



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

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

AM2020/99

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

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

Sydney

10.00 AM, TUESDAY, 5 DECEMBER 2023

Continued from 04/12/2023

PN1087

JUSTICE HATCHER: So Ms Marshall's the first witness?

PN1088

MR GIBIAN: Yes.

PN1089

JUSTICE HATCHER: Thank you.

PN1090

THE ASSOCIATE: Can you please state your full name and address?

PN1091

MS MARSHALL: Karen Tracey Marshall, (address supplied).

<KAREN MARSHALL, AFFIRMED

[10.05 AM]

EXAMINATION-IN-CHIEF BY MR GIBIAN

[10.06 AM]

PN1092

JUSTICE HATCHER: Mr Gibian?

PN1093

MR M GIBIAN: Yes. Thank you. Thank you, Ms Marshall. Could I just ask you to repeat your name for the record?---Karen Tracey Marshall.

PN1094

And your address?---(Address supplied).

PN1095

And you're employed in hospitality services at the Banksia Lodge in Broulee?---That's correct.

PN1096

You've made a witness statement for the purposes of these proceedings?---I have.

PN1097

Which I think you have with you?---I do.

PN1098

Dated 21 September 2023. I think there was – it's document 28 in the digital court book at page 333. I think there was just not so much a correction but an update that it's appropriate to deal with before it's tendered. At paragraph 3 you refer to your – where you indicate that your current rostered working hours are 8 am to 2 pm Monday through Thursday. Do you see that?---Yes.

PN1099

Has that changed more recently?---Yes, it's now 7.30 to 1.30.

*** KAREN MARSHALL

XN MR GIBIAN

PN1100

And that's still Monday through Thursday, but 7.30 till 1.30?--- Yes.

PN1101

Was there a particular reason for that page?---Because some of the residents were sitting there waiting for breakfast and it was just advisable to feed them a little bit earlier.

PN1102

Noting that update, have you otherwise had an opportunity to read through that statement?---I have.

PN1103

Is it true and correct to the best of your knowledge and recollection?---It is.

PN1104

I tender Ms Marshall's statement.

PN1105

JUSTICE HATCHER: Yes. The witness statement of Karen Marshall dated 21 September 2023 will be marked exhibit HSU100.

EXHIBIT #HSU100 WITNESS STATEMENT OF KAREN MARSHALL DATED 21/09/2023

PN1106

MR GIBIAN: There were just two matters I was going to ask Ms Marshall just to clarify. Firstly, and perhaps more straightforwardly, at paragraph 23, which is I think on the third page of the statement, there's – or before paragraph 23 there's a heading, 'Education and training', do you see that?---Yes.

PN1107

In the first sentence of that paragraph you indicate that you're required to complete the food handling modules once a month. Do you see that?---Yes.

PN1108

And you then provide some explanation as to what's involved in those modules. I just wanted to ask you whether there were other modules or training modules that you undertake on a regular basis other than with respect to food handling?---Yes, I do.

PN1109

What are they?---We also cover basically the whole of aged care in looking out for the change in their eating habits. The modules also cover that. They cover sexual harassment, they cover diabetes, how to modify the food; there's other ones about the behaviour of the residents, how they behave, and of course you've got dementia patients, so what to look out for.

*** KAREN MARSHALL

XN MR GIBIAN

PN1110

How are those delivered, that is, is it in person training or - - -?---We get an email once a month, or twice a month. Sometimes we get two a month to do. And we just get an email and we go online and do it through the app.

PN1111

The second thing that I just wanted to ask you to clarify, from paragraph 5 on the first page you refer to – or there's a heading, 'A day in my role', and you've described the preparation and the like, and then over the page at paragraph 10 you refer to serving breakfast by way of example. I just wanted to ask you if you could explain whether that involves feeding the residents or what your role is in the service of the meals?---No, I actually walk around with all the breakfast cereals on a trolley with juices and milk and all the bowls. I then ask the residents what they want for breakfast. If they want porridge I've got to go back to my main bench and get it. If they want a hot breakfast I've got to go back to my main bench and get it. But apart from that, I just do the bowls of cereal and place it in front of them, and their juice.

PN1112

Yes, thank you, Ms Marshall. I think Ms Rafter will have some questions.

PN1113

JUSTICE HATCHER: Ms Rafter?

CROSS-EXAMINATION BY MS RAFTER

[10.10 AM]

PN1114

MS A RAFTER: Hi, Ms Marshall. My name's Alana Rafter. I'm appearing on behalf of the employer interests today and I'm just going to ask you some questions about your statement, primarily just getting some clarification. So I'll start with your role?---Yes.

PN1115

At 1, you say you work in hospitality services. Would you describe your role as a hospitality officer?---Not really. I just do my job. I don't class myself as an officer, just a worker.

PN1116

I note you work the breakfast and lunch at Banksia. Does a chef work both shifts as well?---They do.

PN1117

Is the chef your direct supervisor?---No, I have an actual supervisor. He works in the office across from where I actually serve the food.

PN1118

Is that supervisor a team leader or the facility manager?---He's a team leader, but he's also a chef.

*** KAREN MARSHALL

XXN MS RAFTER

PN1119

Are there other catering assistants or hospitality workers working alongside you when you're on your breakfast and lunch shift?---No.

PN1120

So it's just you and the chef?---No. I don't work with the chef. The chef is down in the main kitchen and I work up in what they call the shuttle kitchen, which is a separate kitchen altogether, where I've just got bain-maries there, and I put the hot food into the bain-maries.

PN1121

Thanks for clarifying that. Now I'm just going to ask you some additional questions about training. At 23, you state you complete the food handling modules once a month, which cover food safety, safe food handling and the like. How many modules are related to food handling and safety?---Probably once every six months we get the food handling ones they update.

PN1122

So you don't do food handling modules every single month?---No. I should've fixed that up in my statement. It's not every month. It's probably every six months that we'll get a food handling one.

PN1123

How long do they typically take?---Up to an hour some of them. Some of them can take 30 minutes.

PN1124

In fairness I should say that question was directed to the food handling module?---Yes, probably an hour.

PN1125

And it consists of some videos, maybe graphics and text?---Videos and then we've got to answer questions, and you've got to get 100 per cent to get it right.

PN1126

Say you don't get 100 per cent on the first go, do you get another chance to get 100 per cent?---You do, yes.

PN1127

And you've passed all your food handling - - -?---I have.

PN1128

At paragraph 20, you refer to 'thickening drinks'?---Yes.

PN1129

Do you receive training from the chef on how to do that?---No, we actually are told through the RNs if the patient needs to have their drink thickened. I watch a lot of the residents all the time to watch their eating habits. It's part of my – well it's not part of my job, but I do it anyway.

*** KAREN MARSHALL

XXN MS RAFTER

PN1130

Does the RN show you how to properly thicken a liquid?---Yes.

PN1131

I'd now like to ask you a question in relation to dietary requirements. At 11, you talk about how you're required to be aware of the dietary needs for the residents, for example, their allergies?---Yes.

PN1132

Do you have access to an extract of the care plan that sets these out?---Yes. I've only got to walk over to the microwave oven, and beside the microwave I have two folders there, and one of them states all their allergies.

PN1133

I take it in that folder it's divided up per resident?---Yes.

PN1134

Does that information also cover preferences, the likes and dislikes of those residents?---Yes.

PN1135

So we have the allergies, the dietary requirements - - -?---Yes.

PN1136

- - - and their preferences?---It does.

PN1137

But of course you state at 6 that you get to know the residents' preferences, so I take it you retain some of these to memory?---Yes.

PN1138

But if you were ever uncertain you could just go back to the microwave and have a check of that folder?---Yes. A lot of the times the RNs will say Betty's dietary has changed, and I'll put that in the memory bank and know that I've got to give her modified meals, or I've got to give her soft bite meals. It's just something I've learnt to do over the last couple of years.

PN1139

So the RN may give you – I'll just repeat that back. So the RN will give you an update about this resident's dietary requirements have changed now, they can only have pureed food?---Yes.

PN1140

Does that profile near the microwave get updated by the RN?---It does.

PN1141

Is there a communication book or somewhere where you can jot down that verbal update?---Yes, I've got a diet – a diary that it sits on top of the microwave, and you write notes in it every day if need be.

*** KAREN MARSHALL

XXN MS RAFTER

PN1142

If a resident does not finish their meal, are you required to record that somewhere?---Some residents we do. I try to give - when I serve the meals up, I try to give them what they would eat normally. Sometimes the plates do get overloaded a bit, but the food gets thrown out at the end of the day anyway, which is a shame, because it should go to a foodbank somewhere.

PN1143

So it's not necessarily a matter you need to raise to the RN or the chef?---I take a note of it and the next time I serve their meal up I might do it a little bit smaller, because I actually dish the lunches up to them as well.

PN1144

So when you see that happen you take it as feedback as to potentially their preferences; maybe they'd like less?---Yes.

PN1145

If a resident wanted, say, a snack outside of the meal times, subject to it being available and within their dietary requirements, would you provide it to them?---I do. We have always got biscuits. We've always got sandwiches that are pre-made in the fridge, and the biscuits are always there for if somebody wants something, and there's also a bowl of fruit that sits at the end of the – with a net over it every day.

PN1146

If you see a resident that's had a fall within the facility, I take it the protocol is that you would contact the RN or the care team, but you would go and wait with that resident?---I raise an alarm and go and sit with them until a carer or an RN arrives, yes.

PN1147

Thank you for your evidence, Ms Marshall. No further questions.

PN1148

JUSTICE HATCHER: Any re-examination?

PN1149

MR GIBIAN: Yes.

RE-EXAMINATION BY MR GIBIAN

[10.16 AM]

PN1150

MR GIBIAN: Can I just clarify, in relation to the training, as I understood it you said that you do training modules or get an email about training modules once or twice a month?---Yes.

PN1151

Was I right in understanding the evidence you just gave in answer to Ms Rafter's questions that the subject matter of those modules is food handling about every six months or so, is that --?---Yes, that's correct.

*** KAREN MARSHALL

RXN MR GIBIAN

PN1152

Secondly, you said that your practice at least is to watch out for the eating habits of the residents?---That's just something I do myself. I don't have to do it, but I do.

PN1153

What do you do if you notice some difference in the eating pattern or - - -?---I let one of the RNs know.

PN1154

And what does the RN generally do in that situation?---She'll usually come up and sit and watch them eat, and then she'll decide whether or not their diet has to change a bit.

PN1155

Thank you, Ms Marshall.

PN1156

JUSTICE HATCHER: Thanks for your evidence, Ms Marshall. You're excused. Sorry, there's just one question.

FURTHER CROSS-EXAMINATION BY DR RISSE

[10.18 AM]

PN1157

DR RISSE: Just one question. Thank you, Ms Marshall. In reference to the training programs that you do, when do you do them, the modules?---At home. I do them at home on my home computer.

PN1158

Is that done in work time that you then log in some way?---I get paid for training, yes.

PN1159

You do get paid separately for the training?---Yes.

PN1160

As regular hours?---Usually it's an hour. Each pay slip I get when we have done the modules, it'll have 'Training one hour' on the pay slip.

PN1161

Thank you very much?---That's all right. Thank you.

PN1162

JUSTICE HATCHER: Are there any questions arising out of that, Ms Rafter?

PN1163

MS RAFTER: No, your Honour.

PN1164

JUSTICE HATCHER: Mr Gibian?

*** KAREN MARSHALL

FXXN DR RISSE

PN1165

MR GIBIAN: No. Thank you.

PN1166

JUSTICE HATCHER: Thank you for your evidence, Ms Marshall. You're excused. You're free to go.

<THE WITNESS WITHDREW

[10.18 AM]

PN1167

JUSTICE HATCHER: Mr Gibian?

PN1168

MR GIBIAN: The next witness is Ms Ellis.

PN1169

THE ASSOCIATE: Can you please state your full name and address?

PN1170

MS ELLIS: Virginia Ellis, (address supplied).

<VIRGINIA ELLIS, AFFIRMED

[10.19 AM]

EXAMINATION-IN-CHIEF BY MR GIBIAN

[10.19 AM]

PN1171

MR GIBIAN: Thank you, Ms Ellis. Could I just get you to repeat your full name for the record?---Virginia Ellis.

PN1172

And your address?---(Address supplied).

PN1173

And you're employed as a homemaker at the Uniting Care facility in Springwood?---Now lifestyle and leisure coordinator.

PN1174

Now lifestyle and leisure coordinator, I apologise. You've made a further statement for the purposes of this part of the proceedings – sorry, if you'll just give me a moment?---Mm-hm.

PN1175

You have a copy of that with you?---I do.

PN1176

And it runs to some 39 paragraphs and was dated 20 September 2023?---Mm-hm.

PN1177

It's headed 'Supplementary' because there were two earlier witness statements that you made in the first stage of these proceedings?---Yes.

*** VIRGINIA ELLIS

XN MR GIBIAN

PN1178

Have you had the opportunity to read through that statement recently?---This statement?

PN1179

This one, yes?---Yes, I've just had a glance through it.

PN1180

Is it true and correct to the best of your knowledge and recollection?---Yes.

PN1181

Yes, I tender that statement.

PN1182

JUSTICE HATCHER: The supplementary witness statement of Virginia Ellis dated 20 September 2023 will be marked exhibit HSU101.

**EXHIBIT #HSU101 SUPPLEMENTARY WITNESS STATEMENT
OF VIRGINIA ELLIS DATED 20/09/2023**

PN1183

MR GIBIAN: There was just one matter I wanted to clarify. On the second page of that statement at paragraph 15, you say in the first sentence of that paragraph that we still have to wear masks every day?---Yes.

PN1184

Was there a period of time where the practice of wearing masks had ceased?---Just a little bit before I made this statement I think. We had to stop wearing them for a couple of weeks only, and then it came back in 4 September.

PN1185

That is, that there was a direction to return to mask-wearing as a regular habit?---Yes.

PN1186

When did that occur?---4 September I believe, and second day RAT testing.

PN1187

And that remains the practice at that facility - - -?---Yes.

PN1188

- - - as the extent?---Yes.

PN1189

JUSTICE HATCHER: Sorry, so you understand that will now be permanent or indefinite, or is it - - -?---I've got no idea. Just – we've just been told - norm.

*** VIRGINIA ELLIS

XN MR GIBIAN

PN1190

Was there some event that triggered that, do you know?---I think it's a health advice – came – the little email that I got was from the Health Department saying

they suggest that we mask up and RAT test every second day, and I think it's for all visitors that come into the facility as well.

PN1191

MR GIBIAN: Then in the final sentence of that same paragraph, paragraph 15, you say that if a resident has symptoms you have to wear an N95 mask, do you see that?---If they have symptoms we have to full PPE.

PN1192

Yes, sorry, I just wanted to clarify. Is that the only measure that's taken in the event that there is a resident with symptoms, or is there other PPE requirements?---Yes, there's gowns, gloves – if they do test positive, then a shield, things like that.

PN1193

Yes. Thank you, Ms Ellis.

PN1194

JUSTICE HATCHER: Ms Rafter?

CROSS-EXAMINATION BY MS RAFTER

[10.23 AM]

PN1195

MS RAFTER: Hi, Ms Ellis. My name is Alana Rafter. I'm appearing on behalf of the employer interests today and I'm just going to ask you some questions about your statement?---Yes.

PN1196

But first I'll just ask a question arising from what the President just asked you. You refer to a 'health advice' that got emailed to you that talked about the mask requirement?---Yes.

PN1197

Do you still have a copy of that email?---I do have it on my – I can show you on my phone.

PN1198

We would call for a copy of that.

PN1199

JUSTICE HATCHER: Where is your phone?---It's just in my bag. Do you want me to get it?

PN1200

Mr Gibian, is that something we should do now?

PN1201

MR GIBIAN: I'm entirely in the Bench's hand. We have no difficulty with it being called for. It could probably be forwarded to my instructor, whether that's conveniently done now.

*** VIRGINIA ELLIS

XXN MS RAFTER

PN1202

JUSTICE HATCHER: Ms Rafter, do you want the document for the purposes of cross-examination, or would you just want to see it and perhaps tender it?

PN1203

MS RAFTER: I'm happy for it to be tendered.

PN1204

JUSTICE HATCHER: All right. Well, perhaps that can be attended to in due course once the witness has finished giving her evidence.

PN1205

MS RAFTER: I'm now going to ask some questions about your role as lifestyle and leisure coordinator. How many recreational officers do you oversee in your role?---Outside our facility? Is that what you mean?

PN1206

I'll take it back. As a lifestyle and leisure coordinator, you're responsible for overseeing some staff?---One.

PN1207

One staff member within the Springwood facility, and is that a recreational activities officer?---It's just called a wellness officer.

PN1208

And that wellness officer is responsible for delivering lifestyle and leisure services to the different houses?---Yes.

PN1209

At 22(d) of your statement, you state that you plan individual activities for each of the residents based on their preferences?---Yes.

PN1210

Are these preferences set out in a care plan, or do you keep a separate record?---We do a form, which is called a B10.

PN1211

B10?---Yes, which is uploaded to their care plan.

PN1212

So it forms part of the care plan as well?---Mm.

PN1213

And - - -?---Something called a B domain. I'm not quite sure about the care plans, but yes.

PN1214

What content's usually included in the B10?---Everything about the person - their likes, their dislikes, their childhood memories, future goals.

*** VIRGINIA ELLIS

XXN MS RAFTER

PN1215

And are those goals in relation to physical goals, or what type of goals are they concerning?---It depends on the person.

PN1216

Could you give an example?---Somebody who'd never been to a football match. So we took, like, 15 residents to the AFL.

PN1217

So those goals give you some insight into the personal goals of the residents?---Yes.

PN1218

Do you also set goals for interaction and engagement with each of these residents?---Yes.

PN1219

Can you give an example of a goal you might set?---Some people might like to knit, but like to do it with other people, so we set up a knitting group for the ones that want to participate.

PN1220

You determine the activities that each of the individual residents will do?---No, we have a community circle, and it's up to the residents to tell us what they want, yes.

PN1221

Can I take it that the wellness officer will make progress notes for the engagement that the residents do each day?---(No audible reply)

PN1222

I note you used to be a recreational activities officer sometime before 2018?---Yes, I'm trained in lifestyle and leisure.

PN1223

Yes, that's right. You have a Certificate IV I believe. That was your evidence in - - -?---Yes, I do have a Certificate IV, yes.

PN1224

- - - in stage one?---My wellness officer has been with me since maybe January this year. She came into that position. She was on workers comp, with no lifestyle training. So I'm also training her, you know, on so much paperwork that we need to do.

PN1225

Is the wellness officer working towards getting a qualification as well?---That I'm not sure of, yes.

*** VIRGINIA ELLIS

XXN MS RAFTER

PN1226

You refer to the additional admin. I take it there's much more admin in the lifestyle coordinator role than the wellness officer role?---Yes.

PN1227

Who do you report to?---My manager.

PN1228

Is that the facilities manager?---Yes.

PN1229

Do you have regular meetings with the facility manager?---I see him most days that I'm at work, or we have a Teams that we chat or she just rings me.

PN1230

At 12, you note that you're required to take much more regular and detailed progress notes in relation to symptoms of COVID?---Yes.

PN1231

Was that observation in relation to when you were a homemaker or now as a lifestyle coordinator?---Well, a little bit of both, because I still help out on the floor. So if somebody has COVID there's a certain amount of obs that have to be taken every four hours, and then there's trying to keep them connected with family and keep their minds active and busy, keep their spirits up.

PN1232

So when a resident has COVID there's a set timetable where they must adhere to that with their progress notes; go and see the resident and take progress notes every four hours?---Yes, they do all the obs, BPs, stats, you know.

PN1233

And those additional stats, is that when you say it's more detailed; you have specific things to record?---Yes.

PN1234

In your role as lifestyle coordinator, will you still from time-to-time do recreational activities duties on the floor, like the wellness officer?---Oh my God, yes.

PN1235

Apologies, I spoke over you?---Yes. Oh yes. My day – I'm not exactly sure what – I have all the paperwork to do, but every day, like yesterday I looked after 101-year-old, who's quite time-consuming, but deserves to be looked after well and fed. So I look after her. Then the gardening club had two cubic metres of manure delivered, so I had to help get that off the street, and then it was on, doing a couple of notes and things, and then a group went out to the sports club for lunch, and then back. And then I had to get a whole heap of little Christmas cakes cooked for an activity coming up at the end of the week, and then my progress notes, and then, believe it or not, it's, you know, talking to people off and on during the day. I had a couple of meetings in between, so yes.

*** VIRGINIA ELLIS

XXN MS RAFTER

PN1236

With the progress notes as well for COVID, I take it that sometimes you'll help out with the personal care work as well?---Yes, I do.

PN1237

And you're qualified as a personal care worker as well?---Yes. We have a lot of staff working in aged care that have very little experience and not a lot of training, and some residents just need that little bit more experienced care.

PN1238

And you're well placed to do that because you've got experience as a personal care worker, recreational officer, and now with the admin as coordinator?---And I genuinely care about these people.

PN1239

Thank you for your evidence. No further questions.

PN1240

JUSTICE HATCHER: Any re-examination?

PN1241

VICE PRESIDENT ASBURY: Sorry, Mr Gibian, before you do, Ms Ellis, can I just clarify with you in point 5 of your statement?---Yes.

PN1242

Is that 76 hours per week or per fortnight?---Per fortnight, yes.

PN1243

Thank you for clarifying that?---But I work a lot more than that.

PN1244

Yes, including moving that material off the footpath?---Yes, well, you know – all the residents were out there: 'Are you going to come and help me?' 'Oh no, that's dirty work', you know. They'll watch.

PN1245

And you're one of the original applicants?---Yes, I'm – there's very few regular people still left there at Uniting, which is sad. But yes.

PN1246

Thank you.

PN1247

MS RAFTER: Just one question arising from that.

PN1248

JUSTICE HATCHER: Yes.

*** VIRGINIA ELLIS

XXN MS RAFTER

PN1249

MS RAFTER: Ms Ellis, you said you work a lot more hours than your rostered hours?---Yes.

PN1250

Is that overtime?---No. There is no overtime. They won't pay overtime. But still, you know, you've got deadlines. I have to get these things done and I do it. I do it for the residents.

PN1251

No further questions.

RE-EXAMINATION BY MR GIBIAN

[10.31 AM]

PN1252

MR GIBIAN: Thank you, Ms Ellis. Just two things I think. You said in relation to the recreational lifestyle activities that there's a process you referred to as the community circle, where the residents tell you what they want to do?---Yes.

PN1253

Can you describe how that process works?---So we have it on the third Thursday of the month at a set time, and they'll actually have a food focus group where they discuss the foods, their likes and dislikes, what's coming up, what's not coming up. Then we have a community circle and we go through last month's activities – did you like it, did you not like it, where do you want to go – because they really like to go out for lunch and things like that; what do you want to do next month, you know, so – and that's how we work out what they like, and different things like that.

PN1254

And who participates in that - - -?---Lifestyle?

PN1255

Yes?---Yes. Yes, we run it - - -

PN1256

So yourself and - - -?--- - - - and the residents. Sometimes a homemaker will be there, but - - -

PN1257

You run the session?---Yes. The kitchen manager may come to the food focus group and discuss things.

PN1258

The second thing was you were asked some questions about the maintenance of progress notes in relation to residents if they do test positive for COVID?---Yes.

PN1259

You said that observations are required to be made every four hours and that there are specific things to record. What are the type of observations that are required to be made?---Blood pressure, temperature, oxygen stats.

*** VIRGINIA ELLIS

RXN MR GIBIAN

PN1260

What do you do with that information?---It all goes on to their iCare computer. Anything out of the norms, it sets off an alert to the RN.

PN1261

And that's done by the personal care worker or homemaker in the homemaker (indistinct)?---Yes.

PN1262

Thank you, Ms Ellis.

PN1263

VICE PRESIDENT ASBURY: Ms Ellis, sorry, before you go can I just ask one more thing? Do you have a gardener at the facility where you work?---No. We have maintenance, but no gardener.

PN1264

You mentioned the gardening club, so do you - - -?---We have a gardening group, and one of the daughters of one of the residents, she comes in and volunteers her time.

PN1265

Okay?---And the residents that like to garden – a lot of them actually like to garden; they go out in the garden.

PN1266

Thank you?---Yes.

PN1267

JUSTICE HATCHER: Thanks for your evidence, Ms Ellis. You're excused, but can you send that memorandum to the HSU's lawyers?---I'd just like to say, you know, you're more than welcome to come out and see how it is really in aged care, you know, I can say – can tell you how it is, but to really experience it. I mean we're short-staffed; every day we're short-staffed, you know.

PN1268

VICE PRESIDENT ASBURY: We have done some inspections during this proceeding?---Have you? Yes.

PN1269

Yes, quite extensive ones. Thank you?---Thank you.

