



# DECISION

*Fair Work Act 2009*

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

## **Health Sector Awards—Pandemic Leave**

(AM2020/13)

VICE PRESIDENT HATCHER  
DEPUTY PRESIDENT CLANCY  
DEPUTY PRESIDENT DEAN  
COMMISSIONER SPENCER  
COMMISSIONER LEE

SYDNEY, 27 JULY 2020

*Applications to vary Health sector awards – pandemic leave – significant deterioration in position – Aged Care Award – Health Professionals Award – Nurses Award – draft determinations issued.*

### **Background**

[1] In a decision published on 8 April 2020 (the April Decision), a Full Bench of the Commission, acting on its own initiative in response to the current worldwide COVID-19 pandemic, determined to vary 99 modern awards to include provisions establishing an entitlement to unpaid pandemic leave.<sup>1</sup> In the April Decision we noted that the Australian Council of Trade Unions (ACTU), the Australian Nurses and Midwives Federation (ANMF), the Health Services Union (HSU) and the Australian Professionals, Engineers, Scientists and Managers Association (APESMA) foreshadowed that further measures might need to be taken in respect of “health care workers” covered by a number of awards (Health awards).<sup>2</sup>

[2] The President of the Commission, Justice Ross, issued a statement on 15 April 2020<sup>3</sup> (the April Statement) in which it was noted that the ACTU was coordinating the finalisation of claims in respect of the matter. The April Statement also included some commentary about the coverage of enterprise agreements in the areas covered by the Health awards identified by the ACTU and other unions.

[3] Following the April Statement, the following applications were filed pursuant to s.158 of the *Fair Work Act 2009* (the FW Act):

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<sup>1</sup> [2020] FWCFB 1837

<sup>2</sup> *Aboriginal Community Controlled Health Services Award 2010; Aged Care Award 2010; Ambulance and Patient Transport Industry Award 2010; Health Professionals and Support Services Award 2010; Medical Practitioners Award 2010; Nurses Award 2010; Pharmacy Industry Award 2010; Social, Community, Home Care and Disability Services Industry Award 2010; Supported Employment Services Award 2010*

<sup>3</sup> [2020] FWC 1956

- Application by the HSU and the United Workers' Union (UWU) to vary the *Aboriginal Community Controlled Health Services Award 2020*;
- Application by the HSU, UWU and ANMF to vary the *Aged Care Award 2010*;
- Application by the UWU and the HSU to vary the *Ambulance and Patient Transport Industry Award 2020*;
- Application by the HSU and UWU to vary the *Health Professionals and Support Services Award 2010*;
- Application by the Australian Salaried Medical Officers Federation (ASMOF) and the HSU to vary the *Medical Practitioners Award 2020*;
- Application by the ANMF, UWU and HSU to vary the *Nurses Award 2010*;
- Application by the AMESMA and the Shop, Distributive and Allied Employees Association (SDA) to vary the *Pharmacy Industry Award 2010*;
- Application by the Australian Municipal, Administrative, Clerical and Services Union (ASU), the HSU and UWU to vary the *Social, Community, Home Care and Disability Services Industry Award 2010*;
- Application by the ASU, the HSU and the UWU to vary the *Supported Employment Services Award 2010*; and
- Application by Mr Alan Stokes to vary the *Ambulance and Patient Transport Industry Award 2020*.

[4] In a Decision issued on 8 July 2020 (8 July Decision) we determined that we would not at that time grant the applications made by a number of unions to vary identified “Health awards”<sup>4</sup> to provide for paid pandemic leave. On a fairly fine balance, we determined that we were not at that time satisfied that the grant of the unions’ application was necessary to achieve the modern awards objective in s 134(1) of the FW Act.

[5] In a Statement issued on 22 July 2020 (22 July Statement) we identified that there had been a significant change in circumstances since the 8 July Decision was issued.<sup>5</sup> We expressed a provisional view that the significant change in circumstances would justify the grant of a paid pandemic leave provision in the *Aged Care Award 2010* (Aged Care Award) of the type foreshadowed in paragraph [131] of the 8 July decision—that is, a provision entitling employees to up to two weeks’ paid leave on each occasion they are required to self-isolate because they display symptoms of COVID-19 or have come into contact with a person suspected of having contracted COVID-19.

[6] In the 22 July Statement we noted that there had also been an announcement published on 20 July 2020 of a one-off \$1,500 payment to financially support Victorian aged care

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<sup>4</sup> [2020] FWCFB 3561

<sup>5</sup> [2020] FWCFB 3834

workers who have been instructed to self-isolate or quarantine at home because they are either diagnosed with COVID-19 or are a close contact of a confirmed case, but cannot rely on sick leave while absent from work.<sup>6</sup>

[7] However, we noted that, in determining whether we should proceed to vary the Aged Care Award in accordance with our provisional view, it would be necessary to take into account the announcement described in paragraph [6] above. We considered that it might be that the contemplated scheme of payment referred to in the announcement would constitute an adequate substitute for any award variation to provide for paid pandemic leave that we might make and/or that the announcement reflects an industry consensus reached between governments, employers and unions as to how the current situation in the aged care industry in Victoria should appropriately be dealt with. We noted that further information was required to allow us to properly assess the position in that respect.

