

FAIR WORK COMMISSION

AM2021/63

THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

Applicant

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

First Matter

AM2024/11

THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

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

Second Matter

**AUSTRALIAN NURSING AND MIDWIFERY FEDERATION
REPLY SUBMISSIONS ON OUTSTANDING ISSUES FROM THE STAGE 3
DECISION [2024] FWCFB 150 CONCERNING REGISTERED AND ENROLLED
NURSES WORKING IN AGED CARE**

A. Introduction

1. By orders of 08 July 2024, Hatcher J directed that the issues of classifications, rates of pay, operative date and phasing-in in respect of registered nurses (“**RNs**”) and enrolled nurses (“**ENs**”) in the aged care sector, and any other matters necessary to give effect to the *Stage 3 Aged Care Decision* [2024] FWCFB 150 (“**Stage 3 decision**”), be dealt with in a separate hearing commencing 17 September 2024.
2. By order [2], parties other than the Australian Nursing and Midwifery Federation (“**ANMF**”) were directed to file, by 26 August 2024, any submissions, evidence and draft determinations concerning these issues, including any material in response to these submissions, evidence and draft determination filed by the ANMF on 26 April 2024 in matter no. AM2021/63 (“**ANMF S 26 April 2024**”).
3. On 26 August 2024, submissions pursuant to Order 2 were filed by:
 - (1) the Joint Employers (“**JE S [x]**”);¹ and
 - (2) the Commonwealth (“**Cth S [x]**”).²
4. Order [3] of the orders of 08 July 2024, provided for the ANMF to file evidence and submissions in reply by today, 09 September 2024. Accordingly, these submissions are filed in reply to the JE S and Cth S.
5. These submissions are broken into three primary parts.
6. **Part B** replies to JE S.
7. **Part C** replies to JE S 16 May 2024.
8. **Part D** replies to Cth S.
9. Additionally, on 18 July 2024, representatives of the ANMF wrote to the chambers of Hatcher J, copied to other parties (“**18 July 2024 letter**”), referring to:
 - (1) the decision of the Commission ([2024] FWCFB 298) determining the approach to the operative date and phasing-in of minimum wage increases for relevant

¹ Joint Employer Response to Identified Issues, 26 August 2024. By JE S[1.2] and [1.3], the Joint Employers also rely on their submissions of 16 May 2024 (“**JE S 16 May 2024 [x]**”) as these relate to classifications, rates of pay and any other matters necessary to give effect to the *Stage 3 decision*.

² Commonwealth’s Response to 8 July 2024 Directions, 26 August 2024.

aged care classifications, other than RNs and ENs (“*First Stage 3 phasing decision*”); and

- (2) the ANMF submissions of 10 May 2024 (“**ANMF S 10 May 2024**”), addressing the operative date and phasing in of increases for the classification of aged care employees under the *Aged Care Award 2020* and the *Nurses Award 2020*.
10. The 18 July 2024 letter identified a revised position of the ANMF with respect to the operative date and phasing-in of minimum wage increases for RNs and ENs in the aged care sector. That revised position was adopted having regard to the *First Stage 3 phasing decision*, and was as follows:
 - (1) increases to minimum rates for RNs and ENs in the aged care sector would occur in two tranches in accordance with the methodology identified at [18] of the *First Stage 3 phasing decision*;
 - (2) the operative date for the first tranche would be 1 January 2025;
 - (3) the operative date for the second tranche would be 1 October 2025.
11. The purpose of the 18 July 2024 letter was to indicate the ANMF’s position so that other parties might have the opportunity of addressing it in their submissions to be filed on 26 August 2024. The position identified in the 18 July 2024 letter remains the ANMF’s position on operative date and phasing-in in respect of RNs and ENs in the aged care sector. As further identified in the 18 July 2024 letter, the ANMF otherwise continues to reply on ANMF S 10 May 2024.
12. As such, for the purpose of the hearing commencing on 17 September 2024, the ANMF relies upon:
 - (1) ANMF S 26 April 2024;
 - (2) The draft determination for the *Nurses Award*, and marked-up *Nurses Award*, filed 26 April 2024, subject to the revisions identified in the ANMF Submissions of 12 July 2024 arising from the *First Stage 3 phasing decision*;
 - (3) An Excel spreadsheet (filed in .xlsx format) showing the calculations feeding into the various relativities and rates of pay that were used to populate the rates in the *Nurses Award*;

- (4) a further statement of Julianne Bryce (ANMF Senior Federal Professional Officer), dated 26 April 2024;
- (5) a statement of Tanya Vogt (ANMAC Chief Executive Officer), dated 23 April 2024;
- (6) a further statement of Heila Brooks (Care Manager, St Catherine’s Hostel), dated 22 April 2024;
- (7) ANMF S 10 May 2024, subject to the matters identified in the 18 July 2024 letter; and
- (8) these reply submissions.

B. Reply to JE S

B.1 The financial viability of the sector

B.1.1 The StewartBrown evidence (JE S [3.6]–[3.10])

13. The ANMF has made submissions about the relevance of the financial viability of the aged care sector, and evidence (in one form or another) from StewartBrown, on a number of previous occasions.³ Most-relevantly, its submissions of 17 November 2023 addressed the report of Mr Stuart Hutcheon of StewartBrown prepared for the Stage 3 hearing, upon which the Joint Employers continue to rely. The basic points the ANMF made in relation to Mr Hutcheon’s report, and which it repeats, are as follows:

- (1) Mr Hutcheon does not (without disrespect to him) have the right expertise to give statistical or economic opinions, and the Commission cannot know if Mr Hutcheon’s data is statistically representative (see at [57]–[58] of the 17 November 2023 submissions). Indeed, Mr Hutcheon agreed that he was not representing to the Commission that his survey report was statistically representative of the industry.⁴
- (2) how collected data was modified (*e.g.*, by excluding outliers) and “*cleansed*” is opaque and has not been explained to the Commission (see at [59], [62]–[63]);

³ Submissions dated 22 July 2022 at [844]–[856], submissions dated 20 January 2023 at [100], submissions dated 16 February 2023 at [2]–[25], submissions dated 17 November 2023 at [54]–[83].

⁴ Transcript of 07 December 2024, PN3088–3090.

