

16 March 2021

Associate to the Hon Justice Ross AO
Fair Work Commission
Level 4, 11 Exhibition Street
MELBOURNE VIC 3000

By email only:

chambers.ross.j@fwc.gov.au and amod@fwc.gov.au

Our Ref: 008470 Your Ref: AM2020/99

Dear Associate

AM2020/99 – Application by the HSU to vary the Aged Care Award 2010

We refer to the above matter and advise that we act for the Australian Nursing and Midwifery Federation. Please find enclosed notice of representation by way of lodgment.

As you may be aware, the final report of the Royal Commission into Aged Care Quality and Safety was tabled in Parliament on 1 March 2021. We refer to 'Recommendation 84: Increases in award wages' which is in the following terms:

Employee organisations entitled to represent the industrial interests of aged care employees covered by the Aged Care Award 2010, the Social, Community, Home Care and Disability Services Industry Award 2010 and the Nurses Award 2010 should collaborate with the Australian Government and employers and apply to vary wage rates in those awards to:

- a. *reflect the work value of aged care employees in accordance with section 158 of the Fair Work Act 2009 (Cth), and/or*
- b. *seek to ensure equal remuneration for men and women workers for work of equal or comparable value in accordance with section 302 of the Fair Work Act 2009 (Cth).*

Our client is an employee organisation that is entitled to represent the industrial interests of aged care employees covered by the *Aged Care Award 2010* and the *Nurses Award 2010*. In accordance with the Royal Commission's recommendation, our client is seeking to collaborate with the Australian Government and employers, with a view to applying to vary the wage rates in those awards. Our client has written to the Acting Minister for Industrial Relations (copied to the Minister for Health and Aged

Care and the Minister for Senior Australians and Aged Care Services) and the Aged Care Workforce Industry Council in that regard. Copies of those letters are enclosed for the Commission's information.

In Volume 3 of its report, the Royal Commission states at pages 414-417 (footnotes omitted):

A wages gap exists between aged care workers and workers performing equivalent functions in the acute health sector. Successive governments have made several failed attempts to address that gap by providing additional funds to providers in the hope that these funds would be passed on to aged care workers as increased wages. For this reason, while our recommendations in our chapt[sic] about the funding of aged care will, if implemented, see substantial increases in the subsidies received by providers, we consider that merely increasing subsidies without more is unlikely to translate into higher wages.

In 2018, the Aged Care Workforce Strategy Taskforce recommended that the 'industry develop a strategy to support the transition of personal care workers and nurses to pay rates that better reflect their value and contribution to delivering care outcomes'. The Taskforce considered that this, and its other 'strategic actions,' could be 'executed in one to three years'.

Wage increases have flowed as a result of the annual award reviews by the Fair Work Commission, and there have been some minor improvements to penalty rates as a result of the four yearly review of the Aged Care Award 2010 by the Fair Work Commission in 2019. But, otherwise, there has been no discernible increase in aged care wage rates in the more than two and a half years since the Taskforce report was published. The Taskforce's proposal of a sector-led process leading to substantial increases in aged care wages rates seems to have limited prospects of success.

In our view, providers, unions and the Australian Government must work together to improve pay for aged care workers. There are two parts to our proposed recommendations on this topic. The first is a work value case and equal remuneration application to the Fair Work Commission that would ask the Commission to examine the terms and conditions in the relevant awards. If successful, this will increase the wages of personal care workers and nurses in both residential and home care.

...

While the Fair Work Commission would exercise its independent discretion if any such application was made, on the extensive evidence before this inquiry about the work performed by personal care workers and nurses in both home care and residential care, we consider that all three of the section 157(2A) reasons may well justify an across-the-board increase in the minimum pay rates under the applicable awards. There is also a strong argument for parity

between residential care workers working under the Aged Care Award 2010 and social and community services workers who were awarded a significant pay increase as a result of the Equal Remuneration Order made by Fair Work Australia in 2012.

