

Australian Industry Group

Gender Undervaluation
– *Social, Community, Home Care
and Disability Services Industry
Award 2010*

Submission
(AM2024/21)

3 October 2024



**GENDER UNDERVALUATION – SOCIAL, COMMUNITY, HOME
CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010**

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1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) concerns the proceedings commenced on the Fair Work Commission's (**Commission**) own motion concerning the issue of gender-based undervaluation of work under the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHCDS Award or Award**).
2. The submission is framed by reference to the questions posed by the Commission in its statement of 24 June 2024¹.
3. Ai Group also has a significant interest in the applications made in matters AM2024/25 and AM2024/27. We intend to respond to those applications in reply.

¹ *Gender Undervaluation – Priority Awards* [2024] FWCFB 291 at [11].

2. THE LEGISLATIVE FRAMEWORK

4. This proceeding is being conducted pursuant to s.157 of the *Fair Work Act 2009* (Cth) (**Act**).
5. When assessing whether minimum wages may be increased (on the basis of gender-based undervaluation or otherwise):
 - (a) The Commission must be satisfied that the relevant variations are justified by ‘*work value reasons*’,² as defined by s.157(2A) of the Act;
 - (b) The Commission must be satisfied that making the variations outside the system of annual wage reviews is necessary to achieve the modern awards objective (**MAO**);³ and
 - (c) The minimum wages objective (**MWO**) also applies.⁴

Work Value Reasons

6. Sections 157(2A) and (2B) of the Act define ‘*work value reasons*’ and the manner in which they are required to be considered by the Commission, as follows:

157 FWC may vary etc. modern awards if necessary to achieve the modern awards objective

...

- (2A) **Work value reasons** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
 - (a) the nature of the work;
 - (b) the level of skill or responsibility involved in doing the work;
 - (c) the conditions under which the work is done.
- (2B) The FWC’s consideration of work value reasons must:
 - (a) be free of assumptions based on gender; and

² Section 157(2)(a) of the Act.

³ Section 157(2)(b) of the Act.

⁴ Section 284(2)(b) of the Act.

- (b) include consideration of whether historically the work has been undervalued because of assumptions based on gender.

7. A Full Bench of the Commission set out some key principles in relation to ‘*work value reasons*’ in s.157(2A) of the Act in the *Aged Care Stage 1 decision*.⁵ Relevantly, it said as follows:

Section 157(2A)

1. Section 157(2A) can be said to exhaustively define ‘*work value reasons*’ in the sense that there are no other express provisions in the FW Act which inform the meaning of s.157(2A), although the objects of the FW Act will inform the interpretation and application of the concepts within s.157(2A).
2. The reasons which justify the amount employees should be paid for doing a particular kind of work must be ‘*related to*’ any one or more of the 3 matters in s.157(2A)(a) to (c). There is nothing in the statutory context to suggest that the expression ‘*related to*’ in s.157(2A) was not intended to have a wide operation or that an indirect, but relevant, connection would not be a sufficient relationship for present purposes. The expression ‘*related to*’ is one of broad import that requires a sufficient connection or association between the 2 subject matters; the connection must be relevant and not remote or accidental.
3. Section 157(2A) does not contain any requirement that the ‘*work value reasons*’ consist of identified changes in work value measured from a fixed datum point. But, in order to ensure there is no ‘*double counting*’, it is likely the Commission would adopt an appropriate datum point from which to measure work value change, where the work has previously been properly valued. The datum point would generally be the last occasion on which work value considerations have been taken into account in a proper way, that is, in a way which, according to the current assessment of the Commission, correctly valued the work. A past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.
4. Where the wage rates in a modern award have not previously been the subject of a proper work value consideration, there can be no implicit assumption that at the time the award was made its wage rates were consistent with the modern awards objective or that they were properly fixed.
5. Section 157(2A) does not incorporate the test which operated under wage fixing principles of the past that the change in the nature of work should constitute ‘*such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.*’ There is simply no basis for introducing such an additional requirement to the exercise of the discretion in s.157(2), which might have been, but which has not been, enacted.
6. In the Pharmacy Decision, the Full Bench described in detail the development by the AIRC of an approach whereby the proper fixation of award minimum rates of pay required an alignment between key classifications in the relevant award and

⁵ *Aged Care Award 2010, Nurses Award 2020, Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200 (***Aged Care Stage 1 decision***).

classifications with equivalent qualification and skill levels in the Metal Industry classification structure.