<THE WITNESS WITHDREW

[10.34 AM]

PN1270

JUSTICE HATCHER: Ms Rafter, when you see this memorandum, if you want to tender it you can just send it to my Chambers and we'll print a copy of it.

PN1271

MS RAFTER: Thank you, your Honour.

*** VIRGINIA ELLIS

RXN MR GIBIAN

PN1272

JUSTICE HATCHER: All right. So do we now adjourn till 11 am, is that the plan?

PN1273

MS HARRISON: Your Honour, the UWU witnesses I think at the very least would be available at 11. I mean that's the time they're scheduled to get into the offices, so that might – so 11.15 would be preferable.

PN1274

JUSTICE HATCHER: 11.15. All right, we'll now adjourn and resume at 11.15.

SHORT ADJOURNMENT

[10.35 AM]

RESUMED

[11.16 AM]

PN1275

JUSTICE HATCHER: You're ready to go, Ms Harrison?

PN1276

MS HARRISON: Yes, your Honour.

PN1277

JUSTICE HATCHER: So the next witness is Ms Hood, is that right?

PN1278

MS HARRISON: Yes, that's correct, your Honour.

PN1279

JUSTICE HATCHER: All right. We'll swear Ms Hood in.

<JESSICA HOOD, AFFIRMED

[11.16 AM]

EXAMINATION-IN-CHIEF BY MS HARRISON

[11.17 AM]

PN1280

JUSTICE HATCHER: Ms Harrison.

PN1281

MS HARRISON: Thank you. Ms Hood, are you able to state your full name for the record?---Jessica Maree Hood.

PN1282

Ms Hood, you're employed at Resthaven Aged Care?---Correct.

PN1283

And is your role title sort of described as housekeeper/gardener?---Correct.

JESSICA HOOD

XN MS HARRISON

PN1284

Have you got a copy of your statement that you provided in these proceedings in front of you?---I do.

PN1285

Have you had an opportunity to read through that statement recently?---Yes.

PN1286

Is that statement some 11 pages long?---Yes.

PN1287

Is the statement true and correct to the best of your knowledge?---Yes.

PN1288

Your Honour, I'd seek to tender that statement.

PN1289

JUSTICE HATCHER: The witness statement of Jessica Hood together with Annexure JH1 filed on 15 September 2023 will be marked UWU26.

**EXHIBIT #UWU26 WITNESS STATEMENT OF JESSICA HOOD
TOGETHER WITH ANNEXURE JH1 FILED ON 15/09/2023**

PN1290

MS HARRISON: Thank you, your Honour. I don't have any further questions.

PN1291

JUSTICE HATCHER: Mr Ward?

PN1292

MR WARD: Thank you, your Honour.

CROSS-EXAMINATION BY MR WARD

[11.18 AM]

PN1293

MR WARD: Ms Hood, can you hear me, and can you see me?---Yes, I can.

PN1294

Thank you. My name is Nigel Ward. I appear in these proceedings for the joint employer interests. I'm just going to ask you some questions?---Mm-hm.

PN1295

Do you have your statement in front of you?---I do.

PN1296

Can I just start with paragraph 3? You say you've got a Certificate II in Horticulture?---Yes.

PN1297

Did you get that certificate before you became the gardener or after you became the gardener?---Before I became a gardener.

PN1298

Was that because you had a general interest in gardening?---Yes.

*** JESSICA HOOD

XXN MR WARD

PN1299

Since getting the Certificate III(sic) and becoming the gardener, your employer has not required you to do any – get any further qualifications, like a Certificate III or a Certificate IV?---No, because I – no. I deal with just the courtyards, not the whole area.

PN1300

We'll come to that. And I take it you're the only gardener at the facility?---Yes, but we do have contractors come in as well.

PN1301

We might deal with that now then. So I think your statement says the contractors deal with the perimeter?---Mm-hm.

PN1302

Can you just explain to me what is meant by 'the perimeter'?---So we've got a large bit of land, so it's all the front lawns, the back areas, where there's a lot of plants. We've got two – two to three pillows high up with plants all up there as well.

PN1303

So there's a contractor who comes in to mow the lawns?---Yes.

PN1304

And the same contractor comes in to do things like pruning and re-planting of all that perimeter area?---Yes.

PN1305

Does the contractor do anything else?---Irrigation.

PN1306

So that would be, again, irrigation of the perimeter area?---Correct.

PN1307

Now, you say in your statement at paragraph 7 that you're a housekeeper. It's not a phrase – I don't think it's a phrase we've heard in these proceedings before, so just bear with me?---Mm-hm.

PN1308

I take it from your statement that that means you do cleaning duties?---Yes.

PN1309

Does it also mean that you do food-related duties as well?---That's correct.

PN1310

In terms of the food-related duties, you're not a cook, are you? You're not a chef?---No.

PN1311

And the facility has a cook or a chef?---They do.

*** JESSICA HOOD

XXN MR WARD

PN1312

I'll come back to that. So it's a combination of cleaning, and it's a combination of food duties?---That's right.

PN1313

Just for completeness, if I can take you to paragraph 7? You say there that you're classified as a level 2.2 housekeeper and 3.2 level gardening under the Aged Care Award. I'm not trying to argue with you, but it's my understanding that those classifications are actually under your enterprise agreement, is that right?---Yes.

PN1314

Not the award itself?---I'm not quite sure on that.

PN1315

So what made you write paragraph 7? Did somebody help you with that, or did you write it?---No, because that's actually on my – it used to be on our old pay slips, so that's how I know those figures.

PN1316

But you accept in paragraph 8 that you're paid in accordance with your enterprise agreement?---Yes.

PN1317

JUSTICE HATCHER: What's your classification under the enterprise agreement?---As in? I don't - - -

PN1318

In paragraph 8 you say that - you've identified the enterprise agreement that covers your work. Is there a classification or a level or a pay grade under that agreement which applies to you?---I think there is.

PN1319

But are you able to – do you know what it is?---I'd have to go through – I think they have the levels in there.

PN1320

MR WARD: Can I help you, Ms Hood, if I could?---Yes.

PN1321

Your Honour, I might give a copy of the agreement to the Bench. Just so you understand, I've just provided the members of the Commission and the expert panel members the Residential Aged Care and Community Services Enterprise Agreement 2016 for Resthaven Incorporated. I might help you this way. If you turn to page 41?---41?

PN1322

Yes. Are you at 41?---Yes, there we go.

PN1323

You'll see there's a group of classifications called 'Residential Employee'?---Yes.

*** JESSICA HOOD

XXN MR WARD

PN1324

My understanding is that where you say in paragraph 7 'I'm a level 2.2' for your housekeeping. That's a residential employee level 2.2? Does that sound right?---No. This agreement is quite old, as in - - -

PN1325

Is there a replacement agreement, is there?---No, no. Resthaven pay above the award rate.

PN1326

Yes?---So I still don't know why that - when this agreement was made that was the figures that we got paid back then.

PN1327

Let me see if I can help a little better. If you turn to page 47, you'll see 'Residential services employee level 3', do you see that?---3.1?

PN1328

At page 47, it starts with 'Residential services employee level 3'?---Correct, yes.

PN1329

And under 'General' it says, 'This is a progression point for defined level 2' – you see that?---Yes.

PN1330

If you go all the way down the page you see a heading called 'Indicative roles'?---Yes.

PN1331

And one of them 'Gardener experienced/unqualified'?---That's correct.

PN1332

Is that your classification for your gardening?---Correct.

PN1333

I take it then that your classification for your home-keeper job – bear with me, I'll see if we can get this. No, I'm going to struggle.

PN1334

VICE PRESIDENT ASBURY: Mr Ward, is it on the pay slip? It seems to be saying there's a code, HSA level 2, L2P2.

PN1335

MR WARD: Yes. My understanding is, your Honour, that the housekeeper role is level 2, pay point 2 in the agreement, and my understanding is that the gardening one is the one I've just described, which is level 3, and then I understand there are different pay points depending on the number of hours' experience one has in the agreement, and I think that's reflected in the pay slip?---Yes.

*** JESSICA HOOD

XXN MR WARD

PN1336

To try and answer his Honour's question.

PN1337

JUSTICE HATCHER: So Ms Hood, do you get paid different rates of pay for different days of the week, do you, depending upon what job you're doing, or do you get the same rate of pay throughout?---So I get paid a higher rate for gardening, and – so I'm a 3.2 for gardener, and a 2.2 for housekeeping.

PN1338

Thank you.

PN1339

MR WARD: Can I take you to paragraph 10?---Yes.

PN1340

You talk then about a person called Narelle Brennan?---Yes.

PN1341

Am I right that that's your supervisor?---Correct.

PN1342

Is it your supervisor for your gardening job?---Gardening and housekeeping she covers.

PN1343

So you report to that supervisor for both jobs?---Correct.

PN1344

Do the cooks report to her as well?---Yes.

PN1345

And I think you say there kitchenhands and maintenance workers?---That's right, and laundry - - -

PN1346

And laundry?---Yes.

PN1347

In the housekeeper job you do, you don't do laundry?---No.

PN1348

Could you just for my benefit explain to me what's the difference between being a housekeeper and a kitchenhand?---A kitchenhand would be making sandwiches in the main kitchen, doing a lot of dishes, maybe making desserts or cakes. I'm really not sure what else they do, because I've never worked in the kitchen either.

*** JESSICA HOOD

XXN MR WARD

PN1349

So you don't work in the kitchen; your food-related activities relate to taking meals to residents and things of that nature?---Yes. So in the morning I prepare

their breakfast, as in Weetbix and toast and, you know, scrambled eggs that I can make, but at lunch, you go to the kitchen and pick up the bain-marie, because the main kitchen make the lunch.

PN1350

Okay, well - - -?---And I just serve it from the bain-marie.

PN1351

We'll come back to that. Can I take you to paragraph 14?---Yes.

PN1352

You say – and I think this is about your gardening job - you say:

PN1353

The roster is flexible, can be changed. I like to start early at 5.30 and finish at 1.30 when it's hot.

PN1354

Can I just – I take it you have some flexibility as to when you're allowed to work?---Yes, especially in the heat - - -

PN1355

What do you mean by 'heat'?---Well, anything over 38, like 42 degrees. So it's extreme heat.

PN1356

Extreme heat. Thank you?---Yes.

PN1357

If it is an extremely hot day, your employer lets you start early to get the job done?---Yes.

PN1358

If you go to paragraph 15(a), you state you start by cleaning the staff area and front entrance. Can you just explain to me what you actually do when you're cleaning it? What do you mean by 'cleaning'?---I wipe down all the tables and chairs, empty the bins, empty the ashtrays, blow-vac, water the plants around the area, decobweb, touch points, as in door handles and - - -

PN1359

Is that a combination of gardening and housekeeping or is that just the gardening job?---Well, it's tidying those areas up.

PN1360

At paragraph 16, you say this:

PN1361

This is a summary of how a usual day...is broken up.

*** JESSICA HOOD

XXN MR WARD

PN1362

Then you say:

PN1363

Factors such as weather and people calling in sick can

PN1364

change how and where work.

PN1365

I take it by 'weather' you mean, if it's raining, you don't do your gardening job?---Correct.

PN1366

And if it's raining, does that mean you do your housekeeping job instead?---I will help someone in the pantry or I'd scrub some lounge chairs or table chairs, wipe down some walls, rails.

PN1367

If you can't do the gardening work because it's raining, you just generally help out with what you're capable of helping out with?---Yes.

PN1368

Then you say 'people calling in sick'. I take it that calling in sick relates to the housekeeper job, not the gardening job?---Yes, housekeeping. So someone might call in sick in the morning and they're trying to find someone to cover the shift, but, as a gardener, I'm there at 7 o'clock and most shifts start at 7.30, so I'll go in and start till they can find somebody, but sometimes they can't, so I'll do the shift in there for the whole day instead of gardening.

PN1369

So that might be another housekeeper calls in sick, so you step in for them?---Yes.

PN1370

I take it there's no such thing as a cleaner at your facility; they're all housekeepers?---Well, we do have cleaners actually. We have a central clean and Aruna(?) and Wilpena clean. That's in the high care areas, and the central cleaner would come to my area just to clean four rooms, and I do the other 11 rooms.

PN1371

Can you just help me out as to what a central clean means?---So she will clean the rooms thoroughly, where I will just spot check, as in basins, toilets, overways and floors.

PN1372

I see. So there's a dedicated cleaner?---Yes.

PN1373

Who will do a certain amount of cleaning work?---Yes.

*** JESSICA HOOD

XXN MR WARD

PN1374

And then you do some additional specific tasks on top of that?---That's right.

PN1375

Thank you. Now I might regret asking this question, but if you go to paragraph 18(a), can you tell us what 'blowback' means?---Blow-vac - blow-vac the leaves.

PN1376

Blow-vac?---Yes.

PN1377

Okay?---Yes, I've just seen it too.

PN1378

That's okay?---I think that's a typo.

PN1379

Don't worry about that. You say in 18(d) that you maintain documents that record details of gardening practices. Do you maintain those in a manual record or a computer record?---Just in a book, just in for my own self as in where I fertilise, so I'm not over-fertilising something, where I need to poison because it hasn't been poisoned for a while.

PN1380

So that book will record that you fertilised a particular courtyard on a particular day, or that you've already done watering?---Yes, so I know that I've fertilised that area or what courtyards I've spent more time in, so I can start on the other courtyards.

PN1381

Do you have a general schedule of which courtyard you do when and what you do there or are you free to make that up?---No, so in the mornings, I do the staff area and the front and then I do the two big courtyards and then I do the rest of the - you can't do all of them; you do a couple of the small courtyards at the end of the day.

PN1382

At paragraph 20, you talk about working in the low care areas, and I think you talk there about residents - you actually get residents to help out with the gardening?---Mm-hm.

PN1383

I take it that's gardening in the courtyards, it's not gardening in the perimeter of the facility?---That's correct.

PN1384

Do I take it that those residents are sufficiently independent and aware to actually do gardening work with you?---The dementia ward not so much, but the low care, yes.

*** JESSICA HOOD

XXN MR WARD

PN1385

Yes, okay. In paragraph 21, you say:

PN1386

There is no formal training about how to involve residents in my work.

PN1387

So you've not had any training from your employer about engaging with residents?---No, not with gardening, no.

PN1388

Is that just something you've picked up from experience?---Yes.

PN1389

You haven't had training in dealing with people with dementia?---I have, yes.

PN1390

That's separate to what we've just talked about?---Yes. It's more their behaviours we get trained for.

PN1391

And how - - -?---How to deal - how to deal with their behaviours.

PN1392

How often do you do that?---Probably twice a year.

PN1393

Is it an online course?---Sorry, once every two years.

PN1394

Once every two years?---Yes.

PN1395

Is it an online course or is it a face to face course?---Face to face.

PN1396

How long does it go for?---I'm pretty sure it went for two hours.

PN1397

Is it in paid time?--- Yes.

PN1398

Has it helped you engage with residents with dementia?---Sometimes, yes.

PN1399

Sometimes not?---Yes.

PN1400

Okay?---What works for one resident won't work for the other.

*** JESSICA HOOD

XXN MR WARD

PN1401

Can I just take you to paragraph 26. This is by way of clarification, if I can. You talk about breakfast preparation. You said you don't go into the kitchen. Where are the breakfast things kept?---In the pantries in the dementia ward. We've got a little kitchen in each area.

PN1402

So it's like a little kitchenette with a sink and - - -?---Yes.

PN1403

I take it that what is available for breakfast each day, the suite of what's available is standard?---Yes.

PN1404

You put that on a trolley and you take the breakfasts to the dining room, or do you take the breakfasts to the resident?---Because it's a dementia ward, some have them - I don't use trays, I take them to the table, serve it up and they have the trays in the bedroom.

PN1405

When you the word in 26(a) - you say, 'Breakfast preparation and service' - can you just help us understand what you mean by 'service'?---Well, you're serving your food, you're serving a meal to them.

PN1406

To the resident?---Yes.

PN1407

You then talk in paragraph 26(c) about, 'A handover, if it has not occurred on Wednesday.' Can you just explain to me what the handover - is it a meeting?---Yes, so we have a 10-minute meeting two days a week with our supervisor. If there's any changes to their dietary requirements, a new resident coming in, if someone's gone to hospital - so we have that twice a week.

PN1408

That might be your supervisor saying, 'Something's changed with Resident Jane, please be aware when you serve them breakfast that this is what you need to do'?---Yes, and she'll have the documents redone for us.

PN1409

Does that involve possible changes in dietary requirement?---Yes, like they could be eating a normal meal and then they might be minced.

PN1410

Your understanding of each resident's dietary requirement, where do you get that understanding from?---There is a folder in each kitchenette of each resident of their dislikes, likes, whether they're lactose intolerant or high blood pressure - not high blood pressure - blood sugar, whether Equal sugar. Yes, there's all different things.

*** JESSICA HOOD

XXN MR WARD

PN1411

You have access to that?---Yes.

PN1412

I take it when there's a new resident joins, does your supervisor take you through that?---There will be a slip of paper on our diary in the kitchenette for us to read through.

PN1413

If you have any questions, you ask the supervisor about that?---Definitely, yes.

PN1414

In paragraph 29, you talk about - sorry, I withdraw that. In paragraph 28, you talk about cooking breakfast?---Mm-hm.

PN1415

Is that cooking in the kitchenette? It's not cooking in the main kitchen?---Cooking in the kitchenette.

PN1416

So that would be - - -?---We've got a stove in there.

PN1417

So that would be making toast, scrambled egg, things like that?---That's correct.

PN1418

Then in paragraph 29, you talk about the fact that sometimes you try to change the menu a bit?---Mm-hm.

PN1419

I take it when you say 'try to change the menu', that that's within the suite of what's available for breakfast or one of the other meals?---That's right.

PN1420

That might be because the resident wants a change or it might be because you're just trying to give them some variety?---Just variety, because one of the workers might have said yesterday that she hasn't eaten her breakfast for the last two days, so I'll change it up.

PN1421

When you say one of the workers might say that, that's a care worker, is it?---A care worker, or it could be a housekeeper.

PN1422

It could be a housekeeper who's just observed that the tray's not been touched?---That's correct.

PN1423

Is that reported or recorded anywhere if the tray has not been touched?---In our diary.

*** JESSICA HOOD

XXN MR WARD

PN1424

Does that go to the registered nurse for consideration?---Yes.

PN1425

If there's any need to change the diet of a resident, the registered nurse will be making those decisions?---Yes.

PN1426

Can I take you to paragraph 36. In paragraph 36, you talk about replenishing stores from the main kitchen. I take it that would be - hopefully I'm not saying this in a bad way - that might be, 'We need more cornflakes in the kitchenette, I'm going to go and get more cornflakes and put them in the kitchenette for breakfast tomorrow'? Is that what you mean by 'replenishing stores'?---Correct.

PN1427

Then you talk in 38 about you start cleaning to keep the common area tidy. I take it that is you vacuum, you're cleaning walls, you're - - -?---Dusting.

PN1428

Dusting?---Yes.

PN1429

Do you have an emphasis now on high touch points?---Sorry?

PN1430

Do you have an emphasis in your cleaning now on high touch points?---Yes, we do light switches and railings and door handles, yes. That's all in our duty statement.

PN1431

Have you always done those things?---No, not so much - since COVID. We might have just done - I think it was a door handle before COVID, and depending whether you were the central cleaner or the housekeeping cleaner, one of us did the railings, the other one didn't.

PN1432

Am I right in saying that, as a housekeeper, you have greater focus now on high touch points than you did before COVID?---Yes, during COVID we did, and there's a few more, that type of switches - what's the other one - the remote control.

PN1433

Thank you?---Residents.

PN1434

Can I take you to page 8, which talks about working with residents?---Page what, sorry?

PN1435

It's page 8. Sorry, it's page 8?---Page 8, yes.

*** JESSICA HOOD

XXN MR WARD

PN1436

Can I take you to paragraph 51. I'm just trying to understand this, if I can. You say:

PN1437

I have been asked by the care coordinator to help with a resident in the dementia ward.

PN1438

Can you explain to me what you were asked to help with?---So this certain resident doesn't like new people and especially males, and she had to get a flu jab taken by a doctor, and this was a male. The care coordinator knows that she's quite good with me, so I went in there just to help calm her down with the doctor coming in so they could give her the flu jab, to try and - - -

PN1439

Sorry, I - - -?---To try and keep her in a good mood.

PN1440

I see. When you say she's quite good with you, I take it you're saying you've built a good relationship with her over a period of time?---Correct.

PN1441

When you were helping the doctor, you were talking to her to try and keep her calm or - - -?---That's right.

PN1442

You later on say in that paragraph this - I'm happy for you to read it all if you need to - but halfway down, you say:

PN1443

I can be asked to give medication to residents while a PCW stands at the door if that resident...

PN1444

?---That has happened a few times, yes.

PN1445

Are you trained and qualified to give medications?---No.

PN1446

But you've been asked to do it anyway?---But she's standing in the room with me and I will just put it on her overway for her and she'll just take it.

PN1447

So the resident is still taking the medication themselves?---Yes.

PN1448

I see. So it's not that you're administering the medication to the resident?---Oh, no, no, no.

*** JESSICA HOOD

XXN MR WARD

PN1449

You are doing that under the direct supervision of the personal care worker?---That's correct.

PN1450

But is there any reason the personal care worker isn't doing that?---She just had a dislike to her that day.

PN1451

Okay?---That's all.

PN1452

I take it again, over time, you have built a relationship with that resident that allowed you to do that?---That's correct.

PN1453

It's not something you would normally do?---Oh, no.

PN1454

You say in paragraph 53, right at the bottom:

PN1455

I have found that if I can spend 15 minutes

PN1456

with that resident talking to them, they are happy with that.

PN1457

I take it, in your day, you have got the time to do that?---When I'm cleaning her room, that's when I'll talk to her because, no, you don't have 15 minutes to talk to a resident, or, if she's at the table, I'll make her a cup of tea if I'm wiping down all the tables and chairs. So you've just got to find the right spot at the right time of the right duty.

PN1458

In terms of those conversations you have, what would you be talking about?---Well, they're all different, so whatever they bring up. It can change every day with a dementia resident.

PN1459

So they could be talking about their family one day or television the next, something like that?---Yes, or their mum and dad, want to know that they're coming - all sorts.

PN1460

In paragraph 58, you talk about the fact that you broke up a fight. It's my understanding that if you see something like that, there's normally a procedure or a protocol you have to follow like pressing an emergency button?---Mm-hm.

*** JESSICA HOOD

XXN MR WARD

PN1461

Do you have such a procedure?---So that particular fight, I was in the kitchenette and most of the residents were in the dining room and both men started to fight, which was upsetting the whole dining room table. So my first interaction was just to break it up and get them apart, and then I pressed the button to get help.

PN1462

But the procedure you're trained in - and I'm not trying to get you in trouble - but the procedure you're trained in is, when you see that, is to press the button for help, isn't it?---Yes.

PN1463

You talk in paragraph 56 about, 'Most of these incidents require an immediate response' and that it's not always possible to wait for a PCW or nurse. Can I just put this to you: if a resident has a fall, am I right that the procedure is you're not allowed to actually get the resident up or anything like that; you've got to press - - -?---No, no, I don't touch them, no.

PN1464

You press the call button?---Yes.

PN1465

And you have to wait for a personal care worker or a registered nurse to come?---Yes.

PN1466

Am I right that you would stay with the resident and talk to them and maybe try and keep them calm?---That's correct.

PN1467

You wouldn't just leave them, you'd stay there?---No, no, I'd be right there.

PN1468

But you're not allowed to move them or give them any - - -?---No.

PN1469

No?---No.

PN1470

Thank you for your evidence. Just wait there because I suspect there will be some re-examination. Your Honour, can I just ask for the EA to be marked as an exhibit?

PN1471

JUSTICE HATCHER: Yes. The Residential Aged Care and Community Services Enterprise Agreement 2016 will be marked exhibit JE12.

EXHIBIT #JE12 RESIDENTIAL AGED CARE AND COMMUNITY SERVICES ENTERPRISE AGREEMENT 2016

*** JESSICA HOOD

XXN MR WARD

PN1472

VICE PRESIDENT ASBURY: I've just got a couple of questions. Ms Hood, can I just take you to your statement. In paragraph 9, you've gone through your hours of work and what your roster looks like for a fortnight?---Mm-hm.

PN1473

If I could just take you to your payslip which is on the last page of your statement. It's JH1?---Yes.

PN1474

I'm sorry, I haven't got a calculator up here and maths is not my forte, but my understanding of that payslip is what it's showing us is that when you do your housekeeping shift and you're paid at level 2.2, the rate is \$26.18 per hour?---That's correct.

PN1475

And when you're paid at your higher rate doing your gardening shifts, which is level 3.2 in the agreement, it's \$27 per hour?---That's correct.

