

**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

**SUBMISSIONS IN RELATION TO ISSUE REGARDING  
REMOVING AGED-CARE WORKERS FROM THE *NURSES AWARD 2020***

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Filed on behalf of (name & role of party)	<u>The Applicant, the Australian Nursing and Midwifery Federation</u>		
Prepared by (name of person/lawyer)	<u>Nick White</u>		
Law firm (if applicable)	<u>Gordon Legal</u>		
Tel	<u>03 9603 3035</u>	Fax	<u>03 9603 3050</u>
Email	<u><a href="mailto:nwhite@gordonlegal.com.au">nwhite@gordonlegal.com.au</a></u>		
Address for service	<u>Level 22, 181 William St., Melbourne, Vic., 3000</u>		

**A. Introduction**

1. On Wednesday, 24 August 2022, Ross J raised with counsel for the ANMF (at PN14762) that a way of “*avoiding any inconsistency in the [Nurses Award 2020]*” would be to “*remove the [nurses’] classifications in aged care from the [Nurses Award] and move them to the Aged Care Award.*”
2. On Thursday, 25 August 2022, the Full Bench indicated (starting from PN15303) that it wished to give the ANMF a further opportunity to say what it wanted to say about that proposal, and that leave would be granted to file submissions by 4:00 pm on Tuesday (*i.e.*, 30 August 2022).
3. These are the ANMF’s submissions, filed pursuant to that leave, in relation to that proposal. For clarity, the ANMF understands the proposal to involve the removal into the *Aged Care Award 2010* of classifications for NPs, RNs, ENs, and AINs, in each case where those persons work in residential aged care or in home care for aged persons, and the removal of those persons from the coverage of the *Nurses Award* (“**Proposal**”).
4. The ANMF’s submissions are divisible, at the highest level, into two contentions.
5. *First*, the Proposal could not, at this stage of the proceedings, be effected without unfairness to the ANMF (and possibly to other persons). The issues raised by the Proposal are many and various. The ANMF would seek to advance not only submissions but evidence in relation to why the Proposal should not be effected. It cannot now do so. Nor could it do so, fairly, in any short timeframe. Further, other persons may be necessary or appropriate to have before the Commission as persons whose rights or interests are affected by the Proposal.
6. Accordingly, the Commission would not enter into the question of whether the Proposal should be effected. That issue can be ventilated by the Commission, or by any other relevant person, on another occasion and be dealt with then.
7. *Second*, alternatively, if—which the ANMF submits the Commission would not do—the Commission decides it will enter into the question of whether the Proposal should be effected, the ANMF directs submissions (necessarily limited, and in the absence of evidence which it would prefer to call), in support of the proposition that the Proposal should not be effected.

8. In summary, these reasons are that the Proposal is not necessary to achieve the modern awards objective. The Proposal would not ensure a fair and relevant minimum safety net of terms and conditions.

**B. The Application by the ANMF**

9. By its application of 17 May 2021 made pursuant to section 158 of the *Fair Work Act 2009* (Cth) (“**FW Act**”), the ANMF sought:

- (1) the amendment of the Nurses Award by inserting a new schedule, applicable to aged care workers only and expiring after four years, which increases rates of pay by 25 per cent; and
- (2) the amendment of the Aged Care Award by:
  - (a) removing PCWs from the main stream of “aged care employee” in Schedule B and creating a new classification structure for them; and
  - (b) increasing PCW rates of pay by 25 per cent.

10. These amendments were sought specifically to give effect to Recommendation 84 in the Final Report ([FR.1.263]). That Recommendation provided that:

“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 ... .”

11. Furthermore, the Royal Commission (at [FR.3A.416]) identified an urgent need for a review of wage rates applicable to aged care workers and further, at [FR.3A.416], that, whilst the Commission would exercise its independent discretion:

“... 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 employees.”