- (3) reports prepared for benchmarking, in which one excludes outliers, are no doubt useful to StewartBrown’s customers, but are not useful to the Commission which is concerned with an entire sector (even, *e.g.*, facilities that are outliers because they are much more profitable than the norm) (see at [60]–[61]);
 - (4) Mr Hutcheon does not provide calculations so as to enable scrutiny of his opinions (see at [65]–[69]);
 - (5) Mr Hutcheon’s calculations assume, which is not the fact, that the Commission’s Orders will have the necessary effect that all nurses, even those on above-award wages, will receive a 25 per cent wage increase ([72]–[75]). (See cross-examination on 07 December 2024 at PN3102–3103).
14. In addition, Mr Hutcheon accepted that his survey was opt-in (07 December 2023, PN3069), with participation that varied from place to place (PN3070–3075), and that government-owned providers mostly did not participate (PN3080).
 15. As the ANMF submitted on 13 December 2023 (PN5717–5720), it accepts that an unfunded wage increase in a labour-intensive industry “*is likely to cause financial difficulties for at least a proportion of employers,*” as Hatcher J put it at PN5716. The Commission could not, however, proceed on the basis that Mr Hutcheon’s opinions provide a basis for being more precise than that. For that reason, JE S [3.4]–[3.9] could not be adopted. Findings expressed in terms of actual dollar figures simply cannot safely be made on Mr Hutcheon’s evidence.
 16. As the ANMF has said before (PN5709), nothing in that involves any criticism of Mr Hutcheon, who was a truthful witness doing his best to assist the Commission. It remains, however, than an opt-in paid survey, the participation in which varies from place to place and sector to sector, prepared by a person who is not an economist or statistician, to provide a benchmark for the clients of the report (rather than a statistically-representative survey), which addresses a different issue than that which confronts the Commission (because it assumes no absorption into above-award payments), cannot support specific, dollar-figure, findings. A finding at that level of generality would be consistent with the finding the Full Bench made in the *Stage 2 decision* at [431].

B.1.2 Nursing employees in aged care and above-award payments (JE S [3.11]–[3.13])

17. JE S [3.11] contains two propositions. *First*, that most aged-care nurses are covered by enterprise agreements rather than the *Nurses Award*. *Second*, as a “*general proposition*,” that even those who are not so covered are paid above award rates.
18. The *first* may be accepted, though that does not tell one how much above the award minima the enterprise agreements are (if at all). The evidential basis for the *second* is not apparent.
19. As to the *first*, the most-recent evidence before the Commission is the August 2023 edition of the ANMF’s “*Paycheck*” publication, tendered (with leave) by email dated 15 December 2023 at 17:32. On page 40 of *Paycheck*, the following relevantly appears:

“This section of *Paycheck* provides information on agreement coverage in the non-public residential aged care sector and an analysis of the wage rates for key nursing classifications based on 661 enterprise agreements operating as at 15 July 2023. The information is updated on a six monthly basis as new agreements are approved by the Fair Work Commission. It includes data at a national level as well as by each State and Territory.

Australia wide, the proportion of facilities covered by awards is 8.9% and the proportion of facilities where the entire nursing workforce is covered by agreements is 86.2%.

...

Across Australia, 86.2% of all aged care facilities have their entire nursing workforce covered by enterprise agreements (2104 out of 2442 facilities). This coverage rate is calculated by mapping enterprise agreements to the Australian Government Department of Health list of Non-Public Sector Residential Aged Care Services (excluding services associated with public hospitals or publicly funded regional area health services). 84% of these fully covered facilities are covered by a single agreement setting out wages and conditions for all classifications of nursing staff (RN, EN and AIN/ PCW). In 4.8% of facilities, nursing classifications are partially covered by agreements and partially covered by the *Nurses Award*.

Only 9.0% of facilities are totally award reliant. On a State/Territory basis, the percentage share of facilities that are totally reliant on awards is 5.1% in NSW; 3.5% in VIC; 3.3% in SA; 1.5% in TAS; 7.4% in ACT; 22.1% in QLD and 19.9% in WA. In the Northern Territory, all facilities are fully covered by agreements.”

20. There follows a detailed analysis in tables of agreement coverage by state. On pages 41–43 there is a comparison of the hourly rate with relevant public sector rates of pay. With very few exceptions, public sector rates of pay are higher.

21. What does not appear there, but what can be reproduced by combining a few tables in the *Paycheck* publication, is a comparison between the actual average rates of pay and award minima. The table on pages 15–16 sets out award minima as at 30 June 2023. Table 3 on page 41 contains the average wage rate as at July 2023. Setting out the two side by side reveals, for the EN and RN classifications appearing in Table 3, the following:

	Award rate	Average rate
EN min	\$ 29.00	\$ 28.70
EN max	\$ 30.51	\$ 32.04
RN level 1 entry	\$ 31.03	\$ 33.30
RN level 1 thereafter	\$ 37.28	\$ 41.69

22. One can add to this the minimum hourly rates from the ANMF’s draft determination for the *Nurses Award* (filed 26 April 2024), and then — with that information — calculate, on average, how much of a wage rise is capable of being absorbed by the current average over-award pay rate:

	Award rate	Average rate	Rate sought	% absorbed
EN min	\$ 29.00	\$ 28.70	\$ 36.07	0%
EN max	\$ 30.51	\$ 32.04	\$ 37.95	20.6%
RN level 1 entry	\$ 31.03	\$ 33.30	\$ 38.71	29.6%
RN level 1 thereafter	\$ 37.28	\$ 41.69	\$ 46.51	47.8%

23. The Commission is able to proceed on the basis, therefore, that there is limited or no scope for absorption toward the lower end of the EN classifications, but considerable

scope for absorption toward the upper end of those classifications, and in the RN classifications (at least amongst those in relation to which the ANMF has data).