PN1476

So those hours equate with that fortnightly roster, so the 11 hours at level 2.2 is for the two days you're doing the housekeeping shift on ordinary days and then the Saturday and Sunday?---That's correct.

PN1477

Then the 45 hours at the \$27 an hour is your gardening shifts?---Correct, yes, correct.

PN1478

Do you ever do a shift that is both on a day, or are they separate shifts always?---I've done many shifts on both.

PN1479

Okay?---I actually did one yesterday.

PN1480

Can you also just clarify for me - I thought that you said that when you are serving the breakfasts and you say at paragraph 32 that you might make a milkshake or a heavier breakfast like scrambled eggs with cream, or something like that, for a particular resident, can I assume from that that you are actually cooking the eggs in your area?---Yes.

PN1481

So something like eggs, you actually cook yourself to serve to the residents?---Yes. We've got a microwave, we've got a stove in there and we've got a thermometer to take the temperature to make sure it's the right temperature.

PN1482

Is there anything else besides eggs that you cook in that area?---Ham and cheese toasties.

*** JESSICA HOOD

XXN MR WARD

PN1483

I count that as cooking - toast?---And every Wednesday they have a scrambled egg, bacon and tomato breakfast, but I think the main kitchen does that because that's a non-set thing every Wednesday morning.

PN1484

You serve that from the bain-marie?---Yes, I don't work on a Wednesday in there, though.

PN1485

You don't work on a Wednesday, but you are cooking scrambled eggs and you're adding cream or - - -?---Cream and that, yes, because some residents do actually have scrambled eggs for breakfast and we cook it in our serviette - little pantries.

PN1486

Thank you for that?---No worries.

PN1487

JUSTICE HATCHER: Anything arising from that, Mr Ward?

PN1488

MR WARD: No, your Honour.

PN1489

JUSTICE HATCHER: Ms Harrison?

PN1490

MS HARRISON: Yes, thank you.

RE-EXAMINATION BY MS HARRISON

[11.55 AM]

PN1491

Ms Hood, just following on from her Honour's question in relation to the cooking in the kitchenette, are you able to describe for the Commission how you make those - how you know what you're cooking in relation to each resident?---We've got a breakfast menu.

PN1492

So the breakfast menu determines for every resident?---Yes, and if there's a diabetic there, it will be written up that there's a diabetic there, or a lactose intolerant.

PN1493

Thank you, your Honour, I don't have any further questions.

PN1494

JUSTICE HATCHER: Thank you for your evidence, Ms Hood, you are excused, which means you are free to go and disconnect?---Thank you.

<THE WITNESS WITHDREW

[11.56 AM]

*** JESSICA HOOD

RXN MS HARRISON

PN1495

JUSTICE HATCHER: Ms Holmes is next.

<JULIE HOLMES, AFFIRMED

[11.57 AM]

EXAMINATION-IN-CHIEF BY MS HARRISON

[11.57 AM]

PN1496

MS HARRISON: Good morning, Ms Holmes. You might want to move to the seat closer just because I know that the audio was slightly better before. For the purpose of the court record, are you able to state your full name?---(Indistinct) Holmes.

PN1497

Ms Holmes, you are currently employed at BlueCare?---Yes.

PN1498

Is your occupation or job title described as a personal carer domestic?---Yes.

PN1499

You have provided a statement in these proceedings?---Yes.

PN1500

Have you got a copy of that statement in front of you?---I do.

PN1501

Have you had an opportunity to recently read through that statement?---Yes.

PN1502

Is it true and correct to the best of your knowledge?---Yes.

PN1503

Your Honour, I seek to tender that statement.

PN1504

JUSTICE HATCHER: The witness statement of Julie Holmes, with annexures JH1 and 2, filed on 15 September 2023, will be marked exhibit UWU27.

**EXHIBIT #UWU27 WITNESS STATEMENT OF JULIE HOLMES
WITH ANNEXURES FILED ON 15/09/2023**

PN1505

MS HARRISON: I don't have any further questions, your Honour.

PN1506

JUSTICE HATCHER: Ms Rafter?

CROSS-EXAMINATION BY MS RAFTER

[11.59 AM]

*** JULIE HOLMES

XN MS HARRISON

*** JULIE HOLMES

XXN MS RAFTER

PN1507

Hi, Ms Holmes, my name's Alana Rafter; I'm appearing on behalf of the Joint Employers. Just confirming you can see me?---Yes, I can.

PN1508

And, importantly, hear me. I am just going to be asking you some questions about your statement and go from there. In your statement, you refer to your role as a personal carer domestic employee?---Yes.

PN1509

You also refer to another role of personal care worker?---Yes.

PN1510

It's my understanding those are two separate roles; is that correct?---I started off in Community as a personal carer domestic. I then moved across to the Labrador Gardens facility as a personal carer hospitality, so a hospitality officer.

PN1511

Thank you for that clarification. In your role as hospitality officer, you do preparation and service, but you do not do cooking?---That's correct.

PN1512

Are you aware that your employment is covered by an enterprise agreement?---Yes.

PN1513

I might take you to that enterprise agreement, which I believe is with you. So this is the BlueCare and Support Employees Enterprise Agreement 2023, and I will just - apologies, I am just going to get some copies for the Bench and the parties here, so bear with me, Ms Holmes. If I can first take you to page 61, and I do note that this page is a different orientation; it will be landscape orientation. At the top of that page, it says 'Appendix 4'?---Yes.

PN1514

Thank you. Just confirming we have all got the same page. Now, if I can take you to the table there, underneath (a) 'Wage rates for direct carers, activities officers and most senior food services facility employee', if we can look at the classification level column - that's the first one - you will see the first row is ACFDC2.1?---Mm-hm.

PN1515

And the second is ACFDC2.2?---Yes.

PN1516

Would you accept that's the same description you provide at 4 of your statement, and you are welcome to check your statement, of course?---Yes.

PN1517

If we go across three columns under the heading 'Base rate', it says \$30.09?---Yes.

*** JULIE HOLMES

XXN MS RAFTER

PN1518

Would you accept that's your current pay rate, base pay rate?---Yes.

PN1519

Thank you. Now I would like to go over - bear with me whilst I find the page myself - to page 39 of that agreement, of the enterprise agreement. We are back to portrait orientation now?---Yes.

PN1520

At the top of that page, just to make sure we're on the same, it says 'Appendix 1'?---Yes.

PN1521

We will see a couple of subheadings in bold and the first one is 'Progression'?---Mm-hm.

PN1522

The next one is 'Aged Care Facilities Direct Care (ACFDC) Classification'?---Yes.

PN1523

That would be the definition of ACFDC that appears in your statement. I saw you nod, but I think you should verbalise your answer?---Yes.

PN1524

Thank you. This classification description includes, to read from what appears under the classification level:

PN1525

All employees working in direct care roles (including personal carers at all levels), recreational and lifestyle roles (at all levels) and the most senior food services employee at any facility.

PN1526

?---Yes.

PN1527

Now I would like to take you over the page to page 40. In fairness, actually, I will take you back one page to 39. I am going to take you to a table over the page that falls under the heading of 'Level 2 Employees', so this is your classification under the EA. You will see, at about the halfway point on page 39, Level 2?---Yes.

PN1528

Okay, excellent. Now we will go over the page to page 40?---Yes.

PN1529

You will see there's a table. This table sets out some examples of the positions covered in this classification level and it includes some indicative responsibilities. I want to draw your attention to 'Hospitality Officer' - that's the fourth row, third category of that table. Do you see that?

*** JULIE HOLMES

XXN MS RAFTER

PN1530

JUSTICE HATCHER: Sorry, Ms Rafter, what page are you on now? I fell behind there.

PN1531

MS RAFTER: Apologies, your Honour, I'm on page 40, looking at the table.

PN1532

THE WITNESS: So am I.

PN1533

MS RAFTER: Thank you, Ms Holmes. And I am directing your attention to the Hospitality Officers section of that table. I just want to confirm - earlier you confirmed you do food preparation and services, but I want to confirm you don't make the beds as a hospitality officer?---No.

PN1534

You don't do laundry services within your role?---No.

PN1535

You are not involved in the development of resident care plans as a hospitality officer?---No.

PN1536

And you do not assist with activities of daily living, including mobility, eating and drinking?---Ah - - -

PN1537

I will break that up because I see it was unfair of me to put them as one long list. Do you assist with activities of daily living such as mobility?---No.

PN1538

Do you assist with residents' eating?---Yes.

PN1539

Could you give an example of how you provide that assistance?---I make sure that they receive the drinks according to their care plan, their food according to their care plans. Any stipulations or digressions in their care plan, I have to be aware of.

PN1540

Thank you?---Regarding (audio malfunction).

PN1541

So, as part of your role, when you are serving food to residents, you are doing it in accordance with their dietary requirements?---That's right.

PN1542

Would you ever be providing assistance, like feeding a resident?---I have previously.

*** JULIE HOLMES

XXN MS RAFTER

PN1543

You have previously? I note some hesitation in that. Does that typically fall within your role or is that something - I will withdraw that and put it as one question. Is that something that typically falls within your role?---No.

PN1544

So it's something a bit out of the norm?---Yes.

PN1545

Thank you. I can put the enterprise agreement to the side for now and, your Honour, I would seek it to be marked.

PN1546

JUSTICE HATCHER: All right. The BlueCare and Support Employees Enterprise Agreement 2023 will be marked exhibit JE13.

EXHIBIT #JE13 BLUECARE AND SUPPORT ENTERPRISE AGREEMENT 2023

PN1547

Before we move on from that, Ms Rafter, can you - in appendix 4, which you took us to on page 61 - - -

PN1548

MS RAFTER: Yes.

PN1549

JUSTICE HATCHER: There's the ACFDC classifications.

PN1550

MS RAFTER: Yes.

PN1551

JUSTICE HATCHER: And then there's the - under (b) there's ACF classifications.

PN1552

MS RAFTER: Yes.

PN1553

JUSTICE HATCHER: Where will we find the definitions for those classifications?

PN1554

MS RAFTER: If I can have one moment.

PN1555

PROF BAIRD: I think ACFDS is page 39.

*** JULIE HOLMES

XXN MS RAFTER

PN1556

JUSTICE HATCHER: No, ACF without - - -

PN1557

PROF BAIRD: Without the DS.

PN1558

MS RAFTER: Your Honour, our understanding is that the ACF will be aged care facilities - will be the same, but at this point, I can't see a separate definition for ACF.

PN1559

VICE PRESIDENT ASBURY: There is one in 3.2 for aged care facility.

PN1560

JUSTICE HATCHER: I am just looking at this because, if you go to page 61, you have ACFDFC rates at 2.1, 2.2, 3, 4, 5, 6, 7, and then you have the ACF rates, which are lower, with the same grading structure that suggests some distinctions in duties, so I'm just wondering how the agreement defines the difference between those who are deemed to be direct care workers at a higher rate than those who are not, noting that Ms Holmes is classified as a direct care worker.

PN1561

MS RAFTER: I note - - -

PN1562

MS HARRISON: Your Honour, if I might be of some assistance?

PN1563

JUSTICE HATCHER: Yes.

PN1564

MS HARRISON: My understanding, and apologies, your Honour, I wasn't involved in the drafting of the agreement, but my understanding is that the wage rates, they are combined in the same classification structure. I think the actual definition of who falls within the direct care is defined on page 39, and the remainder of it all remains part of the same description levels because I think the prior agreement had had both the direct care and indirect care all as part of the same classification structure, but to take into account the aged care work value increase, which this agreement came into effect afterwards, it has separated out the two pay streams.

PN1565

JUSTICE HATCHER: Without defining who is who?

PN1566

MS HARRISON: Yes.

PN1567

JUSTICE HATCHER: If Ms Holmes was under the award, would she be a personal care worker or not? I assume not, would she?

*** JULIE HOLMES

XXN MS RAFTER

PN1568

MS HARRISON: Your Honour, I might take that question on notice.

PN1569

JUSTICE HATCHER: Yes, all right. Okay, we'll move on.

PN1570

MS RAFTER: Ms Holmes, could you confirm who your supervisor is?---My direct supervisor or the facility supervisor?

PN1571

I'll start with the direct supervisor?---Peter Daspich(?).

PN1572

And what's Peter's position?---Hospitality team leader.

PN1573

Thank you for that. I note you work Friday to Tuesday. Is there generally a chef rostered in the kitchen on those days?---Yes.

PN1574

You referred to another supervisor. Were you referring to the facility manager on top of the team leader?---Yes.

PN1575

In your statement, you refer to a host of different documents that set out dietary requirements and this included a detailed book stored in each of the court's dining areas - I note there are four main courts and two smaller courts - a list of residents' dietary requirements that are attached to the trolley used to transport food to the dining room?---They're separate.

PN1576

Yes, I'm listing two separate, different documents for you?---Yes.

PN1577

There's also tray cards, another separate document?---Yes.

PN1578

And there is also a dietary profile stored at the nurses' station; yes?---The dietary profile book is kept within the servery.

PN1579

The servery, yes?---The dietary profiles are completed in the clinical office.

PN1580

Is it your understanding that these multiple sources to check dietary requirements is due to the layout of the facility?---I'm not sure I understand that question.

*** JULIE HOLMES

XXN MS RAFTER

PN1581

I will rephrase; I will ask it a different way. I note you refer to tray cards at 24 of your statement. I take it these are put on the trays when you're delivering the food?---Yes.

PN1582

Are these always used with every meal?---Yes.

PN1583

Are these pre-prepared by the clinical nurse, or who prepares these?---To my understanding, they're prepared when a resident enters the facility and they remain that way with those selections.

PN1584

So there is a set of tray cards for each resident?---Yes.

PN1585

You work Friday to Tuesday as a hospitality officer. I take it you would build up some familiarity with these dietary requirements and preferences?---Yes.

PN1586

You would not necessarily need to check every time?---I do because they can change regularly and some things can be implemented overnight.

PN1587

At 78 - and I'll let you go to 78 of your statement - you give a hypothetical scenario of information - I will withdraw that. You no longer attend a handover meeting with the PCW and RNs?---That's correct.

PN1588

At 78, you give a hypothetical scenario of information being communicated in that handover meeting that you might not receive?---Yes.

PN1589

The example you provide is notice that a resident is fasting due to a blood test?---Yes.

PN1590

Has that example happened?---Yes.

PN1591

Could you tell me what - I withdraw that. Was the resident provided food?---Yes.

PN1592

And the resident had the food?---Yes.

PN1593

I take it the blood test was rescheduled?---Yes.

*** JULIE HOLMES

XXN MS RAFTER

PN1594

Was that raised with - I withdraw that. Was that a personal experience for you?---Yes.

PN1595

Did you raise it with your supervisor, the team leader?---Not by me.

PN1596

Can you tell me how it was brought to your attention?---I was told that that particular person was scheduled for a fasting blood test and it now had to be rescheduled due to me providing him with food.

PN1597

Who conveyed that message to you?---It was a direct team leader in the court, which was my AIN at the time.

PN1598

That notice that a resident was meant to be fasting in preparation for a blood test, is that the type of information the clinical nurse should have communicated to the kitchen to write in the communications book - communications diary, I should say?---Not to the kitchen, but - yes, sorry.

PN1599

To the hospitality officers?---Yes, it would have been passed on to me had I had the time for handover.

PN1600

So I take it that was just a breakdown in the processes? The message should have been communicated to you, but it just wasn't?---No.

PN1601

'No' that that's not the process?---Sorry, yes, that was exactly what happened.

PN1602

So there is a process, they are meant to communicate it to the hospital officers - when I say 'them', the clinical nurse - with an update about a dietary requirement and it just did not occur on that occasion?---Due to time.

PN1603

At 66 of your statement, if I can take you there, you refer to a single - apologies, I'll wait. At 66, you refer to a single buddy shift and state that was the extent of the training you received when you started?---Yes.

PN1604

Did you receive any mandatory training such as online modules when you commenced?---We have constant online modules that we have to fulfil.

PN1605

By that, I understand you do online module training currently?---Yes.

*** JULIE HOLMES

XXN MS RAFTER

PN1606

Back when - - -?---But very minimal to the role that I'm in.

PN1607

Minimal as in it's not exclusive to hospitality and food services, it covers manual handling, fire safety, et cetera?---Yes, that's correct.

PN1608

Did you do any of this mandatory training when you commenced?---No.

PN1609

Do you recall when you started - do you happen to recall when you started doing online training?---Because I was in the community before, we had to do all our online training anyway. When I moved over to the facility, the training wasn't - didn't particularly pertain to my role; it was a broader scope.

PN1610

Does any of the training BlueCare provides cover dementia?---I believe so.

PN1611

Thank you for your evidence. No further questions, your Honour.

PN1612

JUSTICE HATCHER: Ms Holmes, have you received a 15 per cent wage increase in the course of this year?---I believe so.

PN1613

When did you receive that? Was that when the enterprise agreement came into effect?---I think so.

PN1614

Do you know if - - -?---I think there was a delay. Sorry.

PN1615

Tell me if you don't know, but do you know if all the employees at the facility where you work received the same increase or that some people got it and some people didn't?---I don't know that, no.

PN1616

All right. Thank you. Ms Harrison?

RE-EXAMINATION BY MS HARRISON

[12.22 PM]

PN1617

Ms Holmes, can I just take you to - just a quick correction. Can I just take you to paragraph 4 of your statement, just at the start. It says:

PN1618

My employment is covered by the Aged Care Award 2010.

*** JULIE HOLMES

RXN MS HARRISON

PN1619

Should that say that your employment is covered by the BlueCare and Support Employees Enterprise Agreement 2023 instead?---I may suspect so. I'm not sure.

PN1620

JUSTICE HATCHER: It's technically a correct statement, Ms Harrison, so - - -

PN1621

MS HARRISON: Your Honour, other than that, I don't have any further questions.

PN1622

JUSTICE HATCHER: All right. Thank you very much, Ms Holmes, you are excused and you're free to go, so you can disconnect from the courtroom?---Thank you.

<THE WITNESS WITHDREW

[12.23 PM]

PN1623

MS HARRISON: Your Honour, just in relation to your questions earlier in relation to the witness and whether or not she would have been covered by the minimum wage increase, I think the answer to that would be, no, she was covered by the award.

PN1624

JUSTICE HATCHER: I assume that what's happened is that that's been passed on when this agreement came into effect; is that right?

PN1625

MS HARRISON: Yes, that's correct, your Honour.

PN1626

JUSTICE HATCHER: You may or may not want to deal with this in due course, but I'm just interested to know whether or to know why she's been classified as a direct care worker by her employer and whether there was any distinction made by her employer having regard to the different rates of pay provided for in appendix 4, but any party can address that as they see fit or otherwise.

PN1627

Is that all the witnesses we need to deal with this morning?

PN1628

MS HARRISON: Yes, your Honour.

PN1629

JUSTICE HATCHER: Mr Gibian, with the expert witnesses this afternoon, when do you want to call them?

*** JULIE HOLMES

RXN MS HARRISON

PN1630

MR GIBIAN: They are here now, but we were suggesting to have an early lunch break, if that can be accommodated by the Bench, and maybe resuming at 1.30 or something in that range.

PN1631

JUSTICE HATCHER: 1.30? All right.

PN1632

MR GIBIAN: In terms of the timing this afternoon, there was two hours allocated for Professors Charlesworth and Meagher this afternoon. We are obviously keen for them to be dealt with and concluded in that time. I also have to leave personally at 4 o'clock because I have had another matter listed in the Federal Court at 4.15. We do have other people here as well.

PN1633

JUSTICE HATCHER: Well, you've got two very competent counsel assisting you, so that won't be a difficulty.

PN1634

MR GIBIAN: So that may not hold things up, but I thought I would just inform the Bench.

PN1635

JUSTICE HATCHER: All right. They will both be accommodated in the witness box. I'm not sure what that little table's for, but anyway.

PN1636

MR GIBIAN: I think that was my suggestion actually.

PN1637

JUSTICE HATCHER: Obviously, apart from their joint report, is there any other documents we need to have at hand to understand their evidence?

PN1638

MR GIBIAN: I don't believe so. There's a matter I was just going to raise that I just have to discuss with them. There is a document that we were, tentatively at least, proposing to provide in addition to the report, which is a New South Wales award from 2004 applying to the Department of Aged and Disability and Home Care. We can provide that now if that would be useful for the Commission to have. I am not suggesting you should read it over lunch.

PN1639

JUSTICE HATCHER: You just provide it to my associate after we adjourn and she will distribute it to the members of the Bench.

PN1640

MR GIBIAN: Yes.

PN1641

JUSTICE HATCHER: All right, if there's nothing further, we will adjourn and resume at 1.30.

LUNCHEON ADJOURNMENT

[12.26 PM]

RESUMED

[1.36 PM]

PN1642

JUSTICE HATCHER: Right, Mr Gibian.

PN1643

MR GIBIAN: Yes, I call Drs Charlesworth and Meagher, who are in the witness box.

PN1644

JUSTICE HATCHER: All right. We will administer the oath to them both.

PN1645

THE ASSOCIATE: Dr Meagher, can you please state your full name and address.

PN1646

PROF MEAGHER: Gabrielle Anne Meagher (address supplied).

<GABRIELLE ANNE MEAGHER, AFFIRMED

[1.37 PM]

PN1647

THE ASSOCIATE: Dr Charlesworth, can you please state your full name and address.

PN1648

PROF CHARLESWORTH: Sara Catherine Mary Charlesworth, (address supplied).

<SARA CATHERINE MARY CHARLESWORTH, AFFIRMED [1.37 PM]

PN1649

MR GIBIAN: Sorry to ask you to repeat it, but, Dr Charlesworth, can you repeat your full name for the record.

PN1650

PROF CHARLESWORTH: Sara Catherine Mary Charlesworth.

PN1651

MR GIBIAN: And you are presently a professor emerita at RMIT Victoria?

PN1652

PROF CHARLESWORTH: That's correct.

PN1653

MR GIBIAN: Dr Meagher, can I ask you to do the same thing.

PN1654

PROF MEAGHER: Gabrielle Anne Meagher.

PN1655

MR GIBIAN: You're a professor emerita at Macquarie University in Sydney?

PN1656

PROF MEAGHER: Yes.

PN1657

MR GIBIAN: Now, you have both prepared a - well, there is a supplementary statement by both of you annexing, in substance, the supplementary report. You have a copy of that with you, both of you?

PN1658

PROF MEAGHER: Yes.

PN1659

MR GIBIAN: Your Honour, there were just a couple of relatively minor typographical corrections. It's probably easier if I just identify them.

PN1660

JUSTICE HATCHER: Yes.

PN1661

MR GIBIAN: So this is in the substance of the report itself. It's document 42 commencing at page 471 of the digital court book. The report itself commences on the third page. The first is within paragraph 12, which is towards the bottom of page 4 of the report, commencing towards the end of the fifth last line. It's the sentence that reads:

PN1662

For example, the Decent Work Good Care project led by Professor Charlesworth found -

PN1663

in that line the word 'changing' as it appears before 'needs' should be deleted and the word 'fluctuate' should appear in the following line after the words 'individual service users'.

PN1664

JUSTICE HATCHER: So:

PN1665

The needs of a diverse range of individual services fluctuate on a day-to-day basis.

PN1666

MR GIBIAN: Yes.

PN1667

JUSTICE HATCHER: Yes.

PN1668

MR GIBIAN: The next is at paragraph 22 - sorry, that's very minor, but at the end of the second last line the acronym 'SCHADS' that has been used I think within this report has been used as 'S-C-H-C-D-S'. I think the final one is, within paragraph 33, there are a number of dot points on page 13. The larger dot point which occupies the middle part of page 13 right at the end of that indented paragraph, it says 'gaol' and it should say 'goal' right at the end of that sentence.

PN1669

I think those were the typographical corrections we wanted to make. Otherwise, does the report represent the opinion of both of you individually and collectively? Yes, I tender the supplementary statement, the annexed report and other documents.

PN1670

JUSTICE HATCHER: All right. The joint supplementary statement of Professor Sara Catherine Mary Charlesworth and Professor Gabrielle Anne Meagher, together with their joint report and annexures, will be marked exhibit 102.

**EXHIBIT #102 JOINT SUPPLEMENTARY STATEMENT OF
PROFS CHARLESWORTH AND MEAGHER PLUS JOINT
REPORT AND ANNEXURES**

PN1671

MR GIBIAN: There were then just a couple of matters I just wanted to ask the professors to comment upon really in answer to some general criticisms of the observations made perhaps about the classification descriptors that have been prepared. Those are at annexure A to the report, as you know, with the corrections made to them.

PN1672

For the benefit of the Bench - I'm not sure it's all sequentially page numbered, but the report itself runs to 25 pages and there are a number of numbered annexures after that. The first annexure is some material in relation to needs profiles of older persons receiving aged care services which runs to six pages and then immediately following that is annexure A. It's page 505 within the court book.

