (United Voice; The Australian Workers' Union of Employees, Queensland [2011] FWAFB 2633). The Full Bench observed low paid employees are “employees who are paid at or around the award rate of pay and who are paid at the lower award classification levels” [17]. The Full Bench then commented: “We do not think it can be disputed that a very significant proportion of the employees in the aged care sector are low-paid in that they are paid at or around the award rate of pay and at the lower award classification levels” [19]. The Full Bench then nominated reasons for the low pay: “When it comes to actual terms and conditions it is clear that with the exception of employees to whom an enterprise agreement applies, the minimum terms and conditions generally constitute the actual terms and conditions” [26]. In its concluding remarks the Full Bench highlighted key aspects of the aged care industry:

“... we are satisfied that the employees to whom the authorisation would apply are low-paid, that they either have not had access to enterprise bargaining or face substantial difficulty in bargaining at the enterprise level ... [and there is a] high degree of commonality in the nature of residential aged care enterprises” [36].

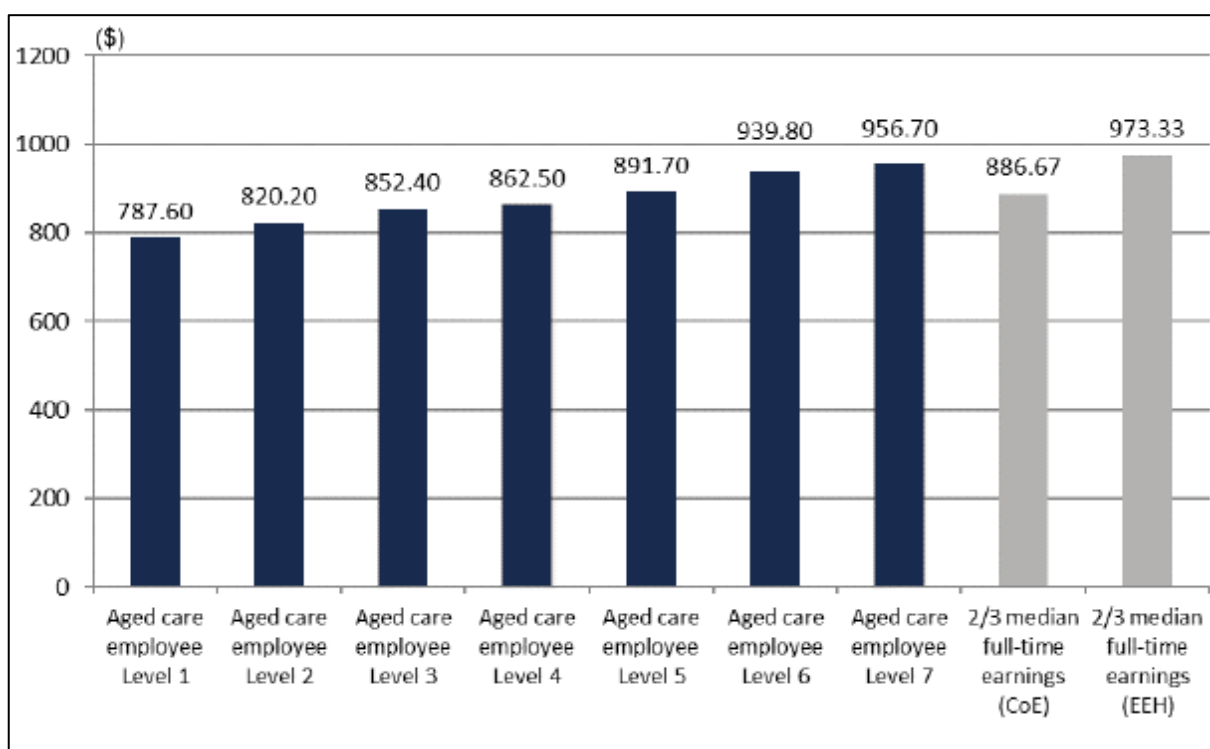
114. The FWC’s *Annual Wage Review 2013-14* ([2014] FWCFB 3500) decision of June 2014 assists understanding of the concept of low pay in Australia: “we accept the prevailing view that the low paid are those award-reliant employees who receive a rate of pay that (as a full-time equivalent) would place them below two-thirds of median (adult) ordinary time earnings” [391]. The FWC restated this view in the *Annual Wage Review 2020-21* ([2021] FWCFB 3500) decision of June 2021 [137].

115. In August 2019 the FWC concluded a “4 yearly review” of the Aged Care Award ([2019] FWCFB 5078), and the decision included a detailed summary of the RACF industry [19-33]. When discussing the concept of low pay in Australia and the employees covered by the Award, the Full Bench stated:

“One of the s.134 considerations which we are obliged to take into account in giving effect to the modern awards objective is ‘the needs of the low paid’ (s.134(1)(a)). In the Penalty Rates Decision the Commission determined that a threshold of two-thirds of median full-time wages provides ‘a suitable and

operational benchmark for identifying who is low paid', within the meaning of s.134(1)(a). There is, however, no single accepted measure of two-thirds of median (adult) ordinary time earnings. The two main ABS surveys of the distribution of earnings which are relevant are the Characteristics of Employment Survey (the CoE) and the Survey of Employee Earnings and Hours (the EEH)" [31].

116. The Full Bench decision included a “Chart 1: Comparison of minimum full-time weekly wages in the Aged Care Award 2010 and two-thirds of median full-time earnings” [32]. Chart 1 is reproduced below:



117. The Full Bench then remarked: “The data shows that the full-time weekly wage for all classifications in the Aged Care Award 2010 was below the EEH measure of two-thirds of median full-time earnings. Most classifications were also below the CoE measure of two-thirds of median full-time earnings, except for Aged care employee Levels 5 to 7.” [33]. These data indicated that in 2019 PCW grade 1 to grade 3 (aged care employee level 2 to level 4) were low paid employees under the ABS Characteristics of Employment Survey data, and even PCW grade 5 (aged care employee level 7) were low paid employees under the ABS Survey of Employee Earnings and Hours data. The Full Bench reached the same conclusion [62].

118. Accordingly, it is our opinion that in 2019 employees covered by the Aged Care Award 2010 were low paid. Since then, the Award rates of pay have only increased by the amounts determined by the FWC’s Annual Wage Reviews of 2020 (PR718835) and 2021 (PR729273). Therefore, in our opinion employees covered by the Aged Care Award 2010 generally, and PCWs in particular, remain low paid employees.

Is the low pay of PCWs justified by work value?

119. Notwithstanding our conclusion that employees covered by the Aged Care Award 2010 are both award reliant workers and low paid, their award rates of pay could be explained by work value reasons. We compared the classification descriptions found in Schedule A of the 2009 version of the Award and those found in Schedule B of the 2021 version of the Award. Table 4 shows those comparisons for the aged care employee classifications that contain a PCW grade, namely levels 2, 3, 4, 5 and 7. This comparison is revealing, for the descriptions used for levels 2, 3, 5 and 7 are word-for-word identical (PCW grades 1, 2, 4 and 5). The descriptions for the aged care employee level 4 (PCW grade 3) are almost identical, with the only difference being additional words to the final dot point of the 2021 version. This minor variation was introduced by the August 2019 “4 yearly review” of the Aged Care Award ([2019] FWCFB 5078, at [90]).

Table 4: Aged Care Award classification descriptions comparison 2009 and 2021

2009 Schedule A		2021 Schedule B	
Aged care employee - level 2 (PCW grade 1)	An employee at this level: <ul style="list-style-type: none"> • is capable of prioritising work within established routines, methods and procedures; • is responsible for work performed with a limited level of accountability or discretion; • works under limited supervision, either individually or in a team; • possesses sound communication skills; and • requires specific on-the-job training and/or relevant skills training or experience. 	Aged care employee—level 2 (PCW grade 1)	An employee at this level: <ul style="list-style-type: none"> • is capable of prioritising work within established routines, methods and procedures; • is responsible for work performed with a limited level of accountability or discretion; • works under limited supervision, either individually or in a team; • possesses sound communication skills; and • requires specific on-the-job training and/or relevant skills training or experience.
Aged care employee—level 3 (PCW grade 2)	An employee at this level: <ul style="list-style-type: none"> • is capable of prioritising work within established routines, methods and procedures (non admin/clerical); • is responsible for work performed with a medium level of accountability or discretion (non admin/clerical); • works under limited supervision, either individually or in a team (non admin/clerical); • possesses sound communication and/or arithmetic skills (non admin/clerical); • requires specific on-the-job training and/or relevant skills training or experience (non admin/clerical); and • In the case of an admin/clerical employee, undertakes a range of basic clerical functions within established routines, methods and procedures. 	Aged care employee—level 3 (PCW grade 2)	An employee at this level: <ul style="list-style-type: none"> • is capable of prioritising work within established routines, methods and procedures (non admin/clerical); • is responsible for work performed with a medium level of accountability or discretion (non admin/clerical); • works under limited supervision, either individually or in a team (non admin/clerical); • possesses sound communication and/or arithmetic skills (non admin/clerical); • requires specific on-the-job training and/or relevant skills training or experience (non admin/clerical); and • In the case of an admin/clerical employee, undertakes a range of basic clerical functions within established routines, methods and procedures.
Aged care employee—level 4 (PCW grade 3)	An employee at this level: <ul style="list-style-type: none"> • is capable of prioritising work within established policies, guidelines and procedures; • is responsible for work performed with a medium level of accountability or discretion; • works under limited supervision, either individually or in a team; • possesses good communication, interpersonal and/or arithmetic skills; and • requires specific on-the-job training, may require formal qualifications and/or relevant skills training or experience. 	Aged care employee—level 4 (PCW grade 3)	An employee at this level: <ul style="list-style-type: none"> • is capable of prioritising work within established policies, guidelines and procedures; • is responsible for work performed with a medium level of accountability or discretion; • works under limited supervision, either individually or in a team; • possesses good communication, interpersonal and/or arithmetic skills; and • requires specific on-the-job training, may require formal qualifications and/or relevant skills training or experience. • in the case of a personal care worker, holds a relevant Certificate 3 qualification (or possesses equivalent knowledge and skills) and uses the

	<ul style="list-style-type: none"> • In the case of a Personal care worker, is required to hold a relevant Certificate III qualification. 		skills and knowledge gained from that qualification in the performance of their work.
<p>Aged care employee—level 5 (PCW grade 4)</p>	<p>An employee at this level:</p> <ul style="list-style-type: none"> • is capable of functioning semi-autonomously, and prioritising their own work within established policies, guidelines and procedures; • is responsible for work performed with a substantial level of accountability; • works either individually or in a team; • may assist with supervision of others; • requires a comprehensive knowledge of medical terminology and/or a working knowledge of health insurance schemes (admin/clerical); • may require basic computer knowledge or be required to use a computer on a regular basis; • possesses administrative skills and problem-solving abilities; • possesses well developed communication, interpersonal and/or arithmetic skills; and • requires substantial on-the-job training, may require formal qualifications at trade or certificate level and/or relevant skills training or experience. 	<p>Aged care employee—level 5 (PCW grade 4)</p>	<p>An employee at this level:</p> <ul style="list-style-type: none"> • is capable of functioning semi-autonomously, and prioritising their own work within established policies, guidelines and procedures; • is responsible for work performed with a substantial level of accountability; • works either individually or in a team; • may assist with supervision of others; • requires a comprehensive knowledge of medical terminology and/or a working knowledge of health insurance schemes (admin/clerical); • may require basic computer knowledge or be required to use a computer on a regular basis; • possesses administrative skills and problem-solving abilities; • possesses well developed communication, interpersonal and/or arithmetic skills; and • requires substantial on-the-job training, may require formal qualifications at trade or certificate level and/or relevant skills training or experience.
<p>Aged care employee—level 7 (PCW grade 5)</p>	<p>An employee at this level:</p> <ul style="list-style-type: none"> • is capable of functioning autonomously, and prioritising their work and the work of others within established policies, guidelines and procedures; • is responsible for work performed with a substantial level of accountability and responsibility; • may supervise the work of others, including work allocation, rostering and guidance; • works either individually or in a team; • may require comprehensive computer knowledge or be required to use a computer on a regular basis; • possesses developed administrative skills and problem-solving abilities; • possesses well developed communication, interpersonal and/or arithmetic skills; and • may require formal qualifications at trade or Advanced Certificate or Associate Diploma level and/or relevant skills training or experience. 	<p>Aged care employee—level 7 (PCW grade 5)</p>	<p>An employee at this level:</p> <ul style="list-style-type: none"> • is capable of functioning autonomously, and prioritising their work and the work of others within established policies, guidelines and procedures; • is responsible for work performed with a substantial level of accountability and responsibility; • may supervise the work of others, including work allocation, rostering and guidance; • works either individually or in a team; • may require comprehensive computer knowledge or be required to use a computer on a regular basis; • possesses developed administrative skills and problem-solving abilities; • possesses well developed communication, interpersonal and/or arithmetic skills; and • may require formal qualifications at trade or Advanced Certificate or Associate Diploma level and/or relevant skills training or experience.

120. The failure to identify any substantive difference between the classification descriptions of 2009 and 2021 could be interpreted in several ways. One way is to conclude the work of the aged care employees has not changed since 2009, and therefore neither has their work value. Another way is to conclude the Award classification descriptions do not reflect the work and work value of contemporary aged care employees. We subscribe to the second interpretation.
121. This view is reinforced with an examination of the witness statement of Leigh Svendsen (dated 22 April 2021) and the statement's supporting materials. Paragraphs 154 and 155 refer to the AIRC Order of 30 June 1998 that published the "Health and Allied Services - Public Sector -Victoria Consolidated Award 1998" (Tab 111 of Exhibit LS-1, p. 76). We note that Appendix A of the 1998 Award (Tab 111 of Exhibit LS-1, pp. 142-154) also contains classification descriptions, and that these are very similar to those found in the Aged Care Award of 2021. A direct comparison with the 1998 Award is not possible for the 1998 Award had 11 classification descriptions levels while the Aged Care Award has only 7 levels. It is unlikely that generic classification descriptions of 1998 reflect the work and work value of aged care employees in 2021.
122. We further note the discussion of Leigh Svendsen's statement regarding the "award modernisation process" by the AIRC of 2008 and 2009. In January 2009 the AIRC published an "exposure draft" of an "Aged Care Industry Award 2010" (Leigh Svendsen's statement, paragraph 205; Tab 144 of Exhibit LS-1, p. 1038). The classification descriptions found in Schedule A of the exposure draft award are very similar in layout and wording to that finally published in the modern award on 3 April 2009, and reproduced in Table 4. Leigh Svendsen's statement notes the 13 February 2009 submission about the classification descriptions in the exposure draft award of the ASU (paragraphs 212- 215; Tab 148 of Exhibit LS-1, p. 1185). The comments of the ASU included:
- "[they are] a mixture of generic skills requirements at each level plus a range of job titles variously referred to as 'indicative tasks' or 'indicative roles' but which appear to be primarily based on the title of the positions set out at each level."
- "... classification structures that are essentially based on job titles are a retrograde step, ... [because it] may lead to anomalies, incorrect classification and the inability for the exercise of skill levels to be appropriately recognised and rewarded. Employees may be classified on the basis of their job title (as little other guidance is available) which is normally determined by the employer."

