

IN THE FAIR WORK COMMISSION

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

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

Matter No: **AM2020/99 and AM2021/65**

HSU SUBMISSIONS IN REPLY RE: CLASSIFICATION AND ALLOWANCE ISSUES

JOINT EMPLOYER SUBMISSIONS

The Aged Care Award

Summary of the Joint Employer's proposal

1. The amendments proposed by ACCPA and Australian Business Industrial (referred to hereafter as the **ABI Proposal**) to the Aged Care Award is lengthy and supported by equally lengthy submissions dated 1 November 2023 (**ABI Submissions**). What substantive alterations it proposes involve, with the exception of the allowances, making the Aged Care Award slightly worse for employees, without any real basis and usually with no particular link to anything determined by the Full Bench in *Aged Care Award 2010* [2022] FWCFB 200. The ABI Proposal also does nothing to address the concerns raised by the Full Bench in relation to the rudimentary and compressed nature of the classification structure in the Aged Care Award or the SCHADS Award.
2. The ABI Proposal can be broken down to five headnote areas:
 - (a) retaining existing internal relativities *despite* their misalignment to the C10 scale, based on a misguided reference to *external* actual wage relativities, and in a manner that fails to attempt to address deficiencies identified in the classification structure;

- (b) an alteration to the current structure to further limit the already inadequate career paths by removing the current top-level classification at Level 7 both in relation to the direct care stream and general stream;
- (c) a further amendment to the introductory level in both the direct care stream and the general stream to require that employees remain at that level for up to 500 hours and permitting the employer to extend that period at its discretion if it considers further training is required;
- (d) separating the direct care stream into direct care and recreational activities streams and the general stream into distinct classification structures for general services (laundry, cleaning and driving), maintenance services, administration services and food services; and
- (e) the introduction of a definition of the expression '*or equivalent*' which removes the existing element of objectivity and instead leaves assessment of whether an employee possesses equivalent knowledge and skills as a discretionary determination in the hands of the employer.

3. These alterations are not supported by the HSU, for the reasons set out below. The ABI Proposal do not address the compressed and inadequate nature of the existing classification structure.

4. In addition, the ABI Proposal includes:

- (a) various alterations to the classification descriptors which lack any explicable rationale or basis in the evidence, and take no serious steps to address the invisible skills involved in the performance of work as identified in *Aged Care Award 2010* [2022] FWCFB 200;
- (b) the introduction of a Medication Administration Allowance of \$2.77 per week payable to a direct care employee who had completed the relevant competency and approved by their employer to administer and monitor medications; and
- (c) the introduction of a Specialised Dementia Unit Allowance of \$0.76 per hour payable to a direct care employee appointed by their employer to work in a specialised dementia unit.

5. The HSU believes that the additional skills and responsibility involved in the administration of medication and work in a specialised dementia unit, if recognised in an appropriate classification structure, are best addressed by senior or specialist care worker role rather than payment of a distinct allowance.

The proposed new structure

The correct approach to C10 Alignment

6. The ABI Submissions set out various tables purporting to align the ABI Proposal to the C10 metals framework.¹ The submissions do this on the basis of a comparison between the current wage rates in the Aged Care Award and the Manufacturing Award, and come to the conclusion – as has been the case throughout the proceedings – that aged care workers in both the general and direct care streams are on the whole overpaid.
7. There are two major problems with this approach:
 - (a) first, it ignores the fundamental purpose of the C10 scale in the context of the Manufacturing Award, which is to set internal relativities; and
 - (b) second, it maintains the robotic approach to using the actual rates contained in the Manufacturing Award as the final destination for any external classification with an asserted equivalent skill level.
8. The C10 scale reflects a process by which a range of different classifications within the historical Metals Award were, in effect, banded on the basis of their work value relative to the basic tradesperson. Its primary focus is internal relativities; the provision of a career path within an industry or trade, and the adequate minimum reward for the added skill and utility reflected in additional qualifications and competencies.
9. It subsequently was and can continue to be used to drive external structural efficiency and consistency throughout the award system, in that it can provide (as the Full Bench made clear in *Aged Care Award 2010* [2022] FWCFB 200) a useful initial benchmarking system based on qualifications. It is not the end of the exercise; qualifications are not

¹ ABI Submissions at [40] (Table D1 and Table D2).

the only measure of skill and responsibility as the Charlesworth and Meagher report and the findings of the Full Bench makes clear.² As the Full Bench observed, the C10 framework approach has its limitations, including:³

- alignment with external relativities is not determinative of work value
- *while qualifications provide an indicator of the level of skill involved in particular work, factors other than qualifications have a bearing on the level of skill involved in doing the work, and*
- *alignment with external relativities is not a substitute for the Commission's statutory task of determining whether a variation of the relevant modern award rates of pay are justified by 'work value reasons' (being reasons related to the nature of the employees' work, the level of skill and responsibility involved and the conditions under which the work is done).*

10. The Joint Employers' assessment fundamentally fails to engage with the question of internal relativities. It distills to a submission that nothing further (apart from removing access to Level 7) ought be done in relation to the classification structure in the Aged Care Award, which is unsustainable in light of the Full Bench's findings in *Aged Care Award 2010* [2022] FWCFB 200 as to the inadequacy of the current classification structure and classification descriptors.
11. It is telling in this sense that there is no comparison between the ABI Proposal and the current Aged Care Award. It is unsurprising, given that such a comparison discloses exactly how little the proposal actually does. The comparison exercise is set out on the next page:

² For example, in relation to 'invisible skills': *Aged Care Award 2010* [2022] FWCFB 200 at [759]-[829].

³ *Aged Care Award 2010* [2022] FWCFB 200 at [192] and [939].

