

IN THE FAIR WORK COMMISSION

Applicants: HEALTH SERVICES UNION OF AUSTRALIA and others

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

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

**FINAL REPLY SUBMISSIONS FOR THE HEALTH SERVICES UNION
AND OTHER APPLICANTS**

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The ‘employer interests’

Who are the so-called ‘employer interests’?

1. A 982-page set of submissions (including annexures) has been filed by Australian Business Lawyers on behalf of a group described collectively as ‘the employer interests’.¹
2. It is important to be clear as to who is actually speaking. In fact, the submissions are made on behalf of:
 - a. **first**, Aged and Community Services Australia and Leading Age Services Australia, which are national peak bodies representing aged care employers across Australia (and who have since merged to become the Aged and Community Care Providers Association (**ACCPA**), and
 - b. **second**, Australian Business Industrial, a registered association of employers entitled to represent, principally, employers in the

¹ ABL submissions at [1.1].

manufacturing and associated industries (as well as members of the NSW Chamber of Commerce) in NSW.²

3. ACSA and LASA self-evidently have a legitimate interest and presence in the proceedings. That said, they are of course not the sole relevant ‘employer interests’ that have participated in the proceeding. Leaving WACCI, discussed below, to one side, a significant number of employers in the sector have filed submissions and participated in the preparation of the Consensus Statement. All uniformly support the HSU’s applications.
4. ABI’s role is less clear. Despite the way they have purported to conduct themselves, they have not been appointed (and cannot assume a role as) counsel assisting the Commission; they are here to, apparently, resist the HSU’s applications being granted. To the extent that the position they take departs from that embraced by literally every actual participant in the sector – and the Royal Commission’s recommendations – the fact that it is being advanced by a body with no actual interest in the industry should be taken into account when considering what, if any, weight to give it.

What position is being advanced?

ACSA and LASA’s agreed position

5. The Royal Commission into Aged Care at Recommendation 76(2)(e) proposed that:

The Aged Care Workforce Industry Council lead... the aged care sector to a consensus to support applications to the Fair Work Commission to improve wages based on work value and/or equal remuneration, which may include redefining job classifications and job grades in the relevant awards.

6. In line with that recommendation, and with the assistance of the Commission in the course of these proceedings, the relevant industry stakeholders and applicant

² ABI Rules at rule 6. Note that there is no evidence that would suggest that a single aged care provider is a member of the NSW Chamber of Commerce.

unions developed a Consensus Statement, representing an 'agreed position'³ between these parties. This was filed on 17 December 2021.

7. LASA and ACSA, among other national peak bodies, were part of the process. They were actively involved in negotiating the substance and wording of the statement, and were signatories to the agreed position reflected in the Consensus Statement. This has been discussed in detail in the HSU's primary closing submissions, but in summary it is agreed that:
 - a. 'wages in the aged care sector need to be **significantly** increased';
 - b. 22 factors, and fundamentally the significantly increased complexity of the work, need to be taken into account by the Commission in undertaking the analysis; and
 - c. the changes in characteristics of aged care consumers have affected not just direct care workers but indirect care workers, and their work requires higher levels of skill than that undertaken by their equivalents in other sectors.
8. This Consensus Statement was made in advance of, and informed, the preparation of evidence and submissions by the Applicants in these proceedings.
9. Paul Sadler, the CEO of ACSA, who was involved in negotiating the Consensus Statement on behalf of ACSA, gave some evidence as to how that organisation approves collective public statements (in that case, press releases from the Aged Care Collaboration decrying the low wages of aged care workers):⁴

...so there's a delegated authority to me as the chief executive officer, to approve media statements on behalf of ACSA, and in most cases it will have been me approving it, but it may well have been on the basis of policy positions developed and approved through either the ACSA board in consultation with our members... And from time to time in any

³ Directions, 4 January 2022.

⁴ Sadler XXN, Transcript, 11 May 2022 PN12229-12231.

statement that's put out by a collaboration there will be some need to compromise to get wording out in a fashion which, you know, we can all adopt publicly.

10. The Commission can be satisfied that assent to the content of the Consensus Statement represents the considered view of the organisations speaking on behalf of their members for the purposes of the present proceedings. No witness put forward by ABL caviled with any aspect of the statement, or gave any evidence departing from it.
11. In the course of opening submissions, the Full Bench drew to the attention of the advocate for the 'employer interests' apparent inconsistencies between submissions that were being advanced by ABL and aspects of the Consensus Statement which had been agreed to by ACSA and LASA and presented as an agreed position for the purposes of the proceedings. The question was taken on notice.⁵ It was not suggested that either ACSA or LASA were withdrawing their support.
12. The submissions filed by ABL in closing continue to either ignore or in some cases (particularly in the context of indirect care workers and the degree of any increase) actively contradict this agreed position. At 2.1-2.9 of Annexure P (found at pages 968-969 of 982), ABL appears to submit that ACSA and LASA:
 - a. can abandon, and
 - b. to the extent of any inconsistency, have abandoned,
 - c. the agreed position as set out in the Consensus Statement.
13. The closest ABL gets to a justification for these conflicting approaches is at 2.7(c), where it is said that the statement was '*a negotiated position between 12 separate organisations at a particular time and context.*' ABL does not identify any *changes* since it was negotiated with and agreed to by ACSA and LASA nor is there any evidence

⁵ Ward, Transcript, 26 April 2022 PN375.

that either ACSA or LASA has ever decided to abandon or renounce their support for the Consensus Statement.

14. Rather remarkably, it is said at 2.9 that the Unions should have cross-examined Mr Sadler about this issue. It is not explained why any obligation arose for the Union parties to cross-examine Mr Sadler in relation to the Consensus Statement, particularly in the absence of any suggestion by him, or otherwise, that ACSA no longer supported its contents. It might be wondered what could be asked in cross-examination: *'Your organisation has reached an agreed position with the unions and other stakeholders about these applications – did you mean it?'*.
15. The Unions – and not to mention the other employer stakeholders – have conducted themselves in the proceedings on the basis of the agreement reached and that the Consensus Statement represented the carefully considered view of the organisations that participated in the process. Parties cannot conduct themselves as though the proceedings are a game; these are serious matters which have significant consequences for hundreds of thousands of employees across Australia in a critical sector. To the extent that ACSA and LASA *are* now attempting to abandon their previous agreement, this is an abuse of process and should not be permitted.
16. It is, however, unclear that this is what they are doing. Absent a clear statement to the contrary and an explanation being provided, the Commission should proceed on the basis that at least ACSA and LASA, together with the other participants in the process, approved and continue to adopt the contents of the Consensus Statement.

What is ABI's position?

17. ABI is not a signatory to the Consensus Statement. This is because it is not an industry stakeholder.
18. In those circumstances, the HSU accepts that ABI is not strictly speaking bound by the agreed position. However, the counterpoint is that its views are of no particular

significance. It has not been appointed 'employer body assisting the Commission' and is not otherwise entitled to act as a roving objector. It is absurd, and contrary to the proper and efficient operation of the Commission's processes, to allow an unrelated industry body to derail an application that otherwise enjoys consensus support among all relevant stakeholders.

19. The position that is in fact being advanced by ABI is difficult to discern from the submissions. Notwithstanding their length, no concrete proposal is actually advanced: what does it say the Commission ought *do* in respect of the application? To the extent it can be understood, it appears – most notably from 4.47 and 4.48 – that the position is that:
 - a. to the extent that minimum rates of pay should be increased, this should only occur for RNs, ENs, '(Cert III) Care Workers'⁶ and Head Chefs/Cooks; and
 - b. any increase should be '*marginal*' rather than significant, noting that it is not explained what '*marginal*' means.
20. There is also an allusion to an alteration to the various classification structures in the Aged Care Award, including delineating between direct and indirect care workers, at 4.37-4.40. Again, no concrete proposal has been provided as to what changes are suggested to the classification structures. This is a plain departure from the Consensus Statement. It is contrary to the views of every actual stakeholder in the industry (and, incidentally, the conclusions reached by the Aged Care Royal Commission). It is, as set out above, being advanced by a body which appears to speak for nobody actually involved in the industry.

The errors of principle in ABL's submissions

21. The HSU has set out at some length the correct approach to applications to vary minimum award wages generally, and in particular how work value assessment

⁶ It is unclear what is captured by this term, i.e. home care workers?

is to be conducted. Similarly, to the extent that the ABL submissions reproduce matters previously set out in earlier submissions as annexures, the HSU has previously filed reply submissions. Accordingly, it does not propose to reiterate all those matters.

22. In large part, at least at a high level, the parties are aligned as to the correct approach. However, when the detail is considered ABL's submissions involve four critical errors in respect of the following matters of principle:

- a. **first**, the application of concepts of 'evolutionary' rather than 'significant' change;
- b. **second**, the actual reasoning in and direct applicability of the *Teachers' Case*;
- c. **third**, the relevance of gender-based factors in the undervaluation of the work reflected in the current rates; and
- d. **finally**, the ongoing (and indeed historical) significance of the C10 scale in wage fixing principles, and the matters contemplated by those rates.

'Significant change'

23. ABL correctly acknowledge at 4.22 that an application for an increase in minimum award rates for work value reasons no longer need clear what it describes as the '*significant change*' hurdle. ABL then proceeds, apparently in support of its contention that the rates for indirect care workers should *not* be increased, to describe the work performed by administrative,⁷ cleaning,⁸ gardening,⁹ maintenance¹⁰ and servery/kitchen hand¹¹ employees as having merely '*evolved over time*'. Virtually the entirety of ABL's analysis of the evidence appears reliant on an attempt to categorise changes in the work of employees in aged care or in providing home care services as being '*evolutionary*' rather than '*significant*'. In

⁷ ABL submissions at [11.4].

⁸ ABL submissions at [13.4].

⁹ ABL submissions at [14.4].

¹⁰ ABL submissions at [15.4].

¹¹ ABL submissions at [17.4].

reality, this approach involves the continued application of ABL's '*significant change*' hurdle.

24. As has been explained in the Final Submission of the HSU, the two concepts are inextricably linked. To elaborate briefly: before the introduction of the *Fair Work Act 2009* (Cth), the Commission's established wage fixing principles required, among other things, an applicant to demonstrate that there had been work value change since a nominated datum point and that there had been '*a significant net addition to work value requirements*'¹² over that period before a wage increase would be justified on work value grounds.
25. The initial principle, which was introduced in the context of the reintroduction of quarterly wage indexation (separate to increases based on national productivity gains and in light of operative principles of comparative wage justice), referred to '*changes in work value*' only.¹³ The additional restrictive language was introduced the following year to clarify the intended limitation.¹⁴ When the principles were reasserted in 1983, it was again emphasised that the reason for the limitation was to achieve wage restraint.¹⁵ Importantly, the "significant net addition" concept was later explained as being in direct contrast to '*progressive or evolutionary change*'.¹⁶
26. Of course, it should be apparent from the HSU's submissions that the evidence, properly analysed, demonstrates that the changes in work across the Aged Care Award and the SCHADS Award have not been merely evolutionary in character. But in any event,, '*progressive or evolutionary change*' is still change in the value of particular work; it is just not of a sort that, under previous and entirely different regimes (with an express focus on controlling wages growth absent from the present Act), was considered appropriate to justify a wage increase. That regime, and those considerations, have not been imported into the current legislative

¹² See e.g. *1976 National Wage Case Decision* (1976) 117 CAR 355 at principle 7(a)(ii).

¹³ *1975 National Wage Case Decision* (1975) 167 CAR 18 at 37.

¹⁴ *1975 National Wage Case September Decision* (1975) 171CAR 79 at 83-84..

¹⁵ *1983 National Wage Case Decision* (1983) 4 IR 429.

¹⁶ *State Electricity Commission of Victoria v FIAA* (G7498) at [190].

regime. Instead, as the parties ostensibly agree, section 157(2) and (2A) require a broad and relatively unconstrained evaluative judgement, unconstrained by historical approaches.

27. Of course, the existence of a significant net addition to work value may be relevant when the Commission comes to assess whether a variation in modern award minimum wages is justified by work value reasons. However, the converse is not correct; at least not in the manner posited in the ABL submissions. That is, to the extent that ABL's submissions as to why wages for indirect care workers should not be increased depends on this idea that changes in that work have been 'evolutionary' only, they involve an error of principle. The question is what the work is worth. In any event as set out in the Final Submissions of the HSU, and reflected in the Consensus Statement, the seismic changes across the sector have affected these workers, the work they perform and their skills and responsibilities, significantly.

The Teachers Case?

28. The ABL submissions rely heavily on what is said to be the reasoning in the *Teachers Case*¹⁷, particularly in respect of what it says in relation to adherence to the C10 scale. Its understanding of the Full Bench's approach is set out at 7.11. The ABL submission at 7.11(d) that, in coming to its decision, the Full Bench gave '*primacy to fixing a benchmark classification...to the C10 framework and then resetting internal relativities*' is wrong.
29. For one thing, the Full Bench found that increases were justified, separate to any question of relativities, on work value reasons (based on changes held, as it happens, to be a '*significant net addition to their work value*').¹⁸ This was at least as important as the C10 scale. That is, the Commission did not determine that

¹⁷ *Re Independent Education Union of Australia* [2021] FWCFB 2051 (*Teachers Case*).

¹⁸ *Teachers Case* at [645].

increases in rates of pay were justified by, or limited to, a comparison with the C10 scale.

30. For another, the 'benchmark' classification was set at C10(a), that is, the top of the C10 scale. This is the 'entry level' classification for teachers. The classification structure derived thereafter bore no relationship to the scale in the Manufacturing Award. Its utility, in this matter, is of limited value. The same can be said of the rejection of the time-based classification structure: that occurred in the context of a nationally recognised career progression scheme reflecting an established career path. It is not authority for the proposition that workers in lower-skilled industries, including those with underdeveloped career progression models, should be dead-ended and have no access to progression through experience.
31. Finally, it should also be observed that the Full Bench in the Teachers' Case did not actually '*reset*' either internal or external relativities, rejecting an IEU submission that the starting rate should be set at the *correct* C10 relativity, that is, that which had been assessed as the notional value of work requiring a degree qualification, being 180%. The Bench instead adopted the compressed actual relativity of 148%. There is a real tension in the employer approach of requiring strict compliance with the C10 relativity scale where it suppresses wages but ignoring compression at above-trade levels.
32. That said, the approach taken by the Full Bench in the Teachers' Case as to the correct approach to section 156(3) and (4) remains instructive in relation to section 157(2) and (2A). However, the decision does not support the rigid adherence to external award relativities that ABL's submissions urge, much less dictate that such an approach is appropriate in any other proceeding.