“Employees may be locked into inappropriate levels of pay and remuneration simply on the basis of job titles. The classification structure offers an arbitrator little guidance in determining a disputed job classification case.”

123. In our opinion, these comments are still relevant. While Schedule B of the 2021 version of the Aged Care Award 2010 does mention for each of 7 levels of age care employees “Indicative tasks performed at this level are: ...”, no tasks are actually listed for any level. Rather what follows are lists of occupations, positions or job titles (e.g. Chef, Personal care worker etc). These features of the Award classification descriptions further support our view they do not reflect the work and work value of contemporary aged care employees.

Deficiencies of the Aged Care Award classification descriptions

124. On 13 February 2009 aged care industry employers made a submission to the AIRC regarding the exposure draft award (Leigh Svendsen’s statement, paragraph 208; Tab 146 of Exhibit LS-1, p. 1079). This submission had the following comment: “the levels at which ‘Aged Care Employees’ have been graded is one level too high for each classification (see Aged Care Employers Draft Award classifications filed 16 December 2008)” (Tab 146 of Exhibit LS-1, p. 1098). Yet this submission did not justify the claim with any work value material. (see Tab 152 of Exhibit LS-1, p. 1348 - PN510).
125. When the Full Bench of the AIRC made its “Award Modernisation” decision and published the “Aged Care Industry Award 2010” and three other “health and welfare services” awards, on 3 April 2009 ([2009] AIRCFB 345; Leigh Svendsen’s statement, Tab 153 of Exhibit LS-1, p. 1392), it made the following comment: “Each of the awards has been altered since the release of the exposure drafts. We have not adopted the proposal by the Health Services Union to create one award. This approach would have constituted a significant departure from the existing pattern of regulation. It would also have involved important work value considerations and posed a number of relativity issues” [146]. The remark “important work value considerations” indicates that work value assessments did not feature in the award modernisation process. Furthermore, we agree with Leigh Svendsen’s statement (paragraph 222) that the AIRC seemed to have included the proposed classifications nominated by the aged care industry employers in the published award. That is: “All Personal Care Worker classifications are moved down one level”.

126. The FWC was asked to consider the Aged Care Award 2010 classifications in 2013 (United Voice and others [2013] FWC 5696; Leigh Svendsen’s statement, paragraph 227 & Tab 157 of Exhibit LS-1, p. 1512). Unions submitted that the classification structure is ambiguous and uncertain [61]. Gooley DP did not concur with this view and stated: “The classification structure in the Award is a skill-based classification structure. While it has indicative tasks, the classification structure is not limited to those tasks and was designed to adapt to the changing needs of the industry. It is designed to enable new positions to be placed in the skill-based classification structure. That a position is not included in the indicative tasks list does not mean it is not be covered by the Award” [69]. This comment of the FWC acknowledged the so called “indicative tasks” only lists positions, and not specific tasks, duties or functions that aged care employees might perform. We do not agree that Schedule B of the Award is “a skill-based classification structure”. We also note work value was not discussed or assessed by the FWC in this decision.
127. The classification structure of the Award was next considered by the FWC with the “4 yearly review” of the Aged Care Award ([2019] FWCFB 5078) in 2019. Assertions made by some employers in this case seem to conflict with those made before Gooley DP in 2013. In 2013 unions sought to have employee progression in the classification structure to be based on service recognition (in-service experience or job tenure). Aged care employers argued this would result in employees with no AQF qualification or equivalent being paid the same as those who hold the qualifications ([2013] FWC 5696, at [65]). In 2019 unions sought to have PCW progression partly based on attainment of a qualification (Certificate III). One employer group (Australian Business Industrial) claimed “classifying an employee based on their qualification ... would have the likely effect of having two employees who perform identical duties being entitled to different minimum wages merely because one employee possesses a qualification which the other does not” ([2019] FWCFB 5078, at [74]). The aged care employers also suggested the union proposal would result in employees being paid differently despite performing the same work, simply because one employee possesses a qualification that is not required ([2019] FWCFB 5078, at [76]).
128. The employer submissions to the FWC in the 2013 case and the 2019 award review case paint a confusing picture about how the classification structure of the Award operates or should operate. The submissions of 2013 imply qualifications are an important aspect for aged care employee progression. Yet the submissions of 2019 seem to imply in-service experience and not qualifications have more value.

129. This confusion notwithstanding, an employer submission of 2019 gives some guidance about what the word “required” could mean: “We say that the words ‘is required’ does not mean whether or not the employer requires it. We say that a proper construction is whether the nature of the role and the duties requires the qualification. Because the classifications are all about the nature of the work, the duties that are being undertaken and so when read properly in that context, the phrase there is [sic] talking about whether or not the nature of the work requires the qualification” ([2019] FWCFB 5078, at [92]).
130. In their 2019 submissions employers referred to “the principle of equal remuneration for work of equal or comparable value” (at [74]) and “work value” (at [76]). But no employer submission indicated if a work value assessment had been conducted for any employees covered by the Award. However, the Full Bench did comment on the potential that a “work value” application was relevant to the Aged Care Award: “The proper fixation of minimum award wages is an important issue and deserves more consideration than merely being used as a throw away line in support of an ostensibly unrelated claim” (at [60]).
131. In our opinion there are deficiencies with the Aged Care Award classification descriptions. The classification structure does not contain skill based or task-based descriptions. The “indicative tasks” only lists job positions or job titles. The classification descriptions of Schedule B, and reproduced in Table 4, are generic competency descriptions. These classification descriptions have not been varied since 2009 (except for the minor change to the final dot point of aged care employee level 4 made in 2019). Therefore, the criticism of the ASU in 2009 regarding the classification descriptions in the exposure draft award remain valid (Leigh Svendsen’s statement, paragraphs 212- 215). We agree with the comments of Leigh Svendsen’s witness statement made at paragraphs 10(d) and 10(c). We do not think the Aged Care Award classification descriptions are useful in assessing or identifying the work value of aged care employees.

Lack of work value assessment for PCWs

132. We are unaware of any work value assessment of employees covered by the Aged Care Award 2010 having been conducted by the FWC or its predecessors. The AIRC indicated that work value assessments were not part of the award modernisation process of 2008

and 2009 ([2009] AIRCFB 345, at [146]). In 2011 the issue of wage comparisons for employees covered by the Award was raised before FWA ([2011] FWAFB 2633). The Full Bench indicated the merits of such wage comparisons were not germane to the matter: “They referred to a Productivity Commission report which suggested that competitive wages could not be achieved for aged care workers unless the costs and prices for aged care are independently assessed and fixed. They also submitted that the wage rates claimed by the applicants are based on invalid comparisons with manufacturing and other industries. We are not in a position to evaluate the significance of these submissions” (at [35]).

133. When the first review of the Award was conducted by the FWC in 2013 ([2013] FWC 5696), there is no indication that a work value assessment was undertaken. When the second review of the Award was conducted in 2019 ([2019] FWCFB 5078), the Full Bench clearly noted that a work value assessment was not conducted (at [59] to [62]). The Full Bench did confirm that the work value of employees should be recognised in awards: “The submission put is consistent with an observation by a Full Bench of the AIRC in *Re: Hospitality Industry (General) Award 2010*: ‘The basic concept that employees who have obtained and utilise relevant skills in their work should have those skills recognised and paid for within the classification structure is well established. It was an element of the structural efficiency principle of the late 1980’s which was directed, amongst other things, to establishing skill-related career paths which provide an incentive for workers to continue to participate in skill formation.’ ” (at [84]).
134. We examined the cases that made changes to the Award listed in Leigh Svendsen’s statement (paragraph 226; Tab 156 of Exhibit LS-1, p. 1494). We cannot detect any occasion when a work value assessment was attempted. Accordingly, we agree with Leigh Svendsen’s statement at paragraph 10(a): no work value assessment has been conducted in relation to the Award. In summary, the combination of the deficiencies with the Aged Care Award classification descriptions and lack of a work value assessment since 2009 are compelling reasons to conclude that the work of aged care employees is likely to be undervalued.

Changes in work value for aged care employees

135. In our opinion, there is substantial material that shows the work value of aged care employees, and those working in RACFs in particular, has increased since 2009. The

aged care workforce census reports contain information about 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 for employees covered by the Aged Care Award 2010.

136. For the 2012 census (King, Mavromaras, Wei et al 2012) 101 aged care employees were interviewed, covering the range of occupations found in the industry (including staff covered by the Nurses Award 2020). When discussing their work the interviewees mentioned both formal skills and informal skills, with an emphasis on the “social and emotional” features of their work. These skills included: communication and interpersonal skills; emotional skills (sometimes called emotional intelligence) to work with older people who have a range of physical and mental needs; caring; compassion; empathy; honesty; patience; and respect. In the 2012 census report the authors nominate a range of workplace behaviours within the concept of emotional labour. Therapeutic emotional labour, which develops a client’s emotional well-being. Instrumental emotional labour, which is applied to calm a client during a procedure or intervention and increase the levels of trust and confidence. And collegial emotional labour, used to facilitate effective communication between co-workers. The authors then comment: “The use of emotional labour is therefore productive and should be recognised as a set of skills required for undertaking care work. This contrasts to concerns often expressed about the need for employers to contain emotions in the workplace – to make sure that workers do not ‘care too much’. Indeed King (forthcoming) has identified aspects of the work environment that enabled care workers to use emotional management strategies to successfully juggle or synthesise the emotional demands of their work” (King, Mavromaras, Wei et al 2012, p. 150).
137. In short, these soft skills are often overlooked or not recognised when work value is considered, as they can have gender stereotypical foundations: “Aged care has traditionally relied on employing workers who were perceived to have these types of emotional and social skills, but as an innate quality often having been gained through informal caring. As the need to recruit from outside of the traditional groups increases it may well be necessary to formalise these skills into training programs” (King, Mavromaras, Wei et al 2012, p. 150). As these aged care workplace behaviours can be taught and learned, they contribute to the work value of employees and, in our opinion, should be recognised as a set of skills.

138. The 2016 workforce census report (Mavromaras, Knight, Isherwood et al 2017) shows that RACF employees, including PCWs, regularly undertake training to improve skills in their current job. This nature of this training covers dementia training, palliative care, wound management, mental health, and management and leadership training (Mavromaras, Knight, Isherwood et al 2017, pp. 29-31). This new knowledge would complement the notable in-service experience of the workforce, as a sizeable majority of RACF employees had more than 4 years of direct care work experience (Mavromaras, Knight, Isherwood et al 2017, pp. 33-36). These skills are used in the performance of their work (Mavromaras, Knight, Isherwood et al 2017, pp. 39 and 148-149). Communicating in a language other than English is also applied in the work by many aged care employees (Mavromaras, Knight, Isherwood et al 2017, pp. 44-45).
139. The staff interviews conducted for the 2016 workforce census report reveal the conditions under which the work is done. These conditions include stress and high workloads. Other conditions are unique to the aged care workplace environment: the “emotionally draining” consequences of dealing with the deteriorating health and death of clients; and the challenging behaviours of some clients when working in palliative and dementia care (Mavromaras, Knight, Isherwood et al 2017, pp. 140-141). The 2016 staff interviews, like the 2012 interviews, highlighted the social skills applied in an emotional labour context. Other work-related skills were noted: time management and conflict resolution skills (Mavromaras, Knight, Isherwood et al 2017, p. 143). The physical nature of the work (manual handling) and working with medication were also mentioned (Mavromaras, Knight, Isherwood et al 2017, p. 146).
140. The 2020 workforce census report (Department of Health 2021) used a different methodology to that of previous census reports. Despite this, and consistent with the 2016 report, it shows the range of speciality skills of staff in RACFs (both nursing occupations and PCWs). The skills include dementia care; diversity awareness; elder abuse awareness; falls risk; infection prevention and control (IPC); medications; palliative care; and wound care (Department of Health 2021, p. 21). While not all RACF employees have undergone training to acquire these specialist skills, Figure A4.1 of the report (Department of Health 2021, p. 52) indicates these “formally obtained specialist skills” are widespread among the RACF occupations.
141. In our view, the aged care workforce census reports show that the nature of the work, the range and depth of skills involved in performing the work, and the conditions under

which the work is done are complex. The generic classification descriptions of Schedule B of the Award are unable to accommodate this complexity. And therefore, conceal the work value of aged care employees covered by the Aged Care Award 2010.

142. About two-thirds of PCWs have completed a Certificate III course or higher in a relevant direct care field (Department of Health 2021, p. 9). Despite this the Royal Commission recommended the content of Certificate III and IV courses be reviewed to reflect the specialist aged care needs of RACFs (Recommendation 78). The range of specialist aged care skills of the workforce was noted by Commissioner Briggs: trauma-informed care, cultural safety, mental health, physical health status, wound care, oral health, palliative care, falls prevention, first aid, monitoring medication and dysphagia management (Royal Commission 2021b, Volume 3A, p. 402). Recommendation 80 highlights the importance of skills devoted to dementia care and palliative care, as the Royal Commission remarked these aspects of aged care are now part of the “core business” of aged care providers (Royal Commission 2021b, Volume 3A, pp. 405-406). Recommendation 81 calls for going professional development so employees can upgrade their skills, knowledge and capabilities (Royal Commission 2021b, Volume 3A, p. 407). In our view this reflects the constantly changing nature of aged care work and growing breadth and depth of the workforce skills demanded.
143. Of high relevance to our expert opinion report is the Royal Commission’s Recommendation 84 (increases in award wages) so that pay rates reflect the work value of aged care employees (Royal Commission 2021b, Volume 3A, pp. 415-416). The Royal Commission also noted a disparity in pay between residential care workers working under the Aged Care Award 2010 and social and community services workers who were awarded a significant pay increase as a result of the Equal Remuneration Order made by Fair Work Australia in 2012. The CEDA report of August 2021 likewise argues there is this disparity in pay between the two health and welfare services awards (CEDA 2021, pp. 22-23).

