



**TRANSCRIPT OF PROCEEDINGS**  
*Fair Work Act 2009*

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

**AM2020/99 and others**

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

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

**10.06 AM, TUESDAY 12 DECEMBER 2023**

**Sydney**

**Continued from 08/12/23**

PN4655

JUSTICE HATCHER: Just some machinery matters. Mr McKenna, you sent an email asking for some additional documents to be marked as exhibits, as I understand it?

PN4656

MR McKENNA: Yes, I'm instructed that we did, your Honour.

PN4657

JUSTICE HATCHER: All right. Unless any party opposes it, can I just direct you to send in a list of the documents and what they're markings would be and we'll deal with that administratively?

PN4658

MR McKENNA: Commission pleases.

PN4659

JUSTICE HATCHER: Mr Ward, you sent in a document which was called for last week, which you want to have marked as an exhibit?

PN4660

MR WARD: Yes, if your Honour please.

PN4661

JUSTICE HATCHER: Is there any opposition to that, Mr Gibian?

PN4662

MR GIBIAN: No, your Honour.

PN4663

JUSTICE HATCHER: All right. So email from Lucinda Shields, dated 16 November 2023, concerning Uniting Springwood increased COVID-19 precautions will be marked exhibit JE23.

**EXHIBIT #JE23 EMAIL FROM LUCINDA SHIELDS WITH  
SUBJECT 'UNITING SPRINGWOOD: INCREASED COVID-19  
PRECAUTIONS - MASKS AND RAT TESTING NOW REQUIRED',  
16/11/2023**

PN4664

JUSTICE HATCHER: Are there any other administrative matters, before we begin? No? All right, Mr Gibian.

PN4665

MR GIBIAN: Your Honour and members of the Full Bench, as the Full Bench is aware, the issues remaining to be considered in this stage of the proceedings were separated into two categories. The weight adjustment issues, dealing with what further increase ought to apply, with respect to what we call direct care employees, which I'll come back to in a moment, and what increase is justified, on the basis of the evidence in stage 1 of the proceedings and as supplemented by

further evidence in this stage of the proceedings, with respect to what we call indirect care employees.

PN4666

The second class of issues would be classification and allowance issues. In broad, we would frame that as the question as to what steps the Commission should take to address what were identified in the evidence in stage 1 of the proceedings, as the deficiencies in the current classification structures and wage rates, so far as my client is concerned, relevantly, to the Aged Care Award and the SCHADS Award, the homecare classifications within the SCHADS Award.

PN4667

I want to come back to analyse a little further what we say the difficulties are or the difficulties which were referred to in the evidence in stage 1 of the proceedings, which was the way in which the classification structures are currently written and constructed. But, in brief, the reference was made to the rudimentary nature of prescriptors lacking in definition or clear basis for progression and the compressed nature of the wage rates, namely, the extremely small steps that existed between the relevant classifications and the very limited capacity for progression, particularly for those actually providing direct personal care, either in a home care context or residential care context.

PN4668

As identified at the outset of the proceedings there are perhaps, within that broader question, there's a subset of more discrete issues. There's probably more than I identified but we broadly categorised them into six parts. My client's proposal to move the home care classifications or home care work, providing care and assistance to aged persons in their homes from the SCHADS Award into the Aged Care Award. The question as to whether it will all be distinct classifications, structures and wage rates for direct and indirect care work in the Aged Care Award, in a residential care context.

PN4669

Thirdly, the question as to how medication competency and specialist work, particularly in relation, on our application, to dementia care palliative care palliative care and what's referred to as the household model of care ought to be dealt with. Whether it ought to be recognised by way of providing for further progression in the classification structure or an element of further progression in classification structure or, as we understand what the employers propose, by way of allowance.

PN4670

Fourthly, the changes proposed by the ANMF to the AIN or nursing assistant classification in aged care.

PN4671

Fifthly, other differences between my client's proposal and that of the ANMF, so far as the aged care and to the extent that it's sought to be duplicated for the AIN classifications in the Nurses Award. Primarily the reference to supervision, delegation and directions of a registered nurse, and there's another issue in relation to reference to medication administration.

PN4672

Finally, there's perhaps a grab bag of other matters raised by the joint employers' proposals, with respect to the Aged Care Award, particularly. Primarily, the proposal to remove level 7 from the aged care classifications and various other changes to the thresholds for progression between classifications as they propose them.

PN4673

Obviously, and as I think was raised with you in opening last week, there is some overlap between those two sets of issues, but I propose to address them in that order, if it's convenient. In particular, we accept that there's obviously a relationship between wage when it comes to the side of direct and indirect care and the structure that will be proposed within the Aged Care Award for those classifications.

PN4674

We also recognise that the extend of the further increase in direct care, particularly justified on work value grounds may interact with the way in which the Commission considers, ultimately, some or part of those issues might be dealt with by way of further gradations or bigger jumps, as it were, in the classification structure, in part, as we propose.

PN4675

So what I propose to do, if it's convenient, is, firstly, address the wage adjustment issues dealing with indirect care and then the further increase for direct care, with the discrete issues the Commission wished to be addressed about, concerning the conservative impact of COVID and the question of under staffing, then turn to the proposal that we've made, with respect to classification descriptors and classification structures.

PN4676

I will address on the classification descriptors, Mr Saunders is going to address on the way in which we've endeavoured to go about dealing with the internal relativities to try and incorporate within the Aged Care Award particularly, but also the home care classifications, be they in the Aged Care Award or the SCHADS Award, to create meaningful progression in rates between the classifications, to recognise acquisition of skills and qualifications and experience.

PN4677

I'll then address those grab bag of six issues as briefly as I can, at the conclusion of the submissions, if that is convenient.

PN4678

Can I turn then to firstly address the wage adjustment issues? I think that it's sufficiently clear what we say, at least, the starting point of the consideration of the Commission, in terms of what further wage adjustment is appropriate is having regard to the stage 1 decision but, briefly, to recap, we think it is, or in our submission it is - the core findings out of stage 1 of the proceedings were that so far as the class of direct care employees are concerned, that the existing rates did not properly compensate the employees for the value of the work performed. That it was not possible to determine or appropriate to determine a final increase at that

stage but, rather, to determine an interim increase that sat comfortably below the level of increase that may be determined on a final basis and that the Full Bench was satisfied that with respect to the various categories of direct care employees, that both in the Aged Care Award, the SCHADS Award and the Nurses Award, that the interim increase of 15 per cent was plainly justified by work value reasons. Those findings, at paragraphs 957, 961 and 966 of the stage 1 decision.

PN4679

We took the expression 'plainly justified' to mean 'amply', that is, as foreshadowed. The conclusion of the Full Bench was that further increases were justified, albeit by a yet unquantified amount, on the evidence as existed at that point.

PN4680

Again, to repeat, so far as indirect care is concerned the finding, as we understand it, was that with respect to support of administrative employees, the evidence was not as clear and compelling and varied between classifications such that the Full Bench did not determine it appropriate to set an interim increase at that stage. But, particularly at 926, made clear that it intended to return to that question at this stage of the proceedings, on the basis of the evidence that had already been heard and findings that had already been made in the first stage of the proceedings, together with any supplementary evidence which the Commission has now heard in stage 3.

PN4681

Your Honour the President asked me a question about the composition of those two categories of direct and indirect care at the outset. I think it's probably sufficiently clear to everyone, but (indistinct) in terms of direct care, in the first stage 1 decision, in the stage 1 decision, I should say, was those personal care workers covered by the Aged Care Award, home care workers covered by the SCHADS Award, at present, and registered nurses, enrolled nurses and assistants in nursing and nurse practitioners, under the Nurses Award, engaged in aged care work.

PN4682

As the Full Bench knows, that category, at least so far as the category to which the interim increase applied, was expanded to recreational activity officers, head chefs, cooks. Perhaps it's necessary to say something briefly about that. We regard the recreational activity officers as being within the direct care category, as it may be. They were under the Aged Care Award as it existed prior to the interim increase being – or the variations giving effect to the interim increase being implemented, recreational officers were, or recreational lifestyle officers was listed as an indicative task within the personal care stream in the award, as it had been constructed since was first made.

PN4683

We also observed that the decision of the Full Bench, in the second stage of the proceedings, at paragraph 70 of the stage 2 decision, if it's sufficiently clear to refer to them that way, referred to that class of employees as performing work - that the work performed by that class of employees is aligned to the work of direct

care workers, and that's certainly as we understand the evidence that was heard in the first stage of the proceedings.

PN4684

The head chef, cook, or the most senior catering employee, perhaps falls into a different category. I don't think we could say that that is a direct care employee, in the sense that that I think we understand that expression was sought to be used, that is, involved, in a substantial way, in the direct physical care of residents in an aged care facility. Rather, the interim increase was justified on the basis of evidence particular to the changes in food services and catering, in a residential context, particularly the increased focus upon nutrition and personal choice and the impact that that had on the most senior employee in the food services area, in decision making and management, in terms of the implementation of catering and food services within the residential facility.

PN4685

In that context, when we come to this stage of the proceedings, the Commission would need to separately consider what increase is appropriate for that class of employee, together with the remaining indirect care employees in the support, administrative and (indistinct) services roles.

PN4686

In that respect we did just want to say, at the outset, that the expression 'indirect care' is used, by my client at least, advisedly, that is, on the understanding of the submission that the Full Bench will understand that we make that those roles are not unconnected to care, they are part of - those workers are part of a care team, providing an overall suite of care and services to the residents in a residential facility but in a less direct way, in the sense of less substantial involvement in direct physical care of the residents. Those classes of employees that remain in the indirect stream are those that are now within schedule B.1 of the award, as it exists subsequent to the variation given effect to the interim increase being the administrative employees, cleaning and laundry, maintenance and gardening and the remainder of the food services employees, outside of the most senior food services employee and chef category.

PN4687

As to the approach that the Commission will now adopt, obviously enough section 157(2)(a) continues to require the Commission to be satisfied that any variation to minimum award wages be justified by work value reasons, with respect to the relevant classes of employees that are being dealt with.

PN4688

In our submission, it's sufficiently clear, from the stage 1 of the decision, or the stage 1 decision, I should say, that the Commission is satisfied that a further increase is justified for all those employees within the direct care category and that it is likely, given the basis of the determination with respect to that matter in stage 1 of the proceedings that the same or a closely comparable increase would be justified, with respect to all of the classes of direct care employees. I say about leaving to one side the issues which arise in relation to the proposed changes to the classification structures that might impact differently on different levels within the classification structure.

PN4689

So far as the indirect care employees are concerned, I wanted to say something briefly about the way in which we would ask the Commission to address the existing and further evidence, with respect to that class of employees.

PN4690

As I observed in the stage 1 decision, at paragraph 900, the Full Bench - or one aspect of the evidence, with respect to the indirect care employees that was identified was there was some variation between the evidence, with respect to different classes of the employees falling within the indirect category, by which we understood that to mean that the evidence, as to the impact of the various work value considerations that were subject of the evidence, appeared to vary, to some degree, between their impact on administrative as opposed to food services or cleaning or laundry or maintenance workers.

PN4691

That's not a matter that we can disagree with, in any absolute sense. There may be some argument as to the degree to which there is such variation. It is certainly our submission that the - as I'll describe, at least, in overview in a moment, that many and the most significant elements of the considerations that the Full Bench identified as relevant to the assessment of the work value reasons effecting the work of direct care employees also having an effect and a significant effect, on the work of all of those categories of direct - of indirect care workers, I should say.

PN4692

Do we say that that is identical, with respect to each of those classes? Obviously it's not a position which we could say it's identical, with respect to each of the classes.

PN4693

The extent to which that is or gives rise to a question as to whether differential increases should arise, with respect to different classes of workers, is a matter which depends upon the degree of exactitude to which one thinks it is possible to engage, in embarking on the work value assessment.

PN4694

The way in which we would ask the Full Bench to consider the evidence, in light of the observations to the different impact upon different classes of employees is something akin to the way in which the Full Bench dealt with the differences between home care and residential care, in terms of personal care work, in the stage 1 of the decision. I don't think I probably need to go to it, but - and the members of the Full Bench will recall, particularly at paragraphs 930 and 931, in a conclusionary sense, at least.

PN4695

The Full Bench acknowledged that there were differences between the nature of the work and the impact of various of the considerations relevant to work value assessment between the work of a personal care worker in a residential context and the personal care worker or home care worker providing care to aged persons in the home, but, ultimately, accepted that, I think by reference to a submission ultimately that Mr Ward made, that the Full Bench might weigh up all of the

differences and similarities and come to the view that, on balance, the same outcome was appropriate.

PN4696

Without wishing to caricature it too much, in home care although there has been a, as the Full Bench knows, very substantial increase in the acuity in frailty and care needs of the residents being dealt with. Maybe, as an overall cohort, they are a level lower, in terms of care needs and frailty, because of the way the system is constructed, than those that are being dealt with in a residential care context, that being the whole purpose of the system.

PN4697

But, on the other hand, the home care workers are performing work in a manner which is they are on their own, on the whole, making - providing care, making judgments and decisions without working in a team environment in a way which is available in a residential care context. So it's not - that type of approach of weighing differences and similarities is a matter that doesn't necessarily mean that there's some different outcome is appropriate for a different class of employees, simply because it is possible to identify some difference in degree or type of event to the various changes that have been - - -

PN4698

DEPUTY PRESIDENT O'NEILL: So that was somewhat of a swings and roundabouts approach.

PN4699

MR GIBIAN: Yes.

PN4700

DEPUTY PRESIDENT O'NEILL: What do you say - I mean you don't need to say it now, but what the roundabouts are, in relation to the other classes of indirect employees? I can see the swings, perhaps the roundabouts are a little less clear.

PN4701

MR GIBIAN: I understand. I understand what your Honour says. Perhaps I was approaching it in two levels. Firstly, there's a question about the difference between different types of workers falling within the indirect care category, as it were, that that is probably more a situation in which there might be swings and roundabouts, as it were.

PN4702

If your Honour is talking about a comparison between indirect care and the direct care - - -

PN4703

DEPUTY PRESIDENT O'NEILL: The point I was making was simply, in not making a distinction between the home care employees and residential care employees, one of the differences was that the home care employees had less supervision, were more autonomous, so there were some considerations that were perhaps of higher value that didn't exist in the residential facility. I'm not quite so



clear how that balancing act applies, in the case of direct care workers and indirect care employees.

PN4704

MR GIBIAN: Yes, I understand what your Honour says. Ultimately, it's a matter of weighing the degree of impact of various considerations relevant to work value for both classes of employees.

PN4705

What I wanted to do, and I'm going to do it at a relatively high level, without descending into too much of the evidence because we've been through it a number of times already, but we emphasise the degree to which the significant, at least, considerations taken into account by the Full Bench, in the stage 1 decision, with respect to direct care workers, that they have an impact, and a significant impact, to indirect care workers, in the nature of the work that they are performing and the skills and responsibilities, et cetera, required.

PN4706

Whether it's the same level and warrants the same outcome in a sort of swings and roundabouts sense, is a matter, ultimately, for the Commission's assessment, obviously.

PN4707

DEPUTY PRESIDENT O'NEILL: Just before you move off there, in terms of the findings of the Bench in stage 1, they also make the observation, in paragraph 901, that there wasn't the benefit of the Spotlight skills analysis, in respect of the indirect employees. That was obviously a powerful consideration in the interim increase for direct carers. Is there anything we should make of the fact that there remains no evidence about the invisible skills directly, in respect of indirect carers?

PN4708

MR GIBIAN: What we would say about that is that what the evidence demonstrates, and we heard more of it last week, is that the work of the indirect care workforce is also subject to the same type of standards and expectations, in terms of the delivery of person-centred or relationship based care, to residents, which gave rise to the Spotlight invisible skills consideration for the emotional skills, communication skills, relationship skills, which were found to be significant, by the Full Bench, in the stage 1 proceedings. And that the evidence, both in the stage 1 proceedings itself and as it's been supplemented, makes clear that the indirect care workers are also intended to, and do perform work involving those types of skills.

PN4709

JUSTICE HATCHER: Mr Gibian, you mentioned, a little while back, section 157, which has obviously altered since the stage 1 decision, are you going to return to that? There's one specific matter I want to raise with you.

PN4710

MR GIBIAN: Yes, your Honour.

PN4711

JUSTICE HATCHER: Are you going to return to that?

PN4712

MR GIBIAN: I'm happy for your Honour to raise a question.

PN4713

JUSTICE HATCHER: Well, as you know, the section was modified to add subsection (2B) and, in particular, I'm looking at paragraph (b) of the subsection. In the stage 1 decision I think there was, as I recall it, there was a finding that it was not necessary to identify the reasons for the undervaluation identified, although it was said to be likely based on gender. I'm just wondering, in terms of the finalisation, whether we need to revisit that and make, in the light of what the subsection requires, make more definitive findings about that?

PN4714

MR GIBIAN: It does dictate, obviously enough, what the Commission is or what its consideration must include. I'll consider that - I'm not sure I've turned my mind to whether it's necessary to revisit, as it were, the - anything that was done in the first instance decision and there was, it appears to us, a clear finding, in relation to historical and the valuation of direct care work - - -

PN4715

JUSTICE HATCHER: I'm not suggesting we revisit that finding, per se, but it seems to me that the subsection requires us to actually identify whether the reason for that was because of historic assumptions based on gender.

PN4716

MR GIBIAN: The section doesn't appear, to us at least, to require a change of approach. The only consideration would be that it is - what it is directing the Commission to do is to ensure it turns its mind to a particular matter, namely, to ensure that in engaging in the exercise it's presently engaging in, that any determination is free from gender based assumptions, in relation to work value and whether or not, historically, the relevant work has been undervalued on that basis.

PN4717

I agree that hitherto it's perhaps not been - that is under valuation is the issue rather than the precise cause of it. There was certainly much, in the stage 1 decision, which, and I'm thinking particularly of the passages that are around paragraphs 847, 848, something like that, in which there was consideration by the Bench of the concept of invisible skills or Spotlight skills and the characterisation of skills of that type as being naturally occurring traits, rather than acquired skills warranting significant consideration and the work value assessment as being based upon gender based assumptions as to the nature of the - - -

PN4718

DEPUTY PRESIDENT O'NEILL: That was in relation to the direct care - - -

PN4719

MR GIBIAN: Yes. Yes.

PN4720

DEPUTY PRESIDENT O'NEILL: - - - part of the equation, whereas we're now looking at the indirect care.

PN4721

MR GIBIAN: Indeed.

PN4722

JUSTICE HATCHER: Can I take it you wouldn't be heard against the finding that the undervaluation, which is at least already has been found to have occurred, was at least, in part, because of assumption based on gender?

PN4723

MR GIBIAN: Yes. We think it's clear - it's sufficiently clear, from the stage 1 decision, as your Honour, Vice President says, at least so far as direct care is concerned, that that is the case. That the nature of the work and skills and it's the perception of that caring work as being historically women's work, or associated with innate traits that were described to women was a significant aspect of the historical undervaluation of that work and that those skills were often overlooked or entirely or not afforded the value and significance they ought to have been.

PN4724

JUSTICE HATCHER: Thank you.

PN4725

MR GIBIAN: We would say that that also applies to the indirect care categories that we are dealing with, in terms of gendered assumptions like that, where much of those categories are also - well, there's perhaps two things, are also doing work which has been perceived in a similar way, be it cleaning work or laundry work or administrative work or food related work, perhaps not entirely in the same way, but in the same category.

PN4726

And, secondly, as I've said, as I previewed, that those employees are also intended to and do exercise the type of relational communication, care and skills that are also required of the direct care workforce.

PN4727

Mr Saunders points out to me, and my recollection was only partial in that respect, is this issue was, in part, dealt with in the stage 2 decision. My recollection hadn't extended to the element of the modern awards objective, the additional consideration added to the modern awards objective, but there is also discussion of 157(2B) of the stage 2 decision, from paragraph 180.

PN4728

I'll consider whether there's anything else I can assist your Honour with in that respect, in due course, if that's a convenient course.

PN4729

If I can turn then to what I propose to say in relation to the increase appropriate, with respect to indirect care workers? As I foreshadowed, I don't propose to

revisit everything we've said in both the stage 1 submissions and evidence and in the further submissions we've made in this topic but, rather, to highlight elements which, in our submission, are of significance in considering the work - the increase which is justified by work value reasons for those classes of employees. If there's any particular matters the Bench would like me to address in more detail I'm happy to do so, to the extent I'm able.

