



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

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

AM2021/63, AM2024/11

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

**Applications by Australian Nursing and Midwifery Federation (145V)
(AM2024/11)**

Re Nurses Award 2020 [MA000034]

Melbourne

10.00 AM, THURSDAY, 19 SEPTEMBER 2024

Continued from 21/05/2024

PN1

JUSTICE HATCHER: I will take the appearances. Mr McKenna, Mr Hartley and Ms Jones, you appear for the ANMF?

PN2

MR J McKENNA: If the Commission pleases.

PN3

JUSTICE HATCHER: Mr Ward, you appear for ABI and the various child care interests?

PN4

MR N WARD: Not child care on this occasion, your Honour, aged care.

PN5

JUSTICE HATCHER: Sorry. What is the ACCP?

PN6

MR WARD: We are living in a world of - - -

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JUSTICE HATCHER: Australian Community Care something Providers.

PN8

MR WARD: Yes, Providers Association. Yes, your Honour. Thank you.

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JUSTICE HATCHER: Yes. I just thought the 'CC' was child care. Ms Eastman, you appear for the Commonwealth?

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MS K EASTMAN: Yes. Thank you.

PN11

JUSTICE HATCHER: All right. Mr McKenna, can we start off with marking the evidentiary material that you rely upon.

PN12

MR McKENNA: If it please the Commission, yes. So there are three witness statements and, as your Honour would be aware, the parties have indicated they are not required for cross-examination. They are the statements of Ms Tanya Vogt - and I think, sorry, it's starting at page 259 of the digital hearing book.

PN13

JUSTICE HATCHER: Yes.

PN14

MR McKENNA: There is a statement of Ms Vogt, the chief executive officer of the Australian Nursing and Midwifery Accreditation Council.

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JUSTICE HATCHER: What is the date of that?

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MR McKENNA: That is dated 23 April. It runs to 14 paragraphs.

PN17

JUSTICE HATCHER: All right. The statement of Tanya Vogt, dated 23 April 2024, will be marked exhibit ANMF54.

**EXHIBIT #ANMF54 STATEMENT OF TANYA VOGT DATED
23/04/2024**

PN18

MR McKENNA: If your Honour pleases, there is a further statement of Julianne Bryce, who is the senior federal professional officer of the ANMF. That commences on digital hearing book page 262 and is dated 26 April 2024.

PN19

JUSTICE HATCHER: So the further statement of Julianne Bryce, dated 26 April 2024, will be marked exhibit ANMF55.

**EXHIBIT #ANMF55 FURTHER STATEMENT OF JULIANNE
BRYCE, DATED 26/04/2024**

PN20

MR McKENNA: Your Honour, there is also a further statement of Heila Brooks, commencing on digital hearing book page 264. Ms Brooks is the care manager at a residential care facility in Wangaratta. That statement is dated 22 April 2024. It runs to 15 paragraphs.

PN21

JUSTICE HATCHER: The further statement of Heila Brooks, dated 22 April 2024, will be marked ANMF56.

**EXHIBIT #ANMF56 FURTHER STATEMENT OF HEILA BROOKS
DATED 22/04/2024**

PN22

Is that all the new evidentiary material that is relied upon?

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MR McKENNA: Yes.

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JUSTICE HATCHER: Yes. All right. I can indicate we have read the various submissions, so do you want to proceed, Mr McKenna?

PN25

MR McKENNA: If your Honour pleases. Just by way of clarification, the three primary sets of submissions that are relied upon for the purpose of this hearing are the submissions of 26 April 2024, commencing at digital hearing book 49. Those submissions primarily deal with the issues of classification rates of pay and

operative dates phasing in. There are some other matters that are dealt with in those submissions that will fall away by reason of subsequent decisions of the Commission.

PN26

There is one matter which I will turn to in due course and that is the issue of standard rate that is dealt with in those submissions. That has been dealt with, with respect to the Aged Care Award, but not yet with respect to the Nurses Award, so I'll say something briefly about that. There is also the submissions of 10 May 2024 which were filed in reply to the Commonwealth's submissions on operative date and phasing in. Those, I understand, are available to the Expert Panel.

PN27

There is also the most recent reply submissions of 9 September 2024, commencing at digital hearing book 329. Those submissions identify the material that is relied upon by the ANMF for the purpose of this hearing. That of course includes the three witness statements which have now been marked. If it assists, the material relied upon is set out at paragraph 12 of those submissions, on digital hearing book 331.

PN28

A draft determination of the Nurses Award has been filed. That does deal with matters such as the rates of pay and so forth for AINs which have now fallen away by reason of decisions of the Expert Panel. If it is of any assistance to the Expert Panel, the federation can provide an updated version of that, but at first glance it seems that it's reasonably clear which issues have been dealt with and which issues remain to be addressed.

PN29

There is also an Excel spreadsheet that has been filed. That shows the calculations that feed into the various relativities and rates that were used to populate the Nurses Award draft determination. That is at digital hearing book 267. The figures in that spreadsheet predate the increase by reason of the annual wage review, so there are some changes to those figures, but it otherwise is intended to provide some clarity about where rates of pay and relativities have come from.

PN30

JUSTICE HATCHER: Mr McKenna, in respect of the classification structure of the Nurses Award is there any material or guidance that you can take us to which indicates, in respect of registered nurses, which of these classifications are relevant to aged care? I assume that RN1 is relevant, but as we go up the hierarchy do these classifications have relevance to aged care such that we need to consider it in this aspect of the proceedings?

PN31

MR McKENNA: Your Honour, as to the question as to specific evidence dealing with that point, I don't believe that I'm in a position to take the Expert Panel to that, but we do say that they are relevant. Levels 2, 3, 4 and 5 for aged care registered nurses are levels to which a registered nurse would be appointed. In an

aged care facility, for example, a registered nurse may be appointed to a position that is at level 2, level 3, level 4 or level 5, so we do say that they are relevant for the purpose of the aged care application proceeding.

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JUSTICE HATCHER: For example, if you go to the top classification, registered nurse level 5, I find it difficult to understand how that would have application to aged care.

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MR McKENNA: I suspect I'm a little behind you, but I think that level 5 is in respect of a director of nursing position.

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JUSTICE HATCHER: Yes.

PN35

MR McKENNA: To that point, your Honour has just marked the witness statement of Heila Brooks.

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JUSTICE HATCHER: Yes.

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MR McKENNA: She describes her role as being akin to a director of nursing role, so, in our submission, she would be a level 5 aged care employee.

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JUSTICE HATCHER: All right. What about nurse practitioner?

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MR McKENNA: There has been evidence from a Mr Voogt - Stephen Voogt - and another nurse practitioner, Hayden Brooker(?) They were part of the stage 1 evidence, they are nurse practitioners. So, yes, your Honour, those classifications are relevant to the aged care proceeding.

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JUSTICE HATCHER: Would there be any dispute that a large majority of nurses in aged care would be at the RN1 classification?

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MR McKENNA: If I can approach your Honour's question this way: the federation's case is that aged care registered nurses are not confined to level 1.

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JUSTICE HATCHER: I understand.

PN43

MR McKENNA: It may well be that a large number of them are employed at level 1 and we say that is one of the reasons why the incremental progression within level 1 is important, but it is not the federation's case that that is the only level that is applicable to aged care registered nurses.

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JUSTICE HATCHER: Thank you. While we're in the phase of asking and answering questions - - -

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MR McKENNA: I anticipated there might be some of that this morning.

PN46

JUSTICE HATCHER: - - - is there any circumstance in which a nurse who has completed their undergraduate degree might be working in aged care, or anywhere in health care for that matter, prior to full registration?

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MR McKENNA: My instructing solicitor will correct me if I'm wrong on this, but I understand that the completion of an undergraduate degree is one of the preconditions to registration. Additional steps need to be take and the Nursing and Midwifery Board of Australia needs to be satisfied of matters other than the completion of an undergraduate degree. So it is at least hypothetically possible that a student may complete their undergraduate nursing degree and continue to work in aged care prior to then being registered as a registered nurse.

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JUSTICE HATCHER: But the additional requirements relate to things like criminal checks and English language proficiency. There is no requirement after the completion of the degree to undertake some further - - -

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MR McKENNA: No.

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JUSTICE HATCHER: - - - practical experience or on-the-job experience.

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MR McKENNA: That's absolutely correct. The degree itself - and there is evidence of this, and I'll return to it - involves, I think, 800 hours of practical placement and the degrees - and this the evidence of Ms Vogt, to be accredited as a degree that would lead to registration, the degree must equip the student to be fully competent to practise as a registered nurse.

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JUSTICE HATCHER: Yes. All right. Thank you.

PN53

DEPUTY PRESIDENT O'NEILL: Just on that, can I just ask a follow-up question. If there was such a person - so three-year degree qualified person who was not yet registered - what classification would you say that they fall within under the Nurses Award?

PN54

MR McKENNA: Well, if they were an employee who was progressing from being an enrolled nurse, otherwise they would be - there is a student nurse - might

I just take some instructions? Deputy President, I think the answer to that question is at present under the Nurses Award as it stands they would be an ARN. From 1 January their employment would transfer across to the Aged Care Award. This is assuming it's a residential facility - I think that was where the question was directed - and they would fall within the relevant classification of direct care/personal care worker.

PN55

DEPUTY PRESIDENT O'NEILL: Thank you.

PN56

JUSTICE HATCHER: If the Nursing and Midwifery Board has a capacity for provisional registration, that's for people returning to the profession after a break, is it?

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MR McKENNA: In some circumstances conditions may be placed upon registration. So, for example, if a nurse is found to have undertaken unsatisfactory conduct, then AHPRA might impose a condition on their registration that they be supervised. That is not the standard course and that arises really in exceptional circumstances.

PN58

Return to practice, yes, your Honour is quite right, there is a form of provisional registration involving overseas practitioners and practitioners who have been out of the profession for some time, and going through the return to practice process.

PN59

JUSTICE HATCHER: Thank you.

PN60

VICE PRESIDENT ASBURY: Can I just ask, with the three-year degree and the four-year degree, am I correct in understanding that you can do the three-year nursing degree qualification with another degree?

PN61

MR McKENNA: Yes.

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VICE PRESIDENT ASBURY: So when you finish that course - be it three and a half years or three years - you have got the nursing qualification and the 800 hours of on-the-job training?

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MR McKENNA: That's so. As I understand, the 800 hours is a condition of - it is a mandatory condition of a course that is accredited to meet the Nursing and Midwifery Board requirements. The evidence before the Expert Panel is that the vast majority of undergraduate nursing degrees are three-year degrees. I think the two witnesses identify each two exceptions to that. The evidence of Ms Vogt is that if it's done in longer than three years, it's really just spacing it out, but, Vice

President, I think you might also be referring to the fact that there is a capacity for double degrees.

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VICE PRESIDENT ASBURY: Yes.

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MR McKENNA: Which might involve multiple qualifications, multiple degrees, done over a longer period, but that would still have the minimum requirements to meet the accreditation for the purposes of AN-ACC and the Nursing and Midwifery Board of Australia.

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VICE PRESIDENT ASBURY: So whether it's a three and a half, three-year or a four-year period of study, out of that they emerge with a nursing degree - - -

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MR McKENNA: Yes.

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VICE PRESIDENT ASBURY: - - - and the requisite period of practical training to achieve accreditation?

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MR McKENNA: Yes, that's so, in accordance with accreditation standards and it must be satisfied that the program study equips the student to be able to practise as a nurse, and in an unsupervised way.

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VICE PRESIDENT ASBURY: Okay. Thank you.

PN71

MR McKENNA: I will return to these matters, if it please the Expert Panel, unless that is deemed not necessary at the appropriate time. With respect to the submissions today, I will be addressing the Expert Panel on the issues of classifications and rates of pay. Mr Hartley will address the Expert Panel on operative date and phasing in.

PN72

I have taken the Expert Panel to the submissions that have been filed, but the federation has filed extensive written submissions. I don't propose to rehearse all of those submissions, but rather perhaps highlight what we identify to be the key points, but of course if there are matters of particular interest of concern or, conversely, matters about which the Expert Panel does not wish to be troubled, we are of course in the Expert Panel's hands.

PN73

Within the broader topic of classification and rates of pay, there are three more specific topics. The first of those is what has been identified as the RN issue and to adopt the language from the orders of 4 April, that issue is:

PN74

Whether the registered nurse level 1, year 1 benchmark minimum rate of pay (aligned with classification C1(a) in the C10 Metals Framework) should apply to a registered nurse holding a three-year or a four-year university degree.

PN75

That of course arises from paragraph 204 of the stage 3 decision. Secondly, there is the EN issue and, again, adopting the language of 4 April it involves a question of:

PN76

Which enrolled nurse classification should correspond to the new Level 6 – Team Leader direct care employee classification in the Aged Care Award 2010.

PN77

That arises out of paragraph 205 of the stage 3 decision. Then there is a minimum rate increments and relativities issue which has been described in the orders of 4 April to include:

PN78

What the minimum rate increments within each classification of registered and enrolled nurses, and the relativities between those classifications, should be.

PN79

As indicated, there is a small additional topic which I'll address relating to the standard rate in the Nurses Award. If I can commence with the RN issue, it's dealt in the written submissions of the ANMF - the 26 April submissions - at Part B, paragraphs 14 and following, that is digital hearing book 53, and in the reply submissions of 9 September 2024 at Part C.1, paragraph 37, digital hearing book 341.

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It is the applicant's position that the proper application of the C10 would involve the alignment of C1(a) of the Metals Framework with an RN level 1, pay point 1, being a registered nurse with a three-year degree. That is now a consent position as between the federation and the joint employers. There has been much authority on the proper application of the C10 in recent times and I refer to the Pharmacy decision, the Teachers decision, of course the stage 1 decision and again the stage 3 decision. Those authorities each recognise a failure to complete the implementation of the C10 alignment process as it relates to degree-qualified workers.

PN81

Having regard to that, the Expert Panel in the stage 3 decision at paragraph 131, looking at the development of the classification structure under the Nurses Award, the historical basis for it, identified that:

PN82

By 1993-4, after the restructuring of the tertiary education sector, the entry-level qualification for a RN had become a three-year bachelor's degree from a university or a postgraduate nursing qualification. The C10 Metals

Framework Alignment Approach, if applied to federal nursing awards, should on a prima facie basis have resulted in an alignment with the C1 rates in the Metal Industry Award. However, this was never considered.

