

**FAIR WORK COMMISSION**

**AM2020/99; AM2021/63; AM2021/65**

**WORK VALUE CASE – AGED CARE INDUSTRY**

**RESPONSE TO QUESTIONS BY THE FULL BENCH IN BACKGROUND DOCUMENT 10**

**AGED & COMMUNITY CARE PROVIDERS ASSOCIATION LTD AND AUSTRALIAN BUSINESS  
INDUSTRIAL – THE JOINT EMPLOYERS**

**7 MARCH 2023**

## RESPONSE TO QUESTIONS BY THE FULL BENCH IN BACKGROUND DOCUMENT 10

### Introduction

1. On 23 December 2022, the Full Bench published “*Background Document 10 – Stage 3 Outstanding Issues*” (**Background Document 10**). The document included 50 questions for the consideration of the parties. Responses to the questions directed at the Joint Employers follows.

### Social, Community, Home Care and Disability Services Industry Award 2010

#### Question 3 for all parties:

#### Does any party propose any amendments to the classification structure under the *SCHADS Award*?

2. Focusing upon the *SCHADS Award*, the nature of the applications before the Commission are confined to home care employees working in aged care in the home care sector. The home care sector is defined as “*the provision of personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence*”.<sup>1</sup> The *Stage 1 decision* provides for an interim increase of 15% to apply to “*direct care workers*” working in aged care under the *SCHADS Award*.<sup>2</sup>
3. To give effect to the *Stage 1 decision*, it follows that the classification structure under Schedule E must be amended to create an “*aged care*” stream, as distinct from the “*disability*” stream. The interim increase (together with any subsequent increase) would apply to the aged care stream. The disability stream would remain unaffected by the determinations of the Full Bench, having not been the subject of any evidence or work value application.<sup>3</sup>

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<sup>1</sup> *Social, Community, Home Care and Disability Services Industry Award 2010*, cl 3.1 (***SCHADS Award***).

<sup>2</sup> *Stage 1 decision* [2022] FWCFB 200.

<sup>3</sup> This distinction is reflected in the *Determination – SCHADS Award* [MA000100] PR751296 (3 March 2023).

## Comparison of the two proposed *Aged Care Award* classification structures

Question 4 for all parties other than the HSU:

Do parties support the HSU's proposed changes to the entry level (unqualified) RAO classification level?

4. The Commission should approach the HSU's proposed changes with caution.
5. The Commission had the benefit of five witnesses that held the role of RAO;<sup>4</sup> each RAO held a Certificate IV, with some obtaining further and/or degree qualifications. As to qualification held by the RAO prior to a Certificate IV, the evidence suggests at minimum a Certificate III was obtained (noting that employees making the transition to RAO, often commence work in the aged care industry as a PCW and acquire additional qualifications to take on the RAO role).
6. The following problems arise on the HSU's proposal:
  - (a) there is little evidence, if any, for the Commission to make a determination on work value grounds that the "*unqualified*" RAO classification should be amended;
  - (b) there is no evidence to justify the significance of "*6 months*" as a marker for the application and achievement of competency by a RAO (unqualified or otherwise); and
  - (c) the proposal suggests an unqualified RAO with more than 6 months experience aligns to a PCW with a Certificate III qualification (an alignment that has the effect of undermining the Certificate III qualified position).

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<sup>4</sup> Fiona Gauci, Sanu Ghimire, Jade Gilchrist, Michelle Harden and Josephine Peacock.

**Question 5 for all parties other than the HSU:**

**Do parties support the HSU's proposed additional classification levels for RAOs?**

7. The Joint Employers repeat their answer to Question 4 and make the following observations with respect to the proposed “*qualified*” RAO and “*senior*” RAO.
8. The evidence supports the recognition of a qualified RAO in the *Aged Care Award*. The relevant qualification is a Certificate IV. However, there is no evidence to support the introduction of a new classification, namely, a “*senior*” RAO.
9. The evidence reveals a RAO may get further qualifications. That does not correlate, however, to a change in competency within the role of RAO. For example, Josephine Peacock, in addition to attaining Certificate III and Certificate IV qualifications, attained a Bachelor of Health Science (Leisure and Life). This additional education qualified Ms Peacock as “*Diversional Therapist*”.
10. The HSU's proposal appears to be introducing an additional classification based on years of service rather than “*the essential elements of qualifications, displayed competence and acquired experience and responsibility*”.<sup>5</sup> The evidence in Stage 1 does not provide a basis on work value grounds that would justify the introduction of a new “*senior*” RAO classification.
11. The Commission should be cautious to avoid variations based on years of service when there is not a connection with achievement of greater competency, especially in circumstances where the Full Bench have previously described such an approach as “*anachronistic*” and not appropriate within a work value determination.<sup>6</sup>

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

12. Yes.

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<sup>5</sup> *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [647] (**Teachers Case**).

<sup>6</sup> *Ibid*.