PN4730

The starting point, in our submission, in assessing the increase for indirect care workers, or a useful starting point, at least, is to go back to or identify those elements which were of significance to the Full Bench in determining that an increase was justified, so far as direct care workers is concerned. That is, perhaps, most - done in the most straightforward way by reference to the summary of factual findings or factual conclusions that were pertinent to the direct care employees within the stage 1 decision, summarised most conveniently at paragraph 890.

PN4731

I don't know whether the Full Bench has access to the decision. We did provide an electronic bundle of authorities of which it is contained, if the Bench doesn't have it otherwise available. I think it is tab 16, page 784, commencing at page 784 of that bundle. The list of factual findings - sorry, if I could just have a moment.

PN4732

JUSTICE HATCHER: These findings repeat the agreed contentions, in effect, don't they?

PN4733

MR GIBIAN: Yes, which earlier on in the decision, from around 750 something, the Full Bench found that there was evidentiary or set out the evidentiary foundation for those propositions. That is, they weren't put forward on the basis that they were agreed but on the basis that they were not in substantial dispute at least and was otherwise supported by the evidence in the proceedings.

PN4734

Now, a number of them are, in a sense, conclusionary or contain assertions, with respect to a particular class of employees, but can I just identify that in our submission a significant number of the are, and indeed the significant factual elements, have also had important and significant impacts on indirect care work. Most notably we refer to subparagraph (2), a reference in the change of acuity and care needs of persons in residential care arising both from the fact that people are living longer and entering aged care later and the change which has occurred in the last 15 or 20 years, in the provision of home care and residential aged care, so as to encourage persons to stay in their homes until it is not safe for them to do so and they require residential care.

PN4735

At paragraph 4 there's reference to the proportion of residence and clients in aged care with dementia and dementia associated conditions. And subparagraph (7)

and (8) - sorry, subparagraph (9), I should say, an increase in regulatory and administrative oversight of the aged care industry.

PN4736

At paragraph 12 reference to the changed philosophy or models of care having shifted to one that is person centred, based on choice control, requiring focus on individual needs and preferences of each resident or client. At paragraph 13 to aged care employees having greater engagement with family and next of kin of clients and residents.

PN4737

Paragraph 14, increased emphasis on diet and nutrition of aged care residents. At paragraph 15, the standard use and implementation of technology in delivery and administration of care. And, finally, at paragraph 16, that aged care employees are required meet cultural and social and holistic needs of diverse communities.

PN4738

All of those considerations that are identified, which without reading the others in full, appear, in my submission, or are, in my submission, the major factual elements underlining the work value considerations, so far as direct care workers is concerned are relevant to and have an impact on the support and administrative roles within the direct care category.

PN4739

As I say, it's not necessary or appropriate now to endeavour to summarise all of the stage 1 evidence but I wanted to emphasise, perhaps, three matters that are of significance, in that context, in the impact of those considerations upon the indirect care roles.

PN4740

Firstly, the change to the philosophy of model of care. The evidence, both in the first stage of the proceedings and as has been supplemented in stage 3 of the proceedings, indicates that the non direct care roles are not to be regarded as a distinct or distant from the provision of care but are part of the overall care being provided to residents in a residential aged care facility. Food and cleaning services, laundry services and the physical environment are part of the care and not distinct from it.

PN4741

The intention of the, and, indeed, the requirements now imposed upon aged care providers, is that all aspect of the care, be it direct, physical personal care or food and nutrition or the physical facilities are to be provided in a manner which is directed at a person-centred approach tailored to the individual needs, preferences and desires of the residents, in a manner which maintains their, to the extent possible, their dignity, autonomy and independence, as individuals.

PN4742

JUSTICE HATCHER: That's the description of the nature of the service provided by the employer to the residents, or perhaps the persons in home care, it's not a description of the skills and responsibilities of the workers themselves, is it?

PN4743

MR GIBIAN: It is not directly but the impact that it has on the work of the workers in the supported administrative categories is plain and abundantly demonstrated by the evidence. That is, in providing – in interacting with the residents, in providing in cleaning their rooms, in dealing with their laundry, in providing food, each of the workers is engaged, not - an intention and effect of the change in philosophy is that those services are not provided in a manner which is institutionalised. That is, everyone gets the same, but those workers engage with the residents on a day to day basis and communicate with and interact with the residents in negotiating the manner in which that work will be done, which fits in with the needs and the desires of the individual resident and recognises the independence and dignity of the resident to make choices in relation to how they will receive and the type of services and care that they will receive.

PN4744

JUSTICE HATCHER: So just exploring the how is that different in kind to, say, persons doing the same functions in a hotel? You might say it's, again, resident centred services?

PN4745

MR GIBIAN: What the workers in a residential aged care context are dealing with are, and as the evidence has made clear, providing care to persons who are in their home, that it is the home of the resident, which is quite different from a hotel where someone is coming in to stay for a day or two, with relatively undifferentiated desires. Rather, that the individual resident is - the aged care facility is their home and to be treated as such and the person is expressing their preferences and needs, in the context it pertains to what happens in their home. Obviously enough - and in a context of not a one-off short term relationship but an ongoing relationship between the workers and the resident in facility.

PN4746

You heard the evidence last week from, I think, both Ms Riboldi and Mr Mamarelis about the steps that are taken to ensure, to the extent possible, consistency of rostering to allow an individual relationship to develop between an individual worker and a resident, using the skills: communication, empathy and other skills of the worker.

PN4747

In addition, of course, the residents to whom this care is - indirect care, if you want to refer to it in that way, is being provided, and the statistics are really stark that are dealt with in the first stage, the decisions are really stark are now increasingly of very high needs and suffering from various forms of physical or cognitive decline and both the communication and the relationship is developed in the context of the difficulties that that situation can frequently give rise to, requiring, as it does, quite different forms of negotiation, communication, relationship skills that would be conceived to be present in a hotel-like environment and, as the Full Bench has heard, both in stage 1 of the proceedings in the recent week, all of those workers are being provided with training, in relation to dementia care, dealing with difficult or challenging behaviours, because that is something that they have to deal with, on a day to day basis in both

safely and appropriately providing the work but also in developing that one to one relationship with the client.

PN4748

VICE PRESIDENT ASBURY: Some more than others.

PN4749

MR GIBIAN: I'm sorry, your Honour?

PN4750

VICE PRESIDENT ASBURY: Some more than others, as was observed in stage 1. It's not consistently across all classifications that that exposure occurs.

PN4751

MR GIBIAN: As I said, previously, your Honour, I accept that to some degree. That is, there is obviously differences. Perhaps, just before I go to that question, what the evidence also demonstrated was that, and I think Mr Mamarelis said this, from a employer perspective, quite clearly last week, is that part of the role of the indirect care worker is not only providing the cleaning or laundry or food services, as it might be, but also to fulfil a function of providing social support to the residents, by forming a relationship, by talking to them in a regular basis, which provides, in addition to purely physical personal care, a social care function which is quite distinct from anything that workers engaging in cleaning work, if that's a general category, would encounter in any other context than a residential care facility.

PN4752

JUSTICE HATCHER: If we can, let's say, take the food services system which, on one view, is the high-water mark of the support workers, the evidence tends to indicate that they may engage in interaction with residents when they engage in actually serving the food. But if we take, as a starting point, the personal care worker, let's say, for the sake of argument, we grant you a claim for 25 per cent and then we work backwards, first, do you agree or disagree with the proposition that the quality of the interaction between a food service assistant and a resident is not the same as for a personal care worker? That is, the personal care worker is engaging with residents at a much higher level of care and skill.

PN4753

MR GIBIAN: Your Honour knows that our application is for a common increase for direct - - -

PN4754

JUSTICE HATCHER: Yes.

PN4755

MR GIBIAN: That's my client application. Obviously that involves - any work value assessment involves assessment of various aspects of the work of the relevant class of workers. The question your Honour asks identifies one aspect of it, so far as food services workers are concerned. There is also all of the changes that have been made in terms of the - evidence that has been heard as to the nature of the requirements that are imposed, quite properly in the aged care context, in

relation to preparations of food, food safety, all of those type of - so that, in a sense, a different category.

PN4756

If you're just talking about the personal interaction, I accept what your Honour says, to the extent that it's different in the way in which it is put into effect. That is, the personal care worker is providing direct care and, in a relationship sense, is required to negotiate and exercise the communication and interpersonal skills, to arrange for showering and toileting for persons with frequently very high care needs, which is obviously a very complex relational, communication, interpersonal task.

PN4757

The food services worker is not doing that, but they are communicating in relation to, and the Full Bench heard evidence about it, about food choices, so they are required to communicate, understand, comprehend, explore requests, make judgments about the extent to which those requests, those needs can be accommodated within existing arrangements. If they can't, negotiate and suggest alternatives and the like. So it's in a different context, but it is also, we would say, a complex - or requires complex relational, communication skills.

PN4758

JUSTICE HATCHER: The second aspect is just quantity. That is, special care - -  
-

PN4759

MR GIBIAN: I'm sorry, your Honour?

PN4760

JUSTICE HATCHER: The second aspect is not quality but quantity, that is personal care workers exercise those skills all the time because that's all they do, whereas food service assistants will only exercise those skills for a relatively small proportion of their working time.

PN4761

MR GIBIAN: I'm not sure that I accept that the evidence would be that it was a small proportion of their working time, necessarily. I accept they also, the evidence generally said they also do work in - food preparatory work, or the like, which, to the extent that they are uninterrupted, engaged in that work, there is some weight to what your Honour says.

PN4762

I think the evidence would also suggest that the extent to which they are engaged in that work in a way which is uninterrupted is not the - is the exception rather than the norm. That is, that they are interrupted very frequently. I'm sorry, the witness's name is now escaping my mind, but the witness who said she's working in the annex kitchen last week, that is, that's in the aged care facility where the residents live and are moving about their day, so it's not that the food services - there is some differences, I think, between different types of facilities, but very frequently it's not that the food services worker is in some separate building doing the food preparation work, they are in the facility, in the home of the residents,



and interacting with them on a more or less constant basis, even in the middle of which they have to do the food preparation tasks and the like as well.

PN4763

So we don't - I understand what your Honour says, and there's some merit to it, of course, but it is not - it's not that there's an hour long service period and then that's the only interaction that the workers have with residents. It's not - that's not the evidence and I would add to that the observation that I made about the intention and fact that it's intended that these workers also perform a social support role and have relationships with the residents and assist in that function, as part of their work.

PN4764

In that respect, I think that's covered much of what I wanted to say on that first issue. We do make the observation that in terms of the provision of personal - person centred relationship type care, that is, I think as some of the evidence has demonstrated, been an approach which providers have been endeavouring to adopt for some time, but it is a dictate within the aged care quality standards, which are applicable to all aspects of the care and support provided to residents in an aged care - in a residential context.

PN4765

There are distinct standards in that respect, which set out the requirements with respect to personal clinical care and services and support standards, that's standards 3 and 4, but all of them are subject to standard 1, which is concerned with dignity and choice and I provided - we provided, last week, an extract from the guidance from the Aged Care Quality and Safety Commission setting out the expectations of workers of all classes within a residential facility to give effect to those standards in the course of their work. The particular requirements within standard 7, dealing with workforce requirements, equally applicable to direct care workers and indirect care workers in a residential context.

PN4766

We also referred, earlier in the proceedings, to Professor Meagher's evidence, in the first round of proceedings, particularly as to the requirement for the provision of person centred care to be a whole of staff approach. And in addition to the lay evidence we rely on that.

PN4767

I think I've already referred, in substance, to some of the additional evidence, particularly the employer evidence from last week, from Ms Riboldi and Mr Mamarelis about the role of direct staff, of indirect care staff, I should say, in developing independent relationships with residents, as part of social support.

PN4768

Without going to it, the nature and demands - we endeavoured to (indistinct) by way of example, only of the evidence, or the further evidence in that respect, in the wage adjustment submissions that we filed, which are - commences at page 198 of the court book, particularly from paragraph 16 to paragraph - and onwards, to give some examples of the evidence about - of the evidence as to the type of personal interactions and relationships that exist between the indirect care

workers, be they cleaners or food support or laundry workers, and the residents, in the residential facility, and the type of emotional and other demands that that places on the workers, in that context, in addition to the more discrete tasks that they undertake, in the course of that work.

PN4769

The second theme that I just wanted to emphasise, out of the considerations that were significant in the decision, with respect to the direct care workforce in stage 1, is the extent to which the indirect care roles are affected by the changes to the acuity frailty and care needs of the residents in residential facilities which have occurred over the last 10 or 20 years.

PN4770

I wasn't going to repeat the evidence about the extend of that change, it is extremely stark. I was just going to note - I was going to return to it in dealing with the home care elements. There was some update to that, in Appendix 1 to the further report of Professor Charlesworth and Professor Meagher, some updated material in relation to the changes in acuity and care needs of recipients of home care support and of residents in residential facilities.

PN4771

Essentially, indicating, I think the previous evidence really went up to around 2019 also, because of the timing of the proceedings, but indicating a continued trend towards persons who are older, frailer with higher care needs increasingly being provided with care in the home and a consequent increase in the overall acuity and care needs of residents in residential facilities.

PN4772

In that respect, we note the conclusion within the consensus statement, at paragraph 22, that the changes in the characteristics of aged care consumers have caused the conditions under which work is performed to be more challenging for indirect care workers as well as direct care workers and that a consequence of which is the provision of high levels of skills, compared to workers in other sectors or in the aged care in the past.

PN4773

The requirements imposed by the aged care standards upon workers to provide care and to provide support services in a manner which is person centred is made more complex and sophisticated, in terms of the nature and sophistication of the communication relationships and empathic skills required of indirect care staff, as a consequence of the changes in the composition of the resident population and increased level of care required.

PN4774

Support and administrative employees, and there's extensive evidence of this, are exposed to and required to have the skills to deal with challenging and difficult behaviours by residents, particularly in the context of residents suffering dementia.

PN4775

Can I note, in that respect, in the further submissions that we filed on this issue, there's an example provided by Ms Laidlaw, which we've extracted at paragraph 16 of those submissions, as to the nature of interactions which occur in a residential aged care context, to all workers, including indirect care workers and the type of skills required to deal with challenging and difficult behaviours in that context.

PN4776

The change in care needs also effects the conditions under which the work is performed, be it the laundry work, the cleaning work or the catering work, referable to residents with increasingly complex care needs.

PN4777

One aspect which is also emphasised, and perhaps goes to the question your Honour, the President, asked earlier, as to the extent to which indirect care workers have engagement with indirect - with residents. Professors Charlesworth and Meagher, in their supplementary report, particularly paragraph 12, talk about a concept of regular irregularities. That is that the work is interrupted on a constant basis, as a result of the fact that it is performed in the context of a residential aged care facility. That is increasingly so because of the increasing care needs and acuity of the residents concerned and the work that is performed, if it be, for example, food preparation work, is required to be undertaken, if that's a discrete task, in a context where there is frequent interruption by other needs and the workers exercise a degree of skill and use situational judgment in terms of having to juggle the food preparation, in this example, with interacting with residents who require assistance or interrupt the more discrete tasks.

PN4778

All of that is amply demonstrated in the evidence to which we referred, at length, in stage 1 of the proceedings that we've endeavoured to describe in the supplementary submissions, in terms of the evidence which was provided in stage 3.

PN4779

The third element, and final element, that was significant in the consideration of direct care work, which is as relevant to indirect care workers, is the changes in the regulatory environment which have occurred. Support and administrative staff are also affected by the changes in the regulatory requirements. As I've mentioned, the aged care standards apply equally to all workers in a residential aged care context and informs the way in which they are required to perform their work and the skills and responsibilities involved.

PN4780

Other regulatory requirements also involve people in the same way, including the Aged Care Quality and Safety Commission Rules, the Charter of Aged Care Rights, the National Quality Indicator Program, the new Code of Conduct for Aged Care and what's referred to as the Serious Incident Response Scheme. There was evidence of all classes of those employees being involved in accreditation exercises. That is, being interviewed as part of those types of processes.

PN4781

The evidence, including the supplementary evidence, heard or received last week outlined that training is provided to those - is required to be undertaken by those workers with respect to that range of regulatory requirements, including a Serious Incident Response Team, the Aged Care Standards and that other training is provided, in relation to elder abuse and neglect, infection prevention and control, dementia care risk management and restricted practices, not only to direct care but also to all indirect care workers engaged in residential care.

PN4782

Those regulatory requirements are, themselves, indicative of increased scrutiny and responsibility of all staff in residential care, for very good reasons, of course. That that has an impact on the nature and conditions of the work that is performed, in a manner relevant to an assessment of work value reasons.

PN4783

It also has a real skill impact, in our submission, in the sense that there is obviously an enhanced knowledge requirement. That is, learning and applying the relevant regulatory requirements. They also require, in themselves, the application of that knowledge in making assessments and judgments in the course of work.

PN4784

The example that was explored somewhat last week was the Serious Incident Response Scheme process. That is, any worker in a residential context who observes an incident is required to know or to have the knowledge as to how to respond to it. Identify whether it is a reportable incident or not, make an assessment as to what the appropriate response to that incident is, be it providing immediate first aid, calling for assistance, reporting it appropriately, if necessary, through the incident management system, required to be implemented by the provider, as a result of this scheme, and participate in reporting - preparation of reports, and the like, in relation to any incident which they observe or are involved in.

PN4785

As I say, that is a real skill impact and, again, quite unlike anything that a worker undertaking, in the broad sense, cleaning work or food services work might encounter in any other context outside of residential care.

PN4786

That also is a third element which I wanted to identify separately to - which was significant in the direct care findings and is important in, or has an important impact on work value considerations, so far as the direct care work is concerned.

PN4787

In our submission, fundamentally, the work performed by employees, in support administrative roles or food services steam is a form of care work, as well as having the additional occupational or trade elements in it. The workers operate as part of the caring team and cannot be separated from it and are required to exercise, if not in an identical way, but many of the relational, communication and interpersonal skills required of direct care workers, are in both negotiating and

implementing their duties in the way in which they interact with residents and in terms of the expectation and reality that they provide social support in developing and maintaining relationships with residents, as an important element of the care able to be provided within a residential aged care context, in a person centred rather than an institutional way.

PN4788

All of those considerations, in our submission, can comfortably satisfy the Commission that an increase, and a substantial increase in an award range for those class of employees is appropriate or justified by work value reasons. Otherwise we obviously, as I have indicated, rely upon the submissions that we advanced earlier in the proceedings and all of the evidence which has been filed in that respect.

PN4789

Unless there's anything further in relation to the indirect care work that I can assist with to supplement what we've previously said?

PN4790

JUSTICE HATCHER: I'm just wondering whether the evidence concerning what I'll call infection control measures and regimes is also inputted into the indirect care worker's question?

PN4791

MR GIBIAN: It is. I was going to refer to that somewhat in dealing with the COVID aspect, as it were, and emphasise that that is also relevant to indirect care. In that respect it perhaps operates in two ways. Obviously all workers in the residential aged care context are trained in and are required to have infection prevention and control skills and to implement infection prevention and control measures and part of what we say about the pandemic issues is that the level of sophistication and rigour which is applied to those processes, as relevant to all employees, have increased by a very substantial margin, in a manner which is relevant to work value assessment.

PN4792

In addition to that, as is made clear in the evidence and some of the documentary material, there are certain classes of the indirect care workers for whom that is particular relevant, including cleaning, laundry and food services, particularly. I might say, also, the administrative employees who have a role in enforcing or coordinating and enforcing infection control measures and communicating with residents and families in that type of circumstance. So it has particular impacts, as your Honour has perhaps foreshadowed in relation to certain classes of work performed within the indirect care givers.

PN4793

PROF BAIRD: Mr Gibian, may I ask, you've talked quite a bit about the indirect care workers, laundry, food services, administrative workers, I wondered if you could just elaborate a bit on - and you've mentioned that the work that they provide is not directly to the direct care workers. We haven't talked much about gardening and maintenance workers, I wonder if you could elaborate on their care provisions?

PN4794

MR GIBIAN: There is evidence in relation to those workers. The maintenance and - I think there is often an overlap in roles but perhaps talking about them separately somewhat. Both of those - whether maintenance or gardening are also performed work, in a manner which is not dissimilar to cleaning and laundry, in the home or the home environment, maybe outside home environment, but home environment of the residents. There is evidence about the involvement of residents in the gardening tasks which are being done. That is, the gardener is performing tasks, involving the residents in those - that task, both in decision making and, to the extent possible, involved in a physical sense, as part of a social interaction in the workplace.