12. The ANMF is an employee organisation entitled to represent the industrial interests of:

- (1) some classifications of the aged care employees covered by the Aged Care Award; and

- (2) employees covered by the Nurses Award and relevantly aged care workers covered by that Award.
13. The Nurses Award does not separately identify and define aged care workers. Accordingly, the ANMF's application was limited to seeking an increase to the minimum wages for:
  - (1) those employees whose industrial interests it is entitled to represent under the Aged Care Act (*i.e.*, workers in the personal care stream); and
  - (2) aged care workers covered by the Nurses Award.
14. The proposed new schedule to the Nurses Award, applicable to aged care workers only, is a device to facilitate the ANMF's application to increase minimum wages for aged care workers covered by the Nurses Award. In making the application and seeking this schedule, the ANMF made plain:
  - (1) that it sought flat, across-the-board increases of 25 per cent to minimum rates to recognise the chronic undervaluation of all relevant aged care employees, notwithstanding that there exists some incongruity in internal relativities within the Nurses Award and as between the Aged Care Award and Nurses Award;<sup>1</sup>
  - (2) that the fact of the variation presently sought to the Nurses Award involving a pay increase only for aged care employees did not imply that a pay increase for other employees covered by that award was not also justified. Rather, pay increases for the non-aged-care classifications under the Nurses Award are also justified and necessary;<sup>2</sup>
  - (3) that the operation of the proposed new Nurses Award schedule relating to aged care employees was sought for a period of 4 years only. However, it was not intended that the increased minimum rates for aged care employees would be temporary.<sup>3</sup> Rather, the ANMF stated that it would bring a further application

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<sup>1</sup> ANMF Application to vary a modern award, 17 May 2021, Annexure 2 at [6].

<sup>2</sup> ANMF Application to vary a modern award, 17 May 2021, Annexure 2 at [7].

<sup>3</sup> ANMF Application to vary a modern award, 17 May 2021, Annexure 2 at [8].

to increase minimum rates for all classifications under the Nurses Award prior to the expiry if any new schedule.<sup>4</sup>

15. The basis for seeking across-the-board increases of 25 per-cent to minimum rates is addressed in the oral evidence of Annie Butler (ANMF Federal Secretary).<sup>5</sup> Ultimately, the effect of ANMF's application would be to preserve the classification structure and internal relativities for all direct care workers in aged care covered by the Nurses Award or Aged Care Award.
16. At the time the Royal Commission tabled its Final Report (including Recommendation 84), the Commission already had on foot an application brought by the HSU and others to increase minimum rates under the Aged Care Award. Recommendation 84 provided that any applications to vary the Aged Care Award and Nurses Award (and SCHCADS Award) would involve collaboration and thereby anticipated that such applications would be heard and determined together. By limiting its application to vary the Nurses Award to those employees performing aged care work, the ANMF acted to facilitate this. The alternative approach, bringing an application for minimum wage increases for all classifications under the Nurses Award, would have likely delayed or frustrated the progress of the current applications.
17. The Commission has raised concerns in relation to the ANMF's proposal for the Nurses Award schedule, applicable to aged care workers only, to expire after 4 years. The ANMF makes no further submissions in relation to that issue. Rather, it indicates that that part of its application is severable from the balance, such that if the Commission were not minded to insert a four-year sunset clause it would nevertheless (if satisfied as to appropriate matters) increase wage rates for aged-care workers for work value reasons under the Nurses Award as set out in the ANMF's application.

**C. The Proposal could not be effected without unfairness to the ANMF**

18. There are three applications before the Commission, made in November 2020 and May 2021. Each of them seeks, centrally, to vary relevant awards by increasing the rates of pay for aged-care workers by 25 per cent.

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<sup>4</sup> ANMF Application to vary a modern award, 17 May 2021, Annexure 2 at [8].

<sup>5</sup> Transcript 2 May 2022, Cross-Examination of Annie Butler [at PN3377].