7. Having regard to relativities within and between awards remains an appropriate and relevant exercise in performing the Commission's statutory task in s.157(2). Aligning rates of pay in one modern award with classifications in other modern awards with similar qualification requirements supports a system of fairness, certainty and stability. The C10 Metals Framework Alignment Approach and the AQF are useful tools in this regard. However, such an approach has its limitations, in particular:
 - alignment with external relativities is not determinative of work value
 - while qualifications provide an indicator of the level of skill involved in particular work, factors other than qualifications have a bearing on the level of skill involved in doing the work, including 'invisible skills' as discussed in Chapter 7.2.6
 - the expert evidence supports the proposition that the alignment of feminised work against masculinised benchmarks (such as in the C10 Metals Framework Alignment Approach) is a barrier to the proper assessment of work value in female-dominated industries and occupations (see Chapter 7.2.5), and
 - alignment with external relativities is not a substitute for the Commission's statutory task of determining whether a variation of the relevant modern award rates of pay is justified by 'work value reasons' (being reasons related to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is done).
8. In exercising the powers to vary modern award minimum wages, the Full Bench must take into account the rate of the national minimum wage as currently set in a national minimum wage order (s.135(2)).
9. Statements of principle from work value cases decided under different statutory regimes and pursuant to wage fixing principles which no longer exist are likely to be of only limited assistance in the Commission's statutory task under s.157(2). Some of those statements of principle have no relevance at all, given they are grounded in wage fixing principles which required a change in work value to constitute a significant net addition to work requirements. The adoption of the observations such as those at [190] in the ACT Child Care Decision runs the risk of obfuscating the Commission's statutory task of determining whether a variation of modern award minimum wages is justified by work value reasons, being reasons related to the matters in s.157(2A)(a)–(c). To adopt such an approach may also be said to be adding to the text of s.157(2A) in circumstances where it is not necessary to do so in order to achieve the legislative purpose, and may also be an unwarranted fetter on the exercise of what the legislature clearly intended would be a discretionary decision.
10. It is not helpful or appropriate to seek to delineate the metes and bounds of what constitutes 'work value reasons' divorced from a particular context. In our view the meaning of 'work value reasons' should focus on the text of s.157(2A). Any

elaboration will develop over time, on a case-by-case basis as the Commission determines particular issues as and when they arise.⁶

The Modern Awards Objective

8. Section 138 of the Act states:

138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

9. Section 134(1) of the Act contains the MAO:

134 The modern awards objective

What is the modern awards objective?

- (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
- (a) relative living standards and the needs of the low paid; and
 - (aa) the need to improve access to secure work across the economy; and
 - (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and
 - (b) the need to encourage collective bargaining; and
 - (c) the need to promote social inclusion through increased workforce participation; and
 - (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
 - (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or

⁶ *Re. Aged Care Award 2010, Nurses Award 2010 and Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200 at [293].

- (iv) employees working shifts; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

10. The key principles concerning the MAO were summarised by the Full Bench in the *Aged Care Stage 1 decision*.⁷ The following propositions can be distilled from that summary:

- (a) Each of the matters in s.134(1) of the Act must be taken into account insofar as they are relevant, however no particular primacy is attached to any of considerations, and not all will be relevant in the context of a particular proposal to vary a modern award;⁸
- (b) In giving effect to the MAO, the Commission is performing an evaluative exercise in taking into account the s.134(1) considerations and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance;⁹
- (c) While the s.134(1) considerations inform this evaluative exercise, they do not necessarily exhaust the matters which the Commission may consider in determining a fair and relevant minimum safety net. Further matters may

⁷ *Re. Aged Care Award 2010, Nurses Award 2010 and Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200 at [271] – [278].

⁸ *Re. Aged Care Award 2010, Nurses Award 2010 and Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200 at [271].

⁹ *Re. Aged Care Award 2010, Nurses Award 2010 and Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200 at [272].

be determined by implication from the subject matter, scope and purpose of the Act;¹⁰

- (d) Fairness in the context of providing a ‘*fair and relevant minimum safety net*’ must be assessed from the perspective of employees and employers covered by the modern award in question;¹¹
- (e) There is a distinction between what is ‘*necessary*’ and what is ‘*merely desirable*’. That which is desirable does not carry the same imperative for action.¹² Further:

[278] What is ‘*necessary*’ to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances of the particular modern award, the terms of any proposed variation and the submissions and evidence. Reasonable minds may differ as to whether a proposed variation is necessary (within the meaning of s.138), as opposed to merely desirable.¹³

The Minimum Wages Objective

11. The MWO is contained in s.284 of the Act:

284 The minimum wages objective

What is the minimum wages objective?