PN83

At paragraph 204 of the stage 3 decision, the Expert Panel proposed an alignment of the C1(a) rate with the RN with a four-year degree, that being referable to a rate at that time of \$1470.80 per week and on our maths following the annual wage review would now be \$1526. Practically, the applicant's proposal would involve the alignment of C1(a) with a three-year degree and the removal of the four-year degree classification from the Nurses Award where that classification on the evidence has very little work to do, and is essentially a historical anomaly.

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JUSTICE HATCHER: Sorry, do we know when that was added and why?

PN85

MR McKENNA: It was added, from memory, during the award modernisation process. As to why or where it came from, I think that is a mystery. With respect to the three-year nursing degree, I have addressed this to some extent already so I will attempt to be brief. In order to be registered as a registered nurse, a person must have successfully completed a program of study that is accredited by ANMAC, the Australian Nursing and Midwifery Accreditation Council, and approved by the Nursing and Midwifery Board of Australia.

PN86

There are of course requirements. ANMAC imposes requirements on the program of study. It must be delivered at AQF level 7. That is, it must be an undergraduate bachelors degree. The evidence from Ms Vogt is that the accredited course requirements do not differ as between the a three-year and four-year degree, and the delivery of a bachelor of nursing over four years simply has the effect that the program is less intense.

PN87

As I indicated earlier, both Ms Vogt and Ms Bryce give evidence about the landscape of undergraduate nursing degrees available and identify that the vast majority of those undergraduate degrees are three-year degrees, with the exception of double degrees and some other anomalies where it is - I think there is one that is marginally shorter than three-year where it is done on a trimester basis and one or perhaps two that are marginally longer on the basis that it is spread out. From a practical perspective, Ms Brooks, who is the care manager of the facility at Wangaratta, her evidence is that in her experience there is really no different. She is not aware of any difference in practical application of a nurse with a three or four-year degree.

PN88

The RN accreditation standards also ensure that the degree prepares a student for safe and ethical practice in accordance with the RN standards of practice. There is a minimum of 800 hours of professional experience placement and in accordance with the RN standards of practice a person who is registered as a registered nurse

is responsible and accountable for ensuring that they are safe, and have the capability for practice.

PN89

Coming back to where I began, the proper application of the Metals Framework completing what was not previously completed with respect to degree-qualified nurses, proper application of that is that a three-year degree-qualified registered nurse level 1, pay point 1, would be aligned with the C1(a) rate. Of course that then includes an assumption that an aged care registered nurse has - the work of an aged care registered nurse has the same work value as a metal industry employee with the same qualification. As this Expert Panel would be aware, there is a body of authority, including from this Expert Panel, as to why that is not a safe assumption.

PN90

The ACT Aged Care decision considered a submission that a child care worker might have a rate which is lower than a comparable employee under the metals industry framework and the Full Bench there held that, if anything, the nature of the work performed by child care workers and the conditions under which that work is performed suggests that they should be paid more and not less than their Metal Industry Award counterparts.

PN91

In my respectful submission, that same reasoning could be adopted here and would be adopted here particularly having regard to the evidence that the Commission has heard of the work value of nurses and the invisible skills that they exercise, such that that suggests that aged care nurses should be paid more and not less than their Metal Industry Award counterparts with the same qualification. If it please the Expert Panel, those are the submissions that are in issue, unless there are any questions.

PN92

DEPUTY PRESIDENT O'NEILL: Just one from me. I think Ms Vogt's evidence speaks of an accelerated two-year program for enrolled nurse.

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MR McKENNA: Graduates.

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DEPUTY PRESIDENT O'NEILL: Well, for enrolled nurse was as I understood it. It's not clear whether that's an exercise and recognition of prior learning or if it is a shorter degree.

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MR McKENNA: My understanding is it is in respect of a recognition of prior learning.

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DEPUTY PRESIDENT O'NEILL: It's mentioned in paragraph 13 of the witness statement of 23 April. It is, it's a bit unclear. There is a reference to a two-year masters program for some candidates with an associated first degree.

PN97

MR McKENNA: Yes.

PN98

DEPUTY PRESIDENT O'NEILL: Or as an accelerated two-year program, so I wasn't sure if that was a reference to a masters or a two-year accelerated program to the undergraduate degree.

PN99

MR McKENNA: That is subject to the qualification that there are two-year masters degree programs that have been accredited by ANMAC for candidates already holding an associated first degree or as an accelerated two-year program for persons already registered as enrolled nurses. My understanding is that that is a reference to recognition of prior learning.

PN100

Might I just get some instructions. Yes, my instructions confirm that that is the case; the accelerated two-year program involves a recognition of prior learning of the EN, presumably obtained through the diploma that an EN must have.

PN101

DEPUTY PRESIDENT O'NEILL: That was the related question. Is it the case that enrolled nurses - the required qualification is a diploma level in all instances?

PN102

MR McKENNA: In all instances, it is now. That is the position as this panel would be aware from the detailed analysis of the history of the Nurses Award. That is a position that was not always the case, but it has been for some time that the minimum qualification for an enrolled nurse is a diploma in nursing.

PN103

DEPUTY PRESIDENT O'NEILL: Thank you.

PN104

MR McKENNA: Moving then to the EN issue, this is addressed in the submissions of 26 April at Part C, paragraph 35 and following of the digital hearing book 59, and of the reply submissions of 9 September at - - -

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JUSTICE HATCHER: Sorry, what was the first page number?

PN106

MR McKENNA: Sorry, yes, digital hearing book 59.

PN107

JUSTICE HATCHER: Fifty-nine.

PN108

MR McKENNA: And in the reply submissions at Part C.2 from paragraph 38 and following, that's digital hearing book 341. It is the ANMF's position that an enrolled nurse pay point 1 would be aligned with the level 6 team leader direct

care employee classification under the Aged Care Award. That arises from the statement of the Expert Panel at paragraph 205 of stage 3 that:

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We also consider, having regard to the work value reasons identified in the Stage 1 decision and this decision, that the rate for an EN in aged care who has responsibility for

PN110

supervising other PCWs should be set at the same rate which we propose for a Level 6 direct care employee (Team Leader) with supervisory responsibilities, namely \$1370.80 per week.

PN111

There are possibly a number of ways of reading that statement. The consent position as between the ANMF and the joint employers is that the classification of enrolled nurse pay point 1 would be aligned with the classification under the Aged Care Award of level 6 team leader. It is the applicant's submission that the better reading of that paragraph is to that effect, but even if one were to take the contrary view, there is an abundance of evidence in support of aged care enrolled nurses exercising supervisory responsibilities.

PN112

I won't take the Expert Panel to those. They are set out in the 26 April submissions, at least some of them, at paragraph 41 and following. There is particular evidence from Ms Brooks saying that enrolled nurses in aged care provide guidance and supervision to PCWs as a central role, and as a function of the scope of their education - - -

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JUSTICE HATCHER: An enrolled nurse pay point 1 is, by definition, somewhere in the first year of their work as an enrolled nurse.

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MR McKENNA: It is.

PN115

JUSTICE HATCHER: Is it likely that a person in their first year would be supervising a team of PCWs in an aged care facility?

PN116

MR McKENNA: That is a component of their training and that is a component of the standards for practice. The standards for practice provide that an enrolled nurse -

PN117

provides support and supervision to assistants in nursing (however titled) and to others providing care, such as EN students, to ensure care is provided as outlined within the plan of care and according to institutional policies, protocols and guidelines.

PN118

So in answer to your question, your Honour, yes, it is envisaged that an enrolled nurse will commence practice, being capable, and that appears to be consistent with the evidence before the Expert Panel.

PN119

JUSTICE HATCHER: All right. So if team leaders under the Aged Care Award will not receive incremental pay adjustments, why would an enrolled nurse in aged care which we've equated at the same work value receive incremental adjustments?

PN120

MR McKENNA: Because, your Honour, the level 6 team leader role involves a person with a certificate IV and an enrolled nurse will enter her or his career with a higher classification, being the diploma degree, and is a registered health professional. So through their career they will - and the evidence supports this - gain experience from which will flow higher work value.

PN121

I will come to deal with this issue in more detail addressing classifications, but our position is that there is increase in work value for enrolled nurses that is not recognised otherwise than the incremental increases - the annual incremental increases. In fact there really is no - well, there certainly wasn't a proposal before the Expert Panel and the evidence, including again of Ms Brooks, is that she is not aware of any other way of differentiating between - well, within levels of registered nurse and, flowing from that, within the enrolled nurse progression.

PN122

JUSTICE HATCHER: So how does one progress the pay points for enrolled nurse?

PN123

MR McKENNA: Predominantly through a passage of time, your Honour. That's accepted. There is an annual increment as between pay point 1 and pay point 2, pay point 3 through to pay point 5.

PN124

JUSTICE HATCHER: All right.

PN125

MR McKENNA: Before I leave this point, your Honour, the Expert Panel would be aware that there have been references through the materials to attempts as between the joint employers and the ANMF to consider the possible insertion of some words in either the Aged Care Award, the Nurses Award, to reflect the fact that enrolled nurses provide supervision to direct care employees under the Aged Care Award.

PN126

That's something that is of course expressly identified or reflected in the Aged Care Award and the classification that will commence. Regrettably, there hasn't

been an agreed position reached between the joint employers and ANMF on that topic. If necessary, I might return to address that in reply.

PN127

JUSTICE HATCHER: Is there any evidence that enrolled nurses - I'll step back. Our earlier decision aligns an enrolled nurse performing supervisory duties in aged care with a team leader level 6 under the new structure.

PN128

MR McKENNA: Yes.

PN129

JUSTICE HATCHER: Is there any evidence that enrolled nurses in aged care do not perform supervisory duties? That is, do some other role other than the role we had set the rate for?

PN130

MR McKENNA: Absolutely do. Absolutely do, and there is an abundance of evidence of them performing work involving applying their skills - their clinical skills - for matters such as wound care, administration or assisting in the administration of medication. There is a wide variety of tasks that an enrolled nurse can do and is trained and qualified to do that a direct care personal care worker does not and cannot.

PN131

JUSTICE HATCHER: Sorry, but are there enrolled nurses who are doing those functions in aged care but do not have a supervisory responsibility?

PN132

MR McKENNA: I certainly can't exclude the possibility that that is the case. There are enrolled nurses who are not performing supervisory responsibilities, but in those circumstances we would identify the fact that they are - they have a higher qualification than any direct care employee under the Aged Care Award and they are exercising additional skills and functions.

PN133

JUSTICE HATCHER: But given that we have identified a benchmark rate for an enrolled nurse in aged care performing supervisory duties with respect to other PCWs, wouldn't it prima facie be the case that if there are enrolled nurses who do enrolled nurse work but don't supervise, they should get a lower rate?

PN134

MR McKENNA: No, with respect, your Honour, because, as I say, they are - leaving aside the issue of supervision, having regard to the relativity as between a personal care worker, an aged care direct care worker, who has a certificate IV qualification and an enrolled nurse who has a diploma qualification and is registered as an enrolled nurse, there is a higher level of work value that attaches to the EN role even leaving to one side the supervisory element.

PN135

JUSTICE HATCHER: Thank you.

PN136

MR McKENNA: As Mr Hartley reminds me, consistent with their scope of practice identified in the Nursing and Midwifery Board standards for practice for enrolled nurses, it is within their scope of practice to supervise. I've taken the Expert Panel already to indicator 3.8 of those standards and there is an abundance of evidence of course before this Expert Panel of registered nurses relying on enrolled nurses to implement the care plan.

PN137

Could I move then to the issue of minimum rates increments and relativities. This something obviously that has been touched upon. It's dealt with in the 26 April submissions at Part D, paragraphs 51 and following, digital hearing book 63, and in the 9 September reply submissions at Part C.3, paragraphs 39 and following, digital hearing book 341.

PN138

The position advanced by the federation, as I've indicated, is that an enrolled - sorry, I'll start with the registered nurse, level 1, pay point 1; would be aligned with the C1(a) and from that point all relativities for other levels of registered nurse and nurse practitioners, and the increments within those levels, would be retained. With respect to enrolled nurses, the position is that a pay point 1 registered nurse would be aligned with a team leader level 6 aged care classification and then again the five pay points of enrolled nurse, the relativities therein, would be retained.

PN139

That involves a very minor adjustment to the current classification relativities. On our maths there is a change of about 0.3 per cent as between an EN level 5 and a registered nurse level 1, pay point 1. I think the submission suggested it's about \$5 difference on the current proposal as on the existing structure. So, the position for the federation is that rates should be increased, but essentially relativities should be retained and we propose no other variations to the classification structure.

PN140

JUSTICE HATCHER: So on one view that approach might be characterised as having the best of both worlds. That is, you want to keep the existing pay increment structure which has its origins in a public sector-type pay system, but at the same time take the benefit of the C1 rate in the Metals Framework which never contemplated annual increments of the type that you're now promoting. What do you say about that?

PN141

MR McKENNA: Well, as to the second point, I guess on a simple reading of the Metals Framework approach described in the ACT Child Care decision, step 3 would be retaining existing relativities, which is what we are seeking. In respect of the historical basis for the increments within the Nurses Award, I'll come to that in a moment.

PN142

Our position is that perhaps in contradistinction to other awards in other industries, within the Nurses Award and the nursing industry there is a historical basis, an historical recognition, of the work value of the incremental increases for enrolled nurses and registered nurses such that this would present a distinction and, indeed, a history that arises out of the private sector as well as the public sector.

PN143

Where the classification structure is now is it does include annual increments and our submission is that is an important aspect of it, but it is one aspect of it. The progression in order to be an enrolled nurse requires both registration and the completion of a diploma. Progression from enrolled nurse to registered nurse again requires additional professional qualifications and registration, as does progression to the nurse practitioner role.

PN144

Within the registered nurse classification there are five levels. Progression from level 1 to level 2 to level 3 to level 4 to level 5 is on appointment, it does not involve the passage of time. Within levels 4 and 5, rather than there being pay points there are grades and progression through those grades is not dependent upon the passage of time; it's an appointment issue. The current structure is a hybrid of professional qualifications, appointment and annual increment.

PN145

The historical basis for it - and I refer in particular to the comments of this Expert Panel in the stage 3 decision at paragraph 130, and the reference there to the 1992 review by the Commission Full Bench who, after receiving extensive evidence -

PN146

set nationally-uniform rates for ENs. The rates set, applicable to each of years 1-5 of service, had a relativity range of 91-99 per cent of the entry rate for a diploma-qualified RN.