Current DC classification	Current rate	Current relativity	Proposed classification	Proposed rate	Proposed relativity	Change %	Change \$
Level 1	\$1,047.60	92%	Introductory	\$1,047.60	92%	0%	\$0.00
Level 2	\$1,089.00	95%	Level 1	\$1,089.00	95%	0%	\$0.00
Level 3	\$1,130.90	99%	Level 2	\$1,130.90	99%	0%	\$0.00
Level 4	\$1,144.20	100%	Level 3	\$1,144.20	100%	0%	\$0.00
Level 5	\$1,183.00	103%	Level 4	\$1,183.00	103%	0%	\$0.00
Level 6	\$1,246.80	109%	Level 5	\$1,248.44	109%	0.13%	\$1.64
Level 7	\$1,269.10	111%	N/A	N/A	N/A	N/A	N/A
Current general classification	Current rate	Current relativity	Proposed classification	Proposed rate	Proposed relativity	Change %	Change \$
Level 1	\$910.90	92%	Introductory	\$910.90	92%	0%	\$0.00
Level 2	\$947.00	95%	Level 1	\$947.00	95%	0%	\$0.00
Level 3	\$983.00	99%	Level 2	\$983.00	99%	0%	\$0.00
Level 4	\$995.00	100%	Level 3	\$995.00	100%	0%	\$0.00
Level 5	\$1,028.70	103%	Level 4	\$1,028.70	103%	0%	\$0.00

Level 6	\$1,084.10	109%	Level 5	\$1,085.60	109%	0.14%	\$1.50
Level 7	\$1,103.60	111%	N/A	N/A	N/A	N/A	N/A

12. In any event the alignment exercise is, as set out below, at least arguably miscalculated. Certainly, it takes an unduly conservative approach, which given it leads to skills and qualifications in the current structure being discounted is unlikely to be correct.
13. The HSU analysis on a *pure* qualification basis (that is, without recognizing the inherently higher level of skills and responsibility involved in these roles) is as set out below, for both the general and direct care streams (noting that, supporting the HSU's claims for consolidation, the current indicative qualification levels are identical);

Level	Qualification	C10 Level	Notes
1	Up to three months work experience	C13	C14 is a rate for persons performing induction training only. Direct work performed on the basis of in-house training is correctly banded at C13.
2		C12	Level of responsibility, accountability and discretion increased from minimal to limited, no qualification requirement.
3		C11	Level of responsibility, accountability and discretion increased from limited to medium, no qualification requirement.
4	Certificate III	C10	Accepted benchmark classification
5	Certificate III	C6	Using ABI's metric of Certificate III plus a minimum of three years of experience, and the time-based translation metric found at 20.1(f), this should correctly be at C6
6	Advanced Certificate/Associate Diploma	C5	Pre-AQF qualifications translate to a Certificate IV and Diploma respectively. ABI alignment ignores Associate Diploma requirement and recognition that experience is necessary. When read in conjunction with the need to encompass level 5, minimum C5 is correct banding, although argument for C4 available.
7	Advanced Certificate/Associate Diploma	C3	Although qualification requirements are the same, position description and level necessarily requires further skills

14. It can be observed from the above that the exercise is not able to be perfectly performed, due to the absence of full elaboration of qualification, experience and competency requirements. This only emphasises the inadequacy of the current classification descriptors.
15. The effect, in respect of general staff, is on a rates analysis as follows:

Level	Correct C10	Correct	ABI proposal	ABI
		minimum wage (compressed)		difference from correct
Introductory	C13	\$882.80	\$910.90	\$28.10
1	C12	\$914.90	\$947.00	\$32.10
2	C11	\$945.00	\$983.00	\$38.00
3	C10	\$995.00	\$995.00	\$0.00
4	C6	\$1,140.70	\$1,028.70	-\$112.00
5	C5	\$1,164.10	\$1,085.60	-\$78.50

16. Of course, the outcome is different in respect of direct care workers, on a externally derived cash basis. This is because they have received a 15% wage increase for work value reasons *separate to* proper consideration of their internal relativity. All this does is show the error in approaching the matter backward.

Removing Level 7

17. The only change of any significance structurally in the ABI Proposal is the removal of the existing Level 7 in both the direct care stream and the general stream. This is, surprisingly for such a significant change to the existing Aged Care Award, not explained in any substantial way. The suggestion that the Level 7 classification should be removed from the Aged Care Award has not been raised at any earlier point in the proceedings.

18. There appears to be no attempt to justify it on the basis of any actual evidence, led by the employers or otherwise. At most, it is simply asserted that the evidence in Stage 1 of the proceedings does not support recognition of a Level 7 employee for either the general or direct care streams and an assertion that this appears to be 'predominantly held by non-award employees'.⁴ The evidentiary basis of the assertion that Level 7 roles are held by 'non-award employees' is not revealed.
19. As such, the sole basis of the proposition that Level 7 should be removed from the Aged Care Award appears to be no higher than to refer to an absence of evidence from an individual classification at Level 7 in Stage 1 of the proceedings. That is unsurprising given the fact that no such proposal had been advanced. In any event, the position put in the ABI Submissions is somewhat equivocal to the extent that it is indicated that the Joint Employers do not object to Level 7 being retained albeit questioning the basis for doing so.
20. The idea that further compressing an already inadequate classification structure could address questions of wage undervaluation or otherwise address the modern award objective considerations is difficult to understand. Level 7 provides the opportunity for a higher classification for workers with higher level administrative, problem-solving or communication, interpersonal or arithmetic skills or supervisory responsibilities. That opportunity should not be removed. However, it is not necessary to consider the matter in any further detail as the variation cannot be made.
21. The coverage of the Aged Care Award is, in accordance with clause 4.1 (and common to many modern awards), referable to the classification structure. Removing this classification would alter coverage in a way that would potentially leave a cohort of employees no longer covered by it. There is no basis upon which the Commission could be satisfied that another award other than perhaps the miscellaneous Award would then cover those employees, and s.163(1) accordingly prohibits the making of the determination sought.

