

IN THE FAIR WORK COMMISSION

Applicants: **HEALTH SERVICES UNION OF AUSTRALIA and others**

Matter: **APPLICATION TO VARY THE AGED CARE AWARD 2010; APPLICATION TO VARY THE SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010; APPLICATION TO VARY THE NURSES AWARD 2020**

Matter No: **AM2020/99; AM2021/65; AM2021/63**

SUBMISSIONS FOR THE HEALTH SERVICES UNION WITH RESPECT TO BACKGROUND DOCUMENT 10

INTRODUCTION

1. These are the HSU's submissions in respect of Stage 3 of the proceedings in response to the questions posed by the Commission in Background Document 10. The submissions are made in accordance with the amended directions made on 13 January 2023.

RESPONSES TO BACKGROUND PAPER 10

Question 1 for the HSU: Does the above discussion accurately summarise the changes to the classification structure in the Aged Care Award sought by the HSU and the submissions already filed?

2. The summary provided at paragraphs [26]-[45] of Background Document 10 provides an accurate summary of the changes to the classification structure in the Aged Care Award proposed by the HSU and a reasonable summary of its submissions. The HSU continues to rely on paragraphs [434]-[463] of the HSU's

closing submissions dated 22 July 2022 and paragraphs [216]-[234] of the HSU's closing submissions in reply dated 19 August 2022.

Question 2 for the ANMF: Does the above discussion accurately summarise the changes to the classification structure in the Aged Care Award sought by the ANMF and the submissions already filed??

3. The question is not addressed to the HSU.

Question 3 for all parties: Does any party propose any amendments to the classification structure under the SCHADS Award?

4. The HSU believes that it is appropriate for the Commission to create an industry award for the aged care sector, at least to the extent of incorporating classifications for HCWs providing home care services to aged persons into the Aged Care Award rather than the SCHADS Award.

5. In addition, further consideration should be given to other potential changes to the classification structure for HCWs to address difficulties identified, including the flat and compressed classification structure and lack of clarity in classification descriptors. At this stage, it is contemplated that an expert report be obtained in relation to further improvements that could be made to the classification structure in each award and to make submissions following completion of the expert report.

Question 4 for all parties other than the HSU: Do parties support the HSU's proposed changes to the entry level (unqualified) RAO classification level?

6. The question is not addressed to the HSU.

Question 5 for all parties other than the HSU: Do parties support the HSU's proposed additional classification levels for RAOs?

7. The question is not addressed to the HSU.

Question 6 for all parties: Does the above discussion accurately summarise the changes to the classification structure in the Aged Care Award sought by the HSU and ANMF and the submissions already filed?

8. The summary provided at paragraphs [59]-[71] of Background Document 10 provides an accurate summary of the changes to the classification structure in the Aged Care Award proposed by the HSU and a reasonable summary of its submissions. The HSU continues to rely on paragraphs [434]-[463] of the HSU's closing submissions dated 22 July 2022 and paragraphs [216]-[234] of the HSU's closing submissions in reply dated 19 August 2022.

Question 7 for all parties: Do the parties agree that the principles that should be applied by the Commission when establishing an appropriate classification structure are that:

- 1. It should be a career-based classification structure*
 - 2. It should clearly state the skills, qualifications and experience required at each level*
 - 3. It should provide a clear means to transition from one level to another?*
9. The HSU agrees that considerations such as the need to create a career-based classification structure, to clearly state the skills, qualifications and experience required at each level and to provide a clear means to transition from one level to another are important considerations when establishing an appropriate classification structure.
 10. It is particularly significant, in the context of the aged care sector, to ensure that the classification structure provides a viable path for workers to enable career progression and to recognise and reward enhanced skills, qualifications, responsibilities and experience. The proposals of the HSU to clarify progression from Aged Care Worker Level 1 to Level 3, to clarify the threshold for entry to Senior PCW classification and to introduce classifications for a qualified RAO and Specialist PCW are intended to go some way towards achieving that goal.
 11. Two further observations should be made. Firstly, the considerations raised by the Commission in Question 7 should not be understood to represent an exhaustive

statement of all matters that may be relevant in establishing an appropriate classification structure. For example, Professor Charlesworth identified one of the issues with the current classification structure in the Aged Care Award to be that the classifications are highly compressed and provide meagre reward for progressing from one level to the next.¹

12. Secondly, the identification of three considerations which may be relevant to the establishment of an appropriate classification structure in Question 7 is not inconsistent with a classification structure which permits time-based progression. As the HSU observed in its earlier submissions, the evidence established that PCWs obtain skills and assume greater responsibility by reason of working in the role for a period of time. The evidence filed by the employer parties emphasised that personal care workers obtain skills through experience and that time is required for a person to become an experienced carer, although asserting that workers continued to develop skills for at least three years.² Individual witnesses gave evidence that skills developed over time³ and that a lot of learning is done on-the-job.⁴

Question 8 for all parties: Do parties have further suggestions regarding specific changes to the classification structure for HCWs under the SCHADS Award?