## Principles underpinning classification structures

Question 7 for all parties:

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

1. It should be a career-based classification structure;
  2. It should clearly state the skills, qualifications and experience required at each level; and
  3. It should provide a clear means to transition from one level to another.
13. At the outset, the Joint Employers make the following observations:
- (a) Section 139(1)(a)(i) of the *Fair Work Act 2009* (Cth) provides that a modern award may include terms about minimum wages and “*skill-based classifications and career structures*”. That provision identifies a discretion; none of the terms identified are mandatory inclusions.
  - (b) The Commission should be mindful of the Full Bench view in the *Teachers Case*, namely, that a classification structure built on “*years of service rather than the essential elements of qualifications, displayed competence and acquired experience and responsibility*” is inappropriate within statutory scheme.<sup>7</sup>
  - (c) The notion of “*skill-based*” referred to in s 139(1) is akin to the modern-day notion of “*competence*”.
14. Turning to the principles identified by the Commission:
- (a) It is agreed that an appropriate classification structure should be “*career-based*”. However, care must be taken to ensure that a career-based structure is not artificial, such that it creates artificial steps of progression not based on an increase in competency. An appropriate classification structure must reflect the genuine acquisition of competence and reflect the practical reality of how people develop competence and apply it in the industry. By way of illustration, it would be inappropriate to introduce an additional pay point within a classification level simply

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<sup>7</sup> *Teachers Case* at [647].

to give someone a pay increase after a period that is not based on the acquisition of competence – this would introduce an artifice into the classification structure.

- (b) It is agreed that any classification structure should clearly state the skills, qualifications and experience required at each level. Further, descriptors within each level should ‘practically’ describe, as opposed to ‘esoterically’ describe, so they may be easily understood and applied in the actual workplace. This approach is consistent with the need to ensure a simple and easy to understand modern award.<sup>8</sup>
- (c) Subject to the structure not creating or being built upon an artifice, it is appropriate that a classification structure provides a clear means to transition from one level to another. The levels within the awards should be properly structured on competence and skill, and the descriptions within each award should clearly explain the requisite competencies and skills of each level. For example, as established on the evidence in Stage 1, the displayed competence and acquired experience of a PCW (Cert III) with 3 years’ experience, is distinct from the displayed competence of a PCW (Cert III).<sup>9</sup> Such that there is an identifiable inflection that justifies recognition within the structure of the award – because it is competency based.

#### **Question 8 for all parties:**

#### **Do parties have further suggestions regarding specific changes to the classification structure for HCWs under the *SCHADS Award*?**

15. The classification structure of the “*home care employee*” requires careful consideration. In addition to the answer to Question 3, the Joint Employers note the approach taken by the Commission in the Determination for the *SCHADS Award* at clauses 17.1 and 17.2,<sup>10</sup> which leaves Schedule E unaffected. However, due to the introduction of a distinction between “*aged care*” and “*disability*” home care employees, construction and application of the award may be assisted by the introduction of additional definitions, which may be the subject of further consideration in Stage 3.<sup>11</sup>

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<sup>8</sup> *Fair Work Act 2009* (Cth), s 134(1)(g).

<sup>9</sup> See Joint Employers Submission dated 22 July 2022, Annexure H at [6.40(c)], [2.38] (Mr Sewell and Ms Wade).

<sup>10</sup> *Determination – SCHADS Award* [MA000100] PR751296 (3 March 2023).

<sup>11</sup> See example, *Determination – Nurses Award* [MA000034] PR751294 (3 March 2023), cl 2 “*aged care employee*” definition.

**Question 9 for all parties:**

**Does any party seek changes to the incremental pay points in the *Nurses Award*?**

16. If the Commission is to maintain the incremental pay points in the *Nurses Award*, the Commission must form the view that the pay points are appropriate on work value grounds. That is, each incremental increase reflects applied and acquired competencies at that level.
17. It is noted that clause 15.7 of the *Nurses Award* addresses progressions through pay points. That clause is extracted below:

*“(a) Progression will be:*

*(i) for full-time employees –by annual movement; or*

*(ii) for part-time or casual employees –1786 hours of experience.*

*(b) Progression to the next pay point for all classifications for which there is more than one pay point will have regard to:*

*(i) the acquisition and use of skills described in the definitions contained in Schedule A—Classification Definitions; and*

*(ii) knowledge gained through experience in the practice settings over such a period.”*

18. The references to “*the acquisition and use of skills*” and “*knowledge gained*”, suggests that progression through the pay points is competency-based. However, in contrast to the progression clause in the *SCHADS Award* (see extracted below at paragraph 21), there does not appear to be an explicit *requirement* that such competencies are attained or demonstrated.
19. Further, being historically derived from the public sector, and accepting the minimum award rates are not properly fixed, it is possible that the pay points in the *Nurses Award* remain based off the “*years of service*” model that was identified as an anachronism in the *Teachers Case*.<sup>12</sup> This is a challenge that the Commission must reconcile.

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<sup>12</sup> See *Teachers Case* at [647].

**Question 10 for all parties:**

**Does any party seek changes to the incremental pay points in the *SCHADS Award*?**

20. Progression through incremental pay points should be based upon displayed competency and not simply an automatic pay-rise based on time served.