...

The case will need to be well argued and based on cogent evidence.

The Equal Remuneration Case for social and community services workers suggests that the chances of success in such a case are significantly increased if the Fair Work Commission is presented with an agreed position involving unions, employers and the principal funder, the Australian Government. As Professor Stewart stated:

If the Commonwealth were willing to fund any increases in labour costs, that would not just improve the chances of turning a contested application into one by consent. It would remove an obvious reason for the FWC [Fair Work Commission] to be concerned about agreeing to an improvement in pay or other entitlements.

The reconstituted Aged Care Workforce Council will be well placed to encourage this cooperative approach. We see this as an important aspect of its future remit and it is why we recommend an increase in the number of its members who represent the workforce.

Any such application should not be confined to the Aged Care Award 2010 because that award only applies to the residential aged care sector. Home care workers also need improved pay. Employed aged care workers are entitled to the minimum wages prescribed by the Social, Community, Home Care and Disability Services Industry Award 2010. The classifications set out in Schedule E of that Award should also be the subject of the proposed work value and or equal remuneration application.

Nurses working in aged care should also not be excluded from this process. We accept the impact of a successful case may be less for nurses, because there are fewer award-reliant nurses compared to personal care workers. However, section 206(2) of the Fair Work Act has the effect of incorporating into an agreement a relevant award rate that exceeds the agreement rate. Section 306 of the Fair Work Act has a similar effect where there is a conflict between an equal remuneration order and an Award term.

The Royal Commission refers to the application by the HSU (“the HSU application”) that is before the Fair Work Commission (“the FWC”). We note that this application was made in November 2020 and that directions have been made by the FWC. Further, we note that representatives from the Attorney-General’s Department have appeared as observers at each of the two Mentions to date. The directions dated 18

December 2020 require the union parties, employers and employer associations to file their evidence and submissions in this matter before it is called on for further Mention on 23 August 2021. Presently, it is unclear whether or not the Australian Government proposes to file any such material. The first tranche of evidence and submissions is due by 1 April 2021.

We note that the FWC has encouraged the parties to have ongoing discussions and to progress the matter in a way that is helpful to the FWC (see the transcript of proceedings dated 18 December 2020 at PN52-53). Our client's correspondence to the Australian Government and the Aged Care Workforce Industry Council, and this approach to the FWC, are directed to progressing the matter in a way that is most helpful to the FWC. We note that the parties were granted liberty to apply to vary the directions dated 18 December 2020 (see paragraph [6] of those directions).

On the basis of the Royal Commission's recent report, our client has concerns about the pre-existing timetable for the HSU application, in circumstances where:

1. The employee organisations, employers and the Australian Government have not had the opportunity to collaborate with each other on the basis of the Royal Commission's recommendation.
2. The prospect of any agreed position involving unions, employers and the principal funder, the Australian Government, that could be presented to the FWC in the manner contemplated by the Royal Commission ought to be considered.
3. The Royal Commission's recommendation was not confined to the *Aged Care Award 2010*. In conjunction with collaboration with the Australian Government and employers as recommended, our client proposes to make an application to vary the wage rates in the *Nurses Award 2010* as recommended by the Royal Commission. Much of the evidence in these matters will be inextricably linked. In view of the FWC's encouragement to progress in a manner that is helpful to the FWC, our client considers that the applications recommended by the Royal Commission should not be conducted in isolation from each other.

Please note that our client proposes to make an application under section 158 and/or 302 of the *Fair Work Act 2009* in respect of the *Nurses Award 2010* by 17 May 2021. Further, our client is prepared to file any agreed position involving the union parties, employers and the Australian Government in relation to proposed variations to the *Aged Care Award 2010* and the *Nurses Award 2010*, as recommended by the Royal Commission into Aged Care Quality and Safety, as the FWC sees fit.