13. This question is addressed at Question 3 above.

Question 9 for all parties: Does any party seek changes to the incremental pay points in the Nurses Award?

14. The HSU does not propose changes to the incremental pay points in the Nurses Award.

¹ Expert Report of Professor Charlesworth at [12]-[13].

² Sewell Statement, at [93]; Wade Statement, at [47].

³ See, for example, Jones Statement, at [47].

⁴ Ellis Statement, at [48]; Kelly Reply, at [9]; Fox Statement, at [161]; Phillip Statement, at [56]; Wagner Statement, 11297 at [9]; Alberry Statement, at [7]; Nasemena Statement, at [35].

Question 10 for all parties: Does any party seek changes to the incremental pay points in the SCHADS Award?

15. This question is addressed at Question 3 above.

Question 11 for all parties: Does any party wish to present any further evidence and/or make any further submissions in addition to the evidence and submissions already before the Full Bench in Stage 1 in relation to this issue?

16. The HSU proposes to present further evidence and submissions in relation to potential further changes to the classification structure in the Aged Care Award and the SCHADS Award. At this stage, it is contemplated that an expert report be obtained in relation to further improvements that could be made to the classification structure in each award and to make submissions following completion of the expert report.

Question 12 for all parties: Does the above discussion accurately summarise the parties' positions on whether there should be a separate classification structure for PCWs in the Aged Care Award?

17. Paragraph [97] of Background Document 10 provides a summary of the HSU's submissions with respect to the proposal to introduce a separate classification structure for PCWs in the Aged Care Award. In addition to the points paraphrased at paragraph [97], the HSU also submitted that the proposal to create a separate classification structure for the personal care stream runs counter to the philosophy of person-centred care. The provision of individualised and person-centred care is the responsibility and focus of the entire workforce at an aged care facility and the HSU submitted that the creation of a demarcation between the personal care stream and other workers covered by the Aged Care Award is undesirable in that context.

Question 13 for all parties: Would any such separate classification structure include only PCWs and RAOs?

18. Obviously enough, the HSU does not propose the creation of a separate classification structure with respect to the personal care stream. However, it understands that the proposal to create a separate classification structure for personal care workers would apply to those roles in the personal care stream, namely, PCWs and RAOs.

Question 14 for all parties: Does any party wish to present any further evidence and/or make any further submissions in relation to this issue?

19. The HSU does not propose to present further evidence or submissions specifically with respect to the issue of whether there should be a separate classification structure for PCWs. However, the HSU is available to provide further assistance to the Commission if it has any particular issues of concern and reserves the right to reply to any further evidence or submissions presented by any other party.

Question 15 for the HSU: Does the HSU maintain its opposition to a separate classification structure for PCWs?

20. The HSU acknowledges that PCWs and RAOs were treated differently from the majority of employees in the general and administrative service and food services streams in the awarding of the interim increase. The HSU appreciates that it was appropriate to give effect to the Interim Decision by the making of the determinations on 3 March 2023 which, at least as an interim measure, required the creation of separate pay scales for workers engaged as the most senior food service employee and for those in direct care, that is, PCWs and RAOs.
21. However, for the purpose of Stage 3 of the proceedings, the HSU maintains its opposition to a separate classification structure for PCWs. This is the case given:
- (a) The provision of person-centred quality care is the responsibility of the entire workforce in an aged care facility and not just PCWs and RAOs;

- (b) The work value considerations apply to the entire residential aged care workforce summarised in the HSU's Closing Submissions⁵ which include:
- i. the inherent challenges of the working environment, and the physical and psychological risks it presents;
 - ii. the changing resident demographics and the increasingly complex care needs;
 - iii. the increased skill and labour requirements imposed by regulatory change (and notably increased regulation);
 - iv. the need for a high level of emotional intelligence and skill, in particular given the increased focus on relationship-based care; and
 - v. the significant social value of the work, and its historical undervaluation.

Question 16 for the HSU: If opposition is maintained, what evidence currently before the Full Bench is relied upon by the HSU in relation to this issue?

22. The evidence before the Commission in relation to the work of employees in the general and administrative services and food services stream is relevant to the question of whether there should be a separate classification structure for PCWs. For example, the HSU relies on the following evidence currently before the Full Bench in respect of this issue.
23. The Report of Dr Meagher (summarised at [85] of the HSU's Final Submissions) which asserts that:

The work of personal care workers and ancillary care workers has become more demanding as the profile of residents in aged care and regulatory and community expectations about care quality have changed. But the responsibility to deliver person-centred care goes beyond the specific roles within these two groups. Enabling and re-enabling older people to maintain and regain their capabilities and

⁵ See, for example, Final Submissions for the HSU dated 22 July 2022 at [19]-[21].