⁴ ABI Submissions at [42].

Increasing time at Level 1/Introductory

22. The current entry level classification for aged care employees in either the general or direct care streams (currently referred to as Level 1) applies to an employee *'who has less than three months'* work experience in the industry and performs basis duties'.⁵ The current provisions refer to a period of less than three months' experience without distinction based on the pattern of the ordinary hours of work of the employee.
23. The Joint Employers recognise that retaining an entry level classification is appropriate and consistent with the modern awards objective.⁶ For reasons that are not entirely clear, the Joint Employers propose that the classification be referred to as an *'introductory level'*. Whilst the title is perhaps incidental, given the existing classification titles and the fact that the ABI Proposal involves different pay points for the general and direct care streams, the proposal has the potential to cause confusion.
24. The ABL Proposal seeks to vary the existing provision in two substantial ways:
- (a) first, by changing the reference to three months to 500 hours; and
 - (b) second, by allowing an employer an unfettered discretion to decide to require any individual worker to work for a further 500 hours before moving to the next level.
25. The figure of 500 hours is presumably calculated to be an approximate period of three months working a 38 hour week. The change is, as the Joint Employers recognise, more than cosmetic: it increases the practical calendar period that a part-time employee (which represent the overwhelming majority of the staff working the aged care sector) will now be required to work before being entitled to progression to Level 2 (Level 1 as it is referred to in the ABI Proposal).
26. Again, aside from a cursory reference to equity, no actual attempt is made to justify this change on the basis of any evidence, or to explain how it is necessary to meet the modern awards objective. The submission, at its highest, is that the reference to was chosen to ensure that the transitory period is of fair and equal application to all new

⁵ Aged Care Award, Schedule B clause B.1.1 and B.2.1.

⁶ ABI Submissions at [66].

employees and avoid arguments about inequity.⁷ There is no evidence in the proceedings to suggest that any sentiment of inequity exists among the workforce, much less that it has caused any difficulties. Nor is there any evidence that a longer calendar period in an entry level classification is appropriate for part-time as opposed to full-time employees.

27. The difficulty compounds when the new claim to allow an employer to extend the period in the entry level classification by a further 500 hours if the employer, in its discretion, decides that further training is required for the employee to achieve the necessary competence. The provision would, in effect, permit the employer to double the amount of time any new starter is at this level, and paid the lowest available rate. The provision provides no criteria or guidance as to the manner in which any requirement for further training would be assessed or any option for external correction and is entirely unsatisfactory.
28. The proposal:
 - (a) has nothing to do with any issue determined in *Aged Care Award 2010* [2022] FWCFB 200;
 - (b) is entirely unexplained and unsupported by any evidence;
 - (c) would only compound existing undervaluation;
 - (d) does not meet the necessary jurisdictional threshold as it could not be said to be necessary to achieve the modern awards objective; and
 - (e) otherwise ought not be entertained.

Definition of 'or equivalent'

29. The Level 4 classification in the direct care stream currently includes a reference to a person having the relevant Certificate 3 qualification or 'possesses equivalent knowledge and skills' of someone with a certificate 3, recognizing (as the Joint Employers correctly acknowledge) that not everyone necessarily holds formal

⁷ ABI Submissions at [68].

qualifications, and reflecting the fundamental focus on actual skills and competencies that underpins the C10 structure. Similar equivalency would accordingly be implied into each level, on a correct construction.

30. The current provision term directs attention to the skills and experience *actually held* by the employee, including knowledge and skills derived from on-the-job experience. It is fundamentally objective, or at least objectively ascertainable. An individual said to be classified at Level 3 who persuaded a court or relevant tribunal that he or she in fact held equivalent knowledge and skills to those held by a person with a Certificate 3 qualification could recover underpaid amounts on the basis of having been misclassified.
31. The ABI Proposal seeks to amend this by inserting a new definition of '*or equivalent*' being:
 - (a) recognised formal training and qualifications; and
 - (b) where an *employer* assesses and determines that the employee's prior experience or learning meets the relevant competencies.
32. This is obviously a significant change; it places a harder barrier between the classifications and diverts attention from what an employee objectively can do (that is, the skills the employee, as a matter of fact, brings to the job) to what an individual employer subjectively perceives. It is an amendment that would make progression more challenging for employees who, by dint of their lack of formal qualifications, are more likely to be in a vulnerable group. It is directly inconsistent with the modern awards objective and ought to be rejected.
33. The submission advanced by the Joint Employers in Stage 1 of the proceedings did not suggest that assessment of whether an employee possessed equivalent knowledge and skills should be left entirely to a discretionary assessment by the employer.⁸ To the extent that the ABI Submissions refer to the provision of the Manufacturing Award defining the concept of '*or equivalent*', it does not support its proposal.⁹ The

⁸ *Aged Care Award 2010* [2022] FWCFB 200 at [885].

⁹ ABI Submissions at [59]; Manufacturing Award, Schedule A.

Manufacturing Award does not confer unilateral capacity upon the employer to assess whether an individual employee possesses equivalent knowledge or skills sufficient to access a classification.

Other matters

The Classification Descriptors

34. The Joint Employers propose various alterations to the classification descriptors in both the direct care and general streams, in many instances in a manner that is not clearly explained. It is appropriate to address the changes proposed with respect to the direct care and general streams.

