



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT O'NEILL
PROFESSOR BAIRD AO
DR L RISSE**

AM2020/99 and others

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

**Application by Ellis & Castieau and Others
(AM2020/99)**

9.34 AM, WEDNESDAY 13 DECEMBER 2023

Sydney

Continued from 12/12/2023

PN5401

JUSTICE HATCHER: Ms Harrison.

PN5402

MS HARRISON: Thank you, your Honour and members of the Bench. Firstly, we'd indicate that we rely on our written submissions that were filed on 15 September, in addition to those filed as part of stage 1 and stage 2.

PN5403

I intend to address two of the outstanding issues before the Fair Work Commission, one being what, if any, wage increase should be provided to indirect care workers, however that's described. And the second issue being what further wage increase should be applied to direct care workers. Both have already received the 15 per cent wage increase.

PN5404

That said, before I move on to those two areas I did want to make a couple of comments in relation to a few of the other matters raised. In respect of the classification structure we don't generally seek to add anything further to the submissions of the HSU made yesterday except to indicate UWU supports those submissions.

PN5405

I don't otherwise intend to make any submissions in relation to the relative ease the C10 levels and the wage fixation principles, excepting and to say that we support the submissions of the HSU. We would also rely on the submissions of the HSU in respect of COVID, or at least the change in work value as a result of the changes in infection control regimes, as well as understaffing and the effect on work value.

PN5406

Commission members, in respect of the question of wage increases it's the position of the UWU that the current minimum wage rates provided in the Aged Care Award, the SCHADS Award and the Nurses Award significantly undervalue the work of aged care employees. This is for reasons included but not limited to the historical undervaluation of the female dominated workforce, the increase in complexity of residents' needs and the high level of responsibility being placed on both direct and indirect care employees.

PN5407

JUSTICE HATCHER: When you say the current rates, you mean including the 15 per cent?

PN5408

MS HARRISON: That's correct, your Honour. And further to that, obviously for the direct care workers, those that haven't received an increase, at all. The variations, we say, are justified for work value reasons as defined under section 157(2)(a) of the Fair Work Act and are necessary to achieve the modern award objectives pursuant to section 134 and 157(2)(b) of the Fair Work Act.

PN5409

Whilst we do note that the Fair Work Commission previously determined that there has been a work value increase in relation to direct care workers. We support the positions of both the HSU and the ANMF in saying that a 15 per cent increase for direct care workers was just insufficient to rectify the undervaluation of wages in aged care.

PN5410

Moreover, we maintain that it is appropriate for a 25 per cent wage increase to be applied to all employees covered by the Aged Care Award and the home care stream in the SCHADS Award in addition to the variation of the classification structures to appropriately recognise the changes in work and responsibilities within the aged care sector.

PN5411

In respect of the modern award objectives the Fair Work Commission, we say, should be satisfied that the variation sought is justified for the work value reasons. As the evidence has demonstrated the rates of pay within the aged care industry are low by reason of gender based undervaluation work and the soft skills involved in that performance of that work.

PN5412

And that was seen in the evidence of Dr Charlesworth both in the stage where - probably more relevantly, in the stage 1 and stage 2 proceedings. And indeed backed up by the workforce census data. I note that it was the 2016 workforce data that was in the stage 1 and 2 proceedings, which overwhelmingly and not in dispute show that 87 per cent of the people employed in the aged care sector are women.

PN5413

Residents within the aged care facilities are living longer with ultimate increased fragility, as well as complex physical and mental health conditions. And Mr Gibian took the Bench to some of the statistics involved in that yesterday.

PN5414

Employees covered by the awards are expected to respond to more acute care needs by adopting and applying philosophies such as resident choice centred care, as well as the aged care quality standard principles. And this is definable, we say, in relation to the change in the nature of work.

PN5415

Changes in workplace structure means that those people whose work is covered by the awards are working in an environment with less clinical staff on site such as doctors and often nurses to assist, and at the same time, as residents presenting with increasingly complex caring and medical needs.

PN5416

The corporate changes and changes within the workplace structure of the industry including reduction in the ratio of staff to residents, the number of nursing clinical staff working at the facility, together with the increased complexity of resident

medical conditions results in more challenging workloads and environmental stressors for employees.

PN5417

Changes in the regulatory environment such as the updated Aged Care Quality Standards have resulted in significant changes including increased consistency in reporting and record keeping arrangements, the assessment of performance and order processes, and persons whose employment is covered by the Aged Care Award now working in an environment with a higher regulatory framework. And that applies to direct and indirect care.

PN5418

These updated Australian care and quality standards have also changed and increased community and family expectations. We say rightfully so, but they have changed the nature of the work that is being performed by aged care workers.

PN5419

There's also, and the Commission has heard evidence of this, there's a growing reliance on technology in the delivery of aged care and that's been demonstrated in a range of the lay evidence that the Commission has heard on both in the use of – often referred to as the use of iPads and call bell systems and the like. But it has significantly changed the nature of the work that such are being performed.

PN5420

In respect of the justification in relation to the level of skills and responsibilities under section 157(2)(a)(b) of the Fair Work Act the evolution of the aged care centre means that the skill and responsibility associated with work performed has enhanced – and this includes but isn't limited to the practical skills and the application of knowledge and training associated with providing care to residents presenting with those acute care needs, work processes and skills associated with providing care to residents with acute needs including interacting and relating, communicating verbally and non-verbally, negotiating boundaries, connecting across culture and language barrier differences, monitoring and guiding reactions, managing complex behaviours, and effectively juggling the impact of those actions on a day to day basis.

PN5421

Social and work process skills such as those associated with providing emotional and social support to residents with acute needs, including support to residents and their families during end-of-life care, the skills associated with greater responsibility for assessing and responding to medical needs where there are less clinical staff working within these facilities, the skills associated with providing care to residents presenting with specialist care needs such as dementia, mental health conditions and in need of palliative care.

PN5422

The skills associated with communicating effectively with families about the status or the welfare of residents, as well as responding and dealing with complaints, using problem solving skills including across cultural, linguistic and other communication barriers. The skills associated in dealing with new

technology including for completing training, accessing resident care plans. The associated information within those are for the purpose of creating, updating and maintaining records.

PN5423

For skills associated in dealing with a more complex regulatory environment including record keeping. And then the skills and understanding in exercising standards and precautions in line with the organisational, specific governmental and subtle expectations in relation to disease transmission which primarily arose out of the COVID-19 pandemic.

PN5424

But what has transpired is an increase in infection control regimes across the entire facility on an ongoing basis within aged care. And the rapid mobilisation and deployment of complex combinations of all of those above skills throughout the work day to adapt to the changing needs of residents.

PN5425

In respect of the justification with respect to the modern award objectives under section 134 of the Fair Work Act, this includes but is not limited to workers covered by the awards being low paid. And indeed this is even more pertinent for the indirect carers in the aged care sector. The increase in the minimum wage rates need to improve their living standards especially during the current climate of significant increase in the cost of living.

PN5426

There are challenges in the aged care sector in relation to enterprise bargaining. And even where there are enterprise bargaining agreements, and I accept that the Commission has got some evidence of this but not a large amount, they then offer little if any payments above the award rates. An increase in the minimum wages in this sector would likely increase workforce participation in the sector. A lot of the evidence as gone to the difficulties in retention or attraction of aged care workers. And the aged care was predominantly penalised in its work that has already been accepted by the Commission as being affected by traditional undervaluation based on gender.

PN5427

JUSTICE HATCHER: Are the issues of attraction and retention legitimate to be considered in setting minimum rates and awards?

PN5428

MS HARRISON: Yes, your Honour. We would say they are in relation to section 134. Your Honour, in particular I just want to highlight in relation to section 134 subsection (1)(h), the likely impact of the exercise of modern award powers of the Employment Group in relation to sustainability, performance and competitiveness of the national economy.

PN5429

Although that's framed in relation to the national economy it is obviously integral to the national economy that the aged care sector has a workforce that sustains an increasingly older, aging population. And the failure for the aged care industry to

be able to attract and retain workers would, we would say, undermine that. And so in that circumstance, we would say that the Commission can take that into account in relation to section 134.

PN5430

JUSTICE HATCHER: Well, it seems to me there's two competing considerations here. I thought the HSU put something along the lines that the shortage of workers may be a permanent feature of the sector and therefore we should take that into account as a work value consideration bearing upon work intensification for the existing workforce. But an attraction and retention submission implies that if we award the increase sought that will remedy the shortage, and plus diminish the proposition advanced by the HSU.

PN5431

MS HARRISON: Your Honour, I don't think it goes as far to say that it would completely remedy the deficit in the staff. In the evidence I think that we heard from, I think from Dr Charlesworth, was in relation to the fact that the increase in wages has made some of the staffing difficulties slightly better but not enough to sufficiently rectify.

PN5432

That's staffing shortage and so, I think the two cannot go in tandem in respect of there's a balancing line between keeping the existing workforce within the aged care sector, and to the extent that it can attract some further workers. What we do know is that the aged care industry is going to continue to become bigger with an increase in an ageing workforce and we need more and more employers in that workforce to even sustain the current levels of aged care that are being provided.

PN5433

JUSTICE HATCHER: Just on the issue of participation therefore relied upon in section 134(1)(c) - - -

PN5434

MS HARRISON: Yes, your Honour. Importantly in relation to all of those factors that I've just gone through in relation to the modern award objectives and the work value factors, those significant changes to work within the aged care sector are insulated not just to one group of workers. They're not just insulated to direct care workers.

PN5435

Those changes have impacted all employees working across the industry including those who we are calling a direct care worker for the purpose of these proceedings, such as your hospitality staff, your laundry workers, your cleaning and your maintenance employees. We say that the same work value reasons justifying a wage increase in respect of direct care workers applies to indirect care workers, even with those swings and roundabouts which we discussed yesterday which I'll go through, and thus the current minimum rates for direct care employees are inadequate for work value reasons and an increase is necessary to achieve the modern award objectives.

PN5436

In this respect there is substantial evidence before the Commission that supports that there is gender-based undervaluation of work through the aged care sector generally. The expert evidence of Professor Eagar had shown the impact of having lots of nursing staff on the floor supervising the activities has resulted in more responsibilities upon the workforce including those indirect care workers.

PN5437

That same expert evidence also demonstrated that the gender based undervaluation of work performed by all aged care workers and it's notable that such work wasn't segmented unnecessarily to direct care workers.

PN5438

It is undisputed in these proceedings that the needs of the residents have changed substantially over time. Residents are entering into facilities later in life and have more complex medical and behavioural needs. All employees within aged care facilities have been required to step up and adjust their work practices accordingly. We acknowledge the effect on indirect care workers may be different to direct care workers. However it is indisputable that their work has actually been impacted by that change, adding additional responsibility and pressure to their day to day work when compared to similar work outside of the aged care industry.

PN5439

Further, the expectations on employees within facilities to adhere to philosophies such as residents, and to choice and holistic care models has changed the way in which work is performed. Indirect care employees are now expected, as an example, to spend significant periods of time providing social interaction to residents and getting to know the residents' preferences, likes and dislikes in order to perform their job.

PN5440

It is also very apparent from the evidence before the Commission that it is unusual for an indirect care worker to work in entirely one role. Often those employees are engaged in hybrid or multiple roles across a facility and may even work interchangeably within roles on a particular day.

PN5441

And I just note that that is demonstrated in the evidence of people such as Ms Lynnette Hutchinson who, for example, performs work as a cleaner, food services assistant and laundry employee. And then that was in addition to her performance of diversional therapy work and that was described in paragraphs 49 to 54 of her witness statement which is on page 1391 of the trial book. But that's just one example.

PN5442

It's also very apparent in the evidence before the Commission that the work performed by indirect care workers significantly varies between providers. However, it's clear from the evidence before the Commission that indirect care workers are in fact required to provide and exercise skills outside the obvious demands as stated in their role descriptions.

PN5443

For example, some employees are expected to only press the call button when they see an incident to occur, whereas other indirect care workers have a much more hands on role in relation to those same situations. We heard evidence from some – I think one of the employer witnesses that indicated that the manual handling training was in relation to non-residents.

PN5444

But there was also evidence before the Commission from non-direct care workers who are required to assist personal care workers in doing two-person lifts and manual handling exercises. So, that blurred line between direct and indirect care exists but it varies significantly between facility to facility.

PN5445

And what we would say, that nonetheless all the direct care workers are exposed to an increased risk or responsibility level. There are requirements for reporting those incidences which arguably doesn't fall into the same types of roles in other areas outside of aged care. For example, Ms Emily Lipps who was a food services assistant, gave evidence about redirecting an employee who has an alarm that sounds when they get up or they lean forward.

PN5446

So, when this resident comes into a dining room they have a quite high risk of falls, and so there's an alarm on that person that tells her if the person has stood up or moved and she goes back and she reassures them and tries to get them to sit back down, without obviously manual handling. And that's her role as a food services assistant, to prevent the falls. She's acutely aware of that person's level of dementia. She's acutely aware of that particular person's medical needs and it's her role within that function of food services assistant to try and prevent the falls.

PN5447

To the extent that there are categorised groups of indirect care workers I intend to briefly sort of touch upon the evidence of each of those streams. So, in respect of hospitality and they're sort of loosely termed kitchen assistants, food attendants and a range of other sort of descriptors depending on the worksite, the evidence before the Commission clearly demonstrates that the role of hospitality, kitchen and food services employees clearly varies between facilities and between employees.

PN5448

It's very apparent from the evidence heard last week that some kitchen attendants cook food in some form. Some have a level of autonomy in the nature of the food that should be provided to a resident, particularly for breakfast. Whereas other kitchen assistants serve food, or indeed decant food that comes from a more specified location.

PN5449

We accept that some of these employees rarely assist residents in a clinical setting, however this isn't the case for all, and with the evidence before the Commission that employees attend huddles with clinical staff in some facilities and then are expected to understand the medical conditions and care needs of

those particular residents, for example, the evidence of Ms Heather Pumpa shows that the changes in her employment over a significant period of time at Allity which is some 22 years, and that's from paragraphs 12 and 120 to 139 of her statement and that's contained on pages 1514 and 1524 to 526 of the trial book.

PN5450

Your Honour asked Mr Gibian yesterday about food service employees and how that might be different that hotel or hospitality staff outside of aged care. We would say that there's a very different level of responsibility and care level required in aged care for those kitchen assistants. Every single kitchen assistant however described has given evidence about the fact that they need to review care plans.

PN5451

Sometimes that's not all of the care plans but they do need to review the care plans. They're all trained in relation to the nature of the food that's consumed by the particular resident, knowing whether or not someone can eat solids, whether or not it's minced, moist or similar.

PN5452

They've got an entire role there in making sure that residents' health needs are provided for in a situation where they're often dealing with very vulnerable and frail residents who in a similar situation, say in a hotel setting – a customer in a hotel setting would be able to tell you what they do and don't want. In an aged care home, they may but they may not either. Or indeed what the resident is telling you may not line up with their care plans. And kitchen assistants need to be aware of those differentials.

PN5453

JUSTICE HATCHER: Ms Harrison, you spoke about there being differences in the evidence between the extent to which somebody working in a kitchen might have responsibilities interacting with residents when performing food service functions, the same effect as there's a spectrum where you might have on one hand, a person who just works in the kitchen preparing food, and on the other hand someone who's got significant food service responsibilities with the care aspects attached to that.

PN5454

Does that imply perhaps that there should be distinct classifications depending upon the way in which the person in that category is required to perform their work? That is, for example, a kitchenhand or kitchen assistant full stop, and a kitchen assistant with care of food services responsibilities with a higher rate?

PN5455

MS HARRISON: Your Honour, I think the difficulty with the evidence is that I think we've seen very few occasions where there's not some level of – and I stand to be corrected but I don't think we heard any evidence where someone wasn't required to interact in some way, shape or manner with residents. So, I don't think we've got evidence before the Commission that someone just works in the kitchen and doesn't have to deal with residents.

PN5456

There are obviously varying levels of that responsibility and certainly in relation to the current levels of the Aged Care Award many of those kitchen assistants wouldn't get past level 2 in the current classification structure. And I think there is definitely a need to take into account the level of responsibility that someone may have.

PN5457

The Commission heard from Tania Jesser last week and while she's classified as a level 6 under her enterprise agreement, she's probably a level 6 or 7 under the current indirect care classification structure. She's responsible for the team leader meetings and the like and actually sort of performing or putting together the care plans in consultation with the clinical staff. So, there is some level of differential there already but your Honour, that may well be the case in relation to the differentials.

PN5458

Just going back to the point in relation to the differences between the kitchen assistants, and sort of that potential sort of similar sort of hospitality role in the private sector just outside of the aged care. The work that's been performed is all in the context of dealing with someone who's frail, someone who has significant levels of acuity, who might have dementia, who might have behavioural issues, whilst still providing care consistent with consumer choice and all the while complying with what is now a very quite stringent aged care standard of care, as well.

PN5459

And where that transpires is, you can see that in the evidence of Ms Pumpa, that she now attends huddles with the registered nurse and is provided with updates of whether or not residents are unwell. If there are behavioural issues she's required to note them. And similarly, she just – the way in which she interacts with residents if there's been some sort of circumstance in their life that has changed. For example, they've been diagnosed with a terminal illness or something, is the example she gave the Commission.

PN5460

Previously the expectation was only that nurses and care workers would attend those meetings, whereas now you're seeing an increase in hospitality in direct care of workers attending those meetings. And they're expected to then use that information in the performance of their work.

PN5461

The other evidence that's before the Commission, again this is seen in Ms Pumpa's evidence but also in a number of other direct care workers is that they're expected to attend the same training and personal care workers, including manual handling albeit there is some evidence before the Commission that that might differ slightly depending on providers.

PN5462

VICE PRESIDENT ASBURY: Ms Harrison, wasn't it manual handling – the evidence I recall was that the manual handling is handling food supplies, things

like that, not that it was handling residents, with respect to food services employees?

PN5463

MS HARRISON: Deputy President, that was in relation to the evidence of one of the employer witnesses. I mean that's why I said that I think there is some variance in the evidence there. Ms Pumpa's evidence is that she does the manual handling training with the personal care workers. So, I think there is a difference within that manual handling training between facilities.

PN5464

But there's also evidence before the Commission, and I can't recall which witness this was but there is evidence before the Commission of indirect care workers having an expectation to assist personal care workers in two-person assists and lifts and the like and they certainly would have done the manual handling the personal care workers have attended.

PN5465

There is also significant evidence before the Commission in going back to change in work value for those kitchen assistants and the like. There's significant evidence before the Commission in relation to the change in how work is performed over a significant period of time.

PN5466

Ms Pumpa's evidence shows that when she first commenced employment some 20 years ago the majority of residents would have their breakfast in the common dining areas and most would be able to get up, get their breakfast and sit down. And there wasn't a real sort of focus on dietary requirements or similar.

PN5467

Ms Pumpa's evidence shows that over time the needs for the residents have changed and that aligns with the undisputed fact about the increased frailty and acute care needs. And so now the way in which the meals are served, the focus on dietary requirements, that the residents often assist in terms of terms of eating, or that it's brought to their rooms and that's contained in paragraphs 121 and 122 of her statement.

PN5468

Ms Tracey Colbear(?) provides sort of similar evidence about the change of her role over the last 14 years. She previously prepared the food and drinks and the carers would deliver the meals to the residents. Ms Colbear is now expected to be more involved with the residents in preparing the meals in line with the dietary plans and delivering those meals to residents.

PN5469

And she notes that there's significant responsibility in relation to that because if a kitchen assistant were to get those dietary requirements wrong they indeed are obviously subject to disciplinary proceedings and similar because it's their responsibility to make sure that they are providing for everyone with care plans.

PN5470

From her evidence it's clear that the responsibility placed upon her has significantly increased since her commencement in aged care in 2007. And that's seen in paragraphs 19 to 23 of her statement and in pages 1562 to 1563 of the trial book. I should say, sorry, that's in the stage 1 trial book, so she's in the stage 1.

PN5471

The consumer choice philosophy also has clearly changed the way in which work is performed by hospitality employees. And that's shown in the evidence of Ms Lipps at paragraphs 30, 37 and 55 of her statement, and by Peter Dewar at paragraphs 16 to 19 of his statement where each employee explains that they are required to take new orders and provide alternates to residents when they're not satisfied with a meal provided, all still accounting for their dietary requirements, as well and the requirements of the care plans.

PN5472

Further, residents are now able to choose between eating – admittedly again varying in different facilities, but they're able to choose between eating in the dining room and their room, whichever is their preference. And so, gone is the example from Ms Pumpa where everyone is just expected to come to the dining room and the food is served and it's packed away and that's the end of the kitchen assistants' role.

PN5473

Ms Jesser provides at paragraph 47 of the evidence that an example of a resident requesting to use tablecloths in the dining room and ensuring that those requests are met. Because ultimately they're providing care in someone's home. An although this work of swapping food over sounds quite simple it involves problem solving skills where a resident might want an alternative meal that has complex dietary requirements, and adjusting in accordance with those dietary requirements.

PN5474

There's also significant evidence from persons such as Mr Dewar about needing to be aware of the residents' personal likes and dislikes. For example, Mr Dewar explains the importance of dishing up a resident's meal in a particular way that accords with the resident's preferences and that goes back to that change in the consumer choice model.

PN5475

He notes that for some residents, putting too much food on their plate will put them off eating, and then having to make those adjustments and to actually accommodate that on an ongoing basis. Ms Lord provides evidence about the typical interactions with residents. Ms Lord explained that she doesn't call a nurse when a resident is emotionally upset, and instead the expectation is that she help the resident.

PN5476

She explains that she'll generally make a resident a cup of tea and stay with them and have a chat, which was also the evidence of what the employer witness indicated, as well, in terms of his preference about how indirect care workers deal with residents. If Ms Lord is aware that the resident particularly likes a certain

food she'll try and find it to cheer them up and to make sure that they're emotional health is looked after.

PN5477

So, there's a clear expectation that hospitality employees provide social interaction with residents at facilities and the evidence of Ms Holmes shows that the expectation on hospitality staff to provide social support for residents.

PN5478

And that included changing the way in which work is performed, making time - she provides evidence, for example, about bringing out a speaker for taking song requests from residents to provide them with interactions and similar.

PN5479

So, we say there's a clear change in the performance of work for those hospitality employees. In relation to the role of maintenance and gardening employees we say this has also changed. And it's changed not just in relation to the overall changes in the care philosophies, consumer choice, all the things that we've gone through and described but also, quite significantly is the introduction of new technologies, as well.

PN5480

Those same employees in maintenance and gardening are expected to provide the same level of social interaction with residents whilst still being cognitive of their clinical needs. Mr Morgan provides evidence about substantial changes in his role of maintenance over the last ten years in aged care. And he explains his role involves working proactively to (indistinct) issues.

PN5481

So that involves checking mechanical issues with call bells. There's wheelchairs, walkers, all of the electrical devices that we now find in our homes that are making their way into aged care facilities. He also has responsibilities to keep an eye on potential hazards, cracked footpaths and things that is an increasing level of requirement as part of the aged care standards but also the level of care that's expected.

PN5482

Mr Morgan's evidence is that changes in technology have significantly impacted his role. He now maintain devices that use batteries. He keeps track of them. He regularly replaces them. He charges them. Before he was lucky if there were some devices that he needed to plug into the wall. So, there's changes in the way in which that care is provided.

PN5483

He also describes that he's – Mr Morgan is in the situation where he's previously worked as a personal care worker. But he describes that there's now an expectation in the maintenance role that he also uses those same cross infection control type methods in relation to the work that he performs, as well, to ensure that the work is done in a hygienic manner that you would expect in an aged care home.

PN5484

And that includes being conscious of infectious control and hygiene skills and fixing devices to ensure that he's not spreading germs around the facility between resident's rooms and the like. And that's shown at paragraphs 60 to 67, and 69 to 73 of his statement.

PN5485

Ms Hood who gave evidence last week performs a number of roles, one of those being gardening duties. And she's been employed in the aged care industry for around 19 years.

PN5486

Ms Hood's evidence is that there's not a single shift that she works without having residents approach her, either needing assistance or conversations. And that's shown in paragraphs 42 to 49 of her statement.

PN5487

In order to complete her role as a gardener Ms Hood needs to understand the residents' medical and behavioural needs. She explains that she runs the gardening group which includes taking residents to Bunnings to buy plants, and so she's incorporating that change in consumer centred choice in her work that she performs as a gardener.

PN5488

JUSTICE HATCHER: I think this has been raised before but that group might be better characterised as recreational work rather than gardening work proper.

PN5489

MS HARRISON: Your Honour, I probably would accept that but I think that this is the difficulty, I think, with the delineation between the – partly the delineation between the direct and indirect care and that overlap between what as seen as indirect care workers performing work that probably actually functionally fits within the recreational assistance officer but actually is quite clearly within the scope of Ms Hood's role as a gardener as she's employed.

PN5490

And I think probably importantly it's worth noting in relation to Ms Hood that she performs all this work including those group type activities that may well be more suited in terms of the lifestyle categorisation. But she performs those knowing the clinical needs of the residents and incorporating those into the work that she performs, all the while still being cognitive of those aged care standards of the increased regulations that she is also required to implement on a day to day basis.

PN5491

And indeed there was some evidence from Ms Jane Wahl in stage 1 of the proceedings who actually incorporated dementia care in her gardening, and in terms of how she plans the garden in line with some clinical advice.

PN5492

In respect of the cleaning and laundry roles, the role of cleaning and laundry employees again varies significantly between facilities and I think that evidence is

clear before the Commission. But the evidence before the Commission also shows that it's not uncommon for indirect care employees to work across multiple jobs including the cleaning and laundry roles.