Gender based undervaluation

33. As explored in the previous submissions filed by the HSU in some detail, comprehensive expert evidence has been filed by the HSU and the ANMF setting out the role that gender-based undervaluation has played in the current rates of pay for aged care workers. ABL's advocate did not, in cross examination,

successfully challenge the proposition that the work has historically been undervalued on a gender basis.

34. Nevertheless, ABL's submissions at 4.33-4.36 assert that the extensive expert evidence before the Commission in relation to the historical gender-based undervaluation of care work, in particular, should be entirely disregarded or, at least, is of 'limited utility' to the Commission's task. The sole basis for the challenge is that their conclusions were based on what people are actually paid, not minimum award rates.
35. That observation rather misses the point. The rates contained in the Aged Care Award and SCHADS Award are, as a matter of reality, what people who work in this industry are paid. Bargaining either does not occur or delivers pay outcomes which are only marginally above the award. This is the nature of a funded industry. It ought be observed that the equally unchallenged evidence demonstrated the link between inadequate government funding and gender-based evaluation. For example, Dr Charlesworth observed:¹⁹

The historical disregard the federal government has demonstrated for ensuring decent award rates in a sector for which it is directly responsible works to normalise low wages in residential aged care.

36. Asking the Commission to close its eyes to the reality of gender-based wage undervaluation in this sector, and the impact of Award rates on this in the context of a sector where the Awards are close to paid rates award, is artificial at best.
37. In any event, the expert evidence explained in detail the reasons for the historical undervaluation of work in many female-dominated industries. Paid care work has been historically associated with unpaid caring work traditionally performed by women in the home and community leading to the false perception that such work is natural and therefore unskilled. The expert evidence makes plain that, as a consequence, aged care work has been significantly undervalued in government

¹⁹ See, e.g. Charlesworth DHB4466-4467 at [40]-[46]. See also Meagher DHB4630 at 7.4.

funding, in employment protections and in societal, industrial and organisational recognition of the increasingly complex skills required.²⁰ Without analysis, ABL assumes that the setting of award wages has been entirely immune from these factors. There is no basis for the assumption.

38. In relation to gender-based undervaluation, at 23.19 of the ABL submissions, it is also hinted, in respect of the need to consider the principle of equal remuneration for work of equal or comparable value referred to in section 134(1)(e), that the HSU's application *offends* this principle. This is, to be fair, not outrightly stated. To the extent that it can be understood, the proposition seems to be that:
- a. the HSU's application if granted will lead to the minimum rate of pay for a C10-equivalent aged care worker being higher than that of, for example, a maintenance fitter;
 - b. the maintenance fitter is more likely to be male; and
 - c. therefore, and because the male maintenance fitter may receive less than the female aged care worker, the award system will not provide remuneration of equal and comparable value.
39. It is an ambitious submission. It assumes, reflecting perhaps a degree of gender-based bias, that the work of the entry-level mechanical tradesman is *necessarily* equivalent to that of the aged care worker with a Certificate III. That proposition is, as set out in the Final Submissions of the HSU, inherently unsafe, particularly in the absence of any evidence to that effect.

The significance of the C10 framework

40. ABL's submissions to date in this matter have been almost entirely preoccupied with concerns about external relativities, that is, the fact that the HSU's application will, if successful, mean that the rates of pay are not aligned, on a qualifications-only basis, with the C10 scale in the Manufacturing Award.

²⁰ Charlesworth DHB4466 at [43]; Meagher DHB4628 p28.

41. The submissions now recognise:
- a. at 4.13, that this approach has limited direct utility as comparing an industrial setting to a care setting is not an “apples to apples” comparison such that the C10 scheme can simply be robotically applied; and
 - b. at 4.15, that the C10 framework does not actually limit or otherwise fetter the Commission’s discretion when setting minimum rates.
42. The ABL submissions then proceed to assert, without apparent justification, that even where they concede that work value reasons exist justifying a wage increase, that such an increase should only be ‘*marginal*’.²¹ This is entirely unexplained. Reading between the lines, it appears to in fact be based on a presupposition – contrary to the purported concessions above – that the Commission in fact cannot, or alternatively should not, depart significantly from these external award relativities.
43. This is a position unsupported by any particular point of principle. The structural efficiency principle was developed, as set out in the HSU’s earlier reply submissions, in a particular industrial and political context and for a particular purpose. They are at best a useful starting point – a floor, rather than a ceiling. At most, one tool which might be used in the process of arriving at fair minimum rates which properly acknowledge work value.
44. At 7.14, the ABL submissions make the again adventurous submission that the rates referable to C10 framework, deal not only with a worker’s qualification but with the environment in which the work is performed and the inherent nature of the work. It is not explained how the asserted alignment between a particular classification in a manufacturing context and work undertaken in the context of an aged care facility or the provision of care to an elderly person in the home takes into account the different between the nature of the work and the environment in which it is performed.

²¹ ABL Submissions at 4.48.

45. The asserted approach would also have the effect of entirely negating consideration of changes in work value. Had the exercise urged by ABL's submissions been undertaken by reference to the Aged Care Award and the SCHADS Award 20 years ago, the identical outcome would have been reached. On ABL's approach, the accepted changes in the age, frailty and care needs of residents and consumers, in the skills and responsibilities required of aged care workers, in care models and care philosophy, in the regulatory and governance requirements and accountability and in community and family expectations would be set at naught and unacknowledged in setting minimum rates.
46. It is not necessary to explore this submission further, except to point out the obvious: to the extent that the rates within the Aged Care and SCHADS Award have been set with reference to the C10 scale, this has involved absolutely no consideration of the highly specific environment in which the work is performed and the inherent nature of the work. Plainly it was, as set out previously, no more than notional fixation using qualification as a base indicator of value.

The proposed new classification structure

47. ABL's submissions, at 4.37-4.46, advanced for the first time proposed changes to the classification structure. It is again unclear whether this is put on behalf of ACSA, LASA and ABI, or one or more of them. The submissions are not, as set out above, accompanied by a concrete proposal or the draft changes it is suggested should be made to the classification structure. Nor do the ABL submissions engage with the actual proposal put forward by the HSU.
48. The proposals are too vague, and the justification too poorly set out, to be fully engaged with. Nevertheless, the following observations may be made:
 - a. **first**, the proposal that there be a delineation between direct care and indirect care worker classifications (called a 'care stream' and 'general services' stream), with the latter mimicking the C10 structure, ignores the

fact that all employees are in fact care workers of one kind; it is, as the Consensus Statement acknowledges, incorrect to treat an administrative officer as having an identical job to an administrative officer in a non-aged care setting;

b. **second**, although outside the remit of the HSU's case in respect of the Nurses Award, it should be observed that the idea that annual increments are to be abolished in all circumstances involves a misreading of the *Teachers Case*;

c. **third**, as to the SCHADS Award, there is no evidence of the 'operational difficulties' posited at 4.45, notwithstanding that it was well within the ability of at least LASA and ACSA to call such evidence. Submissions which do little more than speculate as to future problems should, as a general proposition, be ignored.

49. It is appropriate to comment further in relation to the suggestion that the classifications with respect to personal care work and the general and administrative and food services streams be separated. For different reasons, the ANMF also submits that there should be separate classification tables with respect to personal care workers and other employees covered by the Aged Care Award. The ANMF submits that the work performed by Personal Care Workers is qualitatively different from the work done by general and administrative services workers and food services workers.²² However, the ANMF makes clear that, notwithstanding its support for a separate classification table for indirect care workers, it supports rates of pay being increased for those workers.

50. There are a number of difficulties with the submission that the structure of the classifications in the Aged Care Award should be changed. Firstly, the current classification structure is of long-standing and derived from the pre-modernisation awards. Although some aspects of the classification structure have given rise to

²² Closing Submissions of the ANMF at [21]-[22] and [870]-[878].

concerns, there is no evidence at all that the current classification structure is problematic because it has classification levels with role descriptions for personal care work and general and administrative and food services work.

51. Secondly, although there are admittedly differences between the type of duties undertaken by employees within the personal care stream, on the one hand, and the general and administrative and food service streams, on the other, both are properly to be considered as part of the provision of care. Aged persons are being provided with a home and individualised care designed to meet their physical, emotional and social needs. The provision of person-centred care is the responsibility, and the focus, of the whole of the workforce.²³ Separation of general and administrative and food services workers from other care workers is undesirable as it runs counter to the philosophy informing the sector.
52. Thirdly, the work of all workers working in residential aged care, and the demands placed upon them, has been affected by the dramatic changes in the demographics and care needs of residents over the last 20 years. In this respect, the Consensus Statement recorded:²⁴

The changes in the characteristics of aged care consumers (increased acuity, frailty and incidence of dementia) mean the conditions under which work is done are more challenging for employees providing indirect care support services (such as food services, cleaning or general/administrative work). These workers are an important part of the aged care team. Their work necessitates higher levels of skill when compared to similar workers in other sectors, or to aged care in the past.

53. Fourthly, the evidence indicates that it is not uncommon for aged care workers to perform functions across the personal care and administrative and general or food services streams. For example, Anita Field is employed as a chef at Australian Unity, but also performs a medication round.²⁵ Fiona Gauci- (when employed as

²³ See, for example, Meagher Report, DHB462104614 p21-24.

²⁴ Consensus Statement at [22].

²⁵ Field Statement, DHB12339 at [29(b)].

an Administration Officer) undertook medication training, and would assist with making beds when short staffed and administers medication when necessary.²⁶ Kathy Sweeney is assisted by an Extended Care Assistant performing some administrative or receptionist duties.²⁷ Most critically, the household, cottage or homemaker model of care involves Personal Care Workers taking responsibility for cleaning, food preparation/cooking and laundry work in addition to personal care tasks.

ABL's submissions as to work value reasons

General observations

54. The Final Submissions of the HSU set out, in significant detail, the findings as to work value that it says the Commission ought make and the evidence supporting the same in its earlier closing submissions. In response, the ABL submissions do little more than set out a mechanical (and often incomplete) description of the basal tasks performed by the relevant employees.
55. Examples of the particular errors in each summary are discussed in further detail below, but at the outset it should be observed that anyone's job can be made to seem routine and inconsequential if described in a purely mechanical manner. By way of example:

The judicial officer attends work in an office or office-like environment, arriving at a scheduled time. They may report to a supervisor but generally do not have direct day to day supervision. They will have some interaction with consumers, either in person or via AVL, but to a less intense degree than their associates. The tasks involve reading documents, chairing meetings with a high level of formality, research tasks, drafting documents with and without the use of templates and some word processing. The introduction of mechanical aids such as keyboards and email

²⁶ Gauci Statement, DHB11956 at [28]; Transcript, 29 April 2022, PN2203-2206.

²⁷ Sweeney XXN, Transcript, 5 May 2022, PN7033.

has made the work physically less demanding although in some cases has required additional competencies to be obtained.

56. The ABL submissions, like the example above, ignore the critical focus of the work and the actual skills it involves. It is an approach which works well in an industrial setting, as ABI at least would be more familiar with, where productivity can be directly measured, in some cases quite precisely, by produced outputs. It is inapt to describe care work, or really any work involving professional or para-professional skill, the application of which becomes more invisible the more skillfully it is done.
57. In this case, the key omission is any recognition of the central feature of aged care work: the presence of aged persons, most commonly with complex physical, mental and emotional needs, who both require care and must be navigated around, often inflicting physical and verbal assaults on the worker. Astoundingly, it makes no mention of the challenges that this presents in every aspect of aged care work: the reference to 'consumers' could be read as describing customers attending a bank. The Commission ought to exercise caution before embracing this approach.

'Summaries' of lay evidence

58. The ABL submissions also, at Annexures A-I, purport to summarise the evidence of each lay witness. It is entirely unclear to the HSU what the utility of this exercise is said to be, particularly in circumstances where the Commission has already produced an extremely detailed background paper incorporating the party's (including ABI's) comments. The HSU accordingly does not propose to respond to the bland summaries, save to say that the summaries are not agreed and suffer from the defects described above.
59. In those summaries, the ABL submissions do make what are described as submissions as to 'weight'. Uniformly they address matters about which the witnesses were entirely qualified to give evidence and were not challenged in any meaningful manner in cross examination. For example, in Annexure C at 2.42(d),

it is submitted that Ms Flegg's opinion as to the difficulties she has making ends meet on her current weekly (award) wage is unsupported opinion.

60. Once the quibbles are ignored, what these contentions really seem to go to is a disagreement as to what is and is not relevant to the Commission's consideration. This, in itself, relies on an unduly narrow view: work value reasons are not the sole matter in contemplation. By way of illustration, it is apparently submitted that every piece of evidence relating to:

- a. the industry-wide endemic understaffing;
- b. the financial pressures faced by the lay witnesses and thus the ability of the current rates to address the needs of the low paid, as many of these workers are;
- c. the current and ongoing impacts of COVID-19;
- d. various rostering practices within the industry,

should be given little or no weight.

61. For the reasons set out in the Final Submissions of the HSU, the HSU disagrees. These matters explain the actual nature of the work, the conditions under which the work is done, as well as inform other matters arising in respect of the modern award and minimum wages objective. This is a matter for substantive argument, and should not be dealt with in respect of individual pieces of evidence.

Specific Workers – residential aged care

Personal Care Workers

62. At 9.5(a)-(ss), the ABL submissions set out a largely accurate, if incomplete, high-level summary of the basic tasks performed by PCWs and direct care workers. This omits, as set out above, any reference to the characteristics of the 'consumers' referred to, and the other environmental features of the work. It ignores the communication, negotiation, interpersonal and empathic skills obviously required

to undertake care tasks to assist elderly residents, including in a manner that respects the dignity and individual agency of residents.

63. The description is simplistic, and in large part theoretical. By way of example, at 9.5(h), there is a description of a routine. As the evidence makes clear the idea that a direct care worker's day follows a controllable '*cadence*' is at best aspirational: in reality, these workers are highly reactive to resident needs and the events of the day. The description perhaps better suits the environment of a manufacturing facility rather than the dynamic interactions with individual residents, who will often exhibit changeable behaviours or needs throughout the day – and are of course variable individual to individual.
64. Similarly, the description of the work performed in medicine rounds at 9.5(bb)-(gg) significantly downplays the actual experience involved in the administration of medication to elderly residents, the importance of the task and the stakes involved. To say that Personal Care Workers 'assist' with medication rounds does not accord with the evidence. Consider again the evidence of Ms Clarke attempting to conduct a complex medicine round accurately while being quite literally beaten with a shoe by a resident and her distress at the possibility of causing harm to a resident should an error be made in the process.²⁸
65. Indeed, the latter illustrates the most startling omission from this description, and the others: the risk, and persistent occurrence of, difficult 'behaviours' from residents. There is a passing reference to this at 9.5(hh), which identifies that if the PCW finds themselves in an unsafe situation, there is generally a protocol to follow. This utterly ignores:
 - a. the high likelihood that this will occur;
 - b. the extraordinarily challenging nature of this exposure;
 - c. the skills required in extricating oneself while prioritising the resident's safety; and

²⁸ PN12067-12069.