Direct Care

35. In relation to the direct care stream, the Joint Employers appear to propose changes to the classification descriptors as follows:¹⁰
- (a) The addition of a non-exhaustive list of 'direct care duties' at Grade 1 Direct Care Employee with some additional such duties identified at Grade 2;¹¹
 - (b) The addition of a non-exhaustive list of 'leisure and lifestyle duties' at Grade 1 Recreational Activities Officer;¹² and
 - (c) Subtle changes to the existing lists of skills and abilities identified for the various classifications; and
 - (d) The insertion of a new obligation on employees to complete training, qualifications and/or experience.
36. The proposal to include a non-exhaustive list of 'direct care duties' is not, in principle, objectionable. However, although the lists are non-exhaustive, the approach has the potential to limit the type of duties and work contemplated will be performed by

¹⁰ Leaving aside the proposed removal of Level 7.

¹¹ ABI Proposal, clause B.2.2 and B.2.3.

¹² ABI Proposal, clause B.2.

Personal Care Workers and RAOs. The preferable approach is that followed in the HSU's proposed classification descriptors, namely, to endeavour to identify the type of care required to be delivered, the skills and knowledge required and the relevant work environment.

37. The list of '*direct care duties*' is said to be derived from the evidence in Stage 1 of the proceedings and, particularly, the Lay Witness Evidence Report.¹³ However, the distillation of the duties in the ABI Proposal does not capture range of duties and appears to describe certain duties in a limited manner. For example:
- (a) The description of 'observing the condition of residents and recording progress notes' in the ABI Proposal does not properly comprehend the functions of 'observing, monitoring and documenting residents' care and behaviour', 'monitoring residents for skin wounds, lesions and bruises', 'monitoring bowel movements and urination' and 'observing emotional and mental health'.
 - (b) The description of 'assisting with personal care and hygiene' in the ABI Proposal does not properly comprehend the functions of 'contingence management', 'turning residents to avoid pressure sores', 'assisting residents with toileting, showering and dressing' and 'assisting residents to dining areas for meals, including serving meals and beverages and feeding residents'.
 - (c) No mention is made of duties such as 'managing behaviours (for example when residents become violent or distressed)', 'resettling residents when they wake during the night, or are distressed, crying or in need of support' and 'responding to enquiries about residents from families'.
38. The Joint Employers refer to the Full Bench's extensive findings in *Aged Care Award 2010* [2022] FWCFB 200 in respect of '*spotlight skills*' and the inadequacy of the current descriptors to capture the true nature, and complexity, of the work being performed and the skills required to perform work of that nature.¹⁴ The Joint Employers propose to address this in respect of direct care merely by:

¹³ ABI Submissions at [71] with particular reference to the list of duties contained in the Lay Witness Evidence Report at [104].

¹⁴ ABI Submissions at [80]-[81].

- (a) retaining most of the existing language addressing skills and knowledge, save for some formatting changes;
 - (b) adding reference to ‘communication and interpersonal skills’ and ‘computer literacy’; and
 - (c) suggesting progression from ‘sound communication and interpersonal skills’ to ‘good communication and interpersonal skills’ and ‘well-developed communication and interpersonal skills’.
39. This does not grapple with the issue identified by the Full Bench or capture the type of skills and capabilities involved in the work. The intention of the HSU’s proposed classification descriptors is to reflect the range of skills and knowledge required to provide person-centred care to a diverse range of frail dependent older persons. The classification descriptors contained in the HSU proposal are more appropriate.
40. The imposition of provision at all levels requiring employees to complete specific on-the-job training and/or relevant skills training or experience and ‘any other training required by the employer for this level’ is new. The provision is explained only by the assertion that it is ‘consistent with the current construction of the Aged Care Award’.¹⁵ The existing classifications for direct care employees from Level 2 onwards required the employee to have participated in specific on-the-job training and/or relevant skills training or experience.¹⁶ An employer is likely to be entitled to direct an employee to participate in relevant training and the provision of training by employers is to be encouraged. However, the justification or necessity for the specific provision proposed is unclear.

General Stream

41. The changes proposed by the Joint Employers to the general stream are on their face more significant. With respect to the general stream, it is proposed:

¹⁵ ABI Submissions at [83] and [90].

¹⁶ Aged Care Award, Schedule B clause B.2.2, B.2.3, B.2.4 and B.2.5.

- (a) To separate the general stream into distinct classification structures for general services (laundry, cleaning and driving), maintenance services, administration services and food services streams;¹⁷ and
 - (b) Add a more extensive list of indicative tasks (for example, identifying that a gardener might engage in fertilising or trimming).
42. The separation of the general stream into different classification structures for general services, maintenance, administration and food services is, in itself, unobjectionable if it merely represents a reorganisation. However, the structures proposed limit the number of grades in the different categories, such that there is a three grade classification structure for general services, food assistants and a four grade classification structure for gardening and maintenance and administrative employees. That proposal has the potential to limit progression which is currently available and should not be adopted.
43. The introduction of lists of duties appears to have been derived from other modern awards rather than from the evidence in the proceedings. The drafting involves recording, albeit in a non-exhaustive manner, the duties of the various classifications by listing minute tasks which may be performed by an employee. The changes proposed do not appear directed at addressing the actual problem identified by the Full Bench, in that the invisible skills involved in care and care-adjacent work are not exposed. It is telling in that sense that the additions:
- (a) make no reference to the care-related responsibilities of indirect care workers in an aged care setting; and
 - (b) are abstracted from the circumstances and environment in which the work is performed, namely, a residential aged care facility providing care to frail and vulnerable aged persons.
44. The lists of discrete tasks themselves frequently do not capture the work involved indirect care roles in an aged care setting. For example, the skills of an administrative worker in an aged care setting will be specialised to the work of a residential aged care