21. The *SCHADS Award* includes the following provisions addressing progression:

*“(a) At the end of each 12 months’ continuous employment, an employee will be eligible for progression from one pay point to the next within a level **if the employee has demonstrated competency and satisfactory performance** over a minimum period of 12 months at each level within the level and:*

*(i) the employee has **acquired and satisfactorily used new or enhanced skills within the ambit of the classification**, if required by the employer;*  
*or*

*(ii) where an employer has adopted a staff development and performance appraisal scheme and has determined that the employee has demonstrated satisfactory performance for the prior 12 months’ employment.*

*(b) Movement to a higher classification will **only occur by way of promotion or re-classification.**”<sup>13</sup>*

22. Whilst there is an element of the “*years of service*” progression within the *SCHADS Award*, with “*12 months*” identified as the relevant period to consider progression, unlike the *Nurses Award*, there is an express requirement that “*the employee has demonstrated competency*” over that 12-month period and that the employee acquires and satisfactorily uses “*new or enhanced skills within the ambit of the classification*” (if required). Based on that analysis, the construction of the progression clause in the *SCHADS Award* could not be described as anachronistic in the *Teachers*-sense. It is clear that the progression between pay points is not intended to be automatic, but subject to an assessment of competency and skills and a determination by the employer.

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<sup>13</sup> *SCHADS Award*, cl 13.3 (emphasis added).



**Question 11 for all parties:**

**Does any party wish to present any further evidence and/or make any further submissions in addition to the evidence and submissions already before the Full Bench in Stage 1 in relation to this issue?**

23. Yes.

**Key issues arising**

**Question 12 for all parties:**

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

24. The discussion at [96] to [103] in Background Document 10 provides an accurate summary of the parties' position on whether there should be a separate classification structure for PCWs in the *Aged Care Award*.
25. Having had the benefit of the *Stage 1 decision*, and noting the submissions to-date have been responsive to the applications brought by the Unions, the Joint Employers make a further observation that is contrary to the summary at [104], which states "*there does not appear to be any proposals to change the classification structure for indirect care workers (food services employees and general administrative employees)*".
26. Following the publication of the Stage 1 and *Stage 2 decisions*,<sup>14</sup> and noting the Determination for the *Aged Care Award*, there would appear to be merit in separating out a classification structure for each stream under the *Aged Care Award*. This conclusion is supported by the evidence, which demonstrates the differences in work performance and, especially in the case of personal care work, the broad levels of advancement within each stream would be better understood as three separately defined streams. As to the form of this separation, that may be the subject of further consideration.

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<sup>14</sup> *Stage 2 decision* [2023] FWCFB 40 (21 February 2023); *Stage 2 decision* [2023] FWCFB 45 (3 March 2023); *Determination – Aged Care Award* [MA000018] PR751293 (3 March 2023).

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

27. The personal care stream may include both PCWs and RAOs. This is appropriate noting that many RAOs commence work in the aged care industry as a PCW and then pursue a career path to RAO.

**Question 14 for all parties:**

**Does any party wish to present any further evidence and/or make any further submissions in relation to this issue?**

28. Yes.

**Question 17 for the ANMF and Joint Employers:**

**What evidence currently before the Full Bench is relied upon to support the claim that a separate classification structure should be established for PCWs?**

29. When the lay evidence is considered in its totality, the Commission may be satisfied that the nature of the work performed within the personal care stream is both materially different and the role of competency recognition within the personal care stream is distinct from the work performed within the support streams.<sup>15</sup>
30. The personal care stream may be easily accepted as self-contained, with the skills and competencies being performed rarely overlapping with that of the support streams. That is, direct care is strictly within the domain of the PCW. The evidence also supports a finding that it is uncommon for PCWs to commonly shift between the roles under the support streams. Rather, it is built for career-based progression via the attainment of competencies, experience or equivalent (for example, Certificate III, Certificate IV).
31. The introduction of a separate classification structure for the PCWs is also consistent with the objective of ensuing a simple and easy to understand modern award.<sup>16</sup>

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<sup>15</sup> See generally, Joint Employers Submission dated 22 July 2022, Annexure A – Personal Care Employees, Annexure C - Aged Care Employee - General and Administrative Services, Annexure D - Aged Care Employee - Food Services.

<sup>16</sup> *Fair Work Act 2009* (Cth), s 134(1)(g).

**Question 18 for all parties:**

**Are any parties proposing any changes to the classification structure in the *Aged Care Award* for indirect care workers?**

32. Yes. We repeat our answer to Question 12.

**Senior PCW (Aged Care employee level 5) – allowance or separate classification?**

**Question 19 for all parties:**

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

33. Yes.

**Question 20 for all parties:**

**Does any party wish to present any further evidence and/or make any further submissions in addition to the evidence and submissions already before the Full Bench in Stage 1 in relation to this issue?**

34. Yes.

**Question 23 for the Joint Employers:**

**Is a claim for a classification level for an 'Experienced PCW' still pressed? If so, at which classification level?**

35. Yes. As summarised at [110] of Background Document 10, the Joint Employers support the inclusion of a classification level for an experienced PCW located above Certificate III but below a Certificate IV. Such that the classification level would provide an intermediary step between a Certificate III and Certificate IV. This introduction would be entirely based on competence (i.e. it is not an artifice) and provides a clear career path for a PCW rather than having to move straight away to Certificate IV.