- d. the skills involved in *avoiding* this while managing interactions with residents.
66. Similarly, at 9.5(ii) one of the more extraordinarily components of the emotional labour and skill associated with these roles is dismissed with a bloodless reference to '*comforting*' a '*consumer that is palliating*'. The contrast between this bland description, and the actual experience of dealing with a dying person and their family and the skills and responsibility of doing so, as set out in the evidence and the HSU's Final Submission, is stark.
67. ABL's recognises (at 19.3, in the context of describing the work performed by Registered Nurses) the important work of providing palliative care checks on palliative residents every 30 minutes. In fact, in many cases it is the PCWs/AINs who perform these checks on these residents because the RN does not have time to frequently check on residents (also known as being on a sight chart).²⁹
68. ABL's submissions suggest, at 9.5(ss), that PCWs are trained by an RN to undertake blood pressure checks, blood glucose level checks and catheter care. This assertion is not in evidence before the Commission and it is unclear where ABL draws this information from. While the HSU does not contend that RNs never provide such training, an AIN/ PCW commencing in the Aged Care industry is more likely to have learned these skills in their Certificate III training, or on the job during a 'buddy' shift' under the instruction of a more experienced AIN/ PCW.³⁰
69. This summary is followed at 9.5-.9.16 with an again high-level description of the units contained within a Certificate III relevant to aged care. It is unclear what is meant to be drawn from this, noting the recognition that some skills are developed through experience on the job. To the extent that it is suggested that all the skills, knowledge and capabilities required for a Personal Care Worker are to be derived

²⁹ See for example, Ellis DHB11550-11551 at [183] – [205] and Curry DHB11686-11687 at [13] for details of the observations required when a resident is on a "sight chart".

³⁰ See for example, Schmidt DHB11717 at [116]-[118], Curry DHB11701 at [89].

from the Certificate III course alone, such a proposition is inconsistent with the evidence including the evidence called by the employer parties.

70. The purported observations at 9.17-9.25 again address the issue at the highest possible level of abstraction. The submission that the change involves primarily 'intensification' due to changing demographics of aged care residents is wrong. This change has additionally led to an increase in the complexity of the skills required, not simply increased the use of existing skills. Further, while it is a significant factor, it is not the sole one; the changing approach to care and the increased regulatory scrutiny each have had an effect.
71. ABL's submissions suggest, at 9.21, that there are factors which mean the work of Personal Care Workers has become *easier* over time. The first, the improvement of the working environment, misunderstands the impact of the move from institutional to more home-like settings. This is an improvement for the *residents*: it in fact makes the provision of care much harder and more complex, particularly in the homemaker setting. Personal Care Workers are required to perform a greater range of tasks, beyond personal care, as part of the move away from institutional and hospital-like settings.
72. The second, the introduction of mechanical aids, is absurd. The increased use of mechanical mobility aids is more directly attributable to the increased number of residents who are largely or wholly immobile as a result of the increased frailty and acuity of residents, and a corresponding increase in the number of occasions in which residents require assistance with physical movement. The evidence further discloses that Personal Care Workers are now required to know how to safely manually assist residents, as well as, how to safely assist them using mechanical aids. The submission also ignores the communication and negotiation skills involved in facilitating the use of technological aids or lifting devices. It is true that these aids alleviate some of the pure physical strain involved in some tasks than it would be if they did not exist. However, this rather misses the point.

73. Other aspects of the work of Personal Care Workers which is, to be fair, noted in the more detailed summaries in Annexure A to the submissions, is omitted entirely from the high-level summaries in the body of the ABI submissions. That is, the ABI submissions, at Parts 9 to 22 (pages 42 to 97), are summaries of summaries of the actual evidence before the Commission. For example, the summary does not acknowledge that Personal Care Workers undertake at least some cleaning duties³¹ as well as paperwork and charting responsibilities, including with respect to ACFI, the Serious Incident Response scheme and the maintenance of casework notes to assist with care planning.³²
74. Accordingly, while the HSU agrees with the work value changes set out at 9.23, it is submitted that this is an unduly limited view of the nature of the change. It is also again entirely *change* focused, highlighting the error of ABL's approach: no analysis of the value of the work has been performed.

Recreational/Lifestyle officer

75. Again, at 10.4(a)-(u), there is a summary of what, as a general proposition, a RAO might do day to day. To the extent it suggests a controllable or predictable routine, it is misleading.
76. Of course, what has been said above in respect of the complex – and increasingly complex – skills involved in interacting with residents who have challenging physical and mental needs, including 'behaviours', applies equally to RAOs (and indeed all staff). It is again ignored almost entirely in the ABL summary. The summary also omits, fairly remarkably, any real recognition of the work that planning and preparing for activities involves. On reading it one could take a view that the activities emerge fully formed out of the ether, with the RAOs simply channelling them to the residents.

³¹ ABL submissions, Annexure A at [2.38 (l)], [2.66(i)], [2.136 (k)] and [2.156(c)].

³² ABL submissions, Annexure A at [2.66(i)], [2.68(k)], [2.140], [2.156 (e)] and [2.227].

77. Of course this is not the case. The preparatory work is just as, if not more, intensive and demanding than the outcomes it achieves. Recreational officers are required to plan activities which simultaneously meet the individual desires and wishes of the residents while recognizing and adapting to their particular physical and mental needs, all while respecting their inherent dignity. It is a complex and ongoing process. By way of illustration, Josephine Peacock described what is required in some detail:

- a. first, an initial Social and Lifestyle Profile is constructed for the resident, involving conducting a '*comprehensive assessment of the resident's whole life*', including significant interaction with family – a complex task noting that many residents face challenges in expressing themselves;
- b. the construction of an ongoing activities care plan, again with input from family and the resident, reviewed every three months or where a major event occurs (e.g. the resident suffering a stroke and their care needs correspondingly changing);
- c. programming of a center-wide program for small, medium and large group activities and individual support, balancing the need for '*variety and balance*' with the challenges in providing '*physical, social, spiritual [and] cognitively stimulating activities*',³³

all before the facilitation that ABL describes even begins. This is then followed by ongoing evaluation of the success of the program on an individual and collective basis, which is formally documented.

78. The summary contained at Part 10 of the submissions, which is itself a summary of Annexure B, which in turn is a summary of the evidence, is manifestly inadequate to even capture all the work done, let alone explain it or analyse its worth. The observations, in this respect, are even vaguer, although it appears that the ABL submissions accept that there are work value reasons justifying an

³³ Peacock, DHB12035-12037.

increase in the rates of pay for these workers. Both Part 10 of the submissions and Annexure B fail to even record the evidence of Ms Gilchrist, Lifestyle and Volunteer Coordinator.

Administrative employees

79. A person reading the summary of tasks set out at 11.3(a)-(h) for administrative officers would quite easily walk away completely unaware of the fact that this work is performed in an aged care context. The summary does not even mention 'consumers' being the aged care residents themselves. This is, for the reasons set out above, a fairly remarkable omission; it is the critical defect in the summary. As explored in detail in the HSU's Final Submissions, in fact administrative officers have direct and persistent contact with residents and their families. This, as a matter of common sense, is unsurprising; these workers are the first port of call for anyone interacting with the facility.
80. The summary is little more than a high-level description of generic administrative work, including the fairly unremarkable statement that receptionist duties include answering the phone. The point is who is likely to be on the phone, and the nature of these conversations: a resident with dementia, or a distressed or agitated family member of an aged care resident is a somewhat different, and slightly more complex, proposition than someone calling a manufacturing facility to speak to a production manager. Additionally, the summary ignores the integral role this cohort of workers play in ensuring compliance with the increased regulatory and reporting requirements; and correspondingly the particular effect this has had on the degree of skill and responsibility their work requires.
81. This approach, as set out in the HSU's Final Submissions, misrepresents the work performed by these employees. Their work is, as the Consensus Statement recognises, deeply affected by the context in which it is performed, and requires a higher level of skill than their non-aged care counterparts. It is in that context perhaps unsurprising that the 'observations' are as abrupt as they are.

Laundry employees

82. The description of the work of laundry employees at 12.3(a)-(f) at least vaguely acknowledges that these workers interact with aged care residents, in addition to performing laundry tasks – although it is put no higher than a potential.
83. It involves a misreading of, and fundamentally a failure to engage with, the evidence. This highlights the unreliability of the summaries at the various annexures. The submissions refer only to the evidence of Ms Field and Ms O'Donnell. In both cases, the summaries which are cited ignore:
- a. Ms Field's detailed evidence as to her interaction with residents and catering to their particular needs and wishes as to their laundry, as well as her tendency to chat to them and assist if they are in distress;³⁴ and
 - b. Ms O'Donnell's equally detailed descriptions of her interactions with residents on a daily basis particularly during COVID lockdowns,³⁵ and her adjusting her work to their preferences.³⁶
84. It also ignores the risks associated with this exposure. Ms O'Donnell put it this way:

I generally will chat with residents when I see them, and when I go into their rooms to put away their clothes. This seems to brighten their day and it makes me happy. However, there are a few residents who I have learned it is better to avoid. On a few occasions, a resident has trapped me up against the wall with their walker, and not let me move. I just had to hope that someone was around who could come help me.

*It is not the residents' fault, and it's understandable that they get upset at times. I just see dealing with aggression, abuse and at times violence as part of the job now. But when it happens, it is upsetting.*³⁷

³⁴ Field, DHB12337-12338 at [28](l), (m), and (s).

³⁵ O'Donnell Reply, DHB11657-11660 at [7], [25]-[30].

³⁶ O'Donnell, DHB11652 at [63].

³⁷ O'Donnell, DHB11653 at [84]-[86].

85. This reality is entirely absent from both the description of their work, and the summaries of their evidence.
86. Additionally, the proposition at 12.3(d)(iv) that laundry employees are not required to handle soiled or infectious items is wrong; the fact that these items are bagged in a particular way for washing does not in fact mean these employees do not handle them (either while in bags, or to place them there in the first place). To the contrary, the evidence of Ms Field was that:

'o. Once I've taken the bags to the laundry, I take the clothes out of the bags and put them into the washing machine. I have to remove the woollen garments from there and check for things like pads, hearing aids and glasses (as these often end up in the wash).

*p. I also have to make decisions on how to wash the laundry depending on what is on them and what condition they are in. The types of things that you might find on the laundry is blood, saliva , poo, wee and vomit. Sometimes the staff members who work in the Houses don't have time to throw faeces in the toilet so the solids stay bundled up in the sheets.'*³⁸

Cleaning employees

87. The description of the work performed by cleaning employees at 13.3(a)-(k) gives short shrift to:
- a. the particularly unpleasant nature of the work, noting the routine exposure to hazardous waste which one might not expect in, for example, an office building; and
 - b. the nature of cleaners' interaction with residents.
88. At 13.3(i), the interaction is described as 'passing and limited'. Again, this requires most of the evidence to be ignored. The actual evidence of Mr Heyan, who ABL rely on, was:

³⁸ Field, DHB12337 at [28o-p]

'Part of my job in all roles was to chat with the resident and try to make the facility feel more like their home'.³⁹

89. Indeed, this statement puts it a little low: cleaners are required to perform their tasks under time pressure in a manner which respects the fact that the facility, and in particular the individual rooms, is the resident's home. It is the clearest example of how a move away from institutional models of care makes the work more complex; there is a clear difference between, for example, cleaning an unoccupied class room after the children have left for the day and navigating a space that a person is meant to feel ownership over.
90. ABL entirely ignores the evidence of Ms Roberts. In particular, Ms Roberts observed that the idea of routine as suggested by the ABL submissions is illusory:

It was not always possible to clean every room in the facility due to interruptions to my cleaning schedule. For example, I was often asked mid-way through my shift to physically assist with moving a resident from a respite room to a permanent care room, or to a room closer to the nurse's station.⁴⁰

91. The observations set out 13.4 and 13.5 appear inconsistent; on the one hand recognizing the impact that the work environment has on all workers, and on the other hand denying any work value reason for a wage increase that would reflect this. Like the rest of the 'observations' it is entirely unclear how they have been reached or their evidentiary basis.

Gardening employees

92. Although again downplaying the precise nature of the work environment, the effect of regulatory change and the particular care aspects of the work of gardeners, the ABL submissions do correctly identify at least:
- a. the need to take into account resident needs and in particular the needs of residents with dementia, at 14.3(i) and(j);

³⁹ Heyan, DHB771 at [13].

⁴⁰ Roberts, DBH11579 at [47].

- b. the reality that gardeners in aged care facilities do not work in isolation, but as a key part of their role interact with residents in ways which require specialist training, at 14.3(m)-(n); and
 - c. the particular direct engagement, including leading gardening activities, and the corresponding integration of their work into direct care, at 14.3(o).
93. That said, the ABL submissions contain the same defects as are apparent in their submissions regarding cleaners. It is the presence of a vulnerable cohort whose needs must be central that radically transforms the nature of the work. To use a grammatical analogy; it is the residents, rather than the garden who are the object in the sentence. The transformation does not simply reside in modifying a schedule of work but in the need in all respects to be focused on the needs of the residents.

Maintenance employees

94. The summary of the work done by maintenance employees, as well as being fixated on broken curtain rods for reasons which remain entirely unclear, similarly understates the additional complexity that the work environment including the presence of residents adds to work of this kind.
95. Describing this as '*interact[ing] with consumers*' is, as it is in respect of all indirect care workers, an understatement of the actual nature of these interactions and the skill they require. These are complex interactions with people with complex and challenging needs. As Mr Bascuik explained in cross examination:

PN14169: Thank you very much. Just to go through some questions about your interaction with the residents, at 38, you note that you are conscious of the fact that you are working in the homes of residents and, as such, you don't proceed to complete a job in a resident's room without first letting that resident know or perhaps contacting the carer as well?---Well, under the Aged Care Standards, the resident's room is their home. You know, you wouldn't go to someone's house and just walk into it, would you?

PN14176: Excellent. At 49, you also talk about if you happen to know a little bit about their background or their interests and that's also an area of crossover, say, with your interests, you might engage in a bit of small chat about that with them as well whilst you're doing a job?---Well, yes, getting to know some of the residents and some of their interests, it's easier to have a conversation with them. You know, it sometimes can settle them down if they're slightly agitated, or just, you know, it's just so it doesn't - you know, you don't just come in, do the job and walk out and not say anything. You know that's a bit rude.