¹⁷ ABI Submissions at [48].

facility, including (among other things) understanding the needs of residents, liaising with families, doctors, allied health professionals; understanding and engaging with relevant government departments and helping residents and families navigate the finances of aged care.¹⁸

The Allowances

45. The Joint Employers propose the introduction of a Medication administration allowance and a Specialised dementia unit allowance. It is proposed:
- (a) An allowance of \$2.77 per week be paid to a direct care employee engaged in direct care, has completed medication competency or equivalent and approved by the employer to administer and monitor medications; and
 - (b) An allowance of \$0.76 per hour be paid to a direct care employee engaged in direct care duties and appointed by their employer to work in a specialised dementia unit.
46. The appropriate method of recognising the skills and responsibilities involved in administration of medication or work in a specialised dementia unit is those skills being a basis upon which an employee should be classified as a Senior Personal Care classification or Specialised Personal Care classification, respectively. The acquisition of those additional skills increases the scope of practice of an employee and increases the capacity of the provider to provide high quality person-centred care to residents and atomise the particular task and undercut the classification structure and the opportunity for career progression they are intended to provide.¹⁹
47. In the alternative, the amounts suggested for the allowances are inadequate and are based upon amounts arbitrarily adopted from other modern awards. The amount of \$2.77 per week (approximately 7 cents per hour) with respect to the administration of medication has been adopted from the *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award*

¹⁸ See, for example, Lay Witness Evidence Report at [184]-[209].

¹⁹ Charlesworth and Meagher Joint Supplementary Report, 30 October 2023, at [56].

2020.²⁰ The basis of the determination of that allowance and the nature of the work undertaken by relevant employees is not subject of evidence or otherwise apparent. The proposition that an allowance of \$2.77 per week will encourage employees to seek to upskill is difficult to accept.²¹ Enterprise agreements which contain such an allowance commonly provide for an allowance of 4% of pay or \$1 per hour.²²

48. The amount of \$0.76 per hours with respect to an employee appointed to work in a specialised dementia unit is derived from the 'hot places' allowance in the Manufacturing Award where the temperature is between 46 degrees and 54 degrees.²³ The Joint Employers suggest work in a specialised dementia unit has 'higher intensity'. The 'higher intensity' of work in a dementia unit is not akin to a hot places allowance which is in the nature of an environment allowance. Furthermore, the work in a dementia unit also involves the application of additional and specialised skills which are not capable of being compensated by an environmental allowance.

The SCHADS Award

49. The Joint Employers propose only minimal variation to the existing classification structure in the present Schedule E of the SCHADS Award.
50. The first category of variations is designed to distinguish between home care employees in disability and home care employees in aged care.²⁴ Such a distinction will be appropriate if, contrary to the HSU's principal submission, the latter employees remain covered by the SCHADS Award. However, if the Commission accepts the HSU's submission that such workers should be covered by the Aged Care Award, there is no need to make those consequential amendments in the description of the Schedule E workers.

²⁰ *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020*, clause 18.2(c).

²¹ ABI Submissions at [140].

²² See, for example, *Manor Court Werribee Aged Care Ltd, ANMF and HSU Enterprise Agreement 2022*, clause 23; *Regis Aged Care Pty Ltd NSW Enterprise Agreement 2019*, clause 24.9.

²³ ABI Submissions at [144].

²⁴ ABI Submissions at [26(a)] and [159].

51. The second category of variations involve minor changes in the classification descriptors.²⁵ Those amendments are little more than the separation of narrative lists of indicative tasks into subparagraphs grouped by category. The Joint Employers approach appears conditioned upon the following:
- (a) the claim that the classification definitions fall outside the scope of the current applications and is appropriately deal with in the context of the Modern Awards Review; and
 - (b) the fact that the present home care classification structure contains ‘the essential elements of qualifications, displayed competence and acquired experience and responsibility at each classification level’.
52. The HSU disagrees with those propositions. As to the former, the Joint Employers do not make clear why it would be appropriate or preferable to defer dealing with the classifications in Schedule E of the SCHADS Award, in circumstances where the Full Bench has invited the parties to advance any proposed classification changes. The present Full Bench has dealt comprehensively with the nature of the work in the process of its work value assessment. Amending the classification structure to properly articulate the skills, qualifications and experience at each level is necessary to ensure that the work is properly valued (including by identifying differences in work value at each level), and to setting appropriate minimum rates for each level of work.
53. As to the second proposition, whilst the classification descriptors in Schedule E of the SCHADS Award contain sub-headings purporting to address the qualifications, skills and experience required, those sub-headings are supported by narratives which do not accurately or sufficiently describe the skill and responsibility required for the performance of the work. Given the finding by the Full Bench of an historical gender-based undervaluation of the work, which in part arose due to a failure to properly identify and value the skills exercised in the performance of the work, it is appropriate for the descriptors to describe both the skills exercised and the conditions in which the work is performed. The HSU’s proposed classification descriptors include both

²⁵ ABI Submissions at [26(b)]

'Description of work' and 'Work environment' headings, which contain at each level an accurate description of the work itself and the work environment.

54. An example of the inadequacy of the present descriptors appears at Level 1, which contains the following:

Accountability and extent of authority

[Schedule E.1.2 varied by PR500644 from 23Aug10]

An employee in this level performs broad tasks involving the utilisation of a range of basic skills in the provision of domestic assistance and support and is responsible for the quality of their work.

55. In contrast, the proposed descriptor in the HSU Draft Determination provides:

Accountability and extent of authority

The work is performed without direct in-person supervision.

