

## IN THE FAIR WORK COMMISSION

**Matter No.:** AM2020/99

**Re Application by:** Health Services Union and others

### **SUBMISSIONS OF THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION IN THE MATTER OF AN APPLICATION BY THE HEALTH SERVICES UNION AND OTHERS TO VARY THE *AGED CARE AWARD 2010***

1. On or about 17 November 2020, the Health Services Union (“HSU”) and others made an application under section 158 of the *Fair Work Act 2009* (Cth) (“the Act”) to vary the *Aged Care Award 2010*. The grounds and reasons given in support of the HSU’s case included the following:
  - (a) “The current Award wage rates do not recognise the nature of work, the level of skill and responsibility involved in performing the work or the conditions under which work is performed by employees covered by the Award and working in personal care services, general and administrative services and food services.”
  - (b) “[I]t is anticipated that further changes to the conditions under which work is performed will result from the Royal Commission into Aged Care Quality and Safety (legislated to hand down its report on 26 February 2021).” See Annexure B to the HSU’s application at [20], [29] and [40].
2. On 23 November 2020, at a Mention before the Fair Work Commission (“FWC”), Senior Counsel for the HSU stated, “The applicants believe that the current award doesn’t provide wage rates that properly reflect the value of the work, the skills and responsibilities of the employees in residential aged care and consistent with what have been concerns expressed by a series of reports and inquires over time, including in the course of the current aged care royal commission...” (see transcript of proceedings at PN6).
3. On 14 December 2020, the HSU informed the FWC that it anticipated that the evidence in support of the HSU’s case would cover “the findings and observations of the Royal Commission into Aged Care Quality and Safety”.

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4. On 18 December 2020, the FWC made directions in relation to the HSU's application. The Applicants and other union parties were directed to file evidence and submissions by 4pm on Thursday 1 April 2021. In accordance with that direction, these submissions are made by the Australian Nursing and Midwifery Federation ("ANMF") in respect of the HSU's case as the ANMF presently apprehends it.
5. On 1 March 2021, the final report of the Royal Commission into Aged Care Quality and Safety was tabled in Parliament. Its 'Recommendation 84: Increases in award wages' 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).*
6. The 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, the ANMF is seeking to collaborate with the Australian Government and employers, with a view to applying to vary the wage rates in those awards. The ANMF wrote to the then 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 attached to these submissions.
  7. 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.*

8. On 25 March 2021, the Australian Government Solicitor on behalf of the Commonwealth sent a letter to the FWC in which it referred to Recommendation 145 of the Royal Commission as follows:

*By 31 May 2021, the Australian Government should report to Parliament about its response to the recommendations in our final report. The report should indicate whether each recommendation directed to the Australian Government is accepted, accepted in principle, rejected or subject to further consideration. The report should also include some detail about how the recommendations that are accepted will be implemented and should explain the reasons for any rejections.*

The Commonwealth stated, “Consistent with this recommendation, the Australian Government will announce its response to the recommendations of the Final Report on or before 31 May 2021.” Presently, it is unclear whether or not the Commonwealth proposes to file any evidence or submissions in relation to the HSU’s application.

9. 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. The ANMF submits that 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.
10. As noted above, in November and December 2020, the HSU made multiple representations that the proceedings of the Royal Commission into Aged Care Quality and Safety were relevant to its proposed variations to the *Aged Care Award 2010*. However, it now says that its application is not brought “to give effect to a Royal Commission recommendation” (see the letter from the solicitors for the HSU to the FWC dated 26 March 2021 at [6]). The FWC has observed that “[t]he HSU has made it clear that their application is not predicated on the Royal Commission report” (see transcript of proceedings dated 26 March 2021 at PN57, and see also PN47 and PN69).
11. The Royal Commission into Aged Care Quality and Safety:
  - (a) was conducted over a period of more than 2 years and 4 months;
  - (b) received a total of 10,574 public submissions;
  - (c) heard evidence from over 600 witnesses across 99 hearing days;
  - (d) hosted over 2,400 attendees across 12 community forums;

- (e) conducted 13 roundtable consultations with subject matter experts;
- (f) visited 34 aged care service providers across 7 States and Territories.

The product of these proceedings is the final report that was tabled in Parliament on 1 March 2021 (see Volume 1 for a summary of the proceedings outlined above). After all of the above, it is remarkable that an application to vary the *Aged Care Award 2010* would be pressed in a manner that is inconsistent with the express recommendation of the Royal Commission.

12. The ANMF agrees that the current wage rates in the *Aged Care Award 2010* do not recognise the nature of work, the level of skill and responsibility involved in performing the work or the conditions under which work is performed by employees covered by that award. Likewise, the current wage rates in the *Nurses Award 2010* do not recognise the nature of work, the level of skill and responsibility involved in performing the work or the conditions under which work is performed by employees covered by that award.
13. The ANMF accepts the recommendation of the Royal Commission to address this and proposes to act in a manner that allows for that recommendation to be implemented. The ANMF adopts this approach on the basis that it is in the best interests of employees covered by the *Aged Care Award 2010* and the *Nurses Award 2010*. In circumstances where the parties have not had the opportunity to collaborate with each other on the basis of the Royal Commission's recommendation, the ANMF rejects any prejudicial conclusion to the effect that the Royal Commission "may have been a touch optimistic" (see transcript of proceedings dated 26 March 2021 at PN28) in its report.
14. Subject to any collaboration with the Australian Government, employers and other employee organisations, the ANMF proposes to make an application under section 158 of the Act in respect of the *Aged Care Award 2010*, predicated on the Royal Commission's report, by 17 May 2021.
15. Further, the Royal Commission's recommendation was not confined to the *Aged Care Award 2010*. Subject to any collaboration with the Australian Government, employers and other employee organisations, the ANMF proposes to make an application under section 158 of the Act in respect of the *Nurses Award 2010* by 17 May 2021. The United Workers Union ("UWU") has indicated that it proposes to make an application to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* by the same date (see the letter from the UWU to the FWC dated 24 March 2021).

16. Upon its applications under section 158 of the Act in respect of the *Aged Care Award 2010* and the *Nurses Award 2010*, the ANMF proposes to seek directions for the filing of evidence and submissions in relation to those applications in the usual manner.
17. The considerations relevant to those applications will inevitably include factors such as the relativities as between the relevant awards and as between the classifications within those awards (see *Re Pharmacy Industry Award 2010* (2018) 284 IR 121 at [160], quoting *Re Australian Liquor, Hospitality and Miscellaneous Workers Union* (unreported, AIRC (FB), PR954938, 13 January 2005) at [191]).

**GORDON LEGAL**  
Solicitors for the ANMF

1 April 2021



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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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](mailto: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:

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- 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.

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 chapters [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.*

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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 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