PN14178: If you know that a resident may have a particular - with that particular resident - I will rephrase that. Would that then be included on your job hazard analysis that the resident has in the past been a frequent hitter?---If there was a job in that resident's room, yes, it would, and it's been brought up with the maintenance manager and it's been in consultation with the maintenance manager and the RNs that whenever we go into this resident's room, we're to have a second person, normally a carer, just so we can get in, get the work done and then get out so as not to agitate them any more than needed.

96. The contrast between the simplistic description of the questions as posed by ABL's representatives and the actual explanation of the nuance involved is reflective of the difference between the simplistic descriptions provided in ABL's submissions and the reality of what this work involves.
97. The observations of ABL are identical to those set out for gardening employees and again have no apparent basis in any evidence (as well as being entirely unexplained).
98. The ABL submissions, contain the same defects as are apparent in their submissions regarding gardeners and cleaners. It is the presence of a vulnerable cohort whose acute needs must always be placed at the centre of the activities within the residence that changes the nature of the work.

Chefs/cooks/serverly workers

99. At 16 and 17, the ABL submissions separately deal with chefs/cooks and kitchen hands/serverly employees, for the apparent purpose of submitting that there are only work value reasons justifying an increase for the former rather than the latter.
100. The distinction and related analysis (to the extent the bald assertions it makes can be described as such) highlights the error of the ABL approach as set out above; that is, it in truth relies entirely on the proposition that a significant net addition in work value is required before adjustments will be justified. This is, as set out above, simply wrong. The Commission's task is to set fair minimum rates of pay for the work that is actually being performed. Previous wage fixing regimes set in and for different times and different underlying acts do not modify this (by stealth or otherwise).
101. As the Consensus Statement, and thus every actual stakeholder in the industry, acknowledges, the work of *all* indirect care staff is made more complex and challenging by the work environment and the reality that it *is care work*, in addition to the tasks that a serverly worker (for example) might perform in a different environment. In any event, the HSU does not accept that there has not been a significant net change in the work value of serverly workers. The ABL conclusion to the contrary is, as always, unexplained. As set out in the HSU's submissions, the significant change in the nature of the work, the regulatory environment and the demographics of residents has affected these workers as much as any other.
102. By way of illustration, Carol Austen, a serverly worker, described some of her interactions:⁴¹

I have to watch the residents to see if they are eating or not. If I see that someone is not eating, I will go over to them and help them with their food and notify the Registered Nurse (RN) immediately. Sadly, I do see this deterioration of health in residents all the time. It is important to alert the RN as there may be an underlying

⁴¹ Austen, DHB11635-11638 at [18], [29]-[31].

health condition that is treatable or it may be that a resident will require more support on an ongoing basis.

The washing and cleaning has increased since COVID as we have to be more thorough. We have to make sure that we put all the items away and use different chemicals for cleaning different things. Previously, we used to have the dining room set up ahead of service with the crockery and utensils. Now, we are required to set up each individual's eating area so that germs do not transfer to other residents. I expect this will stay the same post COVID.

I will also complete any paperwork required. This involves monitoring of food temperatures and recording this information. We have to attend to this monitoring as it is a food safety requirement. If the temperature of the food drops at the time of service we are not allowed to serve this food because it can make the residents sick. The paperwork is monitored by our Food Authority Accreditor who makes visits to the facility and conducts audits every 12 months. I will meet with the Accreditor as part of the audit and provide any paperwork that they require.

I need to closely observe the residents. I need to learn their personal habits and personality in order to maximise their experience at Uniting. I need to have emotional intelligence to recognize what is wrong and what will be a reasonable solution.

Often this a matter of calming people down before they become very upset. So, it is important to be able to recognise the subtle changes in a person's disposition and respond to those in anticipation of risk of deterioration in their mood or being triggered into more serious upset. Noticing emotional vulnerabilities and deescalating is an essential skill. The de-escalation is especially difficult as it is often in the circumstance of various stages of dementia or other cognitive impairment.

There is a real risk of violence. This includes violence by residents against other residents and the risk of violence to staff. This is a sad reality of dementia. It makes de-escalation skills all the more important. From time to time this level of serious

agitation does still happen. We try in these circumstances to remove the resident from the person they are attacking. We try to calm them down by talking to them away from the other residents. Once separated the calming is relatively easy, by contrast to the preventative action, as someone at that stage of illness will in-part be calmed by the memory loss once out of the situation.

103. The ABI submissions, in purporting to summarise the summaries of the evidence become homeopathic; with the essence of the evidence no longer remaining in detectable quantities. They contain no mention:
- a. in Section 16 of the Chef/Cook:
 - i. performing HR/managerial duties (as detailed at 4.11 and 4.41(b) of Annexure D to ABI submissions);
 - ii. engaging in auditing (as detailed at 3.20 (b)(viii), 4.09 (h), 4.12 (x) (A) and 4.49 of Annexure D to ABI submissions); and
 - b. in Section 17 of the Food Services Assistants:
 - i. cooking food, as opposed to just preparing it as asserted in the body of the ABI submissions (as detailed at 4.14- 4.16, 4.62 (a), 3.10, 3.20 of Annexure D to ABI submissions and the evidence of Ms Twyford⁴²).
104. Indeed, Section 17 of the submissions disregards the evidence of Ms Twyford, who is now employed as the Dining and Food Services Manager of RFBI, reporting to the COO, and was once employed herself as a Catering Assistant. Ms Twyford recounts in great detail, the work performed by Food Services Assistants and the change in their roles and the needs of residents since the 1990s.⁴³

⁴² Twyford, DHB9167-9171 at [15]–[31].

⁴³ Twyford, DHB9167-9171, 9176 at [15]–[31], [47].

105. Given the import of this evidence which is entirely unaddressed by ABI, its submission that there are not work value reasons justifying a significant increase for these workers cannot be accepted.

Specific Workers – Home Care

106. At 22.5, the ABL submissions recite a high-level summary, of the summary at Annexure G, of the basic tasks performed by home care workers.
107. Whilst the summary provides a starting point for the consideration of the work, which accurately describes the concrete component tasks, it fails to include any description of the clients. It employs passive language in a way that appears designed to abstract from the reality of the ways in which those clients, by their needs, by their frailty, by their behaviours, or by their sheer presence, transform work that might otherwise be regarded as straightforward, into work with a much higher level of complexity, responsibility, and difficulty. In so doing, it fails to undertake the sort of analysis required to properly value the work of home care workers.
108. Even from a cursory examination of the description it is apparent that the description understates the demands of the work and the import of the evidence. For example, at 22.5(a), the summary recites that the workers “generally work alone, attending appointments at a client’s home”. The term “home”, which is capable of bearing a number of positive connotations, should not be permitted to mask the reality of the work environment of home care workers. ABL’s description does not acknowledge:
- a. the fact that home care workers operate across a range of environments during the course of a day, both welcoming and otherwise, and need to adapt to each of those environments as they move from location to location;
 - b. the risks associated with entering into an enclosed environment with the client and others who reside in the property, including family members of the client; and

- c. the difficulty involved in operating in a physical environment which, while assessed for hazards, is not under the employer's direct control.
109. Whilst it is acknowledged that workers work under "indirect supervision", that description fails to recognise what is apparent from even their own summary of the evidence; the very limited role those indirect "supervisors" can, and do, play.
110. For example, the evidence from Ms Goh referenced by ABL (at Annexure G, 2.79) is that she is *usually allocated* a team leader. Nothing about that response would make the Commission think that Ms Goh always has access to the benefits of the support or guidance of a team leader. Ms Sedgman's evidence, to which ABL also refers, was: "who I go to is Wendy and Melissa"⁴⁴, the latter of whom she *thought* was a registered nurse. That evidence suggests that any "supervision" is at Ms Sedgman's initiative, and is sought from a person about whose formal qualification, she is not entirely certain.
111. It is curious that ABL now makes a submission about *supervision* (which describes an action) when its cross-examination of the witnesses typically focused *not* on the taking of any action, but upon the person in the senior role. The home care witnesses were typically asked who their "boss" *was*, not what their boss *did*. A series of witnesses identified that they did work within a structure in which there was a "team leader" or "co-ordinator" or "Melissa", who was above them. The existence of a formal structure, a reporting line, or an allocated senior position says little about the actual supervision provided in the course of the performance of the work, and thus little, if anything, about the level of skill and responsibility required to be exercised by the workers.
112. In some cases, however, the formal structure disclosed by the witnesses was revealing. For example, Ms Jennifer Wood gave evidence that she was one of 50 workers in a team under a single team leader⁴⁵. The Commission would not think there was any prospect that Ms Wood's team leader could provide much in the

⁴⁴ Sedgman XXN, Transcript, 4 May 2022, PN5180-5184.

⁴⁵ Wood XXN, Transcript, 4 May 2022, PN5582-5583.

way of meaningful individual *supervision*; that is oversight, instruction, mentoring, guidance and support, no matter how good their intentions.

113. The ambitious quality of ABL's case on supervision is no more evident than in Annexure G (at 2.93(d)) where it deals Ms Wood's evidence about her Team Leader instructing her to continue to the next appointment (in the Blue Mountains) in circumstances where a bushfire was developing in the area. ABL asks the Commission to disregard Ms Wood's dissatisfaction with that decision, and instead, take from that evidence that there was a protocol providing for the reporting of concerns by employees to their supervisor. Presumably the submission implicit in that observation is that the work of the employee was made easier by the presence of the supervisor and the reporting system: "*we do the thinking for you so you don't have to*".
114. ABL then contends at 22.5(c), that *all of the work activities of home care workers are within the competence of the Certificate III qualification*. It cites, in support of this proposition a series of responses in cross-examination where a range of workers accepted, in respect of *some of their work activities (not all)*, a connection (the degree of which was not identified or explored) with their Certificate III studies. For example, the reference to the evidence of Ms Vincent upon which ABL relies is this exchange:

You would generally be doing services that still fall within your qualifications?

Yes.

You always will be doing something that falls within your qualifications. I don't want to suggest that you're acting outside them. When you do your services, if they may not be expressly listed for that appointment, you would record it, I take it, in progress^[1] notes? We used to up until this year. Now we do not have progress notes. So there is no documentation in our progress notes as from this year. ⁴⁶

⁴⁶ Vincent XXN, Transcript, 4 May 2022, PN5708-5709.

115. That exchange couldn't seriously be advanced in support of a proposition about the extent of the connection between Ms Vincent's work and Certificate III qualifications; if not due to the vague and unclear questions, then due to the fact that Ms Vincent is also the holder of two Certificate IV qualifications.⁴⁷ Equally, whilst Ms Wheatley utilised the skills and competencies obtained in her Certificate III, she also pointed out that her skills had *developed significantly* since she obtained her Certificate III.⁴⁸
116. The first reference ABL cites in support of this absolute proposition illustrates the flimsiness of its foundation. It relies upon the acceptance by Catherine Evans in cross-examination, that in performing the crucial work of assessing her clients that she would be *drawing upon* [her] *skills developed through* [her] *Certificate III*⁴⁹. All workers *draw upon* the basic numeracy, literacy and social skills developed in infants and primary school. It does not follow that the metes and bounds of their work can be adequately captured by referring to the syllabus from that period of formal instruction.
117. Ms Evans' evidence about the exercise of her assessment skills clearly identified how the circumstances in which she exercised those skills involved high stakes, and heavy responsibility. The passage from Ms Evans' statement to which the cross-examiner referred was:

*A crucial part of my work with every client I see is assessing how clients are. For some, we are the only regular contact with another human being they have. We might be the only ones who can assess whether their speech, mobility or mood has changed which may indicate a health or welfare issue.*⁵⁰

118. No challenge was made in cross-examination to the assertion in that paragraph of Ms Evans' evidence about the responsibility that lay upon her to exercise her skills

⁴⁷ Vincent, DHB12961 at [19] – Ms Vincent holds a Certificate IV in Aged Care and a Certificate IV in Leisure and Health.

⁴⁸ Wheatley, DHB13534 at [16].

⁴⁹ Evans XXN, Transcript, 5 May 2022, PN6204.

⁵⁰ Evans, DHB12850-12851 at [39].

with vigilance at every interaction, because the well-being of a vulnerable client depended upon it. That was a responsibility of which she was obviously acutely aware. It is no answer to the claim for a proper valuation of the work to disregard the level of responsibility associated with the work which is clearly identified, and then to minimise the work by distilling it down to its basest physical and intellectual element.

119. ABL contends, at 22.5(e), that

A home care employee will usually have a roster with a regular clientele, with a set number of appointments within a day allocated. These are usually confirmed 1-2 weeks in advance.

120. It calls in aid of this almost bucolic description of the life of a home care worker, the evidence of Ms Payton. Ms Payton's evidence was that she works about 17 hours a week:

- a. 'I used to have lots of different clients all over the place. Gradually, I started to get some regular clients, and now I see six clients regularly'...⁵¹
- b. She currently works on six days of the week with both her six regular clients *and others*;⁵²
- c. Her hours vary including Sunday evening until 8.30pm and Wednesdays from 10.00am until 2.00pm and then from 7.30pm until 10.00pm;⁵³
- d. She can lose shifts at short notice⁵⁴; and
- e. She can also pick up shifts from week to week, although she is understandably reluctant to take on 1 hour shifts when they involve significant travel time, for which she is not paid.⁵⁵

⁵¹ Payton, DHB12936 at [25].

⁵² Payton, DHB12936 at [26].

⁵³ Payton, DHB12936 at [27].

⁵⁴ Payton, DHB12937 at [29].

⁵⁵ Payton, DHB12937 at [30].

121. That is, she has shifts which are intrusive upon the usual hours of family life, precarious, and of short length across a number of days, meaning that the ratio of lost time (that is time spent preparing for and travelling to work) to paid time is higher than in many other industries.
122. Ms Sedgman, upon whose evidence ABL also relies in support of this proposition about regular arrangements, said that she had been able to get a '*fairly regular roster*' but had '*been fairly lucky...*' to get such a roster because she had:
- a. initially been employed on a casual basis for six months;
 - b. been converted to a permanent part-time position of 15 hours per fortnight;
 - c. regularly worked over 60 hours per fortnight whilst in the 15 hour per fortnight position because she was offered and accepted those additional hours (because, as her requests for greater guaranteed hours showed, she wanted more regular hours of work);
 - d. had her request for a guaranteed 40 hour per fortnight position turned down by her manager because her availability was not broad enough (she couldn't do Tuesday afternoons because she had an NDIS client);
 - e. managed, by happenstance to snag a 40 hour per fortnight position from a new manager after 2 others in such roles resigned; and
 - f. having secured the 40 hour per fortnight role, currently works between 60 and 65 hours per fortnight.⁵⁶
123. To describe Ms Sedgman's ultimate triumph in securing some guaranteed hours (albeit less than she wished) as reflective of a generally flexible and settled work pattern is obtuse in the extreme. To describe her work patterns as merely *regular* or *set* also fails to properly grapple with the logistics of the work pattern, as the analysis of her "runs" in the HSU's Final Submissions demonstrates. Ms Sedgman's work required her to operate at a daily tempo that could only be fairly

⁵⁶ Sedgman, DHB12365 at [20] – [26].

described as “frantic”, in the midst of what must be a weekly anxiety about the performance of additional hours of work to those guaranteed by her contract.