19. An underlying issue is that the effect of the ANMF's application is that it will create, in effect, a disparity between rates of pay for aged care workers and non-aged care workers under the Nurses Award.
20. It is in this context—with a view to addressing any short-term disparity as between rates of pay for aged-care and non-aged-care work—that the Commission raised the Proposal. But the remedy (the Proposal) is worse than the ailment (the disparity).
21. The Proposal is not part of any party's application (nor anything like the Proposal). No party raised anything like the Proposal in opening submissions, written submissions, nor oral closing submissions (noting that all union parties have now concluded their principal oral closing submissions). Before 24 August 2022, the ANMF had been given no reason to think that anything like the Proposal would be in issue in these applications.
22. Moreover, as is outlined in further detail in Part D.1 below, the Proposal arises in a context. That context includes that:
  - (1) the question of whether aged-care nurses should be classified with other nurses under an occupational award (like the Nurses Award) or an industry award (like the Aged Care Award) was litigated during the awards modernisation process, and the answer then given was that they should be classified with other nurses;
  - (2) in no four-yearly review has any party again agitated this issue;
  - (3) this is indicative of nobody with a relevant interest in the Nurses Award or the Aged Care Award having had an inclination to re-litigate the issue that was resolved as part of awards modernisation.
23. Further, all of the evidence in the application is directed at the issues raised by the applications: *i.e.*, whether wage increases are: (1) justified by work value reasons; (2) necessary to achieve the modern awards objective; (3) necessary to meet the minimum wages objective. There is no evidence directed at the Proposal. As outlined below, the ANMF would, had the issues raised by the Proposal been live, have called rather a lot of evidence in relation to those issues. It is possible that other parties would have, as well. There might have been cross-examination on that evidence.

#### **C.1 Difficulties in understanding the scope of the Proposal**

24. A precursor issue is that the ANMF is not clear as to what the Proposal involves.

25. One possibility is that the Proposal is directed to lifting NP, RN, EN, and AIN classifications from the Nurses Award and dropping them, with their applicable conditions, into the Aged Care Award.
26. The other possibility is lifting NP, RN, EN, and AIN classifications from the Nurses Award and dropping them into the Aged Care Award so that the conditions otherwise applicable under the Aged Care Award apply to those classifications.
27. The significant difference between the outcome depending on what is, in fact, proposed underlines why the ANMF submits that, if something like the Proposal is ultimately to be considered by the Commission, it should be considered as part of a process where any proposed amendments to an award are clearly defined.

**C.2 Evidence that the ANMF would have called had the issues raised by the Proposal been live issues in these applications**

28. The ANMF has had only a few business days in which to consult with its branches as to the issues raised by the Proposal. In Rumsfeldian terms, accordingly, there are very likely to be a considerable number of unknown unknowns in regard to the Proposal—*i.e.*, practical issues that might be the subject of evidence and submissions to the Commission in the context of an application directed to the resolution of the issues raised by the Proposal, which the ANMF has simply not yet identified.
29. The importance to the ANMF of this issue cannot be overstated. If this issue had been raised as part of one of the applications, the ANMF would have conducted Australia-wide consultations, across its branches and membership, with a view to identifying the potential effects of such a fundamental change in the scope of the Nurses Award and the industrial regulation of nursing.
30. That has not been possible. Accordingly, the issues that the ANMF has identified as being raised by the Proposal to which it might have directed evidence, which are set out below, are likely an incomplete set. They are eleven in number.
31. *First*, evidence as to the typicalness and significance of progression from AIN to EN or RN, such that classification under the same award would be appropriate.
32. *Second*, and relatedly, the size and significance of the student nurse cohort undertaking work as AINs under the Nurses Award, and the likelihood of them moving into EN and

RN roles (and, if they so move, whether they tend to move into such roles in the same care sector, or into a different care sector).