## Question 24 for the Joint Employers:

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

36. The following observations are supported by the evidence in Stage 1:
- (a) The administration of medication falls with the scope of practice for a RN and EN.<sup>17</sup>
  - (b) The administration of medication requires the satisfactory completion of an additional unit of competency (that does not form part of a Certificate III) or Certificate IV<sup>18</sup> and/or satisfactory completion of on-the-job training by a RN or RTO.<sup>19</sup> Such PCWs are sometimes described as “*medication competent*”.<sup>20</sup>
  - (c) A PCW may elect to complete a unit of competency directed at “*Assist clients with medication*” in the context of a Certificate III,<sup>21</sup> which is distinct from “*administering*” medication.<sup>22</sup>
  - (d) Not all PCWs administer medication.<sup>23</sup>

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<sup>17</sup> See generally, for RNs: See Joint Employers Submission dated 22 July 2022, Annexure E at [2.11(a)(iii)] (Irene McInerney), [2.26] (Jocelyn Hofman); see Joint Employers Submission dated 22 July 2022, Annexure A at [2.49] (Christine Spangler), [2.136(d)] (Virginia Ellis), [2.172(c)(v)] (Alison Curry), [2.215(f)] (Sanu Ghimire), [2.297(d)] (Tracy Roberts); see Joint Employers Submission dated 22 July 2022, Annexure H at [2.65(b)(iv)], [2.66(b)(iv)] (Kim Bradshaw), [3.43(ii)], [3.44(iii)] (Johannes Brockhaus). See generally, for ENs: Joint Employers Submission dated 22 July 2022, Annexure F at [1.12] (Suzanne Hewson), [1.20], [1.22(a)] (Wendy Knights), [1.34(a)] (Patricia McLean); see Joint Employers Submission dated 22 July 2022, Annexure H at [3.52] (Johannes Brockhaus).

<sup>18</sup> See Unit of Competency HLTHPS007. See example, Witness statement of Alison Curry, dated 30 March 2021 at [9]; Transcript dated 4 May 2022 at PN6762 (Charlene Glass gave evidence that she chose to undertake a Certificate IV as it “*gives you more ability to administer medications, so it gives you a wider scope to do more things at facilities*”.

<sup>19</sup> See example, Witness statement of Paul Jones, dated 1 April 2021 at [19] (Mr Jones completed an online course in medication administration and completed an assessment by a RN).

<sup>20</sup> See example, Transcript dated 3 May 2022, PN4784 (Helen Platt).

<sup>21</sup> See Unit of Competency HLTHPS006.

<sup>22</sup> See example of “*assisting*” in a medication round or with pre-packaged medication packs: Joint Employers Submission dated 22 July 2022, Annexure A at [2.20(c)] (Virginia Mashford - distributing pre-packaged medications), [2.32] (Rose Nasemena), [2.68] (Dianne Power), [2.118(c)] (Paul Jones), [2.136(d)] (Virginia Ellis), [2.156(a)] (Donna Kelly), [2.172(c)] (Alison Curry), [2.193]-[2.195] (Antoinette Schmidt), [2.215(e)] (Sanu Ghimire), [2.241] (Charlene Glass), [2.269] (Geronima Bowers), [2.282] (Judeth Clarke), [2.300] (Anita Field), [2.314(f)] (Marion Jennings), [2.330(f)-(n)] (Helen Platt). Cf evidence of an RN who administers Schedule 8 medicines: See Joint Employers Submission dated 22 July 2022, Annexure A at [2.49] (Christine Spangler), [2.136(d)] (Virginia Ellis), [2.172(c)(v)] (Alison Curry), [2.215(f)] (Sanu Ghimire), [2.297(d)] (Tracy Roberts), [2.330(m)] (Helen Platt).

<sup>23</sup> See generally, evidence of PCWs administering Schedule 4 medication and following the “*six right of safe medication administration*” (or similar protocol): Joint Employers Submission dated 22 July 2022, Annexure A at [2.20(c)] (Virginia Mashford), [2.32], [2.38] (Rose Nasemena), [2.68] (Dianne Power), [2.118(c)] (Paul Jones), [2.136(d)] (Virginia Ellis), [2.156(a)] (Donna Kelly), [2.172(c)] (Alison Curry), [2.193]-[2.195] (Antoinette Schmidt), [2.215(e)] (Sanu Ghimire), [2.241] (Charlene Glass), [2.269] (Geronima Bowers), [2.282] (Judeth Clarke), [2.300] (Anita Field), [2.314(f)] (Marion Jennings), [2.330(f)-(n)] (Helen Platt).