124. That pattern, of part-time workers working hours additional to those guaranteed was discussed by Dr Charlesworth in her Supplementary Report at [22]ff. Dr Charlesworth noted the ease with which part-time employees with guaranteed patterns of work may have their hours increased, and the absence of any penalty for working any additional hours, and how they operate as a disincentive to guarantee part-time workers more hours. Additionally, employers commonly require employees to provide their “availability” (as Ms Sedgman illustrated), which, coupled with the minimal guaranteed hours, operates to create a casualised workforce available to work on demand. It is inapt in the face of that structural, incentivised underemployment, for ABL to describe “roster changes” in the language of 22.5(f), that:

Changes to the roster may arise if a client cancels an appointment or if another home care employee becomes unavailable. [REDACTED]

125. Rather, the practice of roster changes by allocating additional shifts of work to part-time workers is a structural feature of the industry.

126. ABL asserts, at 22.5(g) and (h) that:

Prior to clients being assigned to home care employees, the service ‘Coordinator’ (or case manager) will conduct an initial assessment of the client and the client’s home. [REDACTED]

...A risk assessment is also conducted and the care plan will identify potential safety risks within the home and a remediation plan created if required. [REDACTED]

127. Again, ABL prefers the idealised and abstract description to reality. It references, in support of both of the above propositions, the following evidence of Ms Vincent,

in which she was questioned about the statement in her evidence that she is required to work *'in an uncontrolled environment'*⁵⁷:

Could you explain that process to me? Okay - so initially the case manager or someone in that position actually goes in and is supposed to do a risk assessment and also check products like the cleaning services, domestic assistants, make sure that they have the proper cleaning things, vacuums that are working, et cetera.

*So they check the equipment that you would be using if you were attending there, helping with those domestic services there? They're supposed to, yes.*⁵⁸

128. Fairly understood, Ms Vincent's evidence does not support the proposition that an assessment is always made of a client's home, and steps taken to remediate any risks. Rather, Ms Vincent's evidence, with its emphasis upon the gap between the aspiration and the reality, suggests to the contrary. In any event, such initial assessment may only go so far. Structural modifications to homes are dependent upon factors such as the availability of the funding and the practicality of the modification in the particular premises.
129. At 22.5(i), ABL recites that a shift normally commences with a worker looking at their roster. The assertion as to the existence of this practice tends to contradict the claim in 22.5(e) about the advance notice workers have of their shifts, and the settled nature of work patterns. It reveals the reality of roster changes, which are rendered more likely where the employer has employees on part-time arrangements with less hours of work than are commonly required, as was observed by Dr Charlesworth and as was the case with Ms Sedgman.
130. Ms Wood's evidence was that she did not have a *"roster as such, in the sense of a traditional weekly roster received ahead of time."* Rather, she accesses her roster on her phone through an app, and it changes at short notice. For example, she usually sees a client on Tuesday mornings at 9.30a.m., but must check her roster the night

⁵⁷ Vincent, DHB12977 at [90].

⁵⁸ Vincent XXN, Transcript, 4 May 2022, PN5697-5698.

before in case an 8.00am client has been added. She then checks in again first thing in the morning to see if there are any changes.⁵⁹

131. In Ms Wood's case, the pre-shift preparation involves:

- a. Checking that enough time has been left in the roster between appointments;⁶⁰
- b. Reading the care plan for any new clients to ensure she is aware of any information concerning entry to premises or particular client needs;⁶¹
- c. Reading the client notes;⁶²
- d. Researching/planning parking, if the appointment involves providing transport;⁶³
- e. Reading her emails to ensure she is up to date and responding where required.⁶⁴
- f. All of that work is undertaken in Ms Wood's own time; it is not paid time. She usually spends up to 30 minutes doing that work in the morning.⁶⁵

132. At 22.5(k), ABL asserts that:

The care plan sets out the scope of the work to be performed and may identify unique features about the client's home (for example, they own a dog, or to enter the premises via the back entrance).

133. It does not follow that because a care plan describes the type of service to be provided, that its description of the scope of the work adequately captures the demands of the work that is required, or performed. The first example ABL cites in reference to its proposition comes from the evidence of Ms Payton. In discussing the care plan, Ms Payton said this:

⁵⁹ Wood, DHB12385-12386 at [33] – [37].

⁶⁰ Wood, DHB12387 at [42].

⁶¹ Wood, DHB12386 at [38].

⁶² Wood, DHB12386-12387 at [39], [41].

⁶³ Wood, DHB12386-12387 at [40], [41].

⁶⁴ Wood, DHB12387 at [43].

⁶⁵ Wood, DHB12387 at [44]-[45].

There's actually - on the app there's a care - when you first attend a client you receive a care plan, care notes of what needs to be covered in your shift. So once you've read that it pretty much should stay the same each week, of course it doesn't because the work that we do, the situation constantly changes but the basics of what you do are the same.⁶⁶

134. Ms Payton's evidence demonstrated how the care she in fact provided might deviate from the anodyne description of a required service in a care plan, as follows:

- a. She has a client who is very frail and in her eighties with a range of health conditions. On the first occasion when she attended to provide the woman with assistance showering and dressing, the client said she was too "puffed" (she suffers from COPD) to have a shower. Ms Payton divined that this was actually reluctance to be showered by someone she had only just met. Instead, the client requested she sit and talk.⁶⁷ Ms Payton obviously engendered sufficient trust in the client in their initial interaction, as she didn't again complain of being too "puffed" for a shower. Many other workers gave evidence about how the delivery of intimate assistance, such as showering, required them to develop a relationship of trust with the client, including by employing strategies to respect the client's modesty;
- b. Ms Payton described how the task of showering that client involved a range of strategies to accommodate her frailty; first, turning up the heating and attending other tasks whilst the client 'gathered steam', assisting her to undress and take off her incontinence aids, allowing the client time to rest at points along the way during the process, drying her as much as possible in the shower to ensure her safety and then completing the drying whilst she was holding onto her walker. Ms Payton's description was in keeping with that of other witnesses. The performance of what might be described merely as

⁶⁶ Payton XXN, Transcript, 5 May 2022, PN6411.

⁶⁷ Payton, DHB12938 at [37].

“showering” involves the adoption of strategies suited to the particular client (both their physical capacities and any personal limitations), the particular day (their physical and emotional state on the day), in that environment, for which it is essential that the worker have a detailed understanding of the client’s condition and environment, and that the client have trust in the capacity of the worker to ensure the work will be carried out safely⁶⁸;

c. Ms Payton observed that her role involves:

‘part of my job it to look out for a client's emotional and physical wellbeing and a lot of my clients, especially ones who live on their own, suffer from anxiety to various degrees. I have to be very cognisant of that when I'm visiting them, how their mental state is on any particular day and just to tread very carefully with them.’⁶⁹

d. Ms Payton also described an incident when she had to remain behind with a distressed and overwrought recovering alcoholic client who feared she was at risk of drinking. That instance, referred to in the HSU’s Closing Submissions, illustrated the need for her to deal with the needs of clients in an appropriate manner as situations arose, regardless of the limitations of the formal care plan.

135. Equally, ABL references the evidence of Ms Vincent, who was instructed by her manager to do anything requested of her within her work expertise, regardless of whether it was in the care plan.⁷⁰

136. ABL’s contention also relies upon the evidence of Ms Roe, who was at pains to point out that she *supposedly* was to have access to a client’s care plan before visiting them⁷¹, and when no care plan was available had to resort to contacting other workers to find out about the client and their particular needs or habits⁷², and was sometimes required to perform work that was neither on the care plan nor the roster.⁷³

⁶⁸Payton, DHB12938-12939 at [35]-[42].

⁶⁹ Payton, XXN, Transcript, 5 May 2022, PN6423.

⁷⁰ Vincent, XXN, Transcript, 4 May 2022, PN 5707-PN5720.

⁷¹ Roe XXN, Transcript, 11 May 2022, PN11425.

⁷² Roe XXN, Transcript, 11 May 2022, PN11428.

⁷³ Roe XXN, Transcript, 11 May 2022, PN11435.

137. Although ABL contends, at 22.5(l), that providers still using paper records keep a copy of the care plan at the front of the house, this was also addressed by Ms Roe, who said, in cross-examination as follows:

'Is there a physical copy of the care plan in the client's house as well, or you only have access to the one that's emailed? There is supposed to be a physical copy in the house, but quite often it is somewhere where we don't know where it is.

Okay? Yes, and if - you know, we can go in and ask the client where the care plan is. Sometimes they don't know where it is either, you know, because everybody comes in, families put things away' ...⁷⁴

138. Ms Wheatley also referred to the care plans as being kept in the folder that is *supposed to be* where the client lives⁷⁵, suggesting also, that they weren't always available to the worker.

139. At 22.5(l), the ABL description recites that the workers review the care plan prior to starting the appointment. That description flies in the face of Ms Roe's evidence above. It also neglects to acknowledge the import of the evidence of Ms Wood, for example, about reviewing the care plan on her own time (see above), or that of Ms Wheatley, who is required to review the care plan upon arrival at the client's premises⁷⁶, and so is required to develop any strategy for the performance of the work with that client and in that environment, as she goes.

140. At 22.5(m), ABL recites that: *There are four types of appointment: domestic services, personal care, social support and medication prompt.* ABL then goes on to describe the tasks that are comprehended by those descriptions.

141. From the description of a domestic services appointment at 22.5(o), the reader might be forgiven for thinking that the submission was describing the performance of work in empty premises, much the same as overnight office cleaners. In fact, the evidence showed how the performance of that work is rendered more complex by

⁷⁴ Roe XXN, Transcript, 11 May 2022, PN11432-11433.

⁷⁵ Wheatley XXN, Transcript, 10 May 2022, PN10420.

⁷⁶ Wheatley XXN, Transcript, 10 May 2022, PN10421-10422.

the client receiving the service, whose personal needs are placed at the centre of the performance of the service, unlike when similar work is performed, for example, in offices or in the hospitality industry. Home care workers do not move between a range of empty premises during the course of their working day. They deal with residences, and they deal with the people who live in those residences.

142. ABL refers to the evidence of Ms Heenan, a former enrolled nurse, who has spent the majority of her 40-year career working in home care, in support of its description of this work. Ms Heenan's evidence demonstrated the toll taken by domestic services. She had had to limit the more strenuous activities she undertook since her hip replacement, and could only do about four hours a day of vacuuming and mopping type work without getting a sore back, and had to limit that work to 10 hours in a week.⁷⁷
143. Ms Heenan's evidence also demonstrated why ABL's description of "washing dishes, helping to cook" fails to appreciate the value of the work. Ms Heenan described how she engaged one of her clients in the task of meal preparation, teaching him how to make his own porridge, getting him to assist her with the dishes, and thereby empowered him to do those things independently and take pride in his home and in his abilities. Ms Heenan described how prior to her engagement the client was depressed as a consequence of the isolation brought about by COVID, and *'wouldn't even get in the shower and was in quite a bad way in terms of cleanliness. However, over time he has improved with a lot of patience and encouragement.'*⁷⁸ What is otherwise simple physical work, is rendered complex by her taking on the responsibility of providing that care to the individual in a way that is focused on their needs. In that instance, the manner of providing the care met the immediate needs for cleaning and meals, but also empowered him to provide those things for himself on an ongoing basis. The care was also provided

⁷⁷ Heenan, DHB12883 at [62].

⁷⁸ Heenan, DHB12884-12885 at [70] – [77].

in a way that was adapted to his social and emotional needs for engagement and for a sense of personal pride and autonomy.

144. Although ABL references the evidence of Ms Wagner in support of its description of domestic assistance shifts, its bare description of that work sits uneasily with these parts of her evidence:

*Domestic shifts are incredibly hard as I am required to go from house to house, completing these required duties in the allotted time as quickly as I can.*⁷⁹

*Working in domestic shifts can be incredible (sic) taxing because it involves bending, moving, repetitious movements like vacuum cleaning, wiping such as cleaning shower glass, bases and bathtubs, and being engaged in physical work for an extended period....working at this pace is exhausting and puts pressure on my injury.*⁸⁰

145. Nothing in ABL's description acknowledges the conditions under which work is performed when work is performed in the homes of persons with significant physical and or cognitive deficits. For example, Ms Inglis described attending the homes of clients with dementia where:

- a. the client had left the gas on in the home⁸¹; and
- b. the client had tried to find the toilet during the night but been unable to; with Ms Inglis arriving to find faeces up walls, around his beard, in his mouth and on the bedsheets.⁸²

146. ABL's description of personal care appointments at 22.5(p) also fails to import any description of the conditions under which work is performed or the skills and responsibilities required to be exercised in performing the work.

⁷⁹ Wagner, DHB12728 at [21].

⁸⁰ Wagner, DHB12729 at [23].

⁸¹ Inglis, DHB13528 at [25].

⁸² Inglis, DHB13528 at [26].

147. The level of skill and responsibility required in the performance of personal care work derives largely from the frailty and needs of the clients. That increasing frailty has been described at length in the HSU's Final Submissions. As set out above in the description of Ms Payton's work, the task of showering can require the employment of a range of strategies to deal with the physical and social/emotional needs of the client. The description "check-in" or "welfare stop" doesn't adequately convey the stakes involved in interactions with clients whose principal contact may be with the home care worker, and whose observation of a change in the client's physical presentation or cognitive state may be essential to ensuring that they receive appropriate and timely medical care.
148. ABL describes social support appointments, at 22.5(q) as driving the client to an appointment, shop or activity, as if home care workers are little more than Uber drivers. The only similarity between the two is that home care workers are also required to provide the vehicle and carry the maintenance costs. Ms Heenan described in her evidence the importance for one of her clients of having social connections because of his isolation and loneliness. A measure of her commitment to his well-being was that she herself felt affronted and defensive when others in their community snubbed the client, and how she endeavoured in her visits to lift his spirits by playing his favourite music and singing along with him.⁸³ In effect, Ms Heenan takes on the responsibility of ensuring the client's social engagement and well-being, and engages personally, in a way appropriate to meet the client's needs.
149. The HSU described in its Final Submissions, the social support provided by Julie Kupke for one of her clients who suffers with dementia. Ms Kupke takes the client to buy a lottery ticket, but that process involves long periods of sitting in the car when they commence, or arrive at a destination, whilst the client listens to the radio, as the client is fixated on the music. Ms Kupke in that work has to exercise a biblical level of patience, and/or considerable skills to divert and refocus the

⁸³ Heenan, DHB12887 at [88] – [90].

client back on the task. Social support involves a great deal more than simply driving the client from A to B.

