

**FAIR WORK COMMISSION**

AM2021/63

**THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION**

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO  
AMEND THE *AGED CARE AWARD 2010* AND *NURSES AWARD 2020***

First Matter

AM2020/99

**HEALTH SERVICES UNION**

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO  
AMEND THE *AGED CARE AWARD 2010***

Second Matter

AM2021/65

**HEALTH SERVICES UNION**

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO  
AMEND THE *SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES  
INDUSTRY AWARD 2010***

Third Matter

**AUSTRALIAN NURSING AND MIDWIFERY FEDERATION  
NOTE TO SUPPLEMENT ORAL CLOSING SUBMISSIONS  
MADE 13 DECEMBER 2023**

**A. Introduction**

1. The note is made pursuant to the invitation of Hatcher J, on 13 December 2023 during oral closing submissions.
2. Addressed below are the matters not otherwise addressed during the oral closing submissions of the Australian Nursing and Midwifery Federation (“ANMF”).

**B. Amendments to the Aged Care Award**

**B.1 General approach**

3. On 15 September 2023, the ANMF filed a version of the Aged Care Award, marked up with its proposed changes to that Award, consistent with the “*ANMF draft determination – Aged Care Award 2010*”, also filed that day. The ANMF’s marked up Aged Care Award appears in the Digital Hearing Book (“DBH”) (979). Changes to Schedule B.2 “*Direct Care classifications*” are identified from DHB (1033).
4. The ANMF proposed revised classification structure to the Aged Care Award is based upon the five “*grades*” of personal care worker as were contained in the Award classification structure prior to the interim increase. On 30 June 2023, the Aged Care Award was amended reflect the interim increase and a classification structure for “*Aged care employee—direct care*” was created with 7 levels. Personal care workers at grades 1 to 5 were identified as “*indicative tasks performed*” at levels 2, 3, 4, 5 and 7 respectively.
5. It is acknowledged that the existing classification structure to the Aged Care Award has limitations. However, there is no evidence before the Commission of the existing structure giving rise to particular confusion with respect to proper classification of employees. Accordingly, the ANMF proposal involves modest changes to the existing classification structure, designed to give effect to the principles identified at question 7 to Background Document 10 (DHB (35)), namely a classification structure that:
  - (1) is a career-based classification structure;
  - (2) clearly states the skills, qualifications and experience required at each level; and
  - (3) provides a clear means to transition from one level to another.

6. Of these principles, (2) and (3) are both generally consistent with the orthodox of principles of award construction, namely these:
  - (1) The interpretation of an award begins with a consideration of the natural and ordinary meaning of its words. The words are to be read as a whole and in context: *City of Wanneroo v Holmes* [1989] FCA 369; (1989) 30 IR 362 at 378-379 (French J);
  - (2) It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon: *Kucks v CSR Limited* (1996) 66 IR 182 (Madgwick J).
7. Identifying the appropriate classification for a personal care worker under the Aged Care Award would therefore require giving relevant classification descriptors their natural and ordinary meaning in context, including the context of the relevant industry and industrial relations environment. Here, context would arise from other classification descriptors within a classification level, classification descriptors at higher and lower levels, and the relevant industrial relations environment.

## **B.2 Separate provision for direct care and other kinds of workers**

8. The evidence establishes that direct care employees and indirect care employees perform different roles involving different work. The ANMF position remains that there should be a separate classification structure in the *Aged Care Award* for direct care employees including PCWs and Recreational/Lifestyle activities officers. This is so for two main reasons:
  - (1) *First*, separate classification structure provides an “*obvious drafting technique*” to accommodate different wage rates between direct care workers and other workers.
  - (2) *Second*, a classification structure that does not distinguish between direct and indirect work will be less clear, and less easy to apply in practice.

### **B.3 Introductory category**

9. The ANMF proposes the omission of the “*Aged care employee—direct care—level 1*” classification.
10. As identified above, prior to 30 June 2023, the lowest classification of direct care worker under the *Aged Care Award* was level 2 (Personal care worker grade 1). Entry level personal care workers have commenced at Level 2 under the *Aged Care Award* despite general and administrative services employees and food services employees commencing at level 1. So much is appropriate having regard to the nature of the work of personal care employees, the responsibility involved in doing the work and the conditions under which the work is done.
11. The ANMF propose the deletion of the *Aged care employee—direct care—level 1*” classification where it is not understood that the Commission intended to downgrade the classification of an employee with less than three months’ work experience in the industry.

### **B.4 Level 5 - Grade 4 “Senior Personal Care Worker”**

12. The ANMF’s proposed Grade 4 “*Senior Personal Care Worker*” classification largely reflects the current level 5 classification descriptors save for:
  - (1) Changes references from “*computer*” to “*digital technology*”; and
  - (2) The addition of “*may be required to assist aged persons with self-administration of medication and hold a relevant unit(s) of competency.*”
13. These amount to modest changes reflecting an important skill and responsibility pertaining to assisting residents with medication.
14. It is preferable to make reference to “*assisting*” with medication rather than “*administering*” medication where the latter may be unlawful in some jurisdictions.
15. To insert in an award a description of work that would appear to be unlawful in at least some law areas would be an inappropriate exercise of modern award powers. It may:
  - (1) shut AINs / PCWs out of the relevant classification (Level 5 / Grade 4) in areas where they could not lawfully perform the relevant work;