Nurses Award 2010 (MA000034)

144. Arguments for a general undervaluation of the work of employee classifications covered by the Nurses Award 2020 (the award was restyled in September 2021; see PR731767) are less direct than for PCWs under the Aged Care Award. The Nurses Award has three occupational employee classifications: nursing assistant, enrolled nurses (ENs), and

registered nurses (RNs). The classification structure is shown in Schedule A of the Nurses Award 2020 (see Kristen Wischer’s statement, exhibit AH 33).

145. The witness statement of Kristen Wischer (dated 14 September 2021) and the supporting exhibit materials detail the history of nursing classifications in the relevant federal and state awards. The nursing assistant classification (NA) was previously titled “assistant in nursing” (AIN) under Queensland (Kristen Wischer’s statement p. 48, exhibit AH 22), NSW (Kristen Wischer’s statement p. 51, exhibit AH 23) and federal (Kristen Wischer’s statement p. 52, exhibit AH 24) awards. During the “Award Modernisation” process of 2008 and 2009 there was some confusion about this classification, its relationship to the PCW classification, and the role of AINs in aged care.
146. The transcript of proceedings before the Full Bench of the AIRC on 23 February 2009 contained in Leigh Svendsen’s statement (Tab 152 of Exhibit LS-1, p. 1273) indicates employers understood the role of NAs to be the same or similar to that of PCWs (p. 1327, PN 368; p. 1341, PN 465; & p. 1347). The Nurses Award 2010 published on 3 April 2009 (PR986375) removed this confusion by including a definition of “nursing assistant” in Schedule A – Classification Descriptions of the Award, noting NAs work under the direct control or supervision of either a RN or EN ([2009] AIRCFB 345, at [152]). The 2009 definition is more-or-less the same as contained in Schedule A of the Nurses Award 2020.
147. Despite this clarification, the term “nursing assistant” is not often used in the aged care context. The material we consulted for this report does, only generally, mention “nursing assistants”. The aged care workforce census reports do not discuss this classification. The Glossary of the 2016 report includes the positions Personal Care Attendant (PCA) and Allied Health Assistant (AHA). We have understood PCA to mean PCW (as PCW and not PCA is noted in the Glossary of the 2020 report). None of the aged care workforce census reports include AHAs in the discussions about nurses. And the Royal Commission into Aged Care Quality and Safety reports make no mention of nursing assistants, except for Recommendation 77, and only the position of “assistant in nursing” mentioned.
148. The ABS’s ANZSCO occupational unit group 4233 Nursing Support and Personal Care Workers includes the six-digit occupations personal care assistant (423313) and nursing support worker or “assistant in nursing” (423312). We note the instructions from Gordon Legal dated 21 October 2021 (see Annexure C) entreating us to assume that NAs do

work in aged care and there is a substantial commonality of work as between PCWs and NAs. Consequently, much of our discussion and opinions regarding undervaluation and gender-based undervaluation of the work of PCWs under the Aged Care Award 2010 also applies to the work of NAs under the Nursing Award 2020.

149. Unlike the Aged Care Award, the Nurses Award 2010 did not have notable deficiencies with the classification descriptions. The Schedule A classification descriptions had nursing specific “skill indicators” for each classification pay point, and these have been retained in the Nurses Award 2020.

Lack of work value assessment since 2009

150. Nevertheless, many reasons for undervaluation of work we have expressed regarding direct care employees covered by the Aged Care Award are relevant to employees covered by the Nurses Award. We are unaware of any work value assessment of employees covered by the Nurses Award 2010 having been conducted by the FWC since 2009. The variations made to the Award have been as a result of the “4 yearly review of modern awards” and these amendments dealt with a “common issue” for all modern awards. Occasionally variations dealt with some particular aspect of nurses’ employment (e.g., [2019] FWCFB 121).
151. We cannot detect any occasion when a work value assessment was attempted. Accordingly, we agree with Kristen Wischer’s statement (p. 60, paragraphs 279 to 281) that (i) there has been no work value applications made in relation to the Nurses Award, (ii) award pay increases have been limited to Annual Wage Reviews, and (iii) there has been no substantive changes to pay or the classification structure due to a review of the Award.
152. We note the witness statement of Kristen Wischer and the supporting exhibits do indicate work value assessments have been sought for nursing classifications in predecessor awards (for example, p. 12, AH 5; p. 33, AH 14; p. 42, AH 18; p. 46, AH 21; p. 48, AH 22; p. 51, AH 23; & p. 52, AH 24). We also highlight the comment of the advocate for the (then) Australian Nursing Federation made to the AIRC on 23 February 2009: “We note that it was virtually impossible over the past decade to make significant changes to safety net awards and we're hopefully that the new federal industrial laws will allow this

issue to be addressed because the rates are particularly low and that's as a consequence of the history of the awards” (Leigh Svendsen’s statement Tab 152 of Exhibit LS-1, p. 1371, PN 666). In our view, a lack of work value assessment is indicative of undervaluation.

Changes in work value for nurses working in aged care

153. There is substantial material that indicate the work value of nurses engaged in aged care (and RACFs in particular), has increased since 2009. As we discussed previously, the aged care workforce census reports contain information about 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. The conclusions made from these reports are relevant for employees covered by the Nurses Award 2020.
154. While a minority of the aged care employees interviewed for the 2012 census were nurses (13 RNs and 6 ENs), the aspects of informal skills and emotional labour in the work performed are just as applicable to nurses as they are to PCWs (King, Mavromaras, Wei et al 2012, p. 150). Likewise for the 2016 workforce census report regarding nurses in RACFs undertaking training to improve skills in areas applicable to aged care. Indeed, nurses – both RNs and ENs – were more likely to have undertaken continuing professional development than other aged care staff and had a longer duration of RACF experience than other employees (Mavromaras, Knight, Isherwood et al 2017, pp. 29-31). Again, similar to PCWs, nurses used these skills in the performance of their work while having more of a “managerial role” (more so for RNs than ENs) (Mavromaras, Knight, Isherwood et al 2017, p. 39 and pp. 148-149). Like PCWs, many nurses communicated in a language other than English (Mavromaras, Knight, Isherwood et al 2017, pp. 44-45).
155. A greater proportion of the aged care staff interviewed for the 2016 workforce census report were nurses: 43 (29 RNs, and 11 ENs) out of 100. Therefore, the issues of stress and high workloads, “emotionally draining” work, application of social skills in an emotional labour context, and using time management and conflict resolution skills also apply to nurses working in RACFs (Mavromaras, Knight, Isherwood et al 2017, pp. 140-141, 143 & 146). The 2020 workforce census report also shows the aged care speciality skills of nurses (Department of Health 2021, p. 21) and their range of “formally obtained specialist skills” (Department of Health 2021, p. 52).

156. We note the comment of the advocate for the aged care employers made to the AIRC on 23 February 2009: “So if the Aged Care Industry isn't going to have an award that includes nurses within the industry award then we say the Nursing Occupational Award needs to be made as consistent as possible to the terms and conditions in both of those awards, given that these employees worked side by side under the same roof for exactly the same clients” (Leigh Svendsen’s statement Tab 152 of Exhibit LS-1, p. 1342, PN 472). In our view this remark concedes that the nature of the work, the range and depth of skills involved in performing the work, and the conditions under which the work is done in RACFs is common to employees covered by both the Aged Care Award 2010 and the Nurses Award 2020. While RNs and ENs have different tasks, duties and responsibilities to PCWs, working side by side under the same roof for exactly the same clients suggests their work environment is shared. Accordingly, the constantly changing nature of aged care work since 2009 would impact on the work value of both PCWs and nurses.
157. In the light of the materials we have considered to respond to Question 7, it is our opinion that the work of the PCW classification of the Aged Care Award 2010 and nursing classifications of the Nurses Award 2020 working in RACFs are undervalued. In answering Question 3 we noted the Grimshaw and Rubery (2007, p. v) definition of undervaluation: “a higher quality of labour for a given wage”. Both the aged care workforce census reports and the Royal Commission final report clearly show the nature of work in RACFs has changed since 2009. These changes have required new knowledge and skills to be acquired and applied by direct care employees. Yet these new work demands on PCWs and nurses have not been accompanied by rises in award pay rates that reflect this increase in work value. Accordingly, their work is undervalued because they are supplying a higher quality of labour for their award wage rate. In answering Question 3 we also noted undervaluation can occur when gender-biased assumptions influence understandings of skill. Both the gender profile of the PCW and nursing workforces in RACFs, and gendered assumptions about the skill level required in care-giving work, are in our opinion reasons to conclude the undervaluation is gender based.

Question 8:

If the answer to the question set out in paragraph 11(7) is that there is such an undervaluation in relation to any of registered nurses, enrolled nurses, assistants in nursing and personal care workers:

(a) how (if at all) is that conclusion based on, or related to, opinions you express in relation to the questions we have asked you about a gender pay gap (questions 11(1) and 11(2) of our 11 August 2021 letter);

158. Part 2-3 of the Fair Work Act deals with modern awards. Section 134 outlines “the modern award objective”. This objective includes: “The FWC must ensure that modern awards, [...] provide a fair and relevant minimum safety net of terms and conditions” (s.134(1)). If the pay rates of a modern award do not reflect the work value of an occupation or award classification, it would be difficult to claim the award is “relevant”. If the pay rates of a modern award do not reflect the work value of an occupation or award classification that is predominantly performed by women it would be difficult to claim the award takes into account “the principle of equal remuneration for work of equal or comparable value” (s.134 (1)(e)). Section 135 allows the FWC to vary modern award minimum wages for work value reasons. Section 157(2A) outlines “work value reasons: (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.”
159. As with our answer to Question 7, we mostly restrict our response to Question 8 to the RACF workforce. In our response to Question 7 we expressed the opinion that the work of the PCW classification of the Aged Care Award 2010 and nursing classifications of the Nurses Award 2020 working in RACFs are undervalued, and this undervaluation is due to both a substantial addition to the demands required in the performance of their work since 2009, and gender-related reasons evident in the failure to assess whether the rates of pay properly reflect the value of work. Aspects we discussed in answering Question 1 and Question 2 contribute to this conclusion. We noted there are several measurements that can be used to gauge the extend of the GPG in Australia, with the AWOTE measure being a preferred method as it compares like male earnings with like female earnings (see Table 1 and Table 2). However, AWOTE measures the earnings of adults employed on a full-time basis, and thus may not be appropriate for aged care employees.
160. Direct care employees in RACFs are, generally, part-time workers. Table 3.16 of the 2016 workforce census report indicates that only a minority of aged care staff were engaged on a full-time basis. However, Table 3.18 indicates the majority worked full-

time hours: 35 hours a week or more (Mavromaras, Knight, Isherwood et al 2017, pp. 25-26). The 2020 workforce census report shows only a small minority of RACF staff are engaged on casual contracts (Department of Health 2021, p. 14 Table 2.2). As our Table 2 shows, the AHCE measurement of the GPG is only marginally smaller than AWOTE. Given the vast majority of RACF employees are permanent workers, they would not be paid casual loadings (though a small proportion of RACF workers would receive a shift allowance). In the light of the gender profile of the RACF workforce, the pay rates of employee classifications of both the Aged Care Award and the Nurses Award, in our opinion, contribute to the GPG in Australia.

161. In answering Question 2 we noted limitations of standard econometric or human capital analyses seeking to explain the GPG in Australia. We discussed the inadequacies of statistical analysis that relies on “one-digit” and “two-digit” levels of the ANZSCO skills hierarchy, in contrast to the analysis using “three-digit” and “four-digit” levels. Since the creation of the Aged Care Award and the Nurses Award in 2009, the ABS has revised the ANZSCO skill level attached to PCWs. The ANZSCO version of 2009 (ABS 1220.0 First Edition, Revision 1) allocated skill level 4 to the occupational unit group 4231, which included the six-digit occupation personal care workers, and the occupational unit group 4233, which included the six-digit occupation nursing support worker (or “assistant in nursing”). Revisions made to ANZSCO in 2019 have raised the skill level of both the personal care worker and nursing support worker to skill level 3 (ANZSCO Version 1.3). In explaining this change, the ABS remarked:

“Aged and Disabled Carers” is a single occupation in ANZSCO covering both carers for the aged and the disabled, with some workers requiring more and/or different skills. While there is an overlap of tasks performed by these workers there are differences which should be recognised. Because splitting occupations was out of scope, the ABS and StatsNZ agreed on the indicative skill level required for workers employed in this occupation category and added a note that some roles in that occupation would require a higher skill level. For Aged and Disabled Carers, the indicative skill level was left at Skill Level 4 but it is now noted some roles in that occupation are Skill Level 3” (ABS 2013).

162. Consequently, standard economic or econometric analysis of the GPG in Australia relying on occupational major group and sub-major group ANZSCO skill levels to measure human capital are likely to incorrectly apply skill level 4, and not skill level 3, to PCWs and nursing assistants. Such analysis would undervalue the work and skills of these occupations. The revisions made by the ABS to ANZSCO Version 1.3 indicate

that conclusively measuring “human capital” variables with statistical analysis is problematic.

163. While we did not discuss the recommendations of the Royal Commission into Aged Care Quality and Safety in answering Question 1 or Question 2, they influence to our opinions about undervaluation of work in RACFs. The Royal Commission recommended that a Certificate III be the mandatory minimum qualification for PCWs (Recommendations 77 and 78). While about two-thirds of PCWs have already completed a Certificate III, and about a quarter have completed a Certificate IV, in our view these recommendations acknowledge the increased skill demands placed on PCWs since 2009. In our opinion, the recommendation that Certificate III and IV courses should be reviewed reflects the demands for specialist aged care knowledge and skills in RACFs (Recommendations 79). These recommendations of the Royal Commission indicate that the constantly changing work environment in RACF impacts on not just PCWs, but also RNs and ENs. As these increasing skill demands of the aged care workforce have not been matched by increases in pay rates under either the Aged Care Award or the Nurses Award or a review of the classification structures in those awards, it contributes to the undervaluation of the work of these female-dominated occupations, in our opinion.

Question 8:

(b) how (if at all) is that conclusion based on, or related to, opinions you express about:

(i) contributing factors to a gender-based undervaluation (question 11(4) of our 11 August 2021 letter); or

164. In our answer to Question 7 we concluded the work of PCWs and nurses employed in RACFs is undervalued. We also opined there are persuasive reasons to conclude that the undervaluation is shaped by gender-related factors. These gender-related influences are more implicit than explicit. Historical legacies of gender-biased attitudes about what workplace skills have high or low value in the labour market are particularly relevant for emotional labour and care-giving work.
165. In response to Questions 3 and 4 we noted that social norms about gender can make assessments of work value subjective and not objective. These social norms can impact on a range of work valuation methodologies and methods, including assessments of work value made by tribunals and commercial job evaluation systems. Despite this, these processes can have an “aura” of objectivity free from explicit gender biases. For example, the Full Bench of the FWC in the “Early Childhood Teachers Equal

Remuneration” decision ([2021] FWCFB 2051) of 2021 highlighted the subjectivity of some job evaluation methods: “It is apparent that the results produced by the methodology depend to a significant extent on a subjective assessment of the requirements of a role from the limited information contained in the position description, ... To say this is not to criticise his evidence but rather it illustrates the degree of subjectivity in the CED methodology” [199].