PN147

Annual increments here for enrolled nurses is an issue that arose out of - or at least following the receipt of extensive evidence. The connection between the incremental levels for both enrolled nurses and registered nurses was expressly recognised in the Paid Rates Review decision of 1998 where the Full Bench considered the classification structures of two awards and one of which was the South Australian Private Sector Award, so you're not limited to public sector, and recognised that the annual increments formed parts of the work value assessment for the rates of pay.

PN148

That finding was essentially challenged. Flowing from that decision, there was a draft order proposed by the parties that provided for a classification structure with annual increments. That was rejected on first instance by a single Commissioner. It went on appeal in the South Australian progression determination appeal, wherein the Full Bench upheld the entitlement - or the existence of annual increments within the classification structure.

PN149

The existence of increments is something that has been considered and tested by previous industrial tribunals. It is the result of a very lengthy and detailed industrial history.

PN150

JUSTICE HATCHER: Mr McKenna, I just want to ask you a multi-part question, so I hope you follow this. There is an issue of course about what the transition of the pay rate should be and as part of that you seek an initial increase effective from 1 January in alignment with what happened in the Aged Care and SCHADS Award.

PN151

Earlier in these proceedings we had an anticipation that the private hospital employers were going to show up to this case and engage in extensive argument about some of the bigger issues concerning the award as a whole, but then silently disappeared from the case at some stage without telling anybody.

PN152

I am just wondering whether it is possible that we could approach the matter on this basis: that we award an initial increase of whatever amount from whatever date first, which would just be an increase on the existing structure, but then reserve the bigger issues about the future of the structure in light of a C1 alignment as part of a wide award proceedings involving all the parties, including the private hospital employers.

PN153

MR McKENNA: Sorry, I lost briefly the last - would your Honour mind just repeating which part would be reserved.

PN154

JUSTICE HATCHER: Yes. All right. So one possibility might be that we would simply award a first stage increase on the existing classification structure from an identified date, and let's say we've adopted your date of 1 January, but we do that without prejudices to the issues with the classification structure.

PN155

We would then, in the context of the wide proceedings involving your application presumably sometime next year, deal with these bigger issues about the classification structure, the increments and the implications of the alignment with C1 in the context of the award as a whole and involving the private hospital employers.

PN156

MR McKENNA: I will need to take instructions on that. My initial response, without instructions, is that all parties have been given the opportunity to address those very issues here today. We have filed material to address those issues and, as I say, my initial response would be to urge the Commission to finally determine those issues in the current proceeding, but, as I say, that would need to be the subject of instructions and it might be something that probably needs a few minutes to get those instructions, so if I might come back to that.

PN157

JUSTICE HATCHER: All right. While you're doing that, just remind me, what is the anticipated timing of your larger case?

PN158

MR McKENNA: That is a good question, your Honour.

PN159

JUSTICE HATCHER: No doubt you have been beavering away all this time at the evidence, have you?

PN160

MR McKENNA: Your Honour, in part. Today is listed in the board of nurses and midwives under that proceeding number. As I understand it, the progression of the broader application to some extent is continued on what is happening in this. Your Honour would also be aware orders were made by your Honour for the ANMF to serve on parties a without prejudice document identifying classification structure and pay rates. The purpose of that was to attempt to narrow issues as between the ANMF and particularly probably the private hospitals.

PN161

There has been a body of without prejudice discussion about that which I can't and won't go into, save to say that the federation has not yet received a substantive response to that, and to some extent the progression of our case, it would seem to be - there is potential for wasted resources if we were to be running off putting a case that ultimately is not in issue.

PN162

That's probably a very long-winded way, your Honour, of saying it is progressing. Steps have been taken, but if your Honour were to turn around and say, 'Let's hear this before Christmas', that certainly would not be possible. We had previously estimated about six months to prepare material and that time frame has not contracted in any meaningful way.

PN163

JUSTICE HATCHER: Thank you.

PN164

MR McKENNA: Your Honour, just so that we're crystal clear as to your Honour's proposal and the matter about which - - -

PN165

JUSTICE HATCHER: It's not a proposal, it's just a question.

PN166

MR McKENNA: Yes, of course, the matter that has been raised. So that I can get instructions, I take it your Honour is not suggesting that there would be any delay in - that course would not cause any delay in increases flowing to aged care, but it might be that down the track there is, subject to what might happen in a broader proceedings, more fundamental changes to the classification structure?

PN167

JUSTICE HATCHER: Yes, that's right. So there would at least be a first part increase as part of the transition which could just be applied on a without prejudice basis to the existing structure and let's say we adopt your date of 1 January, some flat amount - let's say, for argument's sake, 3 per cent. Then, as part of the bigger proceedings, we would address these more fundamental questions about the structure in the context of the wider proceedings.

PN168

MR McKENNA: Sorry to labour this, but our proposal of course is essentially half the increase on 1 January, half the increase on 1 October. Assuming that these other issues are not resolved by 1 October, is it anticipated - or under this hypothetical scenario would the increases flow in full notwithstanding that there might be some further consideration of classification structures?

PN169

JUSTICE HATCHER: I haven't thought that far ahead, Mr McKenna. I mean, the problem is you can't work out a transition until you know what the end point is going to be.

PN170

MR McKENNA: No. Of course. I don't mean to be obtuse either, I just wanted to make sure that I can come back with instructions that are actually helpful for the Expert Panel. I guess at the heart of it is I can say with confidence that if what is being discussed would result in any delay in pay increases flowing to aged care workers, it would be opposed.

PN171

JUSTICE HATCHER: Thank you. Just remind me - I'm not sure if the numbers are in the materials somewhere - for an RN1 the increase that you would propose from 1 January is what in percentage terms?

PN172

MR McKENNA: That would be in the Excel document. What we are proposing is as at 1 October there would be parity between the RN level 1, pay point 1, and the classification under the Teachers Award. I think it is - roughly 9 per cent at 1 January.

PN173

JUSTICE HATCHER: Then a further 9 per cent in October?

PN174

MR McKENNA: Yes.

PN175

JUSTICE HATCHER: Thank you.

PN176

MR McKENNA: The next point I wish to address, hopefully briefly, is the existence of evidence of work value increasing with experience. Evidence is identified in the ANMF reply submissions of 9 September at paragraph 46 and

following; that's page 434 of the digital hearing book. Essentially the proposition we take from that is that for enrolled nurses and registered nurses, all other things being equal, their work value will increase with the passage of time.

PN177

We also rely upon the report of Dr Junor and what she says about - particularly her definition of 'skill level' which draws upon - I'll read it. The skill level is defined upon -

PN178

one of the five levels in the Spotlight framework, based on work process knowledge that applies and builds on prior qualifications or life and work experience, through stages of learning - and practice-based development of proficiency and expertise.

PN179

It is submitted there is a consistent theme through the evidence of increase in work value with experience. It's accepted that that doesn't delve into the minutiae of detail of the particular annual progression rates, but that evidence is there and it's submitted that there is certainly no alternative mechanism that has been proposed to address that. There is some evidence put forward by Ms Brooks, care manager of a facility in Wangaratta, and she says that she -

PN180

is unaware of any objective mechanism which functions, or could function, as an alternative to experience, by which the attainment of increased skill and experience can be recognised.

PN181

She also goes on to identify that for some registered nurses there is no - a registered nurse may choose for their own reasons to remain classified at level 1 and they might be so for an extended period of time, in which case their increased work value arising from experience would be reflected by the annual progression at pay points.

PN182

There are other circumstances where there is simply no opportunity for registered nurses to progress to high levels because of the staffing arrangements with their employer. There might simply be no level 2, level 3, level 4 positions to which they could be appointed. In those circumstances their work value will increase with experience and the only way in which that is recognised is by progression through pay points with the passage of time.

PN183

Submissions have been made by the joint employers with respect to onus and in fact, as I understand it, suggested that consistent with the Teachers Award and in reliance of the teachers case, a party who wishes to retain annual increments in a classification structure bears an onus of establishing that that is appropriate.

PN184

To the extent that the ANMF seek increases to minimum awards rates, the Expert Panel must be satisfied that those increases are necessary to achieve the modern award objective and justified by work value reasons. The Expert Panel has made findings, or preliminary findings, about the modern awards objective at paragraph - I think it's 209 -and following the Stage 3 decision. In our submission, those findings can, and would, be applied to the rate increases proposed by the ANMF in accordance with the existing classification structure.

PN185

In addition to the matters considered there, it is submitted that retention of the existing classification structure also draws support from subsection 134(1)(g) of the modern awards objective, which reads, to include the chapeau, that:

PN186

The Commission must ensure modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account...

PN187

for the purpose of (1)(g):

PN188

...the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia.

PN189

It is submitted that the proposal, as it involves annual increments as an element of the structure, is fair, given that that is the only way in which career progression, or rate progression, is available within levels 1, 2 and 3 for registered nurses and for the enrolled nurse classifications.

PN190

JUSTICE HATCHER: Well, there has to be a safety net of minimum rates, and part of the problem here is that these increments ultimately can be traced back to paid rates awards in the public sector.

PN191

MR McKENNA: They can be traced back to paid rates awards, but, of course, the paid rates review decision dealt with that issue, dealt with the conversion of a paid rates to a minimum rates award, and it was in that specific context that those findings were made about incremental salary levels reflecting work value.

PN192

As to the fairness consideration arising from the chapeau of the modern awards objective, it's submitted that objective is also met by the current structure where it allows for the recognition of the increased work value, including the development of invisible skills, which will increase with experience, and it's relevant having regard to that same increase in work value accompanying the increased experience of ENs and RNs which might not otherwise be recognised.

PN193

As to the reference to a 'simple, easy to understand, stable and sustainable modern award', what the federation is proposing is essentially the status quo. This Expert Panel, in the Stage 3 decision, made some comments about what classification descriptors should and shouldn't do. To paraphrase that very briefly, essentially, classification descriptors, the work that they do is to identify to whom minimum rates would be payable. The existing classification structure does that and does that well. There is no evidence before the Expert Panel of difficulties in determining which employees are entitled to which rates, and this matter having been on foot for three and a-half years, you would expect that if that evidence did exist, it might be before the Expert Panel.

PN194

In terms of stable and easy to understand, I would make the same submission. What the applicant seeks is the status quo. The ANMF does not otherwise seek a variation to the classification structure and so, to that end, the modern awards objective has no work to do. We are not asking for a change such that the Expert Panel must be satisfied that that change is necessary to meet the modern awards objective.

PN195

If another party comes to the Commission and does seek that, or indeed if another structure is proposed, the Expert Panel may only make that variation if satisfied that it's necessary to achieve the modern awards objective and, in our respectful submission, the Expert Panel wouldn't be so satisfied for the reasons that I have mentioned.

PN196

The final submission that I would make in respect of the classification structure and increments would be just to say something briefly about the teachers case and as to why that decision is distinguishable from what is presently before the Expert Panel.

PN197

As I understand the classification structure in the EST, in the Educational Services (Teachers) Award, prior to that decision, it involved 12 classification levels, progression through which was only by reason of the passage of time. Now I think, as a matter of practicality, the first three of those weren't used because entry level was at level 4, but still, what faced the Full Bench in the teachers case was a classification structure that is vastly different to what arises under the Nurses Award.

PN198

The revised structure that was adopted in the teachers case was said to be one that was anchored upon the professional career standards established by the Australian Professional Standards for Teachers and tied to teacher registration where applicable and, in my submission, a similar statement can be made about the existing classification structure under the Nurses Award. It is tied, it is anchored to the professional career standards established by the Nurses and Midwifery Board of Australia, in addition to which there is also levels to which an employee may be appointed which are not in any way dependent upon the passage of time.

PN199

Ultimately, where the Full Bench landed in the teachers case was a hybrid between a classification structure based purely on career standards, professional career standards, and one with the passage of time, such that there was a classification for a graduate teacher, and then a proficient teacher with time-based progression within that classification, and then a final classification for a highly accomplished or lead teacher.

PN200

JUSTICE HATCHER: Mr McKenna, in respect of registered nurse level 4 and level 5, as you pointed out, they are not based on pay points but grades.

PN201

MR McKENNA: Yes.

PN202

JUSTICE HATCHER: I can't see any explanation as to how you progress between grades or what grade covers what.

PN203

MR McKENNA: Yes, I'm sorry, your Honour, it is addressed - if you'll forgive me for a moment.

PN204

MR WARD: A.5.4(c)

PN205

MR McKENNA: So schedule A.5.4(c).

PN206

MR WARD: 5.4(c).

PN207

MR McKENNA: Yes. Thank you, Mr Ward:

PN208

Appointment to a particular grade at this level will depend upon the level of complexity associated with the duties described in clause A.5.4. In this connection, the number of beds in a facility will be a relevant consideration.

PN209

The only final submission I would wish to make on distinguishing features - and I won't repeat the submission - but there is here a history recognising the increments as being reflective of work value, and a history which is not limited to the public sector, which is a distinguishing feature to the teachers case.

PN210

JUSTICE HATCHER: Going back to these grades, it seems to me they're classic paid rates provisions, that is, they are simply increments determined by unilateral employer action, but they don't establish an entitlement to any particular minimum rate, that is, they don't describe a class of work to which you have an entitlement

to a minimum rate; they're a classic paid rate system whereby the employer can simply jump you up at its own discretion.

PN211

MR McKENNA: Your Honour, I don't have any instructions to embrace that characterisation, but I don't think I've got anything to say against that.

PN212

If the Panel pleases, those are the submissions on classification (audio malfunction).

PN213

There is one outstanding matter: the different standard rate. The ANMF has previously, back on 26 April and also on 1 March, so the submissions of 1 March 2023 at paragraphs 9 to 12 and then in the 26 April submissions at part G from paragraph 98 and following, made submissions in support of different standard rates in both the Aged Care Award and the Nurses Award, and in the Aged Care Award different standard rates as between direct care employees and general employees, and within the Nurses Award, different standard rates as between aged care employees and other than aged care employees.

PN214

The Expert Panel, in what I think I'll describe as the first operative date and phasing-in decision, rejected the ANMF's submissions about different standard rates in the Aged Care Award.

PN215

I should perhaps pause there and just highlight what the standard rate does. In both awards, it is used as a basis for the quantification of allowances, so the higher the standard rate, the higher the allowance that will be payable.