[8] We invited interested parties, and relevant government ministers and authorities, to file written submissions responding to the provisional views expressed in paragraphs [5] and [7] above, and to provide further information concerning the contemplated scheme of payment referred to in the announcement of 20 July 2020, by 12.00pm on Friday 24 July 2020.

[9] Submissions were filed by the following parties:

- [Australian Chamber of Commerce and Industry, Aged and Community Services Australia, Leading Age Services Australia, Australian Business Industrial and the New South Wales Business Chamber](#) (collectively ACCI);
- [Australian Council of Trade Unions and United Workers' Union](#) (ACTU);
- [Australian Federation of Employers and Industries](#) (AFEI);
- [Australian Nursing and Midwifery Federation](#) (ANMF); and
- [Health Services Union](#) (HSU).

[10] Further information about financial assistance payments was provided by the [Australian Government—Department of Health](#) (AGDH) and the [Victorian State Government](#).

[11] On 24 July 2020 we issued a further Statement<sup>7</sup> (24 July statement) stating that in submissions filed by the ACTU, the HSU and the ANMF it was contended that, to give proper effect to the reasoning in the 22 July Statement concerning the effect of the COVID-19 pandemic in the residential aged care sector, it would be necessary to extend any paid pandemic leave entitlement to persons working in the sector who are covered by the *Nurses Award 2010* (Nurses Award) or the *Health Professionals and Support Services Award 2020* (Health Professionals Award). We expressed the provisional view that those submissions had substantial merit, and we proposed to give urgent consideration as to whether a paid pandemic

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<sup>6</sup> Media release of the Hon Greg Hunt MP, Commonwealth Minister for Health, published 20 July 2020

<sup>7</sup> [2020] FWCFB 3906

leave entitlement of the type foreshadowed in the 8 July Decision should be extended to employees who work in residential aged care facilities and are covered by the Nurses Award or the Health Professionals Award. We invited interested parties and relevant government ministers and authorities to file written submissions in response to this provisional view and the relevant aspect of the submission of the ACTU, the HSU and the ANMF by 2.00pm on Monday 27 July 2020.

### **Additional information from government**

#### *Australian Government – Department of Health*

**[12]** The AGDH provided further information following its announcement of 20 July 2020. It stated the Commonwealth is providing additional financial assistance to:

- Ensure residential aged care employers can cover any additional entitlements to enable employees to work at a single site;
- Ensure residential and home care providers can engage and train additional staff where existing employees are unable to work due to self-isolation requirements and/or where a more intensive workforce mix is required;
- Ensure residential and home care providers can support aged care workers who are unable to work due to symptoms, self-isolation or travel restrictions, regardless of whether they would usually receive paid leave; and
- Ensure residential and home care providers can provide alternative accommodation so workers who live or work in “hotspots” can continue to work.

**[13]** With regard to eligibility, aged care providers located in declared “hotspots”, or employing staff residing in those “hotspots”, will be able to apply for a Commonwealth grant to assist with wage costs. That grant will be paid to the provider to ensure that employees are not disadvantaged by the requirement to self-isolate or to work at only one provider.

**[14]** The AGDH anticipated that grants will be used, for example, to pay casual employees without paid leave entitlements who have to be absent from work due to COVID-19, to provide paid leave to permanent employees without any leave entitlements and to fund payments for additional hours or overtime so employees can work at a single location.

**[15]** AGDH notes that the direct payment for workers is the responsibility of the Victorian Government.

#### *Victorian State Government*

**[16]** The Victorian State Government provided further information on its \$1,500 payment (Victorian WSP) which was designed to financially support eligible Victorian workers (casual, permanent and fixed term) who meet the following requirements:

- are directed by the Victorian Department of Health and Human Services (DHHS) to self-isolate or quarantine at home because they have either contracted COVID-19 or are identified as a close contact of a confirmed case; or

- are directed by DHHS that their child under 16 years of age must self-isolate or quarantine at home because they have either contracted COVID-19 or are identified as a close contact of a confirmed case.

[17] A worker must also meet the following requirements:

- aged 17 years old or more and currently reside in Victoria;
- be likely to have worked during the period of self-isolation or quarantine and is unable to work as a result of the requirement to stay at home, self-isolate or quarantine;
- not be receiving any income, earnings or salary maintenance as a result of not being able to work during the period of self-isolation or quarantine;
- have exhausted all paid personal leave requirements including any type of paid special leave; and
- not be receiving a JobKeeper payment or other forms of Commonwealth Government income support.

[18] The Victorian State Government has also announced a \$300 payment to workers who have been tested for COVID-19, meet the eligibility requirements and are awaiting their test results.

[19] The Victorian State Government supported the principle of paid pandemic leave. It stated a long-term structural solution could be required to respond to the long-term effects of the pandemic. It stated the Victorian WSP was not intended to replace any paid pandemic leave and does not reflect industry consensus in relation to how the current situation in respect of aged care should be responded to. It also stated that the Victorian WSP is available to all eligible Victorians and is not confined to the aged care industry. Workers in public Victorian hospitals and health services working in residential aged care facilities operated by those public hospitals are entitled to paid special leave.