PN4795

VICE PRESIDENT ASBURY: Is that an argument, though, Ms Gibian? It struck me, for my part anyway, that the witness that we had, in relation to involving the residents in gardening activities, it was almost like a recreational activity, rather than a gardening.

PN4796

MR GIBIAN: I think there was evidence last week, in relation to a recreational activity of that nature. There was evidence, in the first stage of the proceedings, from a maintenance/gardening employee, who talked about the fact that the residents were in the space and had views about what should be done or not done with the garden, and he was involved in interactions with the residents in that way.

PN4797

Maintenance falls into the same category. I think I have to accept there's particular evidence about cleaners, in terms of regularity of interaction with particular residents and the consequent capacity and reality to develop direct relationships with are of significance with the residents.

PN4798

I think one would, as a matter of common-sense, infer, and I'm not sure the evidence would suggest to the contrary, that maintenance is a bit more episodic, if you understand what I mean, but it still involves going into the resident's room, which, as I say, is their home, talking to them about what needs to be done, negotiating and communicating in that sense.

PN4799

To which I would add, we don't think any of the classes of employee is excluded from the from the expectation realities that they will be involved in developing relationships with residents, conversing with them, interacting with them, as a form of social support. The opportunity and avenue to do so varies somewhat between the different class of employees but with all of them, have that expectation and reality.

PN4800

PROF BAIRD: Would you think their work has been, traditionally, undervalued?

PN4801

MR GIBIAN: The maintenance - - -

PN4802

PROF BAIRD: The maintenance and gardening?

PN4803

MR GIBIAN: Look, my instinctive reaction is to say less so, and I think there is some evidence that, in fact, many of the maintenance staff are paid higher up the level or higher up the pay scale than some of the - the workers in cleaning and laundry and the type. Whether that's a - I'm not saying that's inappropriate, but perhaps it is less impact in that respect. That's my instinctive reaction.

PN4804

PROF BAIRD: Do you have any sense of why that may be the case?

PN4805

MR GIBIAN: I don't know that the evidence went to this. There's an obvious instinctive assumption that one would make in that respect, that it has something to do with the gender nature of the roles.

PN4806

VICE PRESIDENT ASBURY: There was some evidence about the market rates for maintenance people may be slightly different and their rates could be affected by the industry that they're working in, rather than their gender. There was a suggestion in relation to that.

PN4807

MR GIBIAN: Yes, that's true. That may not be unrelated to (indistinct).

PN4808

VICE PRESIDENT ASBURY: It wasn't so much the gender of the maintenance people as the - - -

PN4809

MR GIBIAN: Not the individual person.

PN4810

VICE PRESIDENT ASBURY: - - - as it was the gender of the - you know, the gender - - -

PN4811

MR GIBIAN: Yes. Yes, I think, if I can clarify my earlier answer, that's what I meant by - I didn't mean the gender of the individuals concerned but rather the section of the worker, which comparative rates with the market, as it were. There was actually evidence of people leaving to get non trade jobs in other sectors that paid more, which is perhaps - so I wouldn't want to be heard to suggest that the rates that are being paid to anyone in this sector have been inflated in any sense.

PN4812

DEPUTY PRESIDENT O'NEILL: It would also be the case that maintenance employees, in other context, by nature of their work are - - -

PN4813

MR GIBIAN: I'm sorry, your Honour, I just missed this one.

PN4814

DEPUTY PRESIDENT O'NEILL: So it would also be the case, wouldn't it, that maintenance employees, unlike some of the other categories, their work outside the aged care industry also routinely involves working in someone's home and requires a level of awareness of the surroundings and appropriateness of their conduct, in light of that common contact.

PN4815

MR GIBIAN: Yes. I accept that. To some extent obviously I would repeat perhaps what I said earlier, in terms of extinguishing features here, which are at least two-fold. One is that the maintenance or gardening work is being done in the home of a range of people, on an ongoing basis. So it's not maintenance, in terms of visiting a person's home, as a plumber, on a one-off basis, or at least irregular basis, hopefully, but rather an ongoing involvement with provision or performance of that type of work in the home of a collection of people. Obviously those people have the types of care needs and acuity and the like that would not be the case in other contexts, in the sense that residential aged care is really now reserved for people who are unable to safely live, in a very substantial part, unable to safely live in their own homes.

PN4816

JUSTICE HATCHER: Would I be right in assuming that a lot of cases that sort of work would be outsourced rather than done by direct employees?

PN4817

MR GIBIAN: I'm not sure there's a lot of evidence about that. I think actually - I am aware, from other proceedings about outsourcing the catering having occurred to some degree. I'm not sure there's evidence about that, in relation to - my perception is there is more of directly engaged employees in that area. But I'll seek some instructions if I'm wrong in my assumption in that respect.

PN4818

It may be an award issue, at some point, about outsourced catering. We'll deal with that another time.

PN4819

JUSTICE HATCHER: Is it convenient to take a break at this point?

PN4820

MR GIBIAN: Of course.

PN4821

JUSTICE HATCHER: All right, we'll break now. We'll resume at 11.45.

**SHORT ADJOURNMENT**

**[11.27 AM]**

**RESUMED**

**[11.51 AM]**

PN4822



JUSTICE HATCHER: Mr Gibian.

PN4823

MR GIBIAN: Yes, thank you, your Honour. On the question your Honour, the President, asked about outsourcing, I mean, there's not a lot of evidence about it. I think, at least, those words struck me or their view, I think is similar to my instinctive reaction was we don't believe that there is commonly that much outsourcing of sort of straight handyman work or gardening.

PN4824

I think that there was some evidence about, perhaps lawns being done by a different person or something like that, in larger places but obviously there is also evidence about contractors. So that is if there's specialist trade work that needs to be done then that's also part of the maintenance function is often coordinating that kind of work in addition to that.

PN4825

JUSTICE HATCHER: Is there any evidence in respect of the categories of what we've been calling indirect care workers that they have a higher concentration of females in aged carers compared to the comparable occupations in other sectors?

PN4826

MR GIBIAN: No. I think I can confidently say there's no evidence of that type of comparison.

PN4827

JUSTICE HATCHER: All right. Thank you.

PN4828

MR GIBIAN: The only other element of direct and indirect care work that I was just going to also just flag was I also referred to the sort of changed consumer family expectations and interactions which is a matter that affects all of the indirect care workers.

PN4829

Well, but perhaps particularly the administrative and reception type staff who perhaps bear that interaction as much as anyone else in the context of a residential facility. Other than that, I was going to turn to what we say about the further increase for indirect care work. In a sense, I wasn't going to say a whole lot about it.

PN4830

As I indicated at the outset, our submission is that an additional increase and a substantial additional increase over and above the interim increase of 15 per cent is justified by the work value reasons for the direct care work for both home care and personal care workers and recreational administrative officers, recreational activities officers, I should say, in residential care by the evidence that was heard in stage 1 of the proceedings leaving aside anything else and that we understand the decision of the Full Bench in stage 1 was to that effect, albeit not quantifying the additional increase that was justified on that basis.

PN4831

And obviously we rely in that respect, on the findings that the Full Bench made in stage 1 of the proceedings and other than to emphasise the significance of the work value considerations that were identified in stage 1 of the proceedings in relation to the nature of the work and skills required, the changing of care needs of the community, the changing models of care, the changing regulatory and governance requirements, the effects of changing of workplace - of workforce composition and the nature of their work environment and family care and the expectations.

PN4832

I didn't want to - I wasn't going to, in oral submissions, elaborate on those to any great degree, the Commission's heard and made findings of those issues. The Full Bench - sorry.

PN4833

PROF BAIRD: Mr Gibian, sorry, could I just clarify - sorry. Did you just say a further increase over and above the 15 per cent for direct care workers; which workers did you say in your list then?

PN4834

MR GIBIAN: As I've foreshadowed earlier, we - so far as my client's interests are concerned, we take that to include the personal care workers and recreational activities officers within residential care and home care workers under the SCHADS Award.

PN4835

PROF BAIRD: All right.

PN4836

MR GIBIAN: As I say, the head chefs, cooks, maybe fall into their own unique category in the sense that they were beneficiaries of the interim increase for slightly different reasons. With respect to that class, we also say that an additional increase is justified on the basis of the original evidence but we accept that they perhaps need to be considered slightly separately to the direct care workers.

PN4837

As I said, we would put the recreational activities lifestyle officers in the same category as the personal care workers as being a subset of that type of work given that the role that they perform and the nature of the work that they undertake. And the claim is for a further 10 per cent.

PN4838

I don't know - no one's raised any - I think there was an inquiry of Mr Hutcheon in relation to the compounding effect of a 15 per cent cost plus a further 10 per cent if calculated in that way but, as I say, our claim is for a further 10 per cent above the 15 per cent that was awarded as an interim.

PN4839

JUSTICE HATCHER: Does that number have any science to it or underpinning rationale?

PN4840

VICE PRESIDENT ASBURY: Mr Saunders is giving you very helpful advice there (indistinct).

PN4841

MR GIBIAN: I think the Bench received that advice more clearly than I did but in any event, look, I don't think we can say it has a precisely mathematical calculation. There was reference in the first stage of the proceedings to the wage levels of disability care and the like in the SCHADS Award as bringing it up in some sort of comparable ballpark to those rates but we didn't claim that that's the basis upon which the Commission would engage in it, it's an impressionistic work value assessment.

PN4842

JUSTICE HATCHER: Well, I'm glad you've made that - I'm glad you raised that because on one view, in finalising the rate for personal care workers, we should look to another award classification with a comparable level of skill which has been properly work valued on assumptions free from gender and it seems to me the obvious place to look is the equal remuneration order applying to the SCHADS Award, social and community service employees which at the Cert III level has imposed a premium of 23 per cent.

PN4843

MR GIBIAN: Yes.

PN4844

JUSTICE HATCHER: Do you see any logic in that approach?

PN4845

MR GIBIAN: Yes. That is the matter that we referred to earlier in the proceedings. As I say, we accept the Commission has to be satisfied it's (indistinct) justified by work value reasons but for all the reasons we've explained in the proceedings to date, we say that that form of increase at that level would be justified by work value reasons.

PN4846

The Commission asked for further - in this respect, for further submissions in relation to the COVID issue and the understaffing issues or the extent to which those issues are relevant to work value reasons. As I said and I think I need to make clear, we don't say a further increase is dependent upon an assessment of those two issues.

PN4847

For the reasons we've explained in the written submissions, we say that they are matters that the Commission could take into account as relevant to work value reasons but we don't - our express submission is that a further increase is not dependent upon acceptance of that submission or consideration of those matters.

PN4848

VICE PRESIDENT ASBURY: Calling it the COVID issue could understate its impact because arguably COVID - it's not just about COVID anymore, it's about any outbreak of infection and it seems to be happening increasingly.

PN4849

MR GIBIAN: Yes. Yes. Your Honour's stolen the first line of my submission in respect to that issue or foreshadowed exactly what we say on that issue. I was going to address briefly those two issues. I didn't want to go into too much length about it.

PN4850

In relation to, as I say, the COVID issue as your Honour, the Vice President perhaps suggests, it's a misnomer to refer to it as the COVID issue or its only properly referred to in that sense in a shorthand way in the sense that we intend to refer to changes in the work organisation and skills, work requirements and responsibilities that in a sense were a consequence of changes driven by the pandemic but have entrenched themselves and become more generally applicable within the aged care sector.

PN4851

That is, we don't suggest as relevant to work value reasons that the Commission would give weight to the work intensification during the initial pandemic period in itself.

PN4852

What we say the evidence demonstrates is that the pandemic identified process improvements in respect of infection control procedures, techniques that could and must be implemented and that the emergency response to the pandemic drove rapid introduction of changes in work practices, procedures and associated training which have entrenched themselves and produced a workforce which has developed and is required to exercise a higher level of skill in relation to infection prevention and control in an environment of a greater degree of responsibility and scrutiny in relation to those matters than was the case historically given the expectations both of the community, families and aged care residents themselves and the broader regulatory requirement which came into existence.

PN4853

VICE PRESIDENT ASBURY: Well, Mr Gibian, I don't want to steal another line from your submission but it seems to me that from my perspective anyway that arguably there is some issue of work intensification and just taking a small part of some of the evidence about the donning and doffing of personal protective equipment, things like having to wash your hands every time you remove another item of personal protective equipment, one can only envisage the amount of time that must be taken doing that that was not previously taken.

PN4854

MR GIBIAN: Yes. You're welcome to. Yes. Yes, absolutely. When I said we don't rely upon - I was referring really to the particular impacts in 2020 and 2021 which in part, have abated or changed but as your Honour points out, there are ongoing lessons and requirements which have been implemented which have both a skill and work intensification and responsibility element to them in the impact

upon the ongoing work that is done in a residential context and as has been pointed out to me, in a home care context as well.

PN4855

VICE PRESIDENT ASBURY: Yes. Well, it's the regular irregularity issue again, isn't it, because in some circumstances you will have to adopt different means of donning and doffing personal protective equipment and in other instances you won't and that could change on a daily basis or within a day.

PN4856

MR GIBIAN: Yes. Yes. As with other duties, the adherence to and observance of infection control procedures and the implementation of outbreak responses are all done in the context of the regular irregularities that are referred to, that is, in the context of other work and the interruptions and the like, which are inherent in it.

PN4857

VICE PRESIDENT ASBURY: And it seems that in some circumstances or in some facilities there's a different - there's a reduced level that's been adopted for when it's an outbreak, so it's gone from four to two or three to two or - cases of something.

PN4858

MR GIBIAN: Yes. And the changes - as your Honour says, there's evidence of some differences between different facilities. The changes in terms of - so some - one observation that I was going to make was the changes to the extent there's been some relaxation of the strictness of lockdown procedures, for example, don't lead to a reduction in the impact upon staff at all.

PN4859

Perhaps that's, in some sense, an enhancement because both - the example is partial lockdowns, that is, segregation of part of the facility rather than a complete lockdown which involves a, in a sense, more complex reorganisation for work task and implementation of staffing and the arrangement of work.

PN4860

But also where - and I think Mr Brockhaus gave some evidence about more elective, that is, the resident is able to make some decisions about the degree of lockdown, involves that kind of communication of - and negotiation of what the appropriate arrangements are with the various residents which, as I say, doesn't really simplify. It in fact, makes - perhaps for a good reason, but perhaps makes more complex the task that's involved in outbreak management.

PN4861

As I say, at least as a matter of high-level summary, we'd say that the additional skills and responsibilities involved in all that have arisen as a consequence at least to cover the correct use of personal protective equipment, not just how to use them but when and where and under what circumstances.

PN4862

Greater knowledge of the signs of illness and the importance of early detection, I should say, greater knowledge of and more strict adherence to cleaning, disinfection and isolation procedures, both generally and in the event of an outbreak and the knowledge of and implementation of isolation measures and relates social support in the event that there is outbreaks in a facility involving the exercise of the interpersonal, emotional and communication skills in dealing with residents and with high levels of acuity.

PN4863

Again, we would make the point, as I've said earlier, this is not limited to direct care workers, but all of the workers in aged care facilities are in residential facilities and as well as home care workers are subject to this high level of skill and high level of sophistication and regarding implementation of infection control measures.

PN4864

In that respect, and this really arose from Mr McKenna's cross-examination, but a useful example was Ms Riboldi's evidence in relation to the procedures that are at (e)(i) and I think Mr McKenna tendered the three-page infection control procedure document that existed prior to the pandemic which has been replaced by a 108-page manual which is now the procedure to be applied.

PN4865

I didn't want to go to it at great length and it may be sufficient but I simply - it commences, I think, at page 28 or 26 in the court book but I did just want to emphasise the extent to which perhaps underlining the point that I made in answer to a question, your Honour the President asked about indirect care workers in this respect.

PN4866

It does refer specifically to requirements in relation to cleaning, food services and laundry in the context of infection control - of staff in the context of infection control procedures. All that that document perhaps indicates the recurrent sophistication with respect to which infection control and management is dealt with.

PN4867

I just was going to note at page - it's in the red numbers, 60 and following, there's provisions about staff education applying to all staff and requirements that they all be trained in aspects of infection prevention and control and from pages 96 to 98 there were particular requirements imposed with respect to cleaning, laundry and food services specifically in relation to both prevention and outbreak management.

PN4868

Can I also just identify - and I don't need to go to it, but particularly the evidence of Ms Digney, D-i-g-n-e-y, gives evidence in relation to the requirements that have been imposed for - in her example at least, in relation to the home care provision arising from the lessons which have been learnt in the context of the pandemic.

PN4869

JUSTICE HATCHER: If you look for example at exhibit J23 where it talks about government advice about increased transmission of COVID and there's measures to wear masks and take rapid antigen tests, et cetera, is there any evidence that any of those types of measures were ever taken pre-COVID and there were other types of outbreak of illness, for example, the flu or whatever?

PN4870

MR GIBIAN: No I think is the answer. I'm not sure they're in evidence but Mr Ward or the Joint Employers in their submissions did refer to current New South Wales ministry advice and Commonwealth Department of Health advice, they are documents which change and with some regularity and perhaps that's part of the issue.

PN4871

I did look at the history of those documents. There seemed to be something called a flu pack which existed before, I think in 2018, there was a history - sort of history of the amendments that have been made or variations that have been made to those documents. There was such a document but I don't think it's in evidence. I don't think there's any evidence to suggest that that type of requirements in relation to masking or the like, was ever implemented in aged care (indistinct).

PN4872

VICE PRESIDENT ASBURY: Mr Brockhaus might have said something about it because I recollect him saying that prior to COVID there was an infections - some of them did have infection control documents.

PN4873

MR GIBIAN: Yes.

PN4874

VICE PRESIDENT ASBURY: There was one that was not formatted properly but we got that, that was pre the COVID pandemic.

PN4875

MR GIBIAN: Yes.

PN4876

VICE PRESIDENT ASBURY: So they did have them.

PN4877

MR GIBIAN: Yes. There was - I don't have the exhibit number, but there was tendered by Mr McKenna, I think, the three-page document that was the RFBI procedure which existed prior to the pandemic.

PN4878

It may have been slightly more than three pages if it was formatted correctly but Mr Brockhaus said they also had a - that Buckland had a procedure prior to the pandemic. He gave some evidence about it but I think he said he'd been unable to find it or at least it's not in evidence.

PN4879

VICE PRESIDENT ASBURY: Yes.

PN4880

MR GIBIAN: He gave some evidence about his recollection of it. I understood your Honour, the President, to ask about Ministry of Health or sort of government level advice on that subject. As I say, I don't think there's any of that in evidence. The only knowledge I have is there was something called a flu pack which existed prior to - - -

PN4881

JUSTICE HATCHER: Are there any remaining vaccination requirements in aged care?

PN4882

MR GIBIAN: I think the evidence is no but I'll check. I only take that from the employer evidence that was filed in this stage of the proceedings which said that there was - that they were not imposing strict vaccination requirements any longer. I'm not sure whether that's a matter which will go to work value one way or the other in any event.

PN4883

JUSTICE HATCHER: I mean, on one view, things like having a RATS shoved up your nose every morning or wearing a mask might be better rewarded by a disability allowance rather than a work value increase.

PN4884

MR GIBIAN: I think we would - I think we disagree with that so far as the personal - the RAT test, if that's - that process your Honour may have a point.

PN4885

I think so far as the personal protective equipment is concerned, we would consider that to be both a skill addition - a skill and knowledge element in addition to the effect that it has on work intensification or just inconvenience and annoyance both because of the requirement to know how to use it properly, to know when and where to use it but also the evidence to the effect that it does have in residential aged care or both residential and home care an effect upon the capacity or the practicality of the performance of the caring work, in a sense that it creates an impediment to communication or an additional element of communication difficulty and the like in the actual performance of work.

PN4886

So we think that would fall in a different category. Rapid antigen testing - it's probably hard to see a skill element involved in that but it has an initial annoyance or work intensification element. That's what I propose to say in relation to the infection control order, the issue arising from the pandemic.

PN4887

As we say, it is a skill knowledge responsibility requirement arising from, we would say, the implementation of what are by some orders of magnitude, a quite different approach and a more rigorous and sophisticated approach to infection



management control which is not something that, as one would expect, is going to go away, both because COVID itself is not going away.

PN4888

It itself is staying but also because what has happened is infection control procedures with respect to other illnesses have been adopted and applied to other illnesses on an ongoing basis.

PN4889

PROFESSOR BAIRD: Mr Gibian?

PN4890

MR GIBIAN: Yes.

PN4891

PROF BAIRD: Would you consider that infection control practices would have the same impact on direct care workers as indirect care workers?