The work is clearly defined in clients' care plans, requiring minimal employee discretion in the type of work to be performed.

56. The HSU's proposed clause defines the level of accountability and extent of authority by reference to:

- (a) existing practice (absence of supervision);
- (b) the care plans that define the work to be performed by workers (which otherwise are not identified in the classification descriptors as prescribing the work to be performed); and
- (c) the absence of discretion required to be exercised by the worker in the performance of the work.

57. It is important that the classification descriptor records the absence of supervision. That feature distinguishes the classification from other industry entry-level classifications. It renders inapposite the Joint Employers characterization (at [153]) of the position as a C14 role (i.e. a position with a minimum training requirement of up to 38 hours induction training) within the C10 Framework.

58. Of course, the descriptors each level of the existing classification structure includes the heading 'Specialist knowledge and skills' (with 'Interpersonal skills' dealt with separately). However, the narrative under that heading in Levels 1 to 3 does not identify the knowledge and skills required to be exercised to perform the work. Rather, in each of those classifications, the narrative is but a list of indicative but not exclusive tasks. That approach conceals the skills in fact performed in the performance of the work, which are not limited to the skills required to be exercised for the performance of any of the named tasks.
59. The Joint Employers proposed amendment to the 'Specialist knowledge and skills' descriptions at Levels 1 to 3, maintains that approach of defining the required knowledge and skills by reference to indicative tasks, albeit it adds the gloss in each case of categorizing the tasks as 'domestic assistance and support duties', 'personal care duties', 'social support duties' or 'administrative duties', and separates the indicative tasks by adopting an alphabetized list. Those changes do not assist to meet the objective of clearly stating the skills required at the level.
60. The inadequacy of that description is illustrated by reference to the HSU's proposed descriptor for this heading in Level 1, which identifies in a comprehensive manner the skills required to be performed. It provides:

The work may involve applying:

- 1. Skills to undertake cleaning and other domestic support in private homes while maintaining clients' and employees' health and safety.*
- 2. Knowledge of hygiene practice and basic infection control and prevention.*
- 3. Basic relationship-building skills to respond to, and communicate with, a diverse range of clients whilst maintaining professional boundaries.*
- 4. Sound communication and interpersonal skills in dealing respectfully with a range of clients who are all able to communicate and make decisions about the support they require, clients' families, members of the public, other health professionals, and other employees.*

5. Adequate written documentation skills to update visits in clients' care plans.

6. Knowledge of the Charter of Aged Care Rights and the Code of Conduct for Aged Care and the maintenance of clients' dignity and confidentiality.

61. The Joint Employers proposed descriptor for 'Qualifications and experience' at Level 1 is:

An employee at this level is required to complete on-the-job training which may include an induction course and any other training required by the employer for this level.

62. The descriptor makes the present inadequate form of words worse, by being both open-ended and circular. There is a similar vice in the Joint Employer's proposed articulation of 'Qualifications and experience' for Level 2, namely:

An employee at this level is required to complete relevant experience/on-the-job training commensurate with the requirements of work at this level and will participate in any other training required by the employer for in this level.

63. The qualifications for each level are determined by what the employer requires for the level, leaving progression entirely in the hands of the employer. In contrast, the HSU's proposed clauses adopt objective descriptors as follows:

64. For Level 1:

Less than three months' work experience in the aged care industry

65. For Level 2:

- (a) entry level for provision of personal care work up to six months ~~or more~~²⁶ work experience in the aged care industry;
- (b) specific on-the-job training and/or relevant skills training or experience.

66. For Level 3 (relevantly):

²⁶ Typographical error in draft determination.

1. A relevant Certificate III qualification (or equivalent knowledge and skills gained from experience working in aged care. If an employee holds a relevant Certificate III they must be classified no lower than this level.

67. Combined, those descriptors establish a definite pathway for progression:
- (a) from Level 1 to Level 2 upon attaining three months experience;
 - (b) alternatively, to Level 2 upon the commencement of personal care work;
 - (c) to Level 3 upon the attainment of a Certificate III or equivalent.
68. Nothing in the ABI Submission addresses in any positive way the absence of career progression in the present classifications which was identified by the Aged Care Quality and Safety Royal Commission as inimical to professionalization of the care workforce. The HSU's draft determination also provides for career progression by:
- (a) providing a senior home care employee classification for employees, where presently progress beyond Level 3 requires movement into a managerial/administrative role;
 - (b) providing a 'specialist home care employee' classification for employees with Certificate IV or equivalent skills who are required to provide end-of-life care and/or care to clients with moderate or greater levels of physical or cognitive decline; and
 - (c) properly benchmarking the care co-ordinator role (proposed to be Level 7 in the HSU draft).
69. Although the ABI Proposal attempts, at Level 4, to address the skills (as opposed to component tasks) of the role, it does so in a limited way. That attempt (which has added *'the ability to plan, direct and train subordinate staff'* and *'a thorough understanding of the relevant technology, procedure and processes used within their operating unit'* to the present descriptors) still falls well short of accurately describing the skills necessary to acquit the role. The descriptor at Level 6 of the HSU's draft determination is specific and comprehensive.

70. The ABI Proposal also attempts, at Level 5, to describe the skills necessary at that level. Again, the HSU provides a better formulation of the necessary skills at Level 7 (the corresponding classification). As discussed above in respect of the Aged Care Award, the Joint Employer approach in relation to the SCHADs Award appears to be 'guided by' its interpretation of the C10 Metals Framework Alignment Approach. That guidance appears to lead to the conclusion that because the presently existing rates exceed those in the Manufacturing Award for workers at an equivalent benchmark level, nothing further is required to be done by way of the articulation of appropriate classifications. The Commission would not take that approach.
71. In any event the exercise has not been correctly carried out. The true alignment is:

Level	Qualification	C10 Level	Notes
1	Less than 12 months experience	C13	C14 is a rate for persons performing induction training only. Direct work performed on the basis of in-house training is correctly banded at C13.
2	Cert II	C11	Based on indicative qualification, noting that a Certificate 1 does not exist
3	Cert III	C10	Agreed benchmark qualification.
4	Cert III plus experience	C7	Very difficult to benchmark but unlikely to be below Cert IV equivalent level given nature of tasks.