### **Submissions in response to the 22 July Statement**

#### *ACTU*

[20] The ACTU made submissions on its own behalf and on behalf of the UWU. It generally supported the provisional view set out at paragraph [4] of the 22 July Statement but expressed three concerns. Firstly, the ACTU submitted it was unclear why casual employees not engaged on a regular and systematic basis would be excluded from the entitlement, given that there is no information that those employees would be less likely to be infected with COVID-19 or to transmit it. Secondly, the ACTU submitted it was unclear whether the self-isolation conditions set out at paragraph [131] of the 8 July Decision were intended to be general descriptions or fixed categories. Should the provisional view only include the conditions set out at dot point 2, the ACTU submitted the entitlement may be too narrow. Finally, the ACTU expressed concern that the provisional view does not adequately cover all types of work performed at residential aged care facilities.

**[21]** The ACTU filed a draft determination that it said would give effect to our provisional view. The ACTU submitted that the draft determination maintains the existing Schedule X unpaid entitlements, predominantly because they will continue to apply to casuals whose engagement is neither regular nor systematic, and inserts a new Schedule containing the paid entitlement. The proposed Schedule is as follows:

**Schedule Y – Industry Specific Measures During the COVID-19 Pandemic**

**Y.1** Subject to clauses Y.2.1(d) and Y.2.2(c), Schedule Y operates from [X] 2020 until 30 September. The period of operation can be extended on application.

**Y.2.1 Paid pandemic leave**

**(a)** Subject to clauses Y.2.1(c), (d), (e) and (f), an employee is entitled to take up to 2 weeks' leave on each occasion the employee is prevented from working:

**(i)** because the employee is required by government or medical authorities to self isolate or quarantine;

**(ii)** because the employee is required by their employer to self isolate or quarantine;

**(iii)** because the employee is required on the advice of a medical practitioner to self isolate or quarantine because they are displaying symptoms of COVID-19 or are suspected to have come into contact with a person suspected of having contracted COVID-19;

**(iv)** because the employee is in isolation or quarantine while waiting for the results of a COVID-19 test; or

**(v)** because of measures taken by government or medical authorities in response to the COVID-19 pandemic.

**(b)** An employee is entitled to a paid day of leave on each occasion the employee is tested for COVID-19, save where such test is performed at the employee's usual workplace and counted as working time.

**(c)** Except where Y.2.1(a)(ii) applies, the employee must give their employer notice of the taking of leave under clause Y.2.1(a) and of the reason the employee requires the leave, as soon as practicable (which may be a time after the leave has started).

**(d)** Except where Y.2.1(a)(ii) applies, an employee who has given their employer notice of taking leave under clause Y.2.1(a) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason given in clause Y.2.1(a).

**(e)** A period of leave under clause Y.2.1(a) must start before 30 September 2020, but may end after that date.

**(f)** A casual employee is not entitled to leave under this clause unless engaged on a regular and systematic basis.

**(g)** Leave taken under clause Y.2.1(a) does not affect any other paid or unpaid leave entitlement of the employee and counts as service for the purposes of entitlements under this award and the NES.

**(h)** For a full time employee, leave taken under clause Y.2.1(a) shall be paid at the employee's base rate of pay for the employee's ordinary hours of work in the period of leave.

**(i)** For a part-time employee, pay will be for either:

**(i)** their agreed ordinary hours of work under 10.3(c)(i); or

**(ii)** the average of their weekly ordinary hours of work for the previous twelve months; whichever is greater

**(j)** For a casual employee, pay for leave taken under clause Y.2.1(a) shall be calculated on the average weekly pay received by the employee in the previous 6 weeks, or where the employee has been employed for less than 6 weeks, for the duration of their employment.

NOTE 1: A employee covered by this award who is entitled to the benefit of this Schedule has a workplace right under section 341(1)(a) of the Act.

NOTE 2: Under section 340(1) of the Act, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes or does not propose to exercise a workplace right, or to prevent the employee exercising a workplace right. Under section 342(1) of the Act, an employer takes adverse action against an employee if the employer dismisses the employee, injures the employee in his or her employment, alters the position of the employee to the employee's prejudice, or discriminates between the employee and other employees of the employer.

NOTE 3: Under section 343(1) of the Act, a person must not organise or take, or threaten to organise or take, action against another person with intent to coerce the person to exercise or not exercise, or propose to exercise or not exercise, a workplace right, or to exercise or propose to exercise a workplace right in a particular way.

**[22]** The ACTU submitted a paid pandemic leave entitlement should also be inserted in the Nurses Award and the Health Professionals Award. If such an approach is adopted, the ACTU submitted it could be drafted in such a way to only apply to employees working at residential aged care facilities.

**[23]** As to government financial assistance measures announced for Victorian workers, the ACTU submitted these payments are not legislative in nature or enforceable. Therefore, they are not the same character as the safety net of fair, relevant and enforceable minimum terms and conditions envisaged by the FW Act. Those measures do not provide a safety net to workers outside Victoria.