to delay decline are also important principles in aged care. As older people move around a facility and engage in various activities and interactions, they are likely to come into contact with many staff members beyond those who are responsible very directly for their daily care. These staff members need to know each older person as a person, and to have the knowledge and skills to respond to them as people with individual and changing needs and capabilities. Related, higher rates of mental health disorders and behavioural needs and high rates of dementia are evidence of the increased psychosocial needs of older people in residential care. Greater psychosocial needs increase the likely frequency that all staff in a facility are called upon to exercise judgment, responsibility and assessment skills, as well as strong interpersonal skills, as they interact and respond appropriately to older people's concerns and behaviours. The changing occupational structure of the residential care workforce is relevant here: there has been more growth in the ancillary care staff than in the direct care staff, which could indicate that ancillary staff are called upon to interact more with older people and their families. More generally, the more complex working environment entailed by the changing resident profile requires judgment, prioritisation and collaboration skills across the full range of tasks and roles in residential care.

24. In addition, the HSU refers to evidence which comprehensively demonstrates that the non-direct care classifications are:
- (a) crucial to the work carried out by PCWs; and
 - (b) that they often interact with residents and therefore face similar challenges to those faced by PCWs as a result of the increased acuity of residents.
25. By way of example, the evidence summarised at [280] to [281] of the HSU's Final Submissions includes:
- (a) The evidence given by Mr Basciuk, a maintenance worker who gave the following evidence during the hearing:

PN14178: If you know that a resident may have a particular - with that particular resident - I will rephrase that. Would that then be included on your job hazard analysis that the resident has in the past been a frequent

hitter?---If there was a job in that resident's room, yes, it would, and it's been brought up with the maintenance manager and it's been in consultation with the maintenance manager and the RNs that whenever we go into this resident's room, we're to have a second person, normally a carer, just so we can get in, get the work done and then get out so as not to agitate them any more than needed.

- (b) The evidence of Ms Sandra O'Donnell, Laundry Assistant at hearing who explained that:

PN6665 You have?---A couple of times I've been, you know, pushed up against the door or, you know, put into a little alcove and I can't get out because they've got me blocked in, so I have to wait for someone to come.

PN6666 How did you handle that?--Not much you can do. You just stand there and wait for someone to come

- (c) The evidence of Ms Lynette Flegg, a Senior Administration Officer, gave evidence that:

PN5942 Was it just off-putting? —It was a bit off-putting but I wouldn't have said that I was worried about them breaking my wrist or anything like that. It was just they grabbed it and I wasn't able to easily pull away, but they did eventually let go on their own. But there have been cases of – only recently we had a case of not being able to leave the office area because one of the residents was behind the door throwing a chair around. So, you know, we have a lot of incidents.

26. Further, there is evidence before the Commission which demonstrates that it is not uncommon for aged care workers to perform functions across the various streams in the Aged Care Award. This includes the evidence of:

- (a) Ms Anita Field who is employed as a Chef, but also performs medication rounds⁶;

⁶ Field Statement, DHB12339 at [29(b)];

- (b) Ms Fiona Gauci who, when employed as an Administration Officer, was also required to assist with administering medications, and would assist by filling in as a PCW, when the facility was short staffed⁷; and
- (c) Ms Kathy Sweeney, who while employed as Administration Officer, also assisted a staff member who is employed as an Extended Care Assistant who also performs some administration duties⁸.

Question 17 for the ANMF and Joint Employers: What evidence currently before the Full Bench is relied upon to support the claim that a separate classification structure should be established for PCWs?

27. The question is not addressed to the HSU.

Question 18 for all parties: Are any parties proposing any changes to the classification structure in the Aged Care Award for indirect care workers?

28. The HSU believes that further consideration should be given to other potential changes to the classification structure for indirect care workers in the Aged Care Award. At this stage, it is contemplated that an expert report be obtained in relation to further improvements that could be made to the classification structure in each award and to make submissions following completion of the expert report.

Question 19 for all parties: Does the above discussion accurately summarise the parties' positions on whether there should be a separate classification of Senior PCW (Aged Care employee level 5) in the Aged Care Award or, alternatively, an allowance provided?

29. The summary provided at paragraphs [105]-[110] of Background Document 10 restates the HSU's proposal with respect to the proposed classification of Senior PCW at Aged Care Employee Level 5. However, the Background Document does not describe the submissions made in support of the proposal.⁹

⁷ Gauci Statement, DHB11956 at [28]; Transcript, 29 April 2022, PN2203-2206;

⁸ Gauci Statement, DHB11956 at [28]; Transcript, 29 April 2022, PN2203-2206.

⁹ See, for example, Final Submissions for the HSU dated 22 July 2022 at [442]-[444].

30. The HSU's submissions included that the reference to a Senior Personal Care Worker is appropriate to recognise the level of seniority, skill and responsibility of a Level 5 employee and that requirement that an employee required to assist with medication and holding the relevant qualification should be classified at Aged Care Employee Level 5. The HSU referred to evidence that experienced PCWs engage in the administration of medications to residents¹⁰ and are required to undertake the relevant competency to undertake those tasks.