PN1673

The first matter was that I think you've seen in some of the submissions that were filed that there are some observations made about the degree of detail and asserted complexity of the wording in the classification descriptors both with respect to residential care and home care. I was wondering if there was any general observation you had about the approach that you were proposing in this respect in answer to that matter.

PN1674

MR WARD: I object to the question. These witnesses have been brought forward in response to specific questions and an expert report they've have the benefit of. He shouldn't be allowed to start to adduce further evidence at this stage.

PN1675

JUSTICE HATCHER: Well, it's evidence that deals with issues that you raised. Is this responsive - to what, Mr Gibian?

PN1676

MR GIBIAN: Yes, the written submissions that were filed coincidentally with our written submissions on this issue. Sorry, I've forgotten the date; I think it was 1 November.

PN1677

JUSTICE HATCHER: Mr Ward, I think as long as it's evidence that responds to criticisms made in submissions filed, it would be useful for us to hear it.

PN1678

MR WARD: If the Commission please.

PN1679

PROF CHARLESWORTH: I'm happy to respond to that.

PN1680

MR GIBIAN: May it please.

PN1681

PROF CHARLESWORTH: Firstly, the detail in the classification structure goes to addressing the major findings of the Commission in the first stage about the invisible skills that are used in aged care and the detail of the classification structure is fleshing out what those skills look like, the context in which they take place, the skills and judgment for example required.

PN1682

Secondly, I think in some of the written observations about our joint report it was put forward that it too complex. We would just like to note in terms of the modern award objective while the first part of it goes to the need to ensure a simple and easy to understand award, it has also go to be - we also need to consider - or the Commission needs to consider, rather, a stable and sustainable modern award system and we would suggest that our proposed classification structure is a way of providing that future proofing.

PN1683

MR GIBIAN: Just on that last matter, how does the structure that your assisted development and proposing assist in the future proofing - or endeavour to future proof the classification structure?

PN1684

PROF CHARLESWORTH: It really takes the work that has been currently carried out, both in home care and residential aged care, but also looks forward to the fact, for example, next year it's anticipated there will be a registration system in aged care that will require certificate III as a minimum qualification to work in aged care. It's looking at the work - Gabrielle might be able to respond to this - the increasing acuity of both clients and residents, and making sure that we have classification structures that are fit for purpose, particularly at the more senior end

in the non-professional classifications that are covered by the aged care and the SCHADS Award.

PN1685

PROF MEAGHER: Yes, in the appendix to the report is information about how the share of older people living in residential care is falling. A proportion of older people living in residential care is falling and a proportion receiving high level home care packages is increasing. Also, showing that the - basically that the case load is getting more complex in both fields and we need to have a classification structure that provides for workers that are going to be able to deliver that work that matches that case mix.

PN1686

MR GIBIAN: In that connection another matter that was raised in some of the submissions was whether it is necessary to incorporate - sorry, I withdraw that and I'll go back a step. You referred, Professor Charlesworth, in your earlier answer to the findings that the Commission made in the first stage of these proceedings, including the reference to invisible or spotlight skills in the Commission's decision in that respect.

PN1687

Another issue which has been raised in some of the submissions is whether it is necessary or appropriate to include reference to those or a description of those in the classification descriptors themselves. I just wanted to ask how in your proposal it assists in differentiating between the different classification levels to include reference to those type of skills and responsibilities.

PN1688

PROF CHARLESWORTH: I'm not sure, Mr Gibian, I entirely understand the question. You might - - -

PN1689

PROF MEAGHER: I think I might.

PN1690

PROF CHARLESWORTH: Okay.

PN1691

PROF MEAGHER: So at the different levels - we say things like that at level 2 you need basic relationship-building skills and sound communication skills, but as we move up the classification structure they need to be good or advanced, so we're trying to both include and make explicit these otherwise invisible skills and show that they can be built over time, and that as you are doing more complex work those skills need to be of a higher order.

PN1692

MR GIBIAN: I understand. Another issue which is raised, and I think this really arose from - most clearly at least in my mind - observations that Mr Ward made yesterday. Part of the description of the work at various levels both within the personal care work in residential care and home care work is a reference to the

nature of or degree of the care needs of residents or clients to whom that care is being provided.

PN1693

An example of that is on page 2 within level 2 of the 'Personal care and general streams'. The first heading under that descriptor refers to the 'Description of work' and you'll see under 'Personal care work' that the description of 'work' which is included is to provide -

PN1694

person-centred incentive care to a diverse range of frail dependent older adults in a residential aged care facility who require basic personal care, social support and who are able to communicate -

PN1695

et cetera. I just wanted to ask if you could explain the rationale for including a description of the work which incorporated reference to the care needs or acuity condition of residents and clients.

PN1696

PROF CHARLESWORTH: Well, in our report - in the front part of the report - we talk about the environment in which aged care is performed. It's a very distinctive regulatory environment. Person-centred care is at the heart of our current regulation and obligations of both providers and indeed workers, including for example the Charter of Human Rights, et cetera, the Code of Conduct for Aged Care and it's once again really making explicit what this work is.

PN1697

It's referring the whole aged care system in both home care and residential age care is premised on an assessment of the needs of the individual. So residential age care facilities, assessment is made and those facilities will receive funding based on the particular profile of individual residents. Exactly the same happens in home care in terms of the allocation of packages. So, yes, I think that - I don't know if you want to add anything else.

PN1698

PROF MEAGHER: I think the question is also getting at - at level 2 it says:

PN1699

Basic personal care to people who are able to make decisions -

PN1700

and then as we go up the levels we get to people who may have profound cognitive impairments and be unable to make decisions, and the level of skill that's required to - it requires different levels of skill to deal with residents and clients who have different levels of need. The greater the need, the more skill is required.

PN1701

JUSTICE HATCHER: Can I just raise something? So obviously in designing a classification structure one of the issues which we will be concerned about is the

ease of compliance and not creating something which will be conducive of disputes.

PN1702

PROF CHARLESWORTH: Yes.

PN1703

JUSTICE HATCHER: It might be said in respect of the classification that has just been brought to our attention that in order to determine which classification applies to you, you need to have knowledge of the characteristics of the adults for whom care is being provided. Speaking for myself, I have just have got a concern that it may, for example, lead to disputes about whether the adults being cared for can properly be characterised as frail and dependent as distinct from something else, and that involves in turn various value judgments to be made. Do you see the issue in that respect?

PN1704

PROF CHARLESWORTH: Yes, but the value judgments are made in terms of assessing that person's need; so for a home care client their cognitive function will be assessed, their mobility, their capacity to undertake the activities of daily living will all be assessed. In home care in one way it's easier because you're just working with one client, for example, who has been assessed with profound cognitive decline and may have mobility issues.

PN1705

In a residential care setting you need a skills profile that will allow you to be able to work and provide care and support for those individuals, but not everybody in that facility will require that level of skill, so it's making sure that you have that staffing profile across the classification structure that's there to be able to deal with issues as they arise.

PN1706

Although, I would say if you're thinking about a dementia unit - and most residential facilities have a dementia unit - a higher level of skill is required because of the profound cognitive impairment that by the time you get put into a closed dementia unit you're experiencing.

PN1707

JUSTICE HATCHER: Yes, well, I suppose a dementia unit is pretty easily identifiable.

PN1708

PROF CHARLESWORTH: Yes.

PN1709

JUSTICE HATCHER: But I'm just wondering short of that if this matter ever came as a dispute before this Commission or before a court, they would need to make a value judgment about the persons being cared for at the time of the relevant pay period in order to determine what the person's pay entitlement was.

PN1710

PROF MEAGHER: They would have - if you're asking about, you know, 'I'm working with Mrs Smith and she's not very well', well, if Mrs Smith has been awarded a home care package, for example, the guidelines for assessing people's eligibility for a home care package say if you're at level 4, the highest level, you -

PN1711

may be extremely vulnerable, have severe cognitive decline and/or behavioural and/or psychosocial management issues requiring frequent intervention; may need comprehensive assistance with social and community participation, maintaining caring relationships and activities of daily living and/or need specialised management of their personal and physical health.

PN1712

So you could say, well, which classification under the - what level package do they get? In residential care they have a new system - I can't remember what the -
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PN1713

PROF CHARLESWORTH: ANACC - - -

PN1714

PROF MEAGHER: Double C. I can't remember what it specifically refers to, but it has got 13 categories about mobility, cognition, health issues and so on. You could ask about those, what category the person - in a sense it's kind of clear because the people are allocated to these categories for the purposes of funding.

PN1715

VICE PRESIDENT ASBURY: But if you take, for example - and correct me if I haven't understood this properly - the level 3 in your proposed classification structure, it seems to me that level 3 - the overarching provisions at the beginning seem to be saying that the people who are being cared for may have physical disabilities and mild cognitive impairment, but have the capacity to make decisions about their care. Then you go to level 4 and it seems that it's saying who may not have the capacity to make the decision.

PN1716

That to me seems a distinction between level 3 and level 4, but then in some of the areas that describe the skills that people are exercising - because I understand you're trying not to be task based, you're trying to look at skills. Well, for example, in the communication area in your point 5 on page 510 of the court book, page 6 of the document, it talks about at your point 5 - which used to be point 6 with the changes, but it says:

PN1717

Sound communication and interpersonal skills in dealing respectfully with a range of residents including those who may not be able to make the decisions.

PN1718

I understand how difficult it is to capture things, but is the differentiation that you're dealing with people who may not be able to make decisions and then who cannot make decisions as you go higher up the structure, and at a certain level

people can make decisions and we need to get the differentiation right because it seems the overarching thing is saying 'can make decisions' and then some of the criteria are saying 'may not be able to'.

PN1719

PROF CHARLESWORTH: Your Honour, I can see the point that you're making and the reality is in aged care facilities you have a range - put aside the dementia unit - of people. The point of the structure is to make sure you have a staffing complement so that you have people who are able to deal with - or work with the people who have the highest needs. It doesn't mean they will be doing that all the time, but when they're called on to do that.

PN1720

You sometimes find in the case of dementia, outside a dementia unit workers will need to have the skill to be able to de-escalate a situation. They need to be observing the behaviour of residents, moving very quickly to de-escalate, and having that skill that might not be exercised every single day but having someone there who knows how to do that is really important.

PN1721

For example, in Scandinavia where I have spent some time in nursing homes there where you have a far greater proportion of registered nurses and our equivalent of enrolled nurses, there is much greater teamwork, so everyone works in together but there is always somebody there with the skills to deal with the people with the highest level of acuity.

PN1722

VICE PRESIDENT ASBURY: So your view is that those issues can be addressed by the mix of staff that are working at a particular time?

PN1723

PROF CHARLESWORTH: Yes.

PN1724

VICE PRESIDENT ASBURY: And again from my perspective only it seems that there are a number of facilities where the difference in levels is quite - it's not a huge amount of money difference, but it's the tasks that people do and they're very specific about, 'You'll be doing this role for these days, that role for those days', they're different roles.

PN1725

I'm just wondering if the current practice is mixing staff really carefully to have the minimum number of people doing a particular thing, whether this is going to be a massive change to have enough people who have got the capacity, because in - sorry, I'm going around in circles, but other than in a dementia ward you could have people who - in a group of residents being cared for, some who have some capacity, some who have less, some who may have none about some things.

PN1726

So, how do you mix the staff to make sure that it's fair for employers who are paying the rate so they don't have to pay the higher rate all the time perhaps and you also recognise the skills of the people who are required to do the work?

PN1727

PROF MEAGHER: I guess maybe there are a couple of things that you could say there. One is that about half the people in residential care have got dementia, so it's kind of a - and many have mobility issues and, you know, complicated health issues and so on and so on, and they're probably only going to get sicker over time because they're staying at home. So it's kind of - you need a highly skilled staff ultimately and that kind of has to be faced up to.

PN1728

People are also deteriorating over time on the whole. Now, a third of the people in residential care die there so new people are coming in because they've had a crisis and now they - so I guess I think - and having excess - what might be perceived as excess skill capacity, I'm not sure it's a helpful way to think about the staffing in a system like this, if you know what I mean. We've only got - we've got 10 things that need to be welded in a particular way a day. If one person can do 10 a day where only one person can do that, it's sort of not like that.

PN1729

VICE PRESIDENT ASBURY: Realistically if employers can pick - they have to work out how many levels - so take that level 3/level 4 barrier.

PN1730

PROF MEAGHER: Yes.

PN1731

VICE PRESIDENT ASBURY: 'How many level 3s do we need, how many level 4s do we need?' because realistically they're probably going to make that decision given that's how they have traditionally operated for the moment. You know, they're just my observations.

PN1732

PROF MEAGHER: Yes.

PN1733

VICE PRESIDENT ASBURY: A distinction between them is sometimes quite fine and difficult to say, 'Well, on that day were you actually working at a level 4 rate because of the people you were caring for on that day?'

PN1734

PROF CHARLESWORTH: Your Honour, if I could just perhaps make a clarifying point. The proposal is not that people would be paid at level 4 just for the time or the day that they're working at level 4, because if you're a level 4 you're a level 4. It's a bit like being a registered nurse.

PN1735

VICE PRESIDENT ASBURY: Yes.

PN1736

PROF CHARLESWORTH: Some registered nurses change adult nappies.

PN1737

JUSTICE HATCHER: Yes.

PN1738

PROF CHARLESWORTH: You know, that's the reality. It's not a specific nursing duty, but they do it because they work in a team environment. The point is that you will have a staffing profile that will enable you to provide a range of care and if you have a look at what currently happens in residential care from my observation in Australia, it's that really in a de facto way work organisation is such that the more experienced workers who are paid at exactly the same rate as the less experienced workers are asked to take charge.

PN1739

You might bring in a less experienced worker and have her - in the morning you're getting people up, you know, dressed, showered, et cetera. You might have that person coming through and taking the laundry through to the laundry room. That's the way the work is organised. Now, what this proposal is to actually recognise - - -

PN1740

VICE PRESIDENT ASBURY: You're recognising it, yes.

PN1741

PROF CHARLESWORTH: Yes.

PN1742

VICE PRESIDENT ASBURY: I understand.

PN1743

PROF CHARLESWORTH: You're recognising the skill.

PN1744

VICE PRESIDENT ASBURY: So your argument would be they're not all the same now.

PN1745

PROF CHARLESWORTH: No.

PN1746

VICE PRESIDENT ASBURY: And you're simply recognising what happens in practice.

PN1747

PROF CHARLESWORTH: Yes.

PN1748

VICE PRESIDENT ASBURY: Yes, I understand. Thanks.

PN1749

JUSTICE HATCHER: Mr Gibian.

PN1750

MR GIBIAN: I think that clarified a couple of things that I was going to ask, anyway. I just wanted to make clear that I have correctly understood. When I think both of you made reference to assessments already being made, that was a reference to assessments of need that are required to be made for funding purposes?

PN1751

PROF CHARLESWORTH: Yes.

PN1752

MR GIBIAN: And also for the provision of care purposes, is that - - -

PN1753

PROF CHARLESWORTH: Yes.

PN1754

MR GIBIAN: Yes. That is, it's something that already happens along the lines that you intended in the classification descriptors.

PN1755

PROF CHARLESWORTH: Yes.

PN1756

MR GIBIAN: I understand. The second issue I just wanted to - I think it was answered by the question that the Vice President just asked actually, which is how you understand that the work - in terms of home care I think, Professor Meagher, you said it's sort of more straightforward in the sense that you have a particular client and a particular worker is allocated to provide the care to that worker at least on an occasional or on an ongoing basis, but in residential care it depends upon the mix.

PN1757

I did just want to ask to the extent there's anything more to add to it, the extent to which that is something that already is done in a practical sense in the allocation of work or within a centre between experienced and - persons who are recognised as being experienced and skilled.

PN1758

PROF CHARLESWORTH: Yes, it is, and so when somebody has gone and got their medication competency, that person - you know, when others are bringing people to the table in the dining room, that person will be behind the trolley coming around giving people their medications. So that's already happening, but the worker who is doing that is not currently paid - she is being paid at the same rate as the other workers.

PN1759

MR GIBIAN: Yes. Following on from that - and tell me if I've misunderstood. I don't think this is in terms of expert evidence - the intention is also to recognise

that the same task, be it showering, toileting or feeding, can have different skills attached to it depending upon the needs of the resident or client that are being dealt with.

PN1760

PROF CHARLESWORTH: Different skills and levels of responsibility. For example, in the 2014 New South Wales Home Care Award those distinctions are also made, so that they're made between the - they distinguish between the impact on the worker, say, for example, of certain behaviours. Some people's dementia can be very aggressive, for example, but they also distinguish between the nature of the work and they make in that particular award a big feature of bodily intrusion.

PN1761

If you're doing any work that requires bodily intrusion - it might be changing catheters, for example - then you need to be in that award, which is now no longer - you needed to be classified at level 3 rather than level 2, for example.

PN1762

MR GIBIAN: That was the last thing I was just going to clarify. I think we have provided to the Bench a copy of the 2014 New South Wales award known as the Care Workers Employees - Department of Family and Community Services - Ageing Disability and Home Care (State) Award 2014. I think it's sufficient if I lead, but this is an example of that kind of approach being applied in another award. Do you have a copy of that with you?

PN1763

PROF CHARLESWORTH: No.

PN1764

MR GIBIAN: If you don't, I can provide a copy.

PN1765

PROF CHARLESWORTH: I didn't bring my copy of that one - no, I did, I did.

PN1766

MR GIBIAN: You do?

PN1767

PROF CHARLESWORTH: I've got it here.

PN1768

MR GIBIAN: Yes.

PN1769

MR WARD: How does this go to responding to our submissions?

PN1770

MR GIBIAN: Mr Ward opened - - -

PN1771

JUSTICE HATCHER: I think reconstruction of the logic is that there has been some criticism of the notion of having a classification structure where classifications are referable to the - I could just say the status of the persons being cared for and Mr Gibian is raising this as an example of where that approach was taken in a previous state award.

PN1772

MR WARD: That's a long bow, your Honour.

PN1773

JUSTICE HATCHER: Is that how this gets - - -

PN1774

MR GIBIAN: Indeed. Mr Ward opened yesterday on the basis that there was some fundamental difficulty with endeavouring to differentiate classifications on the basis of skills and responsibilities required to perform the same task in providing care for a resident or client depending upon the needs of that resident or client. This is merely an example of an instance where I think in the home care context in this sense New South Wales, before the - I won't say privatisation - outsourcing of that function in the state where there were differentiations on that basis.

PN1775

I think you see that, firstly, on page 14 in clause 15. There is the grades of care worker, grades 1, 2, 3 are identified, including by reference to the duties - whether the duties fall within grade 1. Sorry, Prof Charlesworth, tell me if I'm pointing to the wrong part. Then commencing at the bottom of page 59, I think, there is an annexure F, 'Guidelines for grading care work'.

PN1776

VICE PRESIDENT ASBURY: So the point that this document makes is that the approach is looking at how these kinds of factors impact differently depending on the level of care that the particular patient or resident requires. So a patient with dementia is more difficult to do those intimate cares, for example, than a patient who is not cognitively impaired but is physically impaired so you don't need to negotiate with them. You just need to move them and - yes, so the point is that you're looking at how the abilities or disabilities of the people being cared for impact on the people providing the care so that the skill level is actually different.

PN1777

PROF CHARLESWORTH: Yes.

PN1778

VICE PRESIDENT ASBURY: Yes, I understand. Thank you.

PN1779

JUSTICE HATCHER: So am I right in understanding this award only had two personal care grades?

PN1780

PROF CHARLESWORTH: It had three, your Honour.

PN1781

JUSTICE HATCHER: There is a grade 1 which is - I think it's domestic assistance.

PN1782

PROF CHARLESWORTH: Yes.

PN1783

JUSTICE HATCHER: Which is not actually a personal care classification.

PN1784

PROF CHARLESWORTH: No, it's a home care classification though. So it's the same distinction as in the SCHADS Award where level 1 is domestic work and level 2 is personal care.

PN1785

JUSTICE HATCHER: Right. Thank you. Do you want to tender this, Mr Gibian?

PN1786

MR GIBIAN: Yes. I was just going to identify from page 62 there is perhaps in a way which allows you to understand the distinctions which are endeavouring to be drawn by reference to discrete tasks; a differentiation based on the nature of the assistance that's required, the care by reference to particular tasks. Am I understanding that correctly, Professor Charlesworth?

PN1787

PROF CHARLESWORTH: Yes, as I understand.

PN1788

MR GIBIAN: I tender that.

PN1789

JUSTICE HATCHER: All right. The Care Workers Employees - Department of Family and Community Services - Ageing Disability and Home Care (State) Award 2014 will be marked exhibit HSU103.

**EXHIBIT #HSU103 CARE WORKERS EMPLOYEES -
DEPARTMENT OF FAMILY AND COMMUNITY SERVICES -
AGEING DISABILITY AND HOME CARE (STATE) AWARD 2014**

PN1790

MR GIBIAN: I think Mr Ward intends to now ask some questions.

PN1791

MR WARD: Professors, it's nice to see you again. I think you will recall me from the first part of the case. I don't know, I think we met on Zoom, but my name is Nigel Ward and I appear for the employer interests. Is it sufficient to say 'doctor' - is that acceptable? Right, I'll stick to that. Just to be fair to you, I want to ask you some general questions about the statement and then I want to talk a little bit about the architecture of the structure, and then I want to talk about some specific language that is in the structure.

PN1792

In the interests of time - as I'm told everybody wants to get back to Melbourne tonight - I'll try and keep myself limited to the residential structure, but I will ask a few questions about home care. Would you accept as a proposition - I don't know if you know this - that there are 121 modern awards made by the Fair Work Commission?

PN1793

PROF CHARLESWORTH: Yes.

PN1794

MR WARD: Yes. Have either of you written classification structures before for any of those 121 modern awards?

PN1795

JUSTICE HATCHER: By definition they don't; we do that.

PN1796

MR WARD: Sorry?

PN1797

JUSTICE HATCHER: By definition they don't, because they're not members of the Fair Work Commission.

PN1798

MR WARD: Have any of you contributed to the drafting of classification structures in any of those modern awards?

PN1799

PROF CHARLESWORTH: Not in the modern awards, but I did contribute to the classification of home care workers in the Local Government Award that were employed by Victorian local government.

PN1800

MR WARD: So it's a Victorian local government award?

PN1801

PROF CHARLESWORTH: Award, yes. That's pre-modern award.

PN1802

MR WARD: Do you know the name of it?

PN1803

PROF CHARLESWORTH: It was the Victorian Local Government Award and basically the one level home care classification was unpacked to two levels, and it was approximately 1986.

PN1804

MR WARD: Thank you.

PN1805

PROF CHARLESWORTH: So many years ago.

PN1806

MR WARD: Many years ago. Dr Meagher?

PN1807

PROF MEAGHER: Not a modern award, no.

PN1808

MR WARD: No. To be fair to you, have any of you contributed to the drafting of enterprise agreements?

PN1809

PROF CHARLESWORTH: No.

PN1810

MR WARD: Is that a no - - -

PN1811

PROF MEAGHER: No.

PN1812

MR WARD: No. Can I take you to paragraph 21 of your report. This is really by way of clarification at this stage. You say in 21 - you refer to the Background Paper 10:

PN1813

The FWC summarised the parties' views on principles underpinning classification structures at [72]-[95]. There is general agreement among the parties that the new classification structures: should be career-based; clearly state the skills, qualifications and experience required at each level; and provide a clear means to transition from one level to another.

PN1814

In quoting that do I take it that you accept that as a proposition?

PN1815

PROF MEAGHER: Yes.

PN1816

MR WARD: Yes.

PN1817

PROF CHARLESWORTH: Yes.

PN1818

MR WARD: Thank you. If I can take you then to paragraph 27. You say this at paragraph 27:

PN1819

Ideally, classification structures and descriptors should have sufficient detail and precision to ensure employers locate and pay employees at the correct classification level for the work to be performed.

PN1820

I am assuming - am I right - that that's stated because of the consequence of the employer getting it wrong in terms of penalties and fines?

PN1821

PROF MEAGHER: It's also a work value issue to do with recognising that a classification structure should recognise the skills and - work that people do and the skills that are required.

PN1822

MR WARD: So it's not just the proposition that the employer needs to - the structure needs to be sufficiently detailed and precise so the employer gets it right?

PN1823

PROF MEAGHER: Yes, also that.

PN1824

MR WARD: Also that?

PN1825

PROF CHARLESWORTH: Yes.

PN1826

PROF MEAGHER: Yes.

PN1827

PROF CHARLESWORTH: Of course. If I could just add in my observation particularly in regional areas - in home care, for example - there is often employer practice of paying workers who perform personal care at level 1 under Schedule E of the SCHADS Award, so yes, it is important and they're able to do that because it's sufficiently vague.