PN5493

Employees in these roles are often required to use equipment which has changed over time, as well as interact with residents to provide the socialisation aspects of that holistic care model to implement those aged care standards and to continue to perform their duties whilst taking into account resident's preferences.

PN5494

The evidence of Ms Lynette Hutchinson is that over her ten year career in aged care the role of cleaners has substantially changed, and again Mr Hutchinson is one of those workers that has worked in a number of roles and continues to work in a number of roles across an aged care facility.

PN5495

She discusses in her evidence that the role has become more specialised with the use of, in her centre, upholstery cleaning machines, carpet cleaning machines, that cleaners need to also be cognitive of all of the infection control guidelines, the importance of touch point cleaning, the infection control, all of which started with COVID-19 but has now expanded into the continual requirements in relation to any infectious disease.

PN5496

And that work has involved a significant shift in responsibility to the cleaners and to laundry staff to stop the spread of those types of illnesses. Ms Hutchinson also completes the laundry as part of her employment, so she not just works in cleaning but also in laundry. That includes labelling clothes as part of the admissions processes.

PN5497

She gets to know residents' preferences as to the way they like their clothes to be folded, to be provided into their rooms, and similar. So that client choice focus care model comes all the way through to your laundry staff that are putting clothes back into rooms in terms of how, so that residents feel at home in their rooms.

PN5498

Ms Amanda Wallen has provided evidence about the awareness of resident preferences similarly, in putting away clothes and ironing. She keeps records of the residents' preferences to ensure they're complied with. And she explains the focus on individualised care at the facility that she works in. And that's in paragraphs 41 to 46 of her statement.

PN5499

The roles also involve a level of dealing with complaints and Ms Hutchinson provides examples of dealing with clothing that's lost, and how she goes about ensuring that residents are treated with dignity and respect in relation to that type of situation, which obviously eventuates on some level of regularity.

PN5500

Mr Wood provides evidence of the expectation around interaction with residents and he explains about a resident who resides in the dementia ward and thinks they are a laundry employee, and he's been asked by diversional therapists to try and include the resident in very safe ways incorporated in his care plan. And that's in paragraph 27 of his statement.

PN5501

Members of the Bench, the clear change to clients and to care models is demonstrated in the evidence of the lay witnesses about their interactions with residents, and the clear change in management expectations about how they deal with those. The change impacts not just direct care workers but also indirect care and support staff, and this includes the need to communicate with residents and their families, the expectation to provide social interaction with residents and the use of de-escalation and redirection techniques where residents display complex behaviours, often as a result of health conditions.

PN5502

It is not uncommon for indirect care employees to be the first employee on the floor to respond to a resident or to an incident, and that's because of the decrease in nursing staff supervising work on the floor as outlined in the evidence of Professor Eagar.

PN5503

The evidence before the com clearly shows that nurses, personal care workers spend a significant amount of time attending to residents in their rooms, and accordingly they're not on the floor when incidents occur. And it's indirect care worker employees who are generally the face of the facility, working on the floor and giving effect to that, and they're often the people reporting those incidences.

PN5504

And there is plenty of evidence before the Commission in relation to that. There's the evidence of Ms Lipps who estimates that a couple of times a month she will witness

PN5505

a fall of a resident, being the first staff member to be present. Being able to act in these situations involves an awareness of the resident's clinical needs and she gives evidence that she's aware of which residents are not clinically safe to move around the facility without help and the redirection techniques that she uses.

PN5506

Ms Hood provides evidence of a resident coming into the dining room naked and then having to deal with those incidences that are fairly common. Mr Morgan provides evidence about a resident he found to have fallen over in the car park and how he dealt with that situation.

PN5507

Ms Hutchinson similarly provides evidence of adjusting her work to help residents who are upset or in need of assistance.

PN5508

Management expectations have moved towards an holistic care model within aged care and that includes that need to provide personal care to residents from all employees within an aged care facility. Thus, there is clear evidence, we say, before the Commission that shows the nature of indirect care work within the aged care industry has changed significantly over time. And as a consequence of this an increase in wages for indirect care employees is clearly justified for work value reasons.

PN5509

The current minimum rates of pay do not recognise the level of skill and responsibility being exercised by indirect care workers. Food services, hospitality staff, who exercise skills well beyond those in non-care settings including the use of knowledge of diets, residents' likes, dislikes, care plans, the expectations to provide social interaction, and the aged care standards, cleaning, laundry and maintenance staff similarly provide a more specialised role compared to those in non-care settings such as exercising skills in infection control, working through residents' needs, including responding to those needs as required.

PN5510

In respect of the application as a whole, the minimum wages provided for in awards are inadequate and the Fair Work Commission should make those changes on the basis of work value reasons to achieve them on all the objectives in section 134 and 157.

PN5511

Aged care employees are low paid and this should be considered by the Commission in making the determination. Indirect care employees perform an important role and we would say should not be left behind in terms of a wage increase awarded to their colleagues considered to be direct care workers.

PN5512

Significantly, we say the Commission must continue to take into account the historical undervaluation of the female dominated workforce and the need to achieve general quality of the workforce by ensuring equal remuneration of work for equal or comparable value. If the Commission pleases.

PN5513

JUSTICE HATCHER: Thank you. Mr Hartley?

PN5514

MR HARTLEY: If the Commission pleases. The split between myself and Mr McKenna is roughly that I'll be dealing with wage adjustment issues and Mr McKenna, the classification issues but there'll be a little bit of the classification issues that I address. Could I start though by dealing with two matters that arose in questions from the Bench.

PN5515

The first is section 157(2B). I think the question raised yesterday was, is it necessary for the Commission to make definitive findings about the reasons for undervaluation. We put a submission in stage 2, I think it was, that the

Commission did need to make a finding of that kind. That was our submission as at 20 January 2023 in paragraph 21 and following.

PN5516

At 67 we said that revisitation of earlier findings was required. In the stage 2 decision which is 2023, Full Bench '93 at 186 to 187 the Commission said in effect it may be appropriate in many proceedings to make definitive findings but it's not necessary. And in 187, findings were made to be the effect that it was likely that the undervaluation was a result of gender based undervaluation but it wasn't necessary to be definitive on that point.

PN5517

So, we wanted to draw to your attention that the Commission has in fact already considered this point. But our submission was and remains that it's an appropriate thing to do to make a finding definitively that the historical undervaluation is the result of gender based undervaluation.

PN5518

It follows, we say, logically from many of the findings the Commission has already made, excepting the expert evidence of the many experts before it. And so, we continue to submit that it would be desirable for the Commission to, as it were, firm up findings in that regard.

PN5519

JUSTICE HATCHER: That has particular implications for nurses.

PN5520

MR HARTLEY: Yes.

PN5521

JUSTICE HATCHER: Because the nurses have an occupational award which prior to this case didn't distinguish between what sector nurses worked in. So, it seems to me that a conclusion of that nature with respect to nurses in this case would necessarily apply to all nurses under the award? Because I don't understand how a finding of that nature could be made in a way which is confined to the aged care industry.

PN5522

MR HARTLEY: I think my response to that question or observation - - -

PN5523

JUSTICE HATCHER: And I'm not saying that's a reason not to make a finding.

PN5524

MR HARTLEY: Yes. Yes.

PN5525

JUSTICE HATCHER: But it does have broader implications.

PN5526

MR HARTLEY: I understand why your Honour says that. One might think that for many of the reasons that a finding of that kind would be made in this industry

it would be an accurate finding to make in respect of other aspects of the nursing professions, as well. But the evidence that's presently before the Commission is more or less confined to aged care, so it would be possible for the Commission to say that the findings that we make as to gender undervaluation are limited to this industry.

PN5527

It may be, probably not, but it may be in looking at this evidence in relation to the work that's performed by nurses and other sectors that would require a different finding. Probably not, as I say, but it would be possible for the Commission to limit its findings to this award, we'd say – to these workers, I should say.

PN5528

JUSTICE HATCHER: The new provision refers to historic undervaluation.

PN5529

MR HARTLEY: Yes.

PN5530

JUSTICE HATCHER: So, of course the nurses rates and the nurses awards have a common historic source.

PN5531

MR HARTLEY: Yes.

PN5532

JUSTICE HATCHER: And it just seems to me that that finding couldn't distinguish aged care, in a sense.

PN5533

MR HARTLEY: Unless it were the case, which is not the ANMF's position, that there were differences in the value of the work being performed by the nurses. So, Mr McKenna said on day 1 and I'll say again today that that's not the ANMF's position and there will be another application forthcoming which will say that the work done by nurses and other sectors is also undervalued.

PN5534

And it's safe to anticipate that the same arguments or similar arguments will be made about gender based undervaluation. My point is only that a finding made in respect of particular workers wouldn't prevent someone from turning up in that later application and saying those findings were, for example, wrong and shouldn't be repeated in respect of nurses in a new application. We'd be saying the same things but other people might be saying different things.

PN5535

The second point is something arising just out of this morning, attraction and retention. That was dealt with at paragraph 269 of the stage 1 decision. We have submitted that attraction and retention was relevant both to work value and the modern award's objective.

PN5536

At 269, the first of those submissions was rejected. But at 1039 t 1040 it was accepted by the Commission that attraction and retention were relevant to 134(1C), as your Honour said. And that was confirmed in the stage 2 decision at paragraph 173. So, again this is something that the Commission can draw on its earlier work.

PN5537

The next subject that I wish to spend a little bit of time on was the increased value of the work of direct care workers. It's been the nature of this proceeding for obvious reasons that there's been a lot of focus on the indirect care workers. We don't have an interest in that aspect of the application. We support an increase in rates but we don't make submissions about it and we didn't call evidence about it.

PN5538

We thought it was important given that – and I'll develop why it is that we say this is the task of the Commission – it's to revisit the stage 1 evidence and the stage 1 findings in combination with the new evidence, of course, but to finalise the task at the start of the stage 1 of identifying what really is the level of increase that's desirable or appropriate for direct care workers.

PN5539

So, I wanted to spend a little bit of time just drawing attention to not delaying too long by reading from paragraphs but identifying what are the bits of a few documents of the stage 1 documents that we say will be very important for the Commission in finalising its stage 1 task.

PN5540

So, we submit consistently with what the HSU and Mr McKenna said on the morning of day 1 that the correct way to understand the stage 1 decision is not, as I think the joint employers submitted, that what it did was determine, apart from COVID-19 and understaffing only what should be the correct wage increase, but rather that it went part of the way to identifying what was the wage increase that was justified by work value reasons, and also left out of the consideration of COVID-19 and understaffing.

PN5541

So, we say that it's theoretically possible for the Commission to make no findings at all about COVID-19 or understaffing and still award a further increase to direct care workers based on the findings, and the evidence from stage 1. Of course, we do say that the COVID—19 and understaffing issues are also relevant to what wage increase should be awarded but they're not a sine qua non as it were.

PN5542

So, I'm going to draw attention to quite a few paragraphs in the stage 1 decision. I'm also going to draw attention to quite a few paragraphs of what I'm going to call the lay evidence report, which was the report of Deputy President O'Neill to the Full Bench. To lesser extends I will refer to the stage 2 decision and I'll also make reference to some of the submissions that we made in stage 1, in particular in respect of the expert evidence about gender undervaluation and skill identification.

PN5543

It is important to recall that before stage 3 the Commission had already received the evidence of over 100 witnesses. And you can see that from paragraph 34 of the stage 1 decision. That included the evidence of expert witnesses directed to gender undervaluation. Extensive consideration was given to the findings made about that topic.

PN5544

And the Commission made the finding that the interim increase was plainly justified leaving over, we say, the question about what else might be justified. At paragraph 49 of the interim decision were the considerations that weighed in favour of an interim increase. And so you can see in point 1, common ground between the parties of the work undertaken by RN's, EN's, and certainly PCW's has changed significantly in the past two decades.

PN5545

Accordingly the evidence establishes – this is point 2, that those people aren't properly compensated. There's a number of complex issues left over for consideration. But already it was found in points 1 and 2 that there was undervaluation of at least those roles.

PN5546

One sees at 53 what it was that the Commission had left over for itself in stage 3. And we draw attention to the fact that it identifies not only wage adjustments justified on work value grounds for employees not dealt with in stage 1 but also any further wage adjustments justified on work value grounds for direct care employees. At 55 is the finding that the interim increase is plainly justified by work value reasons.

PN5547

At 56 there is express recognition of the fact that the Commission isn't suggesting that the 15 per cent interim increase necessarily exhausts the extent of the increase justified by work value reasons. Now thereafter there is a lengthy analysis and construction of, in particular, section 157(2A). I won't go through that but I note the finding at paragraph 163 which is on page 175 of the industrial reports that section 157(2A) doesn't incorporate the 'significant net addition principle' from previous wage fixing principles. We say that was an important finding.

PN5548

Jumping all the way forward to paragraph 216 on page 188 there's a reference to chronic understaffing. And this was one of the issues that was left over for this stage of the proceeding. One sees that in paragraph 220. And really the issue of the Commission was left for itself was, is that understaffing permanent or is it transitory?

PN5549

At paragraph 293 one sees a summary of conclusions on construction which may be important for the Commission to think about in crafting its decisions for stage 3. Now I wanted to draw attention to the fact that largely passed over because this was Mr McKenna's point, the fact that as recorded at paragraph 350 there was a

positive submission from the joint employees that the minimum rates of registered nurses should go up by 35 per cent.

PN5550

At paragraph 353 and 354 there's a reference to provisional views having been expressed that the rates of pay have not been properly fixed in any of the awards. 354 records that the parties agreed with that and the view was confirmed. Can I jump now to paragraph 447. Paragraph 447 is some evidence about the degree to which workers in the industry are female.

PN5551

One sees that the vast majority of direct care workers in both residential and in home aged care services, over 83 per cent identify as female. And there's a table over the following page which gives figures as to the size of the workforce including divided up between NP's, RN's, EN's, direct care workers and what-have-you. Table 4 on page 251 - - -

PN5552

JUSTICE HATCHER: Sorry, just - - -

PN5553

MR HARTLEY: Yes.

PN5554

JUSTICE HATCHER: Table 3 - - -

PN5555

MR HARTLEY: Yes.

PN5556

JUSTICE HATCHER: When is that dated from?

PN5557

MR HARTLEY: That is dated from - - -

PN5558

JUSTICE HATCHER: Is that the 2016 ABS Census data? Is that what you - - -

PN5559

MR HARTLEY: I think it's from – I'm understanding from the bottom of paragraph 447 and footnote 441 that it comes from the Commonwealth submission dated 8 August 2022 in the annexure. The Commonwealth was asked by the Commission in stage 1 to provide the best information it could as to the composition of the workforce. And it did that submission of 8 August, which I think was the first submission it made. So, I think your Honours will find that that is where that table comes from. Yes, in fact you can see underneath the note, 'Source: Commonwealth submissions dated 8 August 22, Annexure A, tables A1 and A2.'

PN5560

JUSTICE HATCHER: Yes. The submissions will presumably disclose the date, as well.

PN5561

MR HARTLEY: Yes. I was down to page 251 and table 4, which is fulltime equivalent direct care employees in residential aged care as percentages over times. So, this is between 2003 and 2016. The source of this is Professor Eagar's report. And what one - - -

PN5562

JUSTICE HATCHER: Sorry, I'm lost. What paragraph are you up to?

PN5563

MR HARTLEY: It's underneath paragraph 462 and it appears at page 251 of the industrial reports. One sees that this is relevant to the workforce composition point that received some attention in stage 1. If one looks at the percentage of registered nurses it diminishes from 21 per cent in 2003 to 14 per cent in 2016. Enrolled nurses also diminished. Personal care attendants increased by about 15 per cent.

PN5564

So, this was a point that received some attention and I'll come to this in stage. Because there were fewer registered nurses they were having to fit more work that only a registered nurse could do, into less time or less person hours as it were. And the result was that they were unavailable to do some of the things on the floor that they previously were doing which increased the workload both enrolled nurses and care workers. So, it is important to understand that the nature of the workforce and composition of the workforce has been changing.

PN5565

Can I jump now to paragraph 551. In paragraph 551 - - -

PN5566

JUSTICE HATCHER: Sorry.

PN5567

MR HARTLEY: Yes.

PN5568

JUSTICE HATCHER: Just going back to table 4 - - -

PN5569

MR HARTLEY: Yes.

PN5570

JUSTICE HATCHER: Does the personal care attendant include nursing assistants?

PN5571

MR HARTLEY: Yes. Now 551 is a list that propositions that were uncontentional between the parties as to the basis upon which all parties contended that the work was undervalued, there were 16 of them – at 739, and in the interim period between this paragraph 551 and 739 what the Commission does is consider whether the evidence supported these matters that were uncontentional as between

the parties, and at 739 found that there was a sound evidentiary basis for each of the 16 propositions.

PN5572

We say these are very important propositions because they go a long way to explaining why it was that the Commission identified that the work was undervalued. But can I sort of pause there and say that I think, at least from the ANMF's perspective, the way that we put the case at stage 1 is that for two reasons the Commission would find that the work was undervalued.

PN5573

The first was that there had been lots and lots of changes in the nature of the work over a period of more than 20 years which hadn't been reflected in changes in the wage rates. Many of those are outlined in the 16 propositions that were uncontentious and then also the subject of positive findings. The second limb was that the work had been undervalued based on gendered undervaluation.

PN5574

So we relied on each of those two things. These 16 points largely go to the first of those propositions. And when one scans through them one can understand how it was that the Commission came to the state of comfortable satisfaction as to 15 per cent. Acuity is greater, polypharmacy is greater, dementia is more prevalent.

PN5575

The point that I made in point 6 about the change in composition of the workforce, RN's have increased responsibility and managerial duties, observations that are made about the nature of the supervision of PCW's and AIN's, increase in regulations, more palliative care, higher qualifications, changing philosophy of care, greater engagement with families, changing diets, and it goes sort of on and on and on.

PN5576

All of these matters, the Commission accepted were changes in the nature of the work over the previous 20 years, and therefore went a very long way to explaining why it was that the work had been undervalued. I'll draw attention to paragraph 877 for the same reason as the previous reference I made in the joint employer submission that there should be a line as between the registered nurse, level 1, pay point 1 and C1A. Mr McKenna will deal with that but that's an important observation.

PN5577

And that at 922 one has conclusions aligning with what had been foreshadowed at the outset of the reasons as to the justification for increase. At line 61, one sees the interim increase is plainly justified. The same finding at 966. And then if one goes to paragraph 968 one sees a little bit more information about what the Commission considered is leaving over for itself in stage 3.

PN5578

So, starting with 968, 'We wish to make it clear this does not include our consideration for the union's claim for a 25 per cent increase. Our suggestion is that 15 per cent is exhaustive.' 969, 'We also point out,' and the word 'also' is

important there, 'that in determining the quantum of the interim increase we have not taken into account all of the material before us.'

PN5579

And then you have reference to COVID-19 and understaffing. So, it's clear that these are two separate things that the Commission is leaving open for itself. Similar points made at 1095 and 1098. So, returning to where I started we say, 'Further wage increase ought not to be coextensive with whatever the Commission's findings are in relation to COVID-19 and understaffing, important though those points may be.'

PN5580

Now I indicated that I was going to draw attention to a few aspects of the report prepared by Deputy President O'Neill dated 20 June 2022, which I'll call the lay evidence report. In addition to containing an overview of the witness' qualifications on occasions - - -

PN5581

JUSTICE HATCHER: Sorry, Mr Hartley, can you just pause while I find that?

PN5582

MR HARTLEY: Yes, of course.

PN5583

JUSTICE HATCHER: So, that's in the first issue of the court book, is it?

PN5584

MR HARTLEY: It should be. I'll see if I can pull it up there myself. I'm hearing whisperings to my right that it's not in the court book. It's research and information on the major cases page.

PN5585

JUSTICE HATCHER: Okay, just give us a second, Mr Hartley.

PN5586

MR HARTLEY: Yes.

PN5587

JUSTICE HATCHER: Someone is going to send me the link.

PN5588

MR HARTLEY: It might help if I indicate now that the other documents to which I'll be going in my submissions are the ANMF submissions of the 22 July 2022.

PN5589

JUSTICE HATCHER: Yes.

PN5590

MR HARTLEY: Then the ANMF reply submissions, and I think it's 17 August 2022; the ANMF stage 2 submissions and I think it's 20 January 2023; and then quite a few documents in the stage 3 hearing book. So, perhaps if the associates

would be kind enough to ensure the Commission has those documents, that'll speed things up.

PN5591

JUSTICE HATCHER: All right. Well, I have the report.

PN5592

MR HARTLEY: I'm grateful for that indication. So, the report dated 20 June 2022. It contains an overview of the witness' qualifications, locations, roles and what-have-you. But there are two, we say, very important parts that we want to draw the Commission's attention.

PN5593

The first is part C which contains an overview of the evidence about the typical duties of particular roles. So for example, one sees in part C.2.1, commencing at paragraph 90 of the report - - -

PN5594

JUSTICE HATCHER: Sorry, paragraph what?

PN5595

MR HARTLEY: C – it's paragraph 90.

PN5596

JUSTICE HATCHER: Ninety.

PN5597

MR HARTLEY: An overview of the typical duties of a registered nurse in residential care, a long list of bullet points; and one seems similarly at paragraph 96, a list of roles – would it assist the Commission if I paused to allow all members of the Bench to - - -

PN5598

PROF BAIRD: It would. Sorry, I have got no internet connection due to a problem with the laptop.

PN5599

MR HARTLEY: I apologise to the Commission.

PN5600

PROF BAIRD: That's all right. I'll share for a moment and we'll get it fixed.

PN5601

MR HARTLEY: Would it be – would it - - -

PN5602

PROF BAIRD: You've got it printed, thank you. I can just use that one, okay. Thank you.

PN5603

MR HARTLEY: I apologise to the Commission.

PN5604

PROF BAIRD: That's all right. No, it's not your fault. It's a technical problem.

PN5605

MR HARTLEY: I note the time. I wonder if it's convenient to the Commission to take the morning break now.

PN5606

JUSTICE HATCHER: Yes, we might take a break now and we'll resume in 15 minutes and we'll have all this for when we get back.

PN5607

MR HARTLEY: If it please the Commission.

SHORT ADJOURNMENT

[10.45 AM]

RESUMED

[11.23 AM]

PN5608

JUSTICE HATCHER: Yes, Mr Hartley.

PN5609

MR HARTLEY: Can I start by making some apologies. The first is for the evident disruption caused by my submission. And the second is, I know I'm rushing a little bit through these references because there's a lot to fit into a short time, so if it assists people for me to slow down I can but I thought I'd just keep pressing and see how we go.

PN5610

JUSTICE HATCHER: No, that's fine. And all you did was expose bigger issues with our IT system which I won't go into.

PN5611

MR HARTLEY: I'm grateful for that indication. So, I was at paragraph 96 in what I'm calling the lay evidence report which outlines the typical duties of enrolled nurses in residential care. In this round of hearings the Commission heard evidence repeatedly really of enrolled nurses doing three things in particular:- wound care, medications of particular kinds; observations of particular kinds.

PN5612

And one sees that in paragraph 96 in the second bullet point which is medication round, check the schedule 8 drugs and cupboards at the beginning round of the shift; the third bullet point, wound dressings, observations, COVID testing. And last bullet point, monitoring blood glucose levels. So, this is a source of information should the Commission require as to what it is that ENs and residential care are doing which other workers are not doing.

PN5613

Part C.2.5, and I won't go into this but it's a similar list in respect of care workers in residential care. We also draw attention in this document to part D which is entitled, 'Illustrative examples of witness evidence and common issues and

things.' Deputy President O'Neill set out a summary of the witness evidence divided up into particular headings of propositions which exposed, we say, the very considerable changes in the nature of the work, conditions in which it's done and so on in sub parts.

PN5614

So, at D.1, commencing at 258 outlines evidence concerning increased security and more complex needs in residential facilities; D.2, commencing at 276 is changes in staff mix; D.3, commencing at 291 is a change to the person centred philosophy of care; D.4 at 203 is residents' expectations, regular treatment and things of this kind; D.5 at 385 is the expansion in the roles of particular workers, the increased skill required, matters such as wound care complexity, polypharmacy, pain management, infection prevention and control; incontinence care and dementia care; mobility and fall prevention and social supports; palliative care and increased comorbidity, as well as detail about the enhanced level of observational and interpersonal skills that are brought to bear by workers.

PN5615

D.5.3 in particular, starting at 412 is in relation to clinical skills, clinical observations, falls, wound care, skin care, bruises, catheters and medication. Commencing at 467 in part D.6, specialised skills in regard to dementia and palliative care. D.7 at 500, the impact of death upon workers and its increased frequency. I think we've heard evidence which lines up with findings in the stage 1 report that it's roughly one third of residents that die each year, so one can imagine the burden that that has on workers.

PN5616

D.8 at 512, the increased physical and emotional demands of working in aged care, which I think ties into D.9 commencing at 529, violence and aggression in the workplace. One sees at 534, for example, that there are workers that gave evidence to the effect of experiencing violence or aggression with every shift. D.10 at 559 is in relation to the nature of supervision.

PN5617

D.11, 578, the increased use of technology which includes both digital technologies but also the increased use of what's called analogue technologies such as lifting machines and what have you. D.12 at 592 is a summary of the qualifications held by workers. I'll pass over attraction and retention but it's in D.13. D.14 at 626 contains some findings about the overwhelmingly female nature of the workplace. And D.15 at 638 is the inherent value of the work.

PN5618

It is critical in our submission that in making findings relevant to this stage 3 that the Commission refamiliarise itself with that report. It's I think the easiest way of going through the statements and the cross-examination of the hundred or so witnesses that gave evidence in stage 1 and is, we say, very important.