B.1.3 Absorption (JE S [3.14]–[3.17])

24. As to JE S [3.14] concerning whether absorption will or will not be permitted, the Commonwealth could be asked to confirm its position in the September 2024 round of hearings. So far as “*absorption*” refers to a circumstance whereby funding is provided to employers on account of increases to minimum rates, but by one means or another employers fail to pass the whole of that amount through to workers, the ANMF’s position is that that clearly should not be permitted. Increased funding in relation to wages, arising out of a work value case, should go to wages.
25. JE S [3.17] is (with respect) a little difficult to understand. It seems to submit that if absorption is permitted, the economic disadvantage to employers will be “*modest*”; whereas if absorption is not permitted, the disadvantage will be “*material*.” That cannot be right. There are two scenarios, as follows:
 - (1) Scenario 1: the Commonwealth increases funding by X per cent calculated on award minima:
 - (a) (1)(A): No absorption: whatever the employers receive, they must pass on. This is neutral for them: they receive (say) \$10 from the Commonwealth being the X per cent increase to (say) the RN’s wage, and they give that \$10 to the RN.
 - (b) (1)(B): Absorption: the employers have a windfall gain. They receive the \$10 from the Commonwealth reflecting the X per cent increase to the RN’s wage, but pass on only the \$5 necessary to bring the RN’s wage up to the new minimum. They retain \$5.
 - (2) Scenario 2: the Commonwealth funds only whatever is the increase necessary to bring all employees up to the new award minima. Here, absorption is not possible. For an employee \$3 below the new minimum, the Commonwealth provides to the employer, and the employer must provide to the employee, that \$3. For an employee \$4 below the minimum, it is the same but substituting \$4 for \$3. This scenario is necessarily neutral for the employer.

26. In short, all scenarios are either neutral for employers or provide them a windfall. The windfall scenario — Scenario (1)(B) absorption — is perverse: why would the Commonwealth fund a wage increase on the basis that the employees need not actually receive that wage increase? In any case, *contra* JE S [3.17], there is no world in which, assuming Commonwealth funding tracks the Commission’s staging and phasing-in, employers are out of pocket.

B.2 Time is required to prepare for implementation of any variations

27. JE S Part 4 does not directly reply to the ANMF’s proposal for the operative date and phasing-in of further minimum wage increases for RNs and ENs in aged care. Rather, it is asserted at JE S[4.1] that aged care providers “*require time to ensure all essential preparatory steps and necessary communications are made and received prior to the operative date*” of any further minimum wage increases. The Joint Employers do not identify how much time would be required. No evidence has been provided in support of a contention that the operative date proposed by the ANMF would not be feasible, or that specific transitional arrangements are necessary.
28. It is accepted that the determination of appropriate transitional arrangements is a matter that calls for the exercise of broad judgement, rather than a formulaic or mechanistic approach involving the qualification of the weight accorded to each particular consideration.⁵ However, it is incumbent upon a party seeking transitional arrangements to identify a proper basis for any delay in increasing minimum rates otherwise justified by work value reasons.

B.2.1 Residential aged care

29. The submission at JE S [4.4] is to the effect that the implementation of Commonwealth funding for residential aged care takes time.
30. In this proceeding, the Commonwealth previously agreed that it may be theoretically possible to provide additional funding to the sector relatively quickly following a decision by the Commission regarding an increase to minimum award rates.⁶ That

⁵ *Penalty Rates – Transitional Arrangements decision* [2017] FWCFCB 3001 at [142] and *4 Yearly Review of the General Retail Industry Award 2010* at [264]

⁶ Reply Submissions of the Commonwealth, 10 February 2022 at Annexure [2].

agreement was subject to the caveat that the Commonwealth has a responsibility to ensure funding is distributed accurately and appropriately including:

- (1) to ensure value and efficient use of taxpayer funding; and
 - (2) to ensure there is sufficient funding that is well targeted for aged care providers to support the increased costs in respect of increases to award rates.⁷
31. The interim increases to award minima wage arising from the *Stage 1 decision* commenced on 30 June 2023. Those increases were fully funded by the Commonwealth in accordance with appropriate accountability mechanisms. One would expect that if this process had involved particular complexities or delays, evidence of this would have been placed before the Commission.
32. The Commonwealth funding commitment contained in Cth S is otherwise addressed below at Part D.
33. With respect to the specific sub-paragraphs to JE S [4.4]:
- (1) *Contra* JE S [4.4(a)], the Commission can have confidence that the accurate distribution of funding will occur expeditiously given the similar process undertaken for the implementation of the interim increase and the absence of evidence to the contrary. The development of appropriate accountability measures is not a regulatory burden for the purpose of s 134(1)(f);
 - (2) The Commonwealth has previously recognised that would be possible to incorporate increases to award minimum wages into the Australian National Aged Care Classification (“AN-ACC”) price.⁸ This is what ultimately occurred with respect to the Stage 1 interim increases.⁹ As identified below at [66], the Independent Health and Aged Care Pricing Authority (“IHACPA”) can be asked now to provide pricing advice. *Contra* JE S [4.4(b)], this does not provide a proper basis to delay implementation of minimum wage increases.

⁷ Reply Submissions of the Commonwealth, 10 February 2022 at Annexure [2].

⁸ Reply Submissions of the Commonwealth, 10 February 2022 at Annexure [3].

⁹ Department of Health and Aged Care “Aged Care Worker Wages - Guidance for aged care providers on the provision of funding relating to Stage 2 of the Fair Work Commission Aged Care Work Value Case” <https://www.health.gov.au/sites/default/files/2023-06/aged-care-worker-wages-guidance-document.pdf>

- (3) It may be accepted that the calculation of the rate of funding increases is a complicated task. However, the proposition that this would here be expected to take months (JE S [4.4(c)]) is not properly supported by evidence. In any event, the Commonwealth has recognised it could make an AN-ACC price decision without IHACPA advice.¹⁰
- (4) The Commonwealth has previously agreed that a change to the AN-ACC as a funding mechanism would only involve changes to subordinate legislation (then in the *Aged Care (Subsidy, Fees and Payments) Determination 2014*; and the *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*).¹¹ The ANMF understands that this is the process that occurred with respect to the Stage 1 interim increase, and will occur with respect to Stage 3 increases for classifications other than nurses. The ANMF proposal would require this process to be expanded to incorporate final award rate increases for ENs and RNs in aged care at the same time. This would not appear to introduce any particular complexity requiring additional time (*contra* JE S [4.4(d)]).
- (5) The bare reference at JE S [4.4(e)] to the need to develop and implement “*relevant information and communications technology changes required to implement the increased funding*” is unexplained and unsupported by evidence. It should be given no weight.
34. For the reasons addressed in the ANMF S 26 April 2024 at Part D, and below at Part C.3, the need for employers to grapple with material changes to the classification structure and to consider any transitional arrangements would not arise. Should the Expert Panel determine that changes to the classification structure are necessary to achieve the modern awards objective, certainty could be achieved by a table or provisions setting out transitional arrangements.¹²

¹⁰ Reply Submissions of the Commonwealth, 10 February 2022 at Annexure [8].