- (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
 - (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
 - (aa) the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps; and

¹⁰ *Re. Aged Care Award 2010, Nurses Award 2010 and Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200 at [273].

¹¹ *Re. Aged Care Award 2010, Nurses Award 2010 and Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200 at [272].

¹² *Re. Aged Care Award 2010, Nurses Award 2010 and Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200 at [277].

¹³ *Re. Aged Care Award 2010, Nurses Award 2010 and Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200 at [278].

- (b) promoting social inclusion through increased workforce participation; and
- (c) relative living standards and the needs of the low paid; and
- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the *minimum wages objective*.

12. The Full Bench in the *Aged Care Stage 1 Decision* noted that there is a substantial degree of overlap in the considerations relevant to the MWO and the MAO, although some are not expressed in the same terms.¹⁴

¹⁴ Re. *Aged Care Award 2010, Nurses Award 2010 and Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200 at [290] (***Aged Care Stage 1 Decision***).

3. THE COMMISSION'S QUESTIONS

Question 1

13. Question 1 posed by the Panel is as follows:

(1) Having regard to the findings contained in the Stage 1 and Stage 2 gender pay equity research reports, has the work to which the classifications apply been historically undervalued because of assumptions based on gender?

14. Ai Group does not contend that the work to which the relevant classifications apply has been historically undervalued because of assumptions based on gender.

15. As for the '*Stage 1 and Stage 2 gender pay equity research reports*'; neither provide a basis for a conclusive determination that the work to which the relevant classifications apply has been historically undervalued because of assumptions based on gender. Rather, at their highest, they go to whether a comprehensive work value assessment of the occupational groups examined has ever been undertaken.¹⁵ It is trite to observe that the absence of such an assessment having been undertaken does not of itself warrant a finding of undervaluation.

Question 2

16. Question 2 is as follows:

- (2) Would variations to the minimum wage rates prescribed for the classifications:
- (a) be justified by work value reasons within the meaning of s.157(2A) of the Act?
 - (b) be necessary to achieve the modern awards objective in s.134(1) of the Act?
 - (c) be necessary to achieve the minimum wages objective in s.284(1) of the Act?

¹⁵ Stage 2 Report at page 10.

17. Ai Group does not contend that variations to the minimum wage rates prescribed by the Award for the relevant classifications should be made and on that basis, it does not propose to comprehensively address the aforementioned statutory elements in this submission.
18. For present purposes, we simply note that central to any consideration of a proposed increase to minimum wages prescribed by the SCHCDS Award should be a careful assessment of the impact that the increase would have on employers.¹⁶ This is particularly important in circumstances where many employers covered by the Award are not-for-profit organisations that rely heavily, if not exclusively, on government funding. For instance, disability services are primarily funded through the National Disability Insurance Scheme (**NDIS**).
19. The NDIS is characterised by pricing limits, which are stipulated in the *NDIS Pricing Arrangements and Price Limits 2024-25 (Pricing Arrangements)*.¹⁷ Those limits effectively impose a cap on the amounts that providers can charge for their services, thereby preventing them from passing on additional costs.
20. The Pricing Arrangements are derived from the *NDIS Disability Support Worker Cost Model 2024-25 (Cost Model)*.¹⁸ The Cost Model is based on a series of assumptions and is used by the National Disability Insurance Agency (**NDIA**) to estimate the costs to disability service providers of providing the relevant services and inform its pricing decisions.¹⁹
21. The NDIA has been found to be ‘*aggressive*’ in its price regulation activities in ‘*trying to set the absolute minimal cost to control the cost to government of the NDIS as a whole*’.²⁰ This can be seen in various aspects of the Cost Model, which

¹⁶ Section 134(1)(f) of the Act.

¹⁷ *National Disability Insurance Scheme, Pricing Arrangements and Limits 2024-25* (Version 1.3) <<https://www.ndis.gov.au/media/7150/download?attachment>> (accessed 2 October 2024).

¹⁸ *National Disability Insurance Scheme, Disability Support Worker Cost Model, Assumptions and Methodology 2024-25* (Version 1.3) <<https://www.ndis.gov.au/media/7152/download?attachment>> (accessed 2 October 2024).

¹⁹ *Re. Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383 at [218](14) – (15).