Our client exercises its liberty to apply to vary the directions dated 18 December 2020 so that these matters can be progressed in a manner that is most helpful to the FWC and adapted to the nature of the proceedings. Our client is available to appear at short notice in relation to this application.

If you have any queries, please contact our office.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Philip Gardner', is positioned above the typed name.

Philip Gardner
Special Counsel
GORDON LEGAL

Enc: Form F53 – Notice of representation
Letter to the Acting Minister for Industrial Relations
Letter to the Aged Care Workforce Industry Council

Notice that a person:

- (a) has a lawyer or paid agent; or
- (b) will seek permission for lawyer or paid agent to participate in a conference or hearing

Section 596 of the Fair Work Act 2009 and rules 11, 12 and 12A of the Fair Work Commission Rules 2013

This form can be used to give notice to the Fair Work Commission (Commission) that a lawyer or paid agent is acting for a party in a matter before the Commission.

This form can also be used to give notice that a party will seek permission for a lawyer or paid agent to represent the party in the matter by participating in a conference or hearing.

1. The matter before the Commission

What is the name and matter number of the matter before the Commission?

| | |
|----------------------|---|
| Matter name | Application to vary the <i>Aged Care Award 2010</i> |
| Matter number | AM2020/99 |

2. The party giving notice



These are the details of the party giving notice.

If the party is an individual, provide the following details:

| | | | |
|---------------------------|---|-------------------|--|
| Title | [] Mr [] Mrs [] Ms [] Other please specify: | | |
| First name | | | |
| Surname | | | |
| Postal address | | | |
| Suburb | | | |
| State or territory | | Postcode | |
| Phone number | | Fax number | |
| Email address | | | |

If the party is not an individual, provide the following details:

| | |
|------------------------------------|---|
| Legal name of party | AUSTRALIAN NURSING AND MIDWIFERY FEDERATION |
| Party's ACN (if a company) | |
| Party's ABN (if applicable) | 41 816 898 298 |

Form F53 – Notice that a person: (a) has a lawyer or paid agent; or
(b) will seek permission for a lawyer or paid agent to participate in a conference or hearing

| | | | |
|---|--|-------------------|----------------|
| Party's trading name or registered business name (if applicable) | | | |
| Contact person | KRISTEN WISCHER, Senior Federal Industrial Officer | | |
| Postal address | Level 1, 365 Queen Street | | |
| Suburb | Melbourne | | |
| State or territory | Victoria | Postcode | 3000 |
| Phone number | (03) 9602 8500 | Fax number | (03) 9602 8567 |
| Email address | kwischer@anmf.org.au | | |

Which party is the party giving notice?

- Applicant
- Respondent
- Other

If you answered **other**—provide details below:

| |
|---|
| AUSTRALIAN NURSING AND MIDWIFERY FEDERATION |
|---|

3. Notice that the party has a lawyer or paid agent

Is the party giving notice that a lawyer or paid agent acts for the party?

- Yes
- No

If you answered **Yes**—provide details of the lawyer or paid agent below:

| | | | |
|--------------------------------------|------------------------------|-------------------|----------------|
| Name of lawyer or paid agent | NICHOLAS WHITE | | |
| Firm, organisation or company | GORDON LEGAL | | |
| Postal address | Level 22, 181 William Street | | |
| Suburb | Melbourne | | |
| State or territory | Victoria | Postcode | 3000 |
| Phone number | (03) 9603 3035 | Fax number | (03) 9603 3050 |

Form F53 – Notice that a person: (a) has a lawyer or paid agent; or
 (b) will seek permission for a lawyer or paid agent to participate in a conference or hearing

| | |
|---|---------------------------|
| Email address | nwhite@gordonlegal.com.au |
| Are copies of correspondence and other documents in the matter to be sent to the lawyer or paid agent? | |
| <input checked="" type="checkbox"/> Yes | |
| <input type="checkbox"/> No | |

4. Notice that the party will seek permission for lawyer or paid agent to participate in a conference or hearing

Is the party giving notice that the party will seek permission for a lawyer or paid agent to participate in a conference or hearing?