150. Whilst ABL acknowledges at 22.5(t) that home care workers are required to observe the client and their surroundings, and to escalate such observations where something is out of the ordinary, that description of the work fails to acknowledge the complexity of the judgment that may be required. As Ms Payton explained in her evidence, she had an 84-year-old client with significant bruising, which was explained by a fall she had the previous week, and the client was being seen by a doctor, and lived with her husband. Ms Payton did not escalate that to her employer, but would have done if the woman had lived alone.⁸⁴ It is not simply the case that anything “out of the ordinary” is to be notified to a superior, rather, in practice, home care workers must exercise skills of observation *and* assessment, to determine the circumstances in which further assistance is required.
151. ABL describes at 22.5(u) and (v) two very obvious instances where a home care worker is required to escalate; where a client has a fall and where the client has a skin tear or bruising. Those matters involve a very straightforward observation and report. Even then, it is apparent from Ms Roe’s evidence that the worker may need to make an assessment based on the nature of the event, and an assessment of any wound, whether to first call for an ambulance.⁸⁵ However, the matters that may need to be escalated are not limited to those examples. Home care workers are required to pay close attention to their clients, so that they can identify changes which might signify consequences for their health. That requires:
- a. knowledge of the factors that impact on the health of older persons, and the signs of ill-health;
 - b. ongoing observation of the client to equip the worker to detect relevant changes;

⁸⁴ Payton XXN, Transcript, 5 May 2022, PN6412-6413.

⁸⁵ Roe XXN, Transcript, 11 May 2022, PN11407 – 11412.

- c. sufficient judgment to understand whether any signs of changes are explicable by any underlying morbidity or general decline, or are signs of something more serious.
152. In Ms Inglis' case, she was able to detect that something was not right with a client because she "*did not look right*", had a bit of a rash, and the T-section of her face looked dry and scaly and unlike her. Because the client was fitted with a catheter she was vulnerable to urinary tract infections.⁸⁶
153. At 22.5(y), ABL observes that home care providers often employ systems or protocols for clients to adopt when they feel unsafe. As observed in the HSU'S Final Submissions, such protocols are necessary because home care workers work, in most cases alone, and are required to deal with persons, and in locations, where they could come to harm. Even if the incidence of such harm or threat is rare, any assessment of the conditions under which home care workers work must acknowledge the vulnerability of that position, which adds to the burden of the work.
154. At 22.5(z), ABL refers to what is describes as "quasi-clinical" activities. It is not clear where the "quasi" in that phrase springs from. In any event, the performance of any of those procedures, blood pressure check, blood glucose check or catheter bag change involves the performance of a procedure at close quarters with a client, in which the procedure must be carried out correctly to ensure that pain and discomfort are minimized and the result is accurate and/or satisfactory.
155. Additionally, it is important to observe that the performance of any of these procedures requires considerable "bedside manner", that is, the ability to reassure the client and to instill confidence in the client that the procedure will be carried out properly. The need for home care workers to perform this work can only increase with the increasing frailty of clients receiving home care, and the increasing centrality of home care amongst the care options for aged persons.

⁸⁶ Inglis, DHB13528 at [24].

156. ABL's summary of the "quasi clinical" work neglected to mention the tasks identified in its own evidence. Ms Cudmore annexed to her statement at SC-04 a position description for a Health Support Worker which described the position as follows:

Tasks allocated will be principally related to nursing duties.

157. That position description referred to care being provided pursuant to a Home Care Package⁸⁷:

- a. clients suffering stroke, Parkinson's disease, Cerebral Palsy and Multiple Sclerosis;
- b. the provision of total bed baths where required;
- c. providing assistance with toileting and continence aids;
- d. cleaning catheter insertion sites;
- e. bowel management,
- f. application of creams and non-complex dressings;
- g. providing oral hygiene care; and
- h. assisting with fitting aids and prostheses.

158. At 22.7, ABL identifies 9 'findings' about the work performed by a Coordinator. The sole evidence before the Commission was that of Peter Doherty, who was the only Coordinator witness.

159. Based on Mr Doherty's evidence, which on the whole, went unchallenged, there are other 'findings' which are supported by the evidence, namely:

- a. That what clients need and what they get in terms of package levels are often two different things;⁸⁸

⁸⁷ Cudmore XXN, Transcript, 12 May 2022, PN 13737 – 13739; SC-03 described a position providing assistance under the CHSP scheme.

⁸⁸ Doherty XXN, Transcript, 5 May 2022, PN6063.

- b. A co-ordinator may be required to field 30 to 40 calls a day;⁸⁹
 - c. Contrary to what is suggested at 22.7(d) the task of rostering may be an almost entirely manual process, which is made ever more challenging by the shortage of care workers, the inability to attract new workers into the sector, the effects of COVID, the cost of petrol which has meant that some care workers haven't been able to afford to fill their tanks in order to come into work, and ever more clients seeking care;⁹⁰
 - d. In addition to the "direction" and guidance that coordinators provide to care workers (see ABL at 22.7(g)), they also provide encouragement and emotional support in what can be stressful and challenging situations.⁹¹
160. At 22.8, ABL identified 6 'findings' about the work performed by a Team Leader. The sole evidence before the Commission was that of Lorri Seifert, who was not cross-examined. Ms Seifert's unchallenged evidence was that:
- a. Her role was much more demanding than her previous team leader role in a disability group home;⁹²
 - b. She was required to "supervise" 60 care workers.⁹³ The Commission will recall Ms Wood's evidence that her supervisor had some 50 workers in her team;
 - c. She had to field phone call enquiries from carers throughout the day about issues ranging from a carer having been held up in roadworks or with a flat tyre, to counselling carers who have received abuse from clients, injuries, accidents, technical issues, rostering issues, availability issues, and carers who are stressed and need help or just a debrief; ⁹⁴
 - d. She had to manage staff personal development;⁹⁵

⁸⁹ Doherty, Transcript, 5 May 2022, PN6293-PN6299.

⁹⁰ Doherty, Transcript, 5 May 2022, PN6270-6276; PN6346-3648.

⁹¹ Doherty, Transcript, 5 May 2022, PN6319-6322.

⁹² Seifert, DHB12501, 12518-12519 at [11], [152] – [158].

⁹³ Seifert, DHB12505 at [43].

⁹⁴ Seifert, DHB12508, 12509-12510 at [70], [80] – [86].

⁹⁵ Seifert, DHB12512-12513 at [103] – [105].

- e. She had to manage staff performance and disciplinary matters;⁹⁶
 - f. She was responsible for ensuring care workers are trained in safe working practices;⁹⁷
 - g. She was responsible for recruitment, which was particularly difficult in the face of a growing client base and a decreasing team. She originally had 28 carers on her team, but that team is now down to 17, because they have not been able to replace carers who have left; she has experienced people refusing the job on the spot because the pay is too low;⁹⁸
 - h. Her employer is also short on team leaders which has meant Ms Seifert has had to take on extra teams of carers (where she once looked after a team of 28, she now looks after 60 carers).
161. At 22.9, ABL observe that the work of a home care employee and a personal care worker in a residential setting is similar. As set out in HSU's Closing Submissions dated 22 July 2022, this is not just because of the similar qualifications and care provided. There are a number of common features of the work across the aged care system including the core nature of the skills, the changing demographics of each cohort and the changing demands of the models of care which are the same in each area.
162. ABL's description of the 'subtleties' between personal care workers in residential care and those in-home care misses:
- a. The uncontrolled and changing nature of the work environment of home care workers; and
 - b. The way in which the time limits associated with home care work imposes a greater level of difficulty in organizing and performing the work in the available time.

⁹⁶ Seifert, DHB12513-12514 at [106] – [114].

⁹⁷ Seifert, DHB12514 at [115] – [120].

⁹⁸ Seifert, DHB12514- 12516 at [121], [127] – [130].

163. ABL's comment, at 22.9(c), that the work can 'focus' on domestic residential duties would not be accepted by the Commission. The evidence does not show that the bulk of the work is "merely domestic". In any event, as set out above, the characterisation of work as domestic should not conceal the value of that work when performed in the home care setting, involving as it does, responsibilities to perform that work in a manner that ensures the well-being of the clients. The Commission would reject this attempt to minimise the work of home care employees. Home care workers are required to deal with diverse situations with individuals whose needs may change on a daily basis, who are required to exercise a high degree of discretion, judgement and advanced interpersonal, communication and empathetic skills.

Conclusions as to ABL submissions about the lay evidence

164. The ABL submissions, rather remarkably, do not engage at all with the propositions advanced by the HSU as to the work value factors which it is submitted justify the change. The approach taken – a mechanical and overly simplistic summary of basic tasks presented largely out of context, coupled with assertions without explanation as to what conclusions should ultimately be drawn – is entirely unsatisfactory, and is of no real assistance to the Commission. The approach ignores the extensive evidence as to the nature of the skills and responsibilities involved in undertaking those tasks, the context and environment in which the work is performed, the extent to which the nature of those tasks have been affected by changes to the resident/consumer population and the regulatory, governance and accountability arrangements which impact upon the workers performance of work and the responsibilities of the workers.

Expert evidence 'summary'

165. Six experts gave evidence in the proceeding. The expert witnesses spoke with one voice – for a range of reasons including gender-based undervaluation of care work generally, that the current modern award rates do not represent fair remuneration

for the work performed. Although each expert was cross-examined, the only substantive challenge to their findings appears to be:

- a. the proposition that the analysis was based on *actual* rates of pay, not award minima; and
- b. an apparent challenge to the concept of gender-based undervaluation of work (at least absent a comparator).

166. As to the first, this is, as set out above, misconceived. The reality of this sector, as in most funded sectors, is that the award rates are in fact what people are paid (or very close to). There is no real scope for the kind of market variance and bargaining-based profit/productivity sharing which might otherwise inform the setting of a lower-scale minimum. As Professor Charlesworth explained, reliance on government funding represents *'a built-in restraint in that it was something that was seen as an indication of gendered undervaluation'* and *'government underfunding itself is based on a lack of recognition of this work as fully work and as work of value.'*⁹⁹

167. Additionally, this part of the ABL submission misses the point. The task for the Commission is to set *'fair and relevant'* conditions of employment and rates of pay in modern awards. If a minimum rate does not, as the expert consensus says, reflect proper remuneration for the nature of the work performed on the basis that it is too low, this standard has not been met. As has been explained and appears to be accepted, the task of the Commission is to assess whether there are work value reasons which justify a variation to minimum rates and to value the work performed.

168. In respect of the second argument above, this is a remarkable proposition. It has been explored for the first time in detail at Parts 3 and 4 of Annexure J of the ABL submissions, in what appears to be an attempt at competing expert opinion evidence. The difficulty is that this is not coming from an expert witness or based on any expert opinion given in the proceedings. The *'employer interests'* did not

⁹⁹ Charlesworth XXN, Transcript 2 May 2022, PN2514.

lead any expert evidence of their own justifying these positions. The cross-examination does not bear any of it out. It is non-expert opinion from, at best, a lawyer, which has not been put to the actual experts in the field for response.

169. The confusing, and confused, nature of this diatribe is epitomized at 3.18 of Annexure J, in which the ABL submissions:

- a. describe the C10 scheme, developed in the male-dominated metal trades industry in the late 1980s and which it is accepted does not translate easily into non-industrial settings¹⁰⁰, as being inherently '*gender neutral*', and
- b. suggests that the expert evidence leads to the '*troubling*' conclusion that '*all women's work is of greater value than all men's work*' within the modern award system.

170. This appears to rest on a misunderstanding of how the phrase '*women's work*' is used in the expert evidence. The experts are not saying that the work *is inherently women's work* – the idea that any such thing exists is an inherently sexist proposition. As ABL notes at 4.13, men also in fact do this work. The point is that the work has been *perceived* as '*women's work*' and unfairly attributed less value by society, employers and government (in respect of funding), leading to an inequity.

171. This is so *regardless* of what anyone else is paid: it is not a comparator-based exercise. For example, Professor Charlesworth explained in her oral evidence:¹⁰¹

PN2515 *Bear with me when I try and describe this - I'm just trying to get my head around - is it undervalued by comparison to something?---The concept of gendered undervaluation is precisely there because it's not asking for a male comparator. It's not saying, 'relative to other jobs'. It's looking at the actual skills that are required and involved and on the basis and the knowledge, the judgment, the discretion and on the basis of that saying it's undervalued.*

¹⁰⁰ ABL submissions at 4.13.

¹⁰¹ Charlesworth XXN, Transcript 2 May 2022, PN2515-2516.

PN2516 So it's intrinsically undervalued rather than comparatively undervalued?---It is, although back in the mid-1990s I did an interesting comparison between the work of home care workers employed by local government and gardening assistants and surprise surprise, the gardening assistants were paid more than the home care workers. They were tending plants. The home care workers were tending frail older people. The gardening workers got paid wet weather allowances, dirt allowances. Home care workers deal with bodily fluids. They're not paid dirt allowances or back in those days when there were such things as dirt allowances and things like that. So that was some work I undertook for the then pay equity unit within the then federal department of industrial relations. So that was a comparison which highlighted that undervaluation. But in Australia and particularly since the pay equity inquiries in both New South Wales and Queensland, late 90s, early 2000s, there is now I think a much better understanding of gendered undervaluation as something of itself where you don't require this male comparator to establish its fact.