²⁰ *Re. Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383 at [218](20).

entirely omits certain Award-derived entitlements, underestimates the true cost of others (such as overtime) and assumes a degree of labour optimisation and rostering efficiency that is simply divorced from the operational realities of organisations that provide the relevant services. This is, in large part, a product of the consumer-directed care model that underpins the provision of the relevant services, which has resulted in greater fragmentation in work patterns, as employers are now *'less able to organise the work in a manner that is most efficient'* to them.²¹

22. The impact of these various factors is clear. Employers in the disability sector have been under significant strain since the rollout of the NDIS.²² Indeed, the circumstances of many providers appears to be worsening. A survey of 432 organisations (99% of which provided services under the NDIS)²³ conducted by National Disability Services (**State of the Sector Report**) revealed that 2023 was *'the worst year for financial viability'* of providers in the eight years the survey has been run.²⁴ Thirty-four percent of respondents reported making a loss, while 18% reported just breaking even.²⁵ This was a significant increase from the previous two surveys in 2021 and 2022, where 19% and 23% of providers respectively reported making a loss.²⁶
23. Accordingly, the Commission should not in this proceeding move to award any increase to minimum wages payable in the disability services sector unless a clear commitment has been made by the Commonwealth Government to fund such increases, in their entirety. Employers must not be left to simply absorb the additional costs associated with wage increases, having regard to the various matters set out above.

²¹ *Re. Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383 at [218](10)(f).

²² *Re. Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383 at [218](21).

²³ National Disability Services, *State of the Disability Sector Report 2023*, pages 6-7

²⁴ National Disability Services, *State of the Disability Sector Report 2023*, page 3.

²⁵ National Disability Services, *State of the Disability Sector Report 2023*, page 3

²⁶ National Disability Services, *State of the Disability Sector Report 2023*, page 3

Question 3

24. Question 3 is as follows:

- (3) Does the work of employees under any of the classifications involve the exercise of 'invisible' skills (including gender-related indigenous cultural skills) and/or caring work of the nature described in paragraphs [156(1)] and [172]–[173] and elsewhere in the *Stage 3 Aged Care decision*?

25. In the most recent Annual Wage Review decision, the Expert Panel stated:
(emphasis added)

[118] ... In the Stage 1 Aged Care decision and the Stage 3 Aged Care decision, the work of home care workers in aged care covered by the SCHADS Award was found to have been the subject of gender undervaluation having regard to the female domination of that occupation, the existence of the indicia of gender undervaluation in their history of award regulation and the nature of the 'invisible' caring skills exercised in their work. As the Stage 1 and Stage 2 reports indicate, there is no reason to think that the position of home care workers servicing disability clients is any different. Indeed, as found in the Stage 3 Aged Care decision, some employers and employees covered by the SCHADS Award undertake a mixture of aged and disability home care services. In our view, that warrants a priority consideration of whether the classifications and rates of pay for Home Care Employees— Disability Care under the SCHADS Award should return to alignment with those for Home Care Employees— Aged Care on the basis of the outcome determined in the Stage 3 Aged Care decision.²⁷

26. Notwithstanding the Expert Panel's observations about home care workers; it remains incumbent on the Commission in this proceeding to be satisfied that 'invisible' skills are in fact involved in the performance of the relevant work on the basis of evidence about the same, as well as a consideration of the criticality of any such skills and the frequency with which they are used in performing the work. The same is of course also true to the extent that there is any proposal to increase the minimum wages payable to other employees covered by the Award.

27. Whilst we would not oppose the proposition that, to some degree, the work performed by certain employees covered by the SCHADS Award requires the provision of care to others and the exercise of skills that enable them to do so effectively, it does not follow that such skills are 'invisible' or that the applicable minimum wage rates suffer from gender-based undervaluation.

²⁷ *Annual Wage Review 2023-24* [2024] FWCFB 3500 at [118].

Question 4

28. Question 4 is as follows:

- (4) Is the benchmark rate identified in paragraph [170] of the *Stage 3 Aged Care decision* appropriate to apply to any of the classifications for which a Certificate III qualification or equivalent is required?

29. Ai Group submits that it is appropriate for the Full Bench's consideration of Question 4 to occur in three parts:

- (a) *Firstly*, it is necessary for the Full Bench to determine Question 2 in the affirmative. Ai Group's position in respect of that question is set out earlier in this submission.
- (b) *Second*, in so far as a Full Bench of the FWC has previously determined it appropriate to apply the 'benchmark rate' to certain classifications of workers covered by the *Aged Care Award 2010 (Aged Care Award)* and *Nurses Award 2020 (Nurses Award)*, it is necessary to consider whether the reasons underpinning this approach may readily be translated to any of the classifications under the '*Home Care Employees – Disability Care*' stream of the SCHADS Award for which a Certificate III qualification or equivalent is required.
- (c) *Third*, even if those reasons are established, regard must be had to the limitations of the rate arrived at in the 2011 ERO decision (the **ERO rate**) that was subsequently adopted as the SCHADS Award '*benchmark rate*'.