PN5619

JUSTICE HATCHER: That figure of one third of residents dying each year, where did that come from?

PN5620

MR HARTLEY: It was given in evidence by one of the employer witnesses. I'm certain I heard it in stage 1, as well.

PN5621

JUSTICE HATCHER: Thank you.

PN5622

MR HARTLEY: Can I take that on notice and give your Honour some references?

PN5623

JUSTICE HATCHER: Thank you.

PN5624

PROF BAIRD: I understood it was given by Dr Meagher, as well in the evidence at the - - -

PN5625

MR HARTLEY: I think you're right, Professor Baird, yes.

PN5626

PROF BAIRD: About the number of deaths.

PN5627

MR HARTLEY: I think you're right, Professor Baird, and I'm grateful. And I'm sure there are other references which I'll ask my instructor to track down and we'll inform your Honours as soon as we can.

PN5628

JUSTICE HATCHER: And while you're doing that is there any evidence, longitudinal evidence about that that is, as compared to, 10, 20, 30 years ago? Is that - with the change?

PN5629

MR HARTLEY: Yes. That may also be in some of the reports produced by Professor Meagher. But the overwhelming thrust of the evidence is that people are coming into aged care later and more acute, and the consequence of that is that they die more quickly than used to be the case. So, I'm giving sort of a high level summary and a few references but the gist of the evidence in stage 1 was, it used to be the case that people would come into residential aged care facilities and live relatively normal lives for a period of time and then get old and die. And now the situation is very different.

PN5630

Now the next document that I wanted to draw attention to is our written submission dated 22 July 2022. That was our closing submission in stage 1. In particular, what we did with a few to assisting the Commission was we set out in our parts D and E, submissions that corresponded to the structure that was utilised in the layout in this report.

PN5631

So, our part D is structured in the same way as part C. It's a submission in relation to the nature of the work. And our part E corresponds with the same number of headings to the themes that were identified by Deputy President O'Neill in the lay evidence report. The structure that we utilised within each submission part was to set out, so far as these things appeared in relation to particular categories of evidence, what was agreed between the parties, usually by reference to the consensus statement which appears at the annexure to the stage 1 decision.

PN5632

What was in the lay evidence report, and which of that we adopted which generally was everything, and what further evidence we said was relevant to the same issues which we then divided up between evidence from union officials, evidence from employer witnesses, and evidence from what we call frontline workers. So, for example, in part D.2 at paragraph - - -

PN5633

JUSTICE HATCHER: What's the date of this submission?

PN5634

MR HARTLEY: It's 22 July 2022.

PN5635

JUSTICE HATCHER: Yes.

PN5636

MR HARTLEY: In part D.2 commencing at 106 we – well, at 105 we adopted what Deputy President O'Neill had said in the lay evidence report concerning what it was that enrolled nurses did. We added underneath that further evidence at 106. For example, we gave a quote from the evidence of Lisa Bayram who was a registered nurse called by us about what it was that EN's did that PCW's didn't do, and the answer that she gave.

PN5637

It's set out in four paraphrases:- in charge of the ward; responsible for medication rounds; responsible for anything of clinical care or complex care needs; wounds; oxygen therapy; CPAC machines; blood glucose; anything to do with comorbidities; responsible for providing leadership to personal care assistants; organising workload; assisting RN's. So, there's further evidence that we drew attention to and that continues over the page by reference to evidence from officials. And we do the same thing for registered nurses, for care workers and so on.

PN5638

In part D.8 commencing at paragraph 132 we set out evidence in relation to what we called the nursing team, which was really evidence about how it was that all these various roles fit together and operate as one cohesive whole. And in the same way in our part E we have a structure that mirrors part D. So, for example, part E.1 corresponds with part D. 1 and deals with increased acuity and more complex care needs and residential care.

PN5639

We, as with part D, set out what had been agreed between the parties. We adopted what had been said in the lay evidence report. And then we set out lots and lots of evidence from people that we call frontline workers, officials, employer witnesses, we set out relevant quotations from the royal Commission, and we articulated how it was that we said that evidence was relevant to work value.

PN5640

That part in point 1 which is just increased acuity covers 20 pages. The whole of part E which is sort of our supplement, as it were, to the layout of this report, covers about 150 pages. So, we've spent a long time outlining the lay evidence that we say is relevant to the work value of direct care workers. We rely on all of those submissions. Again, I don't think our documents in the stage 1 decision are long so I can't see that there's no inconsistency between our approach and the Full Bench's approach but there aren't any obvious ones, at least.

PN5641

So, I think it's the case – well, I won't say that. I'll say we submit that the layout of this report and the submissions that we directed to the themes identified by Deputy President O'Neill will be of assistance to the Commission in considering now in stage 3, what should be the further increase awarded to the direct care workers.

PN5642

So, that's the lay evidence.

PN5643

Now the stage 1 expert evidence is also highly relevant. I'm returning now to the stage 1 decision. One can see in paragraph 42 of the stage 1 decision a summary of what the conclusions were that the Full Bench drew from the expert evidence and there are many of them and they're detailed and they cover a number of pages.

PN5644

VICE PRESIDENT ASBURY: Sorry, what paragraph?

PN5645

MR HARTLEY: Paragraph 42.

PN5646

VICE PRESIDENT ASBURY: Forty-two, thank you.

PN5647

MR HARTLEY: So the Commission sets out there first of all where it is that they deal with the evidence in respect of gender undervaluation but then the propositions that are accepted. So, a valuation of workers influenced by social expectations. Undervaluation occurs when work value is assessed with gender bias. And then an explanation of how it is that that gender bias, first of all, arises; how it is that it influences the way in which skills are recognised, and even an analysis of the way in which historically – this is point 6, work valuation by industrial tribunals in this country had been affected by gender undervaluation in the ways outlined in Roman I, II and III.

PN5648

JUSTICE HATCHER: So, going from the general to the specific, how did that impact historically upon work valuation of nurses' work? How do you - - -

PN5649

MR HARTLEY: From the general to the specific. I think the - - -

PN5650

JUSTICE HATCHER: That is, there's some point in time in which a rate was set in a matter which you say was affected by gender?

PN5651

MR HARTLEY: I think the finding that was made by the Full Bench in stage 1 is that all of the rates and all of the awards have never been properly fixed. And the consequence of that – but the Full Bench didn't go on to say, as we urged them to do in stage 2 in particular, that a reason why the rates have never been properly fixed was gender undervaluation.

PN5652

But they did accept evidence to the effect of saying that in effect there were lots and lots of skills that are brought to bear by nurses and others working in aged care which have not been recognised because they are hidden or invisible or under qualified or under specified, which are the various terms that Professor Junor uses and I'll come to that.

PN5653

But you have, and this is why we say that a finding that previous wage fixation had been affected by gender undervaluation is almost inevitable. Because you have findings that the skills that exist aren't reflected in the existing rates. The natural conclusion to draw based on the evidence of Professor Junor, as well as the other experts who give evidence about the existence of the gender pay gap and the mechanisms by which gender undervaluation comes to exist, is that the reason why the rates are low is naturally because these skills weren't recognised.

PN5654

And the reason why the skills weren't recognised and I'll come to this, but you can sort of wrap it up holistically by saying people don't value what basically are typically described as women's work. They don't recognise things that actually are skills, as skills. And that leads to a mis-assessment of how much skill is actually brought to bear. And that leads to fixing the rates improperly.

PN5655

There are other things that for example, I think the report that deals at greatest length with gender undervaluation in an industrial tribunal context is that of Professors Smith and Lyons that there's an analysis that they perform of a wage fixation history by industrial tribunals in Australia.

PN5656

They draw attention to the fact, for example, and this is a little bit out of my memory so this may not be exactly accurate but there were points in the past where there was expressed gender discrimination. So, it was said for example,

you know, we don't need to pay – that there'll be different rates for women doing this work than men doing the same work.

PN5657

So, there's just no doubt that at some point in the past there was explicit gender undervaluation. The question really was had that ever been rectified. And the answer was no by almost all of the experts. One of the reasons why I think nearly all experts gave as to why that would not have happened is because one has this, I won't say unthinking, but perhaps inaccurate comparison between the skills that are brought to bear in stereo-typically female occupations and the skills that are brought to bear in stereo-typically male occupations, as though they're the same thing.

PN5658

And we drew attention in a way that the Commission identified in stage 1 to the fact that speaking with your supervisor on a job site is not the same thing as speaking with a person who's suffering from dementia. So, communication skills, you can – you say communications skills but it means very different things depending on who you're communicating with and in what context.

PN5659

JUSTICE HATCHER: But again, more specifically, where did the current rate structure in the Nurses Award come from?

PN5660

MR HARTLEY: Yes. Well, I think the best explanation of that, your Honour will find in background document 2. Background document 2 is a document entitled, 'Award Histories.'

PN5661

JUSTICE HATCHER: Yes.

PN5662

MR HARTLEY: It's dated 9 June 2022 and it contains over 21 pages, a history of wages and classifications in the Aged Care Award, in the Nurses Award and in the SCHADS Award. The other document that we would draw attention to in respect of award history is the statement of Kristen Wischer filed by the ANMF in stage 1. That's dated 14 September 2021. That is a statement that's some 1324 pages, mostly because of annexes, every document that explains how it was that the rates came to be set. I think I am right to say that there's nothing inconsistent as between the statement of Kristen Wischer and background document 2, and the conclusion from background document 2 was the one I referred to earlier, which was never properly fixed.

PN5663

My friends can say if I've got this wrong, but I think there's a similar history done by Leigh Svenson by the HSU. There's a similar statement by Leigh Svenson which I think feeds in the same way into background document 2. I haven't come prepared to walk your Honours through the statement of Kristen Wischer, so I might be at a bit of a disadvantage were I to try to do so, but I can identify at least that that is where your Honour will find the answer to the question.

PN5664

JUSTICE HATCHER: Again, that historical analysis demonstrates that a finding of gender undervaluation, based on that historic wage-setting process, would not be confined to aged care nurses, because it would necessarily be common to everybody covered by the Nurses Award, would it not?

PN5665

MR HARTLEY: I think that's so. I was going to then move on to just identifying, still in the stage 1 decision, that there are two parts of that decision that particularly deal with the expert evidence about gender undervaluation. It's part 5.2 and then part 7.3.2, which deals with Professor Junor and invisible skills specifically.

PN5666

Starting with part 5.2, at paragraph 374 one – I beg your Honour's pardon. It's paragraph 370, is where there's a summary of the evidence of Professor Charlesworth. 374 is the finding of Professor Charlesworth's reports that there had been a historical as well as an ongoing undervaluation of work, that the undervaluation was profoundly gendered and an explanation of how it was that Professor Charlesworth said that came about. At 381 to 382 one sees a summary of the changing care needs. This comes from the report of Professor Kurrle. I'm sorry, Vice President Asbury, have I lost you?

PN5667

VICE PRESIDENT ASBURY: No, I just pushed the wrong button on my laptop. I'm here, sorry.

PN5668

MR HARTLEY: I see. So your Honours will see in the chart underneath 381, for example, a graphical illustration in the changing nature of the care needs in permanent residential care for complex health care, and one sees the dramatic change between even 2009 and 2015.

PN5669

There follows summaries of the evidence of Professors Eagar and Meagher. For example, at 393 there's a summary of the findings from the Meagher report about the changes in the structure of aged care. At bullet point 1, strong evidence that residents are older, sicker and frailer than before, about the overwhelmingly female nature of the workforce, the change in the structure of the facilities themselves; they're now larger and what have you. So this is one area in which the expert evidence is summarised.

PN5670

Commencing at 400 – well, I should say 396 – is a summary of the evidence of Associate Professor Smith and Dr Lyons. Those were witnesses called by the ANMF. That's the report that, as I say, I think has the most detailed examination of how one might come to the conclusion that the process of industrial wage fixation itself involved gender bias or undervaluation. I drew attention in particular to paragraphs 400 and 402 of the stage 1 decision in that connection.

PN5671

Then at 409 one has a very short overview of the evidence of Associate Professor Junor. I think it's important to put a mark next to paragraph 410, because that's where it gets explained what Professor Junor means when she uses particular terms. So the terms that she uses, the umbrella term is invisible and the sub-categories are hidden, under-defined, under- specified or under-codified. A hidden skill is one that's diplomatically kept unnoticed or downplayed because it's behind the scenes, and an example of that that I think Professor Junor gave in evidence was a skill where if it's obvious that you're doing it, it undermines the effectiveness of it.

PN5672

So if what you're doing, for example, is trying to redirect an agitated person who's suffering from dementia, if that person understands that you're trying to sort of game them, in a sense, it undermines the efficacy of the skill. So it has to be something that appears to be very natural, and because it appears to be very natural, it's thought of as not being a skill.

PN5673

It's the same with under-specified. Under-specified skills are skills that are soft or natural and might be described as innate and personal rather than as a skill. I think an example that we gave in stage 1 is the difference between saying this person is empathetic and saying this person is skilled in emotion management. When you describe it in the latter sense it's very clear that what you're describing is a skill. When you describe it in the former sense, less so. So these are the different kinds of invisibility which are picked up later on. One sees at paragraph 415 that the Full Bench says, 'We're going to deal with Professor Junor separately later, and that is indeed what they do.'

PN5674

Dropping down to paragraph 740 – I should put this in context. This is in part 7. Part 7 is called 'Our findings'. Part 7.3 is called 'The contentious issues', contentious largely because the joint employers put them in issue. Part 7.3.1 is gender undervaluation Part 7.3.2 is invisible skills, in the Junor report part 7.2.3. 3.3 is the existence of a gender pay gap and its significance in the context of that proceeding.

PN5675

So at 740 one has an analysis of all of the various experts, Smith and Lyons, Junor, Charlesworth, Meagher, all of whom give evidence about gender undervaluation and how it arises, and there's a fairly lengthy discussion of that evidence. I would draw attention to the table that appears underneath paragraph 750 which appears on page 316 of the Industrial Reports, which are the five Vs that Professor Junor set out in her report, which are a way of explaining the mechanism by which certain skills are related to segregation in the workforce. So visibility:

PN5676

Women's skills may not be visible. Care-related skills are intangible. Occupations may have limited industrial history of work value investigations.

PN5677

We'd say that's an apt description of this industry. And it goes on. Valuation:

PN5678

Women's skills are often not valued. Female-dominated occupations may be based on skill hierarchies developed outside the service sector, such as the C10 framework -

PN5679

- and it goes on down the page.

PN5680

At 758 we have the Commission setting out the findings that it makes by reference to that expert evidence. We've been here already. This is the one that goes through points 1 through 6 but I just wanted to draw attention to where this sits in the scheme of things.

PN5681

Then we get, starting at page 321, a consideration of Professor Junor's report specifically. I'll go through this pretty quickly. One sees in 761 that the way that this report came about is that workers were interviewed about questionnaires that they had filled in concerning the nature of their work. Those responses were coded and cross-checked by each of Junor and her collaborator, Professor Hampson. The coded responses were then used to produce what were described as heat maps showing Spotlight skills used by workers, Spotlight skills being, in effect, skills that are hidden, upon which one shines the Spotlight by application of this tool.

PN5682

One can see an illustration of that in table 14, appearing underneath para 770, which is a table showing selected activities illustrating the use of Spotlight skills for registered nurses, and what one can see in the first line A1, sensing contexts or situations, which is the first of the Spotlight skills, then one has levels, a hierarchy of the skill involved and the use. So there's orienting oneself to the use of the skill, fluently performing that skill, solving new problems concerning the use of that skill, sharing solutions or expertly creating a system.

PN5683

So you have the identification of the skill and then the level at which that skill is used, and the numbers underneath there, 12.5, 9.0, 3.5, is the average number of instances of the use of those skills in the coding that was done by Professor Junor and Professor Hampson. Then one identifies the types of skills that are being brought to bear by particular workers and the levels at which they are being brought to bear.

PN5684

The examples underneath, L3, L4, L4 and what have you, are examples of the types of skills that Professor Junor has in mind. So, for example, underneath A2, in the first example, monitoring and guiding reactions is the skill. Leading a daily reassessment of residents' preferences and wishes, prioritising them over routines, is an example of that skill. Judging impact is another skill. Making decisions in

the context of uncertainty and information gaps is an example of that skill. There are similar tables for ENs and PCWs.

PN5685

What Professor Junor opined, which is quoted by the Full Bench at 775, is that these Spotlight skills are utilised intensively, extensively, and with a high level of proficiency by all workers in direct care work, and Professor Junor drew attention to the heavy responsibility for the quality of life and death that aged care workers have for the residents.

PN5686

At 783 of the stage 1 decision there's a summary of the explanation that Professor Junor gave for how it is that the current pay rates in aged care didn't reflect underlying work value, and there follows after that a consideration of whether criticisms made by the joint employers of Professor Junor's evidence should be accepted. the short answer is no, they shouldn't be accepted. One sees that at paragraph 829, where the Full Bench says:

PN5687

We accept Associate Professor Junor's evidence that the skill, responsibility and effort required in the EN, RN and AIN/PCW classifications is under-recognised in the current applicable award rates of pay.

PN5688

At 847 there's acceptance that:

PN5689

The Spotlight skills identified in the Junor report in respect of those classifications are correctly characterised as skills, as opposed to personality traits, and should be taken into account in the assessment of work value. Indeed, it seems to us that the mischaracterisation of the so-called soft skills as personality traits

PN5690

- which was the submission made by the joint employers –

PN5691

or the simple cognitive activity of adults –

PN5692

PN5693

- that's a quote from the submissions of the joint employers –

PN5694

- is at the heart of gendered undervaluation of work.

PN5695

So consideration and rejection of a submission to the effect that Professor Junor was measuring nothing substantial.

PN5696

I'll also draw attention but not go to our closing submissions 22 July 2022. From 770 to 831 is where we gave our summary of what had been done by Professor Junor in her report and why it was cogent, probative and relevant, which the Commission accepted at 856, and also, at 321 to 445 of our reply submissions of 17 August, responding to criticisms made by the employers.

PN5697

That's everything I wanted to say about the earlier stage evidence. In terms of the stage 3 evidence relevant to direct care, I think the only point that I want to draw attention to is something that I thought was really helpful in the reports of Professors Charlesworth and Meagher. It's at page 481 of the stage 3 court book at paragraphs 19 and 20.

PN5698

Nothing, of course, in what Professors Charlesworth and Meagher say detracts from the proposition that carers are exercising skills rather than drawing on traits or attributes, but they make two points that I think respectfully capture something very nicely, which is even if you accept that what's involved in care work is skills, these skills are different again, for two reasons.

PN5699

The first is unlike the situation of carers in a home environment, carers in residential aged care have no pre-existing connection with the people for whom they're providing care, so you have to generate a connection with these people, and lots of them, and often in a short period of time, and that makes it more difficult even than the skills involved in providing care in the home.

PN5700

The second point is sort of an obvious one, when you think about it, which is often it's the case that people come into residential aged care exactly because people can no longer care for them in the home. So the skills that would be required to care for people in the home aren't widely available. That's why they go into specialist facilities where they get experts to look after them and provide for their care needs. I thought that was some very useful stage 3 evidence directed at the same point.

PN5701

VICE PRESIDENT ASBURY: And I think relevantly also, Professor Meagher said – I think she referred to it as the moral weight of what people were doing.

PN5702

MR HARTLEY: Yes.

PN5703

VICE PRESIDENT ASBURY: Because they don't have a familial bond with the people that they're caring for.

PN5704

MR HARTLEY: Yes. We adopt that observation from the professor. Very quickly I want to deal with minimum wages and modern awards objectives. The

basic point is everything that the Commission has already said in relation to those objectives it can say again. In addition, section 134(1)(ab) wasn't around at the time of stage 1, was around at the time of stage 2. It's something to which the Commission will have to give particular consideration, but we say that the findings about 134(1)(a), (b), (c) and (h) can all be made again. The same with 134(1)(ab). That was considered in the stage 2 decision at 175 to 176.

PN5705

I won't repeat what I said before about the desirability, at least, if not the need, of firming up the findings about gender-based undervaluation. The same findings that were made in respect of the minimum wages objective can again be made, for the same reasons. Perhaps, if it assists, I can just give paragraph references to the stage 2 decision where the relevant findings were made. 134(1)(c), the finding is at 460 of the stage 2 decision. 134(1)(h), the finding is at 488.

PN5706

For the minimum wages objective, for (a) the finding is at 497. It's neutral. For (aa), which is the need to achieve gender equality, favours amendment. Social inclusion, favours amendment for the same reasons as 134(1)(c). Relative living standards, favours amendment for the same reasons as 134(1)(a). Providing a comprehensive range of fair minimum wages to junior employees, et cetera, not relevant, for the same reasons given at 492 of the stage 2 decision.

PN5707

The next topic to which I want to address some submissions is financial stability. As with stage 1, here in stage 3 the joint employers have put a submission that capacity to pay is an issue that goes to timing and phasing, not whether an increase should be awarded at all, and we embrace that observation.

PN5708

The joint employers have, on several occasions now, sought to put into evidence analysis from StewartBrown, the firm. I think in stage 1 quarterly reports were attached to references of witnesses without a statement supporting it. In stage 2 there was a statement of Grant Corderoy that was served not long before the hearing. He was cross-examined by the HSU. We made submissions about the weight of that evidence which were considered in the stage 2 decision.

PN5709

In stage 3 we now have the statement of Stuart Hutcheon. I'd like to start by saying that nothing in what I say should be taken as critical of Mr Hutcheon. He was a truthful witness who was doing his best to assist the Commission, and he did, in certain ways, but it's also important to understand that in our submission there are serious limits to the use to which his evidence can be put.

PN5710

The StewartBrown survey is an opt-in, paid survey. The percentage of participation varies from place to place. With a few exceptions, to which Mr Hutcheon drew attention in his evidence, it doesn't contain government-owned providers. Mr Hutcheon is an accountant and an auditor, not an economist or statistician or econometrician. The purpose of doing the survey is benchmarking rather than producing a statistically representative sample.

PN5711

The reports don't say that they're statistically representative, neither the sort of landscape reports that are produced for the subscriber base nor the specific report that Mr Hutcheon produced for use by the Full Bench. So that's the first reason, is that Mr Hutcheon – and I say this uncritically of him – doesn't purport to be producing a statistically representative survey. That's not the objective of producing these benchmarking reports.

PN5712

JUSTICE HATCHER: So, Mr Hartley, why do we need to go into this issue? That is, I would have thought there's two fundamental propositions here. First of all, I understand the Commonwealth will fund the outcome determined in this case, and the evidence you're talking about is really concerned with the consequences if the outcome wasn't funded.

PN5713

MR HARTLEY: Yes.

PN5714

JUSTICE HATCHER: Which is contrary to, I understand, the working premise.

PN5715

MR HARTLEY: Yes.

PN5716

JUSTICE HATCHER: Secondly, regardless of the criticisms you make, I wouldn't regard it as an unsurprising conclusion that an unfunded significant increase to the cost of labour, in a labour intensive industry which is not necessarily hugely profitable, is likely to cause financial difficulties for at least a proportion of employers. I mean, that's just - - -

PN5717

MR HARTLEY: Your Honour, I accept that. The punch line of where I was going is really to say that - I don't think anyone could contradict the types of propositions that have just fallen from your Honour. What we say the Full Bench couldn't do is take the dollar figures from the StewartBrown report and say, 'There it is. That will be the effect,' assuming, contrary to where your Honour started, that these wage increases were going to be unfunded.

PN5718

So we would urge against relying on the precise detail of the StewartBrown report or a finding, for example, that the wage increase would be 858 million for residential aged care (indistinct). It would be unsafe to rely on that, but that doesn't gainsay the proposition that, as your Honour says, there's been quite a bit of evidence in this proceeding that aged care employers, or at least some of them, aren't flush with cash. So that's understood.

PN5719

On that basis, I'll pass over the rest of my submission there, but I will draw attention to the fact that a few things that Mr Hutcheon said in cross-examination we think are relevant to what it is that the Commission will be doing. In

particular, Mr Hutcheon identified that there are costs associated with the use of agency workers, including that they just cost more to begin with. There's a higher cost, there's the cost of turnover and training, and an inability to attract staff leads to a lower occupancy rate, which in turn results in lower profitability.

PN5720

So one can see the through-line between an increase in wages leading to an increase in the attractiveness of the role, leading to a decrease in the use of agency staff, leading to profitability, or greater profitability, for employers. So that was the nature of some of the evidence that Mr Hutcheon gave in cross-examination, and we rely upon that.

PN5721

Now, COVID-19. I will, noting the time, see if I can go through some of this stuff more quickly than I had intended. The short point, I think, left over by the Commission from stage 1 to this stage 3 was everyone understood at the time of the stage 1 decision that COVID-19 had very much changed things in the aged care industry. The question was, was that a short-term change that was going to be reversed out pretty quickly or not, and the evidence, we say, is super abundantly clear that the answer is not.

PN5722

The un-cross-examined evidence and the cross-examination reveals very clearly that the effect of the COVID-19 pandemic has been to fundamentally change infection prevention and control in aged care, relevantly not only to COVID-19 but, as I think every employer witness accepted in cross-examination, it's also meant that people are better now at dealing with gastro outbreaks or influenza outbreaks. So there are learnings from COVID-19 that transcend COVID-19.

PN5723

I'll just make reference to the fact that at page 631 of the court book, which is in our wage adjustment submissions of 15 September 2023, we made submissions summarising the effect of the COVID-19 evidence in stage 1. We drew attention in particular to the evidence of Mark Sewell, an employer witness prognosticating that IPC lessons learned in COVID would be retained going forward, irrespective of what happened with COVID, over coming years, and we say that was a sound prognostication, which the evidence now shows.