166. In our opinion, the ending of any specific reference to the gender of employees in aged care does not mean gender was no longer an issue when work value was assessed and/or when wage rates were set. Absences of a direct gender reference in the various awards or industrial tribunal decisions should not be interpreted as an end of the influence of gender-stereotypical attitudes.
167. The witness statement of Kristen Wischer notes several examples of gender influencing industrial instruments despite the remove of specific reference to the sex of employees: a 1986 Victorian tribunal case regarding the application of the 1972 Equal Pay Principle (Kristen Wischer’s statement p. 11 paragraph 49, exhibit AH 4); and a 1987 federal tribunal case also regarding the application of the 1972 Equal Pay Principle (Kristen Wischer’s statement p. 16 paragraph 73, exhibit AH 7- pp. 12-13 of the unpaginated exhibit).
168. In addition, the Full Bench of the FWC in the Early Childhood Teachers Equal Remuneration decision ([2021] FWCFB 2051) of 2021 highlighted how gendered attitudes can have a lasting impact on award pay rates. Specifically, the failure of a modern award and its predecessors to fix wage rates on the basis of a proper assessment of work value, and failure to take into account substantial changes in the nature of the work, the level of their skills and responsibility since the award was made (at [645]).
169. The failure to make substantive updates to the classification descriptions of the Aged Care Award and the lack of work value assessment since 2009 suggest gender-stereotypical thinking has influenced attitudes towards the skill of the RACF workers, the skill demanded by their work, and the work environment. The Full Bench of the FWC in the Early Childhood Teachers Equal Remuneration case, in this regard, commented on classification definitions in some awards: “... the classification definitions were never constructed for [that] purpose; their function is only to describe what is necessary to qualify for the minimum levels of remuneration prescribed by the award. There is no basis whatsoever to conclude that these classification definitions accurately describe the

duties, skills, responsibilities and work environment of all engineers...” ([2021] FWCFB 2051 at [203]).

170. That the gender profile of nurses and PCWs in RACFs continues to remain significantly skewed towards women suggests that gender cannot not be removed as a factor which has shaped, and continues to shape, the remuneration of direct care staff. In response to Question 3 and Question 4, we discussed how the characterisation of work as feminised can influence valuing the work. Specifically, the invisibility of skills in feminised work, due to the use of “soft skills” (e.g. communication, emotional labour, relationship building), which have similarities with traditional gender roles of women as mothers and care-givers. For the reasons discussed above, and elsewhere in this report, it is our opinion historical legacies concerning gender and skills continue to impact the undervaluation of the work of direct care employees in RACFs.

Question 8(b):

(ii) barriers and limitations to the proper assessment of work values in female-dominated industries and occupations by industrial tribunals in Australia (questions 11(5)–11(6) of our 11 August 2021 letter).

171. In responding to Question 8(b)(i) we highlighted two examples of Australian industrial tribunals taking more than a decade to apply the 1972 equal pay principle to nursing awards. This delay suggests the polycentric nature of industrial tribunals, for their deliberations entertain a variety of competing, and sometimes contradictory, issues. The witness statement of Kristen Wischer has as exhibits examples of several federal tribunal wage-fixing principles that have been, at various times, barriers or limitations to the proper assessment of work values in female-dominated industries and occupations: the 1998 (WFP-4), the 1989 (WFP-5) and the 1994 (WFP-6) principles. The 1988 work value principle set January 1978 as the cut-off date for past work value to be considered (WFP-4, p. 180). This was restated with the 1989 principles (WFP-5, p. 103), together with the notion that “a significant net alteration to work value” needed to be demonstrated. Thus, remedying historical gender-based undervaluation of work may not be through recognising an alteration to work value, but rather correcting past undervaluations (the nature of the work may not have changed). The 1994 principles introduced further barriers. Namely, the limitations of internal award and external wage relativities so as to avoid “wage ‘leapfrogging’ arising out of changes in relative position” (WFP-6, p. 175). This principle was a factor in a 2005 case regarding AINs (Kristen Wischer’s statement p. 52, exhibit AH 24 p. 21).

172. The processes adopted by tribunals to assess work values in female-dominated classifications is often a barrier. The processes may inhibit the recognition and delineation of skills in female dominated occupations and industries and the ability to compare jobs that entail dissimilar work.
173. In Volume II of the NSW 1998 Pay Equity Inquiry Report, Justice Glynn made extensive commentary on the impact of the NSW State Equal Pay Case 1973. She noted the processes involved (1) increasing the level of women's wages by adjusting their basic wage to that of men, and (2) thereafter reviewing the level of wages from time to time without discrimination based on sex (Glynn 1998b, pp. 49-50). The first process was straightforward. The second process required reviewing the value of work.
174. Justice Glynn commented on cases where the second process was done by comparing the work of female employees with the work of male employees in the same award to assess work value. In situations of "exclusively female employment" a comparison could be made between "a female award and a parallel male award for similar although not identical work" (Glynn 1998b, p. 53). Justice Glynn noted the NSW tribunal's "difficulty in making findings as to equality when the work is quite different" (Glynn 1998b, p. 54). Justice Glynn concluded, applying the NSW State Equal Pay Case 1973 wage-fixing principles had limitations when a work value assessment involved "dissimilar work performed by male and female employees" (Glynn 1998b, p. 147).
175. We noted in our response to Question 5 the FWC has expressed a preference for comparisons between workers performing similar work under similar conditions. In our view, this process is misconceived as it downplays, or even ignores, the reality of gender occupational segregation.
176. Another limitation is how tribunals have considered the issue of increased workloads. Examples of when increased workloads did not indicate a notable addition to work value are a federal tribunal 2000 case (Kristen Wischer's statement p. 44, exhibit AH 20 at [86]) and a state tribunal 2002 case (Kristen Wischer's statement p. 49, exhibit AH 22 at [69-70]). Examples of when increased workloads were relevant to work value are a federal tribunal 1996 case (Kristen Wischer's statement p. 35, exhibit AH 15 p. 17) and a federal tribunal 2005 case (Kristen Wischer's statement p. 52, exhibit AH 24 at [77]).

177. The issue of industry funding is of relevance to the classifications of the Aged Care Award and the Nurses Award working in RACFs. Health care and social assistance industry sectors have all or a sizable amount of operational funding supplied either directly or indirectly from government sources. This employer “capacity to pay” for any increase in award wages has been considered by industrial tribunal decisions.
178. This matter was addressed in 2000 when the AIRC remarked:
“In reaching our decision on the level of increase in wages that should apply over the life of the award we have taken into account the evidence regarding the financial constraints that exist in this part of the health sector. The respondents comprise a mixture of private and ‘not for profit’ organisations operating various size nursing homes across both metropolitan, regional and country Victoria. The aged care sector is one which is governed in its ability to meet increased costs by a funding regime which the Commonwealth Government strictly controls” (Kristen Wischer’s statement p. 45, exhibit AH 20 at [89]).
179. The funding issue was noted as a limitation on award pay rates by employers during the Award Modernisation process of 2009 (Leigh Svendsen’s statement, Tab 152 of Exhibit LS-1, pp. 1342, 1370-1371), before FWA in 2011 (United Voice; The Australian Workers' Union of Employees, Queensland [2011] FWAFB 2633 at [21-22], [25], [27], [29] & [33]), and before the FWC in 2019 ([2019] FWCFB 5078 at [35]).
180. This issue was again raised by a submission of the Counsel Assisting the Royal Commission into Aged Care Quality and Safety in February 2020. The submission observed when additional funding to aged care providers has been made to devote to workforce costs “[t]here is no evidence that either initiative resulted in improved wages in the sector”; so that merely increasing the level of subsidies paid to providers is unlikely to translate into higher levels of remuneration for the predominantly female workforce (Royal Commission into Aged Care Quality and Safety 2020)
181. Another considerable barrier or limitation has been the legislative policy shift since the 1990s to have awards as a key part of an employment “safety net” system. In our answer to Question 7 we quoted February 2009 remarks to the AIRC by an ANF advocate that it had become “virtually impossible” to make significant changes to safety net awards (Leigh Svendsen’s statement Tab 152 of Exhibit LS-1, p. 1371, PN 666). How the FWC has interpreted or applied the award safety net policy is a factor.
182. When the FWC conducted a review of the Aged Care Award in 2013 Deputy President Gooley indicated the difficulties in varying a modern award to “achieve the modern

awards objective ” or because an award is operating other than “effectively, without anomalies or technical problems” (United Voice and others [2013] FWC 5696; Leigh Svendsen’s statement, paragraph 227 & Tab 157 of Exhibit LS-1, p. 1529 at [85]).

183. With the next review of Aged Care Award in 2019 the FWC again highlighted these challenges: “The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award” ([2019] FWCFB 5078 at [10]).
184. In highlighting barriers and limitations confronting Australian industrial tribunals when they have sought to assess work values in female-dominated industries and occupations we do not downplay the challenges involved. Assessing work value will always have elements of subjectivity because the notion of “skill” is a social construction. Nevertheless, assessing the value of work in feminised industries or occupations on a gender-neutral basis requires disregarding the sex of those performing the work, and questioning the continued influence of historical legacies about the skills applied. Failure to appreciate the reality of occupational gender segregation, in our view, is not gender neutral. For comparing the work value of one female-dominated occupation with the work of another feminised occupation (i.e., comparing similar work) is likely to be a flawed process, because the skill level of a comparator occupation is likely to be undervalued due to gender-related reasons. A work value assessment that compares dissimilar work (i.e., a female-dominated occupation with the work of male-dominated occupation) is not without challenges, as the process has greater complexity than “like work” comparisons. While the reluctance of tribunals to compare dissimilar work is understandable, it remains a barrier to the proper assessment of work value of feminised labour. However, assessing work value or skill level does not always necessitate a comparison. Work task, duties and responsibilities can be assessed on their intrinsic merits. Arguably the “skill indicators” for each classification pay point in the Nurses Award 2020 attempts to do this.
185. Two Australian industries have workforces that are substantially comprise women: Health Care and Social Assistance (79%) and Education and Training (73%) (WGEA 2019). When award pay increases in sectors of these industries are considered by tribunals the topic of operational funding and labour costs regularly feature as prominent

limitations in the decision making. We have highlighted the example of this factor in aged care. It has also been raised in cases for the early childhood education sector in NSW (*Re Miscellaneous Workers' Kindergartens and Child Care Centres etc (State) Award* (2006) 150 IR 290), in Queensland (*LHMU v Children's Service Employers Association* (2006) 182 QGIG 318), and the FWC (Early Childhood Teachers Equal Remuneration decision ([2021] FWCFB 2051) in 2021.

186. Federal awards are, and have been for several decades, part of a “safety net”. Safety net awards were not intended to prescribe actual rates of pay and employment conditions for most employees, but rather be a framework of minimum employment standards to underpin making of workplace agreements. In other words, federal awards are not intended to be a comprehensive method of employment regulation as this might discourage enterprise bargaining. In this context the difficulties in making significant changes to safety net awards noted by the ANF advocate in 2009 are still relevant. An object of the Fair Work Act is to ensure a guaranteed safety net of minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders (s.3(b)). However, for many award-reliant workers these minimum terms and conditions are their actual terms and conditions (including award pay rates). Consequently, the respective modern award is no longer part a framework of minimum employment standards for them, but something akin to maximum terms and conditions. This reality notwithstanding, special circumstances are needed to assess work value under a safety net framework (Royal Commission 2021b, Volume 3A, pp. 415-417). Even in situations where legislation permits a tribunal to consider the work value of female-dominated industries or occupations, other factors can influence the outcome. As the FWC noted, no specific priority is attached to any of the section 134 considerations. Hence taking into account “the principle of equal remuneration for work of equal or comparable value” is just one of many factors to be considered.

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Annexure A

29 July 2021

Gordon
Legal

IT'S PERSONAL

Associate Professor Meg Smith
Deputy Dean – School of Business
Parramatta Campus (1PSQ)
Western Sydney University
Locked Bag 1797
PENRITH NSW 2751

Philip Gardner

SPECIAL COUNSEL

E: pgardner@gordonlegal.com.au

Legal Administrator: Trish Perra

E: pperra@gordonlegal.com.au

Our Ref: 008470

BY EMAIL ONLY: meg.smith@westernsydney.edu.au

Dear Associate Professor Smith

Request for expert opinion — Work Value Case in the Fair Work Commission

1. We act for the Australian Nursing & Midwifery Federation (“ANMF”) in relation to Fair Work Commission matters AM2020/99, AM2021/63, and AM2021/65.
2. Matter AM2021/63 is the ANMF’s application and, in broad terms, it seeks two amendments to the *Aged Care Award 2010* and the *Nurses Award 2010*, being these:
 - (1) the amendment of the Nurses Award by inserting a new schedule, applicable to aged care workers only and expiring after four years, which increases rates of pay by 25 per cent; and
 - (2) the amendment of the Aged Care Award by removing Personal Care Workers from the main stream of “aged care employee” in Schedule B, and creating a new classification structure for them—and increasing their rates of pay by 25 per cent.
3. We write with a view ultimately to procuring your expert opinion in relation to issues arising in the ANMF’s application. We envisage that this will require a number of stages, as we outline in more detail below.
4. At the outset, we draw your attention to Document 1 indexed in Schedule A, which is a copy of the “Expert Evidence Practice Note,” being the practice note for expert evidence issued by the Federal Court of Australia (“**Practice Note**”). You are instructed to comply with the Practice Note, including the “Harmonised Expert Witness Code of Conduct” (“**Code**”) in all of your work in connection with this brief, including your dealings with us and the preparation by you of any reports.

Preliminary matters

5. Our objective is that, ultimately, you will produce a report that is in the nature of independent expert opinion evidence. That nature of evidence should meet three criteria, which are highly relevant to your drafting of your report:

- (1) *First*, you will need to establish your expertise—*i.e.*, the training and experience which entitles you to provide an opinion in relation to the questions we ask. So, please provide, in your report, details of your training and experience generally and relevant to answering the questions. Please also attach to your report a copy of your *curriculum vitae*.
- (2) *Second*, you must establish the facts and information upon which you base your opinion in a manner which enables the reader to understand your reasoning process. If you are expressing an opinion which depends upon academic literature, or some particular experience or training of your own, then we ask that you provide sufficient references to identify those matters (such as in footnotes, endnotes and a bibliography).
- (3) *Third*, you need to acknowledge that you have read and agree to be bound by the Code. You are instructed to be bound by the Code, and we ask you to acknowledge that by including the following statement in your report:

“I have read and complied with the *Expert Evidence Practice Note* and agree to be bound by it.