30. We address each of these issues in more detail, below.

Applying the Benchmark Rate identified in the *Aged Care Stage 3 Decision*

31. The Full Bench in the *Aged Care Stage 3 Decision* relevantly held that the current weekly wage under the SCHCDS Award for a Social and Community Services (**SACS**) Level 2 employee at entry (rounded to the nearest 10 cents) was appropriate to serve as the benchmark rate for Certificate III-qualified Personal Care Workers, Assistant in nursing / Nursing Assistant and Home Care Workers under the *Aged Care Award* and *Nurses Award*. The Full Bench explained the

basis for its determination that the SCHCDS Award SACS Level 2 classification was an appropriate comparator in those circumstances, as follows: (emphasis added)

[170] We consider that the rate of \$1223.90 per week (rounded to the nearest 10 cents) is appropriate to serve as the benchmark rate for Certificate III-qualified PCWs, AINs and HCWs. Prior to the making of the ERO there was, as earlier stated, a pay alignment between these classifications and the entry rate for a Certificate III qualified social and community services employee under the SCHADS Award, and that provides a proper basis for the use of the SCHADS Award Level 2 classification as a comparator in the current circumstances. The basis upon which the ERO rates were determined closely parallel the work value reasons upon which we are proceeding in this matter: the high female composition of the industry in question, the significance of the work being 'caring' work, the disguising of the level of skill and experience required to perform the work, the gender-based undervaluation of the work, and the need to remedy the extent to which assumptions on the basis of gender had inhibited wages growth.²⁸

32. Accordingly (and without detracting from our submissions which follow concerning the significant limitations of the ERO rate) on the basis of the approach of the Full Bench in the *Aged Care Stage 3 Decision*, the question of whether it is appropriate in the context of these proceedings to apply the benchmark rate to the relevant Certificate III classification in the '*Home Care Employees – Disability Care*' stream of the SCHADS Award requires a consideration of:
- (a) *Firstly*, any pre-ERO alignment of the classifications under consideration in these proceedings with the SCHADS Award SACS Level 2 rate; and
 - (b) *Second*, whether there are work value reasons that align with the basis upon which the ERO rates were determined.
33. On the first issue (the existence of any pre-ERO alignment of '*Home Care Employees – Disability Care*' stream classifications that require a Certificate III qualification or equivalent with the SCHADS Award SACS Level 2 rate), the relevant point of comparison is what will from 1 January 2025 be known as '*Home care employee level 3 – disability care*'.²⁹ At the time the SCHCDS Award was

²⁸ Re. *Aged Care Award 2010, Nurses Award 2010 and Social, Community, Home Care and Disability Services Industry Award 2010* [2024] FWCFB 150 at [170] (***Aged Care Stage 3 Decision***).

²⁹ See Clause E.3.5 of Schedule E to the SCHCDS Award, which states '*Indicative but not exclusive of the qualifications required in this level is an accredited qualification to the position at the level of*

made, the weekly rate of pay for the equivalent level (*'Home care employee level 3'*) was \$637.60.³⁰ The original rate in the SCHADS Award for a Level 2 classification was \$637.62 per week.³¹ Accordingly, this consideration is satisfied.

34. As to the second issue, as no findings have yet been made in relation to Question 2(a), it follows that it is not possible at this stage to determine whether any such reasons (should they be found) are of a type that *'closely parallel'* the rationale for the ERO rates.

Limitations of the ERO rate

35. We turn now to the third issue which we submit warrants consideration as part of Question 4, namely, limitations of the ERO rate.

36. By way of starting point, the benchmark was not arrived at in the context of a work value case. Rather, the proceedings concerned an application for an equal remuneration order under Part 2-7 of the Act,³² seeking an equal remuneration order applying to employees in the SACS industry nationally, based on the wage rates and classification structure contained in the Queensland SACS award.³³ In response to the applicants' submission that the minimum wages in the modern award did not properly reflect the value of the work, the Full Bench concluded that *'[i]n order to succeed in their submission it would be necessary for the applicants to deal with work value and relativity issues relating to the classification structure in the modern award and potentially to structures and rates in other modern awards. No real attempt has been made to deal with those important issues'*.³⁴ (emphasis added)

Certificate 3 and/or knowledge and skills gained through on-the-job training commensurate with the requirements of the work in this level'.