33. *Third*, the typicalness of NPs, RNs, ENs, and AINs transferring from one kind of nursing to another (e.g., mental health nursing, acute care nursing, palliative care nursing, primary care nursing, disability nursing). If (which the ANMF considers the evidence would show) transferring between sectors is common, that would tend to suggest that classification of aged-care NPs, RNs, ENs, and AINs with all other NPs, RNs, ENs, and AINs is appropriate.
34. *Fourth*, the likely effect of the Proposal on these progressions and transferences. Relatedly, the effect of the Proposal on the unitary nursing “*professional identity*,” and the consequences on the nursing profession if that were lost.
35. *Fifth*, the impact, financially and on conditions, on NPs, RNs, ENs, and AINs if what is contemplated by the Proposal is that conditions will not transfer across with NPs, RNs, ENs, and AINs into the Aged Care Award. This would require evidence as to typical shift structures, rostering arrangements, loadings, leave provisions, penalties, etc., currently paid to affected workers under the Nurses Award, compared with what would obtain instead under the Aged Care Award.
36. *Sixth*, the impact on established demarcation and coverage arrangements and understandings as between the ANMF and other unions, and as between unions and employers. If (which the ANMF considers the evidence would show), moving NPs, RNs, ENs, and AINs to the Aged Care Award would have a disruptive effect on demarcations, that would tend to undermine the stability of the modern award system and provoke demarcation disputes.
37. It may also affect the way in which bargaining occurs for employees who are currently classified under the Nurses Award, and bargaining outcomes. For example, bargaining strength may be diminished when there is no longer a common floor across all sectors in which nurses are engaged, encouraging a “*race to the bottom*.”
38. *Seventh*, the possible or probable effects, on clinical care and patient safety, of separating out nursing work over several awards. A hallmark of the ANMF’s industrial position for decades has been that “*a nurse is a nurse is a nurse*.” The point is not that there are no nursing specialties; the point is that there is a single and very large regulated



profession, with a uniform pathway to registration and maintenance thereof, and uniform educational standards.

39. This ensures that nurses are able to transfer from one part of the profession to another, and the evidence would establish that they do so transfer. Separation out of nursing into a variety of sub-groups, with different conditions of work, covered by different awards, undermines this objective and is likely to (or at least may) lead to a decrease in transfers between sectors of care. A diminishment of the flow of nurses into and out of different sectors, where cross-pollination leads to knowledge transference across different kinds of care, may affect patient care and outcomes.
40. Another way in which patient care may be affected is via any demarcation changes that arise in consequence of the effecting of the Proposal. Other non-nursing unions have different industrial priorities than the ANMF, on account of the fact that their coverage is (much) broader than care workers. The ANMF is a professional as well as an industrial organisation. Its focus is the interests of nurses and care workers, and the patients to whom they provide care. It brings professional nursing expertise to bear in its activities, and does so with a single-minded focus on the work of nursing teams (including AINs) and outcomes for patients.
41. A possible diminishment in the industrial influence of the ANMF would change the bounds, areas of disputation, points of focus, and outcomes of negotiations in aged care. It is likely to have an effect on clinical care. A reduction in the influence of the professional and industrial organisation representing NPs, RNs, ENs, and AINs is not the kind of outcome that the Royal Commission envisaged when it recommended that applications of the present kind be made. This is something about which the ANMF would adduce evidence in a fully-contested application.
42. *Eighth*, relatedly, the likely effect on conditions of employment for nurses, developed over decades in the context of occupation-based regulation, where the award conditions of employment differ as between different kinds of nursing.
43. *Ninth*, if what is contemplated by the Proposal is that conditions will transfer across with NPs, RNs, ENs, and AINs into the Aged Care Award, the likely effect of that transfer into a new ecosystem (the Aged Care Award) on those conditions, as well as the likely effect on the conditions already in the Aged Care Award.