172. Professor Charlesworth explained that the nature of the work, the intensive work that is dependent on a relationship between a worker, a resident or a client, is distinctive and it is difficult, if not impossible, to undertake comparisons with comparable male-dominated industries.¹⁰² The task is to examine the skills and responsibilities actually involved in the work and to ensure that the valuation of the work properly encompasses consideration of all aspects of the work, including skills which have been historically overlooked or undervalued.
173. The opinions that caring work is undervalued are not mere assertion. The expert evidence explained, in a manner that does not appear to be subject of any dispute, why work such as care work undertaken with respect to elderly persons in residential care or as part of the provision of home care services has been undervalued. Paid care work has been historically associated with unpaid caring

¹⁰² Charlesworth XXN, Transcript 2 May 2022, PN2519-2521; Meagher XXN, Transcript 2 May 2022, PN2637.

work traditionally performed by women in the home and community. This association has long resulted in the perception that such work is natural and therefore unskilled. The expert evidence indicates that, as a consequence, aged care work has been significantly undervalued in government funding, in employment protections and in societal, industrial and organisational recognition of the increasingly complex skills required.¹⁰³

174. ABL also suggests, in Annexure J at 4.13, that analysis which focuses on the type of skills which have historically been overlooked or undervalued in care work has nothing to do with gender and does not address the fact that some men work in the aged care industry. As has been explained by the expert witnesses, the complex skills involved in care work, particularly relational, empathic and communication skills, have been undervalued and are perceived to be '*women's work*' because the workforce is overwhelmingly female and because the work is associated with unpaid labour commonly performed by women. It should not need to be pointed out that those skills are undervalued on gender grounds even though some individuals undertaking care work are men. Equally, the fact that, in theory, skills may be undervalued for reasons other than gender¹⁰⁴ does not engage with the evidence explaining that the skills involved in care work have historically been undervalued for gender reasons.
175. ABL's submissions involve significant errors in approach. Combined with the fact that none of this sociological commentary is coming from anyone with expertise in the area, they should be disregarded.

ABL's submissions as to the modern awards objective

176. The bulk of the assertions made within the ABL submissions with respect to the modern awards objective have been comprehensively addressed in the HSU's

¹⁰³ Charlesworth DHB4466 at [43]; Meagher DHB4628 p28.

¹⁰⁴ ABL submissions, Annexure J at 4.14-4.16.

Final Submissions and it is, accordingly, not proposed to reiterate these matters. Again, much of what has been advanced by the HSU has simply been ignored.

177. The ABL submissions appear to suggest, at 23.1-23.3, that the Commission's consideration of the modern awards objective for the purposes of section 157(2)(b) of the Act is limited to a temporal consideration of when any variation determined to be justified by work value reasons should commence, that is, on 1 July or some other time. That is not consistent with the statutory scheme. The combined effect of sections 138 and 157(2)(b) is that the Commission must be satisfied that the variation of the terms dealing with rates of pay are necessary to meet the modern awards objective.¹⁰⁵
178. Having said that, the most significant consideration for the Commission in assessing whether a variation to the rates of pay in the Aged Care Award and for home care workers under the SCHADS Award are necessary to achieve the modern awards objective is that the current rates are too low and do not reflect the value of the work performed by relevant employees. For that reason, the current minimum rates of pay do not provide a fair and relevant minimum safety net of terms and conditions, nor a safety net of fair minimum wages, and the variations sought are necessary to address that situation.
179. It is, of course, necessary for the Commission to also take into account the considerations listed in section 134(1)(a)-(h). The ABL submissions comment on only a limited number of the factors, and again the HSU has dealt with the matter in detail in its Final Submissions. However, some further observations ought to be made.

Relative living standards and the needs of the low paid

180. The ABL submissions, at 23.9-23.10, endeavour to dismiss the significance of the requirement in section 134(1)(a) for the Commission to take into account the needs

¹⁰⁵ Background Document No 1 at [86]; *Re Independent Education Union of Australia* [2021] FWCFB 2051 at [217].

of the low paid by suggesting that it is axiomatic that any employee who is considered award reliant or low paid will benefit from an increase in pay. To the contrary, the fact that a substantial portion of employees covered by a modern award, or in this case all relevant employees, fall within the category considered to be 'low paid' and that an increase in rates of pay will assist those employees in meeting their needs is a consideration which weighs in favour of increasing rates of pay.¹⁰⁶

181. Furthermore, the ABL submissions ignore the striking and uncontradicted evidence referred to in the HSU's Final Submissions relating to the financial stress experienced by aged care workers and the difficulty they experience in meeting their own day-to-day needs and the needs of their families.¹⁰⁷ The ABL submissions, within Annexures A-G, go further to state that the evidence as to the financial pressures experienced by aged care workers and home care workers should be accorded 'little (if any) weight'.¹⁰⁸ That evidence reflects the direct personal experiences and observations of aged care workers upon which they were not challenged. It must be accepted and accorded weight, particularly in relation to the factor referred to in s 134(1)(a) of the Act.
182. The submissions also ignore the fact that ACSA and LASA themselves were both parties to the Australian Aged Care Collaboration which has conducted analysis demonstrating the financial stress being experienced by aged care workers entitled "*Priced out: Aged care wages and living costs*". The conclusions of the report included:¹⁰⁹

¹⁰⁶ See approach in *Re General Retail Industry Award 2010* (2020) 298 IR 112 at [62] and [64].

¹⁰⁷ See, for example, Austen, DHB11640-11641 at [39]; Glass, DHB11622 at [92]; O'Donnell, DHB11655 at [107]-[112]; Roberts, DHB11590 at [162]-[166]; Purdon, DHB12722 at [87]-[92]; Wagner, DHB12756 at [160]-[161]; Kupke, DHB12924 at [127]-[128]; Evans, DHB 1286-12863 at [104]-105].

¹⁰⁸ See, for example, ABL submissions Annexure A at [2.10(a)], [2.112(a)], [2.165(a)] and [2.182(a)]; Annexure B at [2.12(b)]; Annexure C at [2.7(c)], [2.42(d)] and [2.65(g)]; Annexure D at [4.8(b)], Annexure G at [2.14(c)], [2.32(b)], [2.94(d)], [2.63(b)], [2.77(f)], [2.93(a)], [2.107(c)], [2.122(b)], [2.158(b)] and [2.274(a)].

¹⁰⁹ Australian Aged Care Collaboration, *Priced out: Aged care wages and living costs*, DHB16469'16470.

Our calculations suggest that aged care workers in single households are likely to be in serious financial stress with little or no savings buffer, while aged care workers in coupled households are likely to be financially dependent on a partner's income. The results also reinforce concerns that aged care workers, like other frontline workers, are being priced out of housing. Based on the internationally accepted benchmark that rent needs to be no more than 30 percent of a household budget to be affordable, each of the households we modelled is likely to be under stress, most severely in the case of single-parent households. This helps explain why some aged care providers are being forced to offer housing options to attract staff.

183. Although there are obviously other factors to be balanced, it should be uncontroversial that consideration of the needs of the low paid favours varying the rates of pay in the Aged Care Award and for home care workers covered by the SCHADS Award.

The need to encourage collective bargaining

184. At 23.11-23.15, in respect of section 134(1)(b), the ABL submissions suggest that any increase *at all* will lead to the absolute cessation of enterprise bargaining in the entirety of the aged care sector, due to funding constraints. The reasoning appears to be that, under the current Government funding model which does not link funding directly to wage levels, employers will have limited capacity to bargain for rates of pay above minimum rates.
185. There is no evidence to support this apocalyptic proposition and the reasoning is unsound. The evidence makes clear that there is currently very limited capacity for employers, employees and unions to bargain for rates of pay more than marginally above minimum award rates as a result of limitations on funding.¹¹⁰ That does not appear thus far to have prevented bargaining occurring or enterprise agreements being made. The evidence given by union officials is that increasing minimum

¹¹⁰ See, for example, Friend Statement, DHB9073 at [16]-[21]; Friend Supplementary Statement, DHB9106 at [41]-[42].

rates of pay in the modern awards is likely to reduce the concentration on pay as an issue in bargaining and, in fact, encourage bargaining in relation to other conditions or work practices.¹¹¹ In addition, it is entirely speculative; as the ABL submissions acknowledge, at 23.15, as it entirely depends on the Commonwealth's position on funding.

186. The reality is that this is not a sector in which collective bargaining is a realistic proposition for the bulk of the industry as a vehicle for significantly improving rates of pay.¹¹² Where it does occur it does not generate significant improvements in wage outcomes. It would be absurd to refuse to accede to a request for higher wages supported by every actual industry stakeholder on the basis that it would inhibit bargaining in relation to rates of pay. The funded nature of the sector already constrains bargaining in relation to rates of pay.

Social inclusion through increases workforce participation

187. The ABL submissions, at 23.16, appear to suggest that workforce participation will be assisted by maintenance of an 'entry level classification' in the Aged Care Award and the SCHADS Award. The submissions note that the evidence indicates that a majority of employees hold, and are required by their employer to hold, qualifications at least at the level of Certificate III in Individual Support. It appears to be suggested that this is undesirable at least as a requirement for gaining employment.
188. The submission is misconceived. The evidence suggested that many, if not most, employers have adopted the practice of requiring qualifications as a requirement for employment in care roles.¹¹³ That is a recognition by employers of the skills and responsibilities required of care workers rather than a consequence of award provision. The applications do not seek to alter the capacity for a person to perform work as a Personal Care Worker at Aged Care Worker Level 2 and Level 3 under

¹¹¹ Friend Statement, DHB9073 at [18].

¹¹² See, for example, Charlesworth Report, DHB4465-4466 at [33]-[42].

¹¹³ Hutchins Statement, DBH8780 at [41]-[42] and LH-6.

the Aged Care Award without qualifications or as a Home Care Employee Level 1 in the SCHADS Award without qualification or industry experience.

Impact on business

189. At 23.20-22.31, in addressing section 134(1)(f), the ABL submissions again urge the Commission to keep the rates where they are on the basis of, fundamentally, affordability. As well as being entirely contingent on the Commonwealth's position on funding, this ignores the fact that the principal task for the Commission is to set fair and minimum rates for the work. The ABL submissions continue to ignore the question posed in the HSU's earlier reply: how could the Commission, once persuaded that the work required particular rates, nevertheless set lower rates on the basis of affordability?
190. The Commission has previously rejected the proposition that, in the context of government funded social services, determinative weight should be given to the impact of a proposed variation on employment costs or the fact that existing funding arrangements may present difficulties in meeting additional employment costs. In *Re 4 yearly review of modern awards – SCHADS Award* [2019] FWCFB 6067, the Full Bench noted that such an approach would elevate one factor in s 134(1) above all others and would essentially make the workforce captive to the dictates of government funding arrangements. The Full Bench observed (at [137]-[142]):¹¹⁴

In the context of the provision of social services where employers are largely dependent on government funding, or, in the case of the NDIS, a fixed price, we are cognisant of the fact that significant unfunded employment cost increases may result in a reduction in services to vulnerable members of the community - a point made by the NDS. But such outcomes are a consequence of current funding arrangements, which are a matter for Government. ...

¹¹⁴ Reaffirmed in *Re 4 yearly review of modern awards – SCHADS Award* [2021] FWCFB 2383 at [223]-[228].

The Commission's statutory function is to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net. It is not the Commission's function to make any determination as to the adequacy (or otherwise) of the funding models operating in the sectors covered by the SCHADS Award. The level of funding provided and any consequent impact on service delivery is a product of the political process; not the arbitral task upon which we are engaged.

We recognise that it may take time for a funding arrangement to adapt to a change in circumstances, such as an increase in employment costs occasioned by a variation to the award safety net. Such matters can be addressed by appropriate transitional arrangements.

We would also observe that the approach advocated by Ai Group would result in employees covered by the SCHADS Award effectively subsidising the level of services delivered by the NDIS (and other government funded social services) through lower minimum terms and conditions of employment than warranted by a merits based assessment of the claims before us taking account of all of the relevant s 134 considerations. Such a "subsidy" would operate in circumstances where a significant number of these employees are low paid.

...

The Commission's statutory function should be applied consistently to all modern award employees, while recognising that the particular circumstances that pertain to particular awards may warrant different outcomes. The fact that a sector receives government funding is not a sound basis for differential treatment. Further, given the gendered nature of employment in many government funded sectors such differential treatment may have significant adverse gender pay equity consequences.

191. The employer representatives also recognised at the commencement of the proceedings that no incapacity was being advanced relevant to setting of rates. It was accepted that, at most, questions of affordability might be relevant to operative

date and phasing, but are not a relevant consideration in relation to the actual setting of rates of pay.¹¹⁵

Simple, easy to understand, stable and sustainable modern award system

192. At 23.22(a)-(c), in respect of the factors in section 134(1)(g), the ABL submissions appear to (albeit obliquely) suggest that the modern award system will somehow become complex, difficult to understand, unstable and/or unsustainable if rates for indirect care workers in the aged care industry are set at a higher rate than those that apply for workers who perform work in a generally similar category or with a similar job title *outside* the industry.
193. The suggestion that the awards are difficult to understand because specific classifications exist for food services, cleaning, administrative, maintenance or gardening work undertaken in the context of residential aged care is intuitively unsound and unsupported by any evidence. There is no suggestion in the evidence of employers or workers being confused or administrative difficulties being encountered as a result of workers, for example, performing similar work in different settings. The submission is without substance.
194. The submission also requires the Consensus Statement to once again be ignored: every actual stakeholder in the industry agrees that this work is necessarily more complicated and requires more complex skills than if it was being performed outside the aged care industry. This is borne out in the evidence, and in particular that which goes to the effect of changing consumer demographics and increased regulatory requirements on indirect care workers.

Sustainability, performance and competitiveness of the national economy

195. At 23.23-23.26, in addressing the factor in section 134(1)(h), the ABL submissions appear to contend that the increases sought (or indeed any industry) will '*crippl[e] the sector*' and force providers to close or render providers unable to employ the staff necessary to provide necessary services to aged persons. The 'employer

¹¹⁵ Ward, Transcript 26 April 2022 PN464.

interests' rely on little evidence in support of the submission. Absent any reliable evidence supporting the submission, it must be rejected. It can be contrasted with the *Supported Employment Services*¹¹⁶ decision, upon which heavy reliance is placed. For one thing, the affected interests in that case actually led evidence in support of the proposition. For another, it concerned a completely different, and highly specific, sector.

196. The fundamental error in the ABL submissions is that it distills to a proposition that the rates can only be set at a level the Commonwealth is willing to fund. This makes the Commission's decision subservient to the Government's – in other words, requires a complete abdication from the *actual* role of the independent regulator in this respect. It cannot possibly be correct. As has been mentioned, the 'employer interests' do not suggest that considerations of affordability or constraints imposed by government funding are relevant in setting minimum rates and, at most, may be relevant to questions of operative date or transitional arrangements.

ABL's submissions as to the minimum wage objective

197. The ABL submissions raise limited further considerations as relevant to the minimum wages objective. In relation to the factors referred to in section 284(1)(a), namely, the performance and competitiveness of the national economy, the submissions refer, at 24.2, to the nature of the aged care and home care industries as heavily reliant on government funding. It is again suggested that existing difficulties with the funding arrangements are forcing providers to operate at a deficit or endangering the viability of businesses. This consideration has been adequately addressed above.