Question 20 for all parties: Does any party wish to present any further evidence and/or make any further submissions in addition to the evidence and submissions already before the Full Bench in Stage 1 in relation to this issue?

31. The HSU does not propose to present further evidence or submissions specifically with respect to the issue of whether there should be a separate classification of Senior PCW or, alternatively, an allowance. However, the HSU is available to provide further assistance to the Commission if it has any particular issues of concern and reserves the right to reply to any further evidence or submissions presented by any other party.

Question 21 for the ANMF: Does the ANMF maintain their objection to the HSU application to amend the classification description at Aged Care Employee level 5?

32. The question is not addressed to the HSU.

Question 22 for the ANMF and HSU: What evidence currently before the Full Bench is relied upon in relation to this claim?

33. As acknowledged in the Lay Witness Report to the Full Bench at paragraph [442], there is extensive evidence before the Commission about the administration of medication, including the level of authority, the processes involved in both residential care and community care, and the challenges and complexity involved.

¹⁰ See, for example, Lay Witness Report at [444]-[461].

34. The HSU's position is that PCWs who undertake medication duties are required to undertake the relevant training and hold and maintain a relevant unit of competence in order to administer medications. The role of administering, managing and monitoring medications is not a distinct and separate task to that of the rest of a PCW's workload, and is performed continuously throughout shifts. Therefore, recognising this skill through a higher classification would be more appropriate. In the HSU's submission it would be inappropriate for the administration of medication to be dealt with by way of an allowance.
35. The evidence relied on by the HSU in relation to this claim is voluminous, not repeated here and summarised at Section D5.3.5 of the Lay Witness Report to the Full Bench. The evidence includes by way of example:
- (a) The evidence of Paul Jones, Personal Care Worker, summarized at paragraphs 225 to 228 of the HSU's Submissions and [425] to [454] of the Lay Witness Report. Mr Jones' evidence was that:
- ... Over time, I have become familiar with each resident's medications, but it is imperative to check each medication against the chart every time, as GPs often visit the residents in the late afternoon or early evening, and may have, for example, ceased a medication between the dinner-time and bedtime medication rounds. A medication so ceased would still be packed in the Webster Pack and shown on Medsig as being charted for the resident, until the Webster pack is repacked and Medsig updated by the pharmacy the following day. Administering medications is a huge responsibility. If I make a mistake, I could really hurt or potentially even cause the death of a resident.¹¹*
- (b) The evidence of Alison Curry, an AIN Thereafter, is summarised at [458] of the Report and at paragraph 232 of the HSU's Submissions. Her evidence included the following:

¹¹ Jones Reply, DHB12330 at [18](c).

80. *With the assistance of the RN, we perform a before dinner Blood Glucose Level (BGL) check and give all insulins that are charted to residents with diabetes. We check the primary medication chart for the order.*

81. *I log into Medmobile on an iPad and check that the pharmacy has the same information as we do. The pharmacy uploads information on all medications dispensed to residents onto the app. This information used to be all paper based but the iPad was introduced in or around 2020. I had to learn how to use the iPad and the app.*

82. *We then administer the medications as per the instructions on the resident's primary medication chart.*

83. *The RN administers the insulin, and we witness that the resident has received the correct insulin. We need to ensure that the right dose has been given to the right person at the right time and that the medication was in date. We document the BGL level and sign that the insulin has been given. If we get this wrong a resident's life will be at risk¹².*

(c) The evidence of Ms Judith Clarke which is summarised at [456] of the Report. In particular, Ms Clarke gave evidence that:

22. *Nowadays, carers also have to monitor residents with respect to their medications, whereas in the past this would have been done by the RN or EN. For example, when a resident is put on a new antibiotic, we have to monitor them and notify the RN if they have an adverse reaction to the new medication.¹³*

36. The evidence demonstrates that administering medications is an integrated routine part of a PCW's role and demonstrates the ongoing level of skill and responsibility involved in doing the work. This skill does not dissipate from one shift to the next, in the unusual event that no medications were required to be provided to any elderly resident of an aged care home on any one day, nor does

¹² Curry Statement, at [80]-[83].

¹³ Transcript 29 April 2022 PN1349-1353.

the responsibility of monitoring those employees who have had medication administered (even if the medication was administered by another PCW).

Question 23 for the Joint Employers: Is a claim for a classification level for an 'Experienced PCW' still pressed? If so, at which classification level?

37. The question is not addressed to the HSU.

Question 24 for the Joint Employers: What evidence currently before the Full Bench is relied upon in support of the claim that an allowance for PCWs administering medications is appropriate? What level of allowance is proposed?

38. The question is not addressed to the HSU.

Question 25 for all parties: Does the above discussion accurately summarise the parties' positions on the appropriate level of a Specialist PCW?