PN216

JUSTICE HATCHER: I'm not sure that's right. It's more a mechanism for adjustment of the allowances, that is, the allowance has been quantified at some stage and then there's been a working backwards to relate to the standard rate so as to grant an adjustment mechanism over time.

PN217

MR McKENNA: Your Honour, that may be right. I don't know the history. I know that on the face of the awards, so for example, dealing with schedule C to the Nurses Award, it provides for wage-related allowances, and they're all on-call allowances. They provide for a percentage of the standard rate and an amount per 24 hours as that allowance. So they are at least calculated by reference to the standard rate. As to the historical basis for that figure, I'm not in a position to assist the Expert Panel.

PN218

The Expert Panel, in the 27 June 2024 decision at paragraph 34, rejected the ANMF submission about different standard rates for the Aged Care Award. They did so on the following basis:

PN219

Its effect would be to give direct care workers higher allowances than indirect care workers for the same duties or disabilities. For example, a direct care worker would receive a higher allowance for nauseous work than an indirect care worker, despite the same level of disability apparently being involved. No work value or other rational basis for this has been demonstrated.

PN220

If I can make two brief submissions as to why that finding would not flow through to the Nurses Award. The first of those, quite simply, is that, unlike the Aged Care Award, where the standard rate is now based upon a properly fixed minimum rate, the standard rate in the Nurses Award is based upon the rate for RN level 1, pay point 1 other than aged care, which, in our submission, is not properly fixed. So as a matter of fairness and relevance, for aged care workers, a standard rate would properly be calculated on a properly fixed rate and, therefore, we would say, on the registered nurse level 1, pay point 1 rate.

PN221

The second way in which it might be distinguished is that the primary work done by standard rates under the Nurses Award is with respect to wage-related allowances, and I would invite the Expert Panel to draw a distinction between a wage-related allowance and an allowance for a disability like nauseous work where, in all cases, the level of disability would be the same.

PN222

It is accepted that the Aged Care Award standard rate does work for allowances other than nauseous work. It also does work for a sleepover allowance, and it might be said that there is a closer analogy between a sleepover allowance and an on-call allowance, but, notwithstanding that, my submission is that the reasoning of this Expert Panel at 34 would not have equal application to a wage-based allowance as included at schedule C.1 to the Nurses Award and, for those reasons, it would be appropriate and, in my respectful submission, necessary to achieve the modern awards objective for there to be a separate standard rate for an aged care employee under the Nurses Award.

PN223

If the Full Bench please, Mr Hartley will now address the Expert Panel on operative date and phasing in.

PN224

Harping back to the question some time ago from Your Honour The President in terms of the question about re-entry to practice and provisional registration, there is evidence from Julianna Bryce, who was the ANMF senior federal professional officer, referring to re-entry to practice, I understand, that being identified as the only basis for provisional registration, if that assists.

PN225

JUSTICE HATCHER: Thank you. Mr Hartley.

PN226

MR HARTLEY: If it pleases. Your Honours, I wonder whether it might be convenient - principally what I'll be dealing with is operative date and phasing, which relates, in some aspects, to the question or the issue that Your Honour The President raised. I wonder whether it might not be a convenient course for the Full Bench to take a 10-minute adjournment for morning tea, I could get the instructions that we contemplated we would need in respect of the issue your Honour raised, and then when I return, I can address that immediately.

PN227

JUSTICE HATCHER: All right. While you are getting those instructions - I think I know the answer - but does the evidence suggest that the proportion of aged care nurses who are actually paid the award rate is approximately 9 per cent of them? I saw that somewhere in the material, but I can't - - -

PN228

MR HARTLEY: I think it's very slightly more than that, but I can answer that question, yes.

PN229

JUSTICE HATCHER: Can you look up that while we take the adjournment.

PN230

MR HARTLEY: Yes.

PN231

JUSTICE HATCHER: All right. We will adjourn for approximately 10 minutes.

SHORT ADJOURNMENT [11.19 AM]

RESUMED [11.38 AM]

PN232

JUSTICE HATCHER: Mr Hartley.

PN233

MR HARTLEY: If the Commission pleases. Could I start with what I think will be the quicker issue, which is the one about award coverage. I think the most recent and best evidence that the Commission has about that is the Pay Check document which was tendered with leave by email on 15 December 2023 at 5.32 pm. On page 40 of that document, one sees an analysis of precisely this issue, and the punchline is that the proportion of facilities covered by awards - and that's entirely by awards - is 8.9 per cent, the proportion of facilities covered entirely by agreements is 86.2 per cent, and the difference between the sum of those and 100 is presumably the facilities where some are and some aren't agreement-covered, depending on classifications.

PN234

One sees an analysis of exactly that in the pages that follow, broken down by state and broken down by classification. So agreements where, for example, only RNs are covered are identified as a percentage and so on.

PN235

JUSTICE HATCHER: But even where they are covered only by the award, that doesn't necessarily follow that they are paying only the award rate; they may be paying over-award payments.

PN236

MR HARTLEY: They might, and that's - - -

PN237

JUSTICE HATCHER: So it's probably less than that.

PN238

MR HARTLEY: I don't think there's evidence before the Commission that would allow a view to be reached about that. The employers, in their submissions, assert that that is the fact, that people who are not award-covered, or not covered by agreements, are, nevertheless, likely to be paid over the award, and we identified in reply that we're not sure what evidence is relied upon for that proposition. It might be right.

PN239

JUSTICE HATCHER: I recall some evidence about the rates people are paying to agency nurses, which was certainly way above the award.

PN240

MR HARTLEY: Yes. I can't say that it's wrong what the employers say, but I can't point to evidence that suggests that it's right. In any case, I will really come to this when dealing with the topic of absorption. Certainly it is the case that many aged care nurses are covered by enterprise agreements. The degree to which the enterprise agreement rates are above current award minimum varies from classification to classification, and I will come to that, but that's the short answer to your Honour's question.

PN241

JUSTICE HATCHER: Thank you.

PN242

MR HARTLEY: On the longer issue, the ANMF's position is this, in a nutshell, that one half of the amount that the Commission determines is justified by work value reasons would be awarded as from 1 January 2025; the second half would be awarded as from 1 October 2025, and if the Commission were concerned that it had not, to this point, given interested parties in the second proceeding an opportunity of contradicting that second increase - the first one, we say, should be ordered absolutely, as it were - the second one, if the Commission were concerned about providing a further opportunity, it could draft its order in such a way that liberty was reserved to the Private Hospitals to apply to modify the order that would otherwise take effect as from 1 October 2025 if no application was made by them.

PN243

VICE PRESIDENT ASBURY: But wouldn't that just mean they could modify the operative date, rather than the amount? If we awarded half of it from 1 January, presumably the order would have to say what the entire amount is.

PN244

MR HARTLEY: Subject to reserving liberty to apply, and so one could imagine a way of framing an order which would be something like, 'Subject to any application made by the Private Hospitals on or before X date, on 1 October 2025, these things will happen.' So there would be a way of drafting it in such a way that there was no prejudice to a person that decided they wished to make an application.

PN245

I should indicate that when the Commission was deciding whether it is minded to reserve liberty of that kind, I would invite the Commission to reflect upon the transcripts that appear in the digital hearing book, and what the Commission will see is that, at about page 380 of the digital hearing book is a transcript of - my memory, it's a hearing from April - where exactly this issue arose. I retract, it was earlier than April, it was - I'm sorry, your Honours - 29 February of this year, and directions were being made to deal with these issues, what should happen with RNs, ENs, classification structures and what have you.

PN246

At that point, the representative of the Private Hospitals, at PN 175, said, in effect, 'We'd like to be heard about this.' I was asked what I thought about it and I said something equivocal along the lines of, 'We wouldn't want things to slow down because people decide, at the heel of the hunt, to turn up and start arguing about issues that have been on foot for years.' What Your Honour Justice Hatcher did was say, 'You have leave to put on that material. Do it by the same time as Mr Ward's clients.'

PN247

Instead, what happened is that nothing was put on. We were back before your Honours on 17 May. At that point, counsel turned up for the Private Hospitals and proposed orders, in broad terms, to the effect that they should have another few months to put on that material. Your Honour Justice Hatcher took time to consider that issue and, at page 397 of the digital hearing book, your Honour will see that orders were made to the effect that submissions, evidence and draft determinations concerning these issues from parties other than the ANMF should be put on by 26 August, which gave them, in fact, more time than they had asked for.

PN248

It might not be quite the terms that they had asked for. I think your Honour will remember that Mr O'Grady made submissions that this hearing should be about, in effect, the degree to which there would be a flow-over from aged care into the second proceeding, and your Honour made orders, or the Full Bench made orders, in more general terms, in effect saying, 'Give us whatever materials you have in response by 26 August.'

PN249

You received nothing. You did not receive, for example, a submission even saying, 'We need more time, we are prejudiced by having to deal with all this material so quickly, we would like an extension.' You received nothing, and so the Commission would, in my submission, have regard to that history and have

regard to the fact that today it was listed in both proceedings and, again, it would have been open to the Private Hospitals to turn up and say, 'We are prejudiced; here is some evidence about why we are prejudiced. You shouldn't deal with things today, you should wait.' But they didn't do that.

PN250

In my submission, it would be open to the Commission to provide the Private Hospitals a further chance by reserving liberty in the way that I commenced by outlining, but I should say that if the Commission were to proceed in that way, which we don't oppose, but if it were to proceed in that way and if that liberty were exercised, we would be putting a submission with some vigour that there should not be any re-opening of the case on the basis that the Private Hospitals have had, to this point, a proper opportunity.

PN251

That's the submission that the ANMF makes about that point.

PN252

JUSTICE HATCHER: To be clear, the proposal I floated wasn't out of concern of procedural fairness to the Private Hospital employees, it was about dealing with the complexity of some of the issues in the classification structure before the date you desired as 1 January.

PN253

MR HARTLEY: Yes. In terms of classification structures, I think one could imagine a world where the Commission finalised the position in respect of aged care nurses, but then, in a subsequent proceeding, with everyone before it, including Mr Ward's clients and us and the Private Hospitals, entertained fuller argument as to issues that hadn't been litigated in this proceeding. One could imagine a world like that, but one wouldn't, in my submission, allow that concern to leave open the possibility of dealing with broader issues in the second proceeding, allow that to slow down the finalisation of the situation for aged care nurses, which has been waiting for quite a while.

PN254

Can I just orient the submissions that I am about to make concerning operative date and phasing with a very brief chronology. The Stage 3 decision was 15 March 2024. On 12 April 2024, pursuant to invitation in that decision, the Commonwealth made submissions on operative date and phasing. On 19 April 2024, the ANMF wrote to the Commonwealth asking them to indicate what their position would be on funding for aged care nurses because they hadn't indicated that in their submissions of 12 April. That letter is attached to our 10 May submissions.

PN255

On 26 April, we filed a large bulk of material dealing with the way that we said the proceedings should be wrapped up, but that didn't concern operative date and phasing. On 2 May of this year, the Commonwealth wrote back to us indicating that it declined to indicate a position in respect of nurses, and that letter is also behind our 10 May submissions.

PN256

In our 10 May submissions, the ANMF, together with the other unions, made submissions to the effect that the full increases should take effect on 30 June 2024 for all classifications.

PN257

On 27 June 2024, there was the first phasing in decision in respect of non-nurses, which set out some categories, and I will refer to them as categories 1, 2 and 3. Category 1 is: if the total that you're getting awarded is less than 3 per cent, you get the full amount; if you are more than 3 but less than 6, you get 3, and if you're more than 6, then you get half the total. That's on 1 January 2025. Then, on 1 October 2025, the category 2 employees get the balance of what is the effect of the award, and the category 3 employees also get the balance, which, in their case, would be more than 3 per cent.

PN258

Because the issue of nurses was delayed and, of course, there was nothing ordered in respect of nurses, on 18 July, the ANMF modified its position having regard to the Stage 3 phasing decision. That's at digital hearing book tab 14, page 287. Your Honours don't need to go to it. Your Honours know that our position from that time, and now, is that the increases that would be awarded to nurses would have effect in two tranches, one half on 1 January 2025, the second tranche on 1 October 2025, which aligns with the timing of the increases for the other aged care workers.

PN259

On 26 August 2024, the Commonwealth put on its submissions concerning phasing, which contemplate a rather more leisurely schedule of increases.

PN260

On 26 August 2024, the joint employers put on their submissions. We don't see that they put a positive position as to what the date should be, but I think it's fair to say that, in effect, their position is the wage increases should track Commonwealth funding. On 9 September, we put on our reply, in which we indicated that we adhered to our position: 1 January and 1 October.

PN261

Now in terms of the principles that are relevant to operative date and phasing, they have been discussed by this Commission several times before, and we don't invite any different approach this time around. We endeavoured to summarise the principles that had been adopted in the Stage 2 decision in particular at paragraph 8 of our submissions of 10 May, the gist of which, as the Commission knows, is that the forward presumption is 1 July of the following year, but that can be displaced, it's not difficult to displace.

PN262

The Commission is guided by what is fair and just, having regard to the acting with good conscience and substantial merits of the matter, and we drew particular attention in that submission to the legislative amendments emphasising the importance of eliminating gender-based undervaluation of work.

PN263

In the submissions of my friends, I think there are really three points that I wish to address, two of which come out of my friend Mr Ward's submissions, and one by my learned friend Ms Eastman.

PN264

One is financial viability of the employers; two is the time required for implementation, and the third, which I think is really raised by both sets of submissions, is it is said to be undesirable that there should be increases awarded in advance of the Commonwealth funding commitment, and that's the third subject that I want to address.

PN265

On financial viability, I propose to be quite brief. We accepted, in December 2023, and we accept again now, the following proposition, that an unfunded wage increase in a labour-intensive industry is likely to cause financial difficulties for at least a proportion of employers. That was what your Honour put to me, and I accepted that that was a fair summary of the evidence.

PN266

What we said then, and say now, is that the Commission could not go from that sort of general proposition into dollar figure findings about what would actually be the effect on aged care employers because the evidence didn't permit that level of detail. The submissions that we have made about what I'll call the StewartBrown evidence that's been advanced by different representatives of StewartBrown on different occasions, but our submissions have pretty much been the same throughout, that the reports that they prepare are prepared for a different reason. They are not statisticians, they are not econometricians, and they are addressing a question that is different from the question that the Commission is adopting.