PN4892

MR GIBIAN: We think it has a very - well, we think substantially, yes, in the sense that from the personal perspective of the implementation of infection preventative control procedures by the worker themselves in their performance of work, the requirements are uniform in the sense of the requirement to the donning and doffing requirements, the requiring to be aware of infection control, signs of infection and being trained in and implementing the outbreak management procedures.

PN4893

The only caveat I would add to that is that as I say, there are, in a sense, for some classes, at least, of the indirect care employees additional skill and knowledge requirements in terms of the specific cleaning, laundry, food services, particularly requirements which are imposed by infection management - prevention and management procedures.

PN4894

The second supplementary issue that the Full Bench asked to be addressed about was the issue of understaffing or the persisting difficulties in adequately staffing particularly in residential aged care but also affecting home care providers. In that respect, we do think that that is an element that can be taken into account in the present context in - as being relevant to work value reasons.

PN4895

Obviously enough it is hoped that both the interim increase that is awarded and any further increase that may be awarded by the Commission for workers in aged care may have a positive impact upon staffing difficulties. The Commonwealth refers to other measures which have been sought to be adopted in that respect.

PN4896

We think that there are elements - there are reasons, however, to think that it is highly unlikely that the type of understaffing issues which have been encountered on an enduring basis up to now are going to disappear at any point both because

this is - the work is, in this area, is frequently complex, stressful and difficult and requires skills and aptitude which are not necessarily for everyone and because it is an industry that is dependent in a significant way on government funding and not able to in a way that some other industries might simply higher attraction rates on a market basis to attract workers.

PN4897

That and for the third reason because of all the evidence which aligns with common sense and common knowledge of the increasing demand for aged care which is inevitably - which is happening and will continue into the future that the type of understaffing issues which have been encountered are likely to be an ongoing feature of work in the aged care sector.

PN4898

In that context, there is evidence of the impact that that has upon the workers in a manner which is relevant to an assessment of work value reasons. That's at least the case for a couple of reasons. First is that if there is staffing at a minimum or below the appropriate minimum amount of staffing, it obviously has a work intensification impact upon the remaining staff.

PN4899

It also requires - is likely to require a degree of flexibility and utilisation of workers across different tasks that (indistinct) might not have (indistinct) perform or in a home care context in dealing with different clients being assigned to different clients with whom the worker is unfamiliar and a requirement to adapt to change in work demands.

PN4900

There was also evidence particularly in the course of last week in relation to the burden upon existing staff of having to accommodate, engaging induction, instruction and training and direction of agency workers where that is a necessary alternative which is used by aged care providers where necessary to meet the care needs of residents.

PN4901

The remaining staff perhaps particularly those who are experienced or long-term staff bear the burden then on a regular basis of seeking to induct - of having to induct, train, familiarise agency or short-term staff in order to work in a facility.

PN4902

For those reasons, we think that the understaffing element is relevant to an assessment of work value reasons to be taken into account in the overall consideration of the Commission of what further increase is appropriate for direct care employees as well as indirect care workers.

PN4903

Unless there's anything further on those matters, I was going to turn to the classification and allowance side of the issues. The submissions in that respect perhaps fall into three categories.

PN4904

There is firstly, the proposed changes which - or the changes which are proposed to classification descriptor and structure by us primarily in the aged care award or - and in addition to the home care classifications currently within the SCHADS Award, noting that our application is that they be moved to fall within the Aged Care Award.

PN4905

The second being the issue as to how to address the internal relativities in our application within the Aged Care Award or the home care classifications in a manner which provides for meaningful advancement and thirdly, the discrete set of - or the set of six somewhat discrete issues that I identified at the outset of the submissions today.

PN4906

As I say, I'll speak first about the classification descriptor and structure issues. Mr Saunders has already addressed the relativities issues and I'll return to address the supplementary issues if that's convenient.

PN4907

It's appropriate to commence by highlighting the difficulties or deficiencies in the current classification structure and descriptors both within the Aged Care Award and the home care work in the SCHADS Award that were identified in stage 1 of the proceedings. As I referred to on - or last week in opening, they were identified particularly by the Commission in Background Paper 10 from around paragraph 73 and following.

PN4908

In short, the Full Bench there noted the evidence of both Professor Charlesworth and of Associate Professor Smith and Dr Lyons that particularly within the Aged Care Award and the SCHADS Award that the classification - skills classifications were rudimentary and compressed, that the wage rates - sorry, that they lacked relevant description and information with the result that the work undertaken is not properly described or valued.

PN4909

Reference to the Commonwealth's submissions that the classifications in the Aged Care Award and the SCHADS Award lack recognition for skills and competence were required to be used, containing a provision for additional on the training job opportunities and make any meaningful wage increases and progression up the limited skills classifications.

PN4910

JUSTICE HATCHER: So, Mr Gibian, are you suggesting that independent of the wage levels that the descriptors have some relationship to valuation of the work? I don't quite follow all of that.

PN4911

MR GIBIAN: The descriptors don't in themselves, have a relationship to the valuation of the work. There may be some merit in our submission in - well, perhaps it's taken at two levels. There is merit, in our submission, in

endeavouring to identify the skills involved in the work at the particular levels for a couple of reasons.

PN4912

It is important, on any view, to endeavour to differentiate between the level of skills, qualifications, experience, requirements at the different levels within a classification descriptor to be able to - - -

PN4913

JUSTICE HATCHER: Of course, so it's got to something that people can comply with without too much difficulty.

PN4914

MR GIBIAN: Yes. But also in a manner - sorry, your Honour.

PN4915

JUSTICE HATCHER: Without too much difficulty.

PN4916

MR GIBIAN: Yes, but also in a manner which provides for and recognises differentiation in the level of skills, responsibilities required at different levels.

PN4917

JUSTICE HATCHER: Well, it seems to me that's taking the long way round. That is, the first thing is to have a set of classifications which have the proper wage rates that reflect the value of the work.

PN4918

MR GIBIAN: Yes. Yes.

PN4919

JUSTICE HATCHER: And a proper set of relativities, as you say, to allow for career progression.

PN4920

MR GIBIAN: Yes.

PN4921

JUSTICE HATCHER: But once you've done that then you work backwards and say, 'What's the easiest way we can help people to work out what wage rate applies to whom.'

PN4922

MR GIBIAN: Yes. We agree with that but in a sense, it's one and the same exercise. That is, it's not a separate stage in that respect. That is, working out what the classification structure would be and what an appropriate structure is to allow for a meaningful degree of career progression requires identifying what are the differentiating features of the exercise of an appropriate differentiation.

PN4923

VICE PRESIDENT ASBURY: So that's in the perspective of the employee endeavouring to progress so that they can look at a classification structure and

understand what they need to do to progress what they are entitled to if they feel they are working at a higher level.

PN4924

MR GIBIAN: Yes. Also that in just constructing it initially, the classification structure does recognise and reward the accumulation or/and exercise of additional or superior skills and responsibilities. That is one of the difficulties with the current structure, as I was going to go to, in both the Aged Care Award and the SCHADS Award is a lack of capacity to recognise that by acquisition of skills and experience, workers are able to work at a high level, particularly in the provision of direct personal care work.

PN4925

If you look at the home care classifications, for example, on one view of things and it seems to be as I understand it, at least, the view that's implemented to be practiced, that the direct care home care work stops at level 3. That is, you only get to level 3, there is no further differentiation based - that is possible, based upon the level - the type of work undertaken or level of skill or experience which is obtained in the course of that work.

PN4926

You only have an introductory, on one view, time limited classification, an unqualified classification and a Certificate III classification and then that's it, it stops. There's no capacity to then further recognise development of specialised or more advanced or more senior skills which is something that we wanted.

PN4927

That's why I say that in a sense, it's one and the same exercise rather than - I mean, I understand the drafting of the descriptors and debates about simplicity and that and practicability and the like but that's always a balance with also creating a structure which properly rewards and recognises increase in skills and differentiation in the type of work performed.

PN4928

And this is - that point is not unconnected with the conclusions that the Full Bench made in the first stage of the proceedings in relation to the engendered view of caring work of this type, that is that tendency historically has a couple of elements. One is the matter that the Full Bench addressed at some length, that is, regarding caring facilitative communication type skills as not skills but some form of innate trait or personality trait.

PN4929

Another is though, regarding it as all much one and the same thing, that is, providing care is providing care without viewing it as a skillset which can be developed and improved by qualifications, by experience and by training over time and may involve a different type or degree of skill depending upon the context of which it's performed or the type of resident or client that's being provided with care. That's what we think the challenge is in trying to construct a classification structure that provides for meaningful progression.

PN4930

What I was endeavouring to do was to identify what the Full Bench described as the deficiencies or the difficulties in the current classification, structures in both home care and under the Aged Care Award which in short, are the lack of useful descriptors which allow for differentiation, the lack of meaningful opportunity for progression, particularly in direct care and personal work.

PN4931

Those are the matters that we are endeavouring to - or endeavour to address by proposing changes to the classification structure. Can I just identify - can I deal in turn, with the Aged Care Award and then the home care classifications in the SCHADS Award. Does the Bench have access to the Aged Care Award as it presently exists?

PN4932

It's probably - it's most informative to go to what is now schedule B.2, I think it's on page 54 of the award as I have printed out at least, which are the direct care classifications and it has, as the Full Bench is no doubt well aware, a seven-level classification structure.

PN4933

It starts with what's described as B.2.1 as a aged care direct care level 1 which is a person up to three months experience and then in a very general way, describing the level of responsibility or independence involved. There's no indicative task under personal care for that level. Perhaps the effect of that is somewhat obscure. I think it's been assumed that personal care work starts at level 2 for that reason but perhaps not entirely clear on the award as it currently is or indeed as it was prior to the interim increase.

PN4934

We then start with a indicative task description at level 2 at B.2.2 which again describes an employee at that level by way of very generally stated capacities in terms of working to establish procedures or the level of accountability involved, the level of supervision, communication skills of that employee with an indicative task referred to - indicative task perhaps not aptly but described as a personal care worker grade 1.

PN4935

JUSTICE HATCHER: So those tasks are the same in 2 and 3 except 3 has a reference to health medic skills.

PN4936

MR GIBIAN: Yes. And I think one progresses from limited level of accountability to a medium level of accountability, whatever that means.

PN4937

JUSTICE HATCHER: That's so, yes.

PN4938

MR GIBIAN: And there's a reference to arithmetic as well as communication skills. I don't know how arithmetic skills are particularly relevant in this context but maybe they are.

PN4939

JUSTICE HATCHER: Maybe there's on the job mathematics learning, is there?

PN4940

MR GIBIAN: I mean, look, to be fair, I think these classifications - they used to be combined with the indirect care as well prior to the interim increase so whether that's referable to something to do with administrative work or was intended to be, I don't know.

PN4941

But as I say, the point we make is at level 2 and 3 is one has a personal care worker grade 1 or grade 2 without there being any meaningful capacity to determine when one is a grade 2 or grade 3 - sorry, level 2 or level 3, grade 1 or grade 2 - even the numbering is confusing, other than very generally stated levels of responsibility and - - -

PN4942

VICE PRESIDENT ASBURY: Was there a previous definition of 'Personal care worker grade 1, 2 and 3,' though in the - - -

PN4943

MR GIBIAN: In the modern awards.

PN4944

VICE PRESIDENT ASBURY: Yes. I think there was.

PN4945

MR GIBIAN: I'm not sure, your Honour.

PN4946

VICE PRESIDENT ASBURY: No, but I think there was.

PN4947

MR GIBIAN: Yes. I've been told they were but there were different ones in different awards so whether it's of much assistance, we can have a look at that.

PN4948

JUSTICE HATCHER: Anyway so to compare with these two, so you reach Certificate III level at level 4.

PN4949

MR GIBIAN: Yes.

PN4950

JUSTICE HATCHER: So you would have, for personal care there's two levels below the Certificate III level.

PN4951

MR GIBIAN: Yes.

PN4952

JUSTICE HATCHER: And the one would be effectively for three months, is it, or six months? Six.

PN4953

MR GIBIAN: We've proposed six months.

PN4954

JUSTICE HATCHER: Sure. I see because there's - yes. All right. So let's assume we come up with a definition of what personal care is as a proposition, below the Certificate III level might it mean there to say more than someone with less than six months and someone with more than six months to know who goes - who gets paid more.

PN4955

MR GIBIAN: Yes. Yes. If the Bench goes to the drafting - I mean, I'd like to take a slight step back which is to try and indicate - we accept that there's no one right way to write a classification descriptor. Obviously there's been debate about both the precise wording and perhaps in a more general sense the way in which it most usefully explained or set out.

PN4956

In terms of what we were trying to do or the exercise that was endeavouring to be engaged in was to try and focus upon and identify the nature of the work that is performed and required to be performed in the aged care context to try and make overt the nature of the skills required in undertaking that work, to recognise progression and skills and responsibilities in that form of work and get away from the concept that it's all sort of similar or much the same in its nature and to allow for proper progression through the structure. In that context - - -

PN4957

JUSTICE HATCHER: Well, if that's the way it's structured it's counterintuitive of something based on amount of time served, isn't it? I mean, if it was purely like you describe, you wouldn't have less than six months and more than six months.

PN4958

MR GIBIAN: Obviously these things are a balance to try and work out a sensible structure. This is an industry in which we think that some form of time regression is not necessarily antithetical to recognition of skills and there's a good deal of evidence about - to the effect that there is a familiarisation - I think there's some debate about what period is appropriate but there is a familiarisation period, an upskilling period that is appropriately recognised by having an introductory classification of some period.

PN4959

JUSTICE HATCHER: Sure, but if the requirement is to move someone up after they've served six months, full stop, then having stuff about skills and responsibilities, is just surplusage, isn't it, because you've got to move them up after six months. It doesn't involve any assessment of what they're doing or how much they've learnt. If it's six months, it's six months.

PN4960



MR GIBIAN: Yes. I understand what your Honour says. That would be a very simple structure. We think that there is merit. As I say, we're not wedded entirely to any particular form of words but we do think as a general proposition there is some merit in endeavouring to identify the nature of skills to be exercised at a particular level.

PN4961

Obviously, with respect to level 2 as we've proposed it, in relation to personal care we've said there should be a six-month window in which work is performed at that level but that is in recognition that this is an introductory employee who's likely to - who's to be performing work at a particular level.

PN4962

That is, exercising basic personal skills tasks, basic knowledge of hygiene practices, infection control prevention, basic relationship building skills, that that is the skills that the person will have at that level which will, in a sense, govern the type of work which they are able to be engaged in and perform in addition to just the - - -

PN4963

JUSTICE HATCHER: No, I'm looking at your level 3.

PN4964

MR GIBIAN: Yes.

PN4965

JUSTICE HATCHER: And I'm doing so from the perspective of a payroll manager who, case law suggests, may be personally liable for any mistakes in paying people. So if someone reaches six months do I have to look at all these criteria or is it just six months?

PN4966

MR GIBIAN: It's just six months from level 2 to - well, it is six months from level 2 to 3, yes.

PN4967

JUSTICE HATCHER: So what do I have to look at this other stuff for? I mean, it may lead someone to think that it's six months plus every other thing you've identified and made a mistake.

PN4968

MR GIBIAN: As I say, what we were trying to do was to recognise the skills at the particular level, that is that the person who's at level 2, even in the first six months - well, for two reasons. One is because the person in the first six months shouldn't be doing the work that it's at a higher level, that is, it's six months plus work at that level in level 2.

PN4969

JUSTICE HATCHER: So if you're under six months, if you're performing work at a higher level, you are at a higher rate?

PN4970

MR GIBIAN: Yes. Yes. You should be performing work at that level if you're at level 2 but you can progress to doing higher work at a level 3 level, at least, by six months.

PN4971

JUSTICE HATCHER: But you can't move up before six months, can you?

PN4972

MR GIBIAN: I think the idea is that that's a six-month period and that's a recognition of the level of skills that the person will have in their first six months of employment, yes.

PN4973

The approach that we took was also that there is some benefit in recognising the type and nature of skills and the work environment in the classification structure because it recognises - it makes overt relevant considerations that have been taken into account on the work value grounds in arriving at the classification structure. There may be different reasons about whether they - - -

PN4974

JUSTICE HATCHER: Well, that's what our decision does doesn't it?

PN4975

MR GIBIAN: I'm sorry, your Honour?

PN4976

JUSTICE HATCHER: That's what our decision does.

PN4977

MR GIBIAN: Indeed. Indeed. But we do think that there is some merit in that respect and it also permits the kind of - once we get beyond level 4, the differentiation as well in the level of skills which have been exercised which we had tried to build in.

PN4978

I was going to go really in a more staged way but in short, what we've - and we've developed - it's not an alternative table but a summary, but what we are trying to do is to provide the capacity for people to progress based upon the acquisition of additional - or exercise of additional skills and expertise.

PN4979

At the introductory level, from level 2 after six months to level 3 and the capacity to do a higher level of work, recognition in recognition that one's passed the initial sort of introductory period of employment, one then has from levels 4 to 6 which are at level 4, a Certificate III, level employee but with - not stopping at that point but with the capacity to then obtain progression through undertaking more senior work which would be recognised at level 5 involving - - -

PN4980

JUSTICE HATCHER: So just pausing at the Certificate III, can you just clarify what's the position in respect of some future requirement that that's the minimum qualification. What level of certainty do we have about that?

PN4981

MR GIBIAN: I think everyone thinks it's going to happen and there was an in-principle recognition - acceptance of that recommendation by the government. I'm not sure I can put it higher than that, that's my understanding. I don't think it's the rule yet, at least.

PN4982

Now, that will have an impact on the current classification - yes, on the application of the current classification structure. It would have an impact on the application rate classification structure. We do - I mean, there's a minimum level in the current classification structure. We propose that level 4 be the minimum level for a person with a Certificate III qualification or equivalent skills and experience.

PN4983

We then want to propose that from levels 5 and 6, the capacity to progress to a higher level as a direct personal care worker by the exercise of additional skills, experience at a senior level, at level 5 involving advanced care and support which may include medication competencies and support induction and training of other employees.

PN4984

And at level 6 the specialist level which may include specialist practice in a dementia unit, palliative care, household model and may require a Certificate IV or equivalent and then at level 7, a supervisory role.

PN4985

If I can provide the Bench with a document in table form which isn't oral terms but endeavouring to summarise what we were trying to get at as a structure.

PN4986

VICE PRESIDENT ASBURY: Mr Gibian, before you go to that document, can I just take you back to the movement from level 3 to level 4 and leaving aside the other descriptions but it seems to me that the description of the work at level 3 of personal care work talks about providing care to people who can make decisions about what they want and then level 4 is to people who may not have the capacity to make decisions about their care.

PN4987

MR GIBIAN: Yes.

PN4988

VICE PRESIDENT ASBURY: So it seems like there's a differentiation between 3 and 4 based on that level of cognitive ability of the people being cared for.

PN4989

MR GIBIAN: Yes.

PN4990

VICE PRESIDENT ASBURY: How - and if the qualification is still a Cert III how does the - again, coming back to the papers and how do you differentiate between - given people - the evidence that residents with varying levels of acuity are all grouped together in a particular area, how does one assess whether someone is working with residents at level 4 or level 3.

PN4991

MR GIBIAN: The intention and I think Professor Charlesworth's tried to explain it, is to recognise that the level of skill and expertise required to be applied does vary depending upon the nature of the - and condition and needs of the residents to whom care is provided.

PN4992

I don't think the intention is that it's at level 4 that care only be provided to people who fit that description but that it can incorporate people who fit that description because the level of skill at that level would be required to do that work. That's the level that's contemplated.

PN4993

VICE PRESIDENT ASBURY: All right.

PN4994

MR GIBIAN: And that what is - Professor Charlesworth explained this, is that what is intended is that there would be a team of people so that not everyone would necessarily be at level 4 if there was a resident who had difficulty making their own decisions as it were, but that there would be a team of people who would provide care to that person and to the other residents who may be within the description of level 3.

PN4995

VICE PRESIDENT ASBURY: But to put it again into a practical scenario, there will be some people who have a Cert III that includes - for example, that includes the dementia module and there will be some people that have a Cert III that doesn't include the dementia module.

PN4996

MR GIBIAN: Yes.

PN4997

VICE PRESIDENT ASBURY: So someone who's got the same qualification but has not done something and has done the dementia module may be entitled to level 4 whereas a person with the Cert III that doesn't include the dementia module arguably hasn't got the skill to work with people that have the limited or may not have the cognitive capacity and will be at level 3.