39. The summary provided at paragraphs [111]-[121] of Background Document 10 refers to the submissions of the HSU in relatively brief terms. The HSU made submissions as to why the creation of a Specialist PCW role is appropriate having regard to evidence of industry practice of recognising specialist PCWs involved in areas of work requiring particular skills or experience and commonly involving additional training in relation to the specific area of care. The most prominent examples were PCWs with specific responsibility for dementia care, palliative care and the homemaker or household model of care.¹⁴

Question 26 for all parties: Does any party wish to present any further evidence and/or make any further submissions in addition to the evidence and submissions already before the Full Bench in Stage 1 in relation to this issue?

40. Given that the submission that any reward for PCWs working in dementia or palliative care should be dealt with by way of an allowance was only raised in

¹⁴ Final Submissions for the HSU dated 22 July 2022 at [450]-[463].

reply, the HSU seeks the opportunity to make brief further submissions on this issue if the position is pressed by the Joint Employers. In addition, the HSU is available to provide further assistance to the Commission if it has any particular issues of concern and reserves the right to reply to any further evidence or submissions presented by any other party.

Question 27 for the HSU and ANMF: Is it now agreed between the Unions that the Specialist PCW classification claim sits at Aged Care employee level 7?

41. The HSU agrees that the Specialist PCW classification should sit at Aged Care Employee Level 7.

Question 28 for the Joint Employers: Is a claim for a classification level for a Certificate IV still pressed? If so, at which classification level should this sit?

42. The question is not addressed to the HSU.

Question 29 for the HSU: If it is accepted that the Specialist PCW classification claim sits at Aged Care employee level 7, does the HSU press its claim for a PCW classification at Aged Care Employee level 8? What evidence currently before the Full Bench is relied upon in relation to this claim?

43. If the Commission accepts that a Specialist PCW classification should be created at Aged Care Employee Level 7, the HSU presses a claim that a classification of Personal Care Supervisor be created above Level 7. The only evidence put forward in Stage 1 of the proceedings by an employee undertaking work in the care supervisor position was the evidence of Helen Platt.¹⁵ That evidence, summarised at paragraph [68] of the Lay Witness Report, includes the fact that she supervises 25 to 30 staff on day shift who report directly to her.¹⁶ In circumstances where those staff members are administering medications, and are carrying out the duties

¹⁵ Platt Statement, at [9]; Transcript 4 May 2022 PN4746-4859.

¹⁶ Transcript 4 May 2002 at PN4758-4760 and PN4766-4841.

attributed to level 7, the HSU submits that the additional supervisory skills should be recognised through including a Level 8 within the classification structure.

44. Given that the proposal that a Care Supervisor role be created above Aged Care Employee Level 7 was prompted by the position adopted by the ANMF, the HSU seeks the opportunity to put forward some further evidence and submissions in relation to this issue.

Question 30 for the ANMF and the Joint Employers: Does the ANMF or Joint Employers have a response to the HSU claim that there should be a classification for a PCW Supervisor?

45. The question is not addressed to the HSU.

Question 31 for the Joint Employers: do the Joint Employers press their claim for an allowance for specialist PCWs, and if so what level of allowance is proposed? What evidence currently before the Full Bench is relied upon in relation to this claim?

46. The question is not addressed to the HSU.

Question 32 to all parties: Does the above discussion accurately summarise the parties' positions on whether a Specialist PCW level should include PCWs who have undertaken training in the Household Model of Care?

47. The summary provided at paragraphs [122]-[126] of Background Document 10 refers to the submissions of the HSU in relatively brief terms. The HSU made submissions as to why the creation of a Specialist PCW role referring specifically to the household model of care was appropriate having regard to evidence as to the nature of the work arrangements under that model and the range of tasks, level of responsibility and the nature of the skills required for PCWs working in the household model.¹⁷

¹⁷ Final Submissions for the HSU dated 22 July 2022 at [453]-[458].

Question 33 to all parties: Does any party wish to present any further evidence and/or make any further submissions in relation to this issue?

48. The HSU proposes to present some further evidence in relation to the prevalence of the household model of care. In addition, the HSU is available to provide further assistance to the Commission if it has any particular issues of concern and reserves the right to reply to any further evidence or submissions presented by any other party.

Question 34 for all parties: Does any party wish to present any further evidence and/or make any further submissions in addition to the evidence and submissions already before the Full Bench in Stage 1 in relation to this issue?

49. The HSU seeks the opportunity to put forward some further submissions and possibly evidence in relation to the difference between PCWs under the Aged Care Award and AINs under the Nurses Award and the current and historical approach taken by employers to describing and classifying PCWS as AINS. It is not envisaged to be necessary for there to be further evidence in relation to the work performed by PCWs and AINs, but further submissions are appropriate.

Question 35 for all parties: Do the parties agree that AINs and PCWs perform functionally the same role? Are there differences in skills or qualifications acquired by the respective employees?