Where's WACCI?

198. At the outset of the proceedings, the West Australian Chamber of Commerce and Industry filed lengthy submissions criticizing every aspect of the HSU's

¹¹⁶ 4 *yearly review of modern awards – Supported Employment Services Award 2010* [2019] FWCFB 8179.

applications, which the union was then required to respond to. WACCI have not been seen or heard from since. Like Australian Business Industrial, WACCI has no direct or indirect interest in the industry. Although it is at least more efficient, it is an equally unmeritorious intervention. The submissions should be entirely disregarded.

MARK GIBIAN SC | H B Higgins Chambers

LISA DOUST | 6 St James Hall Chambers

LUCY SAUNDERS | Greenway Chambers

Dated: 19 August 2022

HSU'S ANSWERS TO QUESTIONS – BACKGROUND PAPER 5

Question 1

Where does the HSU derive the proposition of the 'social utility of the work' from? In particular, which part of the legislative framework supports the proposed construction? How should the 'social utility of the work' be measured?

199. In its Final Submissions, the HSU contended that a proper consideration of “the nature of the work”, that is, the work value consideration in s.157(2A)(a) of the FW Act, included consideration of the “social context of the work”, by which it meant that the social utility of the work may be relevant to the assessment of work value.
200. The HSU then went on to refer to a series of cases, including *Re Crown Employees (Scientific Officers, etc – Departments of Agriculture, Mines etc) Award* [1981] AR (NSW) 1091, *Crown Librarians, Library Officers and Archivists Award Proceedings* (2002) 111 IR 48, and *Crown Employees (Teachers – Department of Education) Award* [1970] 70 AR (NSW) 345, in which the maintenance of focus upon the social utility or value of the work performed operated as a corrective to a tendency to undervalue the work because it was performed out of public view, or because the profession was perceived in a particular fashion.
201. The HSU’s submission about the social utility of the work in this proceeding is directed to achieve the same end; to ensure that the value of this work which is performed largely out of the public view in residential aged care facilities and homes, which has long been perceived as women’s work and thus “natural” and not skilled, is not overlooked, or undervalued.
202. A focus upon the social context of the work ensures that all the reasons justifying the increase sought which relate to the factors in s.157(2A) are properly identified and evaluated; that the factors relating to the real nature of the work, the full range of skills and the level of responsibility required to be undertaken, and the

conditions in which the work is performed, are not overlooked. That focus directs attention, not just to the component physical tasks involved in the work (as the ABI Submission appears to invite), but to the cohort of older persons themselves and to the physical, mental and emotional challenges of caring for a cohort with complex physical and social needs. It takes into account the increasing demands imposed by quality standards and models of person centred care and the impact on workers of their dealings with of clients and their families. It acknowledges the increasing burden of responsibility involved in providing care for older Australians following the social reckoning and watershed of the Royal Commission.

203. The “social utility” of the work isn’t propounded as a standalone measure with a single numerical value. Rather, that term is a proxy for the requirement, in undertaking an evaluation of the work, to carry out a clear-eyed and comprehensive assessment, informed by the expert evidence, which rectifies its historical undervaluation.

Question 10

What is the ANMF and the HSU’s response to the Joint Employers submission about the expert evidence and the weight that should be placed on that evidence?

204. This is set out at [165]-[175] of the HSU’s Closing Submissions in Reply.
205. In short, the contentions in the ABL submissions to this effect should be rejected as they are fundamentally misconceived.
206. **First**, the complaint that the undervaluation exercise did not involve an analysis of award wages vs award wages misses the point in two ways:
- a. it ignores the fact that the Award rates are functionally what these workers are paid, which will remain the case due to the recognised low to non-existent bargaining dividend; and

b. in any event it presupposes the need for a comparator to assess gender-based undervaluation of work, which is simply wrong.

207. Second, the remainder of the arguments distill to a challenge to the proposition that gender-based wage undervaluation exists *at all*. This would be, in the contemporary economic and statutory context, an ambitious argument to advance even if backed by expert evidence. Absent any support from anyone with any knowledge in the field, it should be disregarded.

Question 11

Noting that the summary of submissions is a high-level summary only, are there any corrections or additions that should be made?

208. The HSU does not have any additions or corrections to the summary of submissions.

Question 12

To the extent that there is a degree of tension between the Pharmacy Decision and the Teachers Decision in the application of the principles in the ACT Child Care Decision is it common ground that the ACT Child Care Decision was made under a different statutory regime to the Commission's statutory task under s.157(2A)?

209. The *ACT Child Care Decision* was, obviously, made under a different statutory regime. The task for the Commission now is much broader. It is additionally unfettered by the particular wage fixing principles the Commission had adopted at that time.

210. As set out at 13 of the HSU's reply to the Commonwealth, the *ACT Child Care Decision* provides a useful guide as to a possible approach, but is not binding. The degree to which it will be useful will vary industry to industry. To the extent the ABL submissions suggest that it is the only approach and must be rigidly applied, this is wrong.

Question 13

At [16] of its closing submissions, the HSU suggests that ‘all significant stakeholders agree that some variation to wages is justified by work value reasons and that the view of all major stakeholders is that wages need to be “significantly increased”’. What do the other parties say in response to the HSU’s submission?

211. Although this question is described as directed to all parties, it seeks a response to the HSU’s submission about the attitude of the “significant stakeholders”. In this respect, the HSU contends, as explained in its Reply Submissions, that the Commission would give little credence to the views of the parties with minimal involvement in the industry. The HSU does not regard them as “significant stakeholders”.

Question 14

Do the parties agree with the points of agreement identified at paragraphs [194]–[201] above? Are there any other significant points of agreement that should be identified?

212. Yes as to the points of agreement, which are set out at paragraphs [194] to [197]. The paragraphs from [198] to [201] record the submission of the ANMF regarding the ACT Child Care Case. See the response to Question 12 above for the HSU’s Submission as to the import of that case.

Question 17

Do the parties agree with the points of contention identified at paragraph [202]–[219] above?

213. In respect of item (iii) - the status of the Consensus Statement - the HSU’s position is not summarised. It remains the position of the HSU that the Consensus Statement:

- a. as an agreed position, remains binding on ACSA and LASA; and
- b. can be departed from by ABI, if it wishes but noting that organisation’s lack of standing to speak for anyone in the aged care industry.

214. In respect of the suggestion that ACSA's CEO was available for cross-examination, at that point ACSA had not indicated that it resiled from the Consensus Statement (if it indeed does). ABL's representative had been directly asked by the Bench as to whether ACSA and LASA, or merely ABI, had departed from the Consensus Statement, and declined to answer. Further, it is unclear what it is said the unions could have done to 'clarify' ACSA's position.

Question 18

What is the basis for the difference between the number of classification levels in the HSU and ANMF's proposed classification structure for personal care workers?

215. The ANMF developed its alternative proposed classification structures separately to the HSU (some six months after the HSU application was filed). The HSU is not privy to the reasoning of the ANMF as to why it proposed a different classification structure for personal care workers.

Question 19

There are some differences in the classification definitions proposed by each party. How does each party respond to the classification definitions proposed by the other party?

216. The most significant difference between the HSU and the ANMF arises from the ANMF's proposal to remove PCWs from the main stream of "aged care employee" in Schedule B to the Aged Care Award and create a new classification structure for them. The HSU objects to this.
217. Apart from some minor amendments to the classification definitions that are a consequence of that proposed excision, the classification definitions proposed by the ANMF appear largely to align with those proposed by the HSU. Any significant differences and the basis for these are dealt with in the following section.

Levels within Classification Structure

218. The HSU's proposed classification structure contains seven levels across three streams with only six levels for PCWs (at Aged Care Employee – Level 2 to Level

7) and four levels for Recreational/Lifestyle Activities Officers (at Aged Care Employee – Level 3 to Level 6).

219. The HSU’s proposal has the same number of classification levels as the current Aged Care Award overall but adds levels within the current structure (and therefore opportunities for career progression and increased pay) for both PCWs (with a new role of Specialist Personal Care Worker provided for at Level 6) and Recreational/Lifestyle Activities Officers (who are only currently provided for at Level 3 of the award when they are unqualified).

Personal Care Workers

220. The ANMF’s proposed classification structure for PCWs has the same number of classification levels as the current Aged Care Award (being five grades which align to Aged Care Employee – Levels 2 to 5 and Level 7 of the current Aged Care Award and the HSU’s proposed structure).

Level 5 in the HSU Proposal

221. The HSU has proposed explicit recognition at Aged Care Employee – Level 5 that where a Senior Personal Care Worker is “required to assist with medication and hold the relevant unit of competency” they will be recognised and paid as a Level 5 employee. This makes it clear that when this competency is acquired and used as part of a PCW’s role then they will appropriately remunerated. This is not a requirement in order for a PCW to be classified and paid as a Level 5 as demonstrated by the use of the word “may”.
222. The HSU understands that the ANMF considers that the existing Level 5 requirement of “*substantial on-the-job training, may require formal qualifications at trade or certificate level and/or relevant skills training or experience*” would already encompass a relevant unit of competency and that the addition of particular units is unnecessary. The HSU presses its position in the interests of ensuring a simple, easy to understand modern award system, consistent with the Modern Awards objective.

Levels 6 and 7 in the HSU Proposal

223. The ANMF has included the HSU's proposed role titles of Senior Personal Care Worker and Specialist Personal Care Worker in their proposed classification structure. The ANMF has proposed a structure which includes the Specialist Personal Care Worker at Grade 5 (equivalent to Level 7 as opposed to their inclusion at Level 6 under the HSU proposal).
224. The ANMF's proposed classification structure does not expressly include a role of Personal Care Supervisor (as proposed by the HSU at Level 7).
225. The HSU considers that it is appropriate for an additional classification level (at Aged Care Employee Level 6) to be inserted into the Aged Care Award for Specialist Personal Care Workers and that this is necessary to achieve the modern awards objective. This can be contrasted with the ANMF's proposal for the same workers to be categorised as Grade 5 (the equivalent of the HSU's Level 7 workers).
226. In effect, given the classification descriptors, the ANMF's proposal (without the addition of a new Aged Care Employee – Level 8 classification level and pay point) would have the effect that Specialist Personal Care Workers and supervisory employees who supervise them may be employed at the same grade and salary. This provides a flatter classification structure and less opportunity for career progression than that proposed by the HSU. Given that Specialist Personal Care Workers would be on the same level and pay as supervisors this may be a disincentive for workers to seek promotion and impede employers' ability to attract employees into a supervisory role.
227. If the Commission was minded to place the role of Specialist Personal Care Workers at the equivalent of Level 7 (as opposed to Level 6 as proposed by the HSU) then the Commission should consider whether an Aged Care Employee – Level 8 classification level should be established or an annual allowance awarded for those performing supervisory duties.

228. The ANMF proposes to retain the HSU proposed references to Dementia Care and Palliative Care within the definition of Grade 5 – Specialist Personal Care Worker (found at the HSU’s proposed Aged Care Employee - Level 6). However, the ANMF has omitted to include a reference to the Household Model specialist, without any obvious basis. Given the overwhelming evidence filed in relation to the broad and specialised skills of workers employed to provide the Household Model of Care the Commission should ensure that this specialty is recognised within any definition of a Specialist Personal Care Worker.
229. We note that the HSU’s proposed level 6 classification *“may require formal qualifications at post-trade or Certificate IV or Diploma level and/or relevant skills training or experience.”* This reflects the current Aged Care Award but updates the outdated reference to an Advanced Certificate to its replacement the Certificate IV.
230. The ANMF’s proposed classification definition for Grade 5 – Specialist Personal Care Worker (aligned with the HSU’s Level 7) includes a reference to formal qualifications at Certificate IV level. The HSU’s proposal incorporates a Certificate IV qualification at Level 6 instead. The HSU acknowledges that the ANMF’s proposal may provide for quicker progression than the HSU’s proposal.
231. The HSU’s proposed Aged Care Employee – Level 7 classification includes *“may require formal qualifications at trade or Advanced Certificate or Associate Diploma level and/or relevant skills training or experience.”*
232. The HSU now accepts that the references to Advanced Certificate and Associate Diplomas in Level 7 was incorrect. This is the terminology used in the current Aged Care Award. It would appear that this should have been a reference to an Advanced Diploma. There are a number of Advanced Diplomas that may be relevant to the work performed by workers under the Aged Care Award, across the various streams, including the Advanced Diploma of Community Sector Management (CHC62015) and an Advanced Diploma of Hospitality Management

(R12169). The difference between a Diploma and an Advanced Diploma is the extra study time taken to undertake the more advanced learning¹¹⁷.

Recreational/Lifestyle Activities Officers

233. The HSU considers it to be of fundamental importance that appropriate career progression be provided for Recreational/Lifestyle Activities Officers and considers that progression through Levels 3 to 6 should be available for such employees. We understand that the ANMF supports the HSU's claim for these employees. The HSU anticipates that the inclusion of only one level for Recreational/Lifestyle Activities Officers in the ANMF's classification structure may be an oversight or drafting issue arising from the coverage of the ANMF and the ANMF's proposal to carve Care Services workers out of the current classification structure in the Aged Care Award.
234. The HSU's application provides for appropriate and easy to understand career and pay progression for these workers.

Question 23

What do the parties say about the Aged Care Amendment (Implementing Care Reform) Bill 2022 (Cth). Will it affect the propositions in Contention 6?

235. While the requirement to have a Registered Nurse on site and on duty at all times will, as a matter of common sense, lead to an increase in the number of Registered Nurses on site, this does not substantially change the conclusions that flow from Contention 6 as:
- a. it is presently not possible to say whether or not this will have a significant impact on the overall proportions, and it is not immediately obvious that it will;

¹¹⁷<https://www.courseseeeker.edu.au/admissions-information/qualifications#:~:text=Like%20a%20diploma%2C%20an%20advanced,to%20undertake%20more%20advanced%20learning.>

- b. it is unlikely to significantly alter the work performed by the Registered Nurse on duty, with its focus on administrative and higher-level care work; and
- c. it will not operate to reverse the trend of direct care workers performing higher-level duties than they might have ten or twenty years ago; instead it will more likely lead (as it is designed to) to a general *increase* in the level of skilled work being performed across the workplace.

236. It should be further observed that:

- a. the Bill has not yet been passed and could be amended; and
- b. there are existing facilities which have an RN rostered on duty at any one time, which will not be affected.

237. Fundamentally the Commission ought to determine the matter based on the evidence before it which, (for obvious reasons) does not provide a basis for speculating how the bill might impact the work performed by direct and indirect care workers.