PN5724

In our reply submissions on wage adjustment at 1319 of the hearing book we drew attention to authoritative information to the effect that COVID-19 is still a real thing. It's still a declared pandemic. It continues to be a leading cause of death. There continue to be outbreaks in residential aged care facilities. I think every employer witness from whom the Commission heard confirmed that they had had outbreaks recently. That's not a criticism of them, it's just a reflection of the fact that COVID is still an item, and one couldn't treat it as though it were not.

PN5725

The next point that we make is there was an awful lot of COVID-19 evidence that wasn't the subject of cross-examination. We set that out again in our – or we summarise that, rather, and I won't go to it in detail, because it was un-cross-

examined. We've summarised it at page 632 of the court book, which is in our primary wage adjustment submissions. One sees in paragraph 12 a reference to the evidence that we rely upon in relation to changes in IPC based on COVID. I'll give references. The Bucher statement is at tab 48. The Chrisfield statement is at tab 47. The Voogt statement is at tab 50, the Purdue statement, 51, Brooks, 52, Bennett, 46.

PN5726

After that, over the following pages, we provide a summary of each witness's evidence, about which no issue has been taken. COVID-19 outbreaks happen frequently. It will stick around like the flu. IPC standards are higher. There are changed community standards. People are more alert. The lessons learned from COVID-19 are ingrained.

PN5727

At paragraph 18 we quote Ms Purdue's statement about the training standards being higher now. At 21 we quote Ms Brooks about there having been a complete overhaul in education in IPC. Starting at 23 we summarise the evidence of Associate Professor Bennett about the changes in IPC guideline and regulation as a result of COVID-19, and there's a list of changes identified by Professor Bennett in her report at page 69 of the court book, in paragraph 73 of that report, in which she opines, and wasn't challenged, at 75, have become permanent.

PN5728

So there's a lot of uncontested evidence about the significance and permanency of these changes. There was also a lot of cross-examination. I will pass over the first three points I was going to make and just refer to the employer witnesses.

PN5729

I'm dealing now with Ms Riboldi. The pre-existing outbreak management plan of three pages is exhibit ANMF 36. One can compare that with the plan that now exists, commencing at page 2804 of the hearing book. I won't take your Honours through it, but one sees it's a document of about 108 pages, with lots of detail about preparedness, testing, risk assessment, contact management, notifying people, activating the outbreak management plan, treatment signs and symptoms of various sorts of diseases, information about modes of transmission. Ms Riboldi confirmed in cross-examination that she expected the staff to recognise and report these things. Screening that didn't occur pre-pandemic which now does apply, that's at 2838 of the court book. 2843 is education, isolation and cohorting, which Ms Riboldi accepted was challenging.

PN5730

It's an extremely comprehensive plan with new and more complicated procedures that arose in large part due to the outbreak. A lot of it is COVID-specific. Ms Riboldi accepted propositions along the lines that staff developed skills, learned lessons about what worked and didn't, applied those lessons to other villages, refined training, corrected shortfalls, that there was daily work in prevention, daily activities to be prepared for possible outbreaks.

PN5731

Not a temporary document. No intention to revert back to any shorter plan. She gave evidence about the skills involved in the work done by IPC leads, conducting formal and informal training, on the spot training. No intention to remove IPC leads, was her evidence. Preparedness requirements are daily requirements in all villages. Proactive steps being taken to monitor and record symptoms carried out by all direct care workers.

PN5732

Skills that Ms Riboldi confirmed had been developed through the pandemic improved significantly over the last few years, and towards the end Ms Riboldi agreed that the staff were now, as a result of the learnings of the COVID period, in a much better position to respond to a COVID-19 outbreak, ditto an influenza outbreak, ditto a gastro outbreak, and in a much better position to deal with it and contain such an outbreak were it to occur, in large part due to increased skills and direct staff and learnings applied.

PN5733

Very keen to retain those learnings. They weren't temporary learnings, and the phrase that Ms Riboldi used was that they were learnings for life. Skills improved enormously as a result of the pandemic and staff were much better trained.

PN5734

Mr Brockhaus I'll just say a few things about. Mr Brockhaus was unable to find a pre-existing outbreak management plan so the comparison isn't available to be done, but one can say that the document that Mr Brockhaus did produce was also comprehensive and long, and he gave evidence that he'd rewritten the whole document as a result of the COVID-19 pandemic. Mr Brockhaus also gave evidence, just selecting some high points, that he had confidence in all of his staff that they could do what was needed to deal with these sometimes very short timeframes. This is what you do in the first six hours. This is what you do between hours 6 and 12. Had RNs and roles that he didn't previously, so two IPC leads and RN quality care coordinator.

PN5735

Gave evidence about parts of the pandemic plan that just didn't exist pre-pandemic, accepted that it was COVID specific in large parts, steep learning curve for management and individual staff members, accepted, as did Ms Riboldi that staff were in a better position to respond to and prevent any sort of outbreak as a result of the learnings of COVID, better protocols, better skills, better training, and he helped to continue to cultivate new skills in response to COVID outbreaks which were still happening.

PN5736

Mr Mamarelis said similar sorts of things, regarded the IPC lead role as positive, anticipated that that role would continue. The plan which wasn't attached to his statement evolved substantially through the pandemic. To the extent that there were learnings, he said they were here to stay. Again, with the other witnesses, much better position to respond, much better position to prevent, in large part because staff were better placed to implement improved protocols.

PN5737

So, really, the evidence was all one way about COVID, and as Vice President Asbury pointed out, it would be wrong or at least a simplification to say this is just about COVID-19. There had been dramatic changes in the nature of infection prevention and control which involve lots more work and lots more skilled work by all direct care workers.

PN5738

No one suggests that things are now exactly as they were in, say, mid-2021, but that doesn't mean - and the evidence is all one way on this - that things have returned the way that they were people had heard about COVID-19. So we say that the evidence that the Commission heard would contribute strongly to a finding that the value of the work of aged care workers has increased.

PN5739

I'm onto understaffing where I propose to adopt largely a similar approach. In the stage 1 decision, it's at 216 and 220 where the Commission identifies what the issue is and then says, 'We're going to leave this, really, for stage 3'. The question that, really, was left for stage 3 was understaffing something that's transitory, or is it a permanent condition? This has been the subject of some consideration already in the written submissions. So at 639 which is, again, an hour wage adjustment submissions, we start at paragraph 38 by setting out a quote from the stage 1 decision that it was uncontentionous that the workload of nurses and personal care employees had increased as had the intensity and complexity of the work, and the evidential basis was considered in part 7.2.2 and included the evidence that we set out there from Professor Meagher, the Royal Commission report, Associate Professor Bernoth and evidence from direct care workers.

PN5740

At 42 to 44 of those submissions, we set out references to the lay evidence report, our closing submissions and our reply which are relevant to the understaffing issue, and we listed at paragraph 45 evidence from certain direct care workers by reference to tabs of the court book and pages of the court book, I hope the current version of the stage 1 court book, but I can't be certain because they went through versions, and I'm not sure which version was in place at the time this submission was written.

PN5741

That's evidence that goes to showing dramatic understaffing as at the date of the interim decision. We won't go over it again. The matters relevant to whether understaffing has been alleviated are, in our submission, whether certain of the Commonwealth initiatives such as RN 24/7 and care minutes requirements have forced, as it were, an alleviation in understaffing, and, secondly, whether the interim pay increase shows that increased attraction and retention has the effect that understaffing is no longer an issue or won't be in future.

PN5742

I'll refer to, but not in light of the time, go to the statement of Ms Bucher which is at page 685 of the hearing book. From 11 to 14, Ms Bucher's statement was to the effect that she had noticed no alleviation in the workload of workers after 1 July 2023. In the Brooks' statement which is at page - - -

PN5743

JUSTICE HATCHER: Sorry. What's the date of Ms Bucher's statement? 15 September.

PN5744

MR HARTLEY: Yes.

PN5745

JUSTICE HATCHER: I mean, there may be a whole question of whether that evidence is too soon after the increase to discern the effect.

PN5746

MR HARTLEY: Yes. It was as late as we could make it in light of the Commission's timetable, but I accept the force in what Your Honour says.

PN5747

JUSTICE HATCHER: But, again, there's a tension between the submission that understaffing is permanent, and that should be a value reason for further increases and the proposition that higher wages will attract more people to the industry and therefore resolve the understaffing issue.

PN5748

MR HARTLEY: I think I would give the same answer as Ms Harrison gave which is the two things can be true at the same time in the sense that increased attraction and retention will follow, but will not cure the issue of understaffing, and one sees that in the sense in the evidence of Mr Bonner. Mr Bonner, from whom the Commission heard, gave evidence that he was responsible largely for conducting together with Flinders University the so-called missed care report which surveyed the sort of care that was require by residents of aged care facilities that they weren't receiving because there was too few staff and gave as a target 4.3 care hours.

PN5749

The care minutes requirement - but it need not have been care minutes. One might have seen, for example, that attraction and retention could have led to the same outcome, an increase in the number of care minutes that are provided, but still a shortfall. And one still has the consequence of RNs, ENs, direct care workers trying to fit more work than is possible into the number of hours in the day and have it be the case that attraction and retention reduces, but does not eliminate, that problem.

PN5750

JUSTICE HATCHER: The problem is that increased wages will take some time to work through the system. For example, registered nurses don't come out of thin air. They have to go a number of years of training and those sort of things.

PN5751

MR HARTLEY: Yes, yes.

PN5752

JUSTICE HATCHER: And so the extent that higher wages might attract more people in the industry, that'll be delayed by the need for people to recognise that in the labour market and undertake the training necessary to enter into the industry.

PN5753

MR HARTLEY: Yes. That's so. An observation I'd made in response to that, however, is if the Commission is making a finding, as it is, on the balance of probabilities about which is the more likely outcome, is it likely that these shortages will be alleviated, or is it more likely that they won't be. A very salient fact appears at stage 1 decision paragraph 2 which is that modelling prepared for the Royal Commission estimated that the number of direct care workers needed to maintain current staffing levels was 316,000 full-time equivalent workers by 2050, so an increase of 70 per cent.

PN5754

The point being made there that you need to find another 70 per cent of workers just to maintain existing dramatic understaffing. So is there a real likelihood that so many workers are going to be found by 2050 to deal with the aging population to not only get the 70 per cent that you need just to maintain existing levels, but also provide the additional care minutes that people like Mr Bonner say one needs to ensure that there is not missed care.

PN5755

There's just no evidence, in our submission, that would satisfy the Commission that that's likely. The safe finding, in our submission, is that understaffing has been for a long time and continues to be and is likely to continue to be a more or less permanent feature of aged care given that the need for care is accelerating, and it would be hopeful, at best, for the Commission to say, well, if we were to award an additional 10 per cent, that'll fix it. So it'll help, no question, about that, but it would be hopeful, I think, to say that it'll cure the issue. I was going to refer to the Brooks' statement which is at 830 of the court book. One sees in - - -

PN5756

PROF BAIRD: Excuse me, Mr Hartley.

PN5757

MR HARTLEY: Yes.

PN5758

PROF BAIRD: There was evidence presented that the number of people in aged care has sort of plateaued, but there's been an increase in those in home care. So that could suggest that the industry has reached a peak of demand for staff, albeit understanding it does need to replace and cover what is currently understaffed, and what will be needed in the future for new staffing commitments to be met, but that it may not increase to the same degree that you're suggesting.

PN5759

MR HARTLEY: I can't myself recall evidence - - -

PN5760

PROF BAIRD: There was a bar graph yesterday with the different - - -

PN5761

MR HARTLEY: I remember the bar graph, but the bar graph, I thought, reflected the position looking backwards, as it were, and so one could see that over the past X number of years, the number of people had remained the same, but the composition differed, but that's different, I think - well, in my submission, it's different from saying that after 2050, that plateau, as it were, will stay either as a plateau or will fall off in circumstances where, as I understood the evidence from stage 1, on the contrary, it's that the number of people entering first, of course, home care and then residential aged care is likely to dramatically increase over the coming decades.

PN5762

JUSTICE HATCHER: So the - it might have been referred to in paragraph 2 of the stage 1 decision. Does that include home care, or is it just residential care?

PN5763

MR HARTLEY: I don't know the answer to that question, but I will find it and answer that question after lunch.

PN5764

JUSTICE HATCHER: Okay.

PN5765

MR HARTLEY: Mr Bonner's statement - I think I've basically described that already. I'll just identify what we say are the salient paragraphs in his statement. There's a description of the survey starting at about paragraph 6. Paragraph 11 contains the recommendation of 4.3 hours per resident with a given skill breakdown. In paragraph 15, he says that he repeated that evidence to the Aged Care Royal Commission. 16, he remains of the opinion. 17, draws attention to the fact that 4.3 was something that he said in 2016, but residents have gotten more acute since then, so query whether it might not be more.

PN5766

Paragraph 18 draws attention to the fact that the care requirement will be 215 minutes per day as from next year. So that's just over 3.5 hours which is less than, of course, 4.3. Paragraph 20, therefore, in his opinion, still less than what is required for appropriate care, and 22, even that may overstate the closeness between the required level of care and what is necessary as a result of care minutes because, as we heard some evidence from Mr Brockhaus about, there's no distinction drawn between ENs and AINs for care minutes.

PN5767

And so as Mr Bonner explains in the statement, some facilities get AINs to count toward their care minutes and not ENs, and that diverts RNs from tasks that ENs might otherwise be doing such as wound care, medications, what have you, which exacerbates that change in the workforce composition which I've more or less started by drawing attention to.

PN5768

I'll just refer as well to, on the subject of understaffing, at page 652 - I beg Your Honours' pardon, 642 of the stage 3 court book. This is in our submissions on the

question. We drew attention to findings from the Royal Commission in paragraph 50, and in paragraphs 53 and 54, we drew attention to so-called staffing ratings which were produced by the department which contain an analysis of whether the staffing levels at residential aged care facilities were in the category of significant improvement needed, improvement needed, acceptable, good or excellent, and the most recent report showed that 56.5 per cent of facilities receiving ratings needed either improvement or significant improvement. So that just goes to showing the current levels, at least, of understaffing.

PN5769

I'll refer to the fact that Ms Riboldi said that despite the 15 per cent increase in wages, despite the government mandate for RN 24/7, still they were unable to fill the RN requirement. Now, Your Honour's point is maybe there's a lag time, but that's the situation as at today, and Mr Mamarelis gave similar evidence about recruiting, in particular, remote employees.

PN5770

JUSTICE HATCHER: It seems like immigration policy will have a significant impact on this which just are unknowns for the time being.

PN5771

MR HARTLEY: That's so. The next topic that I wish to address - and this is the penultimate topic for me - is the level of detail that is desirable in classification descriptors. So there are two classification subjects that I'm addressing. That's the first of them. The second is decompression. We addressed the level of detail that's desirable in classification descriptors at paragraphs 9 to 23 of our reply submissions on this issue which commence at 1337 of the hearing book.

PN5772

The short point that we make is that including too much detail and classification descriptors (1) is not necessary to ensure that the work value of the relevant workers is appropriately valued and (2) is undesirable pragmatically because it will be very difficult to apply at the workplace level. On the first of those points, we say that, of course, a proper consideration of work value involves identifying the skills that workers apply in their work and the conditions that they work, et cetera, and it also involves, in particular, identification of the invisible skills in the way discussed by Professor Junor.

PN5773

The proper identification of those matters will lead to a determination of work value that is not influenced, we say, impermissibly by gender in such a way as to undervalue the work based on gender which is to say that once you set the minimum award rate, it will be set properly so as to recognise work value reasons in an ungendered bias way. That being the case, that being the sort of necessary hypothesis, the function of the classification structure thereafter is to enable determination, we say, at the workplace level and, in the event of dispute by the Commission or by the court, of a level at which an employee works amongst other things, but that is one important thing that a classification structure must do.

PN5774

The barest possible structure would be just an AQF based structure which referred to the relevant qualification and nothing more. I don't think anybody suggests that's appropriate here. Rather, the agreed position, as I understand it, with certain qualifications is that people accept that a qualification structure should clearly state the skills, qualifications and experience required at each level and provide a clear means of transition from one level to another. That comes from question 7 in background document 10, and the responses of all parties were to the effect of saying sort of qualified yesses. People hedged and said, 'There are other things that we'd like you to take into account', but basically, yes, that's what a qualification structure should do.

PN5775

The references in that extract to clarity align with the references in section 134(1)(g) of the Fair Work Act to the need for the award system to be simple and easy to understand. And there is a requirement also in 134(1)(g) for stability which, in our submission, means you don't change for the sake of change. So there's a balance to be struck between competing objectives. Mr McKenna will be dealing with the specific changes that we propose, but the point that we'd like to make at this stage is to identify why the approach that the nurses urge upon the Commission accords with the need for clarity and stability in stating skills and qualifications. Can I hand up a document - - -

PN5776

JUSTICE HATCHER: Before you go on - - -

PN5777

MR HARTLEY: Yes.

PN5778

JUSTICE HATCHER: So in respect of enrolled nurses and registered nurses, you simply apply them to the existing structure. Is that right?

PN5779

MR HARTLEY: I think that's right. Yes.

PN5780

JUSTICE HATCHER: That is to the extent that we deal with nurses in this case - sorry, enrolled nurses and registered nurses in this case, that very submission begs the question as to whether those principles are satisfied with the existing structure.

PN5781

MR HARTLEY: I suppose the sort of short answer that I'll give - and I think this really falls more under Mr McKenna's territory. So I won't tread on his toes, but I think the short answer is no one suggests that it doesn't. We certainly don't, and no other party proposes a variation of the Nurses Award. So we'd be sort of shadowboxing, I suppose, were we to try to deal with arguments that might be made against us.

PN5782

JUSTICE HATCHER: Well, my question was - would tend to suggest that there might be someone facing that issue.

PN5783

MR HARTLEY: Yes. Well, I think I'd better leave that to Mr McKenna.

PN5784

JUSTICE HATCHER: Right.

PN5785

MR HARTLEY: Could I hand up a document that we've prepared? What this document is is a classification - the classification structure that we propose with each grade marked up against the previous grade. So level 1 contains no tracked changes. Grade 2 contains on the differences between level 1 and level 2. Grade 3 has tracked only the differences between level 2 and level 3 and so it goes.

PN5786

And so what one can do is, by looking at this document, identify what on our structure are the differences between grade 1 and grade 2 and then between grade 2 and grade 3 and so on such that one can identify how it is that the structure does, in our submission, delineate between the skills that are required at one level and the skills required at the next level, the qualifications required at one level and what's required at the next.

PN5787

So as an example, one sees that looking at grade 3, personal care worker qualified, in the first bullet point, the change that's tracked is a difference between prioritising work within routines, methods and procedures and prioritising work within policies and guidelines which involves a higher degree of interpretation, in our submission. Third bullet point, you go from sound communication to good communication, and then last bullet point, the big one, of course, is the insertion of the Cert III qualification.

PN5788

In the next level, level 4, one sees that one goes from the existing - well, the grade 3 is capable of prioritising work to is capable of functioning semi-autonomously and prioritising the work, and so it goes on in the same way. Reference there for the first time with supervision of others.

PN5789

I won't sort of go through this in too much detail because that's Mr McKenna's task, but I'm providing it to illustrate that when one looks at a structure that's set out in this way, one can see, for example, that at this level, the difference is that now you need a Cert III. Now your communication skills have to be sound rather than good. Now you're operating autonomously. Now you are supervising others or may be involved in the supervision of others.

PN5790

And it clearly delineates between skills and qualifications from one level to the next while also retaining the skeleton of the existing structure in a way that we say contributes to stability, an approach that just - I won't say just - an approach that contains large blocks of text that much of which is the same as between particular classification levels, and where there are differences, it's difficult to identify

where they are because you're dealing with large blocks of text over, in some cases, pages.

PN5791

It doesn't assist in distinguishing from one level to the other. It's also undesirable, in our submission, that there should be a structure that requires an assessment of the acuity of a patient to decide whether a person's on one level or the next level. That's subjective, even if graded, and difficult to prove retrospectively, and at a high level, that's why we say that the level of detail that's provided for in our classification structure is the appropriate level of detail. As to why it is that the particular changes that we propose should be made, that's Mr McKenna's task. So I'll leave that to him. Now, the final topic that I want to address is decompression and mathematics.

PN5792

I promised a couple of days ago that I would explain where it was that the 18 per cent came from that Mr Hutchins was using in his calculations, and I'll do that now. If I could hand up one more document. Now, the Commission knows that the ANMF proposes that there should be a further 10 per cent increase in all Aged Care Award direct care classifications, that the Nurses Award and classification should be aligned with the aged care PCW classifications, and the RN level 1 pay point 1 level should be aligned with level C1A within the C10 framework.

PN5793

JUSTICE HATCHER: Why C1A?

PN5794

MR HARTLEY: That's squarely within Mr McKenna's wheelhouse, but the short answer is - well, no. I won't even give a short answer. I'll indicate that that's Mr McKenna's task.

PN5795

JUSTICE HATCHER: I'll wait for the short answer.

PN5796

MR HARTLEY: In this document that I've just handed up, there are three groups of figures. Under the heading Current is the current rates inclusive of the 15 per cent in the Aged Care Award and the relatively to what we say is the benchmark level which is grade 3 level 4 100 per cent C10, and then it goes up and down from there.

PN5797

The rates down the bottom, of course, are the rates from the Nurses Award for EN pay point 1, RN level 1 pay point 1 and nurse practitioner pay point 1. Again, we've highlighted in yellow RN level 1 pay point 1 because we say that's the second of the two benchmark classifications that the Commission ought to use.

PN5798

And we align that, as one can see, going to the right-hand side. The grade 3 level 4 level aligns with the C10 Cert III level in the Manufacturing Award, and down the bottom, the RN pay point 1 level aligns with C1A in the Manufacturing

Award. Now, the three rightmost columns contain original relativity, current rate and current relativity. The easiest place to see what we're talking about there is at paragraph 562 of the teachers case, the citation for which is 2021, the Full Bench, 2051, or it's at page 741 of the HSU's - - -

PN5799

JUSTICE HATCHER: Just slow down. Let me just find that.

PN5800

MR HARTLEY: Yes.

PN5801

VICE PRESIDENT ASBURY: 741.

PN5802

MR HARTLEY: 741 of the HSU's bundle of authorities.

PN5803

DEPUTY PRESIDENT O'NEILL: Sorry. It was a document in the bundle of authorities, was it? Seven.

PN5804

MR HARTLEY: It's tab 15 in the bundle of authorities, and it's page 741 of the PDF. Does the Commission have that? So one sees at 562 that what the Commission's doing thereunder is setting out what were the original relativities to C10 and the original C10 structure. That's at column 3 of the table over the page, and then what's called the current relativity to C10 which is set out in the column two along, and the reason why the current relativities are compressed is, as explained earlier, dollar rises rather than percentage rises between original C10 and current C10.

PN5805

Now, I think I'm right to say that all of those relativities remain the case if one just performs the analysis by dividing rates between oneself within the Manufacturing Award. What one doesn't have in the Manufacturing Award is a C1A level. So one gets the relevant compressed relativity for the C1A level from this teachers case.

PN5806

You see at the - about five lines down end of the table on the left-hand side, level C1A, qualification degree, original relativity 180, current wage - current relativity 148. So 148 per cent of C10 is the current compressed relativity that one draws from the teachers case for the C1A level. We calculate the figure that we propose of 1472.60 as 148 per cent of the current manufacturing award C10 level which is 995. So if one takes 995 and multiplies it by 1.48, one gets 1472.160. The current rate for the RN level 1 pay point 1 is 1246.80. The difference between 1246.80 and 1472.60 is an increase of 18 per cent. So that is where the 18 per cent comes from. Now, the result of using two benchmark classifications - - -

PN5807

JUSTICE HATCHER: Sorry – what about the enrolled nurse? Is that - - -

PN5808

MR HARTLEY: In our submission the enrolled nurse should track with the registered nurse. So what one does is – as we understood what was called by the Commission the (indistinct) alignment approach in the stage 1 decision is one starts at step 1 by identifying the benchmark classification. We identify two: the C10 level and the R1A level – sorry, RN level 1, pay point 1. Then one adjusts all other levels – this is step 2 – in accordance with existing relativities. So we adjust all direct care levels in accordance with the existing relativities in the Aged Care Award and we adjust all nursing levels in accordance with the existing relativities in the Nurses Award.

PN5809

So one sees, for example – well, that's the answer to your Honour's question.

PN5810

JUSTICE HATCHER: Speaking for myself, I have trouble understanding the high degree of relativity between an enrolled nurse and a registered nurse that currently exists.

PN5811

MR HARTLEY: Can I address that in a sort of roundabout way via coming to the difference as to decompression approaches between the approach that we've taken and the approach taken by other parties? We haven't proposed any decompression within categories. So within direct care workers, within nurses, we don't propose decompression. We propose decompression as between categories, so that there would be as a result of using the second benchmark classification. If one looks at the – under the big, bold heading, 'Proposed', the middle column, 'per cent increase', one sees that all of the direct care classifications get, on our proposal, an increase of 10 per cent, all of the nursing qualifications get an increase of 18 per cent.

PN5812

The result is that there's a slightly greater decompression from C10 on our proposal. So the EN remains the same relativity against the RN but becomes 109 per cent of C10. The RN becomes slightly more decompressed from the C10, so too the nurse practitioner. But we haven't proposed in this application any decompression as between nurses.

PN5813

JUSTICE HATCHER: Yes, all right.