PN4998

JUSTICE HATCHER: Level 4.

PN4999

VICE PRESIDENT ASBURY: Sorry, cancel that.

PN5000

JUSTICE HATCHER: No, but it's the same proposition why - - -

PN5001

MR GIBIAN: Yes. And I understand the proposition. In terms of the training requirements, the training requirements are what they are. That is, if someone has a Cert III which qualifies them to work in aged care the evidence is that does not necessarily have to have the dementia competency unit in it and that's a matter that's outside of our control and of the Commission's control.

PN5002

JUSTICE HATCHER: But if they've done the unit and they're actually working in the dementia unit. So if they've done the unit and the Certificate III and they're working in the dementia unit at the facility, does that make them a grade 6?

PN5003

MR GIBIAN: Yes.

PN5004

JUSTICE HATCHER: Right.

PN5005

MR GIBIAN: That is - we think that there is - - -

PN5006

JUSTICE HATCHER: So if they've done that part of their Cert III and actually exercising at a higher level of skill, they can move on.

PN5007

MR GIBIAN: Yes.

PN5008

JUSTICE HATCHER: All right.

PN5009

MR GIBIAN: That is, we - and we made submissions about this in stage 1 of the proceedings as well. We think it is - in trying to provide career progression which recognises that position of skills, it is appropriate to recognise that specialist class of skills, at least being - and that the evidence is that this is what happens.

PN5010

That is, that people are recognised as having specialist skills by working in a dementia unit or specifically allocated to palliative care or in a household model. They're just not paid anymore for it at the moment as that they could be recognised by way of an opportunity for correct progression.

PN5011

We've tried - we've not said that just because you have a dementia competency that they'll necessarily be in a specialist category, it's about recognition through the allocation of specialised work in that area. That's the way we've endeavoured to construct it.

PN5012

In terms of Certificate III people who don't have specifically the dementia component, I think the evidence is that all workers, I mean, including indirect care workers have some form of dementia training so we think that a person with a Certificate III was satisfied of the qualification requirements would fit within Certificate IV and be able to work with residents of the class that's describe.

PN5013

VICE PRESIDENT ASBURY: So it's not sufficient just to hold it, so the progression is people may obtain it because they see that that is what I need to progress in my workplace because we do have a dementia ward or a dementia area that I could be allocated to and then I'll be entitled to the next level but I'll obtain the qualification and I'll hold it and when I'm required to exercise it, then that's when I'll get the higher level.

PN5014

MR GIBIAN: Yes. Yes, if they are recognised as a specialist unallocated worker in that area. We don't say that once that they've reached level 6 and are recognised as a specialist in that area, that that means they're only paid work on the shifts that they're in the dementia unit.

PN5015

They have that recognised as having that level of skill and exercise that generally both by way of - that is, I mean, the evidence is in excess of 50 per cent of people in residential aged care have some form of dementia to varying degrees of cognitive effect but have some form of dementia so they would be exercising the superior skills that they have albeit elsewhere and no doubt, also by way of instruction and mentoring and the like, of other staff.

PN5016

PROF BAIRD: Excuse me, Mr Gibian.

PN5017

MR GIBIAN: Yes.

PN5018

PROF BAIRD: Maybe I'm reading it wrongly. If you've got a Certificate III and you've got the dementia care specialty and you're working in the dementia unit, are you paid at level 6 or level 5?

PN5019

MR GIBIAN: 6.

PN5020

PROF BAIRD: But you don't have a Certificate IV.

PN5021

MR GIBIAN: No, that's right. The qualification requirement we've proposed at level 6 would be that it may require a Certificate IV qualification or equivalent. It doesn't necessarily do so and we think that is appropriate to - and the evidence

suggests that's appropriate to recognise the specialist work in those particular type of things.

PN5022

VICE PRESIDENT ASBURY: But experience has it that what occurs when you have advanced qualifications is that there's a time frame where people have the Cert III and it doesn't include things like medication, competency or dementia, the special dementia units.

PN5023

MR GIBIAN: Yes.

PN5024

VICE PRESIDENT ASBURY: As the industry progresses and the classification structure feeds in, people start to do those - or obtain those modules, if you like, in the Cert III instead of towards the Cert IV.

PN5025

So you'll have people who will just - employers who will have a training path that says, 'We're going to drop out this and put in that,' and so you could - it creates - you have to have some way of recognising that some people are going to get it in addition and some people are going to have it as part of their qualification depending on how long they've been in the industry.

PN5026

MR GIBIAN: I understand what your Honour says. What we're endeavouring to do is to recognise the acquisition of additional competencies that maybe part of obtaining the Certificate III, it may be in addition to or separate from obtaining the Certificate III or Certificate IV but it's to recognise what the evidence suggested were commonly required and exercised additional skills and competencies which ought be, in our submission, reflected in a career structure, in a classification structure which allows all career progression.

PN5027

JUSTICE HATCHER: Mr Gibian, why couldn't we just use these as our descriptors?

PN5028

MR GIBIAN: Well, we think this was not intended to be descriptors and maybe - we do think it would have to be fleshed out a good deal more than this but it was endeavouring to describe what we wanted to achieve which was level 1 is not - level 1 is purely introductory for indirect care.

PN5029

Level 2 is an interactive classification for direct care for the first six months to recognise the acquisition - that the starting position would be relatively basic level personal care work and basic knowledge. Allowed to progress without qualification to level 3, recognising additional complexity in the work that can be performed then at that level with some experience.

PN5030

Then having a Certificate III level at level 4 with two possibilities of progression within the - obviously this is tied to what we say about the meaningful progression in rates as well but two further progressions possible at grade 5 at - sorry, at level 5 and level 6 on the basis of seniority at level 5 including additional competencies such as medication competency and a role which the Commission heard evidence about of mentoring, coaching, other staff which is necessarily taken on by more experienced and skilled staff would be recognised and then a specialist on level 6 - sorry, I should say.

PN5031

VICE PRESIDENT ASBURY: So are you - sorry. Are you effectively saying that the jump between level 4 and level 5 is the medication competency or equivalent so notwithstanding they might have obtained it as part of their level 3, if they're required to use it - - -

PN5032

MR GIBIAN: Yes, that's - - -

PN5033

VICE PRESIDENT ASBURY: Sorry, as part of their level 4, as part of the Cert III which is at level 4.

PN5034

MR GIBIAN: Yes.

PN5035

VICE PRESIDENT ASBURY: If they're required to use it then it's level 5.

PN5036

MR GIBIAN: Yes. We don't say that's the only basis to go to level 5.

PN5037

VICE PRESIDENT ASBURY: No. Or it could be dementia, it could be the dementia specialisation. It could be a medication - - -

PN5038

MR GIBIAN: At level 5 what we proposed is that medication competency would be 1. Again, acquisition and utilisation, not really acquisition. We also say it could be other things such as that that person is more senior in the sense that they are providing support, training, mentoring, et cetera, to other staff. So it's not only the medication competency at that level.

PN5039

VICE PRESIDENT ASBURY: Yes.

PN5040

MR GIBIAN: The specialist, we say, should be level 6 which is the dementia unit, palliative care, household model and the like.

PN5041



VICE PRESIDENT ASBURY: Yes. Or you - so I guess where I'm getting at is you could say that level 5 is a Cert III plus certain qualifications or competencies towards a Cert IV.

PN5042

MR GIBIAN: Yes.

PN5043

VICE PRESIDENT ASBURY: Or dementia or medication competency or, for example, palliative care, something like that. So there are some things that a hard barrier, so you would say - your proposal is you wouldn't have people at level 4 using a medication competency.

PN5044

MR GIBIAN: Yes.

PN5045

VICE PRESIDENT ASBURY: They might be obtaining it but they wouldn't be using it. You wouldn't have them using a dementia qualification, they might be obtaining it. Palliative care similar and so on.

PN5046

MR GIBIAN: Yes.

PN5047

VICE PRESIDENT ASBURY: All right. I understand that. Thank you.

PN5048

MR GIBIAN: Yes. Look, we've tried - and it is a balance between having a structure which is easily comprehensible and easily applicable and one which is flexible enough to recognise different ways in which a higher level of skills and competency can be - or ought be recognised.

PN5049

The core idea is particularly from level 4, 5 and 6 is that you don't just get a Certificate III or be a care worker and that's it, that we recognise that because you are doing work which either involves providing care to residents that require a higher level of skill and sophistication in the work or because you're involved in a particular skill or specialty or because you are engaging in training, mentoring and other staff, that you ought be recognised while still being in a direct care role without sort of being a supervisor as having additional skills that ought be recognised by a higher classification.

PN5050

Are there - but we don't want to say, 'Well, it's just if you have a medication competency, that's the only basis upon which you can get to 5.' I mean, in a sense that would be easier to apply but it doesn't recognise that there are a myriad of ways which we do think ought be capable of recognising so it is a balance I - - -

PN5051

VICE PRESIDENT ASBURY: They have to be hard and soft, a line between a classification, you know, between levels in a classification structure is either a hard line or a soft line or a line that you can get over in a variety of ways.

PN5052

MR GIBIAN: Yes.

PN5053

VICE PRESIDENT ASBURY: So you know, taking, for example, I don't know, let's take infection control for argument's sake. So you'd expect that level 4 with a Cert III people would have an understanding of infection control. They'd be able to implement the measures.

PN5054

MR GIBIAN: Yes.

PN5055

VICE PRESIDENT ASBURY: At level 5, you would expect that they'd have some module or something, level of training that's a higher level of infection control. At level 6 you would expect they'd understand why we had - they'd be actually devising the system for infection control or working - or perhaps not solely, that they would have a role in devising the system.

PN5056

MR GIBIAN: Having some role, yes. Yes, or implementing and, you know, ensuring implementation, I'd say.

PN5057

VICE PRESIDENT ASBURY: Well, implementing might be just 'I'm going to do it,' but you mean they have some supervisory role in making sure that people, they're testing, they're training, they're doing those sorts of things.

PN5058

MR GIBIAN: I mean in an organisational sense. Yes.

PN5059

VICE PRESIDENT ASBURY: And then at level 7, for argument's sake, they are actually devising the system.

PN5060

MR GIBIAN: Yes. In a supervisory capacity.

PN5061

JUSTICE HATCHER: Your level 7 on one view, is pitched at a higher level than an existing level 7.

PN5062

MR GIBIAN: I'm not sure that was our intention, your Honour, but - - -

PN5063

JUSTICE HATCHER: I mean, level 7 to me looks - your level 7 to me looks a bit like a (indistinct).

PN5064

MR GIBIAN: Yes. There is some differing evidence about that issue. Professor Charlesworth and Meagher have a slightly different view about the role of a non-nurse supervisory position in a residential context at least.

PN5065

There was evidence, particularly from Ms Riboldi last week about that they do have those people, a sort of coordinating supervisory role of a personal care worker, a capacity but that is something that is done which has - and our view of it is that is something slightly different to the role that the registered nurse has as the clinical leader, as it were, in the facility.

PN5066

VICE PRESIDENT ASBURY: Well, if you wanted a general comparator, it might be something like someone who's overseeing the implementation of a quality assurance system or a - something of that nature.

PN5067

MR GIBIAN: Yes.

PN5068

VICE PRESIDENT ASBURY: So designing the system, making sure the system's got integrity, it keeps operating consistently and is responsible at that overarching level for it.

PN5069

MR GIBIAN: Yes.

PN5070

JUSTICE HATCHER: Now, is that a convenient time for you?

PN5071

MR GIBIAN: It is. We do have a similar document in relation to home care structure if it's maybe convenient that I provide that to your Honours now.

PN5072

VICE PRESIDENT ASBURY: Good.

PN5073

JUSTICE HATCHER: You can hand that up now, we can spend our lunchtime looking at that.

PN5074

DEPUTY PRESIDENT O'NEILL: And just to be clear, the communication competency you're referring to is the Cert IV unit, the administering medication not the assisting clients. Yes.

PN5075

JUSTICE HATCHER: Thank you.

PN5076

VICE PRESIDENT ASBURY: You haven't put lines around it.

PN5077

DEPUTY PRESIDENT O'NEILL: Yes, it's much harder to read.

PN5078

MR GIBIAN: I'm sorry there were requests for a different layout.

PN5079

VICE PRESIDENT ASBURY: There's no lines and no boxes that - - -

PN5080

JUSTICE HATCHER: All right. So we will get to relativities at 2 o'clock, will we?

PN5081

DEPUTY PRESIDENT O'NEILL: Yes.

PN5082

MR GIBIAN: Yes.

PN5083

JUSTICE HATCHER: yes. All right. We'll now adjourn and resume at 2.

**LUNCHEON ADJOURNMENT** **[1.06 PM]**

**RESUMED** **[2.04 PM]**

PN5084

JUSTICE HATCHER: Mr Gibian.

PN5085

MR GIBIAN: Yes. Just before I cross to Mr Saunders I was just going to point out by reference to schedule E of the SCHADS Award just very briefly just make clear the deficiencies in that structure that we're trying to address. Schedule E and E.1 is I think on page 101 of the award as it presently is. The Commission will have seen that at E.1.1 this is level 1 home care employees described as a person appointed to a position having - or it's indicated that 'A person appointed to this position will have less than 12 months experience in the industry.'

PN5086

The other relevant part to note is, or most relevant part of 1.1.4 is indicative but not exclusive tasks listed under the heading 'Specialised knowledge and skills' appear generally to be a reference to what collectively is referred to as domestic assistance, and there isn't a direct reference at least to personal care at level 1.

PN5087

The difficulty with the classification level, maybe at a number of levels, but perhaps most importantly is that it's not clear that you necessarily progress after 12 months beyond level 1, particularly if the worker is regarded by the employer as doing domestic assistance rather than personal care work, and there may be a question about both the prioritisation and/or the differentiation between the two. But there is evidence of people being parked so to say at level 1 and not

progressing if they're perceived to be domestic care work or domestic assistance, which is not as we would say appropriate.

PN5088

One then goes to level 2. I think the heading is right at the bottom of page 101. It doesn't say a whole lot, but other than references to a level, the accountability - at E.2.3 under 'Specialist knowledge and skills' there is the first reference to the provision of personal care, again by way of introduction of the words:

PN5089

*Indicative, but not exclusive tasks, including the provision of personal care, supervising daily hygiene - - -*

PN5090

Et cetera. Again it's not entirely clear that that means you're necessarily at level 2 if you're doing personal care work of some nature or not, because (indistinct) is under indicative rather than exclusive tasks.

PN5091

And then to go to level 3, again with some reference to changes to the references to the degree of accountability, judgment and decision-making involved, there is at E.3.5 an indicative qualification of Certificate III at that level, again indicative but not necessarily exclusive. So again it's not entirely clear whether if you have a Certificate III you're necessarily at level 3.

PN5092

The description at E.3.3 of specialised knowledge and skills, again providing a list of indicative but not exclusive tasks, includes some office type skills. There is about six lines down in that paragraph a hint at, at least some form of high level personal care work, the reference to provision of personal care to clients with a particular emphasis on those requiring extra help due to specific physical problems for frailty. But again without clarity that necessarily that means a level 3 rather than level 2.

PN5093

Dealing quickly with it you then really stop, it appears, in direct personal care, or direct home care work at level 3. There is no further progression beyond that. Level 4 I have to say for my own part is a somewhat mysterious classification, but it appears from the references in the specialised knowledge and skills at E.4.3 to various types of administrative, and computer-based or rostering type tasks that that is an administrative role as I understand it customarily occupied by someone who's allocating and the like in an office rather than a care worker.

PN5094

The really pernicious nature of the way in which it was able to operate at the moment is both the people can be stuck, or whether properly or otherwise on some arguable view of the award stuck at 1 or 2 without progressing. And the possibility of progressing further than 3 where direct home care work is being undertaken on any basis that would recognise any further acquisition of additional skills and experience and qualifications.

PN5095

And there was extensive evidence in stage 1 of the proceedings of individuals who do have Certificate III, Certificate IV qualifications or other competencies which are being used in undertaking that work for which there is no capacity for further recognition by way of progression in the scale as it exists. Then one has two further levels - sorry, a further level at level 5 of a supervisory role.

PN5096

We have endeavoured to unpack that and provide a form of progression in a way which is similar to that that we've proposed with some variations to that we've proposed in home care. Just before I - and I assume that the Bench has looked at it over lunch and before in our proposal - before I go to that I did just want to emphasise a particular reason from the evidence why particularly the failure to recognise any progression beyond level 3 for a direct home care employee is something that perhaps was always deficient to be honest. But is particularly deficient given that the evidence is to the change within the nature of home care work that's being undertaken.

PN5097

Just quickly by reference to Professors Charlesworth and Meagher's most recent report, which is in the court book - sorry, I've lost the reference - commencing I think at page 499 - at appendix 1 to the report, some further materials provided by Professor Meagher particularly I think in relation to, and I referred to this before lunch, but dealing with and setting out some of the further evidence in relation to the change in the needs of an older person receiving aged care services.

PN5098

At the first page, page 499, I think the first page of appendix 1, at the top of that page the appendix starts by recognising the long term goal of aged care policy as being to help older people remain living independently in their own home as long as possible, and that that goal had driven the structure of aged care service system away from residential care towards care in the home and through the provision of home care packages and home support program. In the second and third paragraphs on that page statistics are given in relation to the change in composition or proportion of persons over the age of 65 who are in residential and respite care and receiving home care.

PN5099

In the final paragraph on that first page the report observes that:

PN5100

*At a population level there is evidence of an almost direct substitution of permanent residential aged care with level 4 home care packages.*

PN5101

That's described, or seen in graphic form over the page at figure 1 where the proportional reduction of persons in residential care is taken up almost entirely by persons receiving level 4 home care packages. This is confirming earlier evidence, that is what we are seeing is as a population matter the people of a category that were previously direct in residential care are now being cared for by

way of almost numerical substitution by the provision of home care, and that's a trend that is continuing. I'm sorry, your Honour - - -

PN5102

JUSTICE HATCHER: No.

PN5103

MR GIBIAN: The consequence of course is people are frailer and older when they go into residential care, but they are frailer and older with more complex care needs when they have been receiving home care through the provision of home care packages primarily, particularly the level 4 home care package, and the characteristics of those people are described further on, particularly on the third page of appendix 1, the nature of the care needs - I'm sorry, I'm looking at page 4 of appendix 1 - the nature of the people, older persons who are receiving care pursuant to a level 4 package.

PN5104

We have had that trend, continuing the previous evidence of the trend that's happened since home care packages and (indistinct) home support were implemented. It really puts into stark belief the need to recognise further progression skills and capacities of home care workers, given since the award was first made, particularly the dramatic changes that occurred in the nature of a population receding, support in home as a consequence of both the deliberate government policy to allow people to stay in their own homes as long as possible by the provision of that support.

PN5105

And evidence was already given as to changing societal attitudes and choice of wishing to remain in one's own home for as long as is possible. As I say that puts into stark relief the need, on our submission, to provide an appropriate career structure to recognise that change in the nature of the work that's being performed in that sector. As I say the structure may have been always deficient in some respect - I'm sure my client would say so - but the deficiencies are accentuated.

PN5106

We have endeavoured to deal with that in the structure that's proposed in a draft determination. We have endeavoured to digest into its rudimentary forms.

PN5107

PROF BAIRD: Excuse me, Mr Gibian, just before you go on, I think figure 1 which you were referring to, is the vertical axis percentage? Yes, it must be.

PN5108

MR GIBIAN: I think it's the number of persons per thousand in the population.

PN5109

PROF BAIRD: I see.

PN5110

MR GIBIAN: And so the total column with the lighter shading and the dark shading together is the total who are receiving, per thousands of people over the

age of 65, who are receiving one form or other of aged care, whether it be residential, the light coloured, or home care services which are the darker colours - sorry, level 4 home care packages I should say which are the darker colours. And albeit the somewhat marginal reduction in the proportion of persons per one thousand population in residential care is being taken up; that is those people who were in the 2015-16 year, people in that category or a proportion of them would have been in residential care, that proportion are now receiving home support in a level 4 package, with a quite high level of care needs, which are described later on.

PN5111

PROF BAIRD: Okay. Thank you.

PN5112

MR GIBIAN: That's as I read it at least. If there's an additional level there's seven rather than six that (indistinct) direct to personal care in the home care award. There are pay points in the classification in the existing schedule E classifications. We are endeavouring to redraw that gap without individual pay points. Level 1 is an introductory classification without personal care work, so that would be domestic assistance only. Level 2 is up to six months experience, but it would be the entry level for personal care. And then in a similar way to the manner in which we have proposed to be dealt with in residential care a Certificate III classification with a higher level of work at level 3, with the possibility of progression through a senior and a specialist classification in a similar way.