My opinions set out in this report are based wholly or substantially on specialised knowledge arising from my training, study or experience.”

Please note particularly that the Code states matters that are relevant to the drafting of your report (see in particular paragraph 3). Please have regard to these matters in drafting your report.

6. We **enclose** with this letter the documents indexed in Schedule A (hereafter, when we refer to document numbers (*e.g.*, **Document X**), that is a reference to that index number in Schedule A). You should not regard yourself as confined to these documents. Though, if you have regard to or rely upon any other information or documents, please make reference to any such material where appropriate in your reasons and include a list of these in your report.

Nature of the ANMF’s application and the issues for your evidence

7. The ANMF’s application is made under section 157 of the *Fair Work Act 2009* (Cth) (“**FW Act**”). The Commission may make a determination varying a modern award if it is satisfied, amongst other things, that the variation of modern award minimum wages is

justified by work value reasons. “Work value reasons” is defined, exhaustively, in section 157(2A) of the FW Act as follows:

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

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

8. **Document 2** is a copy of the ANMF’s application. You will see that:
 - (1) at [16] of Annexure 2, the ANMF asserts that current pay rates do not reflect the underlying work value of the work performed by workers, and do not reflect changes in work value over the last 16–22 years;
 - (2) at [17], the ANMF identifies what it says is the trajectory of the nature of work (“*[t]o an ever-increasing degree,*” etc.), and goes on to say that “the work is, and has been overwhelmingly performed by females and as such has been undervalued.”
9. We intend your expert evidence will be directed towards aspects of the following issues:
 - (1) whether the current pay rates do or do not reflect underlying work value, and whether they do or do not reflect changes in work value over the past 16–22 years; and
 - (2) if it is the fact that current pay rates do not reflect underlying work value or changes thereto, whether that is or is not a function (wholly or partly) of the fact that the work is predominantly performed by females.
10. Please note that Dr Anne Junor, Honorary Associate Professor, UNSW Canberra, has also been engaged to provide evidence directed towards aspects of the issues identified at [9] above.

Scope of this initial brief

11. You are briefed to provide a report addressing the following questions:
 - (1) How is the concept of a gender pay gap (“**GPG**”) in Australia addressed in scholarly literature and available research studies, and what is your opinion in relation to whether such a GPG exists?
 - (2) If your opinion is that such a GPG does exist, what are the contributing factors to the GPG in Australia?

- (3) How is the concept of gender based undervaluation in Australia addressed in scholarly literature and available research studies, and what is your opinion in relation to whether there is such gender-based undervaluation?
- (4) If your opinion is that there is such gender-based undervaluation, what are the contributing factors to gender based undervaluation in Australia?
- (5) What, if any, have been the barriers and limitations to the proper assessment of work values in female dominated industries and occupations by industrial tribunals in Australia?
- (6) If your opinion is that there have been barriers and limitations to the proper assessment of work values in female dominated industries and occupations by industrial tribunals in Australia, how have these impacted upon the setting of award minimum rates.

Future instructions

12. For abundant clarity, we presently envision the following process which will lead, in the finish, to the preparation by you of an expert report identifying the matters we set out at [9] above:

- (1) You address the questions set out at [11] above;
- (2) We will provide to you further material pertaining to the setting of award minimum rates for employees falling within:
 - (a) the classifications in Schedule B of the Nurses Award 2010 (**Document 4**)
 - (b) the proposed classifications in the ANMF's proposed amendments to Schedule B of the Aged Care Award (see **Document 2**, Annexure 1, [3]).
- (3) We will provide you a list of the specific questions we wish you to address pertaining to the assessment of award rates and work values for employees covered in the classifications at (2)(a) and (2)(b) above; and
- (4) Ultimately, you will produce a report in relation to the questions we set out at [11] above and any additional questions pertaining to the setting of award minimum rates for employees falling within (2)(a) and (2)(b) above.

Next steps

13. Please contact me if you require any further documents or information in order to prepare your report.

14. We ask you to note that your report is confidential and subject to legal professional privilege of the ANMF. For this reason, we ask that this letter, any other materials provided to you, and any working notes or papers of consequence prepared by you, be maintained in a dedicated file marked as being confidential and subject to legal professional privilege.
15. The ANMF's evidence is due to be filed on 8 October 2021.
16. We shall be most grateful if you would confirm receipt of this letter.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Philip Gardner', is positioned above the typed name.

Philip Gardner
Special Counsel
Gordon Legal

SCHEDULE A – DOCUMENTS

	<u>Document</u>	<u>Date</u>
(1)	Federal Court, Expert Evidence Practice Note	25/10/2016
(2)	ANMF's Form F46 – Application to vary a modern award	17/05/2021
(3)	<i>The Aged Care Award 2010</i>	
(4)	<i>The Nurses Award 2010</i>	

Annexure B

15 September 2021

Associate Professor Meg Smith - Deputy Dean and
Dr Michael Lyons - Senior Lecturer
School of Business Parramatta Campus (1PSQ)
Western Sydney University
Locked Bag 1797
PENRITH NSW 2751

Philip Gardner

SPECIAL COUNSEL

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E: pperra@gordonlegal.com.au

Our Ref: 008470

By email only: meg.smith@westernsydney.edu.au
m.lyons@westernsydney.edu.au

Dear Associate Professor Smith and Dr Lyons

Request for expert opinion — Work Value Case in the Fair Work Commission

1. We refer to our letter to you dated 11 August 2021.
2. In that letter, in paragraph 12, we foreshadowed that we would provide you with further material pertaining to the setting of award minimum rates and a letter setting out further specific questions pertaining to the assessment of award rates and work values. This is that letter; the material is **enclosed** herewith.

The further material

Identification of the material

3. Our letter to you dated 11 August 2021 had a **Schedule A**, which indexed the documents we provided to you together with that letter.
4. This letter also has a **Schedule A**. The four documents already provided to you are indexed again, though not again enclosed. We have also indexed two additional documents.
 - (1) The first of these additional documents is a statement of Kristen Wischer of the ANMF dated 14 September 2021 ("**Wischer Statement**"), together with its annexures (AH 1 – AH 33). The Wischer Statement and Annexures may be accessed at the address provided in the Schedule.
 - (2) The second document is a statement of Leigh Svendsen of the Health Services Union dated 22 April 2021 ("**Svendsen Statement**"), together with its annexures (which are separately indexed). This document has been filed by the Health Services Union in associated proceedings in the Fair Work Commission. It may be accessed on the Fair Work Commission's 'Work value case – Aged Care Industry' major cases page at the link provided in the Schedule.
5. The Wischer Statement addresses the award history relevant to the setting of pay rates for registered nurses, enrolled nurses, and assistants in nursing (or personal care workers), in classifications affected by the ANMF's application concerning the *Nurses Award 2010* and the *Aged Care Award 2010*.
6. The Svendsen Statement addresses the award history of the *Aged Care Award 2010*.

7. Again, you should not regard yourself as confined to these documents. Though, if you have regard to or rely upon any other information or documents, please make reference to any such material where appropriate in your reasons and include a list of these in your report.

Your approach to the further material

8. Each of the Wischer Statement and the Svendsen Statement is a summary of the complex and voluminous documents that each annexes.
9. In each case the primary material is, of course, the annexures. So far as the Wischer Statement and the Svendsen Statement assist you in preparing your report, please use them and have regard to them as you see fit.
10. But, you are not bound to adopt them or accept the correctness of their summaries of the annexures. If you take a different view as to the annexures—for example, in relation to their content, or what should be drawn from them—you should prefer your own view.

Questions

11. It is in that context that we set out the further questions that you are instructed to address, as follows (we number it commencing at (7) to continue from paragraph 11 of our 11 August 2021 letter):
- (7) Based on an analysis of the history of the setting of pay rates for registered nurses, enrolled nurses, and assistants in nursing, is there, in the *Nurses Award 2010* and/or in respect of personal care workers in the *Aged Care Award 2010*, a gender-based undervaluation of the work done by:
- (a) registered nurses;
- (b) enrolled nurses;
- (c) assistants in nursing (or personal care workers)?
- (8) If the answer to the question set out in paragraph 11(7) is that there is such an undervaluation in relation to any of registered nurses, enrolled nurses, assistants in nursing and personal care workers:
- (a) how (if at all) is that conclusion based on, or related to, opinions you express in relation to the questions we have asked you about a gender pay gap (questions 11(1) and 11(2) of our 11 August 2021 letter);
- (b) how (if at all) is that conclusion based on, or related to, opinions you express about:
- (i) contributing factors to a gender-based undervaluation (question 11(4) of our 11 August 2021 letter); or
- (ii) barriers and limitations to the proper assessment of work values in female-dominated industries and occupations by industrial tribunals in Australia (questions 11(5)–11(6) of our 11 August 2021 letter).
12. You should not regard yourself as bound, based on the structure of how we have set out the questions above, to structure your report in the same way. Please address the matters we have set out above in whatever way you think best aids the understanding of the reader.

Addressing the questions

13. For ease of reference, we set out below paragraphs 5–6 of our 11 August 2021 letter, which are important to bear in mind as you prepare your report.

- (1) *First*, you will need to establish your expertise—*i.e.*, the training and experience which entitles you to provide an opinion in relation to the questions we ask. So, please provide, in your report, details of your training and experience generally and relevant to answering the questions. Please also attach to your report a copy of your curriculum vitae.
- (2) *Second*, you must establish the facts and information upon which you base your opinion in a manner which enables the reader to understand your reasoning process. If you are expressing an opinion which depends upon academic literature, or some particular experience or training of your own, then we ask that you provide sufficient references to identify those matters (such as in footnotes, endnotes and a bibliography).
- (3) *Third*, you need to acknowledge that you have read and agree to be bound by the Code. You are instructed to be bound by the Code, and we ask you to acknowledge that by including the following statement in your report:

“I have read and complied with the Expert Evidence Practice Note and agree to be bound by it.

My opinions set out in this report are based wholly or substantially on specialised knowledge arising from my training, study or experience.”

Please note particularly that the Code states matters that are relevant to the drafting of your report (see in particular paragraph 3). Please have regard to these matters in drafting your report.

Yours sincerely



Philip Gardner
Special Counsel
Gordon Legal

SCHEDULE A—DOCUMENTS

	<u>Document</u>	<u>Date</u>
(1)	Federal Court, Expert Evidence Practice Note	25/10/2016
(2)	ANMF's Form F46—Application to vary a modern award	17/05/2021
(3)	<i>The Aged Care Award 2010</i>	
(4)	<i>The Nurses Award 2010</i>	
(5)	<u>Statement of Kristen Wischer</u> Copy and paste the following address into your browser: https://www.dropbox.com/sh/bq4bjbeukqwt3ax/AACT46Eiz0j8UyXxE7IIPmlpa?dl=0	<u>14/09/2021</u>
(6)	<u>Statement of Leigh Svendsen</u> https://www.fwc.gov.au/documents/sites/work-value-aged-care/submissions/am202099-sub-hsu-230421.pdf	<u>22/04/2021</u>

Annexure C

21 October 2021

Associate Professor Meg Smith - Deputy Dean and
Dr Michael Lyons - Senior Lecturer
School of Business Parramatta Campus (1PSQ)
Western Sydney University
Locked Bag 1797
PENRITH NSW 2751

**By email only: meg.smith@westernsydney.edu.au
m.lyons@westernsydney.edu.au**

Dear Associate Professor Smith and Dr Lyons

Request for expert opinion — Work Value Case in the Fair Work Commission

1. We refer to our letter to you dated 15 September 2021.
2. You have informed us that:
 - (a) Attachment AH 7 to the statement of Kristen Wischer dated 14 September 2021 is incomplete; and
 - (b) Based on the material provided to you and the 2020 Aged Care Workforce Census Report, it is unclear whether or not employees in the “nursing assistant” classification of the *Nurses Award 2020* work in aged care.
3. This letter is accompanied by a complete copy of Attachment AH 7 to the statement of Kristen Wischer dated 14 September 2021.
4. You may assume for the purposes of our request for your expert opinion that employees in the “nursing assistant” classification of the *Nurses Award 2020* do work in aged care. The evidence in the case will show that that assumption is correct. There is a substantial commonality of work as between personal care workers under the *Aged Care Award 2010* and nursing assistants under the *Nurses Award 2020*.
5. In the 2020 Aged Care Workforce Census Report, the term “Personal Care Worker” includes, among others, personal care workers, nursing assistants, assistants in nursing and personal care attendants. Nursing assistants and personal care workers (how soever called) have responsibility for delivery of care, particularly with respect to the activities of daily living and day to day care of residents and clients.
6. Our client’s evidence from nursing assistants and personal care workers will identify them working as part of a nursing team, being the “eyes and ears on the floor”. They provide care in accordance with care plans and give information to Registered Nurses in order to implement a resident’s care plan. They notify their relevant Registered Nurse or Enrolled Nurse of a wide variety of matters, such as behavioural changes, bruising or other skin integrity issues, difficulties eating, or changes to mobility or continence.
7. If you require any further instructions for the purposes of our request for your expert opinion, please let us know.

Yours sincerely

A handwritten signature in blue ink that reads "N White". The signature is written in a cursive style with a horizontal line underneath the name.