¹¹ Reply Submissions of the Commonwealth, 10 February 2022 at Annexure [4].

¹² See JE S[5.1].

B.2.2 Home care

35. The Joint Employers make similar submissions about home care providers requiring “*sufficient time*” at JE S [4.6]. The general comments above at [30] to [31] apply in respect to that submission.
36. With respect to the specific sub-paragraphs to JE S [4.6]:
- (1) It is unremarkable that stage 3 wage increases would be implemented in a similar way to the interim wage increases. This has been foreshadowed by the Commonwealth¹³ and the first tranche of stage 3 increases for classifications other than nurses, including in home care, are to commence on 1 January 2025. The Joint Employers fail to identify what “*meaningful preparatory steps*” home care providers are being prevented from taking.
 - (2) As to the need to consider whether any adjustments to home care package agreements are required (JE S[4.6(b)]), the Joint Employers have again elected not to put evidence of the terms of home care package agreements before the Expert Panel, or identify what adjustments may be required. The relevance of and impact of “*absorption practices*” is addressed above at Part B.1.3.
 - (3) The Joint Employers also fail to fully explain the asserted need for the Commonwealth to communicate with home care package recipients (at JE S[4.6(c)]). Even if such communications are required, they could occur in concert with any similar communication regarding the effect of the stage 3 increases for classifications other than nurses.
 - (4) JE S[4.6(d)] involves speculation about what clients with home care agreements might or might not do. There is no evidence to enable the Expert Panel to make a relevant finding. In any event, the ANMF’s proposed implementation dates are the same as those applying to aged care classifications, other than RNs and ENs. As such, the ANMF proposal would not add to the frequency of changes.

¹³ Commonwealth Submissions Concerning Operative Date and Phasing In, 12 April 2024 at [8.1].

C. Reply to JE S 16 May 2024

C.1 The RN issue

37. The Joint Employers have now confirmed the joint position with the ANMF that the three-year degree RN classification (level 1 pay point 1) would align with the C1(a) classification in the C10 Metals Framework (JE S 16 May 2024 [8]). Following the *Annual Wage Review 2023–24 decision* [2024] FWCFB 3500 (“*AWR*”), this rate would be set at \$1,526.00.¹⁴

C.2 The EN issue

38. The Joint Employers have now confirmed the joint position with the ANMF that the EN classification would align with the new Level 6 – Team Leader direct care classification in the Aged Care Award 2010 (JE S 16 May 2024 [9]). Following the *AWR*, this rate would be set at \$1,422.20. No additional language in the EN classification definitions appears to be proposed by the Joint Employers.

C.3 The minimum rate and relativities issue

39. At JE S 16 May 2024 [17] and [39]–[40] it is suggested that the ANMF bears an evidentiary onus to retain annual increments within the classification structure in the *Nurses Award* for aged care nurses. Reliance at JE S 16 May 2024 [17] is placed on *Independent Education Union of Australia* [2021] FWCFB 2051 (“*Teachers Case*”) at [647] for this proposition.

40. That submission misconstrues the Commission’s statutory task. Section 157(1) of the *Fair Work Act 2009* (Cth) means that the Expert Panel may only vary the *Nurses Award* if, and to the extent that, it is satisfied that doing so is necessary to achieve the modern award objective. Any party seeking a particular change therefore bears a legal, or at least a persuasive, onus of showing that the change is necessary in that way: the party who asserts must prove.¹⁵ But the ANMF does not seek a change to the classification structure in the *Nurses Award* for aged care nurses. It seeks only a minor adjustment to the relativities as between EN and RN classifications, which is justified by work

¹⁴ Reflecting the rate for the Proficient Teacher classification employed in long day care centres in accordance with [654] of the *Application by Independent Education Union of Australia* [2021] FWCFB 2051.

¹⁵ *Food Channel Network Pty Ltd v Television Food Network GP* (2010) 185 FCR 9 at 18 [26]–[27] (Keane CJ, Stone and Jagot JJ).

value reasons. The ANMF bears no onus — legal, evidentiary, or otherwise. Its position involves maintenance of the *status quo*.

41. JE S 16 May 2024 does not assert that the removal of time-based increments in the *Nurses Award* classification structure is necessary to achieve the modern award objective. If it did, the Joint Employers would bear an onus of making that proposition good. No alternative proposal is put forward by the Joint Employers, or any other interested party.¹⁶ As noted in ANMF S 26 April 2024 [77], the current classification structure represents a hybrid of professional career standards and time-based increments. It provides a fair and relevant minimum safety net of terms and conditions, taking into account, *inter alia*, “the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia ...” consistent with s 134(1)(g). It is “fair” given that it may be the only career progression available to the employee¹⁷ and in that it allows for the recognition of “invisible” skills. It is “relevant” having regard to increases in work value which accompany increased experience of ENs and RNs.¹⁸ It also assists in ensuring a simple, easy to understand and stable modern award system by meeting the objectives identified in the *Stage 3 decision* at [184].
42. At JE S 16 May 2024 [19] and [20], the Joint Employers question the historical basis for incremental increases for ENs and RNs based on work value. This historical basis is addressed at Part D.2 of ANMF S 26 April 2024 and is not repeated here.
43. Further reliance is placed on the *Teachers Case* at JE S [23] where it is said certain features of the *Nurses Award* structure would need to be removed or changed if the reasoning in the *Teachers Case* were accepted. There are four points in reply.
44. *First*, for the reasons identified at ANMF S 26 April 2024 [60]–[64] and [74], the *Teachers Case* is readily distinguishable.
45. *Second*, it is wrong to suggest that “grades” for RN level 4 and RN level 5 involve progression through annual increments.¹⁹ As discussed at ANMF S 26 April 2024 [53],

¹⁶ As is consistent with the evidence of Heila Brooks (care manager – akin to a DON position – at St Catherine’s Hostel in Wangaratta) that she is unaware of any objective mechanism which functions, or could function as an alternative to experience, by which the attainment of increased skill and expertise can be recognised. Further Statement of Heils Brooks of 22 April 2024 at [13] – [14].