37. Prior to any determination of any allowance, it is observed that if the Full Bench has already relied on the evidence with respect to *administration* of medication as forming part of the work value grounds in the *Stage 1 decision*, the matter has already been dealt with. On one view, it would appear this may have occurred (at least in part). However, if that observation is misconceived, we would press the submission for consideration of an allowance.
38. The allowance would apply in circumstances where the PCW is administering medication (as distinct from “*assisting*” and/or prompting).
39. A comparable allowance, in terms of responsibility and accountability, is a first aid allowance (a weekly first aid allowance of 1.67% of the standard rate per week).<sup>24</sup> The Commission may also wish to consider the “*medication administration allowance*” in the *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020* (an allowance of \$2.62 per week).<sup>25</sup>

### Specialist PCW – classification or allowance?

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

40. Yes.

**Question 26 for all parties:**

**Does any party wish to present any further evidence and/or make any further submissions in addition to the evidence and submissions already before the Full Bench in Stage 1 in relation to this issue?**

41. Yes.

**Question 28 for the Joint Employers:**

**Is a claim for a classification level for a Certificate IV still pressed? If so, at which classification level should this sit?**

42. Yes. The evidence reveals that some PCWs attain a Certificate IV and their level of competence is above a Certificate III. It is appropriate that this marked increase competence be recognised within the classification structure of the *Aged Care Award*.

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<sup>24</sup> See example, *SCHADS Award*, cl 20.6.

<sup>25</sup> *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020*, cl 18.2(c).

43. In terms of relativity, by reference to the C10 framework, the Certificate IV qualified PCW would sit at C7 (which is a relativity of 115%).

**Question 30 for the ANMF and the Joint Employers:**

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

44. There is no evidentiary basis for the introduction of a “PCW Supervisor” into the *Aged Care Award*. Whether the proposed PCW held a Certificate III or Certificate IV, the HSU proposal creates an artifice that is not supported by work value reasons. The evidence is that the supervisor of PCWs in residential aged care is an EN or RN.
45. In contrast to residential aged care, supervision of the HCWs is provided “indirectly”. The evidence reveals that when HCWs require assistance and/or instruction during a client appointment, they will typically make contact with their coordinator (or the office) via telephone. Then, subject to the nature of the inquiry, they may receive instruction and guidance from the coordinator (or, if appropriate, a RN) about the next steps to take.

**Question 31 for the Joint Employers:**

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

46. To the extent the Commission has already taken into account the impact of more residents and clients in aged care requiring palliative and dementia care (etc), this matter has already been dealt with (or at least in part).<sup>26</sup> In particular, regard is had to the summary of the Full Bench’s evidentiary findings in Stage 1 which it is observed “clearly establish a significant increase in the work value of all employees engaged in direct care work”. The following finding were identified as “particularly relevant”:<sup>27</sup>
- “the complexity of the work has increased
  - the acuity of residents in aged care has increase; they enter aged care with increased frailty, co-morbidities and acute care needs

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<sup>26</sup> See *Stage 1 decision* [2022] FWCFB 200 at [965].

<sup>27</sup> *Ibid.*

- *the proportion of residents and clients in aged care with dementia and dementia associated conditions has increased*
  - *more residents and clients in aged care require palliative care*
  - *employees have greater engagement with family and next of kin of clients and residents*
  - *the model of aged care has shifted to person-centred care; requiring employees to be responsive and adaptive*.<sup>28</sup>
47. If, however, the Commission believe there is more to consider with those working exclusively in palliative or dementia care (i.e. in separately defined wards within a residential aged care facility), an allowance may be appropriate. An allowance may also be beneficial to the industry by increasing the attraction for PCWs to undertake and/or seek rotations and/or assignments to dementia and palliative care wards or “wings”. It may also be more practically implemented for PCWs that are allocated to different wards within a residential aged care facility shift-to-shift subject to need and availability.
48. There is evidence before the Commission that some PCWs were referred to as “*team leader*” on a shift. For example, Ms Ellis described that in addition to her personal care tasks, as a team leader she would perform handovers and mentor and train staff.<sup>29</sup> It may also be noted that Ms Ellis had 16 years’ experience in the aged care industry, held multiple Certificate III and IV qualifications,<sup>30</sup> and had undertaken additional courses relating to dementia care.<sup>31</sup> This ‘additional’ work within the role of PCW could be contemplated by the *Aged Care Award* via the “*leading hand allowance*” depending on the circumstances.<sup>32</sup>
49. Under the *Aged Care Award*, a leading hand will be paid a weekly allowance of the amount specified by the item number in accordance with the following scale:

Leading hand in charge of:	% of standard rate
<b>2-5 other employees</b>	2.67
<b>6-10 other employees</b>	3.81
<b>11-15 other employees</b>	4.81
<b>16 or more other employees</b>	5.88

<sup>28</sup> See *Stage 1 decision* [2022] FWCFB 200 at [965].

<sup>29</sup> Witness statement of Virginia Ellis, dated 23 March 2021 at [40].

<sup>30</sup> Witness statement of Virginia Ellis, dated 23 March 2021 at [25]-[27].

<sup>31</sup> Witness statement of Virginia Ellis, dated 23 March 2021 at [23].

<sup>32</sup> *Aged Care Award*, cl 15.3.