**[24]** The ACTU submitted there are a number of differences between the claim made in these proceedings and the Victorian Government's financial assistance measures:

- The \$1,500 and \$300 payments are *one-off payments*, as opposed to the variation sought in these proceedings for employees to be entitled to paid pandemic leave *per occasion* when the circumstances for entitlement are met;
- A worker employed at the lowest grade under the Aged Care Award would receive more income over two weeks, for a 36 hour week or more (excluding penalty rates or other payments) than the payment provided by the Victorian Government;
- Workers cannot apply for a Victorian Government payment; contact initiated by the Department is a key and mandatory element of their process, as opposed to the ACTU claim which allows a worker to initiate the entitlement;
- It is not clear when the Victorian Government would make payments. The ACTU's proposed schedule would require an employer to pay the entitlement in line with award payment of wages provisions (weekly or fortnightly);
- Employees must be "without income during the required isolation/quarantine period" and "unable to work as a result of the requirement to stay at home, isolate or quarantine" in order to be eligible for the Victorian Government payments. Further, employees must not be receiving, or be eligible to receive, any other form of Victorian or Commonwealth government income support. Therefore, employees receiving child support or working a secondary job from home would be excluded. Additionally, employees receiving partial income support would be excluded. The ACTU submits these restrictions and exclusions are not included in the entitlement sought in these proceedings;
- The Victorian Government payments do not cover all possible situations in which a person could be required to self-isolate or quarantine; they are only provided when the Department of Health and Human Services directs the person to do so and the person has either contracted COVID-19 or is a close contact of a positive case. In contrast, the ACTU's claim is intended to cover all legitimate requirements for self-isolation and quarantine;
- To qualify for the Victorian Government payments, an employee must have exhausted any available sick leave entitlements, including any special pandemic leave. The ACTU submits that it is not explicitly stated that leave entitlements need to be paid leave entitlements and if unpaid leave is included in this requirement, then no award reliant employee would be eligible until they had been in self-isolation or quarantine for more than 2 weeks; and
- Eligibility for the \$300 payment is unclear in a number of ways and the timing of the payment is uncertain.

**[25]** The ACTU submitted we cannot be satisfied the Victorian Government financial assistance payments are a suitable alternative for the entitlement sought in these proceedings. Further, it would not be appropriate to 'carve out' the operation of any schedule in Victoria.



In response to paragraph [5] of the 22 July Statement, it states the arrangements in Victoria are not reflective of any consensus, nor consultation with its affiliates.

*AFEI*

[26] AFEI opposed the provisional view set out at paragraph [4] of the 22 July Statement. AFEI's reasons may be summarised as follows:

- The source of the information at paragraph [2] of the 22 July Statement, and its relevance, is unclear;
- The information at paragraph [2] of the 22 July Statement is not probative evidence establishing an elevated risk to aged care workers, manifested from the aged care industry, or which sufficiently warrants the insertion of a paid pandemic leave provision;
- Government funding is available for employees who do not have sick leave;
- No draft determination reflecting the provisional view is available and therefore a number of questions around the scope of the proposed clause cannot be addressed; and
- The meaning of the “threat to the aged care system in Victoria”, referred to at paragraph [4] of the 22 July statement, is unclear, particularly in light of recent government initiatives or its relevance to the modern awards objective.

[27] AFEI observed that a significant number of COVID-19 cases are based on Victoria and referred to announcements on 20 and 23 June 2020 by the Victorian State Government which set out financial support for workers impacted by COVID-19. AFEI submitted that those payments are for employees who do not have sick leave entitlements and their purpose is to ensure there is no financial reason for people not to self-isolate. AFEI submitted that our provisional view is incompatible with the Victorian Government's financial assistance payments and could result in employees being compensated twice for a period of leave, at an employer's expense.

[28] AFEI submitted that in the absence of a draft determination being issued, it was unable to comment on a number of issues relating to scope of the proposed clause. AFEI's issues related to eligibility for the paid pandemic leave, including whether employees would be required to exhaust existing paid leave entitlements prior to becoming eligible for paid pandemic leave; whether an employee would be eligible for the paid pandemic leave where contact with a person suspected to have COVID-19 was not in the course of employment; whether a person would be eligible for paid pandemic leave where they can be provided work to perform from home; and who it is that makes the directive for an employee to self-isolate.

*HSU*

[29] The HSU supported the variation of the Aged Care Award to allow employees up to two weeks' paid pandemic leave for each occasion they are required to self-isolate. It supported the submissions of the ACTU and ANMF. It submitted that to adequately address the outbreaks in the residential aged care facilities the same variation should be made to the

Nurses Award and the Health Professionals Award. The HSU submitted that the Aged Care Award has limited coverage, in that it only applies to aged care workers in residential facilities such as personal care and food services employees. Residential aged care facilities also employ allied health professionals (such as dietitians, occupational therapists and physiotherapists) and nurses, who are covered by the Health Professionals Award and the Nurses Award.

**[30]** The HSU submitted that the Victorian WSP is not a reason to reject the insertion of paid pandemic leave provisions in the Aged Care Award. It also submitted that employees working in residential aged care facilities in New South Wales should have access to paid pandemic leave. In respect of New South Wales, the HSU noted it has members in aged care who had been directed by their employers to self-isolate for two weeks, using their accrued leave, if they had been to any locations associated with COVID-19 outbreaks in South Western Sydney and Batemans Bay.<sup>8</sup> According to the HSU, for employees with little or no leave entitlements (such as casuals) there is “a serious disincentive” for employees who have visited those venues to advise their employer.