Yes

No

If you answered **Yes**—either provide details below of the conference(s) or hearing(s) that the party wants a lawyer or paid agent to participate in (including date and time, if known), or indicate that permission will be sought for participation in all future conferences and hearings:

| |
|---|
| Permission will be sought for participation in all future conferences and hearings. |
|---|

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

| | |
|--------------------------|------------------------------|
| Signature | |
| Name | NICHOLAS WHITE, GORDON LEGAL |
| Date | 16 March 2021 |
| Capacity/Position | Applicant's representative |



If you are not the party giving notice and are completing this form on the party's behalf, include an explanation of your authority to do so in the **Capacity/Position** section above.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS



16 March 2021

Senator the Hon Michaelia Cash
Acting Minister for Industrial Relations
Australian Government
PO Box 6100
Senate
Parliament House
CANBERRA ACT 2600

Via email: senator.cash@aph.gov.au

Dear Minister

**Royal Commission into Aged Care Quality and Safety
Final Report: Care, Dignity and Respect
Recommendation 84: Increases in award wages**

We refer to the final report of the Royal Commission into Aged Care Quality and Safety, tabled in Parliament on 1 March 2021, and in particular its 'Recommendation 84: Increases in award wages' which is as follows:

Employee organisations entitled to represent the industrial interests of aged care employees covered by the Aged Care Award 2010, the Social, Community, Home Care and Disability Services Industry Award 2010 and the Nurses Award 2010 should collaborate with the Australian Government and employers and apply to vary wage rates in those awards to:

- a. *reflect the work value of aged care employees in accordance with section 158 of the Fair Work Act 2009 (Cth), and/or*
- b. *seek to ensure equal remuneration for men and women workers for work of equal or comparable value in accordance with section 302 of the Fair Work Act 2009 (Cth).*

The Australian Nursing and Midwifery Federation ("ANMF") is an employee organisation that is entitled to represent the industrial interests of aged care employees covered by the *Aged Care Award 2010* and the *Nurses Award 2010*. In accordance with the Royal Commission's recommendation, we seek to collaborate with the Australian Government and employers, with a view to applying to vary the wage rates in those awards.

In Volume 3 of its report, the Royal Commission states at pages 414-417 (footnotes omitted):

A wages gap exists between aged care workers and workers performing equivalent functions in the acute health sector. Successive governments have made several failed attempts to address that gap by providing additional funds to providers in the hope that these funds would be passed on to aged care workers as increased wages. For this reason,

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ANMF Journals

Australian Nursing and
Midwifery Journal (ANMJ)
E anmj@anmf.org.au

Australian Journal of
Advanced Nursing (AJAN)
E ajan@anmf.org.au

ABN 41 816 898 298



while our recommendations in our chapt[sic] about the funding of aged care will, if implemented, see substantial increases in the subsidies received by providers, we consider that merely increasing subsidies without more is unlikely to translate into higher wages.

In 2018, the Aged Care Workforce Strategy Taskforce recommended that the 'industry develop a strategy to support the transition of personal care workers and nurses to pay rates that better reflect their value and contribution to delivering care outcomes'. The Taskforce considered that this, and its other 'strategic actions,' could be 'executed in one to three years'.

Wage increases have flowed as a result of the annual award reviews by the Fair Work Commission, and there have been some minor improvements to penalty rates as a result of the four yearly review of the Aged Care Award 2010 by the Fair Work Commission in 2019. But, otherwise, there has been no discernible increase in aged care wage rates in the more than two and a half years since the Taskforce report was published. The Taskforce's proposal of a sector-led process leading to substantial increases in aged care wages rates seems to have limited prospects of success.