Nicholas White
Senior Associate
Accredited Specialist (Workplace Relations)
GORDON LEGAL

Annexure D

CURRICULIM VITAE – MEG SMITH

CONTACT DETAILS

Address

School of Business
Western Sydney University
169 Macquarie Street Parramatta 2150

Locked Bag 1797
Penrith South DC 1797

Telephone



Email

meg.smith@westernsydney.edu.au

1. QUALIFICATIONS

PhD (RMIT) 2009
Master of Arts (Preliminary), University of Sydney, 1985
BA (KCAE) 1981

2. CURRENT AND RECENT EMPLOYMENT (2000-)

- Deputy Dean, School of Business, Western Sydney University (October 2018-)
- Deputy Dean (Accreditation, Partnerships, International), School of Business, Western Sydney University (October 2017- - October 2018)
- Director of Research and HDR, School of Business, Western Sydney University (March 2016 – October 2017)
- Director of Academic Programs (Human Resources and Management), School of Business, Western Sydney University (January 2015 – March 2016 (awarded promotion to Associate Professor effective 1/1/2016)
- Director of Academic Programs (Human Resource Management), School of Business, University of Western Sydney (January 2012-December 2014)
- Associate Head of School (Learning and Teaching), School of Management, University of Western Sydney (June 2010-December 2011)
- Senior Lecturer, School of Management, University of Western Sydney (January 2010 – December 2011)
- Lecturer, School of Management, University of Western Sydney (January 2000 - 2008)

3. PREVIOUS EMPLOYMENT (1987-2000)

- Coordinator, National Research Centre, Amalgamated Metal Workers' Union (1987-1991)
- Director and Co-Owner, Labour Market Alternatives Pty Ltd (1991 – 2000)

4. RESEARCH GRANTS, CONSULTANCY, RESEARCH SUPERVISION AND EXPERT WITNESS EVIDENCE

RESEARCH GRANTS, CONSULTANCY GRANTS RECEIVED (2002-

- 2017 project commissioned by the Public Service Association of New South Wales, Assessing equal remuneration and work value of administrative and support staff in NSW government schools (with Dr Michael Lyons)
- 2014 project commissioned by the Fair Work Commission to utilise Australian Workplace Relations Survey data to assess the gender pay gap and the method of setting pay (\$2,727)

- (with Professor Sara Charlesworth RMIT University, Associate Professor Siobhan Austen Curtin University, Associate Professor Therese Jefferson Curtin University)
- 2013 project commissioned by the Equal Pay Unit, Fair Work Commission to provide an Equal Remuneration Research Report (\$73,000) (with Professor Andrew Stewart University of Adelaide, Dr Robyn Layton AO QC)
 - 2012 project commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs to provide research support to the National Women's Alliances (\$25, 210) (with Dr Kathy Tannous)
 - 2011 Project commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs to conduct a Gender Training Workshop for delegates attending the APEC Women and the Economy Summit (\$11 751) (with Dr Kathy Tannous)
 - 2005 - 2007 Project commissioned by the New Zealand Department of Labour and conducted by the Industrial Relations Research Centre, University of New South Wales, titled *Pay and Employment Equity: Development of a methodology for better recognition of the skills in service work* (\$170 773) (member of the project team)
 - 2005-2006 International Research Initiatives Scheme (UWS) The Research Visit of Dr William J Puette, University of Hawaii, Expert in Private Arbitration Under the Howard Government's New Workplace Relations System (\$8 478) (with Dr Nikola Balnave)
 - 20004 – 2005 Project commissioned by Industrial Relations Victoria and conducted by the Union Research Centre on Organisations and Technology (URCOT), RMIT University, titled *Pay Equity: How to address the gender pay gap in Victoria* (\$49 770) (member of the project team)
 - 2002 – 2003 Project commissioned by the Office of Public Employment, Department of Premier and Cabinet (Victoria) and conducted by the Centre for Applied Social Research, RMIT University, titled *Victorian Public Service: Gender Pay Equity Review: A report for the Gender Pay Equity Project Management Steering Group* (\$44 000) (member of the project team)
 - 2002 – 2005 Australian Research Council Discovery Project (DP0209261) administered by The University of Queensland, titled *The production of pay (in)equity for women: a study of emerging occupations* (\$135 997) (member of the project team)

RESEARCH CONSULTANCY (1991 -2001)

In the period 1991 – 2001 research consultancy projects were undertaken for the following organisations:-

- *Changes To Child Care Funding And Women's Labour Force Participation In Western Sydney* commissioned by the Western Sydney Regional Organisation of Councils and funded by the New South Wales Department for Women (1999 - 2000) (\$40 000).
- *Choice and Coercion: Women's Experiences of Casual Employment* for the Evatt Foundation (1998 - 1999) (\$25 000).
- *Gender Segregation in the Workforce* commissioned by the Department of Workplace Relations and Small Business as input to the Independent Review Committee's 1997 Review of the Affirmative Action Act (1997) (\$18 000).
- *Gender Pay Equity Issues in Red Meat and Poultry Processing* commissioned by the Women's Equity Bureau, New South Wales Department of Industrial Relations (1997) (\$28 000).
- consultancy services to the Labor Council of NSW (1997 – 1998) to develop their submissions to the Pay Equity Inquiry conducted by the Industrial Relations Commission of NSW.
- consultant to the New South Wales Working Women's Centre on the *Working Out Time* project, work which was funded by the New South Wales Department for Women (1996 - 1997) (\$38 000).
- pay equity project for The Age and The Sunday Age newspapers, involving a review of human resource management procedures and policies (1995 - 1997) (\$36 000).
- *Trade Credentials: Do They Help Pay Equity? - A Research Project Comparing Hairdressers and Motor Mechanics* commissioned by the Women's Equity Bureau, New South Wales Department of Industrial Relations on behalf of the NSW Pay Equity Taskforce (1996 - 1997) (\$18 000).

- *The Feasibility of and Development of a Business Plan for a Co-Operative of Garment Outworkers in Sydney* commissioned by the New South Wales Department of Fair Trading in conjunction with the Community Enterprise Network (1996) (\$21 000).
- *The Intersection of Enterprise Bargaining and Training Reform* a project commissioned by the New South Wales Department of Industrial Relations and funded by the Australian National Training Authority (1995- 1996) (\$10 000).
- *The Determinants of Training in Feminised Workplaces* commissioned by the Women's Policy Section of the Department of Employment, Education and Training (1994 - 1995) (\$33 000).
- *Evaluation of the Passenger Motor Vehicle Adjustment Package* commissioned by the Department of Employment, Education and Training in conjunction with Victoria University (1994) (\$120 000)
- *The Position of Women in the National Training Reform Agenda and Enterprise Bargaining* commissioned by the Women's Policy Section of the Department of Employment, Education and Training (1991 - 1992) (\$22 000).

RESEARCH SUPERVISION

Supervised the following completed doctoral theses

- Supporting family-friendly work practices: Cultural possibilities and limitations (T. Moore), (Supervisory Panel T. Mylett, G. Lafferty, M. Smith)
- Developing skilled labour: An analysis of the major factors which enable and hinder employee training in construction companies in Vietnam (Quang Minh Huynh) (Supervisory Panel M. Smith, J. Bye, H. Spong)
- The professional and social integration of International Medical Graduates working in rural communities of NSW: A study assessing the utility of Han and Humphreys' (2006) typological analysis (P. Ramnathan) (Supervisory Panel M. Smith, M. Lyons)
- Leadership in Kuwaiti Commercial Organizations: A Study of the Impact of Leadership HRD Investments (Aseel A.Aziz Alduaiji) (Supervisory Panel M. Lyons, M. Smith)

Supervised the following completed theses in the undergraduate honours program

- An exploration of the role that Settlement Grants Program funded services play in Australian Immigrant Integration (Y. Itoku) (Principal Supervisor, G. Teal)
- Attraction and Retention in Trade Apprenticeships in Western Sydney (L. Thomas) (Principal Supervisor, L. Ingersoll)
- Casual Employment and HRM – Poles Apart or Compatible Partners? (D. Zammit)
- Is affirmative action capable of instigating positive employment outcomes for women employed in female dominated industries? (R. Tregurtha)
- Labour Market Experiences of Generation Y in an Era of Regulatory Change: An Exploratory Study of professionally Employed Women in the Public Sector within the Greater Western Sydney Region (R. Turner)
- Labour Management Strategy: A case study of Telstra 1980-2003 (R. Mortimer)
- Manusafe/NEST and the protection of employee entitlements in a decentralised industrial relations environment (P. Clarke)
- Rags to the Lack of Riches: A case study assessing the impact of decentralisation on gender equity in the clothing sector (D. Scopizzi)
- The impacts of the *National Workplace Relations System* on the terms and conditions of employment of employees in the retail industry (K. Field)
- Work Intensification among Corporate Employees in the Retail Industry (M. Hurtado) (Principal Supervisor, L. Ingersoll)

EXPERT WITNESS EVIDENCE

- Invitation and participation in specialist workshop on aged care services and industrial relations, convened by Peter Rozen QC, Senior Counsel Assisting the Royal Commission into Aged Care Quality and Safety, February 2020

- Expert witness evidence for the Work+Family Policy Roundtable to Senate Finance and Public Administration References Committee inquiry into Gender Segregation in the workplace and its impact on women's economic equality, June 2017
- Expert witness evidence for the Australian Municipal, Administrative, Clerical and Services Union to Fair Work Australia re equal remuneration orders C2010/3131
- Expert witness evidence in a discrimination claim brought before the Victorian Civil and Administrative Appeals Tribunal [*Keenan v The Age Company Limited* [2004] VCAT 2535]
- Expert witness evidence for the Community and Public Sector Union (CPSU) to the Australian Industrial Relations Commission (AIRC) concerning issues of reclassification arising from the restructuring of the Victorian Public Service (VPS) [C2003/368 *Department of Premier and Cabinet and Community and Public Sector Union*]
- Expert witness evidence for the Queensland branch of the Australian Council of Trade Unions to the Queensland Industrial Relations Commission concerning the level of the casual loading [*Re A Declaration of a General Ruling Pursuant to Section 287 of The Act*, No. B1346 of 1999]
- Expert witness evidence for the Labor Council of New South Wales to the Industrial Relations Commission of New South Wales concerning the introduction of a new equal remuneration principle [*Re Equal Remuneration Principle* [2000] NSWIRC, IRC 1841 of 1999]
- Expert witness for the Crown in the State of New South Wales to the Industrial Relations Commission of New South Wales during the course of the Pay Equity Inquiry [*Re NSW Pay Equity Inquiry*, IRC 6320 of 1997]

REFeree FOR THE FOLLOWING JOURNALS

- Australian Bullen of Labour (B)
- Australian Journal of Labour Economics (B)
- Australian Journal of Labour Law (A)
- Gender in Management: An International Journal (C)
- Gender, Work & Organization (A)
- Journal of Industrial Relations (A)
- Labour & Industry (B)
- Labour History (A)

5. TEACHING AWARDS

TEACHING AWARDS

2004 - Vice-Chancellor's Award for Excellence (Commended). The relevant category was Excellence in Teaching.

The award recognised the design of an on-line negotiation environment using WebCt Bulletin Board facilities for students undertaking undergraduate and postgraduate units in negotiation, bargaining and advocacy. In this exercise opposed management and union groups are required over a seven calendar week period to reach agreement on four specified issues in on-going negotiations between the parties. The assessment component of both units requires that students use the evidence of the negotiations to assess the application of specified features of the literature studied throughout the unit. This comprises models of negotiation and bargaining, power, ethics and the impact of communication medium on the style of negotiations deployed. The impetus for this change in the assessment program for the relevant units arose from changes in course structures and also reflections on how students construct their knowledge about negotiation and bargaining.

Subsequently this work has been utilised as part of the *Quality in Learning and Teaching* resources prepared by the Teaching and Development Unit (TDU), UWS. It was initially utilised as a design exemplar in blended learning - whereby the activity was mapped onto a blended learning activity template - and it now forms part of an online module available to academic staff. The activity has led to further discussions with the TDU and academic staff concerning complexity of new teaching approaches and how they can be incorporated into everyday practice. This assessment program, in addition others, was used by Gail Wilson and Rosemary Thompson in research concerning digital

representations of teaching and learning practice at UWS (*Australasian Journal of Educational Technology*, vol. 24, no. 2, pp. 243-149).

6. GOVERNANCE

- Chair, Western Sydney University School of Business Academic Committee including Executive Committee (2015 – 2016, 2019-)
- Member, Western Sydney University School of Business Research Committee (2016-)
- Member, Western Sydney University Vice-Chancellor's Gender Equality Committee (2015-)
- Chair, Western Sydney University School of Business Academic Committee including Executive Committee (2015 – 2016)
- Member, Western Sydney University, Third Party Providers Committee (2021-)
- Member, Western Sydney University, Academic Course Approvals and Progression Committee (2018-)
- Member, Western Sydney University School of Business Academic Committee (2012-)
- Member, UWS Non-Academic Misconduct Committee (2014 - 2016)
- Member, UWS Academic Senate (2009-2011)
- Member, UWS College of Business, Education, Assessment and Progression Committee (2009-2011)
- Member, UWS School of Management, School Academic Committee (2009-2011) (Chair 2011)
- Chair, UWS School of Management School Board (2006-2008)
- Member, UWS College of Business Board of Studies (2006-2008)
- Member, UWS College of Business Research and Higher Degrees Committee (2006-2008)
- Chair, UWS School of Management Conference Committee (2003-2007)
- Member, UWS School of Management Research Committee (2006-2008)

7. COMMUNITY ENGAGEMENT, MEDIA INTERVIEWS

External Committees

- Affirmative Action Agency - Tripartite Evaluation Reference Group, established to evaluate the effectiveness of the Federal Government's Affirmative Action legislation (1989-1990)
- Human Rights Commission – Sex Discrimination Commissioner's Academic Roundtable (2007)
- Department of Families, Housing, Community Services and Indigenous Affairs – Gender Pay Equity Roundtable (2008)
- Department of Premier and Cabinet (NSW) - Quality Part Time Work Roundtable (2008)

Media Interviews, Representation

- 30 November 1999 *Release of Evatt Foundation report on casual employment* ABC 702 Mornings, ABC 702 The World Today
- 6 March 2008 *International Women's Day* Channel 7 Sydney, Perth
- 6 March 2008 *International Women's Day* ABC Triple J
- 12 May 2011 *Inaugural decision under the equal remuneration provisions of the Fair Work Act* ABC Radio National *Life Matters*
- 12 May 2011 *Inaugural decision under the equal remuneration provisions of the Fair Work Act* ABC Radio Adelaide *The Wire*
- 9 March 2015 *Gender pay gap managerial earnings* 2SER
- 23 April 2021 *Ruling underlines limits of equal pay provisions: Expert* Workplace Express