- (2) create the impression that the Commission had formed the view that the work described was lawful in each law area (even if the Commission had not formed that view).
16. The common denominator of “*assisting with medication*” equates to a lower threshold as a classification descriptor. This proposal would obviate the need to distinguish between “*assisting*” and “*administering*” medication for the purpose of this classification.
17. It is not the case that any person who completed the Cert III elective “*HLTHPS006-Assist clients with medication*” would immediately be properly classified at Grade 4 (level 5). That is clear from context relevant to that classification, including that:
  - (1) This classification occurs at a level above the proposed “*Grade 3 – Personal Care Worker (qualified)*” classification as would be applicable to the holder of a Cert III;
  - (2) An employee at Grade 4 would:
    - (a) be capable of functioning semi-autonomously, and prioritising their own work within established policies, guidelines and procedures (rather than capable of prioritising work within established policies, guidelines and procedures);
    - (b) be responsible for work performed with a substantial (rather than medium) level of accountability;
    - (c) require substantial on-the-job training, may require formal qualifications at trade or certificate level and/or relevant skills, training or experience.

**B.5 Level 6 - Grade 4A “*Specialist Personal Care Worker*”**

18. Prior to 30 June 2023, no personal care worker grade was identified at level 6. This remains the case despite the seven levels of *Aged care employee—direct care* now contained in the award. The ANMF seek the inclusion of a grade 4A direct care classification for a “*Specialist Personal Care Worker*” at level 6.
19. This classification is based upon the existing level 6 descriptors (as apply to indirect care classifications) with the addition of:

- (1) “*may assist with the supervision of others*” (as reflects the similar descriptor located at level 5 - Grade 4); and
  - (2) “*may require relevant skills, training or experience in Dementia Care or Palliative Care*”.
20. The Report to the Full Bench by Commissioner O'Neill dated 20 June 2022 (“**Lay Evidence Report**”) identified direct care workers possessing “*Specialist knowledge and care*” pertaining to dementia and palliative care at Parts D.6.1 and D.6.2.
21. Consistent with a recommendation from the academic group during the classification development process to avoid micro-prescription, the ANMF proposal does not specifically identify relevant units of competency (Further Statement Butler Annie Butler dated 1 November 2023 at [117]).

#### **B.6 Level 7 – Grade 5**

22. The ANMF proposal would retain a level 7, grade 5 direct care classification.
23. Unlike the HSU proposal for this classification which would provide for a level 7 supervisor classification across all streams, the ANMF seek a “*Personal Care Supervisor*” classification that does not apply to indirect care employees.
24. The level 7 (Grade 5) classification has always included the descriptor “*may supervise the work of others, including work allocation, rostering and guidance*” as would be retained, unchanged.
25. The changes proposed by the ANMF include inserting the classification title “*Personal Care Supervisor*” and by replacing references to “*qualifications at trade or Advanced Certificate or Associate Diploma*” with reference to qualifications at “*Certificate IV*”.
26. Professors Meagher and Charlesworth accepted that there is no diploma or advanced diploma pertaining to direct care of older persons (aside from the EN qualification) (PN2424, PN2426)
27. The Professors also accepted (at PN2440) that:
- (1) The level 7 qualification is probably less aimed at personal care workers; and

- (2) If a supervisor were supervising care workers, it is preferable that the qualification relied upon be referable to personal care (rather than, say, human resources).
28. Where there exists no diploma or advanced diploma in direct care (other than the EN qualification) it is submitted that it would not be appropriate to make provision for any such qualification at Grade 5 (level 7).
29. The ANMF oppose the removal of this classification and agree with the HSU Classification Reply at [19] and [21], to the effect that:
  - (1) the absence of evidence regarding this role is unsurprising where no party has sought to remove it;
  - (2) removing this classification would alter coverage that would potentially leave a cohort of employees no longer covered by it.
30. Removal of this classification would also be a backwards step in the professionalisation of personal care workers and an unwarranted reduction to the career progression under the award for those roles.

#### **B.7 RAOs**

31. The ANMF application with respect to RAOs mirrors the existing classification. That is, an unqualified RAO is to be located at Grade 2 (level 2). The ANMF has no position in regard to the HSU's proposal for additional RAO classification levels.

#### **B.8 Allowances for medication and dementia care**

32. Work involving the (self) administration of medication and dementia care reflect increased work value, particularly with respect to the skill and responsibility in performing the work. It is appropriate that this be recognised by way of the classification of an employee, rather than an allowance.
33. It introduces unnecessary complication to the application of the *Aged Care Award* to make the payment of an additional weekly amount depend on assessment of whether, in a given week, the employee has been "*approved by their employer*" to administer medication under supervision. It is preferable simply to deal with the issue of involvement in medication administration at the level of classification.

34. A “*hot places*” allowance is not an appropriate comparison where heat goes essentially to the conditions in which the work is done and fails to recognise the level of skill and responsibility involved in doing the work.
35. Further, the ANMF adopt the HSU Classification Reply at [47] - [48] to the effect that, in the alternative, the quantum of the allowances proposed by the Joint Employers are inadequate.

**J C McKenna**

**J E Hartley**

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14 December 2023.

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