¹⁷ See ANMF S 26 April 2024 at [73] – [74] and [78].

¹⁸ See below at [47] and [48].

¹⁹ JE S [23(c)]. See also JE S [40(b)].

progression through grades is not covered by cl 15.3(a) of the *Nurses Award*. Rather, appointment to a “*grade*” will depend upon the level of complexity associated with the duties described in the relevant position descriptor where the number of beds in a facility will be a relevant consideration.

46. *Third*, it may be accepted that the evidence before the Expert Panel does not establish that the work value of an EN pay point 1 (for example) will increase by precisely 1.3 per cent after 1,786 hours of experience, but that kind of precision in the evidence is not required (even if were possible). There is a large body of evidence that the value of the work of ENs and RNs in aged care does increase with experience.

47. That includes the following evidence from ENs:

- (1) Suzanne Hewson describes developing skills required to manage residents with dementia who become a significant risk to staff members and residents. She says that these skills are learned from experience and, if you are lucky, good mentoring from colleagues.²⁰ She also highlighted the skill, experience and concentration required to administer medications properly and safely.²¹
- (2) Wendy Knights gave evidence that most learning about the implementation of high care plans occurred on the job.²² She also described the reduced use of pain relief and restraint medication following the Royal Commission as meaning that nurses and carers were informally learning new skills to de-escalate situations and calm or console residents.²³
- (3) Patricia McLean identified that she would exercise the skills she had developed working in aged care over around 45 years when changing catheters, providing wound care (including drains), treating ulcers, assessing clients as to whether they needed to go to their GP / hospital, applying cream (medicated and non-medicated) to clients’ skin, administering medicine, assisting clients with medication, and monitoring clients’ health to ensure they are doing okay at home.²⁴

²⁰ Amended Statement of Suzanne Claire Hewson (EN) 6 May 2022 at [23].

²¹ Amended Statement of Suzanne Claire Hewson (EN) 6 May 2022 at [24(a)].

²² Amended Statement of Wendy Knights (EN) 29 October 2021 at [67].

²³ Amended Statement of Wendy Knights (EN) 29 October 2021 at [72].

²⁴ Amended Statement of Patricia Mclean (EN) 9 May 2022 at [73].

48. Evidence from RNs also identified the development of work value through experience, for example:

- (1) Addressing violence and unpredictable residents, Irene McInerney identified that staff needed to have good communication skills and be able to judge when to press and when to back off. She said that judging well came from years of caring and nursing experience.²⁵
- (2) Lisa Bayram identified that she relied on years of experience to identify changes and new needs of residents.²⁶ She also used her extensive nursing experience to guide residents and their families in really important decisions.²⁷ Under cross-examination she also said as follows regarding the development of skills relevant to palliative care:

“So listening, making decisions under duress with people who are distressed, leading families who are in situations where they're not familiar and they're anxious and they don't know what's going to happen and trying to get the best outcomes for them and for their loved ones, and the information that you provide and the leadership and the guiding people through the process. That's the really important stuff that everybody needs to be better at, and that you really, really need experience, and mentoring to learn that stuff. Everybody can learn how to fix the bed, do the mouth care, put on the nice music, talk nicely to the families, but that other stuff takes a long time to learn, but it's essential. If you haven't got people who can do that then you can't provide good palliative care.”²⁸

- (3) Likewise, Hazel Bucher identified that palliative care takes time, experience and skill.²⁹ She also recognised that new graduate RNs from Australia and other countries need time to develop and build their clinical experience, and confidence.³⁰

49. This evidence recognises the increased skill and expertise that ENs and RNs develop through increased experience working in aged care. That increased experience allows ENs and RNs to improve their clinical skills, to better manage residents with dementia, to implement high care plans more effectively, to better identify and de-escalate

²⁵ Amended Statement of Irene McInerney (RN) 10 May 2022 at [52].

²⁶ Statement of Lisa Maree Bayram (RN) 29 October 2021 at [38(c)].

²⁷ Statement of Lisa Maree Bayram (RN) 29 October 2021 at [38].

²⁸ Transcript, Cross-examination of Lisa Bayram [PN8252].

²⁹ Amended Statement of Hazel Bucher (NP) 10 May 2022 at [48].

³⁰ Amended Statement of Hazel Bucher (NP) 10 May 2022 at [46].

situations involving violent residents, to more accurately identify the needs of residents, and to better guide residents and their families in end-of-life situations.

50. This reflects increases in work value, much of which will not be recognised by progression to a higher level or grade. As identified in the Further Statement of Heila Brooks, some RNs do not seek higher classifications (*i.e.*, above RN level 1), and for other RNs there may be no opportunity in their work setting for appointment to a higher level.
51. *Fourth*, as identified above, changing the classification structure in the *Nurses Award* for aged care nurses may only occur if the Expert Panel is satisfied that such a change is necessary to achieve the modern award objective. No party has sought to satisfy the Expert Panel of that fact: it forms part of no party's case.

D. Reply to Cth S

D.1 General reply

52. Although some water has flowed under the bridge since the ANMF's principal submissions on phasing-in and staging dated 10 May 2024, the ANMF continues to rely on those submissions. It otherwise responds to the Commonwealth's submissions dated 26 August 2024 on the same topics, as follows.
53. On 15 March 2024, in the *Stage 3 decision*, the Full Bench made findings that:
- (1) the rates for undergraduate degree-qualified RNs have never been properly fixed in accordance with the C10 Metals Framework Alignment Approach, which constitutes gender undervaluation of the work of such nurses ([203]);
 - (2) its analysis indicated that the work of all RNs and ENs covered by the *Nurses Award*, not just in aged care, had been subject to a failure to properly apply the C10 Metals Alignment Framework, and to gender undervaluation ([207(2)]);
 - (3) the rate for an EN in aged care, who has responsibility for supervising other PCWs, should be set at the same rate as PCW Level 6 ([206]);
 - (4) changes in the value of work performed by RNs justify wage increases beyond the interim increase of 15 per cent ([203]).

54. However, for reasons given in the *Stage 3 Decision*, the Full Bench decided not to finalise the classification structure and pay rates for RNs and ENs at that time.