³⁰ Stage 2 Report at page 240.

³¹ Stage 2 Report at page 229.

³² *Equal Remuneration Case* [2011] FWAFB 2700 at [1].

³³ *Equal Remuneration Case* [2011] FWAFB 2700 at [5].

³⁴ *Equal Remuneration Case* [2011] FWAFB 2700 at [261].

37. Respectfully, the statement of the Full Bench in the *Aged Care Stage 3 Decision* that ‘*the ERO rates have been authoritatively determined to be rates which ensure equal remuneration for work of equal or comparable value*’,³⁵ needs to be carefully weighed in the context of how the ERO rates were determined.
38. In the 2011 ERO decision, the Full Bench reached a view that there was not equal remuneration for men and women workers in the SACS industry for work of equal or comparable value, by comparison with state and local government employment.³⁶ The Full Bench concluded that gender partly influenced, but was not the sole reason for, the pay gap.³⁷ Parties were then invited to make submissions on the extent to which wages in the SACS industry were lower than they otherwise would have been, because of gender considerations.³⁸
39. Several observations may be made in relation to this:
- (a) *First*, the Full Bench’s remedy was not directed at addressing work value issues per se; but instead, the extent to which gender may be found to have inhibited wages growth in the SACS industry.³⁹
 - (b) *Second*, the extent of any gap attributable to gender was subject to widely varying estimates, of between 15 to 60 per cent, and was ultimately determined in line with a joint position advanced by the applicants and the Commonwealth.⁴⁰
 - (c) *Third*, the Commonwealth had made clear to the Full Bench that it was ‘*committed to meeting its share of the burden*’ that would flow from ‘*any decision*’ given in the case; and whilst the Prime Minister had announced funding of over \$2 billion during the proposed six-year implementation

³⁵ *Stage 3 Aged Care Decision* at [172].

³⁶ *Equal Remuneration Case* [2011] FWAFB 2700 at [285], [291].

³⁷ *Equal Remuneration Case* [2011] FWAFB 2700 at [282], [291].

³⁸ *Equal Remuneration Case* [2011] FWAFB 2700 at [286], [291].

³⁹ *Equal Remuneration Case* [2011] FWAFB 2700 at [282]; *Equal Remuneration Case* [2012] FWAFB 1000 at [59] – [60].

⁴⁰ *Equal Remuneration Case* [2012] FWAFB 1000 at [66] – [67]; see also [5].

period, there was ‘no suggestion of a limit at the figure of \$2 billion’.⁴¹ It was relevant to the Full Bench’s conclusion as to the appropriate ERO rates, that ‘[t]he Commonwealth has given a commitment to fund its share of the increased costs arising from the proposals. While some state governments are opposed, no government has indicated it will be unable to fund its share’.⁴²

- (d) *Fourth*, the approach pre-supposes that payment at the level of government employment was a reliable benchmark for a gender-neutral level of wages for the not-for-profit SACS industry. There was no evidence in the ERO proceedings in relation to this. As the then Vice President Watson concluded in a dissenting judgment in the 2012 ERO decision, no such presumption could be made, and public sector wage levels had not been established as a reliable benchmark for gender neutral wages in the not-for-profit sector.⁴³

40. In the circumstances, Ai Group submits there must be some doubt as to the extent to which the ERO rate may be said to ‘ensure’ equal work for equal value, and to have been authoritatively determined as such. Further, it is evident from the above that the commitment of the Commonwealth to pay an agreed gap attributable to gender was, in fact, a determinative factor in the assessment of what that gap was.

Question 5

41. Question 5 is as follows:

(5) Is the benchmark rate identified in paragraph [204] of the *Stage 3 Aged Care decision* appropriate to apply to any of the classifications for which an undergraduate degree qualification or equivalent is required?

42. Question 5 is not relevant to ‘home care’ stream in the SCHCDS Award, because none of the classification levels require a degree qualification.

⁴¹ *Equal Remuneration Case* [2012] FWAFB 1000 at [14].

⁴² *Equal Remuneration Case* [2012] FWAFB 1000 at [65].

⁴³ *Equal Remuneration Case* [2012] FWAFB 1000 at [100] – [102].

43. We also observe that the rate payable pursuant to the ERO to employees in the SACS stream, including for those that require an undergraduate degree, is almost on par with the benchmark rate.