In our view, providers, unions and the Australian Government must work together to improve pay for aged care workers. There are two parts to our proposed recommendations on this topic. The first is a work value case and equal remuneration application to the Fair Work Commission that would ask the Commission to examine the terms and conditions in the relevant awards. If successful, this will increase the wages of personal care workers and nurses in both residential and home care.

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While the Fair Work Commission would exercise its independent discretion if any such application was made, on the extensive evidence before this inquiry about the work performed by personal care workers and nurses in both home care and residential care, we consider that all three of the section 157(2A) reasons may well justify an across-the-board increase in the minimum pay rates under the applicable awards. There is also a strong argument for parity between residential care workers working under the Aged Care Award 2010 and social and community services workers who were awarded a significant pay increase as a result of the Equal Remuneration Order made by Fair Work Australia in 2012.

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The case will need to be well argued and based on cogent evidence.

The Equal Remuneration Case for social and community services workers suggests that the chances of success in such a case are significantly increased if the Fair Work Commission is presented with an agreed position involving unions, employers and the principal funder, the Australian Government. As Professor Stewart stated:

If the Commonwealth were willing to fund any increases in labour costs, that would not just improve the chances of turning a contested application into one by consent. It would remove an obvious reason for the FWC [Fair Work Commission] to be concerned about agreeing to an improvement in pay or other entitlements.

The reconstituted Aged Care Workforce Council will be well placed to encourage this cooperative approach. We see this as an important aspect of its future remit and it is why we recommend an increase in the number of its members who represent the workforce.

Any such application should not be confined to the Aged Care Award 2010 because that award only applies to the residential aged care sector. Home care workers also need



improved pay. Employed aged care workers are entitled to the minimum wages prescribed by the Social, Community, Home Care and Disability Services Industry Award 2010. The classifications set out in Schedule E of that Award should also be the subject of the proposed work value and or equal remuneration application.

Nurses working in aged care should also not be excluded from this process. We accept the impact of a successful case may be less for nurses, because there are fewer award-reliant nurses compared to personal care workers. However, section 206(2) of the Fair Work Act has the effect of incorporating into an agreement a relevant award rate that exceeds the agreement rate. Section 306 of the Fair Work Act has a similar effect where there is a conflict between an equal remuneration order and an Award term.

The Royal Commission refers to an application by the Health Services Union (“the HSU application”) to vary the *Aged Care Award 2010*. The application was made in November 2020 and directions have been made by the Fair Work Commission. We note that representatives from the Attorney-General’s Department have appeared as observers at each of the two Mentions to date. Presently, employee organisations, employers and employer associations are required to file evidence and submissions before the matter is called on for further Mention on 23 August 2021. It is unclear whether or not the Australian Government proposes to file any such material. Presently, the first tranche of evidence and submissions is due by 1 April 2021.

The Fair Work Commission (“FWC”) has encouraged the parties to have ongoing discussions and to progress the matter in a way that is helpful to the FWC (see the transcript of proceedings dated 18 December 2020 at PN52-53). The parties have been granted liberty to apply to vary the directions dated 18 December 2020 (see paragraph [6] of those directions).

In light of the Royal Commission’s recent report, the ANMF has concerns about the pre-existing timetable for the HSU application, in circumstances where:

1. The employee organisations, employers and the Australian Government have not had the opportunity to collaborate with each other on the basis of the Royal Commission’s recommendation.
2. The prospect of any agreed position involving unions, employers and the principal funder, the Australian Government, that could be presented to the FWC in the manner contemplated by the Royal Commission ought to be considered.
3. The Royal Commission’s recommendation is not confined to the *Aged Care Award 2010*. In conjunction with collaboration with the Australian Government and employers as recommended, the ANMF proposes to make an application to vary the wage rates in the *Nurses Award 2010* as recommended by the Royal Commission. Much of the evidence in these matters will be inextricably linked. In view of the FWC’s encouragement to progress in a manner that is helpful to the FWC, the ANMF considers that the applications recommended by the Royal Commission should not be conducted in isolation from each other.