PN5113

There are then a supervisor and a coordinator role recognising that the evidence in relation to the coordinator role in home care services being at a high managerial level. That's the way in which we have endeavoured to deal with the problems that we identify in the classification structure for home care workers as it exists in the SCHADS Award at present.

PN5114

JUSTICE HATCHER: Mr Gibian, apart from your proposed restructuring of the home care classifications do you want to say anything else about the justification for the proposal to move the classifications into the Aged Care Award?

PN5115

MR GIBIAN: I did. Would it be convenient if I say that now?

PN5116

JUSTICE HATCHER: Up to you. If it's coming later that's fine.

PN5117

MR GIBIAN: Perhaps I will turn to Mr Saunders first I'll deal with that after that if that's convenient.

PN5118

MR SAUNDERS: Just before turning to the question of the internal, primarily internal, but to a degree external relativities these applications are concerned with,



your Honour Justice Hatcher raised a question before the adjournment about the relevance of the equal remuneration order in the SCHADS Award as a possible basis for aligning rates.

PN5119

It should be remembered that of course that figure of 23 per cent initially came from alignment between that rate and a rate in Queensland Pay Rates Award. More importantly it was solely directed at addressing the finding that the rates had been undervalued on the basis of gender, and curing that. Of course gender-based undervaluation was a cornerstone of the Bench's findings in the initial decision, but it's not the sole basis here.

PN5120

Your Honours, Professors, would recall that a large part of the case is about work value change in addition since these awards were made. So on one view the 25 per cent undervalues it. The reality is of course this is not a precise science. There's no magic to picking these numbers. The HSU's applications, neither of them are externally driven in the sense that it allows that easy benchmarking. We've had to pick a figure, and conventionally when one does that it ends in 5 or zero, and so that's where 25 comes from. It is relatively obvious that some reference has been made to the SCHADS Award and its impact on home care workers in the disability sector in particular.

PN5121

Returning to the internal relativities part of the point at this stage of the proceedings as we understand it is to address the identified concerns about the current classification structure, in that it doesn't adequately incentivise and reward skill development for workers in residential and home care. Necessarily that directs as well as the descriptors which are important, but necessarily it directs attention to the mathematic or relativity between the classifications. Meaningful progression for a classification structure is only achieved by meaningful differences in the amount of money paid for each job. That is how work value is at its heart recognised - - -

PN5122

JUSTICE HATCHER: While we're talking about meaningful differences level 2 is at 99 per cent, level 3 is at 100 per cent. I wouldn't call that a meaningful difference. In fact that said (indistinct) begs the question why aren't they just put together into one classification. I mean I don't think we get that precise for our work value assessments, do we?

PN5123

MR SAUNDERS: Well, many awards at that below trade level are getting close to 98, 99 per cent. The reason for that below C10 relativity is purely a mathematical creation, and it's the difficulty with doing this at this stage in the proceedings. We have rates in this award which have been determined by the Commission to not yet be properly fixed. They're closer, but they're not there, which means that the lowest one can't move backwards, which addresses the question from ABL why does the CD10 rate go up by 2.88 per cent when it was aligned at 100 per cent.

PN5124

It's because mathematically we've had to start from the level 1 position. One sees that in the Excel spreadsheet that was filed with the determination. The formulas are in there, so that is hopefully exposed. But, yes, so 99 per cent to 100 is not a meaningful difference.

PN5125

JUSTICE HATCHER: Isn't the proper approach to pick a benchmark classification, which in this case as you've done with the Certificate III and then just assess appropriate relativities up and down from that?

PN5126

MR SAUNDERS: Yes. It's just because of that mathematical and process difficulty with the 1, 2, the below C10 levels, we haven't been able to do that, but that's the exercise.

PN5127

VICE PRESIDENT ASBURY: Do you think that if you did that then the lowest level would go backward?

PN5128

MR SAUNDERS: They would go down. If you adjust - - -

PN5129

VICE PRESIDENT ASBURY: Yes, I understand. Okay.

PN5130

MR SAUNDERS: - - - if you aligned this to either be compressed or uncompressed below C10 relativities the current level 1, 2, 3 rates go backwards. The same with home care, compression works in both directions.

PN5131

JUSTICE HATCHER: Even if we granted the full claim?

PN5132

MR SAUNDERS: I haven't done the calculations on the full claim. It's the mathematical process, but I'm working with figures that I can't move backwards and my client can't advance (indistinct).

PN5133

VICE PRESIDENT ASBURY: It would probably still result with the full claim, because the same percentage would go on everything.

PN5134

MR SAUNDERS: I think that is mathematically correct, and it does depend - - -

PN5135

VICE PRESIDENT ASBURY: It's unlikely to be mathematically correct, but I think it's right, because I've tried it before doing it both ways with something and it doesn't make a difference. But why wouldn't the two go together anyway, the 99 and the 100? What's the substantive - - -

PN5136

MR SAUNDERS: The substantive reason is that the HSU is through this classification structure not attempting to remake the universe in residential aged care. We have seven levels and we've kept seven levels. The Bench perhaps does not have the same constraints as us.

PN5137

And the answer is slightly different in respect of direct care and indirect care of course, because it's only a six step process for direct care workers. The nature of their work however, the nature of both work we say there is a degree of additional complexity at the below trade level that does make those slightly tighter, relativities appropriate, and they maintain that that's the explanation how they mathematically get there.

PN5138

It's not that much of a departure from the current structure. Both in the Aged Care Award and the home care classifications in the SCHADS Award they're highly compressed as it is, and before going to the detail of that I do want to make it clear this is not as a direct result of the general compression of relativities flowing from the period of flat rate increases.

PN5139

This is more systemic than that, and we say it's connected to long stage undervaluation for various reasons, including gender, of this work. This isn't a decompression for the sake of decompression case in the same way that has been criticised in previous applications.

PN5140

The relativities do require independent attention separate to the question of what general work value increase applies, and it requires particular attention to the current structure. It's certainly not solvable by a mechanistic application of current external award relativities as a sort of decision rule that freezes wage movements until the Manufacturing Award is changed. That doesn't mean that it's entirely unmoored from that external system, but it's a question of how you use it. It won't be surprising that I say it's entirely unmoored from that C10 structure because I'm about to spend some time talking about its relativity to that. But the key focus here is the correct use of that C10 framework as a tool to guide, to influence, to shape broader wage fixation across the award system, which is what the HSU's approach to the changes to the classification structure at least attempts.

PN5141

Before turning to it, it is valuable to initially direct some attention to where that C10 framework came from and what it really is. The starting point is it is not as simple as a qualifications matrix. The qualification indicators are of course useful and they're an obvious objective indicator of skill, but the structure itself goes beyond that. It describes the scope of work within a task, both in terms of equivalent experience or persons performing work within the scope of a classification by its defined terms within the Manufacturing Award.

PN5142

When you are performing the alignment exercise particularly to awards like this it cannot be done precisely on either award. It is critical to look at that broader context of the structure itself. More fundamentally it's emerged as not an act of God. It's one expression of the implementation of the structural efficiency principle. Has the Bench received the HSU's bundle of authorities?

PN5143

JUSTICE HATCHER: Yes.

PN5144

MR SAUNDERS: If I could ask you to turn to the first tab. It's page 3 of the bundle. This is the National Wage Case August 1989 30 IR 81. It will be familiar to members of the Bench, but if I could direct your attention particularly to page 91 of the decision, page 13 of the bundle. This decision has been picked in part because it conveniently summarises the earlier stages that it needs to be read with. If I could draw the Bench's attention to about two-thirds of the way down the page, the indented text, which is the summary of the core of what the structural efficiency principle was trying to do, and relevantly here the first and third dot points.

PN5145

VICE PRESIDENT ASBURY: Sorry, what page in the actual document?

PN5146

MR SAUNDERS: Page 13, we hope.

PN5147

VICE PRESIDENT ASBURY: Thank you. Sorry, the second dot point?

PN5148

MR SAUNDERS: The first and third dot points.

PN5149

VICE PRESIDENT ASBURY: Yes.

PN5150

MR SAUNDERS: The decision continues relevantly over the page at 92, 14 of the bundle under the heading 'Minimum rates adjustment', and again it's that extract of February 1989, 'The fundamental purpose of the structural efficiency principle.' The passage continues and we see over the page the allocation of the relevant rates for building industry and metal industry tradespersons. Agreed between the ACT and the Commonwealth, but not the employers.

PN5151

JUSTICE HATCHER: If you just go to the preceding page that last indented quote is really the fundamental purpose of the whole C10 structure, isn't it?

PN5152

MR SAUNDERS: Yes. But not exclusively the C10 structure. Of course it's dominant within the award system, but it's not universal. But it's the fundamental

purpose of the centralised wage fixation exercise in the post structural efficiency era, yes.

PN5153

JUSTICE HATCHER: Yes.

PN5154

MR SAUNDERS: Continuing over the page the decision sets out the rates for building industry tradesperson, metal industry tradesperson, which the Commission will observe are identical, and these were put forward as the basis, a stable basis for wage fixation. Then at page 94, 16 of the bundle, above the indented metal industry worker text at the paragraph before the one immediately above that starting 'Minimum classification rates', this gives context to the extract that your Honour Justice Hatcher was referring to earlier.

PN5155

VICE PRESIDENT ASBURY: And it was the case that the relativities were between the base rate.

PN5156

MR SAUNDERS: That's right.

PN5157

VICE PRESIDENT ASBURY: The supplementary payments were additional.

PN5158

MR SAUNDERS: Yes.

PN5159

VICE PRESIDENT ASBURY: They weren't required to be relative to the C10, it was the base.

PN5160

MR SAUNDERS: That's right.

PN5161

VICE PRESIDENT ASBURY: Yes.

PN5162

MR SAUNDERS: And that introduces some complexity in the modernisation process as well, but I don't think - it doesn't have much to do with the exercise today. But the main point is it's a tripartite exercise of alignment. It's skill, responsibility and conditions, and that is not all determined by a single qualification obviously, and it is not always going to precisely align even when the qualifications are the same.

PN5163

Of course the C10 structure came in following the structural efficiency principle. The decisions are short so we've included them in the bundle. The first one is at tab 2. It's re Metal Industry Award 1984 Part 1 and Other Awards No.1 (1989) IR 262. We see this is the initial trial, the initial draft. The explanation comes at - I'm sorry, that's at page 29 of the PDF.

PN5164

We see in the second page of the decision, 263, page 30, the indented text, the second dot point, the 12 to 14 level structure. There's some discussion of the introduction, and this is obviously a significant reform across hundreds of classifications, so a trial period formalised in the decision behind tab 3, page 34, re Metal Industry Award 1984 Part 1 No.2 (1990) 32 IR 262. And what emerges from that significantly, without the need to take the Bench to any particular part of it, is this was a structure developed in consultation across particular industries, but particularly industry participants and then approved by the condition following agreement rather than something that had been necessarily scientifically determined.

PN5165

It's a consent structure developed at a particular time for particular purposes. It of course is the exemplar in some ways of the structural efficiency reforms and performed a more and more dominant role in some ways in wage fixation, and that is partly because it remains the most comprehensive broad banding of existing classifications, and thus correctly the back bone of the low professional wage fixation, but it's one part of the process, and certainly its role has a more complex function now, particularly with the Commission having full ownership of the awards without the intervention of industry parties.

PN5166

It's certainly not a situation where - and this decision, the first decision has already made this claim - that misalignment might not appeal qualification basis with the C10 structure is of any real significance, or that simple mechanical exercise is in any way an answer to the question. It's a difficulty with the approach that ABI has taken and which can be observed from the decisions. It is increasingly the standard employer association approach that goes if someone's got a Certificate III it's aligned to C10, everything's fine, it's too redacted.

PN5167

The C10 scale is purely qualitative, and this matter is for the next exercise for when we have to attempt to align these more complex awards, simultaneously more and less complex unfortunately. It ignores those aspects concerning responsibility and skill. It ignores the need to look at conditions and other associated features of the particular work. Frankly, it ignores the question of whether this industry is like at all, or apt to be compared. And secondly - - -

PN5168

VICE PRESIDENT ASBURY: The C10 scale never recognised application of the skill. It was about the skill is the skill, and then the industry that it was exercised in was what determined ultimately what was paid. The idea was to just say this skill is the same regardless, but then it's exercised differently, it's applied differently.

PN5169

MR SAUNDERS: Yes, and you see the development of industry allowances, some which remain, some of which don't. But it creates some complexity for when you are trying to apply it here where indicative skills are not only not

recognised in the current documents, but historically not form part of the wage fixing exercise without following the Bench's conclusion.

PN5170

To an extent the ANMF's approach to its variation has a similar issue. It is compounded by an existing structural issue with that award that I will return to, but really the point that we're making is that pure adherence to external relativities in the way that it's been urged and the way it continues to be urged in terms of the structure of this award is not a rational way of fixing wages and it's not a reflection of how this process is truly intended to operate.

PN5171

Turning now to determining - - -

PN5172

JUSTICE HATCHER: Mr Saunders, just going back to that passage in the first decision it talks about what we identified as the fundamental purpose. The question that arises is how do we maintain that fundamental purpose in a modified system which takes into account invisible skills which weren't taken into account in the early 90s - - -

PN5173

MR SAUNDERS: The answer is - - -

PN5174

JUSTICE HATCHER: - - - without just simply reopening every award and doing work value exercises for the next 20 years?

PN5175

MR SAUNDERS: Certainly one option - the preferable approach is - - -

PN5176

JUSTICE HATCHER: The Bar would like that no doubt, but I'm not attracted to it.

PN5177

MR SAUNDERS: The scope for further spreadsheets is just almost overwhelming. The answer to that is partly through the introduction of the jurisdictional limitation to the Commission changing awards in that one has to be satisfied that work value reasons justify it. That's aside from the various nebulous general considerations in the modern award objective. And the second is retaining a role for it in precisely the same way the Bench has in the first decision. It's a factor that one considers and that we are saying it should be here using it to guide external relativities and requiring reason to depart from it.

PN5178

The totally rational new scheme is outside the scope of these proceedings as well, the difficulties. It is something other unions would want to be heard on, but that's the shorter answer.

PN5179

That does take me to determining what the external relativities in this award should be. That does start with an examination of - sorry, the internal relativities I should say - that does start with an examination of the current award structures. To save some time there's some documents if I could just hand up. In respect of the first document there is an A3 version available if the text size is causing any difficulty for anyone.

PN5180

JUSTICE HATCHER: What does this document show?

PN5181

MR SAUNDERS: Before I explain it can I just check that everyone has got the right three documents. It seemed like it would be less annoying when I was thinking about it in chambers, but the Bench should have three documents; Current Structure Aged Care, Comparative Internal Relativities Residential Care, and Comparative Internal Relativities Home Care. The documents in turn, what the first document does, Current Structure Aged Care, is look at the current award and then identify - it's really an aide memoire - a summary of the various positions the parties have taken as to the C10 alignment. And then the notes column should probably be headed HSU's position, because it's explaining why our version is correct rather than being broad notes on the dispute.

PN5182

JUSTICE HATCHER: So this document what are those percentages on the right?

PN5183

MR SAUNDERS: The percentages on the right are the relativity range between the parties, where it could land based on the assessment on the compressed C10 relativities, potential relativity range. This is the document of which there is a larger version available if that would assist anyone. I don't need to go through it at length. Mr Gibian has told me that I have explained the relativity range poorly. What it is, is, looking at the columns on the left, the range of options that the parties have come to, where that could land comparing the high water mark which tends to be the HSU, and the low water mark which is consistently the joint employers.

PN5184

JUSTICE HATCHER: But grade 3 you've got the relativity range of 95 per cent.

PN5185

MR SAUNDERS: Because everyone agrees that that's C11.

PN5186

JUSTICE HATCHER: But then the other draft you can see that everyone is at 99 per cent.

PN5187

MR SAUNDERS: Yes. The second document sets out the relative positions of the parties. So that's what the actual - leaving aside its findings, so if you just punch the wage rates in the relativity is up.



PN5188

JUSTICE HATCHER: The current relativity?

PN5189

MR SAUNDERS: Yes.

PN5190

JUSTICE HATCHER: This current relativity is 95 per cent?

PN5191

MR SAUNDERS: That's right.

PN5192

JUSTICE HATCHER: So why does it have to change to 99?

PN5193

MR SAUNDERS: Because of the mathematical need to do it. It's a pure expression of mathematics. If you leave it at 99 the rate goes backwards.

PN5194

VICE PRESIDENT ASBURY: If you leave it at 95 it goes backwards?

PN5195

MR SAUNDERS: Sorry, that's what I thought I said. Yes.

PN5196

JUSTICE HATCHER: You keep going, I will do the maths again. I don't think that's right. I don't get that.

PN5197

MR SAUNDERS: If your Honour goes to - there is an Excel spreadsheet with these formulas and things can be punched in. We have filed the live version.

PN5198

JUSTICE HATCHER: If the current relativity is 95 and everyone's got a uniform 15 per cent why can't you maintain the current relativity without someone going backwards?

PN5199

MR SAUNDERS: It came up backwards on my calculations. If that's wrong it's a mathematic - it's a mathematical exercise.

PN5200

JUSTICE HATCHER: There's something wrong there I think, Mr Saunders.

PN5201

MR SAUNDERS: Yes. Leaving the amounts to one side, which is at least objectively ascertainable rather than necessarily a matter for submissions the figures are only in here as indicative. The point is the percentage difference between the classifications.

PN5202

Perhaps if we could return to - away from the numbers - we return to the first document. What this demonstrates, and it would be obvious to the Bench having seen the classification structure and Mr Gibian having gone through it earlier this morning, is this is not an award that is capable of precise alignment based on classifications alone. It is highly contestable. The key differences - at the lower level it doesn't really matter. That's clearly just an argument about whether C14 is the appropriate starting point for someone who is working for longer than a week. The real issues are at CF level 5 through 7.

PN5203

JUSTICE HATCHER: As we started, Mr Saunders, I'm not sure why this matters. The traditional approach is you pick a single benchmark, which I think everyone agrees is C10, for the award. I don't think you now have to mechanistically then apply every metal worker's percentage to each classification, do you?

PN5204

MR SAUNDERS: No, we're not proposing that that occur. Sorry, we are proposing that occur. We do agree, your Honour, that you don't have to do it. This is the continuing relevance of the external framework and the continued structural efficiency that this provides. The C10 framework just provides a guide for setting internal relativities in that way. It's perfectly open for the Commission to simply take the approach that was taken when the system was developed in the first place and move up by 5s, 10s and 15s if that's considered appropriate. This is simply the approach we've taken to preserve that link to an external system.

PN5205

JUSTICE HATCHER: So in the Manufacturing Award what's the current relativity of Certificate IV to Certificate III?

PN5206

MR SAUNDERS: It is 126 per cent.

PN5207

JUSTICE HATCHER: So is that incorporated in your document?

PN5208

MR SAUNDERS: No, because nothing is founded at that - - -

PN5209

JUSTICE HATCHER: Sorry?

PN5210

MR SAUNDERS: Did you say Certificate III or C3?

PN5211

JUSTICE HATCHER: Certificate IV to Certificate III in the Manufacturing Award. What's the relativity current in?

PN5212

MR SAUNDERS: That's C7, so it's 109 per cent.

PN5213

JUSTICE HATCHER: 109. So that corresponds to your level 5.

PN5214

MR SAUNDERS: Yes.

PN5215

JUSTICE HATCHER: But you've got Certificate IV level 6.

PN5216

MR SAUNDERS: The level 6 is the critical problem with the current structure, and it returns to what I said earlier, the HSU is not trying to significantly change where the positions truly are now. Level 6 refers to in its current form persons possessing an advanced certificate or an associate diploma. Those are pre reform qualifications that translate to a Certificate IV or a diploma. Accordingly we've moved it up from the base level Certificate IV classification to an equivalent to C5, which is also justified by the level of supervisory responsibility involved in the role.

PN5217

It also is appropriate to reflect that differentiation in work value apart from the stuff that's quite consistently across the structure and creates a career progression path that isn't capped at C6. But there is a high degree of grey in this exercise. That's the current structure, and the point of this first document is to explain the rationale behind the levels that the HSU's proposal sets out. We're certainly not pretending that that is some sort of scientifically derived. It's our best application of principles in light of what the underlying exercise is meant to be, in light of ensuring some external relativity and achieving that fundamental goal of actually building a career path here.