PN1828

MR WARD: So that observation goes to your views about language and work value, but it also goes to views about ensuring that the employer can get it right.

PN1829

PROF CHARLESWORTH: Yes.

PN1830

MR WARD: Yes, yes. You would agree with me, wouldn't you, that in getting it right for the employer, simple and clear language is to be preferred?

PN1831

PROF CHARLESWORTH: Yes.

PN1832

MR WARD: Yes. Would you also agree with me that where possible - I've lost my sticky note. It will come back in a minute - if there are criteria in the classification descriptors, that objective criteria to be preferred over subjective criteria?

PN1833

PROF CHARLESWORTH: It depends what you mean by subjective. If you are referring to the assessment of the needs of residents or clients, I'm not sure you could describe that as subjective. That's an assessment that is undertaken by professional assessors and that's why it's very important to have that in the award because it goes to the nature and demands, the skills, of the work that's performed.

PN1834

MR WARD: I'm going to come to that in detail later, but I think his Honour the President indicated earlier some concerns about the more value judgments the employer has to make, the more difficult it might be. Would you accept that as a proposition or you don't?

PN1835

PROF CHARLESWORTH: I would accept that as a proposition to the extent to which there is discretion outside the assessments that have been made of the need of the individual resident or client.

PN1836

MR WARD: So if there is a clinical assessment that a doctor has made about somebody, you're saying that is objective. If there is - - -

PN1837

PROF CHARLESWORTH: Yes. It's not a doctor who does the assessment in aged care, it's a Commonwealth assessment team and that tends to be contracted out. It tends to be registered nurses who do that assessment. I think that they would bridle at the insinuation that was merely a subjective evaluation. They're looking at criteria and making an assessment on that basis.

PN1838

PROF MEAGHER: But it's also holistic in taking into account a variety of psychosocial factors and things like that. These are not - they are - yes.

PN1839

MR WARD: So you're not concerned that reasonable minds might differ about those sorts of things?

PN1840

PROF CHARLESWORTH: About the assessment of somebody's needs?

PN1841

MR WARD: Yes.

PN1842

PROF CHARLESWORTH: Yes. You know, every now and again somebody who has been assessed for a package level 2 will say, 'Well, no, I should be a level 3', and a further assessment will be arranged. So, yes, to that extent since an individual assessor is making the assessment one can ask for a reassessment.

PN1843

MR WARD: I'm really endeavouring not to bridle. I (Indistinct) later, so bear with me.

PN1844

JUSTICE HATCHER: Sorry, was that answer concerned with the category of home care package?

PN1845

PROF CHARLESWORTH: Yes.

PN1846

JUSTICE HATCHER: Yes.

PN1847

PROF CHARLESWORTH: Yes.

PN1848

JUSTICE HATCHER: I'm just trying to look at this from a practical point of view. If we have an employee who a year after this happens come to this Commission or to a court and says, 'Look, I wasn't paid the right classification', but they couldn't simply describe their work and hope to receive an accurate answer because you would need to have access to who their patients were at the time.

PN1849

In the case of home care, what home care package they had or in the case of residential care you would have to again remember or work out who they were caring for at the time and what assessment was made by the relevant assessor as to their clinical needs. That is, it becomes something that might be beyond the capacity of an employee to prove their case, you know, after the passage of time.

PN1850

PROF MEAGHER: Would they say, 'I saw a client three times a week who had significant dementia. I needed to coax him to the shower. When I got there breakfast was on the floor.' You know, I mean, this is - I'm just sort of in a sense -
- -

PN1851

VICE PRESIDENT ASBURY: For home care maybe, but - - -

PN1852

PROF MEAGHER: Fleshing out the - thinking about how it might be done.

PN1853

VICE PRESIDENT ASBURY: Yes, it's the residential context though, not the home care.

PN1854

PROF MEAGHER: Yes.

PN1855

VICE PRESIDENT ASBURY: I think the home care would arguably be - - -

PN1856

PROF MEAGHER: Easier.

PN1857

VICE PRESIDENT ASBURY: Well, there would be greater clarity I guess, but it's the residential context where people are all mixed perhaps in - - -

PN1858

PROF CHARLESWORTH: Okay.

PN1859

PROF MEAGHER: Yes.

PN1860

JUSTICE HATCHER: So for grade 2 where you talk about, I think, mild cognitive impairments - - -

PN1861

PROF CHARLESWORTH: Yes.

PN1862

JUSTICE HATCHER: - - - so they said, 'Well, I remember I worked with somebody who' - you know, didn't remember their name or didn't remember this and that. That's the extent of it - - -

PN1863

PROF CHARLESWORTH: Sure.

PN1864

JUSTICE HATCHER: - - - and that becomes very hard to assess then without identifying who the patients were at the time who might have passed away and what their assessment was.

PN1865

PROF CHARLESWORTH: Yes.

PN1866

JUSTICE HATCHER: How someone was meant to have been classified.

PN1867

PROF CHARLESWORTH: Your Honour, in terms of the classifications in the Residential Aged Care Award, if you take a sort of benchmark classification certificate qualified 3 person then the next level above them, the proposed next level, is the senior care worker and they will have additional responsibilities of training and mentoring other workers. They may also have a medication competency.

PN1868

So, yes, they would then be able to come along and say, 'Look, I should have been paid at level 5' - I find it hard to go through the different levels of the two awards - 'because that's the work that I was asked to perform. I was asked to induct new

workers, I was asked to show them how to do PEG feeding, et cetera.' They would have a case.

PN1869

Likewise, somebody who should have been classified at level 6 would have said, 'I am the person in this facility - I'm the personal care worker. When there is an end of life situation I am called in to manage that, to deal with the family', et cetera, et cetera, and they would have a case that they should have been classified at level 6.

PN1870

JUSTICE HATCHER: Yes, so you're giving examples of somewhere where an employee can simply describe what they did - - -

PN1871

PROF CHARLESWORTH: Yes.

PN1872

JUSTICE HATCHER: - - - and on the basis of that description they can - - -

PN1873

PROF CHARLESWORTH: Yes.

PN1874

JUSTICE HATCHER: We can work out what classification they should have been in.

PN1875

PROF CHARLESWORTH: Yes, because the two levels under certificate III, the first is only for three months, with less than three months. The second is for six months or more. Given that we're soon moving to a mandatory registration system where the entry level, if you like -there will be time obviously to get to that - will be certificate III, then that will end up probably being the basic level in the system.

PN1876

With rising acuity, as Gabrielle has documented in appendix 1, we'll start to see that staffing profile move from maybe 50 per cent at certificate III and, you know, the rest at V and IV. That will start to move up so that you'll have fewer people at the cert III qualified level.

PN1877

JUSTICE HATCHER: Thank you.

PN1878

MR WARD: You would agree with me that it is useful in a classification structure to describe the work activities performed?

PN1879

PROF CHARLESWORTH: Yes. Describe the work performed, yes.

PN1880

MR WARD: Yes, and both the qualification and experience required at the various levels?

PN1881

PROF CHARLESWORTH: Yes.

PN1882

MR WARD: I am going to ask you some questions about C10. I don't want these to sound offensive and so I will apologise up-front. I say your academic work is prolific. I have read some of it, but I have not read all of it, but it's my understanding that none of your academic work involves an examination or exploration of the C10 Metals Framework. Is that a reasonable statement?

PN1883

PROF CHARLESWORTH: I think very early in my career when I did a pay equity exercise looking at home care workers in local government, that was around about the time when the Metals Framework was being developed and I can't recall if it in fact there is a reference in the report that was then done for the Department of Industrial Relations on that. No, but I've been aware over the years of the importance of the C10 - - -

PN1884

MR WARD: Yes.

PN1885

PROF CHARLESWORTH: - - - classification as a benchmark classification, yes.

PN1886

MR WARD: As I said, I'm trying to tread carefully with it.

PN1887

PROF CHARLESWORTH: Yes.

PN1888

MR WARD: So you say in your report at paragraph - I think it's 36, you refer to the Metals Framework case in Re Metal Industry Award 1984. Again I'm assuming that both of you read that case to inform yourself about C10. Would that be a reasonable assumption?

PN1889

PROF CHARLESWORTH: I read the - we're looking at paragraph 37?

PN1890

PROF MEAGHER: Yes, correct.

PN1891

MR WARD: Just bear with me.

PN1892

PROF CHARLESWORTH: Yes.

PN1893

MR WARD: I'll make sure I get it right. Sorry, my apologies. At 37, yes.

PN1894

PROF CHARLESWORTH: Yes. This report - I have looked at that earlier, but for this report we were summarising the conditions, outlining of the history of the developing Metals Framework. I also looked at the discussion in the 2023 annual wage review of that C10 framework and the way in which it had been used.

PN1895

MR WARD: Dr Meagher, did you do the same?

PN1896

PROF MEAGHER: No, I didn't do the same.

PN1897

MR WARD: Okay. So again I'm trying to - I don't want to make this offensive. In terms of your understanding of the C10 framework, Dr Charlesworth, you did some work some time ago potentially in Victoria in the early days and you had reviewed the Commission's discussion on the C10 framework and the annual wage review. I think you have just indicated - - -

PN1898

PROF CHARLESWORTH: Yes.

PN1899

MR WARD: Is that how you informed yourself to comment on the C10 framework for this report?

PN1900

PROF CHARLESWORTH: I also made a time to have a discussion with Ian Curry, who is the national training and skills coordinator for the Australian - I forget their full title, but the AMWU.

PN1901

MR WARD: The Metal Workers Union.

PN1902

PROF CHARLESWORTH: The Metal Workers Union, yes.

PN1903

MR WARD: Okay. What did Mr Curry provide you?

PN1904

PROF CHARLESWORTH: I spoke with him about the history of it. I have always been interested in this framework because it has been a seminal one in industrial relations, but it is also because my work has been mainly concerned with female patients. It has been a pretty gender-blind one and one that works - if you're a metal worker, one that doesn't work if you're in care or support.

PN1905

MR WARD: So again if I can just say you've had the benefit of talking to Mr Curry about the history.

PN1906

PROF CHARLESWORTH: The history and - - -

PN1907

MR WARD: You have read the annual wage review - - -

PN1908

PROF CHARLESWORTH: Yes.

PN1909

MR WARD: - - - 2023. You might have done earlier work in Victoria.

PN1910

PROF CHARLESWORTH: Victoria.

PN1911

MR WARD: That is the basis of how you were informed to respond to C10 here.

PN1912

PROF CHARLESWORTH: And many hours of studying their classification framework that sits in the Manufacturing Award; looking at it very carefully.

PN1913

MR WARD: By studying it, you mean reading it and considering it?

PN1914

PROF CHARLESWORTH: Reading it and considering it. Not just the table that sets out C14 through to C1, but also the further descriptors and having a look at - I mean, it's not a precise science when you're comparing such different works, but looking at those classifications as possible anchor points. I suppose what really distinguishes the metal structure is all the work - and this goes back to Laurie Carmichael - that went into unpacking from an entrance labourer level right through to a professional level, establishing a career structure with appropriate relativities between levels, so that's why it was of interest.

PN1915

MR WARD: Can I just ask this then: I think what you've told me is - putting aside perhaps some work you did in Victoria - neither of your academic work relates to C10?

PN1916

PROF CHARLESWORTH: No.

PN1917

MR WARD: No.

PN1918

PROF CHARLESWORTH: No.

PN1919

MR WARD: No.

PN1920

VICE PRESIDENT ASBURY: Well, can I just ask when you were looking at those classifications and the definitions in the award, did you also look at the training packages or modules that underpinned them when it talked about points and - - -

PN1921

PROF CHARLESWORTH: I had a discussion with Mr Curry about those and it would seem that they're fairly flexible in interpretation.

PN1922

VICE PRESIDENT ASBURY: Sorry, Mr Ward.

PN1923

MR WARD: No, that's fine, your Honour. It was my next question, so it's okay.

PN1924

JUSTICE HATCHER: There is built into the C10 structure, for example, an assumption based on the way the AQF works that a certificate III is sort of equivalent in any occupation and any industry. What do you think of that proposition? That is, merely because someone has acquired a certificate III of any type in any occupation in any industry, then prima facie they should be paid the same minimum rate for the same work value.

PN1925

PROF CHARLESWORTH: I think using the C10 classification as an anchor point is useful, not the rates. We weren't interested when we were doing this work in the particular rates. That clearly came a cropper in the ECEC case. We really wanted to just provide ways in which you could unpack, decompress, what are - which I think everybody agrees, including the Bench - very compressed classification structures. So a way of decompressing was to have a look at some historical work that has been done in terms of creating a career structure.

PN1926

MR WARD: I will just ask a question arising from what his Honour the President said. I'm just interested in your view on this. Do you see a certificate III that involves a four-year apprenticeship being equivalent to a course that might be performed in, say, 16 weeks with 128 hours of practical experience? Do you see them as equivalent?

PN1927

PROF CHARLESWORTH: In terms of aged care, what you're matching is just a qualification against what is - over qualification and experience in a particular industry such as aged care. So it's a rough equivalence, but it is a useful anchor point.

PN1928

MR WARD: So four years of TAFE and four years of working on the job in one industry like metals you think could be equivalent to doing a year's TAFE and 128 hours of experience in aged care?

PN1929

PROF CHARLESWORTH: Mr Ward, I don't think that aged care and metal work are comparable in any way, shape or form.

PN1930

MR WARD: In any way, shape or form?

PN1931

PROF CHARLESWORTH: No.

PN1932

MR WARD: We can't compare qualifications either?

PN1933

PROF CHARLESWORTH: Well, they are useful anchor points, but - - -

PN1934

JUSTICE HATCHER: Professor Charlesworth, I think the whole point of the C10 system as it was established is that the pay rates were the equivalence. It's not just the fact that you had classifications with, say, a certificate III, but they were anchored at the same pay rate across all industries and sectors with some exceptions. It's really that that I'm sort of asking you to comment upon.

PN1935

That is, does the original concept that, for example, a certificate III is a prima facie indicator of a particular rate of pay which should apply equally all industries and occupations, do you regard that as valid or not?

PN1936

PROF MEAGHER: Would that apply for a degree, as well, in the AQF?

PN1937

JUSTICE HATCHER: Well, it won't be a degree, but let's say a certificate III because that's the C10 qualification.

PN1938

PROF CHARLESWORTH: Just to clarify, your Honour, do you mean in terms of pay rates or in terms of relativities?

PN1939

JUSTICE HATCHER: Well, pay rates.

PN1940

PROF CHARLESWORTH: Pay rates.

PN1941

JUSTICE HATCHER: I think the current C10 rate is 995.

PN1942

PROF CHARLESWORTH: Yes.

PN1943

JUSTICE HATCHER: If you look across modern awards, you will see all these of rates - certificate III, 995 - - -

PN1944

PROF CHARLESWORTH: Yes.

PN1945

JUSTICE HATCHER: That rate was in this award prior to the interim adjustment.

PN1946

PROF CHARLESWORTH: Right, yes.

PN1947

JUSTICE HATCHER: So as a conceptual idea how valid is that?

PN1948

PROF CHARLESWORTH: It's approximately valid. I mean, it's not a perfect comparison because the work that's done in aged care is much more than the qualifications. It requires a degree of situational judgment, accountability, decision-making as well as skills, but it requires the practise of the skills in a situation that changes daily with different residents or clients.

PN1949

So it's a useful benchmark, but I don't think you could - and in our exercise we didn't look at the pay rates, we looked at in fact the original relativities before - the relativities become compressed over time because of, you know, occasional flat dollar wage increases in the national minimum wage case.

PN1950

JUSTICE HATCHER: Well, it was more than occasional. It went on for 15 years.

PN1951

VICE PRESIDENT ASBURY: For some time.

PN1952

PROF CHARLESWORTH: Apologies?

PN1953

JUSTICE HATCHER: I said it was more than occasional. It went on for about 15 years, I think, so - - -

PN1954

PROF CHARLESWORTH: Yes.

PN1955

VICE PRESIDENT ASBURY: I guess the difficulty is the way that the - for my part, what I'm grappling with is the way that the metals structure was developed. It started with the pay rates - - -

PN1956

PROF CHARLESWORTH: Yes.

PN1957

VICE PRESIDENT ASBURY: - - - and grouped them, and then looked at, okay, what do they do? There was capacity, because there were 587 of them - there was capacity to do that and to phase in the relativities, which of course are now compressed and whatever, but that was the starting point.

PN1958

One of the fundamental principles was take, for example, if you drive a forklift. Regardless of where you drive it, the skill is the same. It's the application of it that's different. So the base rate didn't reflect that it's more dangerous to drive one in a coal mine than it is in a factory, for argument's sake, so you're compensated differently in a coal mine because of that.

PN1959

One of the things that we've heard in the submissions in the previous two phases of this matter is - and to use an example, and I can't remember who it was, but one of the counsel for the applicant said if someone dropped something in a factory, they might hurt themselves or the person next to them, but it doesn't have the same ramifications as if they drop a person - a frail, elderly person - in a nursing home.

PN1960

So I guess what I'm grappling with is how when you've got a framework that measures skills and qualifications, and says a cert III should equal a cert III wherever it is for the purposes of payment, how do you then reflect in a system where it's the application of the skill that is different?

PN1961

PROF CHARLESWORTH: Well, that's why we've just taken that C10 structure to create a basic architecture, but recognising that there are distinctive features of aged care because, as you say, it's a very different context. I do note that the metals classification doesn't take into account decision-making, judgment, accountability. It's looking purely at the skills and in some higher classifications at supervision of - - -

PN1962

VICE PRESIDENT ASBURY: Arguably it was supposed to, you know, exercise its discretion within a scope of a grade, make decisions about something that is of this scope or a broader scope. It really arguably does, but I understand your point.

PN1963

PROF CHARLESWORTH: But I think - - -

PN1964

VICE PRESIDENT ASBURY: It's contextually different.

PN1965

PROF CHARLESWORTH: Yes, it is contextually different, Commissioner, yes.

PN1966

VICE PRESIDENT ASBURY: Yes.

PN1967

PROF BAIRD: Could I just ask a quick question. Sorry to - - -

PN1968

MR WARD: No, no, you're completely out-rank me.

PN1969

PROF BAIRD: If you were given a blank sheet would you construct a classification system for aged care workers in a different way, if the C10 structure didn't exist?

PN1970

PROF CHARLESWORTH: It's hard to imagine a world in which the C10 structure doesn't exist.

PN1971

PROF BAIRD: That may be the issue.

PN1972

PROF CHARLESWORTH: Yes.

PN1973

PROF BAIRD: That may be an answer.

PN1974

PROF CHARLESWORTH: I mean, I think it's fair to say that we used that because that's the one clear classification structure that actually does the work of decompressing.

PN1975

PROF BAIRD: So it's the career - it's way in which that structure enables workers to move from one level to another - - -

PN1976

PROF CHARLESWORTH: Yes.

PN1977

PROF BAIRD: - - - with clearly defined descriptors and boundaries. That is very useful in that structure.

PN1978

PROF CHARLESWORTH: Yes.

PN1979

PROF MEAGHER: And relativities.

PN1980

PROF BAIRD: And relativities.

PN1981

PROF MEAGHER: In the original design with meaningful relativities.

PN1982

PROF BAIRD: Thank you.

PN1983

MR WARD: I don't want this to be unfairly - I might put it to you just to assist the Bench, but would you accept - this is the C10 structure description in the Manufacturing Award:

PN1984

Understands and applies quality control techniques. Exercises good interpersonal and communication skills. Exercises keyboard skills. Exercises discretion within the scope of the level. Performs under limited supervision.

PN1985

There is a variety of other things. It does seem to be a little broader than just the qualification; you would accept that?

PN1986

PROF CHARLESWORTH: Yes, but it's a totally different context. I know I keep harping on this, Mr Ward, but it's just the work of aged care is qualitatively different from the work of manufacturing or metals or vehicle building or any of the occupations that use the Metals Award as structure for their own payment system - - -

PN1987

MR WARD: No, I'm sorry, I wasn't cavilling with you on that. I just thought one of your answers to the Bench was the C10 structure focused on the certification.

PN1988

PROF CHARLESWORTH: Well, it focuses more on the certification and it doesn't go into the need for situational judgment. You know, if you're a welder then there's a certain process that you follow to weld two pieces of metal together and they are procedures that you learn, and you repeat them, but showering an elderly person or showering the same elderly person on different days will require a different awareness.

PN1989

You're dealing with a human being to whom you have to allow to have some dignity in what is essentially an undignified intervention in their lives, so that the kinds of levels of interpersonal and communication skills, and just knowledge of individuals' preferences, is extremely different to the situation that you're faced in metal work.

PN1990

MR WARD: Yes. I don't want to cavil with you with the last part of the answer -
- -

PN1991

PROF CHARLESWORTH: Yes.

PN1992

MR WARD: - - - but in deference to my friends in the metal workers, I think they would say one has to be alive to the fact the oxy torch might not quite be burning at the right level, there might be oxides in the metal which create a different response and judgment and exercise in required in that. It's not that one doesn't have judgment and one does; they are different forms of judgment.

PN1993

PROF CHARLESWORTH: I think that the level of judgment required in aged care work is at a far higher and more complex level than even somebody coping with an oxy torch burning incorrectly.

PN1994

MR WARD: I understand that's your view.

PN1995

PROF CHARLESWORTH: Yes, yes.

PN1996

MR WARD: In your report you talk quite a bit about the relativities within the industrial instrument. Again, I don't want this to be offensive, but it's my understanding that your published academic work isn't all about internal relativities in industrial instruments. You have done a lot of work on gender pay gap and things like that. I accept that, but am I right that the material you used to inform yourself about internal relativities - is that what is found in footnote 14 on page 10 or have I just misunderstood that?

PN1997

PROF CHARLESWORTH: No, that was going to some literature around gender neutral job evaluation. That was only looking at work that happens perhaps much more in the UK context than in Australia where job evaluation is required regularly because they deal with gender pay and equity on an individual basis - - -

PN1998

MR WARD: Yes.

PN1999

PROF CHARLESWORTH: - - - rather than a sectorial basis we do in Australia. That was just one point there, but I have in fact, Mr Ward, written about the compressed relativities in the SCHADS Award for many years.

PN2000

MR WARD: Right.

PN2001

PROF CHARLESWORTH: I've probably got six or seven articles that address that point.

PN2002

MR WARD: I have missed those. I apologise.

PN2003

PROF CHARLESWORTH: That's okay.

PN2004

MR WARD: So you have done that?

PN2005

PROF CHARLESWORTH: I have indeed.

PN2006

MR WARD: You have done that, so that was the experience you drew on, was it?

PN2007

PROF CHARLESWORTH: The experience - those articles drew on both my research and also my experience in - empirical research I've conducted in aged care.

PN2008

MR WARD: Okay. Did either of you read, for instance, various decisions of the Commission that talk about the approach to internal relativities?

PN2009

PROF CHARLESWORTH: No, I haven't.

PN2010

MR WARD: No, you didn't. Okay. Can I come to paragraph 25 and you introduce a term in paragraph 25 that I just want to reflect on a little bit; it's this phrase 'baking-in'. I just want to deal with that. Obviously you would accept that in this case the Commission will ultimately properly set the minimum wages for people in aged care; you accept that?

PN2011

PROF MEAGHER: Yes.

PN2012

PROF CHARLESWORTH: I accept, yes.

PN2013

MR WARD: Yes, and you would accept that part of their consideration is to remedy any gender based undervaluation? You accept that, as well?

PN2014

PROF CHARLESWORTH: I do.

PN2015

MR WARD: Yes. I'm assuming that you have read the stage 1 decision of this case.

PN2016

PROF CHARLESWORTH: I have.

PN2017

MR WARD: Yes, and you would accept that the Commission made various findings on gender undervaluation in stage 1.

PN2018

PROF CHARLESWORTH: Yes.

PN2019

MR WARD: You would also accept that Fair Work Commission decisions are a matter of public record and are not going to get lost.

PN2020

PROF CHARLESWORTH: Yes.

PN2021

MR WARD: Yes. If all of that is on the public record, all of those findings are sitting there, why do I have to bake this into a classification structure?

PN2022

PROF CHARLESWORTH: Mr Ward, to be fair, I think if you read that sentence it goes to a rationale for focusing on the nature of aged care work rather than the workers who perform it and that's because if you look at a female face of an aged care worker, unconsciously a lot of us make assumptions that she knows how to do what she does. I have to say as a woman spending quite a bit of time in aged care, I don't know how sometimes those workers are able to do what they do because even as a woman I am unable to do that kind of work.

PN2023

I would not have the skills to be able to deal with people in an acute state of agitation because of their dementia and so the point that we were making in that paragraph is that we have focused on the work, not the worker. For example, I think in the employer's proposal it's the employees who do X, Y and Z, and we would rather prefer to focus on the nature of the work that's performed because - and as I understand from Mr Curry, this continues to happen in the manufacturing sector where there is a dispute, for example, about a classification.