*ANMF*

**[31]** The ANMF supported the variation of the Aged Care Award to insert a provision entitling employees, including casuals, to up to two weeks’ paid leave, for each occasion they are required to self-isolate. It supported the submissions made by the ACTU and the HSU and agreed it would be appropriate to extend the entitlement to paid pandemic leave to workers covered by the Health Professionals Award.

**[32]** It submitted the Victorian WSP does not provide adequate income support replacement for employees required to self-isolate or quarantine and does not satisfy the need for paid pandemic leave for the following reasons:

- it is a one-off \$1,500 payment, which is not sufficient for employees in the health care setting who may face multiple occasions requiring absence from work for these reasons;
- the requirement to have exhausted all personal leave entitlements is a barrier to accessing personal leave in its broader sense—personal leave may be ‘saved’ to ensure access to leave for caring responsibilities and other personal illness. In the female-dominated nursing and care professions, access to personal leave is important; and
- some employers have required nursing and care employees working across multiple facilities to self-isolate if they have worked at a facility with a COVID-19 case, even though those employees are not identified as a close contact. Some employers have required employees to take paid types of leave or unpaid leave in these circumstances. Employees with accrued personal leave may not access the Victorian WSP in this case.

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<sup>8</sup> [New South Wales Government, COVID-19 latest news and updates.](#)

[33] The ANMF submitted that employees cannot access the Victorian WSP in circumstances where they are required to isolate at home due to minor symptoms but are not medically unfit for work. Further, the majority of nurses and carers cannot work from home and therefore must take leave. If personal leave is exhausted, or refused, employees are potentially left without a source of income as the one-off \$1,500 payment does not cover these circumstances. Further, the additional \$300 payment to employees who do not have access to personal leave but must take leave after being tested and while awaiting test results is subject to the same eligibility criteria as the one-off \$1,500 payment and therefore would present the same barriers to access.

[34] The ANMF submitted that for the variation to the Aged Care Award to be effective, the same variation must also be made to the Nurses Award, so Nurses and Nursing Assistants can also access paid pandemic leave. It submitted that workers with the title ‘Assistant in Nursing’ or ‘Nursing Assistant’ are covered by the Nurses Award. For Personal Care Workers or Personal Care Attendants, award coverage between the Nurses Award or the Aged Care Award will differ depending on the industrial history of each state and territory.

[35] In support of its submission to extend the entitlement to paid pandemic leave to the Nurses Award, the ANMF stated that a ‘significant number’ of Registered Nurses, Enrolled Nurses and Nursing Assistants are employed in residential aged care. It relies on the 2016 National Aged Care Workforce Census and Survey, published in 2017, which found that 153,854 employees were engaged in the residential aged care setting in direct care roles.<sup>9</sup> A later report, published in 2018, found that 42,396 registered and employed nurses were engaged principally at a residential aged care facility.<sup>10</sup>

[36] In relation to reliance on the Nurses Award, the ANMF submitted that in the private sector 96% of Victorian residential aged care facilities are fully covered by enterprise agreements, 95% in New South Wales, 92% in Tasmania and 78% in Queensland. Nurses employed in the public sector in each state and territory are not covered by the Nurses Award but are covered by state awards, enterprise agreements or federal enterprise agreements. There is a low level of enterprise agreement coverage in labour hire organisations, such as nursing agencies that engage nurses to work across a range of settings to cover employment shortages. The ANMF referred to the Witness Statement of Sue Cudmore,<sup>11</sup> in which Ms Cudmore gave evidence that the 5,800 nursing staff who were engaged by nursing agency Health Solutions were award reliant. It submitted that award reliance in the aged care setting is most prevalent in smaller nursing homes and community and home care services. Further, nursing assistants are more likely to be award reliant than Registered and Enrolled Nurses.

[37] The ANMF submitted that the evidence of Ms Rani Sebastian, as summarised at paragraph [54] of the 8 July Decision, is indicative of the duties typically performed by registered nurses in residential aged care. Registered and Enrolled Nurses, all covered by the Nurses Award, make up approximately 25% of the direct aged care workforce. Nursing

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<sup>9</sup> 2016 National Aged Care Workforce Census and Survey – The Aged Care Workforce, 2016; [https://www.gen-agedcaredata.gov.au/www\\_ahwgen/media/Workforce/The-Aged-Care-Workforce-2016.pdf](https://www.gen-agedcaredata.gov.au/www_ahwgen/media/Workforce/The-Aged-Care-Workforce-2016.pdf)

<sup>10</sup> Department of Health, Nursing and Midwifery Workforce – 2018; <https://hwd.health.gov.au/webapi/customer/documents/factsheets/2018/Nursing%20and%20Midwifery%20Workforce%20Summary%20Factsheet%202018.pdf>

<sup>11</sup> Exhibit 37.

Assistants, Assistants in Nursing and Personal Care Workers make up 70% of the aged care workforce and some of those are covered by the Nurses Award. To introduce an entitlement to paid pandemic leave clause in the Aged Care Award and not the Nurses Award would create an anomaly by creating the entitlement for only some of the employees working in residential aged care facilities. Further, the variation would satisfy the modern awards objective.