PN5814

MR HARTLEY: Now, the HSU proposes a greater level of decompression but only, it seems, in regard to PCW/AIN classifications, and that comes about in two ways: one very minor, one larger, and I'll sort of identify it because it's relevant to decompression but Mr McKenna will deal with why our approach ought to be preferred. The minor way is that the classifications that the HSU – sorry, the C10 relativities that the HSU proposes are very slightly less compressed than existing, up to Cert IV. Does the Bench still have a document handed up by the HSU yesterday entitled, 'Comparative Internal Relativities – Residential Care'?

PN5815

Now, one sees there in the left-hand column a statement of the current relativities, which aligns with the table I've just handed up to the Bench. Next to that, nurses' proposal, and one sees that we maintain all the existing relativities and an HSU proposal one sees very markedly different relativities towards the top end in particular. Now, an aspect of that is that the HSU proposes for level 7 a classification of C2A and we say that's mistaken for two reasons: (1) in our submission that should be a Cert IV level, not as C2A aligns with an advanced diploma level.

PN5816

But even if it is an advanced diploma level, C2A is the wrong classification. Mr McKenna will deal with that but if you peg it at C2A, that's how you get to 130 per cent and not otherwise. If it were a Cert IV level, which is a little bit lower down – say, for example, level 5 – one sees that that tracks to 109 and that's pretty much within the range of the current relativities which track from 92 to 111 as against 89 to 109. So if one is just comparing relativities as between the current structure and the structure that goes up to Cert IV in the HSU's proposed structure, it's not actually all that much decompressed.

PN5817

The decompression comes in by introducing levels with higher qualifications and pegging them the higher C levels, of C2A, for example. The professors propose an even greater level of decompression, in effect by re-benchmarking all classifications to the original uncompressed relativities. I'd like to take the court to the table which shows this, because it assists in understanding what is the logic underpinning the different approaches – the HSU's as compared with ours. That table is at page 549 of the stage 3 hearing book. I thought it was – must not be? Yes. So one can see this by looking at the columns with, 'Proposed Internal Relativities'. Starting from the left-hand side, one has classification levels and HSU's proposed determination, proposed internal relativities.

PN5818

One sees that that 130 comes about by pegging the highest level to C2A, then Charlesworth and Meagher proposed classification levels and your Honours will see that they propose different C levels. Charlesworth and Meagher proposed internal relativities and you'll see by comparing those relativities with the original (indistinct) relativities which appear in that table that I've just handed up that what they propose in effect is decompression back to the original relativities. I think it's also important to understand how the rest of the mathematics tracks out because it also informs the way that the HSU arrive at their end numbers.

PN5819

So the Charlesworth and Meagher proposed internal relativities start at 82, run to 135. What is important to note though is if you look at the current rate for residential care level 1, you start with this rate of 1047. You track across to the column fourth from right and despite the fact that you've now got different relativities, that rate is still 1047.60. Then there's an increase of 10 per cent and that gives you 1152.40. That's the same rate as the HSU proposes. The change from current rates is 10 per cent and one sees in this right-hand column that the consequence of decompressing and the way that the professors propose is by the

time you get down to the highest classifications, a wage increase of about 50 per cent in addition to the 15 per cent that's already been awarded.

PN5820

The HSU table handed up yesterday, which I've just taken the Bench to, doesn't contain that final column, which identifies what the percentage wage rises would be but if one divides the last column over the first column what one gets is once again 10 per cent at the lowest level, then 13, 13, 13, 19, 19, 33. So the highest level is 33 per cent in addition to the 15 per cent that's already been awarded. The reason why we draw this to attention is because it helps to explain why on the HSU's approach there is so much overlap between the highest level PCW classifications and what appears underneath that in their table which are the nursing classifications. It had been the case, if ones goes across to the very left-hand side, that there was some overlap between PCW classifications and nursing classifications. On the HSU's proposal there is now much more. This column is headed, by the way, 'HSU Proposal', but we hadn't understood until yesterday afternoon that the HSU proposed anything in respect of the Nurses' Award so this was sort of news to us. I hear that it may not be a proposal. It's just figures that they've adopted from us.

PN5821

JUSTICE HATCHER: The numbers look the same.

PN5822

MR HARTLEY: The numbers are the same. The numbers are the same but the point is that on the HSU's approach, as we had understood it, based on the expert evidence, their expert witnesses said if you decompress aged care classifications you must have regard to what that means for nursing classifications and Professor Charlesworth in cross-examination specifically drew attention to an experience that she had in New Zealand, where that wasn't done and the result was that care workers overtook enrolled nurses and it was a problem. That's exactly what's happening in this final column of the HSU approach.

PN5823

JUSTICE HATCHER: I mean, getting away from the precise numbers, the essential proposition you're raising is that the registered nurse at level 1, which you characterise as the person supervising all the other personal care workers, must be above the highest level for a personal care worker. Is that - - -

PN5824

MR HARTLEY: Yes, we do say that. Now, we don't say - it was suggested yesterday that our proposal is that every nurse must be above every care worker. That's not what we say and one can see that from the column in the HSU's table entitled, 'Nurses' Proposal', where the highest PCW level - well, the second-highest PCW level, 4A - is equivalent to what we propose for EN1. It's out by a few dollars. And PCW5 at 1396 is higher than EN1. So we accept that some level of overlap between high-level PCWs and new enrolled nurses is appropriate. That's been the case in the existing rates, as one can see on the very left-hand column, and we accept that it may continue to be the case.

PN5825

It's consistent with the evidence that was given by, I think it was Ms Riboldi, to the effect that there are ENs that perform sort of team management roles and there are particularly qualified PCWs that do the same thing. So we allow for - - -

PN5826

JUSTICE HATCHER: But the registered nurse must sit above the highest level?

PN5827

MR HARTLEY: That's what we say.

PN5828

JUSTICE HATCHER: How much longer will you be, Mr Hartley?

PN5829

MR HARTLEY: Not very long – I'll finish by lunch.

PN5830

JUSTICE HATCHER: I've got an engagement at 1 o'clock.

PN5831

MR HARTLEY: I'll finish by 1 o'clock.

PN5832

JUSTICE HATCHER: All right, thank you.

PN5833

MR HARTLEY: I think the Commission has the point – so I don't need to belabour it – that if one is going to adopt an approach of decompressing aged care classifications one has to then have regard to how that affects the nursing classifications and structure them up accordingly. That was accepted by the HSU's witnesses in cross-examination. I think the last point that I want to make about the mathematics is, as I calculate things, your Honour Justice Hatcher was right when your Honour said that it's not an issue – if one decompresses, it's not an issue of people going backwards, it's an issue of people not going as far forward as other people.

PN5834

So if you start with the C10 level and the next level down was 99 per cent of that and becomes 95 per cent of that, if you give everyone a 10 per cent wage increase but then you take the person from 99 to 95, they lose some of that 10 per cent wage increase that they just got. So what one can see by looking, for example – well, in particular at the professors' proposal on page 549 of the court book is the way that that's avoided is by ensuring the bottom level gets the 10 per cent wage increase. One sees that in the rate (indistinct) and then you track the relativities up from there.

PN5835

When one does it that way it is true that one ensures that no-one receives less than whatever percentage one decides is the appropriate percentage increase, be it 10 per cent or any other per cent. But if one does it that way it's sort of arbitrary or nominal to say that C10 is the benchmark because it's not really. The bottom level

is the benchmark and everything else follows from that. I've been handed a note which I'd like to review over lunch which I think is an answer to some questions that your Honour asked me but apart from that, that's everything that I wanted to say.

PN5836

JUSTICE HATCHER: Just forget about the question of C1A. I got A mixed up with B.

PN5837

MR HARTLEY: Yes.

PN5838

JUSTICE HATCHER: But after lunch, you might want to consider this – again speaking only for myself – you might want to consider in advance two questions. The first is why we should not take the approach to pay points that we did in the teachers' decision and the second question is related: that is – perhaps it's more of a proposition – that to the extent that we determine an adjusted classification structure for nurses in this case, why it would be expected that that would not then flow on to any broader consideration of the Nurses' Award completely.

PN5839

MR HARTLEY: Can I just clarify: is the question whether it would necessarily flow on?

PN5840

JUSTICE HATCHER: Well, it seems to me that if we adjust the classification structure and pay rates for aged care nurses, it's difficult to see any reason why would we not make the same adjustment across nurses generally in respect of the award, to the extent that it's considered at some future time.

PN5841

MR HARTLEY: We'll consider that and respond after lunch.

PN5842

JUSTICE HATCHER: All right. So, Mr McKenna at 2 o'clock. We'll now adjourn.

LUNCHEON ADJOURNMENT

[12.56 PM]

RESUMED

[2.02 PM]

PN5843

MR HARTLEY: Thank you, your Honour. I've got two clarifications that are answers to questions. Clarification 1, it's been suggested to me that I might have made a submission that sounded like I was saying that where as our structure cuts off at Certificate IV for care workers, the HSU's does the same. If I said that I was wrong and I didn't intend to. The HSU's cuts off at 'address the problem', so if I said that, I withdraw it. That was wrong.

PN5844

The second matter is Mr Saunders draw to attention that in tabs 40A and 40B of the stage 3 hearing book, there is a table which has in the far right column the percentage wage increases for the HSU's proposal. And that's been filed as well in Excel so that one can have a look at the formulas and see how it is that results are arrived at. I think I said that there had not been a document filed with the percentages and I withdraw that.

PN5845

Now, answers to questions. Your Honour Justice Hatcher asked me a question about whether the reference to the Royal Commission report in paragraph 2 of the stage 1 decision was with reference to the industry as a whole or the residential aged care only. As best I can discern, it's the industry as a whole. What there is as well, however, and this addresses both your Honour's question and Professor Baird's question, in the final report of the Royal Commission, volume 3B at page 801, there is modelling of the number of recipients of care that are expected in CHSB, home care, low-level home care, high-level and residential care. And what one sees is that for residential care recipients the projection is an increase from 200,000 recipients in 2019 to about 350,000 recipients in 2049. And the second matter is in the interim report - - -

PN5846

JUSTICE HATCHER: Sorry - recipients?

PN5847

MR HARTLEY: Recipients - well, residents. In interim report, volume 1 at page 96, there is reference to projection of the number of people aged 70 year and over is expected to almost triple over the next 40 years, reaching about seven million by 2055. So a rapid increase in the number of people receiving care of various kinds and all of those graphs that I'm referring to on page 801 show increases in people receiving home care and residential care. So I think that addresses that question.

PN5848

The next question was whether there was evidence that I could point to of deaths in residential aged care from the stage 1 evidence. There are a few answers. At PN 8900 which is in the transcript of 9 May 2022, Professor Eagar said that there are 180,000 beds in the residential aged care sector. It says 'centre', but I think it means 'sector'. Each year, 60,000 residents die and another 60,000 take their place, so that's one-third.

PN5849

In Professor Meagher's report at 7307 of the stage 1 digital hearing book, Professor Meagher referred to nearly a quarter of all residents passing away. One of the employer witnesses from Warrigal, Smith - this is at page 16833 of the stage 1 digital hearing book referred to turnover of consumers - 'turnover' of course, being death and replacement - as being 30 per cent. That's at paragraph 65.

PN5850

Then I think the last question for me to address was one that your Honour raised just before the break. Your Honour raised the question about the teacher's case,

that's Mr McKenna, but the other question that your Honour raised was if an adjustment were made in this case, a wage adjustment, why would that not necessarily flow on with the rest of the teaching.

PN5851

JUSTICE HATCHER: Not just wage adjustment, but any classification adjustment as well..

PN5852

MR HARTLEY: Yes. I think the answer to your Honour's question is this, our case - in relation to wage adjustments at least - in any subsequent proceeding would most likely be whatever was the wage increase that was awarded in this case should be awarded in different cases. In a subsequent proceeding of that kind, there may well be people present who are not present in this proceeding that would disagree with us. So we might say, for example, 'Well, midway through my submissions, I drew attention to the fact that one of the very central limbs of our case is that there have been changes in the nature of work over the past, say, 20 years.' Now we will say, for example, there have also been changes in the nature of the acute care provided by nurses over the past 20 years, but someone from the acute care sector might turn up and say, 'Well, those changes aren't as pronounce and so the wage increase oughtn't to be as great.'

PN5853

So our case would very probably be the same as between - I'll call them proceeding 1 and proceeding 2 but proceeding 2 may have different people presenting different evidence as to different work, albeit performed by the same people and that might result in a differential structure. We would say there shouldn't be one, as a default proposition, but there may be.

PN5854

Now, as to classification structure, as your Honour knows and as the Commission knows, we don't propose an alteration to the pay point structuring in this proceedings. So if one were to be made, that would be one made on the basis of, I suppose, rejection of our submissions and so we might reargue that in a second proceeding or we may see it as being a terrific idea, difficult to say. But suffice to say, there would be different people in a different proceeding concerning a different sector, and therefore while our case may be very similar as between proceeding 1 and proceeding 2, others may not be, and I think that's the best answer that I can give to your Honour's question.

PN5855

JUSTICE HATCHER: Well, it leads on to a further question and this whether we should vary nurses' rates in this case or independent of a broader review of the Nurses Award.

PN5856

MR HARTLEY: That's a matter that Mr McKenna prefers to address.

PN5857

JUSTICE HATCHER: And I would add to that, having regard to the comments made in this year's annual wage review decision about the broader problem of

professional classifications never having been aligned as with nurses to the C1 rate.

PN5858

MR HARTLEY: That's squarely a topic that Mr McKenna proposed to address, so I will sit down unless there are any questions. Thank you.

PN5859

MR McKENNA: If the Full Bench pleases, I propose to structure my part of the submissions as follows, firstly dealing with the question of the proper alignment of RNs level on pay point 1 with (c)(1)(a). That was a question your Honour raised, but I think perhaps in part - - -

PN5860

JUSTICE HATCHER: Sorry. I got confused between C1(a) and C1(b), so no need to worry about that.

PN5861

MR McKENNA: That's useful to know, your Honour. I will address it, because it is, obviously, a significant matter in this proceeding. I then propose to deal with the preferred approach to wage fixation and the correct application of the C10 Metals Framework alignment approach. Then addressing changes to the Nurses Award and, in that context, we would address the ANMF's proposal to align AIN classifications under that award with the PCW classifications under the Aged Care Award.

PN5862

And if it please the Full Bench, in that context we would also address your Honour the President's question about the approach taken in the teacher's case. And I understand what that is a reference to is the approach by the Full Bench there that rejected the incremental increases and introduced a new standard based upon the Australian Professional Standards for teaching. And in that context, we would also address the proposed changes to the OE (?) definition in that award and then, finally, address the proposed changes to the PCW classification in the Aged Care Award which also in large part flow through the Nurses Award.

PN5863

Starting then with the alignment of RN 1.1 with C1(a), I don't understand there to be any controversy about the fact that the Full Bench in applying the C10 Metals Framework alignment approach is able to select multiple key classifications. That indeed was the approach taken by then Australian Industrial Relations Commission in ACT Child Care. The key classifications selected there were the AQF diploma level, which was linked with the C5 level of the Metals Framework and separately a Certificate III or child worker on commencement level 3 were aligned with the C10 level of the Metals Industry Award.

PN5864

As identified in the ACT Child Care when setting out the C10 Metals Framework alignment approach, the starting point for a benchmark is the C10. But it need not, of course, be the C10 of the Metals Framework being used as the

benchmark. And, of course, in the Teachers case, the benchmark there used was C1(a), which is one of the two benchmarks put forward by the ANMF.

PN5865

So in applying the C10 Metals Framework Alignment Approach the case for the ANMF is that there should be two benchmarks, firstly aligning Cert III classifications with C10 and then aligning RN1.1 with C1(a). There appear to be broad consensus amongst the parties as to the appropriateness of using RN1.1 benchmark to C1(a). In that circumstances it's uncontroversial that the RN classification involves an accredited tertiary degree which is an AQF level 7 qualification which aligns with C1 of the Metals Framework.

PN5866

JUSTICE HATCHER: And RN1.1, a person at that level has full registration to practices and - - -

PN5867

MR McKENNA: Full registration. I did propose to go to this in detail but there is a difference between approach with a teacher and the approach with a nurse. A registered nurse is someone who has not only completed the requisite university degree but is registered nurse under the national law with the Nursing and Midwifery Board of Australia.

PN5868

The position of the ANMF, it's accepted the ANMF has warmed somewhat the C10 Metals Framework Alignment Approach from stage 1 proceeding, notwithstanding that the previous reluctance to embrace it. The position that has been put by the Federation since April last year has been that if that approach is to be adopted then RN1.1 is the key classification. And perhaps we'd follow the joint employers, because it really has been the joint employers' position throughout the proceeding that the key classification - at least for professional nurse classifications, and I will return to that - is the RN1.1, most recently confirmed in its classification reply submissions of 23 November, paragraph 75 to 77.

PN5869

Of course, this was a matter discussed by the Full Bench in the stage 1 decision where the Full Bench at paragraph 955 recognised that a comparison between the C10 Metals Framework and the Nurses Award just closed and anomaly and that the realignment of classification rates in the Nurses Award and affecting the 35 per cent increase to all classifications would be consistent with the approach taken in the Teachers decision and the Full Bench went on to express a provisional view of there being considerable merit in such an approach.

PN5870

And further, as your Honour the President has mentioned, this is a matter that was touched upon in the annual wage review of 2022 to 2023, where the Commission identified work value issues with implications for minimum rates of modern awards with higher female reliance at the higher award classifications, particularly those holding undergraduate degrees. And I'm referring to paragraph 134 where it was noted that under the C10 Metals Framework Alignment Approach employees

with degree qualifications were meant to be aligned with the theoretical C1 classification with relativity to the C10 in the range of 180 to 210 per cent. However, for most degree qualifications in awards, the process was never carried through and no one ever placed an appropriate relativity to C10. So that is the clearly the case for registered nurses.

PN5871

Returning to your Honour the President's point about what a registered nurse is in that question, there is no definition of a registered nurse in the Nurses Award. The term 'registered nurse' is a protected title under the Health Practitioner Regulation National Law 2009. So one is not a registered nurse unless one is registered under the national law and registered with the Nursing and Midwifery Board of Australia.

PN5872

So to that end every classification of registered nurse in the Nurses Award is fully qualified as a RN capable of exercising the skills and discharging responsibilities of the profession in an unsupervised and autonomous way. In terms of the requirements for the degree, it is a - the prescribed degree is a three-year degree. It must be provided at a university or higher education provider registered with the Tertiary Education Quality Standards Agency. The degree itself must be approved with the Australian Nursing and Midwifery Accreditation Council as meeting the Nursing and Midwifery Board accreditation standards.

PN5873

And in addition to having completed an accredited degree, a registration as a registered nurse is subject to additional requirements by the Nursing and Midwifery Board of Australia in that all RNs have professional responsibility to meet the RN standards of practice. They are contained the ANMF bundle from stage 1 at ANMF 23. Those are read and applied in conjunction the applicable NMBA companion documents, including the Code of Conduct for Nurses, the National Framework Development and Decision-making tools for Nursing in Midwifery Practice, and Guidelines for Mandatory Notifications.

PN5874

Dealing specifically with the RN standards for practice, the RN is responsible and accountable for ensuring they are safe and have the capacity for practice and they accurately conduct comprehensive and systematic assessments. They are responsible for the planning and communication of nursing practice. They provide and they delegate quality and ethical goal-directed actions and I take responsibility for the evaluation of practice based on agreed priorities, goals, plans and outcomes. So to that end, a distinction can be drawn between a registered nurse level 1, pay point 1, and a graduate teacher who is not yet fully registered and for whom the skills and responsibility of the profession are not yet being fully exercised.

PN5875

Issues of whether that process should occur now in this proceeding, stage 3 of this proceedings or whether it should be deferred have been raised by a number of parties. It was raised in the stage 1 decision. From time to time the joint employers say something about it and it's been raised by the Commonwealth. I

think at the moment it is the Commonwealth who put it the highest, so I will direct these submissions in response to the position taken by the Commonwealth, in particular in the Commonwealth Wage Adjustment reply submissions which are at digital hearing book 3145.

PN5876

In those submissions at paragraphs 3 to 5, the Commonwealth raises a number of matters at 3 to 5 that suggested that it's not appropriate for the Commission to contemplate increases beyond those sought in the union's applications without providing all interested parties the opportunity to be heard. And at paragraph 4 it suggested the Commonwealth haven't been able to fully evaluate the effective increase sought beyond the initial applications where it is said that there is a potential for broader impact on other awards in industries and sectors and where the full extent of the change is sought by the ANMF being a reference to the submissions of 15 September. It was only made clear at that time.

PN5877

The starting point to respond to that is the Commonwealth submissions of 8 August 2022. And I am not sure if that is something to which the Full Bench currently has access. It probably doesn't matter. I think I can talk the Full Bench through it without there being a need to turn the document up. Part D of that submission addresses the approach to the assessment of work value and from paragraph 143, the submissions address it whether there is an anomaly in the rates for degree of qualified nurses. At 1.49, reference is made to the AMNF submission that if there is to be a key classification application of the C10 Metals Framework Alignment Approach then the appropriate key classification is RN1.1 and C1(a). And there is reference also to the submission - at paragraph 150 there is reference to the submission of the joint employers of 4 May that the certificate of the registered nurse aligns with C1.

PN5878

In that context at paragraph 152, the Commonwealth submissions say that it would be opinion to the Commission to align modern award rates for employees with equivalent AQF qualification levels in the absence of any countervailing work value reasons. However, there may be a reason for justifying different wage rates for employees, despite their having attained equivalent AQF qualifications and so on.

PN5879

JUSTICE HATCHER: Mr McKenna, is there any evidence whether in the context of the interim increase or any further increases from what the actual effect on nurses pay would be while there's increases. That is, does the evidence suggest that they get paid the actual award rate or does the evidence suggest that there's a market rate in the aged care sector that's above - - -

PN5880

MR McKENNA: Your Honour, there was some evidence filed in stage 1. It was the second witness statement of Kristen Wischer and that included some material about the enterprise agreement rates and to the extent that they exceeded award minima. I can't off the top of my head tell you what that said. There was a bigger

gap between enterprise agreement rates and award minima for registered nurses than there was for AIEs and PCWs.

PN5881

JUSTICE HATCHER: All right. I mean, I thought I heard one of the witnesses last week say the labour hire rate was almost double, for registered nurses almost double.

PN5882

VICE PRESIDENT ASBURY: Plus accommodation and other - - -

PN5883

MR McKENNA: I think there is some evidence about FIFO.

PN5884

JUSTICE HATCHER: Yes, indeed.

PN5885

MR McKENNA: The previous written submissions of the AMNF of 1 November 2023 addressed the question of procedural fairness, whether hearing and determining this part of the application now gives rise to any procedural fairness issues and, in summary, the response that is set out there is that in the first case it's safe for the Commission to proceed on the basis that if any party was concerned about the Commission granting 25 per cent they would be here. And the difference between 25 per cent and 35 per cent is not such that you could expect that there is going to be a whole lot of other people who are going to be dashing down the door.

PN5886

JUSTICE HATCHER: So what other people would these be?

PN5887

MR McKENNA: Well, as I understand it, it is said against us that there might be other people who wish to be heard. The Federation's position has changed from 25 per cent of the original application. It's now 35 per cent and as I understand it, it has been said against us that that change might give rise to people wanting to be heard. Now, I understand that is a different proposition to the board; a proposition about flow on effects, but in my submission that proposition deals with that issue.

PN5888

In any case, the position of the Federation seeking a 35 per cent wage increase has been live since at least July 2022 or even May 2022 when it was raised by the joint employers and at least for the July 2022 reference, that can be found in the joint employers closing submissions, the reference to the stage 1 decision at 942. And the ANMF has positively sought that that alignment of C1(a) and the RN1.1, since its response to background document 10 and it's been on the record squarely embracing that since March this year.

PN5889

VICE PRESIDENT ASBURY: So Mr McKenna, are you saying that these parties who may have an interest but aren't here would be external to the aged care sector?

PN5890

MR McKENNA: I've said it's said against us.

PN5891

VICE PRESIDENT ASBURY: So your proposition is if no one came and intervened when we were seeking 25 per cent, then when we were seeking 35 per cent, we can assume that they all think there's nothing to see here on the same basis?

PN5892

MR McKENNA: Yes. That's proposition 1. Proposition 2 is that it's been alive for a couple of years. This is not an issue that's come out of the blue last week. It is being squarely before the Commission from the joint employers' position since mid-2022 and it has been squarely before the Commission on - the ANMF said, 'This is what we seek' in its response to background document 10 filed in March this year.

PN5893

And I will come this in a moment, but as the Commission would well recall the stage 1 decision includes a table that sets out the implications, that sets out the nature of the ANMF's ultimate submission about aligning RN1.1 with C1(a) and what the actual implications of that 35 per cent are. In fact, it is probably appropriate to go to that now. If the Full Bench has access to the stage 1 decision, paragraph 944. And there the decision deals with the implication of aligning RN1.1 with C1(a) and it sets out in detail in a table over the page. And those figures have changed slightly, because of the implications of the annual wage review that otherwise reflect the position sought by the ANMF.

PN5894

JUSTICE HATCHER: Do you have any idea when this broader application might turn up?

PN5895

MR McKENNA: Your Honour, not this year and I don't say that facetiously. You will recall from the most recent correspondence the position the Federation was taking was to wait for the stage 1 research. That has now arrived. It has been digested, but it has been - I think it's fair to say the Federation and its representatives have been fairly engaged in this proceeding. But steps have and indeed there is a third junior on this matter who, unfortunately, can't be with us today but Ms Jones is on Teams and no doubt progressing it as we speak.

PN5896

JUSTICE HATCHER: I just note that section 157(3)(a) allows the Commission to vary awards on work value grounds on its own initiative, so maybe we don't need to wait.