8. PUBLICATIONS

Journal Articles

- Bain, L., Smith, M., Mortimer, D. & Bond, S. (2001) Regional unemployment and community learning networks: Do employment surveys have a role? *Employment Relations Record*, vol. 1, no. 2, pp. 9-24.
- Bain, L., Mortimer, D., Smith, M. & Bond, S. (2003) Linking skills development to employment opportunities: the Parramatta skills development and employment generation project, *Employment Relations Record*, vol. 3, no. 2., 29-46.
- Blackman, D., Burgmann, M., Hall, P., Hayes, F., Junor, A. & Smith, M. (2020) From equal pay to overcoming undervaluation: the Australian National Pay Equity Coalition 1988-2011, *Journal of Industrial Relations*, vol. 62, no. 4, pp. 582-607.
- Hampson, I. Ewer, P. & Smith, M. (1994) Post-fordism and workplace change: towards a critical research agenda, *Journal of Industrial Relations*, vol. 36, no. 2, pp. 231-257.
- Junor, A. Hampson, I. & Smith, M. (2009) Valuing skills: Helping mainstream gender equity in the New Zealand state sector, *Public Policy and Administration*, vol. 24, no. 2, pp. 195-211.
- Lyons, M. & Smith, M. (2007) Children's services, wages and Work Choices, *Australian Journal of Early Childhood*, vol. 32, no. 3, pp. 26-33.
- Lyons, M. & Smith, M. (2007) Work Choices and pay equity, *Hecate*, vol. 33, no. 1, pp. 81-93
- Lyons, M. & Smith, M. (2008) Gender pay equity, wage fixation and industrial relations reform in Australia: one step forward and two steps backwards? *Employee Relations*, vol. 30, no. 1, pp. 4-19.
- Nakandala, D., Smith, M. & Lau, H. (2020) Shared power and fairness in trust-based supply chain relationships in an urban food system, *British Food Journal*, vol. 122, no. 3, pp. 870-883.
- Smith, M. (1999) Increasing the scope of pay equity inquiry: insights from case study research, *Labour and Industry*, vol. 10, no. 2, pp. 9-32.
- Smith, M. (2003) Accepting mediocrity as progress: gender pay equity and enterprise bargaining, *International Employment Relations Review*, vol. 9, no. 1, pp. 89-104.
- Smith, M. (2009) Gender pay equity reform in Australia: What is the way forward, *Australian Bulletin of Labour*, vol. 35, no. 4, pp. 652-671.
- Smith, M. (2011) Limits and Possibilities: Rights-Based Discourses in Australian Gender Pay Equity Reform 1969-2007, *Gender, Work & Organization*, vol. 18, no. S1, pp. e180-e201
- Smith, M. (2011) Gender Equity: The Commission's legacy and the challenge for Fair Work Australia, *Journal of Industrial Relations*, vol. 53, no. 5, pp. 647-661.
- Smith M., Layton R., Stewart A. (2017) Inclusion, reversal, or displacement? : classifying regulatory approaches to pay equity, *Comparative Labor Law and Policy Journal*, vol. 39, no. 1, pp 211-245.
- Smith, M. & Lyons, M. (2006) Crying wolf? Employers, awards and pay equity in the New South Wales children services industry, *Employment Relations Record*, vol. 6, no. 1, pp. 49-63.
- Smith, M. & Lyons, M. (2006) Women, wages and industrial relations in Australia: the past, the present and the future, *International Journal of Employment Studies*, vol 14, no. 2, pp. 1-18.
- Smith, M. & Lyons, M. (2007) 2020 vision or 1920's myopia? Recent developments in gender pay equity in Australia, *International Employment Relations Review*, vol. 13, no. 2, pp. 29-41.
- Smith, M. & Moore, D. (2014) Fairness, free agency and Franklin: The forever complex nature of industrial relations in sport. *International Journal of Employment Studies*, vol. 22, no. 1, pp. 5-38.
- Smith, M. & Stewart, A. (2010) A new dawn for pay equity? Developing an equal remuneration principle under the Fair Work Act, *Australian Journal of Labour Law*, vol. 23, no. 3, pp. 152-168.
- Smith, M. & Stewart, A. (2014) Equal remuneration and the *Social & Community Services* case: Progress or diversion on the road to pay equity? *Australian Journal of Labour Law*, vol. 27, no. 1, pp. 31-56.
- Smith, M. & Stewart, A. (2017). Shall I compare thee to a fitter and turner?: the role of comparators in pay equity regulation. *Australian Journal of Labour Law*, vol. 30, no. 6, pp. 113-138.
- Smith, M. & Whitehouse, G. (2020) Wage-setting and gender pay equality in Australia: Advances, retreats and future prospects, *Journal of Industrial Relations*, vol. 62, no. 4, pp. 533-559.
- Tannous, K. & Smith, M. (2012) Volunteering as a strategy to fill gaps in my resume! Findings from a study on jobless individuals in four states in Australia, *International Employment Relations Review*, vol. 18, no. 2, pp. 25-39.

Tannous, K. & Smith, M. (2013) Access to full-time employment: Does gender matter, *Australian Journal of Labour Economics*, vol. 16, no. 2, pp. 237 – 257.

Monographs, Monograph Chapters, Monograph in Series

- Charlesworth, S. & Smith, M. (2018). Gender pay equity, In A. Stewart, J. Stamford & T. Hardy (Eds) *The wages crisis in Australia. What it is and what to do about it*, Adelaide, University of Adelaide Press.
- Ewer, P. Hampson, I. Lloyd, C. Rainford, J. Rix, S. & Smith, M. (1991) *Politics and the Accord*, Leichhardt, Pluto Press.
- Ewer, P. Hampson, I. Lloyd, C. Rainford, J. Rix, S. & Smith, M. (1993) *International Best Practice? A Critical Guide*, Leichhardt, Pluto Press.
- Smith, M. & Ewer, P. (1996) Unions and public policy, in A. Farrar & J. Inglis (Eds.). *Keeping It Together: State and Civil Society in Australia*, Leichhardt, Pluto Press.
- Smith, M. & Ewer, P. (2003) Enterprise bargaining and union decline: part of the problem, not the solution, in J. Burgess & D. MacDonald (Eds.) *Developments in Enterprise Bargaining*, Tertiary Press, Croydon, Victoria.
- Smith, M. & Ewer, P. (2005) What about women?, in C. Sheil (Ed.) *State of the States 2005*, Evatt Foundation, University of New South Wales, Kensington.
- Smith, M. & Ewer, P. (2008) Closing the door on working women, in C. Sheil, C. (Ed), *The State of Industrial Relations*, vol. 5, no. 1, Evatt Foundation, Sydney, 2008, pp. 59-68.

Refereed Conference Papers

- Junor, A., Smith, M. & Hampson, I. (2010) A New Era? Pay Equity Prospects in Australia Following Making it Fair, *Proceedings of the Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ)*, 3-5 February 2010
- Lyons, M. & Smith, M. (2005) Pay equity in the New South Wales children's services industry: Prospects and implications, *13th Annual International Employment Relations Association Conference*, Aalborg University, Denmark, 26-29 June 2005.
- Lyons, M. & Smith (2006) Gender pay equity, wage fixation and Work Choices: Forward to the Past, *1st Biennial Conference of the National Network of Working Women's Centres*, pp. 112-123.
- Smith, M. (2001) Gender, industrial relations and teaching students born in the eighties, *Proceedings of the Inaugural International Employment Relations Association Teaching and Learning Symposium*, Sydney, International Employment Relations Association, pp. 107-112.
- Smith, M. (2003) Necessary but on their own insufficient: Web based technologies in a learning environment, *3rd IERA Teaching, Learning and Research Conference*, Monograph No. 16, National Key Centre in Industrial Relations, Monash University, pp. 161-170.
- Smith, M. (2003) Pay equity in NSW: A complex terrain of capital/state/labour relations, *Reflections and New Directions: Proceedings of the Twentieth Annual Conference of the Association of Industrial Relations Academics of Australia and New Zealand*, Melbourne, Australia, 4-7 February 2003.
- Smith, M. (2005) Why gender pay equity is compromised by the demise of industry collectivity: Women's experience of equal remuneration at HPM Industries, *Teaching, Learning and Research in Institutions and Regions, Proceedings of the 5th Annual Pacific Employment Relations Association Conference*, Rockhampton, Australia, 21 – 24 November 2005, pp, 250-266.
- Smith, M. & Tannous, K. (2011) Access to finance in small business: Does gender count? *Heterodox Economics: Ten Years and Growing Stronger! Proceedings of the 10th Australian Society of Heterodox Economics Conference*, Sydney, Australia, 5-6 December, pp. 291-205.
- Smith, M. & Valdez, A. (2004) The stalled progress of gender pay equity: Signs of convergence – Australia and the United States, *Regionalism and Globalisation: The Challenge for Employment Relations, Proceedings of the Twelfth Annual Conference of the International Employment Relations Association*, Rockhampton, Australia. 5 to 8 July 2004.

Reports

- Austen, S., Smith, M., Charlesworth, S. & Jefferson, T. (2015) *Methods of setting pay and the gender pay gap* for the Fair Work Commission, March 2015.
- Dale, R., Smith, M. & Macdonald, F. (2005) *Pay Equity: How to Address the Gender Pay Gap*, A research report by URCOT for Industrial Relations Victoria, Industrial Relations Victoria, Melbourne (150 pp).
- Junor, A., Hampson, I., Piercy, G., Barnes, A., Smith, M. & Ogle, R. (2008a) *Spotlight: A Skills Recognition Tool: Background Research Report*, Pay and Employment Equity Unit, New Zealand Department of Labour (106 pp).
- Junor, A., Hampson, I., Piercy, G., Barnes, A., Smith, M. & Ogle, R. (2008b) *Spotlight: A Skills Recognition Tool: Folder 1, Introduction for Managers (38 pp.); Folder 2, Adding Value to Job Descriptions (83 pp.); Folder 3, Adding Value to Recruitment and Selection (67 pp), Folder 4, Managing Performance and Careers (64 pp), Folder 5 Toolkit Items (29 pp)* Pay and Employment Equity Unit, New Zealand Department of Labour.
- Layton, R., Smith, M., & Stewart, A. (2014) *Equal remuneration under the Fair Work Act 2009*. Fair Work Commission, Melbourne.
- Probert, B., Smith, M. Charlesworth, S. & Leong, K. (2002) *Victorian Public Service: Gender Pay Equity Review: A report for the Gender Pay Equity Project Management Steering Group*, Centre for Applied Social Research RMIT University, Melbourne.
- Smith, M. & Ewer, P. (1995) *The Position of Women in The National Training Reform Agenda and Enterprise Bargaining*, Canberra, AGPS.
- Smith, M. & Ewer, P. (1999) *Choice and Coercion: Women's Experiences of Casual Employment*, Sydney, Evatt Foundation.
- Smith, M., & Ewer, P. (2000) *Trade Credentials: Do They Help Pay Equity, A Research Project Comparing Hairdressers and Motor Mechanics*, Sydney, Women's Equity Bureau, NSW Department of Industrial Relations.
- Smith, M., & Ewer, P. (2000) *Gender Equity Issues In Red Meat And Poultry Processing*, Sydney, Women's Equity Bureau, NSW Department of Industrial Relations.
- Smith, M. & Ewer, P. (2001) *Changes To Child Care Funding And Women's Labour Force Participation In Western Sydney*, Sydney, Western Sydney Regional Organisation of Councils.
- Varua, M., Smith, M. & Deo, N. (2017). *Employment distribution and remuneration of academic staff, Western Sydney University: An analysis of gender differences*, November 2017.

Presentations and other publications

- Austen, S., Smith, M., Charlesworth, S. & Jefferson, T. (2015) *Methods of setting pay and the gender pay gap*, *AWRS Conference*, 25-26 June 2015.
- Parry, K., Richards, J., Smith, M. & Hall, T. (2018) *Note to governments: sports stadiums should benefit everyone, not just fans*. *The Conversation*, 6 November 2018.
- Smith, M. (2006) *Claim and counter-claim: Designing an online negotiation exercise*, *Quality in Learning and Teaching* <http://ec.uws.edu.au/gilt>.
- Smith, M. (2010) *Prospects for an Equal Remuneration Principle under the Fair Work Act*, Centre for Employment Relations Law, University of Melbourne, 21 October 2010.
- Smith, M. (2012) *Equal Pay and the Community Services Decision: Where to Now?*, South Australian Chapter of the Australian Labour Lawyers Association, 20 February 2012.
- Smith, M. (2012) *Equal Pay and the Community Services Decision: Ramifications and Future Prospects*, New South Wales Chapter of the Australian Labour Lawyers Association, 2012, 27 February 2012, Thompsons Lawyers.
- Smith, M. (2012) *Equal Pay and the Community Services Decision: What are the Consequences for Equal Pay Regulation?*, Victorian Chapter of the Australian Labour Lawyers Association, 7 May 2012, Monash University.
- Smith, M. (2012) *Equal pay and the community services decision: Is there a new discourse in equal pay regulation?* *20th Labour Law Conference*, 13 August 2012, University of Sydney.
- Smith, M. (2013) *Learning Spaces and Group Work*, Academic Course Advisors' Network, University of Western Sydney, 4 April 2013.
- Smith, M. (2013) *Group Work and Collaborative Learning Spaces*, UWS Blended Learning Forum, 14 May 2013.

- Smith, M. (2014) Gender Pay Equity – The Case for Undervaluation, *The Expert Conference on Women in Leadership*, United States Studies Centre, University of Sydney, 19 November 2014.
- Smith, M. (2015) Defending the indefensible: myths about the gender pay gap, *The Conversation*, 27 February 2015 (note, also to be published in the 2015 *The Conversation Yearbook*).
- Smith, M. (2015) *Equal Remuneration: What is the Current Agenda*, Industrial Relations Research Centre, University of New South Wales, 6 August 2015.
- Smith, M. (2015) *Gender Pay Equity: Challenges and Next Steps*, [Women@Work Research Group](#), University of Sydney, 27 November 2015.
- Smith, M. (2016) *Pledging for Parity – International Women’s Day Address*, Australian Taxation Office, 8 March 2016.
- Smith, M. (2017) *Gender Pay Equity: State of Play*, Work+Family Policy Roundtable, University of Sydney, 27 April 2017.
- Smith, M. (2020) Fate of AFL trio shows how players are exposed, *Sydney Morning Herald*, 23 November 2020, <https://www.smh.com.au/business/workplace/fate-of-afl-trio-shows-how-players-are-exposed-20201117-p56fcu.html>
- Smith, M. & Gregory, S. (2016). Award modernisation and barriers to gender pay equity: Towards a new analytical framework. *Association of Industrial Relations Academics of Australia and New Zealand*, February 2016.
- Smith, M. & Stewart, A. (2014) Pay equity where next, *Fair Work Commission Lecture Series*, 21 September 2014.
- Teaching Development Unit & Smith, M. (2007) A blended learning activity – An example. A blended learning activity used by Meg Smith, School of Management, UWS which has been mapped onto the *Designing a blended learning activity template* http://www.uws.edu.au/learning_teaching/learning_and_teaching/teaching_development_unit/teaching_development_activities
- Whitehouse, G. and Smith, M. (2020) Keeping up the fight for equal pay, *Sydney Morning Herald*, 31 August 2020, <https://www.smh.com.au/business/workplace/keeping-up-the-fight-for-equal-pay-20200828-p55q8w.html>

Submissions

- Senate Finance and Public Administration References Committee, *Inquiry into Gender Segregation in the workplace and its impact on women’s economic equality*, Submission on behalf of the Work+Family Policy Roundtable, January 2017 (Submission number 33).
- Queensland Industrial Relations Reform Reference Group, Submission by M. Smith, October 2015
- Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Fair Work Bill* Submission by M. Lyons & M. Smith, January 2009 (Submission number 32).
- Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill*: Submission by M. Lyons & M. Smith, February 2008 (Submission number 36).
- Workplace Relations Policy Group, Department of Education, Employment and Workplace Relations, National Employment Standards Exposure Draft: Submission by M. Lyons & M. Smith, April 2008 (Submission number 34).
- House of Representatives Standing Committee on Employment and Workplace Relations, *Inquiry into pay equity and associated issues related to increasing female participation in the workforce: Witness oral evidence*, September 2008; Submission by M. Lyons & M. Smith, September (Submission number 114).
- Human Rights and Equal Opportunities Commission, Submission by M. Smith on behalf of the National Pay Equity Coalition in response to *Valuing Parenthood Options for Paid Maternity Leave – Interim Paper*, July 2002 (Submission 224)
- Human Rights and Equal Opportunities Commission, Supplementary submission by M. Smith on behalf of the National Pay Equity Coalition in response to *Valuing Parenthood Options for Paid Maternity Leave – Interim Paper*, October 2002 (Submission 257)
- Senate Education, Employment and Workplace Relations Committee, *Inquiry into the Workplace Relations Amendment (Paid Maternity Leave) Bill 2002*: Submission by M. Smith on behalf of the National Pay Equity Coalition (Submission 31).