Question 6

44. Question 6 is as follows:

(6) To the extent that any adjustment to the existing classification structure in any of the awards is required, what are appropriate terms (including classification descriptors and minimum wage rates) for a new or modified classification structure?

45. Ai Group does not propose any amendments to the classification structure of the SCHCDS Award. We may seek to respond to any proposals advanced by other parties.

Question 7

46. Question 7 is as follows:

(7) To the extent that any increases to the minimum rates for any classifications are justified by work value reasons in order to remedy gender undervaluation, what is an appropriate implementation timetable for such increases having regard to funding and related issues?

47. At the outset, we note that it is not practicable to advance a detailed submission addressing an implementation timetable for any increases at this stage, given the Commission has not yet determined that it will in fact increase any minimum wage rates, and if so, to what extent.

48. Nonetheless, for the reasons set out in response to Question 2, in broad terms, it is Ai Group's position that no increase should be implemented unless and until Government funding to cover the increase is available.

Question 8

49. Question 8 is as follows:

- (8) Should the equal remuneration order (PR525485) applicable to social and community service employees under the *Social, Community, Home Care and Disability Services Industry Award 2010* be revoked consequent upon appropriate variations to the classification structure and minimum wage rates in that award?
50. The proposition that the rates payable pursuant to the equal remuneration order should be incorporated into the Award was considered by the Commission during the 4 yearly review of modern awards.
51. After expressing the provisional view that the Commission should adopt such a course, it afforded interested parties an opportunity to file submissions in response, after which it issued the following decision:

[1244] AFEI and Ai Group both oppose the provisional view.

[1245] AFEI advances 4 reasons for their objection as follows:

1. Schedules B and C of the SCHADS Award are operative terms of the Award. Incorporating the equal remuneration order rates into Schedules B and C would therefore result in the equal remuneration order rates becoming operative terms of the Award. That outcome would be inconsistent with the conclusion reached by the five-member Full Bench that the order should stand alone.
2. In reaching its conclusion that the order should stand alone, the Full Bench in its February 2012 Decision considered the positions of the parties. The five member Full Bench's conclusion that the order should stand alone was not expressed as being solely due to the equal remuneration order containing transitional provisions. The fact that the transitional provisions have come to an end are not a sufficient basis to alter the conclusion reached by the Full Bench in its February 2012 Decision.
3. The draft determination does not include all terms of the order which continue in effect from 1 December 2020. The proposed variation could therefore give rise to claims in relation to the independent operation of the modern award terms. Even if the award contained the full terms of the equal remuneration order, this would result in unnecessary overlapping entitlements.
4. The equal remuneration order was made under s302 of the Act, being separate statutory powers to those for making or varying a modern award. It is therefore appropriate that the entitlement to the equal remuneration rates arises solely from that order.

[1246] AFEI submit that the note at clause 15 could be amended to draw the reader's attention to clause 6 of the ERO:

'An equal remuneration order [PR525485] also applies to employees (other than SACS Level 1) in the classifications at Schedule B and C. From 1 December 2020, Clause 6 of the equal remuneration order requires a specified percentage amount to be paid in addition to the rates in Clause 15 of the Award.'

[1247] In their submission of 21 December 2020, Ai Group opposed the provisional view. The reasons for Ai Group's objection are set out in a further submission dated 20 January 2021. Ai Group's primary concern appears to be that the proposed variation would alter the legal obligations imposed upon employers to whom the Award applies and to employers who are covered by the Award but subject to an enterprise agreement, they submit:

'The extent of such concerns, however, depend in part upon whether the amendments to Schedule B and C to the SCHCDS Award will create award derived entitlements to be paid the relevant rates, or whether they will merely provide an articulation of the rates that are required to be paid pursuant to the combined operation of the Award and the ERO. It appears to us that the proposed award provisions would require the payment of the new rates. That is, the clause would not merely serve to make parties aware of the rates that are payable pursuant to the ERO.'

The basis for our opposition to the proposed course of action can be characterised as arising firstly from a concern that the Full Bench does not have power to make the specific variations proposed and secondly, from a contention that the Full Bench should not be satisfied that the variation is necessary to meet the modern awards objective or, to the extent that it may be relevant, the minimum wages objective.'