## Specialist PWC – inclusion of Household Model of Care

Question 32 to all parties:

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

50. By way of clarification, the reference to a “*broader range of capabilities*” is to not suggest the PCWs working in the household model are necessarily exercising higher skill, rather they are exercising a broader range of skills. For example, Marion Jennings gave evidence that she performed a wide range of tasks,<sup>33</sup> which included:

- (a) In relation to the kitchen in the “*house*”, Ms Jennings said: “*no actual cooking took place in a kitchen other than toasted sandwiches and coffee making*”.<sup>34</sup> The central kitchen was responsible for the meal preparation.<sup>35</sup>
- (b) Ms Jennings noted that she was responsible for the washing of “*day-to-day clothes*”. She explained:

*“We did have a centralised laundry, and particular like faeces-stained linen and clothes would go up to the central laundry, because they had larger, more industrial machines, but the residents' day-to-day clothes were done within the household”.*

She also noted the sheets and towels would go to an external laundry provider.

- (c) An outsourced cleaner would come and do the routine cleaning, be it the vacuuming or the cleaning of the bathrooms.<sup>36</sup> Ms Jennings noted that a lot “*of the cleaning under this household model then changed over to the carers*”.<sup>37</sup> In this respect she said that a lot of routine cleaning took place as she “*went*” and that the carer’s did a lot of the “*ongoing cleaning, and the floor-mopping*” at night.<sup>38</sup>

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<sup>33</sup> See generally, Witness statement of Marion Jennings, dated 26 March 2021.

<sup>34</sup> Transcript dated 2 May 2022 at PN2818 (Marion Jennings).

<sup>35</sup> Transcript dated 2 May 2022 at PN2821 (Marion Jennings).

<sup>36</sup> Transcript dated 2 May 2022 at PN2828 (Marion Jennings).

<sup>37</sup> Transcript dated 2 May 2022 at PN2829 (Marion Jennings).

<sup>38</sup> Transcript dated 2 May 2022 at PN2831 (Marion Jennings).



**Question 33 to all parties:**

**Does any party wish to present any further evidence and/or make any further submissions in relation to this issue?**

51. Yes.

**Difference between AINs under the *Nurses Award* and PCWs under the *Aged Care Award***

**Question 34 for all parties:**

**Does any party wish to present any further evidence and/or make any further submissions in addition to the evidence and submissions already before the Full Bench in Stage 1 in relation to this issue?**

52. Yes.

**Question 35 for all parties:**

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

53. The Joint Employers agree that the AINs and PCWs perform functionally the same role in aged care.

**Question 36 for all parties:**

**Should the classification structure and minimum wages for AINs in the *Nurses Award* and PCWs in the *Aged Care Award* be aligned and/or consolidated? If so, how? If not, what is the basis for maintaining a different classification structure and minimum wages for AINs and PCWs?**

54. If the nurse employees working in aged care are going to stay within the *Nurses Award*, it follows that the AINs should remain within the aged care stream under the *Nurses Award*.

55. It also follows, from a work value perspective, that persons performing the same work under different awards should have that work being performed valued the same. This is consistent with the principle of ensuring equal remuneration for work of equal or comparable value.<sup>39</sup>

56. The Joint Employers repeat their answer to Question 35 above, which is supported by the evidence. To the extent the AIN and PCW perform functionally the same role in aged care

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<sup>39</sup> See *Fair Work Act 2009* (Cth), s 134(1)(ab), s 284(1)(aa).

– to that extent, the minimum award wages should be aligned. Achievement of that alignment will likely involve the abandonment of the public sector concept of annual increments *Nurses Award* and to a true shift to increments based on competency.<sup>40</sup>

### Moving aged care nurses from the *Nurses Award* into the *Aged Care Award*

#### Question 37 for all parties:

**Does any party support moving the nursing classifications of such employees engaged in the aged care industry from the *Nurses Award* into the *Aged Care Award*?**

57. This question is difficult to answer and the consequences of such a move should be considered by the Commission.
58. At first blush, there does appear to be some industrial sense in moving the aged care nurses into the *Aged Care Award*. This is because the award conditions have been written for employers throughout Australia in the aged care industry and their employees. This may also assist with attracting nursing employees to stay in the industry. These advantages assume that aged care nurse employees do not typically transition in-and-out of the industry (this is yet to be the subject of any detailed evidence). It would however mean a higher level of complexity within the terms of the *Aged Care Award* given the differences that exist between the awards.
59. The question also raises consideration of moving nurses in the home care sector (etc) under the *SCHADS Award*. It calls to question whether a simple, easy to understand, stable and sustainable modern award system, in this respect, may be better achieved in terms of classifications in industry awards versus standalone occupational awards.
60. Relevantly, these complex considerations arise in the context of a *profession*. In circumstances where the mobility of nursing employees within the profession is yet to be the subject of any detailed evidence (for example, whether aged care nurses tend to specialise and remain within the industry), the Full Bench decision at the time of award modernisation to make the *Nurses Award* an *occupational* award remains a significant consideration. The Commission would need compelling evidence to be satisfied that any change, in that respect, is necessary.

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<sup>40</sup> See *Teachers Case* at [647].

**Question 38 for all parties:**

**If so, how would parties envision the classification and pay structure of aged care nurses resulting from such a move?**

61. In the *Teachers Case*, a relevant consideration identified in terms of classification and pay structure was the registered status of teachers. As an occupation featuring clearly defined qualifications with corresponding scopes of practice for EN, RN and NP, this appears to be a logical starting point.
62. As mentioned in answer to Question 36, the pay structure of aged care nurses would involve the abandonment of the public sector concept of annual increments that appears to be enshrined in the *Nurses Award* and to a true shift to increments based on competency.<sup>41</sup> Even in circumstances where the aged care nurses remain in the *Nurses Award*, the Commission should ensure any pay point fixed represents a shift in the actual acquisition and application of competence.