PN267

All of those points are made in paragraph 13 of our submissions and I don't propose to go through them in any detail because the Commission, to this point, has been prepared to make findings along the lines of generality of the one that I expressed at the outset, and we say it could do so again and it doesn't need to go further, and couldn't.

PN268

Now there are some propositions in my learned friend Mr Ward's submissions about the degree to which nurses are paid above award rates. One is that, generally speaking, aged care nurses are covered by enterprise agreements rather than awards, and we agree, and the other is that those who are not so covered are also paid above award rates. This is the subject matter that I addressed earlier. That might be right. We are not aware of evidence that establishes it. It probably doesn't matter.

PN269

We have set out, at paragraphs 19 to 23 of our 9 September reply submissions - if I could invite the Commission to turn to that, which is at tab 17 of the digital hearing book, starting at page 334.

PN270

JUSTICE HATCHER: 334?

PN271

MR HARTLEY: 334, your Honour. It is page 6 internally numbered in tab 17. There we quote the passage from Pay Check that I earlier referred to, and over the page, we sought to draw from the Pay Check publication some figures that the Commission might find useful about a comparison between average rates and award rates, and one sees that in the table underneath paragraph 21.

PN272

What we did then in paragraph 22 is add to that table the rate that we sought in the draft determination that was filed on 26 April 2024, and then, in the final column, what one might call the per cent absorbed, and the way that one calculates per cent absorbed is, taking for example, EN max, so EN pay point 5, at the moment - well, as at the date that the Pay Check publication was prepared - there have been annual wage increases since then - but, as at that time, it was \$30.51.

PN273

The average rate provided by enterprise agreements was \$32.04, the rate that was sought by the ANMF was \$37.95, so what one does is identify the difference between 1 and 2, and that will give you about \$7, identify how much of that is made up between \$30.51 and \$32.04, which is the increase that is already captured by, as it were, above award payments, and that's what I've called per cent absorbed.

PN274

What one sees is that ENs at the lower end, there's basically no scope for absorption. Towards the other end, roughly 20 per cent, roughly 30 per cent for entry level registered nurses, and roughly 50 per cent for the high end of RN pay point 1. What we don't have in Pay Check is a similar sort of figure for RNs 2, 3, 4, 5. It could be that my instructor or my client has that data, but it's not in Pay Check, and I don't think it can be got especially quickly, but what one sees, there is a range of degrees to which increases in wages could theoretically be made up or absorbed in current above award payments.

PN275

There are some submissions about absorption, in particular in the submissions of the joint employers, but what we understand that to be referring to is effectively this. Point one: assume that the funding increase is calculated on the basis of an assumption that every nurse is currently paid the award rate and not more. Two: increase funding by the amount of that increase, so whether it's 7 per cent or 8 per cent or 9 per cent, you pick the current award rate and you increase that by 9 per cent and figure out what's the amount of money that you need to make that good. To the extent that you've got people who are not on the minimum, then you've got more funding than you need to lift that person to the new floor, so the question is what happens with that amount. Can it be absorbed by the employer or is it to be passed on to employees, even though it is not necessary to lift them to the new floor?

PN276

There is a submission that we don't quite understand at 3.17 of the joint employers' submissions, which is to the effect that absorption is permitted. They say there would be a modest, what we understand to be economic disadvantage to the employers, whereas, if absorption is not permitted, there would be a material economic disadvantage to the employers.

PN277

As we explain at 25 of our reply submissions, we can't see how that can be right. No absorption means that employers pass on whatever additional amounts they receive by way of increased wages, and that is necessarily cost neutral, whereas if absorption is permitted, then, in effect, the employers receive a windfall because they receive an amount of funding on account of an increase in wages, which they don't have to pass on to employees.

PN278

We would say that would be a perverse outcome, but that's not a matter for the Commission, that's a matter for the Commonwealth and how it allocates funding and what restrictions it imposes on employers in regard to how they pass it on, but certainly the Commission could proceed on the basis that, irrespective of what the position is in respect of absorption, employers will not be able to park it, they can't be.

PN279

JUSTICE HATCHER: But does that assume that the Commonwealth funds the employers on the basis that everyone gets the same level of increase?

PN280

MR HARTLEY: No, it doesn't, your Honour. If - which we don't understand to have been the position in respect of all previous increases - the Commonwealth instead conducts an analysis of what is the actual dollar figure which is necessary to - so they take into account the fact that some people are on agreements and therefore you don't need a further \$5 to lift them to the new floor, you need a further \$2. If it's calculated on that basis, then again it's necessarily cost neutral.

PN281

Either it's the case that the Commonwealth - the Commonwealth's funding commitment throughout has been, 'We will fund increases and on costs.' Consistently with that commitment, the employers cannot be out of pocket. It could be that they receive an amount which is more than what is required, but it can't be, consistently with the Commonwealth's commitment, that they receive an amount that is less than what is required.

PN282

The next subject that is addressed by, in particular Mr Ward, is the time that's required for implementation of any increase that is awarded by the Commission. That's a submission which commences at, on my numbering, about 296 of the digital hearing book. It's tab 15, internal number page 8 in my learned friend's submissions.

PN283

The short answer to the submissions that are made here is this. Point one: we accept, of course, that time will be required to put systems in place to calculate how much additional moneys need to be paid to employees, modify one's IT systems and pay systems to ensure that people are paid that amount from X date, so things will have to occur, work will have to be done. What you don't have is either a submission, or evidence, that that couldn't be done by 1 January 2025, and certainly not that it couldn't be done by 1 October 2025.

PN284

My learned friend's submissions, we don't take issue with the idea that work will have to be done, but none of the material that is before the Commission could cause the Commission to find that, if it did order an increase which was effective as from 1 January 2025, it couldn't be done.

PN285

The third subject matter that I wished to address was the undesirability of increases tracking Commonwealth funding. I should start by saying that we accept, as we have always accepted, that it's not open to the Commission, and I don't think anyone is suggesting this, to order the Commonwealth to fund in a different way from how it proposes. That couldn't be done, clearly. On the other hand, the Commonwealth doesn't exercise veto power over the Commission's decision-making.

PN286

Funding is one consideration, amongst many, in setting operative dates and phase-in, and the Commission could not rule out the possibility, because the Commonwealth does not say that if the Commission ordered funding increases at times earlier than those proposed by the Commonwealth, that the Commonwealth would in fact move more quickly than it currently proposes. That couldn't be ruled out.

PN287

We have pointed out, at 52 to 63 of our reply submissions, that decisions about phasing involve choosing between what we have characterised as three competing interests. There's the interest that the Commonwealth has in not being forced into a difficult decision about whether to fund earlier than its commitment; there's the interest that the employers have in not being out of pocket on account of increases predating funding, and there's the interests that the employees have in being paid what the Commission finds to be the actual value of their work.

PN288

It is not at all apparent to us why the employees' interests should give way in that scenario, which is implicit in the submissions made by both the joint employers and the Commonwealth.

PN289

The short points that we make about that, in respect of the Commonwealth in particular, are they have had a long time to think about funding and should not reasonably need more. We put them on notice of - 'put them on notice' is probably an unfair way of putting it - we invited them to start thinking about the

funding that was necessary for nurses a long time ago, and they wrote back in May and declined to do so.

PN290

Information in my learned friend's submissions about the time that is necessary for budgeting and what have you cannot explain any delay out past 1 October 2025, at which point the funding authority will have had the opportunity of giving in-session funding advice, and the submission seems to proceed - I could be wrong about this - but seems to proceed on the basis that only one kind of work can be going on at any given time, so people can't even start thinking about the way that subordinate legislation should be drafted until a determination has been handed down, and we say that's unrealistic.

PN291

The Commonwealth probably has already been thinking about these things, and if it's forced to move quickly, the Commission is entitled to assume that it could do so. Whether it would do so, who know, but it could do so. All of this to say that the Commission would not proceed on the basis that our proposed staging is impossible to achieve. The Commonwealth might choose not to achieve it, but that's a different thing.

PN292

Perhaps the most important issue, however, in respect of the undesirability of tracking the Commonwealth's funding proposal is addressed at 69 to 77 of our reply submissions, and it might be best illustrated by going to the table that we have prepared, which appears at the very last page of our written submission at tab 17. It's 355 in my digital court book, but, in any case, it's right after page 26 internally numbered, a landscape table. Does the Full Bench have that?

PN293

VICE PRESIDENT ASBURY: Yes.

PN294

MR HARTLEY: The effect of staggering increases in the way that the Commonwealth indicates it will fund is a number of anomalous outcomes. As one sees in this table, the effect would be, for example, that a Certificate III PCW would be paid more than an enrolled nurse until about 1 October 2026. The level 6 PCW team leader would be paid considerably more than an EN pay point 1 until 1 October 2027, and that's bearing in mind the evidence that the Commission has heard about the enrolled nurse already being something of an endangered species in aged care, so decreasing the attractiveness of being an enrolled nurse in comparison with getting a greater amount of money based on a qualification that has a lower threshold for achievement is an undesirable outcome.

PN295

A level 6 PCW would be paid more than a registered nurse until 1 October 2027 on the Commonwealth's funding model, which - I don't need to say this probably - but the situation where a degree-qualified registered nurse, with all of the supervisory responsibilities that go along with that position, being paid less than the PCW team leader level 6 is perverse.

PN296

It's anomalous and it creates incentives that are out of keeping with the objectives that are sought to be achieved in aged care, by which I mean this: there is evidence to which we refer in our submissions about there already being a shortfall in registered nurses in aged care and that shortfall being projected to increase over the forward period. So if the funding model brings about a situation where one is paid more by getting a Certificate IV and doing work of less complexity than one receives for going and getting the three-year degree and taking on the responsibilities and burdens associated with supervision, one can imagine at least some prospective aged care workers opting for the more remunerative course, and therefore the shortfall of registered nurses becoming exacerbated.

PN297

VICE PRESIDENT ASBURY: But is the entry level registered nurse level 1 at pay point 1 going to be undertaking those kinds of supervisory duties given the classification definition?

PN298

MR HARTLEY: Yes, your Honour. It is the situation - we addressed the evidence concerning this - my memory is in the December hearings - but it is the fact that in aged care facilities, sometimes there is only one registered nurse, and that registered nurse is someone that has, in effect, just become registered. As to how often that's the case, I don't think there's evidence to enable the Commission to make a finding about it, but it happens. And even if you're talking about, you know, slightly higher registered nurse classifications, the difference between - I mean, looking, for example, at - so as at 1 October 2025, the level 6 PCW team leader is on 1422.21, the RN level 1, pay point 1 is on 1371.17. So there's about a \$50 difference.

PN299

The next few pay points would also still be less than the level 6 PCW team leader, and even the higher pay points would be not very much more for, again, work that involves less by way of academic qualifications, less by way of responsibility, less in terms of complexity. It would be truly a perverse outcome.

PN300

The submission that we make about that is that outcomes of that kind must be avoided with a view to a variety of desirable objectives, one, addressing the shortfall of registered nurses in aged care, but, two - and I think I'm right to recall my learned friend Mr Ward making a submission about this on a previous occasion - maintaining industrial harmony in the workplace. It would be an odd situation where a PCW - odd and unsettling and a situation that would cause tension in the workplace if the pay to workers didn't follow, or didn't align with, as it were, reporting lines, supervisory lines. So that's an outcome that, in our submission, the Commission would be astute to avoid in its funding decision.

PN301

JUSTICE HATCHER: But surely we also need to take into account that the amounts we are probably talking about are significantly greater than the increases

for PCWs and home care workers, and that, by itself, might justify a longer transition period?

PN302

MR HARTLEY: Your Honours would, of course, take that into account, yes, we can't deny that, but - - -

PN303

JUSTICE HATCHER: But as long as the amounts of the increases track with the amounts going to PCWs in the first two tranches, the results you are talking about here won't occur. So to the extent that personal care workers are going to receive about 3 to 4 per cent in the first round and maybe another 4 per cent in the second round, or whether it's vice versa, as long as we track that, then we can't have people falling behind.

PN304

MR HARTLEY: That's not so on the Commonwealth's proposal.

PN305

JUSTICE HATCHER: I understand that.

PN306

MR HARTLEY: Yes. But if what your Honour is saying is that the way that the Commission would approach it would be to take into account that there's a gradient between the approach that we propose and the approach that the Commonwealth proposes, and there would be a way of awarding slightly less than what we seek and still avoiding these results, yes, that is so, that could be done.

PN307

JUSTICE HATCHER: Thank you.

PN308

MR HARTLEY: Unless the Commission has any questions for me, those are the submission on operative date and phasing.

PN309

JUSTICE HATCHER: Just one final question. When you were talking about absorption, I assume that what we do will only affect people in enterprise agreements by operation of section 206?

PN310

MR HARTLEY: This is the one which says that if your wages are less than - - -

PN311

JUSTICE HATCHER: Yes.

PN312

VICE PRESIDENT ASBURY: Your base rate.

PN313

JUSTICE HATCHER: Your base rate falls below the award rate.

PN314

MR HARTLEY: I think the answer to that is, as a matter of the operation of the Fair Work Act, yes, but - and I wouldn't want to be definitive about this, but I have an understanding about the way in which funding was provided to employers as a consequence of the interim increases, which didn't - which caused money to flow into the pockets of workers, despite that that wasn't required by the Fair Work Act, it was just the way that the funding operated.

PN315

JUSTICE HATCHER: That's, with respect, not our concern, is it?

PN316

MR HARTLEY: No.

PN317

JUSTICE HATCHER: We only need to have a concern about the affordability of any increases that we actually award and have legal effect.

PN318

MR HARTLEY: That's so. With respect, I agree.

PN319

VICE PRESIDENT ASBURY: Unless there were enterprise agreements that required a percentage above the award rate. I'm not sure that there was evidence of that, though. I think my recollection is they mainly had rates prescribed in them.

PN320

MR HARTLEY: That's my recollection as well. If there were enterprise agreements of that kind, then your Honour would be right. I can't call one up in my mind. I think I heard my instructor indicate that he has a memory of one witness who had rates tied to an award. I don't know which witness that is, I'm sorry.

PN321

If the Commission pleases.

PN322

JUSTICE HATCHER: Thank you. Mr Ward.

PN323

MR WARD: If the Expert Panel pleases, I am going to deal with the same issues that the ANMF have dealt with, but I am going to deal with them in a slightly different order, if I can. I will deal with the three and four-year degree issue first, the enrolled nurse supervision issue second, I am then going to deal with the operative date issue third, and I will deal with the pay point time-based increment issue last because I think, of all the issues in controversy, that possibly might be the more live one.