PN2024

What is first of all looked at is the work that's performed and then an assessment is made. Well, does that particular worker have the skills to perform that work, but the focus is on the work and so we're arguing I think quite strongly that by focusing on the work one is not - is trying to really reinforce the idea that we are not focused on the workers who are performing it.

PN2025

MR WARD: So in your view the description of the work is pivotal?

PN2026

PROF CHARLESWORTH: Absolutely.

PN2027

MR WARD: Right. I've got a few more general questions then I'm going to take you to the structure if I can. Could I take you to paragraph 29. At paragraph 29, about halfway down, you're talking about - you say this:

PN2028

These challenges and especially occupational health and safety risks in aged care have been well documented by researchers.

PN2029

I'll come later on to the fact that you make reference to work health and safety in the structure. You would accept, wouldn't you, as a general proposition there is a raft of work health and safety laws in this country? You accept that?

PN2030

PROF CHARLESWORTH: Mm-hm.

PN2031

MR WARD: You would accept that those laws set out very clearly the rights and obligations of both employees and employers?

PN2032

PROF CHARLESWORTH: I do.

PN2033

MR WARD: I take it that that's not sufficient for you. You believe we need to make some comment about that in the structure.

PN2034

PROF CHARLESWORTH: It's important because apart from worker health and safety regulation, the various aged care regulation makes reference to the needs to - for example, the aged care quality standards. There is a need for employers to ensure, you know, work is conducted in a safe way and it's really important for workers and - you know, I've seen inductions where workers are told the real importance of protecting both themselves and the resident, for example, when they're lifting them up out of chair or out of bed, for example, so it was part of the environment descriptor in each of the classification structures. I would like to add though that the work environment doesn't go to the classification level. It's pretty consistent across each - - -

PN2035

MR WARD: Yes, we will come to that. So I think your answer, if I understand it, is you don't think these laws are sufficient sitting there. You need to spell that out in the structure.

PN2036

PROF CHARLESWORTH: No, that's not correct, Mr Ward. The point is that these are additional requirement that are set out in relevant aged care regulation that regulates the work that's conducted in aged care.

PN2037

MR WARD: So if the structure - which we'll come to later on - says the employee must work safely, don't you accept that's covered by work health and safety laws?

PN2038

PROF CHARLESWORTH: I do accept it's covered by work health and safety laws. There are additional regulations in aged care.

PN2039

MR WARD: Okay. So if something about safety in the structure is comprehended by work health and safety laws, there wouldn't be a need to repeat it?

PN2040

PROF CHARLESWORTH: There is a need to draw attention to it because it's set out in the aged care regulation that regulates the work performed in aged care.

PN2041

MR WARD: But in other industries even though the Work Health and Safety Acts create that obligation, there's no need to draw attention to it.

PN2042

PROF CHARLESWORTH: It depends what industry you are talking about. As I understand, in disability support there is some in the relative code of conduct. There is some additional requirements in terms of health and safety, but not just of the worker, but also of the client.

PN2043

MR WARD: In the last sentence in paragraph 29 you say:

PN2044

We note that although non-direct care workers in residential aged care have not been the subject of as much published research -

PN2045

I take it you are saying it has been the subject of some public research.

PN2046

PROF CHARLESWORTH: Yes.

PN2047

MR WARD: Yes. I don't see that footnoted, but - - -

PN2048

PROF MEAGHER: Some of it is discussed in my original report about residential aged care that was part of the earlier proceedings.

PN2049

MR WARD: That's where we go back to.

PN2050

PROF MEAGHER: Yes.

PN2051

MR WARD: I was just struggling with that. You say:

PN2052

Many of the same risks as direct aged care workers including unpleasant conditions, infection and disease, musculoskeletal injuries, violence, harassment and stress -

PN2053

apply to them as I understand the way you write that.

PN2054

PROF CHARLESWORTH: Mm-hm.

PN2055

MR WARD: Would you accept that that is a matter of degree?

PN2056

PROF CHARLESWORTH: It depends on the role and it depends on the day.

PN2057

MR WARD: So you would accept it's a matter of degree?

PN2058

PROF CHARLESWORTH: Are you saying there is a lesser degree of unpleasant conditions for non-direct care workers?

PN2059

MR WARD: If I'm a gardener working outdoors most of the time mowing lawns, I'm going to be less exposed to residents, aren't I, and I expect in a relatively pleasant environment.

PN2060

PROF CHARLESWORTH: Yes. There are residents using those gardens who will be - - -

PN2061

MR WARD: I accept that. I accept that.

PN2062

PROF CHARLESWORTH: Yes.

PN2063

MR WARD: But again it's a matter of degree.

PN2064

PROF CHARLESWORTH: It is. I suppose it's sometimes a matter of occupation. As a cleaner or a member of the kitchen staff or indeed your rostering clerk, for example, they might be exposed to those conditions also.

PN2065

MR WARD: Yes, again a matter of degree. So if they were sitting in an office and the office was locked most of the day, it would be a matter of degree?

PN2066

PROF CHARLESWORTH: Not if they were negotiating with an angry family member who didn't think that their loved one had been cared for properly.

PN2067

MR WARD: That's true, but if the other six hours of the day were sitting in a closed office? Do you think it's all the same, do you?

PN2068

PROF CHARLESWORTH: No, I think it varies from situation to situation. The point is that these conditions are also experienced by non-direct care workers.

PN2069

MR WARD: Yes. I wasn't saying they weren't, I was just saying it would be a matter of degree depending on the context. The job and - - -

PN2070

PROF CHARLESWORTH: Depending on the context and depending on the day, yes.

PN2071

MR WARD: Yes. Thank you. Can I take you to page 20. You're talking at paragraphs 54 and 55 about senior care workers and the administration of medications. I just want to understand a little bit about the medication issue. Do you see a distinction in your thoughts about medication between prompting somebody to take a Schedule 4 medication versus actually administering it?

PN2072

PROF CHARLESWORTH: Yes, but both home care workers and residential aged care workers do both.

PN2073

MR WARD: Yes. It wasn't a trick question. I was just asking do you see a distinction between somebody who might prompt versus somebody that might administer?

PN2074

PROF CHARLESWORTH: Yes.

PN2075

MR WARD: Yes, you do. Okay. Would you accept - you might not accept this - as a proposition that - let's take a residential care setting - somebody might be involved in medication administration today but not tomorrow?

PN2076

PROF CHARLESWORTH: Yes.

PN2077

MR WARD: It might possibly be the case that they might be doing it for the morning part of their shift and not the afternoon.

PN2078

PROF CHARLESWORTH: Yes.

PN2079

MR WARD: There might be a third class, which as I understand it is it might be the personal care worker goes around with a registered nurse when they're doing their Schedule 8 medications. That would be a different form of medication.

PN2080

PROF CHARLESWORTH: It depends on the state because there is different state legislation about - - -

PN2081

MR WARD: Yes.

PN2082

PROF CHARLESWORTH: Yes, administration of - yes, of drugs, yes.

PN2083

MR WARD: Yes. Do you accept this proposition, and again it might be jurisdictionally different, that a personal care worker who is assessed as competent - and the evidence in stage 1 was assessed as competent by a registered nurse - to prompt Schedule 4 medications or administer Schedule 4 medications, you would accept that that person would be competent to do it if they had been signed off by the registered nurse?

PN2084

PROF CHARLESWORTH: Yes. To my knowledge though they have to have completed a specific competency in the administration of medication.

PN2085

MR WARD: And that would be the - I'm happy to show you this. I'm not sure you necessarily need to, but at certification III I think that's competency HLTHPS006, assist clients with medication. My understanding is that is the prompt one.

PN2086

PROF CHARLESWORTH: Yes.

PN2087

MR WARD: I'm happy to show it to you if you - no, you might accept that?

PN2088

PROF CHARLESWORTH: Yes, yes.

PN2089

MR WARD: I think in the certificate IV they have both the prompt one, then they have a third one which is administer and monitor medications, HLTHPS007, and that allows the administration of Schedule 4. Is that what you're referring to?

PN2090

PROF CHARLESWORTH: Yes.

PN2091

MR WARD: Would you like me to show them to you just to - - -

PN2092

PROF CHARLESWORTH: Yes, yes.

PN2093

MR WARD: I apologise, I should have done that.

PN2094

PROF CHARLESWORTH: Mr Ward, if I could I would just like to say I have observed workers both prompting and administering medication, and I've asked if they have, you know, the qualification to do so. I've been told by the - you know, either by the nurse or the manager who is taking them around that they do, so I haven't asked to see the actual paperwork - - -

PN2095

MR WARD: I see. No, I see. To this extent I think I agree with your proposition that these medications form part of the certificate III and certificate IV course. I think we had - I won't stress you on this - evidence earlier in the case that registered nurses sign off some people to do it and I suspect that evidence was outside of this in some fashion. You don't have any reason to disbelieve me on that?

PN2096

PROF CHARLESWORTH: No, no, but, you know, I would hope a nurse would only sign off somebody who indeed had that competency.

PN2097

MR WARD: Well, so would I. So would I, especially as I get older. I might just ask for those to be marked, your Honour.

PN2098

JUSTICE HATCHER: The Australian Government document HLTHPS007, administer and monitor medications, will be marked exhibit JE14.

**EXHIBIT #JE14 AUSTRALIAN GOVERNMENT DOCUMENT
HLTHPS007 - ADMINISTER AND MONITOR MEDICATIONS**

PN2099

MR WARD: I've gone one more general question if I might and then we will go to the structure. If I can take you to paragraph 68 with a degree of trepidation. Am I right in saying that - I'll choose these words carefully - you have a poor opinion of the working conditions in the SCHADS Award?

PN2100

PROF CHARLESWORTH: I do, Mr Ward.

PN2101

MR WARD: I thought that might be a reasonable way of putting it. Am I right that you have a view that if one was to move the home care employees into the Aged Care Award, that would have a benefit of materially improving their working conditions?

PN2102

PROF CHARLESWORTH: It would, although as that paragraph is phrased I note that that is beyond this particular matter in which we are both involved at the moment.

PN2103

MR WARD: No, no, I was just understanding whether or not that - - -

PN2104

PROF CHARLESWORTH: Yes.

PN2105

MR WARD: Yes, if that was your view. Thank you. Your Honour, I'm about to move on to the classification structure. I don't know if the Bench wants to take a five-minute break or - no? You're happy - - -

PN2106

JUSTICE HATCHER: No, I don't think so.

PN2107

MR WARD: Okay. Can I ask you to go then to your annexure A.

PN2108

JUSTICE HATCHER: What is the court book page number?

PN2109

MR WARD: I apologise, your Honour, I'm not using it for this.

PN2110

VICE PRESIDENT ASBURY: It's 505.

PN2111

MR WARD: Thank you, your Honour. It's my understanding - and I'll concentrate predominantly on residential aged care for the purposes of time. I don't want to put words in either of your mouths, but my understanding is that you have reviewed this structure, you have made certain recommendations that in both of your minds improve it and, for want of a better way of putting it, you're endorsing it or recommending it. Is that a reasonable way of putting it?

PN2112

PROF CHARLESWORTH: Yes.

PN2113

PROF MEAGHER: Yes.

PN2114

MR WARD: Yes, okay. I'm going to ask a question straightaway which might be unfair and, if it is, please tell me straightaway. This structure uses the word 'may' about 27 times.

PN2115

PROF CHARLESWORTH: Yes.

PN2116

MR WARD: I think you have got a PhD in law, so you're probably more capable of answering this than most of us here, but do you accept that the word 'may' connotes a discretion rather than an obligation? That is, where it says, 'This may include', that is it may or may not include?

PN2117

PROF CHARLESWORTH: It's probably less in a legal sense, more covering - without going into more exhaustive detail - the range of - for example, if we're looking at - perhaps you can just take me to the first - - -

PN2118

MR WARD: I'll give you an example.

PN2119

PROF CHARLESWORTH: Yes, yes.

PN2120

MR WARD: Why don't you go to annexure A. On the very first page it says, 'Work environment. The work may involve - - -'

PN2121

PROF CHARLESWORTH: Yes.

PN2122

MR WARD: Then it has a list.

PN2123

PROF CHARLESWORTH: Yes.

PN2124

MR WARD: I assume you accept that it may involve that, but it may not.

PN2125

PROF CHARLESWORTH: It may or may not, yes.

PN2126

MR WARD: Yes. I wanted to get that out of the way.

PN2127

PROF CHARLESWORTH: Yes.

PN2128

MR WARD: It saves quite a lot of time straightaway.

PN2129

PROF CHARLESWORTH: Yes.

PN2130

MR WARD: Okay.

PN2131

PROF CHARLESWORTH: But the point of 'may', if I could just add, is that it wouldn't be there unless at some stage work typically involves those various aspects of a work environment.

PN2132

MR WARD: This is what I was trying to get to.

PN2133

PROF CHARLESWORTH: Yes.

PN2134

MR WARD: When both of you read this and understood it, you didn't take that to mean 'shall'?

PN2135

PROF CHARLESWORTH: No, there - - -

PN2136

PROF MEAGHER: Those things can't be dictated.

PN2137

MR WARD: That's okay. I'm just trying to make sure we're on the same wavelength.

PN2138

PROF CHARLESWORTH: Yes.

PN2139

MR WARD: It's fine. Now, before I then get into the language in it, can I just ask this: you are comfortable - I shouldn't use that phrase - with a conflated structure. That is, care workers and non-care workers together. Do you have any - assuming it was properly valued and properly aligned, do you have any difficulty if there were separate structures?

PN2140

PROF CHARLESWORTH: Well, I think the point of having the one structure with two streams, if you like: the personal care RAO stream and the – called either the general administrative food services employee stream is to draw attention to the fact that indirect care work is essential to the work of aged care and is different, for example, if you were a gardener or a cleaner or laundry assistants in another setting.

PN2141

MR WARD: But there would be – if you were happy with the rates, you were happy with the alignment and you were happy with the language in both, you

don't have a particular view as to why it should be together or apart, as long as you achieve those three things?

PN2142

PROF CHARLESWORTH: As long as the indirect care worker was valued - - -

PN2143

MR WARD: Correctly, yes?

PN2144

PROF CHARLESWORTH: Yes.

PN2145

MR WARD: Thank you. Now, I'm going to spend a bit of time going to the opening proposition in each level which says, 'Description of work'. I'm going to start with the one that's for level 1 and some of what I ask here is relevant all the way through but bear with me. Am I right in saying that the notion of a person-centred care is an over-arching philosophical proposition for the aged-care sector or have I misunderstood?

PN2146

PROF CHARLESWORTH: No, it sits in the regulation, yes, of the aged care sector, yes.

PN2147

MR WARD: Yes, and it's a way of describing the totality of what the focus of the industry is meant to be about?

PN2148

PROF MEAGHER: Yes, but, look, it's also trying to capture something of the expected quality of all the interactions in-between people, between the people who are looking after people who need – old people who need support and those old people and if you look at the code of conduct which applies to absolutely everybody in aged care except a plumber who might go into a facility to do a contractual job - - -

PN2149

MR WARD: Yes.

PN2150

PROF MEAGHER: - - - it talks about things like – I've got it in front of me here:

PN2151

Act with respect for people's rights to freedom of expression, self-determination and decision-making in accordance with applicable laws and conventions. Act in a way that treats people with dignity and respect and values their diversity, respect for the privacy of people, provide care supports and services safely and competently with care and skill - - -

PN2152

- - - et cetera, et cetera: 'Provide care free of all forms of violence, discrimination', et cetera, et cetera. So the idea is to capture the kind of – it's a

kind of moral weight of the kind of work that vulnerable people are being entrusted to the care of other people who don't have a familial bond with them and it's to kind of express that – the policy is expressing that moralisation, endorsing that, and it's an attempt to express that as the mode of approach the work.

PN2153

MR WARD: Thank you, Dr Meagher. Thank you. I accept the broad policy proposition.

PN2154

PROF MEAGHER: Yes.

PN2155

MR WARD: What I'm just trying to understand is people like myself later on will be in arguments about what it means in relation to the actual work performed.

PN2156

PROF MEAGHER: Yes.

PN2157

MR WARD: Your view is that's it useful to have there because it brings into play all the things you've just said about the work.

PN2158

PROF MEAGHER: Yes, yes – whatever the tasks are, this is how you – this is what you've got to bring to them.

PN2159

MR WARD: But we've got later on down where we've got these things called, 'specialist knowledge and skills' – knowledge and observance of the charter of aged care rights and code of conduct.

PN2160

PROF MEAGHER: Yes.

PN2161

MR WARD: Isn't it sufficient, just to have that? If one observes that, isn't one doing all the things you've just said?

PN2162

PROF MEAGHER: You'd hope so. But I guess if you want to give a description of the work that isn't a list of tasks, because that can't be comprehensive, then saying, 'Care of this character'. That's what the supporting care of this character, that's what the work is.

PN2163

MR WARD: Okay, all right. And I suspect we're about to disagree on this but do you find – you don't find the phrase, 'Frail, dependent older adult', somewhat demeaning to be in an industrial instrument?

PN2164

PROF CHARLESWORTH: I don't, Mr Ward, no.

PN2165

MR WARD: Okay, but is there any reason why you use it in – you're comfortable with it being used in some places and you're comfortable with the phrase, 'Resident', being used in lots of other places?

PN2166

PROF CHARLESWORTH: Could you draw our attention to where we use one and not the other?

PN2167

MR WARD: Well, the words, 'Frail, dependent older adult', is used in all the descriptions of work. Bear with me. I will find my first resident very shortly. If you go to, 'Work Environment Level 1.3: physical aggression with residents, their family members that experience deaths of residents'.

PN2168

PROF CHARLESWORTH: Sorry, Mr Ward, what page are we on?

PN2169

MR WARD: Sorry, I'm on page 2. My apologies.

PN2170

PROF CHARLESWORTH: The residents have already been described in the description of the work so why would you repeat again that they're frail, aged and dependent?

PN2171

MR WARD: Was that – that's why you're comfortable with it?

PN2172

PROF CHARLESWORTH: Yes, we've already described them and this is then going to the work environment in which the work is performed and as I said that is not going to the – distinguishing between levels of skill. It's simply noting the environment within which this work is carried out. It's important to note.

PN2173

MR WARD: Am I right in saying that it simply follows that anybody in aged care must be frail, dependent and older?

PN2174

PROF CHARLESWORTH: Mr Ward, I don't know if you've been in residential aged care?

PN2175

MR WARD: I've lived in one, yes. My mother was a matron of one.

PN2176

PROF MEAGHER: Okay, so in recent years?

PN2177

MR WARD: No, not in recent years.

PN2178

PROF MEAGHER: Well, then - - -

PN2179

MR WARD: But my father passed away in one recently, and so did my father-in-law so I've spent a lot of time - - -

PN2180

PROF CHARLESWORTH: Okay, well, you would have noticed between both situations the increased acuity of residents who live there. I mean, if you go into – it used to be – my grandmother used to be in aged care and it's much more like a hostel environment so that you're very much independent living. That is no longer the case. People are voting with their feet, particularly post royal commission. They are very reluctant to go in residential aged care so when they do go in, when families are exhausted, they are typically older, frailer, sicker, have a variety of co-morbidities and are highly likely, as Gabrielle has pointed out, to have some form of cognitive decline. So I don't think that that's demeaning and that is the nature of the client group.

PN2181

MR WARD: So I think what you've just told me in answer to my question is that definition fits all residents in residential aged care.

PN2182

PROF MEAGHER: There's a few young people in residential aged care who might object to being described that way.

PN2183

PROF CHARLESWORTH: Well, yes.

PN2184

PROF MEAGHER: If it said, 'A diverse range of people who need care and assistance', I personally would also be happy with that.

PN2185

MR WARD: Okay, thank you. I won't press that any further. Thank you, Doctor
- - -

PN2186

PROF MEAGHER: Sarah gave a good account of why it says what it says.

PN2187

MR WARD: Dr Charlesworth might have a different view to you.

PN2188

PROF CHARLESWORTH: I mean, I think it's worth mentioning the fact that there are children in residential aged care is a disgrace noted by the royal commission and moves are afoot to move them out. It is no place for young people with disability to be living.

PN2189

MR WARD: And can I just stick with the level 1 for a minute? So I'm just thinking about this with an employer's eye: that first proposition says, 'Description of the work'. Wouldn't it be better to set out in more detail what the actual work is?

PN2190

PROF CHARLESWORTH: Do you mean the tasks, Mr Ward?

PN2191

MR WARD: Yes, yes, the tasks.

PN2192

PROF CHARLESWORTH: We've tried to avoid taskifying the classification structure because you end up with a list of huge – the classification descriptors will be far longer than they currently are. It's really describing the nature of the work. It's actually saying that this is specific work within, you know, a specific industry environment so I think it is very well worth saying that at the beginning. It means you don't have to repeat it all the way through.

PN2193

MR WARD: Okay, we'll come to that. This classification proposal for residential aged care is already 20 pages long.

PN2194

PROF CHARLESWORTH: I appreciate that.

PN2195

MR WARD: Yes, you don't think that's - - -

PN2196

PROF CHARLESWORTH: I think it's long. It's probably comparable with the 2014 New South Wales home care award. But, you know, and - - -

PN2197

MR WARD: I'm not sure that's the gold standard.

PN2198

PROF CHARLESWORTH: Well, you know, brevity is really problematic when you're looking at gender under-valuation. Unless you spell out as much as possible the accountability extent of authority as we have done, the judgment decision making, specialist knowledge and skills - - -

PN2199

PROF MEAGHER: It's invisible.

PN2200

PROF CHARLESWORTH: - - - it's the work that becomes invisibilised.

PN2201

MR WARD: Yes, but - - -

PN2202

JUSTICE HATCHER: An alternative might be that gender under-valuation is remedied by the pay rate. That is, I think we're getting confused with two different things here. We need to set pay rates which appropriately value the work being done, and then the classification structure is a legal mechanism to distinguish levels of skill and responsibility in the work place based on conclusions they've already reached about the valuation of the work and it seems to me that it might be over-complicating it to think that the classification structure bears the weight of remedying under-valuation when it's really the pay rate that does that.

PN2203

PROF CHARLESWORTH: Your Honour, in the first decision in this matter, there was a partial remedying of the under-valuation. The exercise in this stage three is to create a classification structure and - - -

PN2204

JUSTICE HATCHER: That's part of it.

PN2205

PROF CHARLESWORTH: That's part of it and there is the – yes, of course, there's the separate issue of the remaining, as Your Honour says, setting the rates for indirect care workers and whether or not there's an additional quantum in terms of the direct care workers but there still has to be a classification structure with meaningful relativities and the Bench did seem to agree in the discussion paper no.10 that we didn't have this in aged care. So as part of that exercise and recognising really the way in which work is even currently being undertaken, having those two levels that we stick with personal care work above the Certificate III, your senior care worker and your specialist care worker is really important to recognise that these are different levels of skills and that there need to be decent relativities between the pay rates.

PN2206

JUSTICE HATCHER: Those propositions – speaking for myself – may all be accepted. It's just simply beyond that point when it comes to describing it. It's simply a way of distinguishing as easily as one can between the Cert III and the next step and the next step and I think what you're being asked is whether it really needs – with respect – 20 pages to do that.

PN2207

VICE PRESIDENT ASBURY: Or were you being asked should there be more identification of tasks?

PN2208

MR WARD: I think I was actually proposing both propositions.

PN2209

VICE PRESIDENT ASBURY: Well, for my part the mantra since 1986 has been, 'Describe the skills', not the tasks. So I can - - -

PN2210

MR WARD: Well, yes, and, Your Honour, I think that's why so many employers find it very, very hard to classify people as a lot of awards because nine times out of 10 what happens is we write this thing called indicative tasks down and that's what everybody reads.

PN2211

JUSTICE HATCHER: I thought you were involved in all of that, Mr Ward.

PN2212

MR WARD: Well, I'm happy to say that the ones I wrote, which were quarries, concrete, precast and cement don't suffer from that problem but - - -

PN2213

VICE PRESIDENT ASBURY: But the point of writing them down as to phase them out so that they could be – so that from the outset people could classify based on the old task-based approach because that's what they were going from and then they were transformed into skills – or they should have been.

PN2214

MR WARD: Yes, and then I think my proposition, Your Honour, is this: one has to be careful that the language doesn't become so nebulous as to actually become unworkable. That's the proposition I'm making, yes. Can I move you down the page to this phrase which is called, 'Work Environment'? It says: 'The work may involve', and no.1 says: 'Physical effort in cleaning laundry and kitchen assistant work and in the use of equipment such as vacuums, polishers, heavy laundry and kitchen equipment'. Could I just ask two questions: when I read that, that's not about the environment. It's actually about the work activity, isn't it?