55. On 12 April 2024, the Commonwealth filed submissions about phasing in of the wage increases contemplated by the *Stage 3 decision*. At [9], it said this:

“The Commonwealth funding commitment and these submissions deal only with the direct and indirect care workers who are the subject of the Stage 3 wage increases, which does not include Registered Nurses (RNs) and Enrolled Nurses (ENs). The Commonwealth notes that the Full Bench considered the appropriate course to be to finalise the classification structure and pay rates for aged care RNs and ENs in conjunction with the Australian Nursing and Midwifery Federation’s application in matter AM2024/11. 9 Matters relating to the timing and implementation of any wage increases for aged care nurses made as part of that process will be the subject of a future decision of the Commonwealth Government.”

56. On 19 April 2024, the ANMF wrote to the Commonwealth, which letter is attached to the ANMF’s submissions of 10 May 2024. In short, the ANMF said that:

- (1) [208] of the *Stage 3 decision* did not justify the Commonwealth declining to state a position in relation to the timing and phasing-in of any wage increase for RNs and ENs in aged care;
- (2) in any event, in light of developments in the AM2024/11 (*i.e.*, the prospect of it being necessary to finalise the aged care case prior to AM2024/11), it was desirable for the Commonwealth to state its position concerning the timing of increased funding connected with RNs and ENs in aged care;
- (3) if wage increases for RNs and ENs in aged care were excluded from expenditure proposals considered by cabinet, the ANMF requested that that be rectified and that the “*Commonwealth finding commitment*” be reformulated.

57. As is apparent from its letter dated 02 May 2024 (also attached to the ANMF’s 10 May 2024 submissions), the Commonwealth declined to re-consider its approach. Now, the Commonwealth has indicated that its position on funding for any aged care nurse wage increases is as follows (Cth S[9]):

- “9.1 for any wage increases up to 3 per cent – on 1 July 2025;
- 9.2. for any wage increases up to a further 3 per cent (*i.e.* up to 6 per cent total) on 1 October 2025;
- 9.3. for any wage increases up to a further 7 per cent (*i.e.* up to 13 per cent total) – on 1 October 2026;

9.4. for any wage increases up to a further 7 per cent (i.e. up to 20 per cent total) – on 1 October 2027.”

58. The ANMF’s application has been on foot for about 3.5 years. The *Stage 1 decision*, which was clear in stating that the interim increase of 15 per cent was “*comfortably below*” what the Commission might determine on a final basis (at [938]), was nearly two years ago. As the ANMF has pointed out on several occasions,³¹ the logic of the Commission’s findings concerning historical undervaluation, including gender-based undervaluation, is that:

- (1) for some time, aged-care employees have been underpaid for the value of their work, including because of the stereotypically-female nature of that work;
- (2) were increases to follow Commonwealth funding, as it says would be “*appropriate*” (Cth S [12.2]), aged-care employees would continue to be underpaid for the value of their work, again on that partially-gendered basis, until all funding was in;
- (3) this is despite the minimum wages objective and modern awards objective now expressly requiring the FWC to take into account the need to achieve gender equality including by eliminating gender-based undervaluation of work (ss 134(1)(ab), 284(1)(aa)).

59. Any decision as to staging involves deciding which of (at least) three interests should be subordinated and which superordinated: those of the Commonwealth, those of the employers, and those of the workers. The Commonwealth’s (hence taxpayer’s) interests cannot be directly affected by the Commission’s Orders: the Commonwealth is plainly right to submit (Cth S [14]) that it cannot be ordered to fund differently, or sooner, than its commitment. But its interests can be indirectly affected: if the Commission were to order increases pre-dating the Commonwealth’s funding commitments, then the Commonwealth would be faced with a choice between seeking to fund earlier than it had committed to fund (so as to prevent loss to employers), or allowing employers to bear some loss before funding commences.

60. Accordingly, at least three of the relevant interests are:

³¹ ANMF submissions of 09 February 2023 at [32]; ANMF submissions of 10 May 2024 at [19].

- (1) the interest the Commonwealth has in the staging of increases tracking its funding commitments, so that it is not forced into the difficult choice outlined in the previous paragraph;
 - (2) the interest employers have in not becoming liable to pay increased wages without Commonwealth funding equalling those increases (hence avoiding decreased profits, or increased losses);
 - (3) the interest aged-care workers have in being paid the value of their work — which is to say, in not being paid less than they are worth for reasons including gendered reasons.
61. The unstated assumption in the Commonwealth submission that it is “*appropriate*” for staging to track its funding commitment (Cth S [12.2] is that the interests of the workers should be subordinated to those of the Commonwealth and those of the employers. That is, in order to ensure that the Commonwealth does not face a difficult funding decision or a need to work more-quickly than anticipated, and in order to ensure that employers are not out of pocket (or in the Commonwealth’s words, that there would be a “*non-material impact on business and employer costs*” (Cth S [11])), aged-care nurses should bear being underpaid, on a gendered basis, for more than three years longer.
62. When that assumption is stated, its unattractiveness is apparent. Why should employees be the ones entirely out of pocket, and employers not at all? No answer to that question has been proffered.
63. As for the interests of the employers, the ANMF repeats the submissions made above in relation to the financial viability of the sector. In relation to the Commonwealth being on the receiving end of pressure to move more quickly than it might otherwise have desired, the ANMF submits as follows.
64. *First*, it was obvious from the *Stage 3 decision* that, at some point, wage increases would be ordered. Given the content of the paragraphs of the *Stage 3 decision* identified above, educated guesses could have been made as to their quantum, and funding commitments worked out on the basis of such estimates. Then, if amendment was required in light of the final quantum, there would have been adequate time to do so. This would have assisted in ensuring that aged-care nurses did not fall behind the cohort of other aged-care direct care workers. This was the point of the ANMF’s April

2024 correspondence, which requested the Commonwealth reconsider its approach. The Commonwealth did not reconsider its approach.