PN5897

MR McKENNA: Point taken, your Honour. The final point, just by way of completion for the procedural fairness point, there was a directions hearing in this matter on 25 July. One of the representatives of AiG in that directions hearing raised a desire for an order for parties to clearly articulate any specific variation that was sought. In that context I addressed your Honour and raised the fact that this was a part of the application; that is, the alignment of C1(a) and RN1.1 and welcomed any further order to address any procedural fairness issues that might arise. And of the orders that followed that directions hearing was order 8 of the directions, originally 15 September, but subsequently varied a number of occasions but that order provided that any party proposing a variation to award classification and pay structures, classification descriptors or allowances shall file a draft determination setting out its proposed variations by 15 September 2023. I understand the purpose of that was to address any residual procedural fairness issues and of course that was done.

PN5898

VICE PRESIDENT ASBURY: Mr McKenna, are you aware is there a third qualification - a tertiary qualification above the AQF7 level for registered nurses? A graduate certificate or a - - -

PN5899

MR McKENNA: Well, there are certainly the nurse practitioner qualification and for nurses there are a number of other qualifications that are obtained.

PN5900

JUSTICE HATCHER: What's the qualification for a nurse practitioner?

PN5901

MR McKENNA: I'm sorry. It is in evidence, and I should know the answer to that off the top of my head. It's a masters.

PN5902

VICE PRESIDENT ASBURY: Which AQF9.

PN5903

MR McKENNA: Yes. AQF9, yes, and off the scale for Metals.

PN5904

VICE PRESIDENT ASBURY: Yes. Thank you.

PN5905

MR McKENNA: In terms of when the Federation might be in a position to file, I think that sensibly I am instructed that January would be difficult. But it is something that is underway, and it is something that the Federation takes very seriously, and we will bring as quickly as possible.

PN5906

To return to your Honour the President's question about the prospect of deferring this aspect, as I understand that, that's something that was exercising the Bench's mind. There are a number of amendments to the Fair Work Act that arose out of the Security Jobs, Better Pay amendment from 2022. That, in my submission,

would count against that approach. The first of those is the amendment to the objects of the Act at 3(a), bearing in mind it is now an object of - gender equality is now an express object of the Act. Now both the modern award objective and the minimum wages objective include reference to the need to achieve gender equality.

PN5907

The ANMF's application - these proceedings have been on foot for a significant amount of time. Mr Hartley has been through the evidence and the evidence that supports an increase to the minimum rates for AINs, PCWs, ENs, RNs and nurse practitioners. In my submission, that evidence is strong. This Full Bench is in a position that it can make and, in my respectful submission, should make a determination as to whether further increases are justified by work value reasons.

PN5908

Further, that the Full Bench is in an excellent position to determine whether those increases are necessary to achieve the modern award objective and the minimum wages objective. In those circumstances, it's our submission that the Commission should not defer the making of any appropriate order.

PN5909

JUSTICE HATCHER: We haven't heard anything about operative date yet.

PN5910

MR McKENNA: That's so.

PN5911

JUSTICE HATCHER: We're all waiting with bated breath what the Commonwealth is going to say about that, but depending upon when that is it might not in practice result in any deferral.

PN5912

MR McKENNA: Well, I mean, as the experience of this proceeding shows, they are complex and somewhat cumbersome and lengthy proceedings.

PN5913

JUSTICE HATCHER: That assumes that a full work value case is necessary to achieve the outcome.

PN5914

MR McKENNA: It does, and of course it might be that the issue of gender based undervaluation or historical undervaluation might be truncated in a subsequent case, but for the reasons Mr Hartley identified it is also - I'll go back a step. Mr Saunders identified yesterday - correctly, in my submission - these proceedings are not limited to historical undervaluation.

PN5915

There is a substantial body of evidence about changes to work value and it's anticipated that any subsequent application is going to need to address those matters, as well. So, hopefully it can be done more efficiently and of course the

Federation will do what it can to facilitate that. I don't think it can be assumed that it would be a short, quick process.

PN5916

The last thing I just wish to say about this issue is just to refer again to the evidence before the Commission about - and in particular the evidence of Associate Professor Junor, who identified gender as a primary reason for low pay rates of aged care workers in Australia and of course the highly gendered nature of the workforce.

PN5917

Notwithstanding the interim increase that has occurred, if the Full Bench is satisfied that a further increase is justified by work value reasons, the failure to pass that on as rapidly as possible would perpetuate a scenario in which the aged care workforce themselves are subsidising their employers, they're subsidising the taxpayer and they continue to be held out of a fair and appropriate wage.

PN5918

I then propose to address the issue of the correct approach to wage fixation. The relevance of the C10 Metals Framework Alignment Approach is something that was addressed in some detail by the stage 1 decision. The reference is - again I won't necessarily take the Full Bench to it - paragraph 293.7 and also at 192 and 393. In those paragraphs it's recognised that the C10 Metals Framework Approach and the AQF are useful tools to align rates of pay in one modern award with classifications in other modern awards to support a system of fairness, certainty and stability.

PN5919

The Full Bench also identified limitations to that approach, including the fact that the alignment would depend on relativities are not determinative of work value, that qualifications provide an indicator of a level of skill involved in particular work, but other factors will have a bearing, including of course this level of skill involved in doing the work and including invisible skills.

PN5920

The other limitations included that the expert evidence supports a proposition that alignment of feminised work against masculinised benchmarks such as the C10 framework is a valid and proper assessment of work value in a female-dominated industry and occupation. Finally, that alignment with external relativities isn't a substitute for the Commission's own statutory task of assessing work value.

PN5921

In terms of what the C10 Metals Framework Alignment Approach is, I don't understand there to be any particular confusion or dispute about it. The Full Bench in the stage 1 decision defined the C10 Metals Framework Alignment Approach to be the three-stage test identified by the Commission in the ACT child care case. It's a three-step approach that involves firstly identifying the key classification or classifications, fixing that to a C10 equivalent in the Metal Industry Award, maintaining internal relativities by reference to the key classification and then as a third step increasing the award minima if they are still too low.

PN5922

Despite the limitations of the C10 Metals Framework Alignment Approach, despite the Federation's previous reluctance to embrace it, it is and has been the backbone of modern work value assessment. It was of course used in ACT Child Care and the teacher's decision that has been referred to. It was used in the pharmacy decision to identify the non-alignment between a degree-qualified pharmacist and the relevant classification under the Metals Award. It was used in the subsequent recommendation to the parties in that proceeding to conduct a benchmarking approach based on the C10 metals alignment using the C1(a) classification.

PN5923

In terms of the way that the C10 Metals Framework Alignment Approach has been used by, in particular, the HSU and the joint employers, we make two submissions. Firstly, that the three-step process that is described is not being applied. I'll go into this in a bit more detail in a moment. Both parties really apply stage 1 and stop. Not only is it not carrying through to steps 2 and 3, what is occurring is an attempt to benchmark each classification in particular under the Aged Care Award and align that to a classification in the Metals Framework.

PN5924

Now, an approach based on the AQF has been recognised as having utility. The difficulty here is that the existing classification structure under the Aged Care Award does not mirror the type of language used in the Metals Framework. It's not a case that there is progression through the aged care PCW classifications by having a certain qualification, being 20 per cent, or 40 per cent towards a further qualification.

PN5925

In terms of the HSU's approach and how that manifests, Mr Saunders yesterday handed up a document 'Current structure aged care'. Mine is rather squiggled, but if the Members of the Full Bench happen to have access to that, in my submission the face of this document bears out the difficulty in attempting to benchmark aged care classifications with the Metals Framework.

PN5926

Particularly if you have regard to level 5, the document indicates different - I take the document to be purporting to record the parties' position of relevant Metals Framework classifications aligned to the Aged Care Award based upon the current award. We will see at level 5, which is the second of the certificate III levels, there is a range between C9 and C6, which is obviously a very significant range. Then having regard to level 7, you will see a range between C6 and C2(a). In my submission, that highlights a difficulty of this approach.

PN5927

There is such a degree of subjectivity in benchmarking the classifications of the Aged Care Award with the Metal Framework that it becomes somewhat useless and the problems are magnified somewhat. The column attributed to the ANMF includes references at level 5 to C9 to C8, at C6 to C7, to C6 and at level 7 to C3. Now, those references appear to be taken from paragraphs 28 and 29 of the ANMF reply classification allowance submissions. That's at digital hearing

book 1341. Those submissions are not directed to the current structure of the Aged Care Award, but to the HSU's proposed structure.

PN5928

The ANMF has not put forward positive submissions about what the appropriate Metals Framework classifications align with levels 5, 6 and 7, largely because it's submitted that there is really no utility in doing that for these reasons, but if there is to be an alignment, the HSU's position or a benchmark in the - sorry, the ANMF's position is that level 7 which describes the relevant qualification as being:

PN5929

It may require formal qualifications, a trade or advanced certificate or associate diploma.

PN5930

The ANMF identifies that as being a certificate IV equivalent and I'll come to discuss this more later when focusing on the changes to the aged care classifications. There is obviously a scope of possible qualifications and in circumstances where the evidence is clear that there is no qualification in aged care direct care above certificate VI, other than the enrolled nurse qualification. For that reason, the ANMF's position would be that level 7 is properly benchmarked to C7 and 6 to C8 and 5 to C9.

PN5931

VICE PRESIDENT ASBURY: What is the qualification for an enrolled nurse?

PN5932

MR McKENNA: It's a diploma, which would align to C5 if we were conducting that process. As I say, on the ANMF's proposal where the EN is aligned - well, in accordance with step 2 of the C10 Metals Framework Alignment Approach we would obtain the internal relativities as between ENs and RNs. The joint employers have something to say to that, which I'll respond to in due course.

PN5933

There is also inconsistencies in the HSU's own submissions. The HSU revised position for level 7 is identified in this table as C2(a). The HSU reply classification allowance submissions, at digital hearing book 602, provides an analysis on a pure qualification basis. That is, without recognising the inherently higher level of skills and responsibility involved in doing those roles and in those circumstances identifies level 7 as C3.

PN5934

It may be that they say that the HSU revised position should take into account the inherently high level of skill and responsibility in relation to doing that role, and of course the C3 qualification is an advanced diploma which on any reading doesn't arise, in our submission, at level 7. Similar submissions can be made in respect to the joint employer approach. I don't think I need to labour the point. It is simply that there are significant difficulties in attempting to conduct a classification by classification benchmark approach.

PN5935

I understand that the approach encouraged by the HSU would be to apply the Metals Framework - the primary purpose of applying the Metals Framework would be to identify appropriate internal relativities and the provision of a clear path within an industry or trade. That is of course a departure from the orthodox C10 Metals Framework Approach and for the reasons I've submitted gives rise to difficulties.

PN5936

JUSTICE HATCHER: How much longer will you be, Mr McKenna? We've got behind in the program - - -

PN5937

MR McKENNA: We have.

PN5938

JUSTICE HATCHER: - - - and we need to give Mr Ward a go.

PN5939

MR McKENNA: I will be at least another hour.

PN5940

JUSTICE HATCHER: Well, that's way over the estimate.

PN5941

MR McKENNA: It is.

PN5942

JUSTICE HATCHER: What are we addressing in this hour?

PN5943

MR McKENNA: Your Honour, if I can revise that. I'm close to halfway.

PN5944

JUSTICE HATCHER: That doesn't sound any better.

PN5945

MR McKENNA: I think I've been on my feet for 45 minutes. If I am halfway, well, that would suggest another 45 minutes. I do anticipate, your Honour, though that in the balance of my submissions there are some questions about which your Honour the President has already foreshadowed some questions, but I'll endeavour to proceed as efficiently as I can.

PN5946

It has been suggested by the joint employers that the registered nurse - if one is conducting step 2 of the C10 Metals Framework Alignment Approach and in turn in retaining internal relativities, that the enrolled nurse should be aligned to the AIN classifications in circumstances where it is a diploma rather than a university qualification. In response to that, it's submitted that the enrolled nurse rates have historically been set as a percentage of the registered nurse rates.

PN5947

Mr Saunders took the Full Bench yesterday to the same authority that the ANMF relies upon in support of that proposition. I won't take the Full Bench to it again, but there is a body of material set out in the statement of Ms Wischer, summarised in background document 2, that identifies essentially two paths of wage-setting decisions that now find their way into the Nurses Award; one with respect to AINs, one with respect to nurse classifications being enrolled nurses, registered nurses and nurse practitioners.

PN5948

There is unchallenged evidence from Ms Bryce, which is in the digital hearing book at page 1088, about enrolled nurses, registered nurses and nurse practitioners each being regulated health practitioners responsible and accountable to the Nursing and Midwifery Board of Australia in accordance with the National Law. ENs, like RNs and nurse practitioners, are subject to a professional registration system overseen by the Nursing and Midwifery Board of Australia in accordance with the National Law.

PN5949

Each of those qualifications must complete a relevant program of study accredited by the Nursing and Midwifery Accreditation Council, and the accreditation program for an enrolled nurse is a diploma. Each of enrolled nurses, registered nurses and nurse practitioners have a responsibility to provide high quality, safe and competent nursing care in accordance with the National Professional Practice Framework and have a responsibility to meet the relevant Nursing and Midwifery Board standards for practise.

PN5950

For those reasons it's submitted that they are part of the nursing professional, they are registered health professionals and should track with registered nurses when assessing relativities. On one level it is noted that the approach taken by the joint employers comes to a pretty similar position. I understand the joint employers say that an enrolled nurse should receive an additional 15 per cent increase. We say that they should retain the existing relativity to an RN, with an RN being aligned to C1(a). I think there is about \$35 difference per week between the two, but I will not - please take my maths with a very large grain of salt.

PN5951

That then brings me to address the proposed changes to the Nurses Award. Perhaps the most significant change to this award sought by the Federation is the alignment of AIN classifications under the Nurses Award with PCW classifications under the Aged Care Award. That's done in circumstances where no distinction has been drawn throughout the proceeding to the work value of AINs or PCWs, where both provide direct care in accordance with a care plan because it is created and overseen by a registered nurse.

PN5952

They work is part of a nursing team and with a regulatory framework that puts the registered nurse at the centre of the delivery of that care.

PN5953

JUSTICE HATCHER: Mr McKenna, I think there is more or less a consensus about that alignment, but I think the real issue which you need to address is why we should have classifications which it is agreed do identical work and under the consensus the general rates of pay is spread across two awards. Speaking for myself, I think that's the issue you really need to address us about.

PN5954

MR McKENNA: Yes. Thank you for the indication, your Honour. It's accepted that the ANMF proposal involves overlap. It's submitted that that overlap is not unnecessary in the circumstances that include the fact that both titles are used and it appears to depend upon the employment or industrial setting as to which title is used.

PN5955

JUSTICE HATCHER: That's an easy matter to resolve. We can use both titles in a similar award.

PN5956

MR McKENNA: In terms of whether there ought be consolidation - so that is the use of both titles in the same award - the summary of the reasons that that approach ought not be adopted, firstly there are procedural fairness issues that arise for us.

PN5957

JUSTICE HATCHER: What are they?

PN5958

MR McKENNA: It is not a live issue in this proceeding and I'll make some submissions about why we say that's the case. The ANMF has come to stage 3 expressly on the basis that we understand that that has not been put in issue. That is, the removal of AINs from the Nurses Award is not in issue and I'll elaborate on that, but really - - -

PN5959

JUSTICE HATCHER: Well, I've raised it.

PN5960

MR McKENNA: Yes.

PN5961

JUSTICE HATCHER: So this is the procedural fairness and I asked your witness about it, as well, so as far as I'm concerned it's a live issue.

PN5962

MR McKENNA: I will return to procedural fairness in one moment, but the other high level reasons - similar to the procedural fairness issue is the difficulty we would say that the Full Bench would have in being satisfied that that change to the Nurses Award would be necessary when it hasn't been the subject of directed evidence and detailed submissions.

PN5963

VICE PRESIDENT ASBURY: Well, Mr McKenna, speaking for my part, the history of this whole AIN and PCW issue goes back 20-odd years. I think it was fairly put that it could create confusion to have a classification that clearly says 'under the direct supervision of an RN' in the Nurses Award and also to have it in the Aged Care Award.

PN5964

MR McKENNA: The award modernisation decision addressed that and recognised the existence of overlap, and it noted that concerns have been raised about that potential overlap. Now, we have things to say about the word 'directed' and why we say it should be changed from direct control to a reference to supervision, delegation, direction, but I'll come to that.

PN5965

In terms of difficulties arising from the overlap, there is no evidence that those have come to fruition before the Commission. If those classifications are to be removed from the Nurses Award, in the first instance there would be a loss of classification and a loss of terms and conditions for those AINs.

PN5966

JUSTICE HATCHER: So what are those?

PN5967

MR McKENNA: Your Honour in opening I think asked a question about whether there are differences in terms and conditions between the Aged Care Award and the Nurses Award; there are. They are not drastic, but there are differences. They are set out in written submissions I think filed in stage 2 of the proceedings. Yes, so submissions dated 30 August 2022 at paragraph 63.

PN5968

JUSTICE HATCHER: Are they in the digital court book?

PN5969

MR McKENNA: They will be in the stage 2 digital court book. They're not in the stage 3 digital court book.

PN5970

JUSTICE HATCHER: What is the date again?

PN5971

MR McKENNA: 30 August 2022.

PN5972

JUSTICE HATCHER: 2022.

PN5973

MR McKENNA: Mr Hartley is informing me that they are not apparently in the stage 2 digital court book. They are on the major cases page under 'Submissions'.

PN5974

JUSTICE HATCHER: All right. So what paragraph?

PN5975

MR McKENNA: Paragraph 63.

PN5976

VICE PRESIDENT ASBURY: I seem to remember it's leave and shift loadings or - - -

PN5977

MR McKENNA: Yes. It is split or broken shifts not permissible under the Nurses Award. Persons classified under the Nurses Award are entitled to an additional week of annual leave. There is a pay loading for recall within a rest break under the Nurses Award, but not the Aged Care Award. There is an on-call allowance payable under the Nurses Award, but not the Aged Care Award. Shift work loadings are higher under the Nurses Award. Public holidays rates are higher than the Nursing Award. Disabled employees are entitled to full rates under the Nurses Award. Employees undergoing training are entitled to full rates under the Nurses Award.

PN5978

JUSTICE HATCHER: So under your proposal an employer can escape all those obligations by calling the person a personal care worker.

PN5979

MR McKENNA: The classification of AINs or PCWs - and there is some perhaps not clear and concise evidence about this, but it seems to be that it's subject to industrial arrangements and varies from state to state.

PN5980

JUSTICE HATCHER: No, no, but I'm talking about in futuro based on the variations you have advanced. Does the question of whether you are entitled to these benefits depend upon how you are described?

PN5981

MR McKENNA: In large part we would say that coverage has historically been determined on that basis and we would expect it to continue to, but obviously there are - - -

PN5982

JUSTICE HATCHER: I'm just trying to work out how this works. If you're right about these conditions, then can an employer simply change people's job title from assistant nursing to personal care worker given that there is no other difference in the duties or the obligations or responsibilities of the role?

PN5983

MR McKENNA: Well, as I say, your Honour, I understand that there are simply some states where people are AINs and PCWs. If an employer attempted to make a change that was not consistent with existing industrial practices, then one may expect that that would be resisted.

PN5984

VICE PRESIDENT ASBURY: Well, they have. And what about, for example, approving an agreement with the new employer that hasn't got any history in the industry, and somebody, as they rightly could, comes out of the woodwork and says, 'That's not a personal care worker; that's an AIN', and we say the better off overall test should be conducted against the Nurses Award and not the Aged Care Award which is perfectly feasible, from my part, but in Queensland especially. I can see that happening.

PN5985

MR McKENNA: Well, Your Honour, that potential exists at the moment. The benefit of the ANMF proposal is that it at least aligns the pay rates. So at the moment, there is a difference in minimum pay rates below Cert III as between AINs and PCWs.

PN5986

VICE PRESIDENT ASBURY: Well, speaking for my part again, aligning the pay rates is one thing, but an employer getting an agreement approved and then finding out that, perhaps, the right - the proper analysis against the award wasn't conducted, shift loadings, an extra week of annual leave across an entire workforce of personal care workers who are now said to be AINs is not an insignificant matter to be confronted with.

PN5987

MR McKENNA: No. That's accepted. And the existence of the potential for overlap is - I mean, it's recognised in the coverage clauses of the award, and I think the Full Bench was taken to clause 4.7 of the Aged Care Award yesterday. There are existing provisions to deal with situations where an employer is covered by more than one award. Relevantly, that the employee - that an employer is covered by the award classification which is most appropriate to the work performed by the employee in the environment in which the employee normally performs that work.

PN5988

JUSTICE HATCHER: And which award is that? I mean, there can only be one award. Which award is it?

PN5989

MR McKENNA: And that's a difficult question that will have to be determined in the circumstance, and, in my submission, it's not ideal, but it is not unusual, and I think Your Honour asked a question last week, Your Honour the President, about NDIS workers and the coverage which schedule of the SCHADS Award would apply, and I believe the answer was it probably depends on who you ask. And in all frankness, we have a similar situation here, but the consequence of that, in my submission, is not fatal to the - ought not be fatal to the proposal. The particular considerations in the modern awards objective at 134(1)(g) identify the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.

PN5990

VICE PRESIDENT ASBURY: Which is arguably a good reason why you would avoid unnecessary overlap and have a simple system where one award covers an

industry award because it wouldn't necessarily mean you didn't have AINs in other settings. It would just mean you didn't have them - you had AIN/PCW or something to that effect in the Aged Care Award.

PN5991

MR McKENNA: Which begs the question, Your Honour, if consolidation is to occur, it's not clear to us that it would be appropriate - it would be appropriate for that consolidation to occur by removing AINs from the Nurses Award and placing them into the Aged Care Award. Now, any suggestion of putting personal care workers into the Nurses Award faces all the same problems that I've identified about procedural fairness, about the difficulty the Commission could have in being satisfied, but the decision of - the award modernisation decision referred to making the classification directly relevant to nursing.

PN5992

In our submission, the AIN in aged care is directly relevant to the profession of nursing and should remain in that award and will, of course, remain in the award notwithstanding the - any decision made in this proceeding with respect to AINs in acute care. So removing AINs in aged care would leave a situation where we have some AINs covered by the Ministers Award, some covered by the Aged Care Award, and it is submitted that the role or function of an AIN is a part of the nursing occupation. They belong in that occupational award and should remain in that occupational award.

PN5993

It provides a visible career progression for AINs to progress from that classification from EN to RN, and it - for the reasons I've previously submitted, AINs are part of a nursing team delivering nursing care which is ultimately overseen by a registered nurse.

PN5994

JUSTICE HATCHER: So are personal care workers.

PN5995

MR McKENNA: Yes. Which is why it would be open to the Full Bench to relocate. If consolidation is to be considered, it would be open to the Full Bench to consolidate AINs and PCWs under the Nurses Award.

PN5996

JUSTICE HATCHER: All right. Thank you.

PN5997

MR McKENNA: I think perhaps the only submission that - just to return very briefly, the only submission I would add to what I've previously said is the concept of professional identity. I accept that that - it might be said that that could be retained by retaining the title and incorporating that with a PCW, but there is evidence before the Commission about the existence of an AIN professional identity which arises from the connection - from their place under the Nurses Award and their proximity to the registered nurse and the nursing team.

PN5998

PROF BAIRD: Mr McKenna, just very briefly, can you provide me what proportions or how many AINs are in the aged care industry vis-à-vis PCWs? Do you know?

PN5999

MR McKENNA: Well, I think - Professor, I can't, as I stand here, give you a sensible answer to that question, and I suspect nobody could which is perhaps an even less satisfactory answer. Relatedly, if I could then still with the Nurses Award just address a proposed change definition, and the Full Bench has evidence from Ms Butler, the ANMF federal secretary, about the process that was undertaken overseen by her involving a consultative approach with consultations with academics including the Professor Junor, Associate Professor Meg Smith and Honorary Professor Ian Hampson who were the experts who gave evidence in the proceeding for the ANMF at stage 1, consultations with ANMF professional officers, industrial officers and a number of independent registered nurses who hold senior managerial roles in aged care facilities and described as really equivalent to director of nursing roles.

PN6000

That process has given rise to the draft determination as filed, really, draft determinations because there is a mirroring of those classifications. The AIN definition under the Nurses Award has been changed in the Federation's proposal. The main proposed changes are by replacing the reference to direct control and supervision with supervision delegation and direction, a removal of a reference to the AIN being solely to assist the RN or EN, and a replacement of reference to the register of the Nursing and Midwifery Board of Australia or its successor.

PN6001

Dealing first with the change in language from direct control and supervision to supervision delegation and direction, there's no reference to control let alone direct control to be found in any of the professional practice framework for nurses. It doesn't arise in the RNs standards for practice, the decision-making framework. It's not identified in any of the legislation or regulatory framework for the minimum care minutes or the 24/7 registered nurse requirements. The care minutes and 24/7 registered nurse responsibility guide recognises that PCWs and AINs worked under the supervision and guidance of a nurse.

PN6002

The evidence of Ms Butler about the term control is that it's antiquated and now carries negative connotations which are no longer appropriate in the context of nursing where nursing care's delivered through the combined effects of nursing - efforts of a nursing team. Again, the evidence in this proceeding - I might be repeating myself, but nursing care is provided by AINs as part of a nursing team pursuant to a care plan prepared by an RN where the RN's role is provide the supervision of the implementation and carrying out of what's required in the care plan, and the RN must ensure the care plan is implemented by staff with the appropriate skills, knowledge and training and must supervise the implementation.