44. *Tenth*, the rationale for the different treatment of “*supervision*” as between PCW classifications under the Aged Care Award, and AIN classifications under the Nurses Award. For the purposes of assessing the value of the work, no real distinction has been drawn between these classifications; but if the question were not what value is properly to be ascribed to the work, but what is the significance of the different language used in each award, the evidence may well identify meaningful differences.
45. *Eleventh*, differences in bargaining outcomes (both in terms of agreements made, and the terms and conditions of those agreements) in regard to enterprises with workers who would be classified under the Aged Care Award, compared with those with workers who would be classified under the Nurses Award, the effect of which may be to discourage enterprise bargaining, contrary to the modern awards objective.

### **C.3 Other necessary parties**

46. There are other persons whose interests are likely to be affected by the Proposal. The most-obvious candidates are nursing agencies. At present, they are able to pay their nurses, no matter what care sector they happen to be working in on any given day, based on the Nurses Award. The Proposal would complicate this and likely introduce cost and inefficiency.
47. Otherwise, parties who were involved in the litigation of this issue at the time of award modernisation and who supported the making of an occupational award included the Australian Salaried Medical Officers' Federation (“**ASMOF**”), the Australian Services Union (“**ASU**”), and the Australian Council of Trade Unions (“**ACTU**”). These, and other parties, may wish to be heard again. And, while ACSA and LASA represent a fairly broad cross-section of employer interests, there may be other employers who have an interest in resisting the Proposal, and are not on notice that it is being considered.

### **C.4 Conclusion—fairness**

48. At the highest level, the Proposal could not fairly be effected now because a handful of business days is insufficient time for the ANMF even to identify what are the issues raised by the Proposal.
49. But even those handful of business days have enabled the ANMF to identify a range of matters to which it would, were the issue to be fully and fairly litigated, be the subject of evidence (or in relation to which the possibility of calling evidence would at least be

investigated). Because the ANMF has not had the opportunity of calling that evidence, which would or might have a bearing on whether the Proposal should or should not be effected, that is another reason why the Proposal cannot now fairly be effected.

50. And, there are persons whose interest are affected by the Proposal who are not even aware of its existence. Those persons would, in the context of the history of this application, have had no reason to think that something so significant as moving all aged-care nurses into the aged-care award was or would be under consideration.
51. For these reasons, the Commission would not, as part of disposing of these applications, address the issue of whether it is preferable that all aged-care workers move across to the industry award. If any interested person makes an application to effect that change, or the Commission considers it on its own motion, then the ANMF (and other parties) will have an opportunity of calling such evidence as they are advised to call, subject to a timetable that enables them to conduct proper investigation of the issues thereby raised.

**D. The Proposal should not be effected**

52. If, contrary to the submissions set out above, the Commission decides it will enter into the question of whether the Proposal should be effected, the Proposal should not be effected for the reasons identified below.

**D.1 The Nurses Award**

53. The award history and wage fixing principles relevant to setting of pay rates for RNs, ENs, and AINs is addressed in the witness statement of Kristen Wischer, dated 14 September 2021.<sup>6</sup> That evidence is not directed towards the evolution of specific terms and conditions relevant to RNs, ENs, and AINs, save for classifications and wage rates. Likewise, Background Document 2 is relevantly directed towards “*A history of wages and classifications in the Nurses Award 2010*”.
54. The industrial terms and conditions applicable to nurses in Australia at the time of award modernisation had evolved as the product of decades of industrial arbitration in regard to the nursing occupation, including with respect to AINs. Consequently, those

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<sup>6</sup> Statement of Kristen Wischer, dated 14 September 2021 at [7].

terms were directed to fair and relevant terms and conditions for the NPs, RNs, ENs, and AINs.

55. The Nurses Award was created following the award modernisation request, signed by the Minister for Employment and Workplace Relations on 28 March 2008 pursuant to section 576C(1) of the *Workplace Relations Act 1996* (Cth) (“**WR Act**”). Section 576A(2) of the WR Act provided that modern awards:

- (1) must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and
- (2) together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and
- (3) must be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work; and
- (4) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and
- (5) must result in a certain, stable and sustainable modern award system for Australia.