PN2215

PROF CHARLESWORTH: No, it's about the work environment. We are describing the qualifications, experience, accountability, extent of authority, judgment, decision-making, specialist knowledge and skills, which are exercised in a work environment and we're drawing attention to the fact that this is not just – a lot of people tend to have a view that aged care is just having cups of tea and chatting with people.

PN2216

MR WARD: That's not my view.

PN2217

PROF CHARLESWORTH: Good, I'm very glad, Mr Ward – but that it's to draw attention that there is – and we see this reflected, indeed, in many of the work health and safety regulators – aged care is up there in terms of workers' compensation claims. They draw attention to all these factors and it's really just so that people are aware and hopefully, trained in, you know, using physical effort and also that making reference to the environmental conditions, which are pretty distinct in aged care, as well as the emotional demands.

PN2218

MR WARD: So your evidence in relation to work environment no.1 is that this is a reference to the environment, not a work activity?

PN2219

PROF CHARLESWORTH: If you refer back to what sits above it – specialist knowledge and skills – skills to undertake basic cleaning, laundry and food services, that is fleshing that out in terms of the work environment. It's not just saying, 'You require the exercise of skill but you also require physical effort'.

PN2220

MR WARD: When don't you require physical effort to do cleaning?

PN2221

PROF CHARLESWORTH: Well, this is covering a whole series of specialist knowledge and skills. So for example, you don't require physical effort to do infection control and prevention.

PN2222

MR WARD: Why wouldn't I require physical effort to do that?

PN2223

PROF MEAGHER: Well, physical effort wouldn't normally mean the putting on of gloves and a mask.

PN2224

MR WARD: That involves physical effort, doesn't it?

PN2225

PROF CHARLESWORTH: Mr Ward, I think that's not what's meant here.

PN2226

MR WARD: So that wasn't your understanding?

PN2227

PROF MEAGHER: No, the physical effort is – it's requiring a degree of heavy - -
-

PN2228

MR WARD: Strength – so when you read this, you understood it to be strenuous activity? Is that a reasonable way of putting it?

PN2229

PROF CHARLESWORTH: Yes, yes, it is.

PN2230

MR WARD: Okay, all right. I wasn't trying to be cute. I was just trying to understand.

PN2231

VICE PRESIDENT ASBURY: So you're not sitting on the polishing machine driving around the local shopping centre at midnight when no one's there.

PN2232

MR WARD: No, that wouldn't be included, Your Honour, no. Can I just take you to work environment no.2? I'm just trying to get a handle on this. I asked one

of the witnesses earlier today, what was your understanding of the phrase, 'High temperatures'?

PN2233

PROF CHARLESWORTH: High temperatures you often find in kitchens when they're cooking up, you know – depends on how many residents but certainly those facilities that have got in-house kitchens - - -

PN2234

MR WARD: So, what, 26 degrees, 25 degrees – what would it be?

PN2235

PROF CHARLESWORTH: It's steamy and hot.

PN2236

MR WARD: Give me a temperature.

PN2237

PROF CHARLESWORTH: I wasn't in there with a thermometer, I'm afraid, Mr Ward. But I was in amongst sweat after being in there. So I'm judging from my own bodily reaction.

PN2238

MR WARD: So if I'm mowing the lawn and I'm out in summer and I'm sweating, that would be what you meant by high temperatures?

PN2239

PROF CHARLESWORTH: Yes. This was in reference to the work being typically taken within the walls of the residential facility but yes.

PN2240

MR WARD: Again, without pressing the point, in 2 you say: 'Cleaning up bodily fluids'. Again, to me, that's an activity, not an environmental factor but to you it's an environmental factor.

PN2241

PROF CHARLESWORTH: It's an environmental factor, yes.

PN2242

MR WARD: Okay. If I can take you to 3, so that's work environment 3, 'Emotional demands': can you just explain to me – you've got there, 'Experiencing death of residents'. I take it that would be a matter of degree, depending on the relationship the person, the employee had with the resident.

PN2243

PROF CHARLESWORTH: Yes, but it's also upsetting for everyone when somebody dies in residential aged care and I think Dr Meagher's evidence was that a third of residents – on average a third of residents in residential aged care die every year so frequent occurrence but it's particularly upsetting for workers – either direct or indirect care workers – who formed a close connection with the particular residents.

PN2244

MR WARD: Yes, yes.

PN2245

PROF MEAGHER: And given that the goals of the system are that there should be – care should be based on relationships between the staff and the residents, it's common that people are upset. Lots of people have relationships - - -

PN2246

MR WARD: And if one had a closer relationship one might be more upset than if one had a relationship, yes.

PN2247

PROF MEAGHER: Yes.

PN2248

MR WARD: Yes. Can I take you to level 2? Again the description of work here is now that personal care work provides personal centred care to a diverse range of frail, dependent older adults in a residential aged care facility who require basic personal care and social support and who are able to communicate and make decisions about personal care and support they require. When you read this, what was your understanding of, 'Basic personal care and social support'?

PN2249

PROF CHARLESWORTH: It would be helping people initially get up and out of chairs, taking them to the dining room, that kind of work – perhaps showering. People who are comfortable with being showered, don't have any physical disabilities that need to be accommodated. I know that this is an entry level personal - - -

PN2250

MR WARD: I appreciate that.

PN2251

PROF CHARLESWORTH: Yes, up to six months' experience.

PN2252

MR WARD: Yes.

PN2253

PROF CHARLESWORTH: So this is the very, very beginning, yes.

PN2254

MR WARD: Yes, okay. So was that both your understandings? Thank you. Can I just explore this question about, 'Communicate and make decisions'? I don't want to sound petty in the way I do this. I'm really struggling to understand it. I'm reflecting on my personal situation when I do this. If I was a resident and I was sufficiently capable, for instance, to identify what my favourite television show was, but I needed help with toileting and eating, does that get me in or am I out?

PN2255

PROF CHARLESWORTH: How do you mean, 'Am I out'?

PN2256

MR WARD: Well, it says: 'Who are able to communicate and make decisions' – could be any decision – 'about personal care and support they require'. So for instance, if I demonstrated that by saying, 'I want Channel Nine on my TV', but perhaps in every other regard I might need to be fed, or whatever, would that mean I would be characterised as being able to communicate and make decisions about my personal care and support?

PN2257

PROF CHARLESWORTH: Yes.

PN2258

MR WARD: It would. And so if I said, 'I don't want orange juice today', that would be okay?

PN2259

PROF CHARLESWORTH: Yes.

PN2260

MR WARD: If I indicated that I had a preference for walking in the garden, that would be enough as well?

PN2261

PROF CHARLESWORTH: Yes.

PN2262

MR WARD: It could be that simple, to demonstrate that I can communicate decisions about personal care and support? Dr Meagher, you want to say something?

PN2263

PROF MEAGHER: Look, I guess you can – if somebody has basically just come into a facility, then you wouldn't ask them to shower somebody who couldn't kind of go along with the process and understand what was happening and direct the – to some extent show that they're directing the process. You wouldn't leave a person on their own to do that. So I think if you set the threshold too low, that person just knows what they want to watch on television but otherwise they can't do anything, there's just saying they can be pretty demented but, you know, if they can make that decision then they're a decision maker. It's about the decisions about personal care and support are about the sorts of activities that you're doing with them. It's not a particularly – it's not an abstract concept.

PN2264

MR WARD: So - - -

PN2265

PROF MEAGHER: If you're doing personal care for someone, they need to be able to make decisions about what you're doing with them.

PN2266

MR WARD: So this will require – I think the words His Honour described – this would still require a value judgment resident by resident about whether or not they can communicate and make decisions about personal and support they require?

PN2267

PROF CHARLESWORTH: Mr Ward, we've already talked about the assessment that's been made of residents when they come into residential aged care. So to a certain extent, I will know that the new resident that this level 2 worker is working with is somebody who is able to say, 'This is the way in which I prefer a bath, I don't want a shower. This is the way I prefer to be showered',, you know – 'I like to have my clothes put like this. Please – you know, I've got a sore shoulder, be very careful of my sore shoulder', et cetera. It's somebody who is able to make those kinds of decisions about the ways in which they want things to happen.

PN2268

MR WARD: So again, this is important: if the care plan has on it any type of preference like that, then that person would be deemed to be able to communicate and make decisions about the personal care and support they require?

PN2269

PROF CHARLESWORTH: It they express those preferences – sometimes what's on a care plan is what family members have said.

PN2270

MR WARD: Yes, we've had evidence of that.

PN2271

PROF CHARLESWORTH: Yes, so it depends if the extent to which the individual resident's contributed to his or her care plan.

PN2272

MR WARD: I see. So to actually make an evaluation of how this award will apply, I have to go back to the care plan, see where your preferences referenced on the care plan and who might have actually put them on the care plan?

PN2273

PROF CHARLESWORTH: Yes, I think in a practical sense, Mr Ward, in response to the Bench the point he made is that in residential aged care in particular you need a range of level of workers who can deal with a range of residents and that they will be working together but that as Gabrielle gave the example, somebody's just come on in this job, you're not going to ask them to start off working with a resident who might have – not be able to make decisions about what they want, might have behavioural issues, et cetera, or may have some kind of form of – just thinking of one resident I remember who simply wasn't able to swallow properly and so needed to have her food curated in a certain way so the kitchen staff got involved to try and make that as tasty as possible for her. That was about person-centred care. They weren't just saying, 'Because you can't swallow properly, we're just going to feed you pap'. They worked with her and with the other care staff and said, 'Does this taste good? If we add some onion, if we add a little bit of tomato does it – is it more palatable for you, because you

have to get nutrition'. So it's that kind of resident would need to be cared for by somebody who had more experience and skill is the point I'm making so that - - -

PN2274

MR WARD: We're going to come to that in some detail.

PN2275

PROF CHARLESWORTH: Okay.

PN2276

MR WARD: I'm just trying to understand what your understanding was of how you determined the resident fit that criteria that you were comfortable with and I think you've taken me back to the care plan, you've taken me back to whether or not it's the resident themselves expressing a preference or whether or not it's the family expressing a preference.

PN2277

VICE PRESIDENT ASBURY: Perhaps is it more – and again, is it more saying that personal care has always meant assisting – people being assisted to cut their toenails, put lotion on, be showered, be dressed, fit an incontinence pad on them, all of those things and some people can participate in that and the carer can say to them, 'I'm going to do this, I'm going to put you in the shower' – they're waiting for their shower or they might say, 'Can I have mine later? I want to stay in bed for a while'. The care is going to be the same kinds of care as they're described by people who provide them. They call them their personal cares. We're going to do – cut their fingernails, whatever; put a bit of lipstick on them if that's what they want. And then some people are not able to cognitively participate in that and so that is more difficult to provide.

PN2278

So there's a mix of those people and in a dementia ward they're probably all those people and it's a matter of having the staff in a particular area who can deliver the cares that everybody knows they have to have: everyone needs their toenails cut, everyone needs lotion on their skin, everyone needs skin tears looked at – all of that, that's always been personal care. So essentially, when you say cognitive ability and looking at – you're talking about personal care as it's commonly understood in this sector.

PN2279

PROF MEAGHER: Some people might not need some of those things done and might be able to do it for themselves.

PN2280

VICE PRESIDENT ASBURY: Yes.

PN2281

PROF MEAGHER: And they would be also the sort of people that you would ask the new people to help, et cetera.

PN2282

JUSTICE HATCHER: Can I just raise this proposition? I'm just putting this as a proposition: so let's assume we have the number of levels that you propose and each level has an appropriate pay rate, which values the work correctly.

PN2283

PROF MEAGHER: Yes.

PN2284

JUSTICE HATCHER: I'm just looking at – and just for the time being can we just deal with direct personal care? We'll leave aside indirect care. Why, for example, does level 1 need to say more than: 'An employee can engage in direct personal care of aged care residents who has less than three months' work experience in the aged care industry'. In terms of carrying out the task of working out what pay rate goes to that person, why do you need to say more than that?

PN2285

PROF CHARLESWORTH: Because they do need more than three months' experience. That's why we've put in why they need no – under specialist skills and specialist knowledge and skills, Your Honour, we would put in you don't need previous training or experience. But employers need to make sure that you get this on-the-job training to be able to undertake – you know, we're sticking with direct care work that you can – that you know about basic knowledge of infection control and prevention, you have the interpersonal skills in dealing respectively with a range of residents and their families. So it's not just anyone off the street who's got less than three months' experience, you're actually setting out what the kind of work that will be undertaken by this classification.

PN2286

PROF MEAGHER: Could I ask a question?

PN2287

JUSTICE HATCHER: Can I just say this; that may be going beyond the task of a classification structure definition. That is for example an obligation of an employer to provide training. To the extent that that obligation exists might be in a separate clause of the award. A requirement for aged care persons to employ appropriate persons who don't have criminal records of whatever is dealt with in the regulatory regime. The obligation of the employer to ensure that the work is done safely without risk to the workers or other residents is in the OH&S regime. I'm not diminishing for a second the importance of all those things, but my question is whether those matters are to be dealt with in the classification structure - - -

PN2288

PROF MEAGHER: Could I ask you a question?

PN2289

JUSTICE HATCHER: - - - if one accepts its only purpose is to identify what a person's minimum pay rate entitlement is.

PN2290

PROF MEAGHER: Do you think the list of specialist knowledge and skills is too detailed?

PN2291

JUSTICE HATCHER: I'm just putting a proposition. I'm not expressing a view, I'm just putting one point of view for you to comment upon.

PN2292

PROF MEAGHER: I'm not allowed to ask you that. Sorry about that. It's kind of a bit unfortunate there has to be a forensic, oppositional forensic procedure.

PN2293

JUSTICE HATCHER: That's kind of what we do here.

PN2294

DEPUTY PRESIDENT O'NEILL: Can I just ask a clarification question, because my reading of the proposed structure is that a level 1, that doesn't cover personal care work at all.

PN2295

PROF CHARLESWORTH: No, it doesn't.

PN2296

DEPUTY PRESIDENT O'NEILL: It's level 2, which is the entry up to six months.

PN2297

PROF CHARLESWORTH: Yes.

PN2298

JUSTICE HATCHER: With that proviso take the same question direct to level 2 then. You could just say a person engaged in direct personal care with less than six months' experience. Wouldn't that be sufficient to tell the employer and the employee what minimum pay rate they're entitled to?

PN2299

PROF CHARLESWORTH: I think, your Honour, the problem has been is that the current descriptors in the Aged Care Award have been pretty porous, and - - -

PN2300

JUSTICE HATCHER: Pretty what, porous?

PN2301

PROF CHARLESWORTH: Porous, and hard to classify. So this is trying to - it's genuinely hard for employers to classify people. As I said before you can observe the work organisation in a dementia care unit for example, and you can clearly see who's the senior, designated as a senior member of staff if there's not an enrolled nurse about. They're all paid the same pay rate. So this is unpacking for employers, but also employees, the kind of work that you could expect at any level, and if for example I'm a level 3 - sorry, level 4 Cert III qualified worker, it's very clear to me then the additional skills I'm going to have to acquire if I want to move up to level 5 and conversely level 6. A lot of that would depend on the

extent to which the employer gives me the duties for example at level 5 of training and inducting other workers. They may not, but, you know, that's the way in which I know I can progress. And at the moment we have a huge problem with the lack of supply of workers in this industry, and the overwhelming reason is not only low pay rates, but as the draft national aged care, draft national care and support economy - strategy has pointed out there's a lack of classification structures and career paths. So that it's really just trying to articulate it. Now, your Honour, you may form the view that it's over-egged slightly, and - - -

PN2302

JUSTICE HATCHER: It's not even a question of career progression or levels. What I have been putting to you is that you have the same structure, proper pay rates, seven grades, career progression, but just describe it in a way which is far more simple.

PN2303

PROF CHARLESWORTH: Yes, and then you really run the risk of somebody doing level 6 work being classified at level 4, which is what currently happens.

PN2304

PROF MEAGHER: So the challenge is how to avoid that.

PN2305

MR WARD: Can I take you then to page 4 'Work environment'. I won't talk any further about the notion of physical effort and showering in my view being an activity. I will put that to one side. You introduce this notion of confined spaces, which from an industrial perspective has a very particular meaning. What did you understand it to mean in the context of this?

PN2306

PROF CHARLESWORTH: While newer aged care facilities have a certain, and I can't remember the square metreage, so a lot of the newer aged care facilities you've got a bedroom and you've got an adjacent ensuite.

PN2307

MR WARD: Yes.

PN2308

PROF CHARLESWORTH: Sometimes they are incredibly small and you've got - if you're using a hoist for example, so hopefully you've got another worker there with you helping them, three of you, the resident and the two workers, are crowded into a really confined space and you're trying to get someone into the shower. It can be very difficult, and particularly if the resident is larger in terms of body size, that can be very difficult.

PN2309

MR WARD: So again that phrase would be contextual?

PN2310

PROF CHARLESWORTH: It is. As we've said all the environment, factors under the environment are contextual.

PN2311

MR WARD: How is showering somebody contextual? You either shower them or you don't.

PN2312

PROF CHARLESWORTH: Mr Ward, under - so I'm looking at the specialist knowledge and skills - under 1 on page - under specialist knowledge and skills, 'Knowledge and skills to undertake basic personal care such as assistance with dressing and showering.' Showering has already been mentioned because this is a frequent daily activity in residential aged care. So the factors that are set under environment are contextual.

PN2313

MR WARD: Right. Okay. Can I just stay on page 4 for a minute because there's a term that used here that I couldn't find anywhere else, and later on I want to understand why it's here and not somewhere else. But in work environment 3 on page 4 you will see there it says, 'Emotional demands such as from resident distress.' I'm happy to be corrected by both of you, but it's my understanding that's the only place this appears. First of all what did you mean by resident distress, and secondly - - -

PN2314

PROF MEAGHER: It also appears on page 8. If it doesn't appear - - -

PN2315

MR WARD: It's missing, is it?

PN2316

PROF MEAGHER: - - - it's just an oversight.

PN2317

MR WARD: Okay. No, I was just trying to understand if there was some - - -

PN2318

PROF CHARLESWORTH: Resident distress an example - - -

PN2319

PROF MEAGHER: It's upsetting.

PN2320

PROF CHARLESWORTH: Yes. With dementia around about when the sun starts to go down they can start to get very agitated and get highly distressed and upset. So that you require the skills to deal with that, not only to try and de-escalate the situation, but also regulate your own emotions. So you require situational judgment. So all of those things you require to deal with resident distress.

PN2321

MR WARD: And where in this - - -

PN2322

PROF MEAGHER: It's upsetting. If someone's really upset and crying it's really - it's just upsetting, and it doesn't happen in many jobs.

PN2323

MR WARD: Just for my benefit, I probably missed this, but where in level 2 is the phrase 'situation of judgment' used? Is it used or - it probably is, I just probably haven't seen it.

PN2324

PROF MEAGHER: Basic situational judgment under 'Judgment and decision making.'

PN2325

PROF CHARLESWORTH: On page 5, Mr Ward, at number 1 under 'Judgment and decision making.' No, sorry, that's level 3.

PN2326

PROF MEAGHER: Page 2. The bottom of page 2 under 'Judgment and decision making.'

PN2327

MR WARD: I see. Sorry, I'd missed it. I'd missed that, sorry. Thank you. Can I just ask this question, if I can find where I want to ask it from. If you start with page 4 and if you go to 'Work environment':

PN2328

The general administrative and food service (indistinct) in the work may involve physical effort in - - -

PN2329

I'm asking it here, because it wasn't in the first one either. Is there any reason why there's no reference to any - or I don't see any reference there to any activity related to clerical or administrative work. Is that just an omission or - - -

PN2330

PROF CHARLESWORTH: No. It's so that clerical workers are not normally exercising physical effort, which is why it says the work may involve, but they are working in environmental conditions, and some - you may not have experienced this, Mr Ward, but in some residential aged care facilities in some units there's a strong smell of urine, and your clerical workers will when they go down to talk with residents might experience that. They will certainly experience emotional demands from resident distress or verbal or physical aggression from residents, and particularly family members. Family members are not always very pleasant to staff, and indeed in both - in Victoria for example, I think it's sponsored by the ANMF and the Victorian Government, there was a big campaign just pre COVID about occupational violence in residential aged care.

PN2331

MR WARD: So the reason why administrative activity is not included in number 1 is your proposition you put to me earlier that your understanding there was strenuous physical effort and clerical people don't do that.

PN2332

PROF CHARLESWORTH: No.

PN2333

MR WARD: Yes, okay, that's fine. Now, can I take you then to personal worker 3 and the description of work. This now is including residents who may have physical disabilities and/or mild cognitive impairment - and we talked about what 'may' means - but have the capacity to make decisions about their care. So again reference to that care plan they're still able to express preference themselves independently of their family. I just want to understand this for what comes later. What was your understanding of the phrase 'mild cognitive impairment'?

PN2334

PROF CHARLESWORTH: It's somebody, perhaps like my 98 year old mother who's just been diagnosed with early Alzheimer's. So some cognitive decline, but not profound cognitive decline.

PN2335

MR WARD: And just for my benefit is that a sort of clear medical - if I went to a doctor would a doctor be able to go that person's in category A, that person's in category B, or is it more an evaluative process?

PN2336

PROF CHARLESWORTH: I think whether or not it sits in exactly the same words it's part of the AN-ACC assessment instrument used to evaluate the needs of residents.

PN2337

MR WARD: So if one gets into an argument later on about this structure one would go to that to work out how the employer assessed the resident?

PN2338

PROF CHARLESWORTH: The employer doesn't assess the resident.

PN2339

MR WARD: My apologies.

PN2340

PROF CHARLESWORTH: No, no, the Commonwealth assessor assesses the resident.

PN2341

MR WARD: We would use that later on to come back to this, would we?

PN2342

PROF MEAGHER: I think as a practical matter it's not - there's not a lot of - it's like I was saying before about that you don't send someone who just walked in the door to work with someone who is, you know, severely disabled, and this is someone who hasn't just walked in the door and they begin to work, you know, begin to take care of someone who is a bit more disabled. It's just - you know, I

think it's about work organisation. You don't need to - you're not attaching individual workers to individual clients whose diagnosis you've got. It's more - - -

PN2343

PROF CHARLESWORTH: At the moment the care minutes, so the government is funding care minutes based on that AN-ACC classification instrument. So that in order to provide those care minutes, because the more - the higher the need the greater the funding that's provided to that particular employer, and that employer is expected to employ sufficient staff to be able to care for the range of people that they have in their facility.

PN2344

MR WARD: And I'm right, aren't I, that given the work description in level 1 personal care work and work description level 3, that a person who's a level 2 or a level 3 can effectively work to support the same people?

PN2345

PROF CHARLESWORTH: No, I think in level 2 they don't have that - they won't have the physical disabilities or mild cognitive impairment.

PN2346

MR WARD: If I had 10 people in my wing it might be a class of person a level 2 person can support, but there would be classes of persons who only a level 3 can support?

PN2347

PROF CHARLESWORTH: Yes, but the way the work is organised, Mr Ward, is not that you have one worker for this person, one worker for that person. But there's a general profile, and so you as the RN or the supervisor would then devise a work organisation saying, 'Okay, this is the profile of residents we have in this particular wing. These are the kind of skills that we need.' So that in sorting out who does what, if you like, you would use the lower level workers to do more basic tasks, including with, you know, other people, if it just meant taking them to the table for example at lunchtime, but you would make sure that you have the higher skilled workers there who could deal with people who had physical disabilities, and then remove from here to mild cognitive impairment to the later ones to moderate or profound cognitive impairment.

PN2348

MR WARD: I might ask you to hold that thought. I won't respond to it here, because I want to come back to that in some detail to understand how the rest of it works, if I can.

PN2349

MR GIBIAN: I think I mentioned earlier I have to ask to be excused. I do apologise for that. Ms Doust is here. I may actually be able to return - - -

PN2350

JUSTICE HATCHER: I'm sure we will finish long before then. You're excused.

PN2351

MR WARD: Might I just have a two minute comfort break?

PN2352

JUSTICE HATCHER: Yes, all right. Let's say we will resume at 4 o'clock.

PN2353

MR WARD: Thank you, your Honour.

<THE WITNESSES WITHDREW [3.53 PM]

SHORT ADJOURNMENT [3.53 PM]

RESUMED [4.03 PM]

<GABRIELLE ANNE MEAGHER, RECALLED [4.03 PM]

<SARA CATHERINE MARY CHARLESWORTH, RECALLED [4.03 PM]

PN2354

MS DOUST: I wonder, your Honour, before we proceed, just think of me as a shorter, better-looking version. I wonder if I can just address the question of timing this afternoon, because - - -

PN2355

JUSTICE HATCHER: I was going to say something which was hopefully going to be of great assistance to Mr Ward. So, Mr Ward, I think we fully understand your criticism of the classification structure that's proposed by the witnesses, and obviously you're free to develop that in your submissions, but I'm not sure we're assisted by a line by line analysis of what they have come up with. Either we conceptually embrace that sort of structure or we don't, in which case we will end up with something different. But I'm not sure it's a case of passing each individual word as proposed.