**Application of the C10 framework & internal and external relativities**

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

63. Yes.

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

64. Unlike the *Aged Care Award* and the *SCHADS Award*, the *Nurses Award* includes “*professional*” classifications – that is, classifications that require either a degree or post-graduate degree. For the *Nurses Award*, it would be appropriate to identify two key classifications:
- (a) for the “*professional*” classifications, the key classification is Registered Nurse Level 1 (which aligns to C1 for which the reference point becomes the *Professional Employees Award 2020*<sup>42</sup>); and

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<sup>41</sup> See *Teachers Case* at [647].

<sup>42</sup> See *Manufacturing and Associated Industries and Occupations Award 2020*, Schedule A, clause A.3.1, note at C1.

- (b) for all other classifications, the key classification is Nursing Assistant - Experienced (Cert III) (which aligns to C10).

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

65. Yes.

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

66. As mentioned in answer to Question 40, an additional key classification would be useful in terms of “*professional*” classifications (i.e. those requiring a minimum qualification of a degree or higher).
67. For “*professional*” classifications, the *Manufacturing Award* directs attention to the *Professional Employees Award 2020*.<sup>43</sup>

**Question 43 for all parties:**

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

68. The position advanced by the Joint Employers (summarised at [168] of Background Document 10) was a considered submission, and by force of logic necessarily applied to all RNs under the *Nurses Award*.
69. The Joint Employers agree that the realignment of the classification rates in the *Nurses Award*, consistent with the approach taken in the *Teachers Case*, would address the anomaly within the minimum award rates across all classifications in the *Nurses Award*. Despite the considerable merit in that approach, we accept the provisional view of the Commission to not undertake that exercise for the reasons set out in [956] of the *Stage 1 decision*.
70. As noted by the Commission, it remains open for the ANMF to simply make an application to vary the *Nurses Award*.<sup>44</sup>

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<sup>43</sup> See *Manufacturing and Associated Industries and Occupations Award 2020*, Schedule A, clause A.3.1, note at C1.

<sup>44</sup> See generally, *Stage 1 decision* [2022] FWCFB 200 at [956]

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

71. The Full Bench have formed the view that the relevant wages rates in the *Aged Care Award*, the *Nurses Award* and the *SCHADS Award* have not been properly fixed. The Full Bench has also formed the view that some of the employees under the awards warrant rates that exist outside of the C10 scheme (i.e. an increase based on work value reasons). In circumstances where the Full Bench accept that the existing rates have been infected over the years (and it is accepted it is not necessary to form a view as to why this has occurred), the internal relativities should not be assumed as simply correct and to be adopted.
72. Having said that, industrial sense needs to be applied when working out internal relativities and in the context of recognised competencies such as the Certificate III and Certificate IV, the C10 framework provides a useful starting point.
73. In summary, the following principles should guide the review of internal relativities:
- (a) the relativities in the C10 framework should be a guide;
  - (b) the setting of classification levels and incremental pay points must be based on “*the essential elements of qualifications, displayed competence and acquired experience and responsibility*”<sup>45</sup> and avoid artifice; and
  - (c) particular care should be applied to the *Nurses Award*, which may include minimum rates derived from the public sector, as such it is possible that the pay points reflect the “*years of service*” model that was identified as an “*anachronism*” in the *Teachers Case*.<sup>46</sup>

**Question 45 for all parties:**

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

74. At this stage, the Commission may have formed one of three views:
- (a) the internal relativities within the awards are properly aligned;
  - (b) the rates within the awards are not properly aligned and a view has been formed that the Commission will set the rates; or

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<sup>45</sup> See *Teachers Case* at [647].

<sup>46</sup> *Ibid.*

- (c) the rates within the awards are not properly aligned, and the internal relativities within the awards will be aligned by reference to the C10 framework.
75. Based upon the analysis of the awards conducted in Stage 1, especially with respect to the *Nurses Award*, acceptance of the first view would be troubling. That observation is supported by reference to the Full Bench's acceptance that an anomaly exists within the *Nurses Award*.<sup>47</sup>
76. In circumstances where the Commission has not expressed any provisional view as to the rates (excluding, for present purposes, the introduction of the 15% interim increase into the awards by the *Stage 2 decision* and noting the publication of determinations for each award<sup>48</sup>), the second view does not appear applicable.
77. As such, the starting point is to go to the C10 framework. The C10 framework provides guidance to the exercise. This form of guidance is assistive, especially where it would appear to us that even with the 15% interim increase the minimum rates for direct care workers in aged care will now be demonstrably ahead of any generally comparable classification in any other modern award.