56. During the Award modernisation process the Australian Industrial Relations Commission (“**AIRC**”) considered the terms of the award modernisation request and noted that:<sup>7</sup>

“Clause 4 of the Minister’s request indicates that the Commission is to make modern awards primarily along industry lines but may also create modern awards along occupational lines as it considers appropriate. In context the reference to industry awards is to awards based on the industry of employers. By contrast, the reference to occupational awards is a reference to awards based on the occupation or calling of an employee. The request therefore provides that modern awards should primarily be industry awards, although the Commission may also make occupational awards.”

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<sup>7</sup> Request from the Minister for Employment and Workplace Relations - 28 March 2006 - Full Bench [2008] AIRCFB 550 at [11].

57. The award modernisation process for the health and welfare services sector (excluding social and community services), involved written and oral submissions from many parties.<sup>8</sup> As part of that process, the ANMF (then the Australian Nursing Federation) sought a modern occupational award to apply to nurses employed in the classifications of RN, EN, and AIN. The position of the ANMF was that a modern nursing occupational award would subsume around fifty existing federal awards and around fifty NAPSAs.<sup>9</sup> Support for an occupational nurses award was provided by the:
- (1) ASMOF;<sup>10</sup>
  - (2) the ASU;<sup>11</sup> and
  - (3) the ACTU.<sup>12</sup>
58. That position was opposed by various other parties who favoured various industry approaches or industry awards.<sup>13</sup> Part of the HSU's proposal was the creation of a single Health and Welfare Services Industry Award.
59. During the award modernisation process the ANMF contended that rather than a nursing occupational award being a "*new animal*":<sup>14</sup>
- "... the existing federal and state awards are broadly occupational awards but the making of industry awards, particularly in the aged care sector, would be a dramatic shift away from the historical approach this Commission has taken to awards in the health and welfare industries particularly in relation to nursing."
60. The ANMF sought an occupational award for nurses for reasons including that:
- (1) nursing made up 55 per cent of the health and welfare workforce and was recognised as highly mobile across all sectors of nursing employment;

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<sup>8</sup> The AIRC website hosting information pertaining to the award modernisation process was retired from 18 June 2021. Whilst the information on it is available upon request from the Fair Work Commission, this was not immediately available in preparing these submissions.

<sup>9</sup> Transcript 3 December 2008, Mr Blake appearing for the ANF [PN10].

<sup>10</sup> Transcript 3 December 2008, Mr Grimes appearing for ASMOF [PN265].

<sup>11</sup> Transcript 3 December 2008, Mr Harvey appearing for ASU [PN404].

<sup>12</sup> Correspondence from Michelle Bissett, Industrial Officer, ACTU to the Hon Justice Giudice dated 31 October 2008 re Award Modernisation – Stage 2 Industries; as referenced by Mr Harvey appearing for ASU, Transcript 3 December 2008, [PN404], [PN413] and by Mr Boyce appearing for Aged Care Employers, Transcript 4 December 2008 [PN659].

<sup>13</sup> Transcript 3 December 2008, Mr Blake appearing for the ANF [PN11].

<sup>14</sup> Transcript 3 December 2008, Mr Blake appearing for the ANF [PN45] citing a document "Nursing Awards by Sector" breaking down the existing federal awards and NAPSAs on their scope.