PN324

I don't intend to go into any great detail on the three and four-year degree issue. Our position is in the court book at page 271. We have reached a position of accord with the ANMF. I don't want to detract from their submissions as to why that position of accord is an appropriate position, but, for my clients, it also became an entirely practical issue. Without trying to be too humorous, my clients couldn't find, in their membership, anybody employing a four-year degree nurse in an aged care facility, so, as a matter of practicality, we thought it was a sensible thing simply to merge the three and four-year degree together.

PN325

JUSTICE HATCHER: So we abolish that four-year entry point?

PN326

MR WARD: Yes.

PN327

JUSTICE HATCHER: I suppose it would follow that, if in the future, there was a move, as occurred in teachers, from three to four-year degrees, that would be taken to be already incorporated into the award structure, that is, there wouldn't be another work value case to say, 'Well, okay, it's four years, we need another pay rise'?

PN328

MR WARD: From my understanding of the agreement, one way of putting it is we merge them together and that deals with it once and for all.

PN329

JUSTICE HATCHER: Yes.

PN330

MR WARD: I don't intend to say anything more on that point. I think our submissions deal with it.

PN331

In terms of the enrolled nurse and the supervision issue - this arises from paragraph 205 of the Stage 3 decision - we had simply read paragraph 205 all along to be proposing to set a rate for an enrolled nurse in the knowledge that enrolled nurses may and, based on the evidence, more likely than not do supervise personal care workers. It's clear that some may not, but I think the overwhelming majority of evidence advanced in the case, both on our behalf and the union's behalf, was they play this general supervisory role.

PN332

As we have indicated in our submissions at 271 of the court book, we reach accord with the ANMF in terms of the alignment of the level 6 direct care worker with the enrolled nurse pay point 1. Where we are a little bit at odds is we want some wording to go into the classification structure. I am going to hand up some words in a minute. I apologise, it's been manually amended this morning from a typographical perspective.

PN333

I would then propose to take the Commission to the Nurses Award and explain where it sits, but, in doing that, given something the Vice President asked Mr McKenna this morning, I have realised there's a little bit of an anomaly arising straight away when we do that about other descriptors in relation to pay point 1, which, just for completeness, I think it is probably necessary to raise.

PN334

If I can just hand up, first of all, the words. I will explain why we are seeking the words, and then I will take the Commission to the Nurses Award about where they might sit. I acknowledge straight away that - and I say this without seeking to prejudice the ANMF - Mr McKenna and I have been bouncing these words around. These words themselves don't appear to be controversial; what is done with them perhaps is controversial.

PN335

JUSTICE HATCHER: To be clear, this is meant to be a new classification descriptor, is it? Is that what this is?

PN336

MR WARD: I will explain very shortly where it would go. Our concern is this, and without wanting to sound crude, we want to make sure we get what we're paying for, and it's our understanding that what we're getting is an acknowledgment that enrolled nurses do general supervision in the sense of team leader type supervision, as well as supervision as contemplated under their clinical scope of competence.

PN337

If I could take the Expert Panel to the Nurses Award, and I assume that everybody would have a copy, and if I could ask you to go to schedule A. A.4 has the title 'Enrolled Nurse.' We had assumed that these words would simply go in under A.4 as a kind of chapeau in relation to the enrolled nurse classifications as a suitable place. If the Commission formed the view there was a better place to put it, or if the Commission formed a view, once I have talked about pay points, that there's something very different coming our way, then we would simply ask the Commission to place it in the appropriate place.

PN338

I do note straightaway, however, two things. I think the Vice President asked a question of whether or not enrolled nurses at pay point 1 do, in fact, play a supervisory role. I think the evidence was they do. That might be questions of degree, but they do do that, but perhaps there is something of an anomaly immediately evident from the pay point 1 issue, and that is the skill indicators in A.4.1(c) include this phrase:

PN339

The employee exercises limited discretionary judgment, not yet developed by practical experience -

PN340

and I think we just need to note, for the record, that if you're actually supervising personal care workers we would think you would probably exercise a fairly high

degree of discretionary judgment in allocating them to tasks, allocating them to look after residents and the like. I have to say we hadn't noticed that before the Bench starting asking Mr McKenna questions.

PN341

VICE PRESIDENT ASBURY: Mr Ward, I think in fairness, my question was in relation to the RN.

PN342

MR WARD: It might have been the President.

PN343

JUSTICE HATCHER: Yes. That was my question.

PN344

MR WARD: It might have been the President's question then. I apologise.

PN345

JUSTICE HATCHER: I mean my question was the March decision recognised that ENs generally perform supervisory duties and we aligned it with the team leader on that basis, but are there some ENs who do not - - -

PN346

MR WARD: Yes.

PN347

JUSTICE HATCHER: - - - exercise supervisory duties, and if that's the case, does it follow that they should be at a lower rate than the rate we identified in the decision?

PN348

MR WARD: We didn't take that view, in some measure, I think, because of the observations that Mr McKenna advanced. The enrolled nurse is a diploma qualified person. The level 6 team leader is certificate IV. We do see some general distinctions between them. So no, we didn't want to advance that.

PN349

It also might become quite practically difficult because within a given roster you might have enrolled nurses supervising some part of the roster and possibly not the other. So for us, it just seemed to be a very common sense approach to accept that enrolled nurses may supervise personal care workers, and the evidence is more likely than not they do. We were just happy with the proposition we have advanced for one rate. Is the Commission comfortable to move on?

PN350

JUSTICE HATCHER: Yes. So where's the (indistinct) for the increments? Do you want them returned?

PN351

MR WARD: I need to come to that.

PN352

JUSTICE HATCHER: Yes.

PN353

MR WARD: I mean the operative date and then I will come to the increments. I will spend quite a bit of time on the increments.

PN354

JUSTICE HATCHER: All right.

PN355

MR WARD: Does the Bench need to mark what I have handed up?

PN356

JUSTICE HATCHER: No.

PN357

MR WARD: No. I did notice, in preparing for today, that perhaps in a large measure because of the timetable, what my learned friend, Mr Hartley, said is true, that we didn't necessarily articulate an express position on operative date and phasing, in part because I think we filed before the Commonwealth filed their submissions. With some very real sense of reluctance we propose that the Expert Panel should depart from the proposal of the Commonwealth, and we do so with discomfort and we do so with reluctance.

PN358

I want to explain what we say should happen, and I want to explain a little bit about why we say it should happen and put a proposition as a safeguard which might be necessary in an individual case.

PN359

We are content to accept the proposition advanced by the ANMF, as far as we understand it, and I just want to restate it, just to make sure we have got it right. I think it's on all-fours with what was said today, and I think it's on all-fours with the letter from Gordon Legal of 28 July 2024 which is in the court book at 287 to 288, and that is simply this. My clients reluctantly accept that the operative date and phasing should be aligned to the aged care decision, which is contained at paragraph 18 of FWCFB 298 of 24; that is, as we understand it, on 1 January 2025, if the increase is less than 3 per cent, the full increase will be granted on 1 January 25. If the increase is more than 3 per cent, half or 3 per cent, whichever is greater, will be granted on 1 January 2025, and the balance of any increases will be granted in 1 October 25.

PN360

For my clients, these considerations move them to that position. Firstly, we are concerned about disharmony amongst the workforce generally, given that this case has now gone on for quite some time, and in particular, the separation of the nurses from the case and then the rejoining of the nurses to the case, which is of no fault of anybody in this room respectfully.

PN361

We also have to acknowledge that, in the context of the total workforce, nurses do represent a much smaller portion of the total workforce compared to the personal care workers and non-direct workers in the workforce.

PN362

We are also mindful of the extent and size of overall payments, and in our submissions of 26 August 24, which commenced at I think 289 of the court book, paragraph 312 - and it's in the court book at paragraph 294 - we made a number of observations about those matters referencing the stage 1 decision, and I will just quickly take the Expert Panel to that and then I will add some comments about some of the evidence as I recall it from stage 1 about enterprise agreements and overall payments.

PN363

The stage 1 decision identified the fact that Modelling from the Department of Health and Aged Care indicated 86 per cent of all nursing employees working in aged care are covered by an enterprise agreement, which is a very material number.

PN364

The next one goes a little bit to the question, I think, that fell from the President as well. Almost half of ENs covered by the Nurses Award, 48 per cent, were classified as enrolled nurses pay point 4 or 5. Over half of RNs were classified at levels 1 or 2, however, only 14.3 per cent of in scope employees covered by the Nurses Award were estimated to be award reliant, which is a comparatively small number. We then quote -

PN365

JUSTICE HATCHER: I'm sorry, just to clarify the first sentence. So when you say that, does it follow that almost half are classified as RNs 3, 4 or 5?

PN366

MR WARD: That would be correct. Yes, your Honour. Again, this is coming from the stage 1 decision. This isn't coming from me independently.

PN367

We then identify, as was in the stage 1 decision, some evidence from Uniting NSW.ACT about their enterprise agreements paying in the order of 40 per cent above the award in contrast to relatively low overall payments for PCWs.

PN368

There were two other persons who gave evidence in the stage 1 proceedings about enterprise agreements and their content, and there was another person who gave evidence about enterprise agreements, but also, I think, generally market over-award payments.

PN369

In relation to the first, my recollection was that Mr Friend, an official at the HSU, gave evidence, I think at least on one occasion or possibly twice, having examined in detail enterprise agreements in the sector. While a lot of his evidence was

about personal care workers, the enterprise agreements he annexed or referenced also included classifications for nurses.

PN370

My recollection is that I cross-examined him on those matters and I think he accepted, as a general proposition, most enterprise agreements for registered nurses have over-award payments in the enterprise agreements, I think in the order of 35 to 45 per cent over the minimum payments in the award. I don't have a reference for that, and I apologise, but that's my recollection of it.

PN371

The evidence of Anna-Maria Wade also went, to some extent, to the issue of enterprise agreement coverage, enterprise agreement content, and my recollection was her evidence also went to what sort of happens in the market. So if the Commission is looking for some further evidence, I would suggest that the Commission might find that further evidence there.

PN372

JUSTICE HATCHER: But also, so there were some employers who gave evidence about the sort of rates they were paying for labour hire nurses.

PN373

MR WARD: I think there was extensive evidence on that. I think that your Honour, the President, engaged quite extensively with say Mr (indistinct) or one of my - I have forgotten her name. I apologise, but one of my female witnesses. Gosh. I have forgotten her name now. I'm wanting to say Ms Raboli, but I can't remember if it was Ms Raboli, about the cost of agency nurses, what they pay over the award, and I think there was a discussion about the excessive nature of what they have to pay to get agency nurses in. Yes, I think that was it.

PN374

VICE PRESIDENT ASBURY: Plus expenses, as I recollect it.

PN375

MR WARD: Yes.

PN376

VICE PRESIDENT ASBURY: Travelling. Airfares in some cases.

PN377

MR WARD: Yes. The lot. The lot. Yes.

PN378

VICE PRESIDENT ASBURY: There was some evidence about that.

PN379

MR WARD: So my clients are trying to balance their economic challenges, which I think this Commission has already said are real, given that they are in a fully funded environment. Harmony. An acknowledgement that nurses are a smaller portion of their workforce, and an appropriate acknowledgement that there are quite extensive over-award payments, either through enterprise agreements or

otherwise, and in the knowledge that if the minimum rates go up they are entitled, as a matter of general law and practice, to absorb increases into over-award payments paid at common law or up to increases that are in enterprise agreements.

PN380

For all of those reasons, and as I have said, with some great reluctance and discomfort with the Commonwealth's proposal, my client is prepared to suggest that we align implementation and phasing to aged care.

PN381

The caveat to that might be this. I don't want to suggest for a minute that there may not be an employer somewhere for whom that creates real difficulty, and it might be that the Commission, if they are prepared to accept that proposition that we have advanced, provides some liberty for an individual employer to apply to seek variations to the timetable for their establishment if they actually are in some serious economic difficulty arising from it.

PN382

Now, I haven't put that to the ANMF before today. I only took instructions on that last night, but that might ensure that if somebody was experiencing serious impecuniosity, that they could come forward and perhaps make some application.

PN383

That's our position on operative date. Obviously we would have loved for the Commonwealth to have come onboard, but they have chosen not to do that, and our submission ends at that point.

PN384

That leads me on to pay points. I want to take a little bit of time on this. I'm not entirely comfortable with the suggestion we didn't offer up some alternatives. We might not have offered up a draft determination, but I think there's several averments to alternatives in our submission, but can I, just for abundant caution, start with the Nurses Award itself, and I want to do this to explain what's not in issue as well as what then will be in issue.

PN385

If I could ask the Commission to go to the Nurses Award. Clause 15.2 is the clause I want the Commission to go to - Minimum Rates for Aged Care Employees - and just for completeness, I want to make a couple of notes about what we're talking about. The registered nurse 1, on our reading of the award, has some eight pay points, annual increments. The registered nurse 2 curiously only has four. The registered nurse 3 curiously has four. The registered nurse 4 and 5 do not have pay points, but they have grades, and I want to come to those and make some comments.

PN386

We have also noticed, and we only noticed today, that the nurse practitioner also has annualised pay points. They have two, 1st year and 2nd year, and then the enrolled nurse has five annualised pay points. So that's what we're looking at as we have this discussion with the Expert Panel.

PN387

The first thing I want to say is not in issue. What is not in issue is movement between - I will deal with registered nurses first. What is not in issue is movement between the levels. So we don't take issue with registered nurse level 1 and somebody moving to registered nurse level 2. It's very clear that, in terms of moving between levels, that that is a process of appointment based on the language of the Nurses Award, and it's very clear that when you move levels you are, in effect, changing jobs. You're changing jobs.

PN388

JUSTICE HATCHER: Yes, but if you're doing work which meets the classification description of an RN2 do you have an entitlement (indistinct) if you haven't been appointed to it? That's the issue.

PN389

MR WARD: Well, let's answer that question by going to the text.

PN390

JUSTICE HATCHER: Well, perhaps even putting it more extremely. If you are appointed as a director of nursing. I'm sorry, if you're required to do duties which amount to those of a director of nursing, but you're not appointed to a position, then what are you entitled to?

PN391

VICE PRESIDENT ASBURY: Would it be dealt with by (ii), 'required to perform the duties detailed'?