### **SCHADS Award – Impact of an increase on disability workers**

#### **Question 46 for all parties:**

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

78. The following witnesses gave evidence in Stage 1, which indicates they may work with clients requiring exclusive disability care and/or aged care clients with disability:
- (a) Bridget Payton;<sup>49</sup>
  - (b) Catherine Evans;<sup>50</sup>
  - (c) Julie Kupke;<sup>51</sup>

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<sup>47</sup> See *Stage 1 decision* [2022] FWCFB 200 at [955]: “We agree with the Joint Employers’ assessment that the comparison between the C10 Metals Framework and the Nurses Award discloses an anomaly”.

<sup>48</sup> *Determination – SCHADS Award* [MA000100] PR751296 (3 March 2023); *Determination – Aged Care Award* [MA000018] PR751293 (3 March 2023); *Determination – Nurses Award* [MA000034] PR751294 (3 March 2023).

<sup>49</sup> See Statement of Bridget Payton dated 26 October 2021 at [14]-[16].

<sup>50</sup> See Statement of Catherine Evans dated 26 October 2021 at [68].

<sup>51</sup> See Statement of Julie Kupke dated 28 October 2021 at [15].

- (d) Lyndelle Parke;<sup>52</sup>
- (e) Michael Purdon;<sup>53</sup>
- (f) Maria Moffat;<sup>54</sup>
- (g) Teresa Hetherington;<sup>55</sup>
- (h) Theresa Heenan;<sup>56</sup> and
- (i) Lorri Seifert.<sup>57</sup>

79. In particular, both Mr Purdon and Ms Heenan gave evidence in their statements that they fall under a different classification (in the enterprise agreement and *SCHADS Award*, respectively) when providing disability care. However, some witnesses indicated they had acquired qualifications in disability care and/or had previous work experience in disability care. The extent of the overlap of disability care in aged care services in home care settings is not clear on the evidence before the Commission.

80. Further, due to disability care generally not falling under “*home care work*” in aged care, it was not the subject or focus of extensive cross-examination (it would be limited, if any). To better understand this overlap, the Commission would be assisted by further evidence addressing this point.

**Question 47 for all parties:**

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

81. For persons covered by an enterprise agreement, this question is likely already answered by the enterprise agreement.<sup>58</sup> For those purely operating under the *SCHADS Award*, the answer is more complicated.

82. As a matter of practicality one of two things will apply:

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<sup>52</sup> Witness Statement of Lyndelle Anne Parke dated 31 March 2021 at [15].

<sup>53</sup> See Statement of Michael Purdon October 2021 at [12], [15].

<sup>54</sup> Statement of Maria Moffat dated 27 October 2021 at [5], [11].

<sup>55</sup> Statement of Teresa Hetherington date 19 October 2021 at [36].

<sup>56</sup> Statement of Theresa Heenan dated 20 October 2021 at [49]-[51], [23], [53].

<sup>57</sup> Witness Statement of Lorri Seifert, dated 6 October 2021 at [5], [8]-[10].

<sup>58</sup> See generally, Witness Statement of Michelle Jenkins dated 9 February 2023 at [6], [31].

- (a) businesses will continue to or start to differentiate workers driven by their operating model and/or a lack of funding; or
  - (b) where businesses cannot differentiate workers (or elect not to), the 15% increase could be applied to both categories of worker but that assumes that the business can commercially fund this itself.
83. This is where the funded nature of the sector presents a complication. The funding in the aged care sector in terms of HCP (as opposed to CHSP) comes through the package. The amount of funding a provider receives is dependent on the consumer/client type and the nature of the services, all of which impacts on the pricing of the package.
84. For providers who have both aged care and disability clients, whilst yet to be the subject of evidence, the following observations appear available as general propositions:
- (a) some providers may have the financial latitude (for example, those that have a smaller proportion of disability clients) so can manage and pay the higher rate all the time regardless of which client the employee is working with; and
  - (b) some providers might have a significant split between aged care and disability clients, such that the limited financial resources require the provider to adhere strictly to the home care employee classification (i.e. “*home care employee—aged care*” and “*home care employee—disability*”) and pay different rates. This division introduces a material complication into the home care sector (where the home care provider has material operations in both aged care and disability) that is not swiftly resolved and will require further consideration in Stage 3. As it stands, some home care providers from 30 June 2023 will need to determine which rate applies and when for an employee who works with both disability and aged care home care clients.
85. This issue may not be able to be resolved in these current proceedings. Absent a second work value case focusing upon disability care within the home care sector, the views reached with respect to aged care cannot be simply applied. At this stage, the Commission does not have sufficient evidence before it to properly inform itself in order to address this issue.



## Distinction between home care and residential aged care

Question 48 for all parties:

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

86. The coverage clauses within both awards already achieve the necessary distinction between the two types of employees, namely, home care employees and personal care workers working in residential aged care. There is a clear carve out in the *SCHADS Award* that states employees covered by the *Aged Care Award* are excluded. There is no compelling basis to further distinguish between the work performed. It is not controversial that the work is performed in different environments.

## Indirect care employees

Question 49 for all parties:

Does any party wish to file additional submissions and/or evidence in addition to the evidence and submissions already before the Full Bench in Stage 1 in relation to indirect care employees?

87. Yes.

## Further increase for direct care workers

Question 50 for all parties:

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

88. Yes.

## For the Joint Employers

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**7 March 2023**