[38] However, without limiting the scope of the primary application made in this matter, the ANMF would be prepared to limit the scope of any immediate variation to the Nurses Award to nurses and nursing assistants employed in residential aged care, as defined at clause 3.1 of the Aged Care Award:

“**aged care industry** means the provision of accommodation and care services for aged persons in a hostel, nursing home, aged care independent living units, aged care serviced apartments, garden settlement, retirement village or any other residential accommodation facility.”

[39] The ANMF proposed that the above definition be included in the variation determination and submitted the ACTU’s draft determination could be adapted accordingly.

*ACCI*

[40] ACCI opposed the insertion of a paid pandemic leave clause. With respect to active COVID-19 cases, ACCI submitted that over 90% of those cases are in Victoria and 100% of the government-funded residential aged care cases are also in Victoria. ACCI submitted this presents a difficulty because our provisional view is supported by data only in respect of Victoria, but modern awards operate in a national system. It submitted that in every state except Victoria, the proposed paid pandemic leave clause would result in employers incurring additional non-recoverable and unfunded costs. Further, ACT, NSW, Tasmania, WA, QLD, NT and SA all maintain a “degree of success” in controlling the pandemic, which ACCI stated was “the overriding factor” in our decision not to grant the claims initially. In those states and territories, there appears to be no additional funding available to employers to offset a paid pandemic leave entitlement. As a matter of public policy, the national federal safety net should not be varied when the situation the variation seeks to address is confined to Victoria and, in particular, Melbourne.

[41] ACCI also submitted that we must have regard to labour hire agencies, who almost exclusively engage casual employees. It submitted that labour hire agencies do not receive government funding should they be required to pay their own casual staff to self-isolate or quarantine. Therefore, while these agencies are being increasingly relied on to ‘fill the gaps’ caused by other aged care employees isolating, they do not receive the same government protection should their own staff need to take paid pandemic leave.

[42] In the alternative, ACCI submitted that if we are minded to insert a paid pandemic leave clause, we should take the following considerations into account:

- if an employee is sick and has personal/sick leave accrued, they should be required to take that leave first before a paid pandemic leave entitlement;
- government benefits should offset any payment under an award clause;

- if an employee tests positive for COVID-19, the entitlement should not apply;
- any paid pandemic leave clause should seek to incentivise immediate testing; and
- the trigger for symptom-caused leave should be sufficiently clear and verifiable.

### **Submissions in response to the 24 July Statement**

[43] Only ACCI made submissions in response to the 24 July Statement. The key matters raised in the further ACCI submissions were:

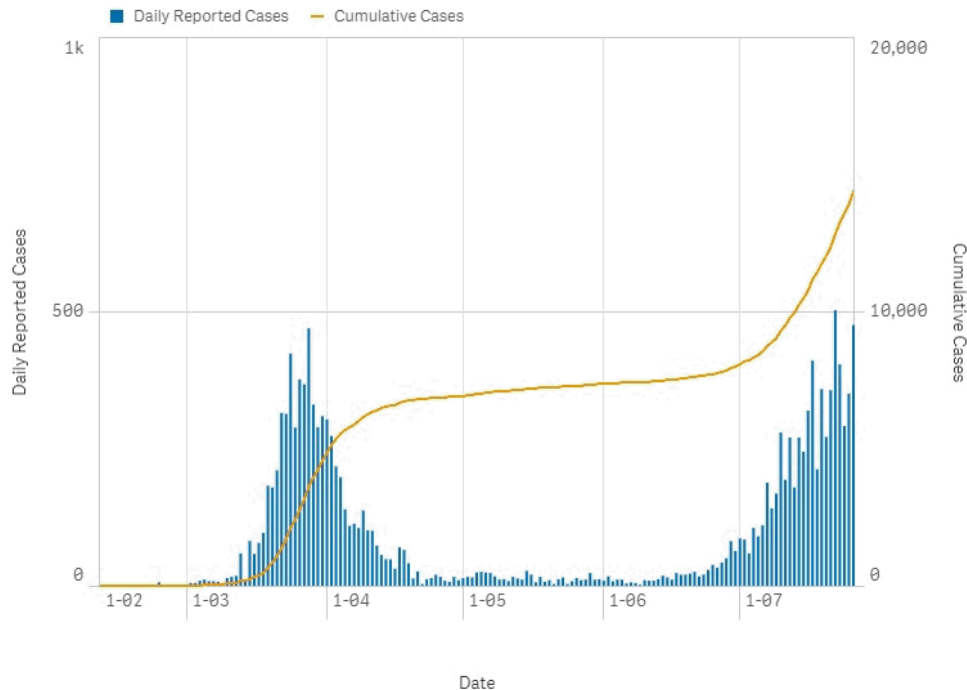
- it was not possible to make any meaningful submission about the relative infection or isolation rates in residential aged care (including for workers covered by the Nurses Award or the Health Professionals Award) because of the lack of access to or visibility over the data regarding aged care facilities staff;
- the extension of the proposed entitlement to nurses may affect the capacity and willingness of labour hire agencies to supply a “*surge workforce*” of nurses to residential aged care facilities to help respond to the pandemic; and
- the introduction of an unfunded and unrecoverable entitlement for agency suppliers of casual staff may create a disincentive for employers to supply such staff, who are currently central to the resilience of the industry and government response to the developing situation.