50. The HSU agrees that the work performed by persons designated as PCWs and AINs in residential aged care is functionally the same and that the evidence did not distinguish between the work performed by persons designated in the two roles. As the Commission observes in Background Document 10 at paragraph [143], the common position of the parties in the proceedings has been that the work performed is essentially indistinguishable. The qualifications relevant to PCWs and AINs are the same.¹⁸

¹⁸ *Aged Care Award 2010* [2022] FWCFB 200 at [685]-[694].

51. Given the evidence in the proceedings and the findings of the Commission in the November 2022 Decision, it is doubtful that many persons working in residential aged care facilities who are designated as AINs in fact fit within the definition of a “nursing assistant” in the Nurses Award. The definition is as follows:¹⁹

Nursing assistant means an employee, other than one registered with the Nursing and Midwifery Board of Australia or its successor or one who is in training for the purpose of such registration, who is under the direct control and supervision of a Registered nurse (RN) nurse and whose employment is solely to assist an RN or Enrolled nurse (EN) in the provision of nursing care to persons.

52. The findings of the Full Bench in the November 2022 Decision included that there has been a reduction in the number of RNs as a proportion of the aged care workforce, RNs are increasingly concerned with administrative responsibilities and administrative duties and workers designated as the PCWs and AINs operate with less direct supervision.²⁰ It is unlikely that many employees designated as AINs working in residential aged care could be said to operate under the direct control and supervision of an RN given the evidence that RNs are not “on the floor” with great frequency and are occupied with administrative and managerial tasks.

53. In addition, the definition of a “nursing assistant” refers to a person whose employment is solely to assist an RN or EN in the provision of nursing care to persons. Again, given the findings of the Commission that RNs are less involved in direct provision of care, it is unlikely that a person designated as an AIN could be described as solely employed to assist an RN or EN in the provision of nursing care. PCWs and AINs are themselves providing direct care to residents.

Question 36 for all parties: Should the classification structure and minimum wages for AINs in the Nurses Award and PCWs in the Aged Care Award be aligned and/or

¹⁹ Nurses Award 2020, Schedule A clause A1.

²⁰ *Aged Care Award 2010* [2022] FWCFB 200 at [619]-[663] and [890](6), (7), (8).

consolidated? If so, how? If not, what is the basis for maintaining a different classification structure and minimum wages for AINs and PCWs?

54. The HSU believes that it is appropriate for the classification structure and minimum wages for AINs working in residential aged care and PCWs to be consolidated in the Aged Care Award as an industry award and aligned in structure and wage rates. Such a change would reflect the fact that persons designated as PCWs and AINs undertake functionally the same role and would avoid, or at least reduce the potential for, employers being able to engage in “award hopping” by designating employees at the classification that permits payment at lower rates for essentially the same work.

Question 37 for all parties: Does any party support moving the nursing classifications of such employees engaged in the aged care industry from the Nurses Award into the Aged Care Award?

55. The HSU is not opposed to the Aged Care Award being an industry award (including incorporating HCWs and AINs engaged in residential aged care), but does not propose that RN and EN classifications for employees engaged in the aged care industry should be moved from the Nurses Award to the Aged Care Award.

Question 38 for all parties: If so, how would parties envision the classification and pay structure of aged care nurses resulting from such a move?

56. The question does not arise.

Question 39 for all parties: Should the key classification for the purposes of the C10 Metals Framework Alignment Approach in the Aged Care Award be Aged care employee—level 4?

57. If an approach of concentrating on qualification level is adopted, the key classification in the Aged Care Award for the purposes of the C10 Framework

would be Aged Care Employee Level 4 given the requirement to hold a Certificate III or equivalent knowledge and skills.

58. The HSU notes the findings of the Full Bench that alignment with external relativities is not determinative of work value, that factors other than qualifications have a bearing on the skills involved in the work and that alignment with external relativities is not a substitute for the Commission's statutory task.²¹

Question 40 for all parties: Should the key classification for the purposes of the C10 Metals Framework Alignment Approach in the Nurses Award be Nursing Assistant, Experienced (the holder of a relevant certificate III qualification)?

59. If an approach of concentrating on qualification levels is adopted, the key classification in the Nurses Award for the purposes of the C10 Framework would be Nursing Assistant - Experienced given the requirement to hold a Certificate III qualification at least for the purposes of the Nursing Assistant classification stream.

Question 41 for all parties: Should the key classification for the purposes of the C10 Metals Framework Alignment Approach in the SCHADS Award be Home Care Employee Level 3?

60. If an approach of concentrating on qualification level is adopted, the key classification in the SCHADS Award for the purposes of the C10 Framework would be Home Care Employee Level 3 given the requirement to hold a Certificate III or equivalent knowledge and skills.

Question 42 for all parties: Is it appropriate to benchmark a different or an additional key classification contained in the Manufacturing and Associated Industries and Occupations Award 2020?