65. *Second*, as outlined in Part D.2, the effect of the Commonwealth's different approaches to funding non-nurse aged care workers as compared with nurse aged-care workers is that, for significant periods of time, there will be anomalies in the minimum rates. These might have been avoidable had the Commonwealth acted more pro-actively.
66. *Third*, Cth S [14.1]–[14.3] provides information about budgeting processes, but none of it deserves particular weight, for two reasons. One is that it does not explain any delay in staging beyond 01 October 2025 (at which point IHACPA will have been able to provide advice, if asked, in session). The other is that the Commonwealth's submissions seem to proceed on a basis that work cannot commence on a given task until all previous tasks have been completed. Contrary to that basis:
- (1) the IHACPA can be asked, now (and could have been asked some time ago) to provide pricing advice based on certain hypotheticals, only one of which may ultimately prove to be correct;
 - (2) advice to Government, development of subordinate legislation, and of ICT changes, can likewise begin now on the basis that there are a number of possible outcomes.
67. *Fourth*, the relevance of Cth S [14.4]–[14.7] to staging is not immediately apparent.
68. *Fifth*, as to Cth S [14.8], the matters there stated are, of course, matters that the Commonwealth may legitimately take into account in making its funding decisions, which are not justiciable in this proceeding. However, they do not provide a good reason for keeping workers out of the value of their work.

D.2 Potential for overlapping minimum rates as a result of Commonwealth funding commitment

69. The *Stage 3 decision* at [188] recognises that an RN will usually be the person with ultimate supervisory responsibility of PCWs. This is consistent with the RN Standards

for Practice which provide that an RN working in aged care will remain accountable for ensuring the appropriate delegation of nursing care to PCWs.³²

70. As identified in ANMF S 26 April 2024 at [35]–[50]:
- (1) the evidence in this proceeding is that ENs have supervisory responsibility in respect of PCWs; and
 - (2) the ANMF understands the effect of the *Stage 3 decision* is that the work value of a EN pay point 1 is equivalent to the work value of a PCW to be classified at Level 6 – Team Leader. This is a joint position as between the ANMF and the Joint Employers.
71. A PCW in the new *Aged Care Award* classification structure will be defined to be an employee whose primary responsibility is to directly provide “*personal care services to residents under the supervision of a registered or enrolled nurse*” (emphasis added).³³
72. For the reasons identified below, adopting the Commonwealth funding commitment (Cth S [9]), as a basis for the operative date and phasing in of minimum wage increases for ENs and RNs in aged care has the potential to create significant industrial disharmony, and other anomalous or undesirable outcomes, as between PCWs under the *Aged Care Award* (on the one hand) and aged care RNs and ENs (on the other).
73. Should the Expert Panel order the operative date and phasing-in of minimum wage increases for aged care ENs and RNs in accordance with the Commonwealth funding commitment, ENs and RNs would receive their increases on the following timetable:
- (1) On 1 July 2025, 3 per cent;
 - (2) On 1 October 2025, a further 3 per cent (*i.e.*, 6 per cent total);
 - (3) On 1 October 2026, a further 7 per cent (*i.e.*, 13 per cent total); and
 - (4) On 1 October 2027, a further 7 per cent (*i.e.*, 20 per cent total).

³² NMBA Registered Nurse Standards for Practice, at [78(c)].

³³ *Stage 3 decision* at [193], definition of an “aged care employee-direct care”.

74. ENs and RNs would not receive their full minimum rate increase, applying the rates set out in the *ANMF's draft determination* and together with the *AWR*, until 1 October 2027. Other direct care workers, as provided in the *First Stage 3 phasing decision* at [18]–[20], will receive their full increase on 1 October 2025.
75. **Schedule 1** to these Submissions is a table plotting the considerable delay and disparity that would result, as between PCWs and ENs and RNs, were the Expert Panel to adopt the Commonwealth's proposal. These points are salient:
- (1) PCWs would receive their final pay increase two years ahead of RNs and ENs;
 - (2) Over the period 1 January 2025 to 1 October 2027, many ENs and RNs in aged care are on considerably-lower minima than their PCW colleagues.
 - (a) See RN level 1 pay point 1: at all of 1 January 2025, 1 July 2025, 1 October 2025, and 1 October 2026 — that is, until 1 October 2027 — the PCW (Level 6 – Team Leader) has a higher minimum than RN level 1 pay point 1;
 - (b) See EN pay point 1:
 - (i) between 1 January 2025 and 1 July 2025, the Cert III PCW (Level 3 — qualified) has a higher minimum than an EN Level 1 pay point 1;
 - (ii) from 1 July 2025–1 October 2026, the minima for the Cert III PCW and the EN Level 1 pay point 1 are roughly the same (*i.e.*, within 20 dollars of each other);
 - (c) See EN pay point 5 (the highest EN level): between 1 January 2025 and 1 October 2026, the highest PCW level (Level 6 — team leader) has a higher minimum than EN pay point 5;
 - (d) ENs and RNs wait until 1 October 2027 for their full wage increase, whereas all PCWs receive their full increases on 1 October 2025.
76. These outcomes, albeit that they are temporary, are at odds with the findings of the Commission in relation to work value, with the AQF and the C10 Metals Framework approach, and with the reporting or supervision relationships in an aged-care

workplace. They are, obviously, anomalous outcomes. They create undesirable incentives — including, for example, for ENs and RNs to cease to work as ENs or RNs and instead to seek roles as PCWs.

77. Such outcomes are patently unfair and undesirable. As Deputy President Binet concluded in *Legal Land Perth Pty Ltd* [2018] FWC 2707 at [15], there exists:

“...the risk of industrial disharmony resulting from employees working side by side under different terms and conditions of employment and the additional cost burdens of administering two sets of pay and conditions for one workforce”

The Expert Panel determined, in the *Stage 3 decision* at [156], that there were work value reasons for the minimum award rates of pay in respect of “*all direct care employees covered by the Aged Care Award, the SCHADS Award and the Nurses Award*” to be “*increased substantially beyond the 15 per cent interim increase.*” Likewise, the Full Bench in the *Stage 2 decision*, at [17], afforded the interim increase to all direct care workers, effective 30 June 2023. The Commonwealth funding commitment, by contrast, divides direct care workers. If reflected in the Commission’s orders as to phasing-in, it would require aged care RNs and ENs to wait substantially longer to be paid in accordance with their recognised work value.

D.3 Critical nurse shortages forecast in aged care

78. Recent figures from the Australian Government Department of Health and Aged Care’s *Nursing Supply and Demand Study* predict a critical shortfall in the nursing workforce in aged care.³⁴ The study aims to quantify supply and demand for nurses between 2023 and 2035, using data collected between 2014 and 2022. This recent study, published 03 July 2024, builds upon previous studies by the Department of Health and Aged Care and other entities, such as Health Workforce Australia.
79. According to these figures,³⁵ there are 50,232 full-time equivalent (“FTE”) nurses presently (as at 2024) in the aged care sector.³⁶ Government forecasts demonstrate demand for 55,572 FTE nurses in aged care this year. This means there is currently,

³⁴ Australian Government Department of Health and Aged Care, *Nursing Supply and Demand projections*, as at 3 July 2024, available at <https://hwd.health.gov.au/supply-and-demand/nursing-supply-demand-study.html>.