PN5218

Could I ask the Commission to look at the Comparative Internal Relativities document. I see. I had misunderstood your question earlier, your Honour Justice Hatcher. Can I just draw your attention to firstly on the far left-hand side of the page headed 'Comparative Internal Relativities Residential Care.'

PN5219

JUSTICE HATCHER: So they're the current percentages?

PN5220

MR SAUNDERS: Yes, actual - - -

PN5221

JUSTICE HATCHER: They're different from this one.

PN5222

MR SAUNDERS: Yes.

PN5223

JUSTICE HATCHER: So what's this one?

PN5224

MR SAUNDERS: This is the - if you could just tilt it slightly so I can be certain. Thank you. That is the alignment exercise and those are the internal manufacturing relativities, which are different to this award because it's not precisely aligned to - - -

PN5225

JUSTICE HATCHER: It's Manufacturing Award?

PN5226

MR SAUNDERS: Yes. They're the existing compressed C10 relativities.

PN5227

VICE PRESIDENT ASBURY: So it's what it would be if it was aligned with the Manufacturing Award?

PN5228

MR SAUNDERS: Yes. It's everyone's position on what it would be if it was aligned with the Manufacturing Award.

PN5229

VICE PRESIDENT ASBURY: Yes. So hence C11 is - - -

PN5230

MR SAUNDERS: Yes.

PN5231

VICE PRESIDENT ASBURY: I understand.

PN5232

MR SAUNDERS: It's using that external structure to shape this which is - given we are not trying to radically remake the current structure. Whether or not that has been inadvertently done in the draft proposal is a separate question. That's the point of the exercise, and that's why - I'm sorry.

PN5233

VICE PRESIDENT ASBURY: I was just going to say where you confused me is you've rounded up the 92.4 to 95 consistent with your it has to end in a 5. Is that -  
- -

PN5234

MR SAUNDERS: No, it's just consistent with whichever formula I used in the Excel spreadsheet. It's an issue that affects the C7 rate across many awards. There's varying - it differs by about \$4.

PN5235

Returning to the Comparative Internal Relativities Residential Care, the far left-hand side is the current Aged Care Award. The rates are only in there to explain the mathematical calculations, the results. Those are the actual internal wage relativities. That is extraordinarily compressed, particularly at the above trade level. That compression even on the ABL analysis, even if that was right, and the reason we keep going back to it and if that was right, because this matters for a rational system of setting award rates, is to compress at level 7. But for the

reasons set out in the initial document, which I won't read as they're set out in the written submissions anyway, the alignments of two just don't take into account either the qualifications or the skill.

PN5236

As we travel across the page that's the actual effect of the nurses' proposal. It deletes the first level, which has no impact for direct care, but does have the indirect care. But it retains the existing internal relativities without change. The employer proposal is in the other direction, but it's the same thing, it retains those compressed relativities and just deletes the top level.

PN5237

JUSTICE HATCHER: So the HSU proposal - and this is level 4 - the HSU proposal for level 4 adds the additional claimed 10 per cent.

PN5238

MR SAUNDERS: Yes, it does, but not in a way that - you can take it off. The point of this spreadsheet is just for the internal relativities.

PN5239

JUSTICE HATCHER: That's what the number is?

PN5240

MR SAUNDERS: Would your Honour bear with me one moment.

PN5241

JUSTICE HATCHER: So the level 4 goes from 114.2 - - -

PN5242

MR SAUNDERS: Yes, it is, it is, it's out of it. I just needed to check the maths.

PN5243

JUSTICE HATCHER: Yes. And then at 95 per cent relativity it would be 1230.

PN5244

MR SAUNDERS: Yes.

PN5245

JUSTICE HATCHER: But that's higher than the current level 4, level 3.

PN5246

MR SAUNDERS: Yes.

PN5247

JUSTICE HATCHER: That is you could change level 3 to 95 per cent and there would still be a pay increase. You don't get a pay drop.

PN5248

MR SAUNDERS: It's at level 1. The difficulty - - -

PN5249

JUSTICE HATCHER: No, I'm just saying, I thought you said you have to keep it at 99 per cent to ensure somebody's doesn't drop, but that's not correct, is it?

PN5250

MR SAUNDERS: I can only say it's a mathematical error on my end. The calculations are set out in the spreadsheets we filed with it. The point is not to maintain what your Honour has described quite correctly as a non-significant or vanishingly insignificant relativity. That was the concern we were attempting to address. If the concern is not mathematically correct the issue falls away.

PN5251

JUSTICE HATCHER: So on the mass of this document we could put for example - for direct care worker purposes we get rid of, we can forget 1, and level 2 could be say 90 per cent, level 3 could be 95 per cent, level 4 100 per cent, and that would still work.

PN5252

MR SAUNDERS: I'm increasingly reluctant to answer questions that involve the mathematical modelling - - -

PN5253

JUSTICE HATCHER: This is what these numbers show.

PN5254

MR SAUNDERS: - - - but if it works it's a path that's open to the Bench. We have kept at the below trade level the existing internal wage relativities, and I have said the entire justification for that.

PN5255

JUSTICE HATCHER: Just for the purposes of the comparison, so under the nurses' proposal where is Certificate III?

PN5256

MR SAUNDERS: Certificate III under the nurses' proposal is PCW4 - 3, sorry, PCW3. I forgot they had renumbered it.

PN5257

DEPUTY PRESIDENT O'NEILL: I'm sorry, can I ask a very dumb question, what explains the difference in dollar amount at that level with the same relativity and the same starting point and the same support for the - - -

PN5258

MR SAUNDERS: The additional 10 per cent, because these numbers are just taken out of everyone's file draft determinations.

PN5259

DEPUTY PRESIDENT O'NEILL: Okay.

PN5260

VICE PRESIDENT ASBURY: So some have got it in and some haven't, or they have all got it in?

PN5261

MR SAUNDERS: The employer proposal does not have it in. So the nurses have added 10 per cent to the structure. We have realigned everything and added 10 per cent and the employers have left it as it is.

PN5262

VICE PRESIDENT ASBURY: Which has 15.

PN5263

MR SAUNDERS: Which already has the 15, yes.

PN5264

VICE PRESIDENT ASBURY: Yes. Okay.

PN5265

MR SAUNDERS: The employer draft determination replicates the current order.

PN5266

DEPUTY PRESIDENT O'NEILL: So it's probably best to ignore the dollar amounts and just look at the percentages.

PN5267

MR SAUNDERS: They're only there to expose the mathematical calculation in the increasingly likely event that it's wrong.

PN5268

VICE PRESIDENT ASBURY: You can't concede too soon.

PN5269

MR SAUNDERS: I didn't say it certainly was, but one becomes concerned. Anomalies did arise when we were attempting to realign the below trade rates, and as I say the spreadsheets are available and the formulas can be changed.

PN5270

Looking at the HSU proposal this explains what - and it's been set out in earlier documents. It's in the classification structure. This is the result of what we've built, but we're talking about a classification structure that ranges from skill trade equivalent work to a build up of competencies to significant above trade and high levels of supervision, high levels of accountability, high levels of responsibility that vary across the levels. The level of responsibility, accountability and autonomy of someone in that level 7 supervisor position is significantly different to a level 4 Certificate III personal care worker, and that's what needs to be recognised by the internal relativities, because they're matters that differ between the classifications necessarily. The 10 per cent reflects intensification issues, condition issues, the like that are uniform across the sector. Internal relativity is about that career recognising and rewarding skill development.

PN5271

My friend is just reminding me that everything is worse in home care, but we will come to that shortly. It's a structure that looking at it and considering the

classification ranges that are set out in the draft determination and summarised in the table Mr Gibian handed up, 100 per cent to 130 per cent, intuitively we would say it falls at least within the range of correct results. There's nothing that strikes with that, the change, the shift in responsibility, shift in accountability, nothing that seems inappropriate, unlike the current structure which everyone else replicates.

PN5272

A 10 per cent bump for that level of change just does not fit with any conception of what the change in value between the roles should be on the evidence the Commission has heard, and certainly it doesn't produce a career path that incentivises skill growth and skill development, which is part of the point.

PN5273

The HSU's proposal on the far right it's not radical in any way, including that it uses the compressed relativities which emerge not as a matter of principle, but a matter of practice, the Commission's practice of awarding flat rate increase. But it is a substantial change, and it does represent a career path for these people. It does address the deficiencies that the Bench identified in the first decision. The rates are not for the purposes of what I'm saying important, this just happens to be what we're asking for. The fundamental point is that path, that bandwidth.

PN5274

The Commission will recall Professors Charlesworth and Meagher in their document files a competing proposal which had a much more extended span of relativities. That in part was informed by using the uncompressed rates for which there is some force in this exercise, rather than decompression for decompression sake, but it is not the approach the Commission has taken in this exercise under this Act.

PN5275

The rates are of course on the HSU's proposal different, on everyone's proposal, different to rates for people with at least equivalent qualifications in other awards, who cares. There are a lot of tables in ABI's submissions, but that's as far as it gets to, and that approach ignores of course the Full Bench's total rejection of this argument in the first decision. We are now strictly talking about the internal rates, in the same way that external link can't properly stymie a work value increase, an across the board increase of the kind the Bench ordered in the first decision. It shouldn't be used to artificially limit a career path when the internal skill development is so different.

PN5276

It leads to the situation, as I have said, where the internal relativities are intuitively acceptable, we say within range, and that is guided by the C10 scale and are relatively modest. This is the link to a consistent and rational system of wage fixation across the modern award system. It's one facet of it. What this structure means and why the alignment to manufacturing, why we all spent a significant time in submissions arguing about this matters, is it means that this structure is externally consistent. The numbers are different, but the correct bracketing - - -

PN5277



JUSTICE HATCHER: The numbers were the whole point of the original exercise. I mean there's a reason why the number 995 appears in so many awards, because that was the way in which it was rolled out.

PN5278

MR SAUNDERS: Yes. But that exercise of 995 appearing in so many awards was an exercise in structural efficiency, but wasn't about taking into account in any way the various environmental industry specific - - -

PN5279

JUSTICE HATCHER: No, I accept that.

PN5280

MR SAUNDERS: - - - (indistinct) specific. But that's the difference. We have now had, we now have a situation where it has been positively identified that these rates, that 995 rate does not properly value this work. That doesn't mean that external linkages are abandoned, and this is the continuing role of the C10 scale, it explains the structure.

PN5281

DEPUTY PRESIDENT O'NEILL: Your proposal would have the level 6 carers at 115 per cent, which is higher than the entry level registered nurse.

PN5282

MR SAUNDERS: Yes. I wanted to come to the external relativities, that particular external relativities issues. It's the late stage anomaly that's arisen in these proceedings, the need to be mindful of that nurse role. As a starting point of course it's impossible to build a system that perfectly fixes wage relativities across the entirety of the award system. There are a certain sectors for which that will never work; for example transport, but there is a case that within a workplace or within a particular industry subset that can and should be done, or at least regard should be had to it.

PN5283

It's the registered nurse and the enrolled nurse. I will start with the enrolled nurse. Your Honours, Professors, will see that under each proposal is - before explaining how we fix it I might just explain the table - is another subset. That contains the rates effective the various changes on enrolled nurse 1 to enrolled nurse 5, the starting and finishing position for an enrolled nurse registered nurse 1.1, which is the entry level for a three year degree qualified nurse, to 1.8, and 4.1 and 5.1 are the high level nursing manager qualifications within the Nurses Award.

PN5284

The far left column is current awards. Those percentage figures are all their current relativity to a Certificate III personal care worker, that we would say is the benchmark. If you are looking at it on a workplace level they are the benchmark classification, because there are more of them as you scale up and down.

PN5285

The nurses' proposal 0 the percentages look different to theirs because of that use of the PCW as a benchmark rather than what's been done in their determination of using our .1.1 as the benchmark classification, but that's where that sits. And your Honours, Professors, will observe that the anomaly still to a degree arises. And then the HSU proposal, it's a little more difficult for enrolled nurses, and at the higher level the registered nurse is clipped.

PN5286

The issue that we anticipate now being raised based on the opening and some of the cross-examination is that the enrolled nurse 1 level cannot be overtaken by any aged care classification rate. It contains three embedded propositions. First, that the enrolled nurse is particularly relevant. The Commission has heard evidence that not only are they a minute portion of the workforce their role - this was the evidence last week - their role is equivalent to the higher level direct care worker, rather than the nursing manager kind of thing.

PN5287

Secondly, that it's a related concept. The enrolled nurse's work value is necessarily higher. That's an evidentiary proposition that doesn't flow, so I will leave them classifications. There are structural issues in that respect. And thirdly, that the rate of the enrolled nurse and the relativities within the Nurses Award are currently properly set.

PN5288

JUSTICE HATCHER: Sorry, currently what?

PN5289

MR SAUNDERS: Currently properly set. Could I ask, your Honours, Professors, to go to tab 6 of the bundle of authorities. The nurses moved in a serious way into the Federal system in the late 80s, early 90s, and as a result a series of decisions were undertaken to set consistent Federal rates for them in part based on the various state awards. We have included the three major decisions. At tab 4 is the one dealing with levels 1 to 3; tab 5 is levels 4 and 5, and tab 6, the most significant one, deals with the enrolled nurse. It's Australian Nursing Federation re Hospital Employees, et cetera, print K3662. Some of the history is set out, but if I could ask your Honour's to go to page - - -

PN5290

JUSTICE HATCHER: Which number is this in the index?

PN5291

MR SAUNDERS: Tab 6. Page 78 is where it starts. Thank you. The significant thing about these decisions is the timing. They are happening in parallel to the development of the metal structure. As we saw earlier with the 1984 award decisions it is quite a different frame of reference for internal relativities, and it's not one that's externally driven. At page 16 of the decision, which is page 93 of the bundle, having assessed but decided not to summarise all the evidence the Full Bench there sets out one sees in the indented text 1 to 5 scale for registered nurses, and the paragraph afterwards deals with that relativity issue.

PN5292

JUSTICE HATCHER: On that page what's a UG?

PN5293

MR SAUNDERS: Undergraduate. They're two different tertiary qualification (indistinct). As I understand it - - -

PN5294

JUSTICE HATCHER: So what's a UG2 qualification?

PN5295

MR SAUNDERS: As I understand it - my friends for the ANMF will correct me if I'm wrong - but it's a three year versus a four year degree. And your Honour would recall that the current Nurses Award continues that later starting point for four year and masters qualified nurses. That's set out in the earlier decision. I have to say the version we have got is atrociously formatted and impossible to read, but I don't understand to be a particularly contentious matter.

PN5296

The internal relativities are set. It is immediately obvious that that is not something derived in the same way as the - a diploma to a C1A. It's a different range. It's a very different concept of wage fixation here. It's to do with the nature of the work inevitably. But more significantly for the purposes of dealing with any anomaly I draw the Bench's attention to the final paragraph.

PN5297

JUSTICE HATCHER: On that page?

PN5298

MR SAUNDERS: Yes, and continuing over the page, the two dot points. This decision is 30 years old, that foreshadowed future change has happened. The structure in the Nurses Award remains in terms of its internal relativities identical, save for the effect of standard compression, if I can call it that.

PN5299

There's a framework developed totally in parallel to the metals framework, which is completely unsurprising when one considers the natures of the two industries. This is not necessarily work that travels hand in glove, and it's related to the proposition that's repeated throughout the expert evidence that the Bench (indistinct) forward that there are difficulties comparing a metal tradesperson to a health worker or a social worker. It never moved to that C10 structure.

PN5300

The only reference to it in the current award is the Certificate III assistant in nursing, which was inserted post the publication of the exposure draft and did not come from the proposal that informed it and was of course set at the rate, creating at that stage - a new rate was created at the Manufacturing Award rate.

PN5301

There is in that context it's not the usual kind of anomaly, it's not a like for like comparison. There's a real tension between this structure and the C10 framework. It's a difficulty, it's not - we're not being critical in a direct sense of

the nurses' proposal and as the table may say, it's supportive of whatever change they wish to seek to the rates of nurses, but to the extent that that affects the Aged Care Award it is difficult to staple the C10 framework onto the registered nurse 1.1, but not adjust the rest of it. That's what's really creating the anomaly, but that's a whole of award issue.

PN5302

As your Honour Justice Hatcher observed during the opening submissions if it is purely based on the entry level qualification that is not limited to an aged care nurse and has obvious flow on effects. What it is it's a structural problem based on changes, (indistinct) things happen. It's not a reason to artificially compress the rates for personal care workers.

PN5303

What the Bench also doesn't have is evidence of the kind of nurse that is working in aged care in terms of their classification level. An RN 1.1 straight out of a degree course with (audio malfunction), they are measurably different to for example a nursing manager, and without that information that is necessarily anomalous. The concern rather falls away.

PN5304

Even on a strict application of classical external relativities it doesn't inherently follow that there's never that kind of - it's historically described as a boss subordinate anomaly. That can happen and the classic example as the graduate engineer in what's now the Professionals Award, which is historically set at C5.

PN5305

In respect of RN 1.1, your Honour Deputy President O'Neill's issue there, returning to the relativities sheet, the reason that this anomaly arrives for them is because for that rate the ANMF has not applied, as I understand it - my friends will correct me if I'm wrong - but the process that the ANMF have applied is adjusting that up to the C1A rate. Then maintaining the internal relativity is not stretching out the 10 per cent, but adding the 10 per cent to the proposed PCW classification.

PN5306

So the problem is really arising from the Frankenstein approach to the system, but that's an issue for the Nurses Award. How convenient that an application to address the internal rates of the Nurses Award at large has already been foreshadowed by the ANMF. That is the area to address this, not by knocking down the HS, the rates for personal care workers. A better option of course may be in this application to apply across the board 10 per cent or whatever general application industry figure the Bench settles on in the Nurses Award and deal with the structural issue at some other point. That is outside the scope of my client's area of interest and it's a matter for the ANMF, but the - - -

PN5307

JUSTICE HATCHER: The problem with that is it just may make it all part of unscramble and properly structure later on if we just add it on willy nilly.

PN5308

MR SAUNDERS: These are as I say matters for the ANMF. The concern that my client has is this created anomaly causing some flow on effect to the proper fixation of a career path for personal care workers and indirect care workers.

PN5309

It should also be observed that the current Nurses Award internal relativities do create that boss - retain in fact that boss subordinate anomaly. It is possible for a level 4 nurse to be paid more than a level 5, and that has its own peculiar history. So it's not an ironclad rule that it has to be a straight progression.

PN5310

JUSTICE HATCHER: Yes. Well, as you will have seen from the Teachers Award decision when the tertiary qualified people are properly aligned with what was meant to happen on the C10 structure all the whole pay point structure was removed and a new structure was established.

PN5311

MR SAUNDERS: That does conveniently lead me to the Home Care Award in which the pay point structure is proposed to be removed. I had prepared a helpful table summarising everyone's (indistinct) - helpful or not, who knows - which I have left on my desk. But if I could ask the Bench in the court book to go to what at least on my version is page 620, but maybe 631 the Bench - it should be paragraphs 70 and 71 of the HSU's reply submissions. Either 620 or 631.

PN5312

JUSTICE HATCHER: No.

PN5313

MR SAUNDERS: Deputy President O'Neill appears to have found it.

PN5314

DEPUTY PRESIDENT O'NEILL: It starts with paragraph 70?

PN5315

MR SAUNDERS: Yes, that's right.

PN5316

JUSTICE HATCHER: Yes.

PN5317

MR SAUNDERS: Yes. Just rather than a table I can identify where the parties are misaligned here, and it's less significant than in the Aged Care Award, because this particular award is even harder to properly align because of the massive compression that really the undifferentiated pay points appear to have caused. Level 1 is less than 12 months experience. We say C13, the employers say C14. The reason for the dispute is obvious enough. Level 2 we say C11, the employers say C12 to C11. It's not a matter of particular significance. We do all agree on level 3.

PN5318

Level 4 is where the difficulty starts to come in. The employer benchmark is somewhere between C9 and C7. That's an enormous range of different skills, and pay point movement is not through any particularly identified competency system. It's a hard barrier in this award. We say C7 for the reasons set out on the right.

PN5319

And then at 5 the critical problem, the current classification descriptor for this level requires above Certificate IV qualifications, a diploma or a degree, and there's two pay points within it, so it falls somewhere between - just on that pure qualification issue - somewhere between C5 to C1, possibly B. We put it at C2A given the high level of responsibility. This is someone effectively at the one level below pure managerial work.