²¹ *Aged Care Award 2010* [2022] FWCFB 200 at [197].

61. In relation to the Aged Care Award, consideration should be given to the classification of Aged Care Employee Level 6. The Aged Care Employee Level 6 makes reference to the holding of an Advanced Certificate (now a Diploma-level qualification). This is not a mandatory requirement but reflects instead an understanding of the level of skill required by the position, which can be gained by non-accredited training or, critically, experience. This aligns with C5 on the C10 scale (which is consistent with the classification covering '*maintenance tradesperson – advanced*' as described). The current benchmarking of Aged Care Employee Level 6 is at 109% of Level 4, rather than 130%.
62. In relation to the SCHADS Award, consideration should be given to the classification of Home Care Employee Level 5. The Home Care Employee Level 5 classification descriptor makes it clear that the skills involved in the work covered by this classification are reflected in a degree or diploma qualification or equivalent experience and skills. Reference to a 'diploma' is counterposed to the '*associate diploma*', which is now the Advanced Diploma (i.e. the qualification below a degree), and it is unlikely that it is correctly interpreted as referring to a current diploma level qualification. The current benchmarking of Home Care Employee Level 5 is at 117%, whereas it should be between C1 and C5, that is, 130% to 180%.

Question 43 for all parties: Do parties agree with the provisional view expressed at paragraph [955] of the Stage 1 decision not to realign the rates in the Nurses Award to the C10 in these proceedings as proposed by the Joint Employers?

63. In principle, to the extent it remains relevant, the external relativity system is intended to assist in facilitating a consistent and objectively ascertainable system by providing an indication of a floor for wages based on qualification level. A significant anomaly may identify that wage rates are *foundationally* undervalued, even before additional work value factors are considered. However, as the HSU understands the decision, no issue is taken with the approach proposed by the Full Bench. The difficulties identified by the Commission at paragraph [955]-[956] of the November 2022 Decision arose from the prospect of adopting a significant

structural change to the Nurses Award absent an opportunity for affected parties outside of the aged care sector to be heard.

Question 44 for all parties: What changes, if any, are sought to the existing internal relativities of classifications in the Aged Care, Nurses, and/or SCHADS Awards?

64. Aside from the benchmarking issues set out above, the HSU does not at this stage seek a change to the current internal relativities. However, as observed above, it is contemplated that an expert report be obtained in relation to further improvements that could be made to the classification structure in each award and to make submissions following completion of the expert report. This may include consideration of changes to the internal relativities.

Question 45 for all parties: Do parties propose any re-alignment between rates external to the relevant awards, considering the C10 Metals Framework Alignment Approach and AQF?

65. The HSU does not at this stage seek any further realignment between rates external to the Aged Care Award and the SCHADS Award beyond the issues identified above.

Question 46 for all parties: Parties are invited to comment on what extent there is evidence currently before the Full Bench suggesting that HCWs work across multiple sectors and with clients with multiple care needs (aged care and disability care).

66. There is relatively little evidence before the Commission which directly addressed the extent to which HCWs engage in work in both the aged care and disability sectors.
67. The evidence that is presently before the Full Bench indicates that at least some HCWs work across multiple sectors and with clients with multiple needs. For example, Lorri Seifert gave evidence about the client base of her employer, Illawarra Retirement Trust, as follows:

In the home care arm of the business, IRT serviced, as at 30 June 2020, around

4,079 home care clients nationally, including:

- a. 939 Home Care Package funded customers;*
- b. 1,400 Veterans Home Care customers;*
- c. 70 customers who received support from DVA's Community Nursing Program;*
- d. 460 Commonwealth Home Support Program funded customers;*
- e. 129 Transitional Aged Care Program funded customers in NSW across the Illawarra, Shoalhaven, Eurobodalla, Bega and Cooma – this is a government-funded short-term restorative care program helping older people when they return to their homes after a stay in hospital; and*
- f. Private fee for service customers.²²*

68. As to the latter issue, the evidence before the Commission indicates that the aged persons receiving care from HCWs were significantly older and frailer, more frequently suffering a multiplicity of conditions that caused physical and other disability. However, the vast majority of those persons did not receive support through the National Disability Insurance Scheme in respect of their disability.
69. A number of the home-care worker witnesses:
- (a) had previous experience working in the disability sector²³ or presently had another role in that sector²⁴;
 - (b) held disability-related qualifications²⁵, including qualifications relevant to providing care to persons with dementia;²⁶
 - (c) provided care to persons with disability other than aged persons;²⁷

²² Seiffert Statement, at [28].

²³ Wood Statement, at [5]; Seiffert Statement, at [17].

²⁴ Heenan Statement, at [3]; Bowers Statement, at [10] (Ms Bowers works between residential aged care and disability work).

²⁵ Fox Statement, at [14]; 15241 [152]; Heenan Statement, at [38]; Kupke Statement, at [15]; Hufnagel Statement, at [15].