PN2356

MR WARD: No, that's fine, your Honour. Could I just have a moment before I respond to that, if I could.

PN2357

JUSTICE HATCHER: Yes.

PN2358

MR WARD: No wonder the Vice President is horrified by the number of pages I have got here, I imagine.

PN2359

VICE PRESIDENT ASBURY: No, not at all, Mr Ward. It's more the colour of your paper.

PN2360

MR WARD: Your Honour, I'm comfortable with that, but can I just put this proposition to you. We will be needing to explain in submissions how this structure operates in a mixed resident environment compel an employer to employ certain people at certain pay grades. And as long as no objection is taken to that, because I haven't taken the professors to that in the detail I was going to now I don't wish to frustrate the Bench. If the Bench tell me they understand the nature of our criticism then we're happy to deal with the rest in submissions. But just give me one moment.

PN2361

JUSTICE HATCHER: All right.

PN2362

MR WARD: Your Honour, on the basis of what the Bench have informed us and in the interests of the efficiency of the matter we will deal with the rest in submissions.

PN2363

JUSTICE HATCHER: All right. Just let me check with Ms Doust. Ms Doust, are you content with that approach, that is we won't be faced with some Browne v Dunn point down the track?

PN2364

MS DOUST: Yes.

PN2365

JUSTICE HATCHER: All right. Yes, thank you, Mr Ward.

PN2366

MR WARD: Thank you, your Honour.

PN2367

JUSTICE HATCHER: Is there any - yes.

PN2368

MR HARTLEY: Just when you thought it was over.

PN2369

Professors, my name is Hartley, I appear for the ANMF. I have got just a few questions for you. First I think should be pretty straightforward. Do you still have to hand a document that I think was marked JE14; I think it's sitting next to you there. I might have misheard, in which case I apologise to Mr Ward, I thought it was suggested to you, and you might have accepted, that this competency was an elective in the Certificate III program. Do you remember a question or an answer of that kind? Mr Ward said Cert IV. On that basis I don't have any questions on that then. You can put it back to one side. Thank you, professors. Now, the first substantive topic - I have two topics I would like to just address with you. Could we start with annexure C in your report, which is court book 549 for people who are looking at the electronic court book. Just let me know when you're there, professors.

PN2370

PROF MEAGHER: Yes.

PN2371

MR HARTLEY: Got it. So if you cut across four columns to the column headed 'HSU proposed internal relativities' you can see in that column that the HSU proposes one set of relativities; you see that?

PN2372

PROF CHARLESWORTH: Yes.

PN2373

MR HARTLEY: And then if you go across a further two columns you've proposed a different set of internal relativities; you see that?

PN2374

PROF MEAGHER: Yes.

PN2375

MR HARTLEY: I think it should be uncontroversial, but tell me if you disagree, that each of those relativities is different from the existing relativities in the Aged Care Award?

PN2376

PROF CHARLESWORTH: Yes, absolutely.

PN2377

MR HARTLEY: You agree with that. And the Aged Care Award is more compressed than each of those relativities?

PN2378

PROF MEAGHER: Indeed.

PN2379

MR HARTLEY: So each of the approaches that are contemplated by the HSU and yourselves involves some degree of decompressing relativities within the Aged Care Award?

PN2380

PROF CHARLESWORTH: Exactly.

PN2381

MR HARTLEY: Now, can I ask you to go to paragraph 49 in your report, which is court book 492. Just let me know when you're there, professors. I think you weren't asked questions about the Nurses Award, but you very diligently make some observations about the position of the enrolled nurse. It's obvious, but just for context you'd agree with me that AINs/PCWs, enrolled nurses, registered nurses are all working within the same workplace - - -

PN2382

PROF CHARLESWORTH: Yes.

PN2383

MR HARTLEY: Is it fair to characterise what you're saying here as being that if you engage in this process of decompression of the Aged Care Award classifications you've got to be mindful about what that means for Nurses Award classifications?

PN2384

PROF CHARLESWORTH: Indeed.

PN2385

MR HARTLEY: And is it correct to say that your opinions are that it would be necessary for any decompressed wage structure to make sense, as it were, across the entirety of that carer and nurse workforce; you wouldn't just stop at the top of the carers and leave the nurses?

PN2386

PROF CHARLESWORTH: Ideally, and if I could just add a little bit of context to that, to our decision to address that issue. In the New Zealand pay equity case that saw aged care workers classifications unpacked from 1 to 4, so that they were pinned to certificates which are analogous to our certificate levels. So level 1 was entry, level 2 was Certificate II, III/III and IV/IV, and when you got Certificate IV you had to be paid whatever work you did at that level. What wasn't thought about, and which proved then a disaster, was both your recreational and activities officers and your enrolled nurses, because the level 4 ended up being way over them, because they weren't part of that aged care work value case in the New Zealand context. So that was in our minds when we thought, well when we're having a look at the relativities they really do need to speak to the enrolled nurses. We weren't - just to be clear we weren't venturing a view of what the ANMF should be pursuing there, but saying clearly some consideration would need to be given to that.

PN2387

MR HARTLEY: Yes. And what you say about the enrolled nurses would be true also, wouldn't it, of registered nurses and nurse practitioners?

PN2388

PROF CHARLESWORTH: Yes, although they're relatively rare creatures in aged care.

PN2389

MR HARTLEY: The nurse practitioner?

PN2390

PROF CHARLESWORTH: Yes.

PN2391

MR HARTLEY: But the registered nurse much more common, albeit not as common as used to be the case?

PN2392

PROF CHARLESWORTH: Not common. They're still thin on the ground, but, yes, they are there.

PN2393

MR HARTLEY: Yes. Can I ask you to just have a look at paragraph 53, please, in your statement, and in the last two sentences you say that the possible discrepancy that you've identified might be addressed by anchoring ENs at C5 which would put ENs above level 6 as their anchored C6. The language that you use 'this might be addressed', is that in fact your opinions, that that would be a suitable way of addressing - if one adopted the approach of decompressing in the way that you've done, would you say that that's the appropriate level?

PN2394

PROF CHARLESWORTH: No. It was expressed this might be addressed.

PN2395

MR HARTLEY: Might be.

PN2396

PROF CHARLESWORTH: So it's just saying that that's one possible course of action. It may also be, given that ENs come in with a diploma qualification with no prior experience in aged care, it might be that a level 6 aged care worker, a specialist aged care worker, may in fact be more skilled. That's not for us to determine. We would for the sake of completeness though, given we're considering a classification structure and trying to make sure that there'd be some articulation then with the Nurses Award in terms of elongating that career structure into that professional level.

PN2397

MR HARTLEY: Yes. And so is it fair to summarise your evidence just now as being that you're concerned to ensure that the outcome of this process isn't something anomalous, but you don't wish to venture an opinion about in relation to ENs and RNs or NPs where the particular package should be; is that a fair summary?

PN2398

PROF CHARLESWORTH: Yes, that is a fair summary.

PN2399

MR HARTLEY: Thank you, professors. You wouldn't disagree with me, would you, that enrolled nurses do clinical placements before entering the workforce?

PN2400

PROF CHARLESWORTH: I'm not aware that they do.

PN2401

MR HARTLEY: Do you disagree that they do or you just don't know one way or the other?

PN2402

PROF CHARLESWORTH: I don't know.

PN2403

MR HARTLEY: Thank you. So that's the first large topic. The second large topic perhaps might be best addressed by starting at page 22 of your annexure A, which I think is court book 526. Just let me know when you're there, professors.

PN2404

PROF MEAGHER: Twenty-two, did you say?

PN2405

MR HARTLEY: Twenty-two, yes, headed 'Level 7 supervisor.'

PN2406

PROF MEAGHER: Yes.

PN2407

MR HARTLEY: Thank you. It's correct, isn't it, one of the matters that's informed the drafting of your classification structure is the desirability of ensuring career progression opportunities?

PN2408

PROF CHARLESWORTH: Yes.

PN2409

MR HARTLEY: This part of the document is, isn't it, a marked up version of the HSU's draft determination in relation to the Aged Care Award?

PN2410

PROF CHARLESWORTH: Yes.

PN2411

MR HARTLEY: And the black text is the HSU and the red text is your proposed amendments?

PN2412

PROF CHARLESWORTH: Correct.

PN2413

MR HARTLEY: So we're talking here at level 7. If you can just look at the chapeau under the bold heading 'Description of work', we're talking about:

PN2414

Provision of and support for the provision of person set of care to a diverse range of frail, dependent older adults.

PN2415

Do you see that?

PN2416

PROF CHARLESWORTH: Yes.

PN2417

MR HARTLEY: And scrolling down - well, in fact there you see to the left of where we just read 'All streams', and looking down also at accountability 'All streams.' Here, unlike at other levels, the classification doesn't distinguish between for example the personal care stream or the general stream or the admin stream. Is that the case?

PN2418

PROF CHARLESWORTH: Yes.

PN2419

MR HARTLEY: Now, both yourselves and the HSU, staying on page 22, middle of the page, you see that one of the mark-ups is the deletion of the word 'advanced' in qualifications and experience. But it's the case I gather from this that both yourselves and the HSU propose at level 7 a qualification higher than Certificate IV. Is that how we understand this?

PN2420

PROF CHARLESWORTH: Yes, or equivalent knowledge and skills and experience at level 5 or 6.

PN2421

MR HARTLEY: Yes.

PN2422

PROF CHARLESWORTH: Yes.

PN2423

MR HARTLEY: Now, in terms of personal care, leaving to one side general or admin type work, the situation is, isn't it, that there is no diploma that exists in relation to aged care personal or direct care. Do you agree with that?

PN2424

PROF CHARLESWORTH: I agree with that, yes.

PN2425

MR HARTLEY: And there is no advanced diploma in aged care personal care or direct care; do you agree with that?

PN2426

PROF CHARLESWORTH: That's correct.

PN2427

MR HARTLEY: Thank you. However, the enrolled nurse is a diploma qualification; do you agree with that?

PN2428

PROF CHARLESWORTH: Indeed, yes.

PN2429

MR HARTLEY: Have you seen the ANMF's proposed classification structure for the Aged Care and for the Nurses Award?

PN2430

PROF CHARLESWORTH: Yes.

PN2431

MR HARTLEY: Yes. You're aware that the ANMF's proposed classification structure for the Aged Care Award has Cert IV as the highest qualification?

PN2432

PROF CHARLESWORTH: Yes.

PN2433

MR HARTLEY: And the AIN qualification in the Nurses Award would likewise have Cert IV as the highest?

PN2434

PROF CHARLESWORTH: Yes.

PN2435

MR HARTLEY: And then a diploma level 4 enrolled nurses. It's the case, isn't it, that a person who wished to advance from a Cert IV level in aged care personal care to a diploma already has the option of going and doing a diploma of nursing?

PN2436

PROF CHARLESWORTH: Yes.

PN2437

MR HARTLEY: So in relation to personal care work in aged care that provides already, doesn't it, a career progression opportunity?

PN2438

PROF CHARLESWORTH: It does to the extent to which enrolled nurses are employed in that particular facility, yes.

PN2439

MR HARTLEY: And so I suppose the punch line of this is - I will put a proposition to you and invite you to comment on it if you'd like. It's not necessary or desirable to insert into the Aged Care Award in relation to personal care work a diploma or advanced diploma level.

PN2440

PROF CHARLESWORTH: This supervisor level as you mentioned at the beginning is covering all streams, and is probably most applicable if one thinks of - they're called different names, but the executive chef for example, or the large facility, you know, the head of gardening, or, you know, if there's maintenance, the head of maintenance; also in administration. So there will be someone who will be in charge of the administration, who will be supervising the work of the people in the occupations that are covered by that particular one. I think it would be fair to say it's probably less aimed in the personal care work. Yes.

PN2441

MR HARTLEY: Professor Meagher, do you agree with that?

PN2442

PROF MEAGHER: (No audible reply)

PN2443

MR HARTLEY: Yes. Would an appropriate drafting response to that sort of observation or evidence be to limit this classification, assuming something like the HSU or yourselves' proposal were to be adopted, so limit level 7 to the non-personal care streams?

PN2444

PROF CHARLESWORTH: In terms of - in terms of the way in which work is currently organised the personal care work will be supervised usually by - you know, limited supervision, but some supervision by a registered nurse. I suppose because this - any new classification structure has to last beyond this year, I think it's possible to have something like this, because it may be in particularly large facilities that you have somebody who is supervising the personal care staff. As you would be aware different aged care organisations organise work differently, and particularly in multi facility organisations there might be someone who is at that supervisor level who's looking after personal care, but more in an administrative sense. So I'm thinking of the person who at head office is doing the recruitment for example for a facility that may or may not be in that state, but they're the avenues through which that work comes. So leaving it like this I think would be probably preferable rather than saying that this does not apply to personal care. It's certainly my view.

PN2445

MR HARTLEY: So at least unless and until someone creates a diploma or advanced diploma qualification in personal care direct work it would necessarily be a nil set, wouldn't it?

PN2446

PROF CHARLESWORTH: No, because they might have a diploma as Gabrielle was suggesting in human resources. So, you know, there may be some relevant diploma they might have.

PN2447

PROF MEAGHER: I think - if I may - I think the idea that creating a career path from entry level in personal care, but in a sense the only further roles beyond personal care work are into enrolled nurse, and registered nurse is too narrow, and that people might realise that they've got really good people management skills and an alternative career path perhaps into management or administration could be facilitated by just leaving this open. It may not be much used, but as Sara says that's how things are organised today. But leaving some opening for alternative forms of progression in the same organisation that you're happy working in, that you know the people, that there's a role that the organisation thinks you could do well, and that they'll help support you to train and you can have a career path in that direction. It will be good to have that there.

PN2448

MR HARTLEY: So far as you had a person who was supervising personal care workers it would be preferable, would it not, for that person's further qualification

to be a diploma or advanced diploma to be relevant to care work, rather than for example human resources?

PN2449

PROF CHARLESWORTH: If that's the direction they wanted to go.

PN2450

MR HARTLEY: Yes. Well, in terms of who it is that's actually supervising care workers, people at for example a Certificate IV level, if they're being supervised by another person it would be preferable that that person have as a diploma or an advanced diploma a higher qualification in respect of that work, rather than in respect of for example human resources?

PN2451

PROF CHARLESWORTH: If they - if they remain in personal care, absolutely.

PN2452

MR HARTLEY: Yes.

PN2453

PROF CHARLESWORTH: Yes.

PN2454

MR HARTLEY: If I could just have a moment. Thank you, professors, that's everything from me.

PN2455

JUSTICE HATCHER: Ms Doust?

PN2456

MS DOUST: Thank you. Professors, just on that last question about level 7 if I just ask you to go to the qualifications and experience descriptor on page 22 of that document. Do you have that there?

PN2457

PROF MEAGHER: Yes.

PN2458

PROF CHARLESWORTH: Yes.

PN2459

MS DOUST: You see there's a reference to a diploma level qualification or equivalent knowledge, skills and experience.

PN2460

PROF CHARLESWORTH: Yes.

PN2461

MS DOUST: In the personal care stream how would you characterise the equivalent knowledge, skills and experience of a personal care worker equivalent to a diploma level?

PN2462

PROF CHARLESWORTH: Well, what we've got there is that they have equivalent knowledge, experience in the aged care industry and experience at level 5 and 6, so that over the years they've developed that deep expertise and are able to do the supervision.

PN2463

MS DOUST: All right. So in your opinion this classification is something that's apt to describe a highly skilled personal care worker?

PN2464

PROF CHARLESWORTH: At level of supervisor they're not doing the hands on personal care.

PN2465

MS DOUST: Yes.

PN2466

PROF CHARLESWORTH: But somebody who is organising their work for example, and so arranging their training, you know, arranging for doing some kind of performance appraisal, et cetera, that's - - -

PN2467

MS DOUST: Sorry, I should have someone who's obtained their skills and experience in the performance of personal care work.

PN2468

PROF CHARLESWORTH: Yes.

PN2469

MS DOUST: Can I just go back; you were asked about enrolled nurses a few moments ago - - -

PN2470

JUSTICE HATCHER: Sorry, Ms Doust, before you move on to level 7 I just noted that it's labelled as a supervisor, but (indistinct) uses the word 'management' which is an important distinction. And I also took note of your reference to the person perhaps holding a qualification of human resources. Is this person in fact a manager rather than a supervisor?

PN2471

PROF CHARLESWORTH: I think that's - if you're in the banking industry you're called a manager of the moment, you're not a frontline teller. The words are used, you know, kind of interchangeably. I think that team management describes the work of a supervisor. It's not being a manager. There's still somebody who sits above this supervisor, and that will be - in the case of personal care work it will be the director of nursing. In the overall facility management there will be a facility manager to whom the supervisor for example in terms of kitchen services will be reporting.

PN2472

JUSTICE HATCHER: Thank you.

PN2473

MS DOUST: In a response you gave a few moments ago to a question from my friend about enrolled nurses, Professor Charlesworth, in your response you said - you gave this qualification to your answer - you said something about to the extent to which enrolled nurses are employed. Do you recall giving that answer?

PN2474

PROF CHARLESWORTH: Yes.

PN2475

MS DOUST: Could I just ask, did you intend to suggest by that that there's limited instances where enrolled nurses are employed in the aged care industry, or you have some particular observation of that?

PN2476

PROF CHARLESWORTH: Yes. And actually Professor Meagher has documented that closely in one of her original reports. We've seen an absolute diminution of the presence of enrolled nurses in aged care, but perhaps she should answer that.

PN2477

PROF MEAGHER: Yes. We don't have - we don't have very reliable data since 2016, but there's been a reduction in the employment of enrolled nurses from 14 per cent in 2003 to 9 per cent in 2016, and a corresponding decline from 21 per cent of registered nurses to 15 per cent of registered nurses, and that will probably increase because of the new regulation. And across that type it also will fall into Allied Health workers. So the growth has just been in personal care workers.

PN2478

MS DOUST: Yes. Just one moment. I'm sorry, did you express the view, Professor Meagher, that you thought that that trend would change in respect of enrolled nurses, or just in respect of registered nurses?

PN2479

PROF MEAGHER: No, no, registered nurses. In relation to enrolled nurses I wouldn't speculate. All I'm saying is, you know, there was no requirement to have a registered nurse in 2016. Now there is one you'd expect, you know, to be more of them employed.

PN2480

MS DOUST: Yes. And can I ask either of you, do you have any knowledge of any reason why there's been a diminution in the number of enrolled nurses in the industry?

PN2481

PROF CHARLESWORTH: Well, I've actually asked employers this, and a response is frequently it will be more expensive and they have a restricted scope of practice. You train up a personal care worker to be able to administer medication and they're cheaper.

PN2482

MS DOUST: Professor Meagher, anything to add to that?

PN2483

PROF MEAGHER: Nothing to add to that.

PN2484

MS DOUST: If I just go back to an answer that you gave much earlier, Professor Charlesworth, I think you indicated in response to a question that you'd seen, I think you said this was in regional or country areas, that there were personal care workers who were stuck at level 1. Do you recall giving - - -

PN2485

PROF CHARLESWORTH: Yes, but that was in home care.

PN2486

MS DOUST: In home care?

PN2487

PROF CHARLESWORTH: In home care, yes.

PN2488

MS DOUST: All right. Are you able to just elaborate on what your observation was of that phenomenon?

PN2489

PROF CHARLESWORTH: It was accepted as both - I'm thinking of one particular not for profit agency up near Horsham. It was because it was felt that they couldn't afford to, even though there wasn't many cents difference between level 2 or level 3, but it was simply the way things are done and people accepted in regional areas that lower wages prevail.

PN2490

MS DOUST: Yes. Can I just go back to an answer that you gave, Professor Charlesworth, I think in response to a question that came from the president about the relative length or complexity of the classification structure. You indicated at one stage that the classifications could be simpler, but you then run the risk of level 6 work as described in the structure being performed by someone at level 4. Do you recall giving that answer?

PN2491

PROF CHARLESWORTH: Not in exactly those terms, but, yes, that there was - particularly in the unpacking process and where the unpacking has, if you like, really taken place, put aside the question of relativities, is between your cert qualified worker at level 4, your senior care worker, level 5, and your specialised care worker at level 6. Those latter two classifications don't exist at the moment.

PN2492

MS DOUST: Yes. And so do I take it from that that you regard the articulation of a different level of skill being required in those two roles as necessary to create that additional career progress for those workers?

PN2493

PROF CHARLESWORTH: Absolutely.

PN2494

MS DOUST: Thank you. Just excuse me for a moment. No, that's all, thank you.

PN2495

JUSTICE HATCHER: All right. Thank you for your evidence, Professor Charlesworth and Professor Meagher, you're free to go.

PN2496

PROF CHARLESWORTH: Thank you.

PN2497

PROF MEAGHER: Thank you, your Honour.

<THE WITNESS WITHDREW

[4.31 PM]

PN2498

JUSTICE HATCHER: Anything else we need to deal with today? I am just looking at tomorrow's program. Since we're keeping on target is it likely that there won't be anything after lunch?

PN2499

MR WARD: That's my understanding. Yes.

PN2500

JUSTICE HATCHER: All right, we will now adjourn and we will resume at 10 am tomorrow morning.

ADJOURNED UNTIL WEDNESDAY, 06 DECEMBER 2023

[4.32 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

KAREN MARSHALL, AFFIRMED	PN1091
EXAMINATION-IN-CHIEF BY MR GIBIAN.....	PN1091
EXHIBIT #HSU100 WITNESS STATEMENT OF KAREN MARSHALL DATED 21/09/2023	PN1105
CROSS-EXAMINATION BY MS RAFTER.....	PN1113
RE-EXAMINATION BY MR GIBIAN.....	PN1149
FURTHER CROSS-EXAMINATION BY DR RISSE.....	PN1156
THE WITNESS WITHDREW	PN1166
VIRGINIA ELLIS, AFFIRMED.....	PN1170
EXAMINATION-IN-CHIEF BY MR GIBIAN.....	PN1170
EXHIBIT #HSU101 SUPPLEMENTARY WITNESS STATEMENT OF VIRGINIA ELLIS DATED 20/09/2023	PN1182
CROSS-EXAMINATION BY MS RAFTER.....	PN1194
RE-EXAMINATION BY MR GIBIAN.....	PN1251
THE WITNESS WITHDREW	PN1269
JESSICA HOOD, AFFIRMED	PN1279
EXAMINATION-IN-CHIEF BY MS HARRISON.....	PN1279
EXHIBIT #UWU26 WITNESS STATEMENT OF JESSICA HOOD TOGETHER WITH ANNEXURE JH1 FILED ON 15/09/2023	PN1289
CROSS-EXAMINATION BY MR WARD	PN1292
EXHIBIT #JE12 RESIDENTIAL AGED CARE AND COMMUNITY SERVICES ENTERPRISE AGREEMENT 2016.....	PN1471
RE-EXAMINATION BY MS HARRISON.....	PN1490
THE WITNESS WITHDREW	PN1494
JULIE HOLMES, AFFIRMED.....	PN1495
EXAMINATION-IN-CHIEF BY MS HARRISON.....	PN1495

EXHIBIT #UWU27 WITNESS STATEMENT OF JULIE HOLMES WITH ANNEXURES FILED ON 15/09/2023	PN1504
CROSS-EXAMINATION BY MS RAFTER	PN1506
EXHIBIT #JE13 BLUECARE AND SUPPORT ENTERPRISE AGREEMENT 2023	PN1546
RE-EXAMINATION BY MS HARRISON.....	PN1616
THE WITNESS WITHDREW	PN1622
GABRIELLE ANNE MEAGHER, AFFIRMED.....	PN1646
SARA CATHERINE MARY CHARLESWORTH, AFFIRMED	PN1648
EXHIBIT #102 JOINT SUPPLEMENTARY STATEMENT OF PROFS CHARLESWORTH AND MEAGHER PLUS JOINT REPORT AND ANNEXURES.....	PN1670
EXHIBIT #HSU103 CARE WORKERS EMPLOYEES - DEPARTMENT OF FAMILY AND COMMUNITY SERVICES - AGEING DISABILITY AND HOME CARE (STATE) AWARD 2014	PN1789
EXHIBIT #JE14 AUSTRALIAN GOVERNMENT DOCUMENT HLTHPS007 - ADMINISTER AND MONITOR MEDICATIONS	PN2098
THE WITNESSES WITHDREW	PN2353
GABRIELLE ANNE MEAGHER, RECALLED	PN2353
SARA CATHERINE MARY CHARLESWORTH, RECALLED.....	PN2353
THE WITNESSES WITHDREW	PN2497