PN5320

Could I ask the Bench to go to the third document headed 'Comparative Internal Relativities Home Care.' The same exercise. There's a typo on the HSU's proposal. I withdraw that. There's the current proposal, the current award relativities on the far left through the pay points. Again highly compressed when one considers the scope of level 5 at all, and certainly some of the highest reaches of that. This award, because the Certificate III initial level is 3.1, contains in theory a much more detailed higher level scale, and again it's a very compressed relativity.

PN5321

The proposal, the HSU's is very similar. Again modest, again intuitively correct. Effectively everything I said in respect of aged care applies double the home care. It's an award that's been systemically undercut. I would I think just be repeating myself to go on to that, but the reason it's not (indistinct) 7, it's a different structure to what's put forward for aged care. And you see that there's a quite different above trade level, and that's because we're replicating different work, but it's not exactly the same as in residential home care.

PN5322

There is one further point that I have been asked - in respect of the level of responsibility for level 5, which came up earlier, the relevant witness's name is Lorri Seifert, and she describes the skill and experience that that level requires, and that gives colour to both where that should be internally and where everyone else goes relatively. That is hopefully explained why the HSU's proposal, why the internal relativities look like they do. It is an attempt at least to retain external consistency across the award system without the reductive approach to it simply being on rate. Unless there was anything further.

PN5323

JUSTICE HATCHER: Thank you. So what's next?

PN5324

MR GIBIAN: Can I just briefly deal with the main sort of classification issues. Firstly in relation to the home care issue, the proposal my client submitted is the home care classifications provided care to aged persons into the Aged Care Award. Essentially there are - or the principal considerations that we say came to

that conclusion are three-fold. Firstly is that, as I will come to as briefly as I can, it's difficult to discern any reasoned basis upon which the home care work was put into the SCHADS Award rather than the Aged Care Award in the first place.

PN5325

Secondly, we rely upon the changes to the nature of and organisation of aged home care which had occurred. And thirdly we think it does assist in providing a modern award system consistent with section 134(1)(g) that is easy to understand, simple, stable and sustainable.

PN5326

In relation to the first point we have included in the bundle of authorities a number of decisions which gave effect to or considered the location of home care work in the aged care industry at the time of the - in the award modernisation process. The first of those is that at tab 9, which is at page 235 of the bundle, the Modern Award Statement [2009] AIRC at 345.

PN5327

At paragraph 76 of that decision, page 138 of the Industrial Reports, electronically page 249. Right at the bottom of that page before paragraph 75 there's a heading 'Health and welfare services (excluding social and community services)', and at paragraph 76 the Full Bench recorded:

PN5328

*The exposure draft for the Aged Care Industry Award not only covers aged care provider institutions, but also extends to services provided in the home by persons who are covered by the award. This approach may require further - -*

PN5329

There's an indication that approach may require further consideration and that there are a myriad of services for the elderly, which are conducted by various organisations (audio malfunction) governments. I think that would be further examined.

PN5330

JUSTICE HATCHER: Is that still the case?

PN5331

MR GIBIAN: That there are a myriad of services. Yes, that is the case. Then the following case at tab 10, the Modernisation Statement [2009] AIRCFB 641, the Commission returned to that issue. The relevant part is on page 42 of the Industrial Reports where the full paragraph 99 there is a heading 'Health and welfare services (remainder)', 'Social community services' at paragraph 100. It was recorded that none of the parties suggested that there should be one award covering all four industries, and that others proposed disability service home care should be covered by separate awards. Further that there be some distinction between direct client care and other support services.

PN5332

The Full Bench then said in the last four lines of that paragraph:

PN5333

*We have decided that social community services and home care and the family day care schemes and disability services can all be dealt with in a social community services framework. There does not seem to be any obvious advantage in taking that more fragmented approach.*

PN5334

That appears to be the extent of consideration as to why that ought to be done. Then over the page, page 43, page 281 of the electronic bundle, at paragraphs 105 and 106, two matters arise. Firstly, at that stage in the process at least it was contemplated that there would be home care employees covered by both the Aged Care Award - that is home care employees covered by the appropriate draft who provide care and support for aged persons, support persons with disability in home, and that the Aged Care Award at that stage also covered persons engaged in the provision of care for aged persons in their home.

PN5335

We also note what is said in 6, namely that the rate for Certificate III qualified home care employee was set as the same rate for a similarly qualified aged care employee under the Aged Care Award. That is there's a relationship between them.

PN5336

Finally at tab 12 the Award Modernisation Statement [2009] AIRCFB 945, commencing at page 317 of the electronic bundle. At paragraph 77, page 387 of the report, page 333 of the electronic bundle, paragraph 77, really one sentence commencing on the fourth line, the Full Bench indicating:

PN5337

*We have decided that home care employees will be solely covered by the Social, Community, Home Care and Disability Services Industry Award 2010.*

PN5338

Why that seems to be done, at least in our analysis of it. And so why that was thought to be appropriate is not revealed in any substantial way in the process.

PN5339

We also note that, as members of the Full Bench will know, the SCHADS Award was subsequently amended in 2012 to include a notation to the effect that employees providing disability support in the home could also be covered by schedule B as well as schedule E, so there's already a degree of confusion and overlap between the work under that award.

PN5340

JUSTICE HATCHER: Which schedule covers NDIS employees?

PN5341

MR GIBIAN: I think there's a debate.

PN5342

JUSTICE HATCHER: Which - - -



PN5343

MR GIBIAN: My client says B.

PN5344

JUSTICE HATCHER: Which schedule does the funding role assume?

PN5345

SPEAKER: B.

PN5346

JUSTICE HATCHER: B.

PN5347

MR GIBIAN: In any event that's sort of the first point. It's not particularly clear why home care provided to aged persons ended up in the SCHADS Award in the first place rather than in the Aged Care Award as had originally been contemplated, and that the rates were set in a manner which aligned them with personal care work, at least a comparable qualification level in the Aged Care Award.

PN5348

The second reason we say favours the conclusion to which we contend is as to the similarities and the relationship between residential aged care and home care provided to aged persons. The points are short. It is that in substance the appropriate characterisation of the provision of care to aged persons is that there is in a sense a single system funded by the Commonwealth to provide care to aged persons to the extent that is possible in their home, and when that is not possible, in a residential care setting across an overlapping client group, that is whose care needs are overlapping but in a spectrum obviously increasing in acuity and care needs as one goes into residential care but with a degree of overlap.

PN5349

The second observation is we say that the core nature of the work has - although there are differences in the way in which, and the context in which it is provided, the nature of the work and the skills required have a high degree of similarity in the provision of personal direct care by body workers, as it's referred to, and the communication and relational and empathic skills examined in stage 1 of the decision - the stage 1 decision.

PN5350

The members of the Bench will have seen in Professor Charlesworth and Meagher's most recent supplementary report that that's the primary basis they think it's appropriate that home care for aged persons be dealt with in the same award.

PN5351

The third point is that the (indistinct) in models of care and care philosophies, that is the movement towards an express focus on persons (audio malfunction) is equally applicable to work in a home care context and in a residential care, the aged care quality standards apply (audio malfunction) as it does in relation to residential care. The nature of qualifications and training undertaken has a high

degree of overlap. The Bench will have heard the evidence last week from the providers that engage in both that the workers have the same induction and the same program in both contexts.

PN5352

The final point in that respect is although the evidence I think this is something that has been happening more recently and is emerging we do have phenomenon of operators who run residential facilities also providing home care services. I think - I mean, Buckland was an example in the sense that they started doing it to provide home care to persons in an independent living, residential village context that they operated and have expanded to provide home care in the community outside of the village itself.

PN5353

Although I accept the evidence is probably on a limited basis but a desire to have workers who are engaged in both and offers a facility for that to occur given the commonality in training and skills and qualifications across the two sectors.

PN5354

As we understand it - I mean, an issue which we've discussed earlier in the proceedings that was said to be some potential difficulty in that respect was the potential for employees who do disability home support, home care work also providing aged home care work. In that respect we don't - I think I answered a question in opening in relation to this question.

PN5355

In short there's not a lot of - whilst we accept it does happen there's not a lot of evidence about the extent of it or the manner in which workers might engage to do. That is whether it's truly a single job in which they interchangeably do either type of work or whether it is a kind of multiple engagement type of arrangement. There's simply not a lot of evidence of that.

PN5356

Secondly, the SCHADS Award already, because of the interim decision has a different rate for aged home care work in any event and there is the other issue that I mentioned, namely the confusion and/or potential overlap between schedule B and schedule E that already exists within the SCHADS Award. So what we are proposing doesn't appear to us to introduce any greater degree of uncertainty or unwieldy nature than of the classification structures that already exists.

PN5357

Finally, to the extent that there are workers who are engaged in what is truly a single employment engaging both types of work the award system has the overlap provision which is intended to address that situation and can be unapplied.

PN5358

Unless there's anything else on that issue?

PN5359

PROF BAIRD: Mr Gibian, I do have a question. I understand from your argument you are suggesting that home care workers, personal care workers, are

very similar in that they do vis-à-vis residential care workers. But when I read your descriptors in your proposed documents on the larger sheets they are different especially at the lower levels. So is there a way that you would like to see them more matched, so that level 1 residential personal care worker is very similar to a level 1 or grade 1 home care worker? A grade 1 residential care worker is similar to a level 1 home care worker?

PN5360

MR GIBIAN: We think the nature of the personal care work, the direct personal care work, has a high degree of similarity, leaving aside the difference in the physical environment and context in which it is performed. The reason why there is somewhat of a difference, particularly at level 1 in the proposed home care classification is that we are preserving the capacity for a domestic assistance home care worker who isn't doing personal care work directly.

PN5361

Now there may be an argument about whether that is an appropriate delineation or not and maybe level 1 could be (indistinct) into level 2 in the home care structure that we have proposed but that is the reason why there is a distinct level 1 in the home care classification that we have proposed. So that on our view would not be personal care work, in the sense of direct bodily care work which in a residential care context, whilst there is some overlap in terms of personal care workers doing some forms of domestic assistance work, in addition to personal care work, to the extent that there is a limitation to domestic assistance to cleaning type work that's in the indirect care classifications obviously.

PN5362

I think I outlined some six grades of issues. I think I can deal with them relatively quickly. The second was the direct and indirect care, the separation of direct and indirect care in the Aged Care Award, I think I've - we favour them staying together on the basis that they're pursuing a common increase. I understand that the outcome flows from that.

PN5363

I think I've probably said enough about specialist work. That is we say, particularly in relation to dementia unit work or palliative care or household models, they are recognised as high skilled workers, we don't think on any view an allowance is an appropriate way to recognise the accretion of skills and capacities which are involved in that work. Much less is inadequately compensated by an allowance which, as we understand on the joint employers proposal, is derived from a heat allowance for working between 46 and 54 degrees is equivalent to the type of skills we are talking about in working in a dementia unit.

PN5364

We think the same, so far as medical competency is concerned, that is it is an accurate (indistinct) of the skill being utilised is a generally available skill for the employer and ought be recognised in the classification scale. Again, with the idea of answering the problem that has been identified in the absence of meaningful career progression to encourage both retention in the industry and encourage acquisition of skills.

PN5365

The fourth point in that respect is the ANMF's proposal to alter or to insert a new definition of aged care nursing assistant into the Nurses Award. I think the submissions that we make in relation to that are relatively clear from the evidence that was heard. The members of the Bench will recall that the current definition of a nursing assistant in schedule A clause (a)(1) to the Nurses Award refers to an employee other than one registered by the Nursing and Midwifery Board who is under the direct control and supervision of a registered nurse and whose employment is solely to assist an RN reporting role, nursing, the provision of nursing care.

PN5366

The position that we've conveyed throughout the proceedings is that while there are people who are called AINs in residential care, for historical reasons that were conveyed, they don't fit within that definition having regard to the findings that the Full Bench made and the really uncontested evidence on that point. That persons undertaking personal care in residential aged care are not the subject of direct control and their employment is not solely to assist an RN or an enrolled nurse in the provision of nursing care.

PN5367

We somewhat read the ANMF's submissions as acknowledging that and proposing to alter the definition to reflect the fact that that classification is not - or the work engaged in does not fit within the classification descriptor as presently described. As was observed in the course of last week the proposal is then to create a new classification structure for aged care nursing assistants which is proposed to entirely replicate that which exists, is proposed to exist for personal care workers in the Aged Care Award.

PN5368

We don't think that that is something that the Full Bench would do, it's obviously enough inconsistent with the factoring section 134(1)(g) that requires the Commission to at least take account of the need to avoid unnecessary overlap. It appears to be intended, according to Ms Butler's evidence, that the sole differentiation would be the title ascribed by the employer to the position. Frankly, it is not clear that that would be the effect of what is being drafted which refers to the nature of the work. Which raises a perhaps even more fundamental problem which is that all personal care workers would both (indistinct) forward in the classification in the Aged Care Work and the classification in the Nurses Award for an aged care nursing assistant as drafted.

PN5369

One would then have to apply, in each and every case the award overlap provision in the Aged Care Award which is clause 4.7 which requires in the usual fashion a consideration of which award contains a classification which is most appropriate to the work performed by the employee in the environment in which the employee normally performs the work. It is accepted by everyone that the work performed is identical in both cases.

PN5370

Perhaps we would say that, if you have regard to the environment. If the environment is a residential aged care facility the answer would always be the Aged Care Award but it at least makes somewhat of a nonsense of that type of provision if the Commission makes an award containing identical classifications in different awards.

PN5371

The final point that we make in that respect is that the reasons of the Full Bench when this issue was raised in the award modernisation process for including the assistant in nursing classification - including that it was also outside of aged care in the Nurses Award was recorded in the decision to which we have made reference in the written submissions. It's in the bundle of authorities that we provided at tab 11. Relevantly at paragraph 152 the Full Bench recorded that they had decided to maintain the - that they had been both asked to delete the classification and make it more relevant and that there were concerns about overlap of classification and the personal care worker. And that the Full Bench had decided to retain the classification in the Nurses Award and make it directly relevant to the work of nurses.

PN5372

JUSTICE HATCHER: Do the assistants in nursing do any home care work?

PN5373

MR GIBIAN: I don't believe so, there was evidence of that or persons referred to as assistants in nursing. That is as we understand it the decision and because of the award modernisation the reason for retaining that classification was to differentiate it, in some manner at least, from personal care workers by reference to the direct connection to the work of nurses. If you take that out that's the only reason for retaining it as a distinct classification at the time of the Full Bench - at the time of the award modernisation.

PN5374

Then the second last issue was just some additional matters that were raised by - in the nurses - in the ANMF application, I should say. There are really two things; one is the Full Bench will recall there's a proposal to include - the ANMF proposal in substance retains the classification descriptors in the Aged Care Award and seeks to replicate them in the Nurses Award for aged care nursing assistant subject to a few minor matters about medication and digital technology and the description of some of the qualifications. But inserting at the commencement of each of the classification words to the effect that the employee is subjected to the supervision, delegation and direction of a registered nurse.

PN5375

My client's view is that is both unnecessary and doesn't add much to the operation of the structure. To the extent it suggests that all work performed by personal care workers at least is subject to the supervision, delegation and direction of an RN is not accurate and doesn't reflect the evidence.

PN5376

I'll accept they may be subject in respect of aspects of their work to delegation, direction or supervision by a registered nurse but in a comprehensive way. That

was made clear when one understands in accordance with the nursing standards and the decision making framework Ms Butler referred to in her evidence as to what was meant by delegation and direction in particular which was the delegation of particular work to a particular person, which is not the bulk of the work performed by personal care workers.

PN5377

The second point is that whilst the HSU's descriptors refer to the administration of medication, the ANMF proposal seeks to replace that with assistance - or limit the reference in the personal care worker classification to providing assistance in self-medication. As we understand it that is advanced on two bases; one is that it's suggested that there may be some jurisdiction in which the direct administration of medication is not permissible by a person who is without registration. It appears only Western Australia was a possibility in that respect and that is not a reason, given the findings otherwise of the Full Bench in respect of that work and the clear evidence that it is done for changing the classification.

PN5378

Having regard to Ms Butler's evidence it seems also to have been - to represent the ANMF's view as to what restrictions ought to exist on the administration of medication rather than those that do in fact exist or reflect existing practice.

PN5379

The final matter is, and I think we've probably dealt with this adequately in submissions, is that the joint employers make various other suggestions including removing level 7 from the Aged Care Award which perhaps they don't seem to be wholly wedded to but would seem to create a problem under section 163 of the Act in the sense it would remove persons from award coverage without there being an alternative award to which they would be in place.

PN5380

We also oppose the change, the progression thresholds being changed to - from a period of three months to a period of 500 hours, particularly where there is the potential, as drafted, for the employer to extend that period at their absolute discretion. We don't think those are appropriate provisions.

PN5381

I think there was one thing that Mr Saunders wanted to clarify.

PN5382

MR SAUNDERS: Yes, I'm sorry to do it, it's to do with the mathematical question that your Honour Justice Hatcher was advancing. The proposition your Honour put to me was correct but it wasn't quite the process I was describing. Can I ask the Bench to go to page 454 of the court book which is tab 40A, the HSU spreadsheet.

PN5383

DEPUTY PRESIDENT ASBURY: Sorry, what was that page again, Mr Saunders.

PN5384

MR SAUNDERS: 454 on my version, so it maybe 465 on the Bench's.

PN5385

JUSTICE HATCHER: It's 454, yes.

PN5386

MR SAUNDERS: We haven't quite identified where the extra 11 pages enter. There should be a spreadsheet dealing with residential care classifications. Your Honours, Professors, will see a column, the third one along, headed, 'Current Internal Relativities'. Those are the actual wage rates compared with one another. As we saw earlier with 2 and 3, they are very very close, 95 and 99. As first sheet sets out on our analysis 2 and 3 should be at 92 per cent and 95 respectively. However, ignoring the additional cross-classification wage increase, if you change those two wage rates to that lower level the actual rate drops and that exercise we can't do.

PN5387

The same result would happen if level 1 was simply deleted and those two lowered to 90 and 95. To achieve that the HSU presses the seven stage classification structure, but to achieve that one would delete residential care level 1 and then use the 1089 figure as the start rather than 10476. So you don't scale down from C3, you scale up from wherever the lowest is. That's the mathematical exercise and that's why it makes a difference. But of course simply translating identical internal relativities doesn't, which is I think what your Honour Justice Hatcher was exploring with me.

PN5388

That was it, thank you.

PN5389

MR GIBIAN: I was just asked to point one further thing out. We are using that expression very generously - sorry go back a step. Part of the proposal to move home care into the Aged Care Award has incorporated reflecting certain conditions from the SCHADS Award for home care workers in the Aged Care Award. We have noticed that - - -

PN5390

JUSTICE HATCHER: Would lead to a massive amount of text being added to the award, as your document discloses. I mean you haven't attempted to harmonise the conditions, you've just added slabs of new text into there.

PN5391

MR GIBIAN: I think your Honour is being a little (indistinct), it's a small part of the document we've ended up - - -

PN5392

JUSTICE HATCHER: The bulk of it is the classification structure.

PN5393

MR GIBIAN: The bulk is the classification which has been subject to other comment. The conditions are relatively confined I should say. We've noticed

there has been some errors just in the translation, I think it's primarily of a formal type. We'll endeavour to correct those and provide a correct version as soon as we can.

PN5394

JUSTICE HATCHER: Thank you. How long will your submissions be Ms Harrison?

PN5395

MS HARRISON: Your Honour, probably no more than 40 minutes.

PN5396

JUSTICE HATCHER: I have another matter at 4.30. I don't want to hurry you if it's easier just to start in the morning we can do that. We might have to make up some time somewhere but we can do that.

PN5397

MS HARRISON: That would probably be my preference, your Honour, but I'm in the Commissions' hands.

PN5398

JUSTICE HATCHER: Is it convenient to start 9.30 tomorrow with your submissions, Ms Harrison?

PN5399

MS HARRISON: That's convenient for me, your Honour.

PN5400

JUSTICE HATCHER: We'll do that then. We will adjourn now and resume at 9.30.

**ADJOURNED UNTIL WEDNESDAY, 13 DECEMBER 2023 [3.54 PM]**



**LIST OF WITNESSES, EXHIBITS AND MFIs**

**EXHIBIT #JE23 EMAIL FROM LUCINDA SHIELDS WITH  
SUBJECT 'UNITING SPRINGWOOD: INCREASED COVID-19  
PRECAUTIONS - MASKS AND RAT TESTING NOW REQUIRED',  
16/11/2023**

.....PN4663