³⁵ Australian Government Department of Health and Aged Care, *Nursing Supply and Demand projections*, as at 3 July 2024. See [Nursing Supply and Demand Results](#) spreadsheet titled ‘National by sector’ at columns I, J and T, rows 91-99.

across the sector, a shortfall of 5,341 FTE nurses. That shortfall is projected to rise to 9,288 FTE nurses by 2025, and 13,342 FTE nurses by 2030.

80. These numbers further demonstrate the urgent need to attract and retain nurses in aged care. Increasing the number of RNs and ENs in aged care is critical to the sector's ability to meet 24/7 RN staffing requirements and mandatory minimum care minutes.

81. Furthermore, as the Full Bench and the Expert Panel have concluded, attraction and retention of employees in the aged care, by way of an increase in minimum wages, will assist in achieving the modern awards objective per s 134(1)(c) of the FW Act.

82. At [1039] of the *Stage 1 decision*:

“In our view, increasing minimum wages will assist in attracting and retaining employees in the aged care sector, thereby promoting social inclusion through increased workforce participation.”

83. At [171] of the *Stage 2 decision*:

“Increases to the minimum rate of pay may increase the attractiveness of the work and in doing so positively impact recruitment and retention in the aged care industry.”

84. At [211] of the *Stage 3 decision*,

“..there is material which indicates that the interim pay increase resulted in increased participation in the aged care workforce, and there is some reason to believe that this will continue if further increases are granted. Accordingly, this weighs in favour of the variations. It may also be the case that improving the capacity for the aged care sector to attract and retain staff, and thereby provide more places and services as required by the community, will support the fuller economic participation and social inclusion of some unpaid carers for whom caring responsibilities currently inhibit their own paid labour force participation.”

85. The timely finalisation of wage increases for RNs and ENs will afford certainty to the aged care sector and assist the sector to meet current and projected nurse shortages, thereby also enabling “*social inclusion through increased workforce participation*” per s 134(1)(c).

86. Conversely, the Commonwealth's funding commitment is inconsistent with recognition of the urgent need to attract and retain ENs and RNs in aged care. It risks jeopardising the sector's ability to successfully implement recent reforms in residential aged care. And, as outlined above, adoption of the Commonwealth's funding commitment would create a perverse incentive for ENs or RNs in aged care to work as PCWs.

E. Conclusion

87. The Expert Panel would therefore make orders:

- (1) to give effect to the *Stage 3 decision* by varying the *Nurses Award* in accordance with the ANMF's draft determination, subject to the revisions identified in the ANMF Submissions of 12 July 2024 arising from the *First Stage 3 phasing decision*;
- (2) for stage 3 minimum wage increases for ENs and RNs in aged care to come into operation in two tranches, on 1 January 2025 and 1 October 2025, in accordance with the methodology identified at [18] of the *First Stage 3 phasing decision*.

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9 September 2024

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Schedule 1: Comparison of PCW and EN/RN final pay increase operative dates

Classification	Current rate As at 9 September 2024 and incorporating the AWR (3.75%).	New rate In respect of PCWs, the <i>Stage 3 decision</i> at [194] and the AWR (3.75%). In respect of RNs and ENs, the ANMF Draft Determinations and the AWR (3.75%).	Percentage increase in new rate	Operative date and phasing in of the new rates				
				As at 1 January 2025 Applying, in respect of PCWs, the first tranche (50%) of the <i>Stage 3 decision</i> at [194] and the AWR (3.75%).	As at 1 July 2025 Applying, in respect of ENs and RNs, the Cth funding commitment (3%).	As at 1 October 2025 Applying, in respect of PCWs, the second tranche (50%) of the <i>Stage 3 decision</i> at [194] and the AWR (3.75%). Applying, in respect of ENs and RNs, the Cth funding commitment (a further 3%).	As at 1 October 2026 Applying, in respect of ENs and RNs, the Cth funding commitment (a further 7%)	As at 1 October 2027 Applying, in respect of ENs and RNs, the Cth funding commitment (up to a further 7%)
PCW (Level 3 – Qualified); <i>[PCW Certificate III]</i> Aged care employee – direct care – level 4	\$1,187.10	\$1,269.80 <i>(\$1,223.90 prior to AWR)</i>	6.97%	\$1,228.45 <i>(50% of the final increase)</i>	N/A	\$1,269.80 <i>(Remaining 50% of the final increase)</i>	N/A	N/A
PCW (Level 6 – Team leader) Aged care employee – direct care – level 7	\$1,316.70	\$1,422.21 <i>(\$1,370.80 prior to AWR)</i>	8.01%	\$1,369.45 <i>(50% of the final increase)</i>	N/A	\$1,422.21 <i>(Remaining 50% of the final increase)</i>	N/A	N/A
EN pay point 1	\$1,209.10	\$1,422.21 <i>(\$1,370.80 prior to AWR)</i>	17.62%	\$1,209.10 <i>Nil increase</i>	\$1,245.38 <i>(3% increase)</i>	\$1,281.65 <i>(6% increase)</i>	\$1,366.29 <i>(13% increase)</i>	\$1,422.21 <i>(17.62% increase)</i>
EN pay point 5	\$1,271.98	\$1,496.18 <i>(\$1,442.10 prior to AWR)</i>	17.63%	\$1,271.98 <i>Nil increase</i>	\$1,310.13 <i>(3% increase)</i>	\$1,348.29 <i>(6% increase)</i>	\$1,437.33 <i>(13% increase)</i>	\$1,496.18 <i>(17.63% increase)</i>
RN level 1, pay point 1	\$1,293.56	\$1,525.96 <i>(\$1,470.80 prior to AWR)</i>	17.97%	\$1,293.56 <i>Nil increase</i>	\$1,332.36 <i>(3% increase)</i>	\$1,371.17 <i>(6% increase)</i>	\$1,416.72 <i>(13% increase)</i>	\$1,525.96 <i>(17.97% increase)</i>