5 Above Cert IV, C2(a) Absolute minimum requirement given bare
degree or diploma qualification indicator. On one view C1(a) is more
appropriate, although some below-level banding for
inexperienced graduates has occurred in other
awards.

THE ANMF SUBMISSIONS

Aged Care Award

72. The ANMF has filed a draft determination dated 15 September 2023 and submissions dated 1 November 2023 (referred to hereafter as the **ANMF Submissions**). The HSU relies on its earlier submissions as to the appropriate variations to the Aged Care Award: its proposal, not the ANMF's, ought to be preferred. Many of the matters addressed in the ANMF Submissions do not need to be addressed by the HSU, particularly the submissions concerned with the nursing classifications in the Nurses Award. The primary issues with the ANMF's proposal in relation which the HSU has concerns are those set out below.

A separate classification stream?

73. The ANMF reiterates that it seeks a separate classification stream for personal care workers in the Aged Care Award.²⁷ This appears to be based on not much more than convenience *if* the rates are different; indeed the ANMF recognizes that its point is more one of form than substance. The justification falls away if the HSU's position that the rates should not be different, which it should be observed meets the goal of '*cultural harmony*' within the workplace.

74. The submission²⁸ that the HSU supports separate classification streams misapprehends the HSU's position. The HSU maintains that there should be one

²⁷ ANMF Submissions at [62]-[66].

²⁸ ANMF Submissions at [64].

classification stream reflecting, fundamentally, that the *entire workforce* is engaged in care-based work (either direct or indirect) and work as part of a team in provided person-centred care to residents at a facility. Separating the direct and indirect workforce will only maintain the failure to recognise this aspect of indirect care work and thus undervalue the position.

75. The suggestion that it is not possible to draft a useful and meaningful classification structure that does not distinguish between direct and indirect care work is too pessimistic: as the HSU's draft determination shows it is, in fact, possible to draft a functional and effective classification structure without artificial bifurcation. That is, it is possible to recognise the differences in the work undertaken in different roles within the context of a coherent classification structure encompassing direct and indirect care work in the residential aged care context.

Medication competency

76. The ANMF suggests a different form of wording to recognise medication competency in the classification structure in the Aged Care Award. In short, it is proposed to replace reference to '*administration*' of medication in the HSU's proposal for a Senior Personal Care classification with reference to '*assistance ... with self-administration*'.²⁹
77. While at first blush this appears to be of little significance, on closer examination it is likely to create more difficulties than it purportedly solves and would not properly reflect the work performed by direct care employees. There was extensive evidence given in Stage 1 of the proceedings in relation to the involvement of personal care workers in the administration of medications.³⁰
78. The concept of administration of medication is broad enough to, sensibly interpreted, encompass the various forms this work in fact takes. No clear distinction was drawn in the evidence between the administration and assistance with administration of medication and the task undertaken by personal care workers ranged from providing

²⁹ ANMF Submissions at [136]-[140].

³⁰ Summaries in the Lay Witness Evidence Report at [442]-[466].

medications to residents and supervising ingestion, crushing medications for residents who are unable to swallow, administering insulin by injection and observing and monitoring the administration of Schedule 8 medication.

79. The evidence included that many of the personal care employees undertook various forms of training in relation to the administration of medication.³¹ The evidence included reference to the units of competency entitled *HLTHPS006 Assist clients with medication* and *HLTHPS007 - Administer and monitor medications*. The latter unit of competency is described as:³²

This unit describes the skills and knowledge required to administer medications to people and monitor them, as per the delegation from a relevant health professional, in accordance with legislation and the employing organisation's medication and delegation policies and practice.

80. The elements of the unit of competency include 'Administer medications within legal parameters' which encompasses both administration of medication, assisting a client in taking medication and overseeing and observing the client when taking medication.³³
81. The adoption of a 'common demoninator' approach suggested by the ANMF would fail to reflect the clear evidence that personal care workers administer medications. Workers involved in administering or assisting the administration require relevant training and, in accordance with the HSU's proposal, fall within the description in Level 5. Self-evidently, the descriptor would encompass only employees who are able to administer medication or assist in the administration of medications only within any constraints imposed by applicable legislation.
82. For the avoidance of doubt, the HSU does not agree with the proposition that its variation either excludes workers in States or Territories where they cannot perform this work or involves the Commission endorsing or encouraging unlawful activity. It should be observed that the ANMF does not actually positively assert that any such jurisdiction actually exists. It is unclear whether any of the examples of legislation

³¹ See, for example, Lay Witness Evidence Report at [601].

³² *HLTHPS007 - Administer and monitor medications*, p2.

³³ *HLTHPS007 - Administer and monitor medications*, p4.

would prevent the type of duties described in the evidence as being undertaken by personal care workers.

Specialist PCW Classification

83. The ANMF raise a concern that the HSU's draft determination, which has an indicative qualification of Certificate IV at Level 6, might result in employees being downgraded from Level 7 to Level 6.³⁴ This appears to misunderstand the current structure in the Aged Care Award. The first Certificate IV level is currently Level 6 (albeit that it is described as an Advanced Certificate, which is a pre-AQF descriptor that parallels Certificate IV).
84. The HSU's structure has been designed in part to as much as possible avoid disruption, in part by retaining the existing 7 Level structure although with a clearer career path. It should be observed that the ANMF's proposal to compress the structure to 6 levels and rename the top two levels, which is not really explained, is as well as compressing rather than developing a career path likely to cause confusion and disruption in a practical sense.