- (2) there was no feature of the nursing workforce that was demarcated on the business of the employer;
  - (3) educational, clinical, registration and training standards were consistent wherever nurses are employed; and
  - (4) 7340 nurses had signed a petition calling for the continuation of nursing occupational awards.<sup>15</sup>
61. In publishing the exposure draft of the *Nurses Occupational Industry Award 2010*, the AIRC noted that the:<sup>16</sup>
- “... Nurses Occupational Industry Award 2010, is, as its name suggests, cast as an occupational award. Nurses are the single biggest occupational group in health and welfare services and the material advanced suggests at this stage that an occupational award is warranted. The award generally applies to nurses wherever employed although nurses employed in secondary schools have been excluded [footnote omitted].”
62. Subsequently, the AIRC noted that it had not adopted the proposal by the HSU to create one award, identifying that:<sup>17</sup>
- “... [t]his approach would have constituted a significant departure from the existing pattern of regulation. It would also have involved important work value considerations and posed a number of relativity issues.”
63. The terms of the Nurses Award differed, and continue to differ, in important ways from the terms and conditions contained in other modern awards. Relevantly, the terms and conditions of the Nurses Award differ from those contained in the Aged Care Award. To identify just a few examples:
- (1) split or broken shifts are not permissible under the Nurses Award (see clause 13.1(i)), but they are under the Aged Care Award (see clause 22.8);
  - (2) persons classified under the Nurses Award are entitled to an additional week of annual leave (see clause 22.2(a)), whereas persons classified under the Aged Care Award are not (see clause 28.1));

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<sup>15</sup> Australian Nursing Federation Award Modernisation Submissions October 2008.

<sup>16</sup> Award Modernisation - Statement - Full Bench [2009] AIRCFB 50 at [77].

<sup>17</sup> Award Modernisation - Decision - Full Bench [2009] AIRCFB 345 at [146].

- (3) there is pay loading for recall within a rest break under the Nurses Award (clause 13.4), but not under the Aged Care Award (clause 22.4);
  - (4) an on-call allowance is payable under the Nurses Award (clause 17.2(a), see also clause 19(b) for recall payments), but not under the Aged Care Award;
  - (5) the shiftwork loadings are higher under the Nurses Award (clause 20.2) than they are under the Aged Care Award (clause 26.1);
  - (6) public holiday rates are higher under the Nurses Award (clause 28.2) than they are under the Aged Care Award (clause 29.2);
  - (7) disabled employees are entitled to full rates under the Nurses Award, but are subject to a Supported Wage System framework under the Aged Care Award;
  - (8) employees undergoing training are entitled to full rates under the Nurses Award, but are subject to a training wage under the Aged Care Award.
64. The issue of annual leave under the Nurses Award was the subject of specific consideration in the award modernisation process. As noted by the Full Bench:<sup>18</sup>
- “Another important matter related to annual leave for nurses. There was universal agreement that the history of annual leave for nurses is both complex and diverse. In the exposure draft we tentatively reached the conclusion that the provision of five weeks leave for all nurses was a reasonable balance between the existing award entitlements. This meant that there were some who may be entitled to an increase but clearly there were nurses whose annual leave would decrease. This quantum was raised as a cost increase in some areas however concern was expressed at the level of penalty rate for public holidays worked by nurses. The exposure draft contained a penalty of 250% for working on a public holiday. It was argued that there was a trade-off between extra leave and payment for a public holiday being reduced to 200%. The Australian Nursing Federation (ANF) submitted that no such trade-off existed. Whilst it appears true that no express trade-off is evident, nonetheless, where the greater annual leave amount is available there generally exists lower payments for public holidays. We have altered the exposure draft by reducing the payment of public holidays to 200%.”
65. A further issue of contention in making the Nurses Award was whether and to what extent AINs (or nursing assistants) should be covered by that award. Ultimately the AIRC determined that:<sup>19</sup>

“In the Nurses Award 2010 there is also a classification for nursing assistant.

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<sup>18</sup> Award Modernisation - Decision - Full Bench [2009] AIRCFB 345 at [151].

<sup>19</sup> Award Modernisation - Decision - Full Bench [2009] AIRCFB 345 at [152].

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

66. Subsequent to the making of the Nurses Award, no party has sought the removal of aged care employees in any four-yearly review.