²⁶ Evans Statement, at [16].

²⁷ Fox Supplementary Statement, at [8]; Purdon Statement, at [12]; Wagner Statement, at [24]; Evans Statement, at [68ff]; Kupke Statement, at [28]-[29]; Payton Statement, at [31].

- (d) provided care to veterans²⁸ (who may be either aged persons or persons with a service-related disability); or
 - (e) provided care to clients of their employer who were not veterans and not in receipt of either an NDIS or Home Care Package.
70. Some of the home care workers worked for organisations covered by enterprise agreements which provided for a different rate of pay when they were providing care to a person with a disability than the rate that applied when they were providing care to aged persons.²⁹
71. However, the evidence is insufficient for the Commission to reach concluded views about the extent to which workers in the industry work across those cohorts of clients. Nor is there specific evidence with respect to the employment arrangements of any individual workers who undertake disability work in addition to providing home care to aged persons or the operations of providers in relation to disability services. Those matters did not arise in the present applications, and were not specifically addressed by the witnesses.

Question 47 for all parties: If a separate classification structure is created for home aged care workers, how will this apply to HCWs who work with both aged persons and people with a disability or who also work in the social and community services sector?

72. An employee may perform home care work involving both aged persons or people with a disability in broadly two circumstances. First, an employee may have two separate jobs (that is, two employments) either with different employers or the same employer.³⁰ In that event, no difficulty arises. The employee would be entitled to be paid in accordance with aged home care rates when performing work in the employment directed at aged care and the rates applicable to disability home care when performing work in that employment.

²⁸ Sedgman Statement; Heenan Statement, at [57].

²⁹ e.g. South Eastern Community Care Community and Disability Support Workers Enterprise Agreement 2020; Community Based Support Enterprise Agreement 2018.

³⁰ See, for example, *Lacson v Australian Postal Corporation* [2019] FCA 51.

73. Second, an employee may have a single job or employment and perform home care work with respect to both aged persons and people with disabilities in that job. In those circumstances, the appropriate classification which ought apply to the employee is to be resolved in accordance with well-known tests examining what is the “*major and substantial employment*” or examining the “*principal purpose*” of the employment.³¹ The employee would be entitled to be paid by reference to the classification which constitutes the major and substantial employment or represents the principal purpose of the employment.
74. In addition, it is appropriate to observe that, as a consequence of the Commission’s decision to increase the rates for home aged care workers, the remainder of the workers classified under Schedule E of the SCHADS Award will be paid at strikingly low rates compared with other workers performing work of similar type. That fact, together with the existing lack of clarity and questionable appropriateness of the delineation between disability services work covered by Schedule B and the provision of home care to persons with a disability within Schedule E, point to the existence of a significant anomaly in the rates. That anomaly has the potential to give rise to industrial uncertainty and to permit award or classification “hopping” and will require consideration by the Commission.

Question 48 for all parties: Does any party consider that there should be any changes to the classification structure to take account of any differences between the home care and residential care settings?

75. If the classifications for home care workers are brought into the Aged Care Award, that move would present an opportunity to address some concerns in relation to

³¹ *Choppair Helicopters Pty Ltd v Bobridge* [2018] FCA 325 at [64]-[68] and authorities referred to therein including *Federated Engine Drivers and Firemen’s Association of Australasia v Maffra Co-operative Milk Products Co Ltd* (1940) 42 CAR 836 at 837; *Ware v O’Donnell Griffin (Television Services) Pty Ltd* [1971] AR (NSW) 18; *Logan v Otis Elevator Company Pty Ltd* [1997] IRCA 200 at 68-73; *Construction, Forestry, Mining and Energy Union v Anglo Coal (Callide Management) Pty Ltd* [2015] FCA 696 at [38]-[39]; *Fair Work Ombudsman v Complete Windscreens (SA) Pty Ltd* [2016] FCA 621 at [27].

the home care classifications, principally the compression of the classifications and the lack of a clear career path for direct care workers.

Question 49 for all parties: does any party wish to file additional submissions and/or evidence in addition to the evidence and submissions already before the Full Bench in Stage 1 in relation to indirect care employees?

76. The HSU seeks the opportunity to put forward further submissions and evidence in relation to the indirect care employees, including with respect to cleaners, laundry workers and maintenance workers.

Question 50 for all parties: does any party wish to file additional submissions and/or evidence in addition to the evidence and submissions already before the Full Bench in Stage 1 in relation to whether a further increase is justified on work value reasons for direct care workers?

77. The HSU seeks the opportunity to put forward further submissions and evidence in relation to the issues arising from understaffing and to update the evidence in relation to the impact of the pandemic and COVID-19 measures in the aged care sector.

MARK GIBIAN SC | H B Higgins Chambers

LISA DOUST | 6 St James Chambers

LEO SAUNDERS | Greenway Chambers

Dated: 7 March 2023