General amendment – nursing supervision

85. The ANMF also proposes that each grade of direct care worker in the Aged Care Award be amended to include reference to the work all duties are performed '*subject to the supervision, delegation and direction of a Registered Nurse (RN)*'.³⁵
86. It is not really explained why this is necessary. It does not so much emphasise the existence of a care team, as posited at [132](1), as highlight the superiority of a Registered Nurse. While it is understandable why the ANMF might consider this important, this is not an appropriate amendment to address the *undervaluation* of personal care work. Additionally, given that the words are of limitation, the

³⁴ ANMF Submissions at [146]-[147].

³⁵ ANMF Submissions at [132].

Commission would have to be satisfied that this involved no inadvertent narrowing of scope such that the variation was not prohibited by s.163.

87. Furthermore, the evidence does not suggest that personal care workers are, with respect to all aspects of their work, subject to the supervision, delegation and direction of a registered nurse. Whilst registered nurses are the clinical leaders in residential aged care, the evidence clearly demonstrated that personal care workers performed increasingly complex work with less direct supervision and are rarely actively or directly supervised in their work.³⁶ The suggested additional wording is not appropriate in that context and does not properly reflect the work performed and the autonomy and decision-making role of personal care workers.

Nurses Award

88. The ANMF proposal to vary the Nurses Award to insert a new definition of an 'Aged care nursing assistant' and to insert a new classification structure for that role. The position of the HSU (explained in its earlier submissions) is that, given the evidence in Stage 1 of the proceedings and the findings of the Full Bench, it is doubtful that many persons working in residential aged care facilities who are designated as AINs in fact fit within the definition of a 'nursing assistant' in the Nurses Award. The definition is as follows:³⁷

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

89. The findings of the Full Bench included that there has been a reduction in the number of RNs as a proportion of the aged care workforce, RNs are increasingly concerned with administrative responsibilities and administrative duties and workers designated

³⁶ *Aged Care Award 2010* [2022] FWCFB 200 at [648]-[663]; Lay Witness Evidence Report at [559]-[577].

³⁷ Nurses Award 2020, Schedule A clause A1.

as the PCWs and AINs operate with less direct supervision.³⁸ Plainly, the evidence indicates that persons providing personal care in residential aged care are not working under the direct control and supervision of a registered nurse or employed solely to assist an RN or enrolled nurse in the provision of nursing care.

90. The ANMF now proposes to add a new definition which seeks to excise those elements in the existing definition in the following terms:

Aged care nursing assistant means an aged care employee, other than an RN, EN, student EN or Nurse practitioner, who is subject to the supervision, delegation and direction of an RN and whose employment is to assist in the provision of nursing care to aged persons

91. The approach now proposed by the ANMF necessarily involves acceptance of at least the following matters:³⁹

- (a) The work performed by persons referred to as AINs and personal care workers is indistinguishable and the skills, responsibilities and qualifications of those workers are the same;
- (b) The current classification descriptors and structure in the Nurses Award does not capture the work performed by persons referred to an AINs in residential aged care providing personal care to residents;
- (c) Persons referred to as AINs in residential aged care does not generally perform work subject to the direct control and supervision of an RN or which is solely to assist an RN or EN in the provision of nursing care; and
- (d) The Aged Care Award more clearly identifies the skills, qualifications and experience required in relation to the performance of direct care work in a residential aged care context.

92. The ANMF proposal to address that situation seeks to insert an identical classification structure for the new '*Aged care nursing assistant*' classification as would exist for direct care employees in the Aged Care Award. That is, it is proposed that two identical

³⁸ *Aged Care Award 2010* [2022] FWCFB 200 at [619]-[663] and [890](6), (7), (8).

³⁹ See, particularly, ANMF Submissions at [119]-[127].

classification structures would exist in different modern awards for workers performing precisely the same work in the same workplaces.⁴⁰ With respect, the appropriate answer to this is not to vary the Nurses Award to duplicate the Aged Care Award structure; it simply is a recognition that, unsurprisingly, workers in aged care are covered by the Aged Care Award. The ANMF proposal creates, rather than avoids, unnecessary overlap in the Award system and is in that sense contrary to the modern awards objective.

93. The proposal also appears to be inconsistent with the determination of the then AIRC when first making the Nurses Award as part of the award modernisation process. In *Re Request from the Minister for Employment and Industrial Relations — 28 March 2008* (2009) 181 IR 19, the Full Bench concluded (at [152]):

In the Nurses Award 2010 there is also a classification for nursing assistant. We were asked both to delete this classification and to make it more relevant. There were concerns about an overlap between this classification and the personal care worker. We have decided to retain the classification in the Nurses Award 2010 and make it directly relevant to the work of nurses. In addition, we have adopted the suggestion of the ANF to provide an additional salary point at the Certificate III level.

94. That is, the basis upon which the Full Bench determined to retain a nursing assistant classification in the Nurses Award, given concerns about overlap with personal care worker classifications, was to limit that role by reference to 'direct relevance' to the work of nurses. That is the element that is now sought to be removed from the new definition of 'Aged care nursing assistant' by omitting reference to working under the direct control and supervision of an RN and being employed solely to assist an RN or EN. That step should not be taken.

⁴⁰ Clause A.2 of the ANMF draft determination with respect to the Nurses Award.

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Dated: 27 November 2023