### **The current position**

[44] In the 22 July Statement, we identified that there had been a significant deterioration in the position with respect to the COVID-19 pandemic since the 8 July decision. Publicly available information as at 26 July 2020 indicates that the position has continued to deteriorate:

- there were 475 new cases reported in the last 24 hours, of which 459 were in Victoria and 14 were in new South Wales;
- the total number of deaths has increased to 155, 32 more than when the 22 July statement was issued;
- 132 of the total deaths have been persons aged 70 or over, and 62 of the deaths have been person in Australian Government-subsidised residential aged care facilities;
- there are currently 241 active cases in Australia admitted to hospital, of which 46 are in intensive care; and
- in Victoria, there are 560 active cases linked to aged care settings, of which about half are residents and about half are staff, and of 22 “*key outbreaks*” identified by the Victorian Government, 10 are at residential aged care facilities.

[45] The following graph produced by the Commonwealth Department of Health, which is an updated version of the graph published in paragraph [112] of the 8 July Decision, shows that the rate of infection in Australia has returned to the peaks experienced in late March 2020:



[46] The seriousness of the position in the aged care sector in Victoria is demonstrated by the measures taken by the Commonwealth and Victorian Governments in respect of that sector to provide financial support to prevent aged workers working at more than one facility to prevent chains of transmission between facilities, to ensure that aged care providers can engage and train additional staff where existing staff are unable to work because of self-isolation, and to ensure aged care providers can provide alternative accommodation so that workers who live or work in “hotspots” can continue to work.

[47] The inference which we draw from this information is that there is a clearly manifested elevated risk of exposure to COVID-19 infection and of being required to self-isolate in the residential aged care sector in Victoria. This represents an alteration of the position which, in paragraph [129] of the 8 July Decision, constituted the “overriding factor” which caused us not to grant provisions for paid pandemic leave in any award at that time. This elevated level of risk is, broadly speaking, equivalent to that of health care workers in the Victorian public hospital and health system who have been afforded unlimited paid special leave by the Victorian Government when required to self-isolate (including casual employees who have been employed on a regular and systematic basis for at least 3 months). We note that this benefit has been extended by the Victorian Government to workers in aged care facilities operated by public hospitals and health services.

[48] We reject the submission advanced by ACCI and the AFEI that the available data is not demonstrative of a rate of self-isolation for staff in the aged care industry due to close contact or display of COVID-19 symptoms that is different from that of the general population or other industries. While there is no direct data concerning the rate of required self-isolation, an inference may clearly be drawn that the high level of infections in aged care

residential facilities amongst both residents and staff and the disproportionate death rate in such facilities will have the necessary consequence that the number of employees required to self-isolate because of contact with other residents and staff will be correspondingly higher.

### **Governmental measures taken**

[49] There are two governmental measures which require consideration in the current context. First, there are the measures taken by the Victorian Government which are referred to in paragraphs [3] and [5] of the 22 July Statement. Based on the further information provided by the Victorian Government, we now have a better understanding of those measures.

[50] The \$1,500 payment referred to in the 22 July Statement is not confined to aged care workers, but is accessible by any adult worker residing in Victoria (including casual employees) who have been instructed by the Victorian Department of Health and Human Services to self-isolate because they have been diagnosed with COVID-19 or are identified as a close contact with a confirmed case or because their child under 16 has been diagnosed with COVID-19 or is identified as a close contact with a confirmed case. The worker must not be receiving any income, earnings or salary maintenance from their employment as a result of the period of self-isolation, must have exhausted paid personal leave entitlements, and must not be receiving a JobKeeper payment or any other form of Australian Government income support. The payment is described as a “*one-off*” payment, which we presume will mean that it is payable in respect of only a single instance of self-isolation. In addition, the Victorian Government has announced that it will pay \$300 to workers who have been tested for COVID-19, meet the same eligibility criteria and are awaiting results.

[51] The following observations may, on the basis of this information, be made about the Victorian Government’s measures:

- the measures are not specifically targeted at the residential aged care sector;
- they do not encompass the whole of the circumstances in which an employee may be required to self-isolate, including where the worker has displayed COVID-19-like symptoms but has not been diagnosed as having been infected or where the worker has been in contact with a suspected, as distinct from confirmed, COVID-19 case;
- they do not maintain the normal pay of the worker but provide for a fixed payment which, in the case of a full 14-day isolation period, is likely to cause the worker to suffer a significant reduction in income;
- the amounts would not be payable to any person who had an entitlement to paid pandemic leave;
- the measures were not the result of any consensus in the residential aged care industry of a need to provide for payment to workers required to self-isolate; and
- the measures are not intended by the Victorian Government to constitute a substitute for a scheme of paid pandemic leave, and indeed the Victorian Government supports the establishment of such a scheme.