PN6003

The RN is able to delegate aspects of that work. The RN also can direct the performance of that work, and, ultimately, beyond and aside those things, the RN retains overall responsibility for the delivery of direct care, and the evidence before the Commission is that they provide supervision, albeit indirect, quite often, on the provision of that care. The effect of that evidence, in our submission, is that personal care workers - sorry, direct care workers, including AINs, are subject to the supervision, delegation and direction of a registered nurse.

PN6004

The submissions in reply of the HSU on classification allowance issues of 27 November acknowledge that RNs are the clinical leads in aged care, but submit that direct care employees perform increasingly complex work with less direct supervision and were rarely actively or directly supervised for their - in their work. Whilst it may be accepted that personal care workers and AINs now work with greater autonomy, reference to supervision delegation direction remains appropriate to - - -

PN6005

JUSTICE HATCHER: So what purpose does it serve in the context of a classification structure having regard to Mr Hartley's earlier principles when the same words appear in every classification? That is, if the purpose of the classifications is to discriminate between pay levels, what purpose does it serve to say that - to describe something which applies equally to every payment?

PN6006

MR McKENNA: Well, as it arises in the Nurses Award, it allows someone to identify who is an AIN and who will be covered by the Nurses Award and therefore - - -

PN6007

JUSTICE HATCHER: No, but you want to put it in the Aged Care Award.

PN6008

MR McKENNA: That is so. And for the purpose of the Aged Care Award, it operates to assist - distinguish the distinction between direct care workers and indirect care workers bearing in mind we propose a separate classification stream, and it is, in our submission, consistent with the evidence that they are words of limitation that allow the identification of someone as being a - an indirect - sorry, a direct care worker.

PN6009

VICE PRESIDENT ASBURY: Mr McKenna, sorry to interrupt you again, but it - again, from my part, it seems like the definition that you're proposing to put in the Nurses Award of an aged care nursing assistant looks exactly like a personal care workers, and if you're going - if your argument is because AINs want an identity with nursing, then having two definitions, one for an aged care AIN and one for a nursing assistant except an AIN in aged care, that is still under the direct control and supervision of a registered nurse is creating two classes of AIN in the one award, isn't it?

PN6010

MR McKENNA: Sorry. Two classes in the one award?

PN6011

VICE PRESIDENT ASBURY: Yes. If you're going to put a definition of aged care nursing assistant that looks different from the AIN in the nursing award, you've arguably split the family already, haven't you?

PN6012

MR McKENNA: Look, it's accepted that that - it is a different - firstly, I accept that it's a - it is - it would involve there being two different AIN definitions, and I have - we, of course, accept that there is no meaningful distinction on the definitions between an AIN and a PCW for the structures of merit. I don't accept, though, that that would remove the existence of professional identity, particularly where professional identity arises from a person being an AIN, and there's obviously evidence before the Full Bench about the employment and people being AINs, I think there's eight or so of the direct care witnesses at the first instance identified as an AIN.

PN6013

We have the evidence of, I think, Mr Brockhaus and - I'm not sure if it was Riboldi or the other employer witness who was talking about employing AINs. So there are people who are being identified and identifying as AINs, and practically speaking, it might not make much difference to them about whether they are someone who is described as working under the supervision, delegation direction of a registered nurse or under the direct control and supervision of a registered nurse where they are identified and identifying as an AIN.

PN6014

VICE PRESIDENT ASBURY: Which brings me to my next point which is the sole way of distinguishing between whether a person was a personal care worker covered by the Aged Care Award or an AIN covered by the Nurses Award was the direct supervision and control of a registered nurse.

PN6015

MR McKENNA: Yes.

PN6016

VICE PRESIDENT ASBURY: So now if a dispute arises, it's having two identical definitions. I mean, as least, you could, as a matter of fact, look at the way the person was working and say is this person within the definition of the nursing assistant in the Nurses Award or a PCW in the Aged Care Award on some kind of objective basis. Now you've got - you're saying, well, they all are because, arguably, the cleaning staff are too because they have to sit beside a resident who's fallen and call the RN, or if they see someone - the food service people, they see someone about to eat something that they shouldn't be eating, they have to consult the RN.

PN6017

MR McKENNA: I accept what Your Honour says until the point of referring to indirect care. We don't accept that - this definition, and particularly inserting

these words of limitation into the Aged Care Award would have the effect of expanding the definitions. The last - and I think I've made this submission to some extent already, but the last submission I'd make on this point is just on the language of direct control. That's language that was adopted by then Australian Industrial Relations Commission's award modernisation process.

PN6018

So far as we can see, that language does not arise out of any submission or any draft award proposed by any party. The context of it being adopted has been addressed in submissions already. In our submission, what is proposed, that is, the concept of supervision delegation and direction is an appropriate reflection of what was intended to draw the requisite connection, the requisite relevance as between the AINs and the nursing occupation.

PN6019

The other primary changes to the definition I can deal with much more briefly, I believe. Reference - there's a proposed change for a place in the reference to solely to assist an RN or EN to language about an AIN being an employee whose employment is to assist in the provision of nursing care to aged persons. At a high level, it's submitted that the purpose of the employment - of all direct workers in aged care is to assist aged persons. They are not employed to assist an EN or RN.

PN6020

As a matter of course, they will work subject to the supervision delegation direction of an RN, but it improperly - it fails to properly reflect the - particularly the concepts of person-centred care and so forth that the Commission's heard much evidence about to be describing an employee as being solely to assist an RN or EN.

PN6021

And then, finally, the replacement - proposed replacement of a reference to an AIN being registered - sorry. The definition at the moment includes a carve out such that RNs, ENs or nurse practitioners are all registered with the Nursing and Midwifery Board of Australia and its successor are not AINs. That is proposed to be removed for a number of reasons. Firstly, the - what's proposed - what is sought by the ANMF and what is, I understand, being considered following the recommendations in the Royal Commission is a registration process for AINs and PCWs such that they would become persons registered with the Nursing and Midwifery Board of Australia. So that would undermine the effectiveness of this definition.

PN6022

And, secondly, it's a tautology to describe someone as a registered nurse registered with the Nursing and Midwifery Board of Australia where it is a protected term such that any registered nurse must be registered with the NMBA. So that is a reason for that proposed amendment.

PN6023

JUSTICE HATCHER: I suppose another alternative having regard to your desire to press ahead with the changes to aged care nurses is to put everybody into the

aged care ward, that is, nurses, registered nurses, enrolled nurses, assistants in nursing.

PN6024

MR McKENNA: That is something that has been raised previously in this proceeding. Submissions - detailed submissions have been made in opposition to it. It is a matter that is strenuously opposed by the Federation and would continue to be strenuously opposed.

PN6025

JUSTICE HATCHER: All right.

PN6026

MR McKENNA: Which leads me to the last point which is to address the particular changes, proposed changes, to the Aged Care Award as flow through to the proposed Nurses Award amendments. As a starting point, the - excuse me, Your Honour. And in case it needs to be said, coming back to Your Honour's previous question, if it were a course being considered consistent with submissions previously filed, it is something that the Federation would seek to make - to put evidence on about and make submissions about.

PN6027

For the purpose of these submissions about proposed changes to the Aged Care Award, could I ask the Full Bench to turn up - the ANMF have field a marked-up version of the Aged Care Award together with the proposed draft determination. It's at tab 57 of the digital hearing book, but if I could direct the Full Bench to schedule B2, the direct care classifications at digital hearing book 1033. Your Honour, it's just occurred to me that before I move to that, I had proposed to deal with Your Honour's question about the potential implications of the Teachers case and progression for the purpose of the Nurses Award. So before I move to the Aged Care Award, if I could - - -

PN6028

JUSTICE HATCHER: Well, we have to move on, Mr McKenna. This has gone way beyond the timetable, and we need to hear from the employers who - - -

PN6029

MR McKENNA: I accept that, Your Honour. I'll endeavour to - - -

PN6030

JUSTICE HATCHER: Speaking for myself, I'm not sure that you need to further explain your proposals with respect to the award variations.

PN6031

MR McKENNA: Well, it's simply this point that Your Honour has raised about - as I understood, one of the two questions immediately before lunch suggested that - well, put to the ANMF that it might be appropriate to vary progression within the Nurses Award for enrolled nurses.

PN6032

JUSTICE HATCHER: Yes. That's a different point. You can answer that.

PN6033

MR McKENNA: I can answer that. Thank you, your Honour.

PN6034

JUSTICE HATCHER: I mean, to put it bluntly, if you seek the benefit of the Teachers decision approach, why shouldn't you bear the consequences?

PN6035

MR McKENNA: Well, it's not so much the benefit of the Teachers approach that we seek. It's that alignment - proper application of the C10 metals framework alignment approach and an alignment of C1A with RN1.1.

PN6036

JUSTICE HATCHER: Yes. But the CT - the whole CT structure doesn't contemplate pay points or things of those natures.

PN6037

MR McKENNA: Your Honour, I've made various procedural fairness points about the alignment consolidation. I won't repeat them, but the same issues would arise here. It's not something that's been subject to specific evidence or detailed submissions. It has been raised, and, in particular, the paragraph 647 of the Teachers case has been raised by the joint employers.

PN6038

It has been addressed in previous written submissions by the ANMF. They are the submissions of - the closing submissions in reply of 17 August 2022 at C32. In the interests of time, I'm content to rely upon what is set out in those written submissions. I'm not in a position to make detailed submissions about the differences or similarities between the - I withdraw that.

PN6039

There is a very important difference between the nursing profession and the teaching profession, and as I understand the approach that was taken in the Teachers case was to develop a revised classification structure based upon the Australian Professional Standards for Teaching which has various levels, graduate proficient, highly accomplished and lead, and progression through those various levels is a matter that is overseen by state registration bodies.

PN6040

So a teacher at any time in Australia will be located at one of those levels by reason of an objective assessment conducted by an independent body. That does not - there is no parallel of that in the nursing occupation save for the distinction between enrolled nurses, registered nurses and nurse practitioners. They are three separate registrations, but within those registrations, within those different levels or different types of nurse, progression is based in large part - not in sole part, but in large part upon grades and annual increments within those grades.

PN6041

That is the product of many years of industrial arbitration. As identified in the written submissions that I've referred to, there have been a number of Full Bench decisions which have confirmed that those internal relativities and those

progressions - those progression points are reflective of work value. So to that end, in our submission, could be distinguishable from the situation in the Teachers case, but more importantly, there isn't this separate objective progression that could be substituted for the existing classification structure.

PN6042

JUSTICE HATCHER: All right. Well, I think we'll stop there. Mr Ward, how long will your submissions take in total?

PN6043

MR WARD: Your Honour, I think I was allocated three and a half hours, and given the unions have had two days, I'm nervous to surrender any of it.

PN6044

JUSTICE HATCHER: I'm not asking you to. I just want to know.

PN6045

MR WARD: I would suspect somewhere between two and a half to three hours is my plan.

PN6046

JUSTICE HATCHER: Just excuse me. Well, look, we might take a short break, and then we'll allow you a full hour today, and then we'll resume tomorrow.

PN6047

MR McKENNA: Your Honour, there is one topic I still have remaining.

PN6048

JUSTICE HATCHER: What's that?

PN6049

MR McKENNA: That is the changes to the Aged Care Award. I - - -

PN6050

JUSTICE HATCHER: Well, I think they're self-explanatory, Mr McKenna. So unless some - there's some point that you want to make in reply to somebody or - - -

PN6051

MR McKENNA: Well, Your Honour - - -

PN6052

JUSTICE HATCHER: I think we fully understand the differences between the parties and the reasons why they've advanced. So - - -

PN6053

MR McKENNA: Your Honour, it is accepted that we have taken - we've exceeded our time. The same occurred yesterday with the HSU.

PN6054

JUSTICE HATCHER: No. That's not the issue. The issue is what do you want to say that we don't already know.

PN6055

MR McKENNA: If there is to be a brief adjournment, I can endeavour to condense it very substantially.

PN6056

JUSTICE HATCHER: Well, what I'll ask you to do is you can put it in writing overnight and give us a note in the morning. All right. We'll have a short break, and then we'll resume with the joint employers.

SHORT ADJOURNMENT

[3.32 PM]

RESUMED

[3.46 PM]

PN6057

JUSTICE HATCHER: Mr Ward.

PN6058

MR WARD: Thank you, your Honour. If the Commission pleases, and in light of the time, and I might deal with the submissions in this way: I won't repeat anything that's in writing. I'll do my very best to avoid that. I might start off by dealing with the question about section 157 and the question of the finding. I'll deal with that quickly, and then I might try and dispose of what I want to say about the evidence last week tonight so that when I move then to classifications generally, residential aged care classifications, I then want to move to the broader question of home care and moving home care, make some comments about the state of the industry, and then there's half a dozen issues that arose.

PN6059

So hopefully the exciting stuff will be commencing tomorrow morning, and I'll deal with the evidence tonight, if people are a little weary and (indistinct). But can I just start with 157 because I think the question has been raised as to whether or not 1572B(b) requires - I think the phrase that Your Honour the President used was a finding. Can I indicate this, that we don't take the view that you'll need to make a finding. 2B by its language requires the Commission in considering work value reasons to include consideration of something.

PN6060

JUSTICE HATCHER: Well, it's a consideration of whether, which suggests either it has been or it hasn't been.

PN6061

MR WARD: Yes. Well, yes, but the fact that you are considering it suggests that you need to intellectually engage with that issue, and I draw this distinction, that it's not that you are making a finding as you might in some circumstances where that might be a jurisdictional prerequisite. I have to make a finding on X to move on to do A and B.

PN6062

So in our view, the question really is how does the Commission demonstrate that it's intellectually engaged with that question in its consideration, and we would actually start by saying that we think, to a large extent, the Commission's already

done that in what it said in the stage 1 and stage 2 decision. If it felt it needed to say a little more as to how it intellectually engaged with that, it can, but we don't necessarily put it to the height of making a formal finding of whether or not something did or didn't happen.

PN6063

Can I turn then to the evidence, and I'm going to deal with the evidence in two ways. I'm going to make some comments about the evidence last week thematically, and then I want to go through job by job what I think came out of the evidence, and I want to start this by saying that it's our view that nothing occurred last week that contradicts any of the evidence take today. I think what happened last week is that the Commission was providing greater texture and, in a variety of areas, greater information about the matters rather than there being anything particularly revelatory last week in the sense of it being new or contradictory of what occurred before.

PN6064

My intention is to work through the evidence this way. I want to talk about the question of interaction with residents and families. I want to talk about COVID which perhaps better should be described as infection prevention and control. I want to come to the workload staff in issue, and then I briefly want to go through medications, dementia, palliative care, household model of care, and then I want to quickly talk about some of the individual roles and what we learnt from last week. So my thing here really is more what more have we learnt that might have been in the case coming out of the stage 1 evidentiary hearing.

PN6065

I won't spend too much talking about stage 1, but I will, on occasions, make an observation. There's a variety of references in the stage 1 decision about interactions with family and residents. I won't go too further. They're at paragraph 729 and 708 in particular, and also 709 to 714 and 715. It's clear from the stage 1 part of the proceedings that it's uncontroversial that there obviously are forms of interaction by all staff. That wasn't contested, and it wasn't contested those interactions can be of a social nature. That wasn't contested either.

PN6066

So what have we learnt? I think stage 3 has affirmed that all employees at various times in various ways will talk to residents and family members. Such interactions, clearly from the evidence, can be personal in nature. They're not just task related. They can be personal. And as we found from the evidence last week, the nature of how personal they might be depends on the nature of personal relationship that somebody has.

PN6067

I think we had evidence from somebody last week talking about how they've got longstanding relationship over many years of certain residents. We had somebody talking in evidence last week about having to help out because a resident didn't like somebody else. So we have to accept that this is a personal dynamic and a set of dynamic personal relationship.

PN6068

I think we also accept that the interactions are part of the broader social and personal support the resident experiences. They are not some form of (indistinct) machinery interaction. They are intended to be part of the broader social process that the resident enjoys. The frequency and character of those interactions, in our view, from the evidence last week will differ depending on the role of the employee and their proximity for the resident, and I use the word proximity perhaps in a quantitative and qualitative stance, and the first thing I want to say about that is I don't want to do an injustice to the personal care worker because, in our view, the personal care worker's interactions are of a nature that is possibly different to anybody else, and there's a reason for that.

PN6069

When you're providing that form of personal care, particularly when you're showering somebody, when you're toileting them and possibly feeding and dressing them, there is an intimacy of proximity that other people don't enjoy. And the nature of how you have to relate to that person in the context of those types of activities is qualitatively different to how somebody else might have to interact in a less intimate situation. So I'm very keen to make sure that we don't undermine the very important role that the personal care worker takes in the nature of their interactions while they're carrying out their work because that's the starting point.

PN6070

Now, if you look at the evidence from last week, the nature of interactions kind of cascades somewhat in a hierarchy. I think the evidence last week showed that, for instance, cleaners are more likely to be around residents than some other people. And so straightaway, that proximity is going to drive, perhaps, frequency of interaction, but it's not going to be the qualitative interactions necessarily that the personal care workers actually are part of and having to have the confidence to perform.

PN6071

I think it was clear from the evidence last week that you could put the food services person potentially in that category. I say potentially. You could do it for this reason: (1) They're clearly engaging with the resident around a subject that is quite personal, that is, food and the consumption of food. For some food service people, that will be more or less. What I mean by that is it was clear from the evidence last week, which I think is different to stage 1, that some food services people take trays to residents in rooms, and I'm going to come back to that.

PN6072

I think the stage 1 evidence suggested that was predominantly a personal care worker job. Again, there was some evidence last week that personal care workers do that, but the cleaner and the food services person seem perhaps to be the next category in that, and then without - it's all being disrespectful. I think we then, perhaps, have people like the laundry person who more likely than not is spending the majority of their time in the laundry.

PN6073

I'm not saying they don't come out of it. I'm not saying they don't have interactions. I'm not saying they're not socially important, but just the physicality

of being in a laundry means they're going to have less opportunity, and I think that would most likely flow to the gardener; to some extent, the maintenance person; possibly the person in the office depending on their role.

PN6074

JUSTICE HATCHER: Sorry. So category 1, you had the - - -

PN6075

MR WARD: I had PCW right at the top.

PN6076

JUSTICE HATCHER: So, of course, but so for the non-direct care people - - -

PN6077

MR WARD: I would say cleaner and food services come next.

PN6078

JUSTICE HATCHER: - - - is 1. Then laundry was 2.

PN6079

MR WARD: I would think you've then got a general group that's probably laundry, gardening, maintenance, office and possibly the cook as well is going to have less interaction because they're actually in the kitchen cooking. I'm not saying they don't have interaction, but then there's probably a clump of people who have some degree of less interaction because they're all focused either physically in a location, be it outside in the garden or whatever, or they're more focused on the work activity.

PN6080

So again, we're not saying people don't have interactions. We're not saying they're not socially important to the resident, but we think there is something of a hierarchy in terms of how that happens quantitatively and qualitatively, and the point of putting the personal care worker at the top, I think, is very much reinforced by the notion of the care minutes as well. You can tell by definition they're the ones spending most of the time.

PN6081

We learnt something new last week which I think we informative as well. In the stage 1 evidence, most of the evidence about forms simply informed us, I think - I'm looking at the President when I say this. I think most of the evidence about forms informed us that there was simply a procedure 1, pressed an alarm or the lapel button. What we learned from last week was a little bit more texture to that, and that was that if a support employee was with the resident when they fell, they were to stay with them, and it went further.

PN6082

We had one resident - one employee last week tell us that they would attempt to comfort them, and I think one - I'll come back to this in a minute, but I think one said they might hold a person's hand in an attempt to comfort them. That's informative because I don't think we have that texture of evidence in stage 1. We

just had the, 'Press the alarm, get the RN and whatever', but that came out of last week.

PN6083

What I think was confirmed last week from stage 1, though, is that support employees are not allowed to move the resident. That was - that's abundantly clear, and I think the witnesses last week who were - who confirmed that, but they're not ordinarily allowed to touch a resident, although we did have the example of the food services employee who said on occasions they gently hold the hands of the resident to usher them to their chair to sit down so they can put their food in front of them.

PN6084

But ordinarily, there's that distinction there between people who are physically engaging with the resident and a group who are not physically engaging with the resident. I thought interestingly last week, we got evidence that some people hold First Aid certificates. There was a little bit of that in stage 1, but I thought we had a little bit more last week.

PN6085

JUSTICE HATCHER: Is there an allowance for that?

PN6086

MR WARD: Well, I don't think there is. I was going to come to that. But there's a number of enterprise agreements in evidence from last week that - there seems to be some enterprise agreements that have First Aid allowances. I can't find one in the Aged Care Award. I'm happy to be corrected, but we can't find one. As to what First Aid activity they were - those witnesses were allowed to perform, I thought that was a little vague.

PN6087

I think the one witness indicated that they were - if it was - I think they used the word 'critical', 'I can apply First Aid subject to the training, but I've still got to press the alarm and get the RN to come here'. So I don't want to suggest that in any way, somebody with a First Aid certificate is playing the intervening role in the protocol of the registered nurse and the like. So I don't think the evidence would support that, but, clearly, some people last week hold a First Aid qualification. And I think one of the witnesses - it might have been Mr Mamarelis. His evidence suggests that that's mandatory for his employees, but I might have got that wrong.

PN6088

JUSTICE HATCHER: I'm just noting that in aged care - 3.1.3 Aged Care Employee General Level 3, it's got as indicative tasks the holding of a St John Ambulance First Aid certificate.

PN6089

MR WARD: There we go. Your Honour's ahead of me. One might assume that it was built into the original value of the work, but that's cheating on my part. Mr Saunders said it might only apply to drivers.

PN6090

JUSTICE HATCHER: Sorry. What was that?

PN6091

MR WARD: I think Mr Saunders is suggesting it might actually be indicative job.

PN6092

JUSTICE HATCHER: I see. It's for the driving. Yes. You're quite right.

PN6093

MR WARD: Yes, yes. I don't think there was a First Aid allowance in the orders.

PN6094

JUSTICE HATCHER: Yes. All right.

PN6095

MR WARD: There was a tremendous amount of evidence last week about interactions with families. I think we had a reasonable amount of evidence in stage 1 about that. More often than not, if a family was in their loved one's room and any member of staff was there who they were familiar with, they might ask how the resident is. We got that from stage 1. I think that was confirmed clearly.

PN6096

I think it was also confirmed, I think, from some of the employers that there was an expectation that if a family member approached them that they were to respectfully engage with the family member, but the evidence from stage 1 about certain things being escalated up to the RN, if it was about care being escalated up to the chef if it was about food or the facility manager if it looked like a complaint, I think the evidence of stage 3 reinforced what we heard in stage 1.

PN6097

JUSTICE HATCHER: So if a family member said, you know, 'How's mum going?' and asked, say, a food service attendant, is the food services attendant authorised or expected to give an answer to that.

PN6098

MR WARD: I think the phrase that was used last week was - I might have this a little bit wrong, but they had to respond respectfully within the scope of their role. That might be to respectfully say, 'I'm sorry. I don't know how mum is', or, for instance, if it is somebody who takes them their breakfast every morning and has some general sense of them, it might be to say, 'Well, I think she's doing fine, but if you want to talk to the RN, you can'.

PN6099

JUSTICE HATCHER: Alternatively, 'She's not eating her breakfast'. Is that - - -

PN6100

MR WARD: Well, I think that would - again, that will be within their scope because they would understand that. They would understand that. So that's kind of - I think that's filled out some texture in terms of the interaction question, and I

do confirm that the evidence from our employer witnesses did indicate there was an expectation of those interactions occurring.

PN6101

Can I come on to COVID, and I'm almost anxious to call it COVID. It might be better to call it infection prevention and control rather than COVID. And I'm not sure this - the dramatic difference in the parties' view on this, but there might be some nuance. There might be some nuance. We said in our written submissions - and I'm happy to say it again today - the process of COVID - the going into a - the lockdowns, everything that happened in COVID, has materially enhanced the industry's approach to infection prevention and control materially. It should - it's not something I ought to even try and (indistinct). It's materially step changed the approach the sector takes to infection prevention and control. The evidence demonstrated that, I think, very clearly.

PN6102

That step change does not simply relate to COVID-19. As the evidence demonstrated, it relates to all viruses of that type. So we had evidence last week of this applying to gastroenteritis. We had this applying to influenza as well as COVID. Now, it's true that when you look at the documents that the operators produced last week and think about Mr Brockhaus' - and I'll get a reference to it in a minute - it had a lot of COVID in it because, perhaps, that's kind of where it was borne from, but it also has very clear protocols now about gastro and flu.

PN6103

So I'm going to use the phrase that there's been a sort of step change in the approach taken in the industry that's borne out of the experience of COVID that is now general to infection prevention and control. And that - as was evidenced last week, that has spawned very substantial and quite detailed and quite sophisticated prevention and outbreak management policies and procedures. And, again, Mr Brockhaus is probably an excellent example of that.

PN6104

It's also introduced some record-keeping practices in terms of monitoring symptoms, and it's also introduced some changes in training for all employees which I'll come to. It should also be indicated that that's not a static field, that infection prevention and control, I think as Mr Brockhaus said, is now - it's an evolving activity. It will be evolving in response to any government alerts, be it about COVID, influenza or whatever, but I suspect it will also be an evolving activity generally because, as I say, there's been a step change in awareness and application. Mr Brockhaus' policy and procedures is found at 2690 of the digital court book.

PN6105

I'll come back to the IPC lead in a minute. It's also clear from last week that there are still some providers who are, as a matter of policy, adopting particular approaches to this issue rather than necessarily being forced, and we had evidence last week of some providers requiring, for instance, RAT tests.