## **D.2 Aged Care Award**

67. The Aged Care Award was not made to cover, and has never covered, NPs, RNs, ENs or AINs (as defined in the Nurses Award).
68. During the award modernisation process the scope of the initial exposure draft of the Aged Care Award published by the AIRC included both aged care provided by persons covered by the award in institutions and in the home.<sup>20</sup> However, following submissions by various interested parties, coverage of this award was revised such that home care employees were (and continue to be) removed from the Aged Care Award and solely covered by the SCHCADS Award.<sup>21</sup>
69. Accordingly, the terms of the Aged Care Award are not directed towards providing a safety net of terms and conditions for NPs, RNs, ENs, or AINs (as defined in the Nurses Award), or for employees providing aged care in the home.

## **D.3 The Proposal is not necessary to meet the modern awards objective**

70. The utility which underpinned the making of the Nurses Award as an occupational award remains today. The requirements of modern awards at section 576A(2) of the WR Act, set out above at [55] above, are echoed in the present modern award objective. The justification for a comprehensive occupational award for nurses, including the coverage of those performing aged care work, remains applicable. The Proposal would constitute a significant departure from the existing, longstanding, pattern of regulation.
71. The removal of an industry segment from that occupational award would also undermine the operation of the Nurses Award as an occupational award, and the reasons justifying the making of the award during the award modernisation process.

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<sup>20</sup> Award Modernisation - Statement - Full Bench [2009] AIRCFB 50 at [76].

<sup>21</sup> Award Modernisation - Decision - re Stage 4 modern awards [2009] AIRCFB 945 at [77]



72. If the effect of the Proposal is to lift NP, RN, EN, and AIN classifications from the Nurses Award into the Aged Care Award, this would deprive those employees of a fair and relevant minimum safety net of terms and conditions as have been developed over decades and were incorporated into the Nurses Award. This would leave NPs, RNs, ENs, and AINs (as defined in the Nurses Award) covered by award terms and conditions developed and adopted for different classes of employees.
73. If the effect of the Proposal is to lift NP, RN, EN, and AIN classifications from the Nurses Award into the Aged Care Award with their applicable conditions this would fail to ensure a simple and easy to understand modern award system. Rather, this would enhance complexity—it would create, under the same award, different conditions based, in effect, on what schedule a worker fell into. This would also encourage (or at least allow) the development of different conditions for nurses depending on the care sector in which they worked. To the extent that this would also involve an expansion of the operation of the Aged Care Award into home care, this was expressly rejected during award modernisation.
74. As identified above, the Full Bench was cognisant of concerns about an overlap between the AIN classification under the Nurses Award and the personal care worker under the Aged Care Award during award modernisation. Despite that, the classification was included in the Nurses Award in a way recognised as directly relevant to the work of nurses. That is, unlike a PCW, an AIN (as defined under the Nurses Award) is an employee:
  - (1) is under the direct control and supervision of an RN;
  - (2) whose employment is solely to assist an RN or EN in the provision of nursing care to persons.
75. That is, the role of the AIN is directly and intimately linked to the work of RNs and ENs. Such a role exists solely to assist RNs and ENs. Terms and conditions applicable to RNs and ENs will therefore also be relevant to AINs.
76. As identified above, there are additional matters relevant to the Proposal to which the ANMF may have directed evidence. Save to say that the ANMF would seek to adduce evidence and make submissions about its concern that the Proposal may result in a loss

of conditions, bargaining strength, and the ability to protect and promote the nursing profession, these issues are not addressed further here.

77. What is sought by the ANMF is essentially an industry schedule to an occupational award. Such approach is not foreign to the landscape of modern awards. Rather, this echoes the *Air Pilots Award 2020* which is an occupational award with separate Schedules providing for sector specific terms and conditions, or the *Professional Employees Award 2020* (which is a combined industry and occupational award).
78. The ANMF remains committed to bringing a further application to address any inconsistency in the Nurses Award arising from its application.

**J C McKenna**

**J E Hartley**

*Counsel for the ANMF*

30 August 2022

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Gordon Legal

Solicitors for the ANMF