PN392

MR WARD: Well, in answering that, I think we go to A.5.5. I will just deal with the director of nursing specifically, rather than sort of give a general answer. My understanding of how this operates is essentially - and 4 and 5 are different, and I will talk more about 4 and 5 in a minute. My understanding about how you would be moved to level 5 is you would have to hold any requisite qualification and you have to be appointed as such by a selection process or by reclassification from a lower level, and I'm assuming - and I might be wrong - I'm assuming that the notion of appointment is a discretionary issue for the employer.

PN393

JUSTICE HATCHER: Well, it's really the second limb is the real issue.

PN394

MR WARD: As in the appointment issue or - - -

PN395

JUSTICE HATCHER: No. The second limb is by appointment by a selection process or by reclassification when the employee is required to perform the duties.

PN396

MR WARD: Well, again, I'm assuming that if they're required to perform the duties, that's at the direction of the employer. It's not that they haphazardly or accidentally, all of a sudden, start doing stuff. I think the proposition there is that

the employer appoints them by a selection process or the employer actively reclassifies them on the basis they wish them to undertake the role of director of nursing. That's how I read it.

PN397

VICE PRESIDENT ASBURY: Or the employee could contend that, 'You are requiring me to do duties that have - - -'

PN398

MR WARD: Yes. We often get into those interesting arguments about whether or not it's formally directed, or in some sense, the employers have created an artifice where it actually has required them to do it. I'm not aware of that ever occurring.

PN399

VICE PRESIDENT ASBURY: But it would be open on those words.

PN400

MR WARD: Look, I'm sure there's lots of people that have lots of arguments about how this classification structure is worded, your Honours. I don't think there's much doubt about that.

PN401

The point we were wanting to make, though, was simply this, that movement between the RN levels does not appear to us to be time related, time-based. It's certainly not primarily related to time, and in that sense, if the question, as we understand it, as posed by the Expert Panel back in April, was merely about time-based increments, the levels themselves, however difficult they might be to apply, or if not comfortable how they're applied, they're going to relate to time.

PN402

I think I should say that it's our view that that same proposition would have to be taken to apply to grades in level 4 or 5, and again, if I take the Commission to A.5.4, registered nurse level 4, again, however unsatisfactory this might be, and however unclear it might be, the one thing that is abundantly clear is that (1) appointment to level 4 is not about time, and (2) A.5.4(c), again however challenging, is not about time.

PN403

It seems that one moves between grades at the discretion of the employer, based on the employer making some evaluative judgment about the complexity of what you're actually doing. Now, that might sound terribly unsatisfactory. It might sound awfully difficult to apply in any proper sense, but we have to concede that's not about time, which is what the question of the Expert Panel went to in April.

PN404

JUSTICE HATCHER: Well, there is a question about whether that is consistent with any notion of minimum rates. Effectively at 4 and 5 the award just gives the employer a menu of rates to choose from and that's it.

PN405

MR WARD: I think, if we were looking at this as a matter of principle, it's clearly not consistent with the notion of setting a fair and relevant minimum rate. It's not consistent with that notion at all. It is, as your Honour says, a smorgasbord for the employer to have a pick from, and there's no evidence as to how the employer picks from it in aged care, but yes, we would accept the proposition, as a matter of proper principle, it doesn't look to us like it's properly setting or fixing a minimum rate. It doesn't do that.

PN406

We set out our submissions on the time-based issue of the pay points in our 16 May 2024 submission between paragraphs 13 and 47, which in the court book takes one from 272 to 281. We deal with clause 15.3 in those submissions, and I would like to take the Commission firstly to that clause in the Nurses Award, clause 15.3.

PN407

15.3 appears to govern progression through pay points. That's its title, Progression Through Pay Points. It appears, on our reading, to govern both the registered nurse and it also governs the enrolled nurse. I will deal with the registered nurse first because it's a little simpler, and then I will come to the enrolled nurse because that gets a little bit more complicated. 15.3(a) is in these terms:

PN408

(a) Progression will be:

PN409

(i) for full-time employees - by annual movement; or

PN410

(ii) for part-time or casual employees – 1786 hours of experience.

PN411

The first thing we want to say about that is that this proposition seems to be written in mandatory terms, 'progression will be', which we have often said 'will' is the modern version of 'shall'. It seems, therefore, that somewhat interestingly enough, the opening proposition is that if you're a full-time employee you will progress based on annual movement.

PN412

'Annual movement' is a curious phrase. It's a curious phrase. The only thing we can take that to mean is 12 months of service. We can't think it could mean anything else, and one assumes that the reference to 1786 hours is some kind of proxy for annual hours of work calculated for the benefit of a part-time or a casual. We have to acknowledge that one then has a look at 15.3(b), and intriguingly, it commences with the words:

PN413

Progression to the next pay point for all classifications –

PN414

And that's classifications for RNs and one assumes classifications for ENs who have pay points -

PN415

for which there is more than one pay point will have regard to -

PN416

and it has two propositions -

PN417

(i) the acquisition and use of skills described in the definitions contained in Schedule A - Classification Definitions; and

PN418

(ii) knowledge gained through experience in the practice settings over such a period.

PN419

There's two things we want to say about clause 15.3. The reference to the annual movement appears to be mandatory. The reference to the other matters is simply something one has regard to.

PN420

Now, it might be challenging to reconcile what that actually means because you are mandated to do something based on time, but at the same time as being mandated to do something based on time you actually have to have regard to other things that don't relate to time. So it's somewhat curiously written, and I don't think you could say it detracts from the fact that you are mandated to move people based on time. That's our first proposition.

PN421

JUSTICE HATCHER: I suspect that that merely identifies what the pay points are rewarding you for.

PN422

MR WARD: It could be. It could be. I will come to that in a moment. I will make a submission on that. I don't want the submission I make to sound unduly facetious, but I will make a submission on it in a moment.

PN423

The conclusion we reach, from reading 15.3, is this proposition, that progression through pay points is primarily based on time, and in our submissions of 16 May 24 we deal with a number of authorities from the Fair Work Commission and earlier that talk about the fact that that is obviously not an appropriate basis for a classification structure, and unlike the unions, we rely on the teachers decision to accept the proposition that time-based increments are anachronistic in all forms.

PN424

We also advance, in those submissions, the proposition that time-based increments do not, in our view, sit comfortably in any way with section 139(1)(a)

which directs the Commission's attention to setting minimum wages, having regard to skill-based structures and the like.

PN425

We don't see anything in the evidence in these proceedings that would convince the Expert Panel that on each anniversary the registered nurse miraculously obtains some form of additional competence or proficiency that could be characterised as a discernible work value change. We just don't believe the evidence is there for that as a proposition.

PN426

At paragraph 22 of our 16 May submissions, in the court book at 274, we make that point and we footnote that because we have reviewed a large number of witness statements, as we do in the footnote. We can't find anything in the evidence that would actually support that as a proposition.

PN427

Now, I say this, and I don't want it to sound facetious. It sound a little facetious, and I apologise and I say it with respect. If we're wrong on that, and miraculously after every 12 months, there is some discernible change in the work to occasion work value change, then just get rid of clause 15.3 completely and introduce language at each pay point along the lines of, 'At pay point 1 the registered nurse demonstrates the following.' You can actually describe what these new competencies, these new proficiencies are at each pay point. Now, we can't do that because we can't see any, but if we're wrong, then obviously one would be capable of doing that.

PN428

The other thing which we think is obviously challenging about this notion that the pay points do, in fact, represent some form of change in work to occasion work value change is this. If that's true, then why do some of them stop at 4? Why do some of them go to 8, and then if we accept, as a general proposition, that after every anniversary you become more competent, such that that occasions a change in work value, then why don't they go on forever? Now, that is a facetious submission because I think it demonstrates the absurdity of what's actually currently in the instrument.

PN429

I suspect that the observations from the President about their providence is more likely than not the truth in terms of coming from the public sector, and the public sector obviously has a long, long history of including time-based increments in all of its instruments.

PN430

VICE PRESIDENT ASBURY: But, Mr Ward, if most of the RNs are, or the majority of them are at RN1, it would keep them in that area where you want them, where you have the majority of the work, where you encourage them to stay there because they're going to get an annual increment.

PN431

MR WARD: Well, I thought we were starting from the proposition that annual increments were anachronistic.

PN432

VICE PRESIDENT ASBURY: Well, in this award - - -

PN433

MR WARD: I'm sorry, I might answer your Honour's question this way. We adverted, at least, to certain solutions, and it might be best if I can explain what those solutions were. I'm not necessarily suggesting that any of them are particularly attractive, but I will at least give it a go.

PN434

At paragraph 46(b), which is at 281 of the court book, we talked about the possibility of simply amending clause 15.3, and it might be the case that you might amend clause 15.3 by simply deleting reference to 15.3(a); that is, you remove this notion that you must mandate progression based on time. Now, that solves one problem, but it might introduce others, which is arguments about how people move up these things and who makes the decision, but that's one proposition that we advanced in our submissions.

PN435

We discussed, at paragraph 29 of our submission, at the court book at 276, adopting some alternative formulations to that contained in clause 15.3 and we averted the Expert Panel's attention to the proposition that's contained in the SCHADS Award. Their clause on progression is at clause 13.3. Again, it might not be particularly satisfactory as a proposition, but that clause creates certain hurdles. It's in these terms:

PN436

At the end of each 12 months' continuous employment, an employee will be eligible for progression from one pay point to the next within a level if the employee has demonstrated competency and satisfactory performance over a minimum period of 12 months at each level within the level and -

PN437

(i) the employee has acquired and satisfactorily used new or enhanced skills within the ambit of the classification, if required by the employer; or

PN438

(ii) where an employer has adopted a staff development and performance appraisal scheme and has determined that the employee has demonstrated satisfactory performance for the prior 12 months' employment.

PN439

There are other ways that one could try and maintain the notion of pay points which is not simply mandated on the basis of my anniversary of employment, and again, our submission averted to that.

PN440

Our submission also talked, in the court book at 271, about the process that the Expert Panel adopted for personal care workers. The Expert Panel, in looking at personal care workers, accepted, as a general proposition, that after a period of time the application of competence, after a period of time, did, in fact, warrant some work value change, and the Expert Panel created the level 4, direct care worker senior, which created a step in rate after some four years' industry experience.

PN441

Now, interestingly enough, that's consistent with the teachers decision as well, because the teachers decision, I think, expressly sets out, as a matter of principle, the proposition that over a period of time an employee might gain sufficient experience to apply their competences in a way which demarks some sufficient change to warrant a work value reassessment. That could be another way that this matter is resolved; that is, you could replace pay points with something of that ilk, which seems to be entirely consistent with what the Expert Panel have done already.

PN442

Obviously, and perhaps more brutally, one could remove them altogether. We didn't advance that in our submissions. We didn't advance that for this reason. We have conceded consistently throughout this case that we do accept that employees generally, particularly when they're new to an industry, after three or four years do have a marked step-up in the application of their competence that warrants recognition, and therefore, simply abandoning the pay points, in our view, would be inappropriate to advance because we have already advanced a submission to the contrary in relation to that step-up process, but there's a variety of ways that the Commission could seek to attend to this issue if it has concerns that, as is proposed in the teachers, and as is questioned by the Commission in April, is it appropriate to maintain time-based annual increments?

PN443

DR RISSE: Mr Ward, can I ask, in relation to the aversion to pay points, it's in the submission, but you have glossed over a little here. Can you return to the issue of invisibility of skills - - -

PN444

MR WARD: Yes.

PN445

DR RISSE: - - - and the notion that, as you said, if you can't tangibly see competencies or capabilities, how would you propose recognising improvements in these invisible skills if not by passage of time?

PN446

MR WARD: Well, there's two things about that - and I say this respectfully - if what we're talking about is so difficult to explain or define, I would question whether or not they warrant work value change. So if they are clearly able to be defined, then as I said, you could simply say, 'At pay point this or pay point that, this is what the employee will demonstrate.' That would be satisfactory. The

other way of dealing with that is to adopt the formulation that you did for the personal care worker level 4, and to include a step-up at an appropriate juncture.

PN447

Our challenge isn't this. Our challenge isn't that through experience you never become more competent. We're not, for a moment, articulating that. Our concern is the idea that this miraculously emerges on the anniversary of your employment. I think, frankly, that's what we're cavilling with, not the broader proposition that, at some point, competency might create increased pay.

PN448

JUSTICE HATCHER: So let's assume we talk what you describe as a brutal approach, or at least, at an incremental system, which was more akin to the teachers structure. How would you propose we adjust the rate to be applied for 2, 3, 4 and 5 by reference to the benchmark rate which we have identified; that is, do we simply adjust them by the amount of difference between RN 1 pay point 1 in the benchmark and apply that percentage to 2, 3, 4 and 5 to get a new rate?

PN449

MR WARD: I will just make sure I understand, your Honour. My assumption
- - -

PN450

JUSTICE HATCHER: No, I will make it clearer. Let's assume, for the purpose of argument, that we have decided to take your brutal approach with 2, 3, 4 and 5 and just set a single rate for each of those classifications. What is the method by which we will set the rate for those classifications; that is, we proceed on the basis of the entry level rate that currently exists plus the new percentage or - - -

PN451

MR WARD: I'm sorry, your Honour. Yes. Well, one would take the benchmark rate as what is currently RN pay point 1.

PN452

JUSTICE HATCHER: Yes.

PN453

MR WARD: There is an internal relativity difference between RN pay point 1 and RN 2 pay point 1. You would maintain that relativity and so forth.

PN454

JUSTICE HATCHER: Thank you.

PN455

MR WARD: Yes. You would do that. I have to concede that the EN is even more complicated. On one reading of the EN classifications one might say that they made a healthier attempt to mask the time element, but it is clearly, as we put in our submissions between 277 and 278 in the court book, it's clearly aware, and if I could take the Commission to A.4, the enrolled nurse, the enrolled nurse classification, unlike the sort of nakedly transparent pay points for registered

nurses, there is an attempt with the enrolled nurse to give the flavour that you're getting something more for your money as you move up the pay points.

PN456

Having said that, as the Commission will see from a reading of 15.3 and then A.4, two propositions prevail. 15.3(a) applies to enrolled nurses; that is, the progression will be based on annual movement, and secondly, that seems to be reinforced to some extent in the actual narrative in the various enrolled nurse pay points themselves because they all require an additional 12 months, as they call it, practical experience arising, but I do acknowledge that there's a greater attempt to suggest more is going on with the enrolled nurses than is the case with the registered nurse.