[1248] In support of their contention that we should not be satisfied that the variation is necessary to meet the modern awards objective or, to the extent that it may be relevant, the minimum wages objective, Ai Group advances the following considerations:

- there are difficulties that will flow from the interaction between the current terms of the SCHADS Award and the proposed variations
- the absence of any provision enabling employers to absorb over-award payments into the proposed rates, in a manner comparable to what is currently provided for under the ERO
- the potentially detrimental, and arguably unfair, effect on employers covered by enterprise agreements of increasing award derived rates flowing from s.206 of the Act and the potential for the variation to discourage employers from engaging in collective bargaining, and
- the absence of any articulated justification for why the proposed variation is necessary to ensure that the meets the Award modern awards objective and the lack of any evidentiary material that would enable a proper consideration of factual matters relevant to the matters identified in s.134. This point is pertinent given the merits of the proposal are, for reasons we identify in this submission, contestable and because the proceedings leading to making of the ERO did not necessitate or otherwise involve the Commission taking into account whether the

rates prescribed in the ERO are necessary to ensure that the Award achieves the modern awards objective.

...

[1251] We have decided to depart from our provisional view. It seems to us that there is a reason to doubt our power to include the ERO rates in a way that creates an award derived entitlement to be paid the relevant rates.

...

[1254] As mentioned by AFEI the 1 February 2012 decision of the Full Bench in the Equal Remuneration Case – 2010- 2012 addressed this issue:

‘The final matter is whether the order should form part of the award or stand alone. Most parties took the view that the order should stand alone. Of the parties who addressed the operation of the better off overall test for enterprise agreements, most took the view that the benefit of the order would be protected by the terms of s.306 of the Act regardless of the operation of the better off overall test. We agree. The order should stand alone. Steps will be taken to include a notation in the modern award alerting readers to the existence of the order.’

[1255] The interaction between Part 2-7 (dealing with EROs) and Parts 2-3 and 2-6 (dealing with modern awards and modern award minimum wages) was considered by the Full Bench in the *Equal Remuneration Decision 2015*:

‘The third limitation concerns the power to vary a modern award.

Ai Group and ACCI and others contend that while the power to make an equal remuneration order is expressed in broad terms (i.e. ‘make any order it considers appropriate’) this should not be interpreted as extending to the making of an order varying a modern award. As Ai Group put it:

‘Put simply, Ai Group contends that an ERO and modern awards are intended by the FW Act to constitute different forms of industrial regulation which are aimed at achieving different and discrete purposes’.

We agree. As we observed earlier (at [42]), the relevant legislative context may operate to limit an expression of wide possible connotation. In the context of the FW Act Part 2–3 (and Part 2–6 to the extent it deals with modern award minimum wages) constitutes a code for the making and variation of modern awards. It is clear from the legislative context that the making of equal remuneration orders under Part 2–7 is intended to be quite separate from modern awards, which form part of the safety net of minimum terms and conditions under the FW Act.

As a general proposition where a particular procedure is designated to achieve something other procedures are impliedly excluded, reflected in the maxim *expressum facit cessare tacitum*.

In *Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia* Gavan Duffy CJ and Dixon J said:

‘When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and

restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.’

Similarly, in *R v Wallis; Ex parte Employers Association of Wool Selling Brokers* Dixon J said:

‘[A]n enactment in affirmative words appointing a course to be followed usually may be understood as importing a negative, namely, that the same matter is not to be done according to some other course.’

In that case the Court held that a section of an Act that indicated the manner in which an arbitrator was to deal with a particular issue precluded the arbitrator dealing with that matter in accordance with more general procedures provided for in that Act.’ (footnotes omitted)

[1256] Taking into consideration these decisions, we have decided that the more appropriate course is to include the ERO rates as a note to clause 15. This will provide an appropriate balance between giving employees easy access to their rates and the concerns raised by Ai Group and AFEI.⁴⁴

52. Ai Group continues to hold the concerns summarised in the decision above and the Commission’s reasoning therein also remains apposite.
53. Further, the incorporation of the rates payable pursuant to the ERO would, in effect, amount to a variation to modern award minimum wages, for the purposes of s.157(2) of the Act. The Commission can vary modern award minimum wages only if it is satisfied of the following matters:
 - (a) That the variations are justified by work value reasons;⁴⁵ and
 - (b) That making the variations outside the system of annual wage reviews is necessary to achieve the MAO⁴⁶.
54. The MWO must also be considered.⁴⁷

⁴⁴ *Re. Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383.

⁴⁵ Section 157(2)(a) of the Act.

⁴⁶ Section 157(2)(b) of the Act.

⁴⁷ Section 284(2) of the Act.

55. Unless the evidence and submissions before the Commission satisfy it of the aforementioned matters and enable a proper assessment of the relevant mandatory considerations, the Commission would not have power to make the variations.