Annexure E

CURRICULUM VITAE

2021

Personal Details

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Employment History

2005 - date	Lecturer C (senior lecturer)	School of Business Western Sydney University
2002 - 2005	Lecturer B	Employment Relations Program School of Management University of Western Sydney
1999 - 2002	Lecturer B	
1997 - 1999	Lecturer A	School of Industrial Relations Griffith University, Brisbane
1997	Lecturer & Tutor (sessional)	Faculty of Humanities & Social Science, UTS
1995 - 1997	Lecturer & Tutor (sessional)	Department of Employment Relations UWS Nepean

Academic Qualifications

2002	Bachelor of Laws with Honours	Macquarie University
2000	Doctor of Philosophy	University of Western Sydney
1996	Master of Labour Law and Relations	University of Sydney
1993	Master of Industrial Relations	University of Sydney
1993	Bachelor of Letters with Honours	Deakin University
1992	Bachelor of Arts	Australian National University

RESEARCH AND SCHOLARSHIP

Publications

Books

- 2009 D. Sappey, J. Burgess, **M. Lyons** & J. Buultjens, *Industrial Relations in Australia: Work and Workplaces* (Second Edition). Pearson Education, Sydney (xiv + pp. 434).
- 2007 D. Sappey, J. Burgess, **M. Lyons** & J. Buultjens, *The New Federal Workplace Relations System, updated edition*. Pearson Education, Sydney (pp. 128).
- 2006 D. Sappey, J. Burgess, **M. Lyons** & J. Buultjens, *The New Federal Workplace Relations System*. Pearson Education, Sydney (pp. 94).
- 2006 D. Sappey, J. Burgess, **M. Lyons** & J. Buultjens, *Industrial Relations in Australia: Work and Workplaces*. Pearson Education, Sydney (xv + pp. 456).

Book Chapters

(B)

- 2003 **M. Lyons**, 'The work organisation in Australian daycare centres: Professionalism or exploitation?'. In L. Briskman & M. Muetzelfeldt (eds.), *Moving Beyond Managerialism In Human Service*, Melbourne: RMIT Publishing, Part Two, pp. 1-15.
- 2000 J. Burton & **M. Lyons**, 'When does a teacher "teach"? The Queensland early childhood professional on trial'. In J. Hayden (ed.), *Landscapes in Early Childhood Education: Cross-national Perspectives on Empowerment*. New York: Peter Lang Publishing, pp. 271-290.

Refereed Journal Articles

(C1)

- 2016 **M. Lyons**, 'University safety culture: a work-in-progress?', *Australian Universities Review*, 58 (1), pp. 45-53.
- 2013 **M. Lyons**, 'Assessing suspension of protected industrial action in Australian higher education workplaces', *Employment Relations Record*, 13 (2), pp. 16-31.
- 2012 **M. Lyons**, 'The professionalization of children's services in Australia', *Journal of Sociology*, 48 (2), pp. 115-131.
- 2011 V. Lopaticka, & **M. Lyons**, 'Employee voice in Australian OHS : evidence from stakeholder submissions', *Journal of Health, Safety and Environment*, 27 (3), pp. 159-170.
- 2010 **M. Lyons** & L. Ingersoll, 'Regulated autonomy or autonomous regulation? Collective bargaining and academic workloads in Australian universities'. *Journal of Higher Education Policy and Management*, 32 (2), pp. 137-148.
- 2009 **M. Lyons** & T. Khoshaba, 'Pragmatism, principles and policy: federalism and industrial relations regulation in Australia'. *Journal of Industrial Relations*, 51 (2), pp. 173-194.
- 2008 **M. Lyons**, 'Defence, the family and the battler: the Democratic Labor Party and its legacy'. *Australian Journal of Political Science*, 43 (3), pp. 425-442.

- 2008 **M. Lyons** & M. Smith, 'Gender pay equity, wage fixation and industrial relations reform in Australia: one step forward and two steps backwards?'. *Employee Relations*, 30 (1), pp. 4-19.
- 2007 **M. Lyons**, '“Lies, damn lies, and statistics”: the Business Coalition for Workplace Reform campaign of 2007'. *Labour and Industry*, 18 (1), pp. 119-136.
- 2007 **M. Lyons** & M. Smith, 'WorkChoices and pay equity'. *Hecate*, 33 (1), pp. 81-93.
- 2007 **M. Lyons** & M. Smith, 'Children's services, wages and *Work Choices*: A “fairer” workplace relations system?'. *Australian Journal of Early Childhood*, 32 (3), pp. 26-32.
- 2007 **M. Lyons** & T. Khoshiba, 'Federalism, unification and continuity: Labor, the Constitution and industrial relations'. *Alternative Law Journal*, 32 (2), pp. 96-100.
- 2007 M. Smith & **M. Lyons**, '2020 vision or 1920's myopia? Recent developments in gender pay equity in Australia'. *International Employment Relations Review*, 13 (2), pp. 29-43.
- 2007 **M. Lyons**, D. Mortimer, E. Whiting & F. Wilkinson, 'Small and medium establishments and the new federal workplace relations system'. *Employment Relations Record*, 7 (1), pp. 37-50.
- 2006 M. Smith & **M. Lyons**, 'Women, wages and industrial relations in Australia: the past, the present and the future'. *International Journal of Employment Studies*, 14 (2), pp. 1-18.
- 2006 **M. Lyons** & L. Ingersoll, 'New public management and “photocopy” bargaining in the Australian Public Service'. *Australian Journal of Public Administration*, 65 (2), pp. 83-94.
- 2006 **M. Lyons** & M. Smith, 'Crying wolf? Employers, awards and pay equity in the New South Wales children's services industry'. *Employment Relations Record*, 6 (1), pp. 49-63.
- 2005 **M. Lyons**, 'An appealing outcome? Industrial arbitration and extended retail trading hours in New South Wales in the 1980s'. *International Journal of Employment Studies*, 13 (1), pp. 107-131.
- 2005 **M. Lyons**, A. Quinn & J. Sumsion, 'Gender, the labour market, the workplace and policy in children's services: Parent, staff and student attitudes'. *Australian Journal of Early Childhood*, 30 (1), pp. 6-13.
- 2004 **M. Lyons** & J. Fleming, 'A study of union mergers: The strange case of the Police Federation of Australia'. *New Zealand Journal of Employment Relations*, 29 (2), pp. 1-16.
- 1998 **M. Lyons**, 'The study of gender in the employment relationship: Some evidence from the Australian child-care industry'. *International Journal of Employment Studies*, 6 (2), pp. 117-135.
- 1997 **M. Lyons**, 'Work rewards, job satisfaction and accreditation in long day care'. *Australian Journal of Early Childhood*, 22 (3), pp. 40-44.
- 1996 **M. Lyons**, 'Who cares? Child-care, trade unions and staff turnover'. *Journal of Industrial Relations*, 38 (4), pp.629-647.

Research Grants Awarded and Funded Research

2017	'Assessing equal remuneration and work value of administrative and support staff in NSW government schools' with Associate Professor M. Smith (WSU).	Public service Association and Professional Officers' Association Amalgamated Union of NSW
2002	'The impact of technological and workplace change on retail banking staff in Australia'	UWS Seed Grant
2001	'The gender imbalance of the children's services workforce in New South Wales' with Dr J. Sumsion (Macquarie University)	New South Wales Department of Community Services
	'Police attitudes towards unions, management, and bargaining: A comparison between Federal and Queensland police' with Dr J. Fleming (Griffith University)	Griffith University Research Development grant (small ARC replacement scheme)
2000	'Trade union recognition in the Australian retail industry: A comparative study'	Centre for Research on Employment and Work, Griffith University

PROFESSIONAL AND COMMUNITY SERVICE

Inquiry Submissions

2012	Fair Work Act Review Panel, Review of Fair Work Act 2009, Submission by M. Lyons, February 2012.	
2009	Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Provision of Childcare, Submission by M. Lyons (Submission number 47), January 2009.	
	Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Fair Work Bill 2008 [Provisions], Submission by M. Lyons & M. Smith (Submission number 32), January 2009.	
2008	House of Representatives Standing Committee on Employment and Workplace Relations, Inquiry into pay equity and associated issues related to increasing female participation in the workforce, Submission by M. Lyons & M. Smith (Submission number 114), September 2008.	
2008	Workplace Relations Policy Group, Department of Education, Employment and Workplace Relations, National Employment Standards Exposure Draft, Submission by M. Lyons & M. Smith (Submission number 34), April 2008.	
2008	Senate Standing Committee on Education, Employment and Workplace Relations, Inquiry into the Workplace Relations Amendment (Transition to Forward with Fairness) Bill,	

Submission by M. Lyons & M. Smith (Submission number 36), February 2008.

- 2006 New South Wales Legislative Council Standing Committee on Social Issues, Inquiry into the Impact of Commonwealth WorkChoices Legislation, Witness oral evidence, tabled research paper, 'Gender pay equity, wage fixation and industrial relations reform in Australia: one step forward and two steps backwards?', June 2006.
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**Aged Care Award 2010
Nurses Award 2010
Fair Work Commission matters
AM2020/99, AM2021/63 and AM2021/65
Updated ABS Data – Tables 1 and 2
Report by Associate Professor Meg Smith and Dr Michael Lyons (October 2021)
School of Business
Western Sydney University
April 2022**

Table 1 Measures of pay differentials between females and males from ABS Average Weekly Earnings and Employee Earnings and Hours surveys.

Measure of earnings	Females (\$)	Males (\$)	Ratio of female to male earnings
Average Weekly Earnings (AWE) survey measure (November 2021) (seasonally adjusted excluding AWOTE)			
Average weekly earnings (AWE) Average weekly total earnings of all employees	1093.80	1577.10	0.69
Average weekly earnings for full-time adults (FTAWE)	1618.00	1934.80	0.84
Average weekly ordinary time earnings (AWOTE) for full-time adults	1591.20	1846.50	0.86
Employee Earnings and Hours Survey measure (May 2021)			
Average weekly ordinary time cash earnings (AWOTCE) for full-time non-managerial employees paid at the adult rate	1617.10	1809.10	0.89
Average hourly ordinary time cash earnings (AHOTCE) for full-time non-managerial employees paid at the adult rate	43.10	47.10	0.92
Average weekly total cash earnings (AWCE) for non-managerial employees	1131.80	1552.40	0.73
Average hourly total cash earnings (AHCE) for non-managerial employees	40.20	44.50	0.90
Average weekly total cash earnings (AWCE) for all full-time non-managerial paid at the adult rate	1639.70	1910.10	0.86
Average hourly total cash earnings (AHCE) for all full-time non-managerial employees paid at the adult rate	43.30	47.50	0.91

Source: Based on Pointon, Wheatley, and Ellis et al(2012), Layton, Smith and Stewart (2013, p. 80) and updated to include more recent data from ABS Cat. No. 6302.0 (Average Weekly Earnings Survey) (ABS 2022a) and from ABS Cat. No. 6306.0 (Employee Earnings and Hours Survey) (ABS 2022b).

Table 2 Differing measures of the gender pay gap.

Measure	GPG (%)	Main features and limitations
Average weekly earnings (AWE) Average weekly total earnings of all employees	30.6	Includes all weekly earnings for all employees but makes no adjustment that a much larger proportion of women work part-time than men – and are therefore paid for fewer working hours.
Average weekly earnings for full-time adults (FTAWE)	16.4	Includes all weekly earnings for all full-time adult employees but makes no adjustment for the fact that men are more likely to work and be paid overtime than women.
Average weekly ordinary time earnings (AWOTE) for full-time adults	13.8	Excludes overtime earnings. Part-time employees are also excluded, the majority of whom are women in lower paid occupations.
Average weekly ordinary time cash earnings (AWOTCE) for full-time non-managerial adult employees	10.6	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly ordinary time earnings thus excluding overtime.
Average hourly ordinary time cash earnings (AHOTCE) for full-time non-managerial adult employees	8.5	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on hourly earnings.
Average weekly total cash earnings (AWCE) for all non-managerial adult employees	27	Includes all weekly earnings for all non-managerial employees but makes no adjustment that a much larger proportion of women work part-time than men – and are therefore paid for fewer working hours
Average hourly total cash earnings (AHCE) for all non-managerial adult employees	9.7	Includes all weekly earnings for all non-managerial employees. Based on hourly earnings thus takes account, to an extent, of the larger proportion of women work who part-time.
Average weekly total cash earnings (AWCE) for full-time non-managerial adult employees	14.2	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly total earnings thus including overtime.
Average hourly total cash earnings (AHCE) for full-time non-managerial adult employees	8.8	Confined to full-time non-managerial employees, thus excluding managerial employees. Based on weekly total earnings thus including overtime. Based on hourly earnings,

Source: Based on Pointon, Wheatley and Ellis et al (2012), Layton, Smith and Stewart (2013, p. 80) and updated to include more recent data from ABS Cat. No. 6302.0 (Average Weekly Earnings Survey) (ABS 2022a) and from ABS Cat. No. 6306.0 (Employee Earnings and Hours Survey) (ABS 2022b).

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