

IN THE FAIR WORK COMMISSION

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

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

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

RESPONSE TO QUESTIONS POSED BY ROSS J, PRESIDENT, AT HEARING

1. In the HSU's Closing Submissions dated 22 July 2022, it accepted the propositions that had been advanced by the Commission in Background Paper 1 as being uncontentious, and advanced a further two propositions, including the proposition that:

Home care workers work with minimal supervision, and the increase in acuity and dependency of recipients of aged care services means that these workers are exercising more independent decision-making, problem solving and judgment on a broader range of matters.

2. Question 2 of Background Document 5¹ asked the Joint Employers whether they agreed that the above proposition was uncontentious.
3. In response, the Joint Employers contended in their Submissions in Reply at 5.4 that:

the second proposition fails to take into consideration the effect of indirect supervision and structured proposals used to replace direct supervision.

4. During the course of the hearing before the Full Bench on 24 August 2022, there was an exchange between the President and Mr Gibian SC about the above issues at PN 14603 and following. Mr Gibian said (at PN 14605):

There was some evidence and there was cross-examination about the capacity to telephone someone, a supervisor or a care manager, and obtain some kind of instructional assistance if there was a difficulty encountered in the course of the provision of the service and that that's the degree of responsibility.

¹ Referred to in Background Document No. 8 at [14] – [19]

5. As PN 14506, the President asked:

Was there any evidence about the utilisation of that?

6. In response the HSU undertook to provide further information to the Commission by close of business on 26 August 2022.
7. The evidence of the home care lay witnesses was that such workers, with very limited exceptions, work alone. The limited exceptions included:
- a. where two carers were allocated to a particular service²; and
 - b. where a team leader or supervisor attended a service with the worker. For example, Ms Seifert, a team leader said that, prior to the COVID-19 pandemic, she aimed to attend at least two client visits per week³. She was usually required to supervise between 15 and 55 workers, hence the direct supervision of workers employed by that company would have been minimal.
8. At [109] to [113] of its Final Reply Submission dated 19 August 2022, the HSU responded to ABL's characterisation of home care workers as being under "indirect supervision". The gravamen of that rejoinder emphasised the extent to which home care workers were required to independently exercise judgment and problem solving skills, and observed that:
- a. the cross-examination by ABL of the home care lay witnesses revealed in several instances that the workers were uncertain about the persons to whom they reported, or who held the position to whom they reported, from which it might safely be inferred that any direct or indirect supervision was minimal at best;
 - b. the cross-examination by ABL of the home care lay witnesses had been:
 - i. directed to eliciting the existence of a person who held a particular role (frequently referred to as the employee's "boss");
 - ii. focused upon extracting an admission that the worker *could* call such person in the event of uncertainty or difficulty (falls and the like);
 - iii. did not explore the extent to which the worker in fact had recourse to their supervisor; and

² For example, Evans, DHB Vol 3, Tab 248, p 12846, [38(b)]

³ Seifert, DHB Vol 3, Tab 241, p12508, [71]

- c. the evidence about the persons in supervisory roles was that they had many workers to supervise and significant other duties, meaning that as a matter of practicality, such person could provide little in the way of guidance, instruction, oversight, mentoring or other assistance⁴.
9. In addition to what the HSU put in its Reply Submission, it is relevant, in considering the import of the indirect supervision or protocols that:
 - a. given the proximity of the worker to the client, the interpersonal interaction taking place in the service and/or the circumstance confronting the worker it is not always appropriate or feasible for the worker to make a telephone call for guidance about a particular problem as it arises, as Ms Wood's evidence demonstrated⁵;
 - b. persons in supervisory roles are themselves affected by the increasing demands of the work in a changed regulatory environment, and have substantial duties in addition to their supervisory duties, such as rostering and client liaison⁶;
 - c. given the nature of home care work which requires workers to organise and perform their work in providing care to clients within strict time limits, it is not always practical or feasible for home care workers to interrupt an appointment to seek support or guidance from a supervisor⁷,
 - d. home care workers are not always able to reach and obtain a response from a registered nurse or supervisor during the course of an appointment when an issue arises concerning that client⁸, and
 - e. home care workers do not always have access to ready support or guidance on weekends⁹ or afterhours¹⁰.
10. In the circumstances set out above, home care workers are required to exercise independent judgment and problem-solving skills to deal with issues as they arise during the course of a service.

⁴ Seifert, DHB Vol 3, Tab 241, p12504-12505, [38] – [43]

⁵ Wood XXN 04 May 2022 PN5619

⁶ As to which, see the evidence of Mr Doherty and Ms Seifert.

⁷ For example, Evans, DHB Vol 3, Tab 287, p 15553, [38](bb); Vincent, DHB Vol 3, Tab 294, p 15673, [66](t).

⁸ For example, Digney XXN 03 May 2022 PN4543-4545; Susan Toner, DHB Vol 3 p 16255 at [36].;

⁹ For example, Heenan, DHB Vol 3, Tab 290, p 15608, [12]-[21].

¹⁰ For example, Wood, DHB Vol 3, Tab 277, p 15098-15099, [58]-[59].