PN6106

Although, some of the witnesses last week said that that had recently stopped, and yet we had other evidence from the witness last week who said we're still doing RAT tests before we entered the premises. So it should be clear that there's a variety of activities like that that are not necessarily uniformly operating across the sector, but depending on particular policies and procedures of a provider, might be in place today and continue to be in place for a period of time.

PN6107

What is clear from the evidence last week is that all employees are now involved in some form of annual IPC type training. At the lowest level - I don't say that in the pejorative sense, but at the lowest level, that might be annual training about the use of PPE, the doffing and donning training. One of the witnesses last week talked about that being a 15-minute module. I think there was further evidence last week of it being a longer module, but at the lowest, it's that, but you've also got evidence last week of the IPC lead, effectively, being a wandering mentor so that if somebody wasn't washing their hands correctly or wasn't doing something correctly, they would be informed on the spot as to how to do that.

PN6108

And that brings me to the IPC lead. These policies and procedures are management documents, and the question, really, is how they're given effect to, and it was clear from the evidence last week that the CEOs of facilities, clinical care managers are involved in the execution of those policies and procedures, but I think it was also clear in the evidence last week that the IPC lead which everybody now has to have plays a kind of central pivotal role in discharging the functions under those policies and procedures and ensuring that both the prevention side and then the outbreak management side is being done properly.

PN6109

And I'm careful how high I say this, but it's seen from the evidence that that role required an enrolled nurse, a registered nurse or a nurse practitioner. I'm nervous to say it must be that person, but it seemed to be the case at least from the evidence that it was always in the evidence the registered nurser or an enrolled nurse playing that role.

PN6110

Now, that makes some sense because a lot of what's coming out of those policies and procedures at a high level has some clinical element to it. So it kind of makes some sense, but I'm not sure if it's the regulatory requirement that the IPC lead must be one of those people, but the evidence said last week that it wasn't anybody other than those people playing that role.

PN6111

And I think we accept that that role - the IPC lead brings with it a level of responsibility that's obviously broader than just a typical registered nurse. Now, I want to say that we want to be a little bit careful about generic observations last week. There was this attempt in the cross-examination to sort of say, well, you know, your staff have got skills from COVID, and they're carrying them on. I mean, that's probably true, but it's not very helpful to the Bench because it's so generic.

PN6112

Mr Brockhaus when I re-examined him said that in answering yes to a question like that, he was talking purely about the IPC lead. I think that might be a little shallow, and I think as these issues cascade down, I think different people play different roles. One person who clearly has been affected by this change in infection prevention is the cleaner. I'm not suggesting for a minute that they're cleaning something they didn't clean before. I think that would be wrong, but the evidence last week talked about touch point - high-touch cleaning, and this is the requirement to follow a schedule of methodically cleaning high touch areas at a relatively high frequency, and I think the evidence was pretty clear last week that that now seems to be something that's permeated the sector as a whole, that is, that cleaning routines now involve the requirement to have high-touch cleaning as part of them.

PN6113

PROF BAIRD: Mr Ward, did you pick up last week that laundry people also - - -

PN6114

MR WARD: I'm going to come to laundry, Professor, if I can. I should deal with those separately. Yes.

PN6115

PROF BAIRD: Okay.

PN6116

MR WARD: Now, I'm not sure if it's in this bit or it's in the laundry bit, but bear with me. I promise to get to laundry. I'm on it. The laundry employees also informed us last week that if they were handling linen or clothes belonging to an infectious resident, they would wear PPE. I said that. Now, I do want to just confirm, of course, what the stage 1 evidence about laundry was.

PN6117

The stage 1 evidence was that they never actually handle the linen or the clothes. Those clothes go into a specialised bag which then goes straight into the washing machine, and the bag disintegrates. So it's not that they're handling the linen or clothes directly because they've gone into a bag.

PN6118

JUSTICE HATCHER: So what is the PPE they put on when they do that?

PN6119

MR WARD: Well, my understanding of what we heard last week was one witness said they donned full PPE. Now, I didn't - I don't think we cross-examined that witness. So I'm not entirely sure what that meant. I suspect it probably meant a mask, but I'll come to this in a minute. I suspect it meant gloves, and I suspect it meant some form of apron or something like that.

PN6120

PROF BAIRD: I think we did get evidence. Full PPE is coat, mask, shield, gloves, and it's the full kit to enter a room of the person who is infected.

PN6121

MR WARD: Yes. Well, I don't know if the laundry person was entering the rooms.

PN6122

PROF BAIRD: To get the - that wasn't clear. To get the washing. That's the bit I wasn't clear on.

PN6123

MR WARD: I had an - ordinarily, the laundry person doesn't enter the room to get the washing. All the evidence in stage 1 was the personal care worker strips the bed, puts the linen in a controlled bag, puts it in a particular place. Then the laundry people come and get the trolley, take it down to the laundry and then do the washing.

PN6124

VICE PRESIDENT ASBURY: Is this a person who's infected or a person - or just generally?

PN6125

MR WARD: So the evidence in stage 1 was not about an infected person.

PN6126

VICE PRESIDENT ASBURY: Yes.

PN6127

MR WARD: The evidence in stage 1 was that's the general practice - - -

PN6128

VICE PRESIDENT ASBURY: Yes.

PN6129

MR WARD: - - - in terms of how laundry gets to the laundry. That was the - - -

PN6130

VICE PRESIDENT ASBURY: I thought there was more evidence this time that said the laundry staff, at least, bring it back following the - - -

PN6131

MR WARD: Well, I think the stage 1 evidence, and Deputy President might remind me, but the stage 1 evidence was that the laundry people normally bring the laundry back from the laundry, and now there was different evidence in stage 1. So some - for instance, the linen might have actually been taken to a centralised linen closet, same for towels.

PN6132

In terms of the taking the resident's clothes back, there was a mixture of evidence as I recall, your Honour. Some personal care workers took clothes back and put them in the wardrobe. In some of the evidence it was the laundry staff who actually put the clothes back in the wardrobe. I think it was sort of a mixed bag of evidence.

PN6133

DEPUTY PRESIDENT O'NEILL: I think there was that distinction, and the bagging of the laundry was in relation to the soiled linen that was likely to be particularly soiled and – but the personal items of residents wasn't bagged up and was simply taken by laundry workers.

PN6134

MR WARD: No, I think if it wasn't soiled, I don't think it went into one of the red bags or the yellow bags. I think it was just part of the washing.

PN6135

DEPUTY PRESIDENT O'NEILL: I think it might have been Mr Brockhaus last week gave evidence that at their facility, it is an expectation – he made a point about the laundry staff having a chat with the resident at the end of the shift.

PN6136

MR WARD: Yes, yes, I don't cavil with that. It's part of their job. We were just earlier saying that the logistics of that job suggest that compared to others, it might be a little bit different.

PN6137

DEPUTY PRESIDENT O'NEILL: They spend most of the day in the laundry.

PN6138

MR WARD: Yes, yes – exactly.

PN6139

JUSTICE HATCHER: Sorry, just to check the current position: I understand you're saying they don the full PPE for handling ordinary clothes of an infected resident.

PN6140

MR WARD: Yes. I'd be careful – there is some evidence of that. I wouldn't want to necessarily suggest that is a uniform approach across the industry but there was certainly some evidence of that last week.

PN6141

VICE PRESIDENT ASBURY: It was Ms Moll, I think.

PN6142

MR WARD: Yes, yes, I - - -

PN6143

VICE PRESIDENT ASBURY: Who said that – dons the full PPE in the laundry to sort linen which may contain COVID and they're currently wearing masks all the time in the laundry.

PN6144

MR WARD: And again, this is the point I made earlier: different operators are going to have different practices. Some operators are still asking people to do RAT tests. Many don't appear to be. So I don't want to take one witness and suggest that's an industry practice but clearly we have evidence from one witness

that that's occurring. We had some interesting evidence last week from the employers about what happens in an outbreak and we heard this notion of zoning, which I don't think we heard when we were in stage 1: that is you might isolate a resident or you might isolate a wing as opposed to necessarily locking an entire facility down.

PN6145

It's also clear that as government advice changes, that advice is shared with the employees and I don't just mean the registered nurse, but it was clear from the exhibit we tendered yesterday, the Ellis email, that as government advice is changing that's being shared amongst employees as well. I can't take that any further than that. I would assume that in sharing that information it's not that each individual employee is independently then deciding what to do under the IPC process. I would suspect what probably happens, having shared that, is the IPC leading discussions with management and decide what happens next and who has to do what. But it's clear that information is being shared.

PN6146

Having said all of that – and I don't want to get too tied up in this – it's clear from the examination of Mr Friend and annexure CF1 which had – your Honour the President asked questions about this – you'll remember this is the residential facility has to report COVID cases and CF1 was annexed to Mr Friend's statement and included a number of facilities, number of facilities that involved COVID cases and a number of residents and I took him to the total number of residents in the sector, I took him to the total number of providers and I put to him based on that mathematics that at least in relation to CF1 – what I mean by that is the data that was in CF1 – that represented 0.03 per cent of facilities in Australia and 0.018 per cent of residents in facilities based on government reporting.

PN6147

I didn't do that to be cute. The reason why I've done that is it's informative to understand when an operator has an outbreak. It's informative. But it's also important to understand, I think, as has been conceded by others, that we are not in the hey day of the pandemic. We're in a different phase in terms of this, which is why I think this conversation is better structured around what has happened with infection prevention and control rather than necessarily what's happened with COVID-19. I also think it's important to understand from the evidence last week that outbreak procedures can impact employees differently depending on their role and I'll just give an example of that. If a resident is isolated in a wing, it might simply be that the gardener is informed not to go to that wing. That's the extent of what happens with that person.

PN6148

However, that wing will need to be cleaned so the experience for the cleaner will be of a higher order and a higher magnitude and that might, as the evidence suggested, involve PPE and a variety of (indistinct). For the personal care worker that's a higher order of magnitude again because the personal care worker actually has to be in very close proximity, providing care and not only providing the care perhaps with full PPE on, but also explaining to the rest of them why they've got PPE on and managing the reaction of the residents.

PN6149

So again, I want just to be a little cautious about understanding that in the context of an outbreak, when it does occur – I'm not saying they're occurring everywhere but when it does occur – how different people might be impacted under an IPC procedure and policy is going to be different. It's going to be different. That's what I wanted to say about infection control.

PN6150

DEPUTY PRESIDENT O'NEILL: Just before you move on, I'm just not quite sure that I understand what overall position or submission you make about that. Are you saying – is it your position that that step change that's born out of COVID is relevant and to – relevant with value reasons – for some or all indirect care workers?

PN6151

MR WARD: Well, I'm going to start by saying this: it's an entirely appropriate issue for you to have in your mind in your deliberations. As to the weight one puts on that particular job, I suspect that will differ. So for instance if you said to me, 'Does that have very obvious work value considerations for an IPC lead', my answer has to be yes. Any other answer would be misleading. If you said to me, 'Does that have material work value considerations for a gardener?', I suspect the answer is it's probably unlikely. I think I used the phrase in our opening submission – this is about characterisation and degree rather than necessarily opposition. So that's how I would answer that, your Honour. Let me come on to the - - -

PN6152

JUSTICE HATCHER: I think there was a question.

PN6153

PROF BAIRD: Sorry, Mr Ward – just a quick question. You may come on to this tomorrow. I just wanted to refer back to your hierarchy that you were proposing.

PN6154

MR WARD: Yes.

PN6155

PROF BAIRD: Are you going to talk further about that tomorrow and give it some weight?

PN6156

MR WARD: I'm happy to take the question now, Professor.

PN6157

PROF BAIRD: Really I was asking are you going to put forward that hierarchy as a proposal that carries different value – monetary value?

PN6158

MR WARD: Can I take that question on notice and answer it tomorrow when I come to that? I'll deal with that tomorrow.

PN6159

PROF BAIRD: Yes. Thank you.

PN6160

MR WARD: I might not have the acuity to do it effectively at 4.30 today. I'll come back to it tomorrow.

PN6161

JUSTICE HATCHER: The way you've characterised it implies that we should not accept the HSU position, which simply integrates direct and indirect care workers at equivalent rates of pay.

PN6162

MR WARD: I think again, some of these issues are nuanced because if you're looking at features of work, and trying to attribute some work value consideration to features of work, I think what we're trying to say to you is that might differ. So, for instance, everything I've just said suggests that in relation to some of those things we've just talked about – the personal care worker carries a burden that some other people don't carry. So in the context of that the answer would be yes. But I think it's very important that we don't – there's not a lot of evidence in stage 3 about personal care workers. I don't think we should lose sight of the important role they play and the burden they carry in a variety of these areas simply because we're talking about other people. I do want to address workload, if I can. I think the stage 1 decision dealt with the question of workload in great detail and I think it was a very strong focus on workload on the question of work intensity and some conclusions were made in the stage 1 decision, most notably at paragraph 569 but there was also discussion on the matter at 559 and 561. I think perhaps what I should do, rather than that, is talk a little bit about what we might have learnt about that issue in stage 3 because I think if one looks at the evidence that came out last week, it was informative of a number of things.

PN6163

I'm going to do this in a particular order – no, I won't. The Commonwealth in its – one of its submissions on – I think it's in their starting submissions found at 3122. I won't take the Bench to it. It's late in the afternoon. I'll paraphrase. The Commonwealth have identified in that submission based on their data what they described as the workforce gap in aged care and I think they basically said a certain number of bodies that are required. You've only got X amount of bodies in the industry and this gap. It's clear from that data, which we accept, that there is a gap but the Commonwealth's material indicates that that gap has reduced and I think the proposition from the Commonwealth is - I can't remember the period over which it's reduced – but the Commonwealth is suggesting it might have been reduced by as much as 30 per cent, although it's still material.

PN6164

The Commonwealth have identified a long list of activities that they are funding and driving to assist the industry in improving that gap but as the Commission would be conscious, some of those will take time. They're not necessarily immediate fixes. So I want to start what I'm about to say from a proposition of we accept that there's a workforce gap. I would suspect if you went to most industries in this country right now they'd probably say the same thing to some degree. We

learned some new things, though, last week which I think are useful and informative. The unions want to advance these in a negative sense but I (indistinct words) positive sense.

PN6165

There seems to be a variety of strategies in residential aged care and I'm going to go to residential aged care because there was very little evidence last week about home care. There's a number of workforce strategies in residential aged care to deal with this. It was clear from some of the evidence that some people are increasing part-time contracted hours. Ms Wren gave evidence she was offered the opportunity to take up more hours. She applied and was successful and I think she indicated last week that that suited her and her personal circumstances. There was evidence – one witness talked about being offered extra shifts. Again that suited them in their circumstances. There was clear evidence last week of employees working overtime. I think I put to them that must constitute reasonable overtime because you've agreed to it and I think most of them agreed to it and we did see some evidence last week of early utilisation of the immigrant worker process through the labour agreements. I was a bit shocked to hear the evidence about the number of nurses pulled out of Fiji – about 130. It wasn't sure there'd be 130 nurses in Fiji. I suspect we might have created a workforce gap for the Fijians but that's perhaps for another day.

PN6166

It shouldn't be suggested that in some way those employees who agreed to those sorts of things were kind of browbeaten or forced into them. The evidence didn't suggest that at all. There was one witness last week, I will concede – and I think, Professor, you asked the witness a question – who said that they worked extra hours and hadn't got paid for them. I might have facetiously suggested they should take to the union about that but on the whole most of the witnesses that said they worked overtime said they got paid for their overtime but was one exception.

PN6167

We also took Mr Friend to their enterprise agreements and I think he accepted that the workload management clause was a relatively common feature of their enterprise agreements. That clause is found in J10. It's found in J11. I won't take the Commission, given the time of day, to it, other than to say this: it had two features to it. Feature one was it required workload management to be a regular agenda item in a consultative meeting process and all of the provisions allowed for matters to be raised as disputes. Mr Friend acknowledged that most of their agreements had conciliation or consent arbitration although he conceded under cross-examination that some had conciliation and arbitration.

PN6168

I asked him whether or not there had been any disputes. I think his answer was not in the last – no matters raised in the Commission the last couple of years. Again, that's not being cute but one has to balance what's really happening out there in the industry. What one would draw from that is for those businesses who have those processes and procedures, while they are under stress and challenge, the issues are obviously being managed locally without the need to come to the Commission in the form of a dispute. I'm not saying that employers

are solving all the problems. I'm just saying again that one has to be somewhat nuanced because if things had reached a point of criticality where the union believed it was necessary to protect its members in this issue, I can assure you, the HSU being who it is and the AMNF being who they are, (indistinct words) this Commission (indistinct). So the fact that a lot of those agreements have that clause shows you that there is a working dialogue that's to some extent helping resolve those issues. I don't say that that applies to the industry as a whole. But it would apply to those people who have those agreements.

PN6169

I just got a sense from the evidence last week – and this is perhaps giving in to more instinct – but there seemed to be slightly more pressure on the residential part of the industry than the home care part. I simply say that because most of the people who came forward last week were from the residential part of the sector. You were also informed last week – and this came from Mr Friend, I think, and some employers – that anecdotally the 15 per cent has helped with recruitment and retention. We don't have any data on that and his Honour the presiding member indicated it's probably a little too early to tell.

PN6170

But Mr Mamarelis indicated that he believed it had assisted and I think Ms Riboldi had indicated as well that it was helping. I don't think we can take that any further from a data perspective but that's of some use. I then want to just deal with the question of agencies because they seem to get massive focus. I'm going to say that for reasons which I'll explain, the question about agencies needs to be approached with a little bit of care. It's clearly one strategy available to meet demand. It's clearly one strategy. It's a legitimate strategy. There was evidence last week about using agency staff and we accept that evidence.

PN6171

That evidence was essentially this: if one is using agency staff who are unfamiliar with the facility, there is some burden placed on the employees in that facility, as would be the case when you have a brand new employee, as would be the case, because that person probably doesn't know – to put it bluntly – where the towels are kept and everything else. So like any new employee, they are leaning on the regular staff of the facility. There was some evidence though last week that operators had preferred suppliers. I think at least one of the witnesses indicated that as much as possible they try and get the same people back as much as possible.

PN6172

But it clearly does create a different dynamic to one where you have full-time or part-time directly employed staff who are inducted and familiar with the workplace. It's a different scenario. I want to say that the extent of the use of agency staff needs to be approached with a little bit of care. The only evidence that I can see before the tribunal about the kind of (indistinct) use is from Mr Hutcheon and the StewartBrown material. I might just very quickly take the Commission to that. I think it's at page 307 of the court book that I want to go to. It's one of the attachments to his report – 3007, I think. Delightfully in the court book, it's upside down. This is table 4 and this is dealing with residential

care and the Bench might recall I took him to figure 2. Figure 2 has a series of boxes. One is for direct care results, one is for indirect care results.

PN6173

The Commission might recall I think I might have asked him in re-examination about this. The direct care results includes a cost for agency staff and that cost is, in dollar figures, \$17.10. You will see that there is a total direct cost of \$192.81. You will also see that this report of StewartBrown doesn't include agency costs for indirect care. I'll come back to that as an issue. Very simply put, \$17.10 over \$192.81 is 8.8 per cent of the bill. Given that the evidence last week is they get paid more than in situ employees, it probably doesn't mean 8.8 per cent of the workforce.

PN6174

So what I want to say, without necessarily getting too granular, is that that information informs us of the relative size of use of agencies, to some degree. Now, it's not perfect but it's the best evidence that's before the Commission about the aggregate use of – the StewartBrown report, that part of the StewartBrown report I accept Mr Hartley's observation that it only applied to persons who signed up but the number of persons involved in that part of the report I think represented about 50 per cent of the facilities in the industry and about 50 per cent of the residential beds. So it's not insignificant in terms of being represented. It's not insignificant.

PN6175

What I'm making of that data is it's not that we've got sort of half a workforce operating through agencies. It's a particular part. There was some criticism of agencies last week. Ms Riboldi indicated that she'd been ripped off by them so it might be, I think, somebody indicated it's a seller's market. There's some truth in there. We also had some evidence I think from Mr Brockhaus that his understanding was that some of those agencies paid employees as casuals, which would obviously inflate the headline rate that they're getting, although they're not getting the other benefits.

PN6176

Mr Mamarelis indicated very clearly that they're paid a lot more than his people, I think that was the phrase. I don't have a reference for this but I sense from the evidence last week that there was probably a primary focus from the use of agencies on registered nurses. That seemed to come through – then care workers and I think the evidence indicates that some agencies are using support staff but I don't necessarily think it's to the same degree it's used for registered nurses and the like and that's evidence by that StewartBrown indirect box where they call out agencies as a cost in one and not in the other and I'm assuming – again it's an assumption – that's because it's not material in indirect costs; indirect employee box cost.

PN6177

Now, the registered nurse issue in agencies is interesting because there actually is evidence – I can't remember who asked the question, that might have been the President – in the first part of the case about what registered nurses normally get paid. Ms Anna-Maria Wade gave evidence about – in stage 1 – about typically

through enterprise agreements what registered nurses get paid compared to the award. she also gave evidence about what personal care workers get paid compared to the award in their enterprise agreements. My recollection – I haven't gone back to it – was that in relation to personal care workers I think she said it's normally in their enterprise agreements, around 4 to 6 or perhaps 7 per cent above the award is my recollection.

PN6178

But with nurses, it was much higher. I think the indicator from Anna-Maria Wade was that nurse rates are somewhere between 30 to 50 per cent higher than the award and the enterprise agreements. I think when I cross-examined Mr Friend in stage 1, he acknowledged something similar. The only reason I say that is that's an interesting consideration in the context of agencies. If you actually have an enterprise agreement and you're already paying 30 or 40 per cent above the award and you're still struggling to get a registered nurse and you still have to go to an agency, it probably tells you what the agency is paying above what they're paying, which is already dramatically above the award.

PN6179

That's why I say I think you have to approach agencies with a little bit of caution. It must follow as a matter of logic that if rates of pay in the residential aged care sector are improved, there is a possibility that will attract more persons to move to direct employment. Again, they'll want to approach that with some caution because we don't have any evidence about why people are with an agency. Yes, it might just be the money. It might be all sorts of other reasons as well. We don't have any evidence about what actually will determine somebody's decision making to swap. So, for instance, if it is only about the money, swapping might be a threshold issue. You know, you might throw another 10 per cent of this and that might not cross the threshold so it doesn't actually help. So again, I think one has to approach the question of agencies with some care. But clearly, if we take StewartBrown as an example and say that perhaps about 8 per cent of your wage bill is taken up with agencies, and wages go up, there obviously would have to be some impact in terms of improving the position.

PN6180

But it won't be a dramatic windfall to the industry in terms of change over costs. It will be relevant, but when you look at those numbers and how they would all add up and the fact that some people are already paying 30 to 50 per cent potentially in their enterprise agreement above the award, putting the award up, particularly for those people, would be an academic exercise. So that's what I wanted to say about - - -

PN6181

JUSTICE HATCHER: I thought there was some evidence last week that arising out of the government funding in effect people have received the interim increase above their enterprise agreement rate.

PN6182

MR WARD: Yes, what happened, your Honour – and I don't want to speak out of school when I do say this so I'll be very careful, Ms Rafter will watch me as I say it – my understanding is it went something like this: when the decision was

handed down, there was then a political dialogue as to whether or not people should actually get an actual increase, irrespective of what they're paid today. My understanding is there's no evidence in this case about this, I don't think. My understanding is that there was a political outcome which said everybody was going to get an increase.

PN6183

There is some interesting formulas for some people as to how that happened. I think the most interesting formula was for the nurses as opposed to the personal care workers. But certainly that, with respect, is not a consideration for this tribunal setting minimum wages. It's interesting. It might be an issue for the Commonwealth, particularly in what they are prepared to fund or not fund. They might now take a different attitude to that.

PN6184

JUSTICE HATCHER: Well, it may (indistinct) Mr McKenna was submitting earlier that nurses don't want to wait. Now, if there's no funding for increases above the award for registered nurses and the increase has no practical effect, well, that submission doesn't mean much because there's nothing for them to wait for. But if the Commonwealth is going to again fund an increase over and above the award, well, that's a different question all together.

PN6185

MR WARD: Well, that's why I say I think that's more a matter for the Commonwealth and the politics - - -

PN6186

JUSTICE HATCHER: No doubt Mr Chin will explain all that to us tomorrow about this political dialogue.

PN6187

MR WARD: At the end of the day we're here to set minimum wages and the normal assumption in the setting of minimum wages unless there's some contractual prohibition is that the employer can absorb both award payments, however they're paid. That's what I put, I think, before the Vice President when the Vice President was heading the Bench. I put a number of parties into a tailspin when I put it and (indistinct) into a very real tailspin and my understanding is there was meetings in Canberra to manage that tailspin but that would be the normal approach.

PN6188

JUSTICE HATCHER: Have you reached a convenient point yet, Mr Ward?

PN6189

MR WARD: Your Honour, I'd welcome finishing now.

PN6190

JUSTICE HATCHER: All right. So how much longer have you got to go?

PN6191

MR WARD: You mean on this issue?

PN6192

JUSTICE HATCHER: No, on everything.

PN6193

MR WARD: I'll need two hours.

PN6194

JUSTICE HATCHER: Mr Chin, how long are you likely to take?

PN6195

MR CHIN: No more than 20 minutes, half an hour, if it please the tribunal.

PN6196

JUSTICE HATCHER: All right, so we should comfortably finish the primary submissions before lunch and then we can use after lunch for replies. All right, if that's convenient we'll now adjourn.

ADJOURNED UNTIL THURSDAY, 14 DECEMBER 2023

[4.48 PM]