The ANMF proposes to exercise liberty to apply to vary the directions dated 18 December 2020. Further, the ANMF proposes to write to the Aged Care Workforce Council and request that it now make arrangements for speedy collaboration between the Australian Government, employers and employee organisations in accordance with the recommendations of the Royal Commission. Subject to that collaboration, the ANMF proposes to make an application under section 158 and/or 302 of the *Fair Work Act 2009* in respect of the *Nurses Award 2010* by 17 May 2021.

Against the background set out above, the ANMF seeks your earliest possible endorsement on behalf of the Commonwealth of the proposed collaboration arrangements through the Aged Care Workforce Council (or another forum you consider might be more appropriate). The ANMF proposes that such endorsement commit the Commonwealth to the collaboration proposed by the Royal Commission.



We have provided a copy of this letter to the Minister for Health and Aged Care and the Minister for Senior Australians and Aged Care Services.

Yours faithfully

Annie Butler
Federal Secretary
Australian Nursing and Midwifery Federation

Cc: The Hon Greg Hunt, Minister for Health
Senator Richard Colbeck, Minister for Aged Care and Senior Australians



16 March 2021

Ms Louise O'Neill
Chief Executive Officer
Aged Care Workforce Industry Council

Via email: contact@acwic.com.au

Dear Ms O'Neill

**Royal Commission into Aged Care Quality and Safety
Final Report: Care, Dignity and Respect
Recommendation 84: Increases in award wages**

We refer to the final report of the Royal Commission into Aged Care Quality and Safety, tabled in Parliament on 1 March 2021, and in particular its 'Recommendation 84: Increases in award wages' which is as follows:

Employee organisations entitled to represent the industrial interests of aged care employees covered by the Aged Care Award 2010, the Social, Community, Home Care and Disability Services Industry Award 2010 and the Nurses Award 2010 should collaborate with the Australian Government and employers and apply to vary wage rates in those awards to:

- a. *reflect the work value of aged care employees in accordance with section 158 of the Fair Work Act 2009 (Cth), and/or*
- b. *seek to ensure equal remuneration for men and women workers for work of equal or comparable value in accordance with section 302 of the Fair Work Act 2009 (Cth).*

As you know, the Australian Nursing and Midwifery Federation ("ANMF") is an employee organisation that is entitled to represent the industrial interests of aged care employees covered by the *Aged Care Award 2010* and the *Nurses Award 2010*. In accordance with the Royal Commission's recommendation, we are seeking to collaborate with the Australian Government and employers, with a view to applying to vary the wage rates in those awards.

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2. The prospect of any agreed position involving unions, employers and the principal funder, the Australian Government, that could be presented to the FWC in the manner contemplated by the Royal Commission ought to be considered.
3. The Royal Commission’s recommendation is not confined to the *Aged Care Award 2010*. In conjunction with collaboration with the Australian Government and employers as recommended, the ANMF proposes to make an application to vary the wage rates in the *Nurses Award 2010* as recommended by the Royal Commission. Much of the evidence in these matters will be inextricably linked. In view of the FWC’s encouragement to progress in a manner that is helpful to the FWC, the ANMF considers that the applications recommended by the Royal Commission should not be conducted in isolation from each other.

The ANMF proposes to exercise liberty to apply to vary the directions dated 18 December 2020. Further, the ANMF requests that the Aged Care Workforce Industry Council now make arrangements for speedy collaboration between the Australian Government, employers and employee organisations in accordance with the recommendations of the Royal Commission. Subject to that collaboration, the ANMF proposes to make an application under section 158 and/or 302 of the *Fair Work Act 2009* in respect of the *Nurses Award 2010* by 17 May 2021.

Yours sincerely

Annie Butler
Federal Secretary
Australian Nursing and Midwifery Federation