PN457

It's not a lot, though, with respect, and I say it's not a lot in this regard. For instance, it seems to be primarily an averment to in-service training being done, and our sense is that in-service training was at large for a great many employees in the aged care sector. There was a great deal of evidence about what in-service training meant and one assumes that that's part of the broader work value finding to set the rate itself in the first place.

PN458

That's what we say about the enrolled nurse, and again, one could remedy the enrolled nurse very easily by adopting a similar approach as has been the case to the personal care worker. I withdraw that. The direct care worker level 4 senior. Again, we're not saying that at some point applied competency might not equal work value. We're just anxious that it happens on the anniversary of your employment.

PN459

Can I just address, in finishing, just a couple of comments, if I can, that arose from the Bench and conversations with my learned friend, Mr McKenna, and in particular, I want to deal with one. We think this should be resolved. For us, we think it should be resolved. We're not attracted to this notion of keeping what we have got for aged care and hiving it all off again for some bigger case. We're not attracted to that for a variety of reasons.

PN460

The arrival of the interests of the private hospitals gave rise to a great many statements about flow-on prejudice and the like. They were given ample opportunity to be here today. They were given ample opportunity to put material on about all of those things, in fact, I think the Commission gave them more than a reasonable opportunity to do that. They didn't bother and they haven't turned up. With respect, if some prejudice falls on them because of a decision here in aged care, so be it. That's just a matter of the way things roll.

PN461

JUSTICE HATCHER: But, again, Mr Ward, the issue is not the prejudice to them. The fact is that their earlier turning up has probably delayed this finalisation of this aspect by some months on the anticipation that we're going to have some good case which didn't eventuate. We're now in September. Unless

we adopt the ANMF submission that we simply apply increases to the existing structure, holus-bolus, any departure from that will require us to publish a provisional view about a new classification structure with accompanying transitional provisions and a transfer timetable, and then we will see further submissions on that, including submissions from the Commonwealth as to what the cost of that would be and to finalise all of that before 1 January, if that's the date we choose to adopt. That's what I really have in mind.

PN462

MR WARD: So I will be clearer then, your Honour. We don't want to be impractical in advancing our submission. If it came to pass that the Commission - let's assume, for present purposes, the Commission was minded to change the structure. If the Commission formed the view that that practically couldn't be done before 1 January and provide procedural fairness to my clients and Mr McKenna's clients, then we accept that it might have to be the case that you would issue the first tranche of increase on the existing structure, but we say don't let that prevent you from issuing that provisional view and proceeding.

PN463

What we don't want is all of that held off to the possibility of some bigger case being run in October next year, or December or whenever. That's what we don't want to happen. We want this to be moved to finality in some appropriate way. If the Commission pleases, those are our submissions.

PN464

JUSTICE HATCHER: All right.

PN465

How long do you think you will be, Ms Eastman?

PN466

MS EASTMAN: Your Honour, I have probably got four points I need to address, just in relation to matters that have been raised this morning. Subject to just getting some instructions from the Commonwealth over lunch, my assessment is probably five to 10 minutes at most.

PN467

JUSTICE HATCHER: But you still want the luncheon adjournment?

PN468

MS EASTMAN: Well, I am very happy to continue now, if that's convenient to the Commission. I'm just not certain if there's anything else from the Commonwealth. I'm just mindful of the time. It's 10 past.

PN469

JUSTICE HATCHER: Well, how long do you think you will be in reply, ANMF gentlemen and lady?

PN470

MR McKENNA: No more than five to 10, and possibly substantially less.

PN471

JUSTICE HATCHER: Okay. We will go ahead I think.

PN472

MS EASTMAN: Shall we go?

PN473

JUSTICE HATCHER: Yes.

PN474

MS EASTMAN: Thank you, Expert Panel. You have the Commonwealth's submissions of 26 August, and they're at tab 16, page 323 of the digital hearing book. I don't want to repeat any matters raised in those submissions, and of course, we rely on it, and you are aware that the Commonwealth's position is very clear that it is committed to supporting further wage increases for aged care nurses.

PN475

The points that I want to address - and I will do it all briefly - is the operative date issue which has been raised by the respective parties today, very briefly on the disharmony issue, and then a very short observation in relation to absorption and over-award of payments.

PN476

I think the critical issue is the operative date, and as I understand it, the parties are now advancing an operative date of 1 January 2025. The Commonwealth has heard the submissions and the contentions, but it's not something that the Commonwealth can agree to, and there's a number of reasons for this. They're set out in our written submissions, but I might address them now.

PN477

The first is just the feasibility of being able to, in a very short period of time, for the Commonwealth to be in a position to make an assessment of both the impact fiscally, but also enabling the subsidy arrangements to be put in place.

PN478

JUSTICE HATCHER: Ms Eastman, before you go on, just so I understand what we're talking about with the funding, are we talking about the type of funding arrangement which arose after the stage 1 decision whereby the Commonwealth agreed to - ended up agreeing to funding a 15 per cent increase for everybody regardless of whether they were on the award rate or not - - -

PN479

MS EASTMAN: Yes.

PN480

JUSTICE HATCHER: - - - or are we simply talking about the actual cost of funding legal obligations that might arise from our decision?

PN481

MS EASTMAN: Well, the way in which the Commonwealth funds in this sector is to provide a subsidy to the providers. It doesn't make an assessment of the subsidy targeted against the particular level of funding required by an individual provider to meet any award rates. So the nature of the funding is not one that is targeted to meet.

PN482

So this is relevant, I think, to the absorption issue, and the Expert Panel was taken to the table in the Federation's submissions in relation to sort of showing where there's an absorption rate or not.

PN483

If one looks at that approach, the Commonwealth doesn't disagree with the analysis set out in those submissions and described this morning, but the premise that's behind it is that there's some assumption that the Commonwealth's subsidies are somehow targeted to what the rate of absorption or funding might be to meet that particular rate, and that's not the way in which the subsidies operate, so in that context I hope that gives you some clarity.

PN484

VICE PRESIDENT ASBURY: So the Commonwealth's funding arrangements assumes that everybody is going to get the increase - - -

PN485

MS EASTMAN: Yes.

PN486

VICE PRESIDENT ASBURY: - - - and it's not able to target it or adjust it so that it might need to have less of an obligation for some providers than others?

PN487

MS EASTMAN: That's right, and the Commonwealth expects that any funding to support wage increases will be passed on for the benefit of the workers in the form of increased wages and then support for those oncosts.

PN488

JUSTICE HATCHER: But I mean you raise the matters of impediment to 1 January, but simply speaking, it's a model which might give funding to employers who are not legally obliged to do anything by our decision.

PN489

MS EASTMAN: It may, but I think that - - -

PN490

JUSTICE HATCHER: Well, why should we take it? I mean that's the Commonwealth's funding model as it is, but why should we take that into account in determining minimum legal obligations?

PN491

MS EASTMAN: Well, it's one factor, and as we have set out in the written submissions, there's a number of factors, and one of the factors also concerns the

financial viability of the aged care providers. I think we have provided to the Commission that there is a concern that many of the aged care providers are unlikely to have financial capacity, potentially to putting the viability of some of those providers at risk.

PN492

There's the aged care sector quarterly financial snapshot, October to December 2023, and that reported that approximately 65 per cent of residential care and 76 per cent of home providers are profitable, and that leaves the balance in circumstances where any immediate change from 1 January would put the viability of those providers in jeopardy. The other point on the - - -

PN493

JUSTICE HATCHER: But unlike with the PCWs, here we're dealing with a relatively small fraction of the workforce and only a small fraction of that fraction are actually paid the award rates.

PN494

MS EASTMAN: And we have heard that this morning and the Commonwealth is certainly aware of that. There's two other factors that the Commonwealth wishes to bring to the Commission's attention, and one is the significant reforms that the Commonwealth has announced very recently with the introduction of an aged care bill with the hope and expectation that that would take effect if passed by 1 July next year, and so the date of 1 July is also consistent with the rather large set of reforms that the Commonwealth has proposed.

PN495

The last point on this is just the feasibility of an operative date of 1 January in terms of both funding and implementation. We have set out, in our written submissions, at paragraph 7 and paragraph 14, the constraints on the Commonwealth to meet an earlier operative date, as well as make an assessment of the fiscal arrangements. Part of this, as the Commission would be aware, is the budgetary cycle and the steps that need to be taken in relation to making appropriate budgetary allowances, and that would take, for the Commonwealth, some indication by mid-December as to whether or not that could be done.

PN496

So we rely on the submissions that we have put to say that an operative date earlier than 1 July would impose an impediment on the Commonwealth to be in a position to make an adequate assessment of what the impact may be fiscally or otherwise. So those are the submissions that I wanted to make in relation to the operative date.

PN497

On the question of the disharmony and the overlapping of rates, the Commonwealth acknowledges that the situation described in the Federation's submissions, and the table that you were taken to at page 355 of the digital hearing book, acknowledges that there would be that disharmony. The Commonwealth's submission in that regard is that will be temporary, but not long-term.

PN498

I think then I probably addressed the other matters in relation to absorption and over-award payments earlier, so those are the only matters that I wanted to raise. Thank you.

PN499

JUSTICE HATCHER: Thank you. All right.

PN500

Mr McKenna and Mr Hartley.

PN501

MR McKENNA: If your Honour pleases. A couple of matters arising by way of reply to Mr Ward, and I will work backwards. Towards the very end of Mr Ward's submissions, your Honour, the President, raised the prospect of applying the brutal approach and how that might work in practice, and as I understand Mr Ward's response, it would be that relativities would be set with respect to the entry level rates, and so a level 1 nurse would be set forever more, whilst they are at level 1, at the entry level rate. A level 2, again, would be set forever more as a level 2 nurse at that rate.

PN502

In my respectful submission, that highlights the deficiencies with the approach and the benefit that is provided by the current system of annual increments in being able to recognise the increase in work value, including the ability to recognise the increase in hidden skills which are not otherwise susceptible to be reduced to descriptors.

PN503

Mr Ward also worked through a number of alternative proposals, including for example, advancement after three to four years, and a number of other proposals. I won't respond to them specifically, save to say this. I think, at one point, he described one of the approaches as being appropriate. That, of course, is not the statutory test for the Expert Panel.

PN504

In changing the classification structure, or in order to be in a position to change the classification structure, the Expert Panel would need to be satisfied that that was necessary to achieve the modern awards objective and no submissions have been advanced in support of that proposition.

PN505

Reliance is also placed on section 193(1)(a) which provides that, 'A modern award may include terms about any of the following matters, and there's reference at (1)(a)(i) to skill-based classifications.

PN506

There is no doubt that skill-based classifications and career structures are, to use the old parlance, allowable award matters, but in my respectful submission, that doesn't take the Expert Panel's task any further at this point.

PN507

There was a discussion between your Honour, the President, and Mr Ward about the concept of being appointed to roles, having particular regard to the registered nurse roles and what that might mean. The Federation's position, subject to instructions clarifying this - and we use, perhaps, as an example, Ms Brooks, whose witness statement is at page 264. She describes herself as the care manager at St Catherine's, which is a senior management position akin to a director of nursing. She has been appointed by the employer, in the sense that she's been employed and she's in that position.

PN508

Our position is that the proper application of the classification structure, it doesn't matter whether she is given the title of director of nursing, and it is not sufficient - and it is not determinative if the employer says you are appointed to level 4 or level 5.

PN509

Assuming that she is appointed to a role as care manager and she is exercising the skills described in schedule A - and perhaps I will find it - schedule A.5.5, registered nurse level 5, 'In addition to the duties of an RN' - and I'm reading from (d) - 'an employee at this level will perform the following duties.' If she's performing those duties and she holds the qualifications required for the employer's particular practice settings, then she would be a level 5 registered nurse.

PN510

I think then that brings me to the proposed wording provided by Mr Ward. It is accepted there is absolutely nothing controversial about these words. It is a statement of fact and it is a statement that is reflected by the evidence in this proceeding. It is one thing, though, for there to be a statement of fact, and there is another thing for the Expert Panel to amend a classification structure to insert additional words.

PN511

Put most simply, the insertion of these words is not necessary to achieve the modern award's objective and the joint employers have not advanced the case such that they are. There ought be no particular concern from the joint employers about the fact that an enrolled nurse may provide supervision. That's expressly picked up by the classification structure of the Aged Care Award and the definition of the direct employee there. It's consistent with the evidence in this proceeding, and in our respectful submission, the words simply are not required and would serve no useful purpose. Unless there are questions from the Expert Panel arising, those are the reply matters for the Federation.

PN512

VICE PRESIDENT ASBURY: Mr McKenna, is it your submission that the relativities recognise the hidden skills or is it an aspect?

PN513

MR McKENNA: I'm sorry. Yes. Absolutely they do. Hidden skills, like other skills, will increase with the passage of time, and so to that end, the increments

that involve annual wage increases pick up increase in hidden skills, and absent those - - -

PN514

JUSTICE HATCHER: I'm sorry, aren't we already awarded the invisible skills by increasing the benchmark rate; that is - - -

PN515

MR McKENNA: Yes. I'm sorry, we're not seeking a further increase. The point is that the annual increments are reflective of work value. Work value included in the skills.

PN516

VICE PRESIDENT ASBURY: But, in essence, the starting rate recognises the proper alignment of the rate, and the starting rate is, you know, the decision says it's the benchmark rate. It's the starting rate and it's justified by work value reasons.

PN517

MR McKENNA: Yes.

PN518

VICE PRESIDENT ASBURY: So if the work value reasons include the hidden skills, then what do the increments deal with?

PN519

MR McKENNA: Well, your Honour, that assumes that hidden skills are static and that's, in my respectful submission, that's not the case or the evidence. Hidden skills, like other aspects of work value, will increase with the passage of time. It will increase with experience.

PN520

VICE PRESIDENT ASBURY: Okay. I understand your submission. Thank you.

PN521

JUSTICE HATCHER: All right. If there's nothing further, we thank the parties for their very useful submissions. We would propose to reserve our decision and we will now adjourn.

ADJOURNED INDEFINITELY

[1.23 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

EXHIBIT #ANMF54 STATEMENT OF TANYA VOGT DATED 23/04/2024 PN17

**EXHIBIT #ANMF55 FURTHER STATEMENT OF JULIANNE BRYCE,
DATED 26/04/2024 PN19**

**EXHIBIT #ANMF56 FURTHER STATEMENT OF HEILA BROOKS
DATED 22/04/2024 PN21**