[52] The Commonwealth Government’s initiatives to provide financial assistance to the residential aged care sector are of significance, having regard to the weight we placed in paragraphs [126] and [129] of the 8 July Decision upon the financial burden which a paid pandemic leave entitlement would place on, inter alia, the residential aged care sector. As earlier set out, the Commonwealth Government’s submissions referred to direct financial support it is providing to residential and in-home aged care providers to support aged care workers who are unable to work due to symptoms, self-isolation or travel restrictions, regardless of whether they would usually receive paid leave. Thus, as explained by the Commonwealth Government, aged care providers located in “hotspots” or whose staff reside in “hotspots” may apply for funding to assist with wage costs via a grant. This funding is intended to be used by the provider for the benefit of employees required, relevantly, to self-isolate, and may extend to the wage costs of self-isolating casual employees who do not have access to paid leave and to full-time and part-time employees who do not have any leave entitlements.

[53] While the information provided to us does not wholly disclose the extent of financial assistance which may be available, it firmly indicates that employers in the residential aged care sector who are most exposed to the risk of their employees having to self-isolate are eligible to receive Commonwealth financial assistance for the cost of continuing to pay wages to employees, including casual employees, who are required to self-isolate.

### **Consideration and conclusions**

[54] Based on the evidence and information before us, we consider that the Aged Care Award should be varied to provide for paid pandemic leave in accordance with the provisional view we expressed in the 22 July Statement. We consider that such a variation is necessary to achieve the modern awards objective in s 134(1) of the FW Act—that is, for the minimum safety net constituted by the Aged Care Award to be fair to employers and employees and to be relevant to the current circumstances of the COVID-19 pandemic. We are also persuaded by the submissions of the ACTU, the HSU and the ANMF that it is equally necessary, in order to meet the modern awards objective, for the Nurses Award and the Health Professionals Award to be varied to provide for paid pandemic leave for employees covered by those awards who are employed by residential aged care providers or are required to work in residential aged care facilities. In respect of the matters required to be taken into account under s 134(1)(a), our conclusions are set out below.

[55] In respect of s 134(1)(a) (*relative living standards and the needs of the low paid*), the needs of the low paid constitute a significant matter in our consideration. In defining the “low paid” for the purpose of our consideration, we adopt the benchmark used in recent Annual Wage Review decisions, namely two-thirds of median full-time earnings as measured by the *ABS Characteristics of Employment Survey*.<sup>12</sup> The most recent of these surveys shows that, as at August 2019, median weekly earnings for full-time employees was \$1,375.<sup>13</sup> Two-thirds of this figure is \$916.67. The full-time minimum weekly wages of grades 1-5 in the Aged Care Award are below this amount, as are the rates for nursing assistants and the lower pay points for enrolled nurses under the Nurses Award. The residential aged care sector has a relatively

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<sup>12</sup> [2019] FWCFB 3500 at [205]

<sup>13</sup> 6333.0 – Characteristics of Employment, Australia, August 2019, released 9 December 2019



high proportion of employees paid at the award rate.<sup>14</sup> Accordingly, we proceed on the basis that the sector employs significant numbers of low-paid employees.

**[56]** As we have earlier found, employees in the residential aged care sector are exposed to an elevated risk of being required to self-isolate that is currently manifesting itself at least in Victoria. As explained in our 8 July Decision as well as in the April Decision, an employee required to self-isolate may not have access to paid personal leave because, in the case of full-time and part-time employees, they may not be unfit for work such as to qualify for such leave or may have exhausted their leave entitlement or, in the case of casual employees, they do not have an entitlement to such leave. The requirement for self-isolation is primarily to prevent the spread of infection which, in the aged care sector is especially critical because of the vulnerability of aged persons to COVID-19 fatalities. Thus, the requirement to self-isolate may be said to be in the public interest. However, absent a paid pandemic leave entitlement or access to other leave entitlements, the employee bears the cost of this. For low-paid employees, this is likely to place them in significant financial difficulty and even distress. Further, as we found in our 8 July Decision at paragraph [123], there is a real risk that employees who do not have access to leave entitlements might not report COVID-19 symptoms which might require them to self-isolate, but rather seek to attend for work out of financial need. This represents a significant risk to infection control measures. These matters weigh significantly in favour of the introduction of a paid pandemic leave entitlement.

**[57]** The matters in paragraphs (b), (c), (d), (da) and (e) of s 134(1) have little or no relevance to the issue of paid pandemic leave and accordingly we do not assign them weight in our consideration. As to s 134(1)(f), we place significant weight on the effect that any exercise of award powers to establish a paid pandemic leave entitlement might have on employment costs and the regulatory burden. However, the financial assistance measures announced by the Commonwealth Government which we have earlier described will substantially reduce if not wholly remove the cost of any paid pandemic leave entitlement which might be established for the most affected residential aged care employers. That is a significant change from the position as it was at the time of the 8 July Decision, and largely removes the weight this consideration bears against the grant of a paid pandemic leave entitlement. We accept that a requirement to administer a paid pandemic leave entitlement is likely to increase the regulatory burden on residential aged care employers in what are undoubtedly already extremely demanding circumstances, and this must be taken as weighing against the award of a paid pandemic leave entitlement. However, we note in this connection that employers already have to administer the existing unpaid pandemic leave entitlement and undertake the processes of accessing the government funding measures we have referred to.

**[58]** The s 134(1)(g) consideration has little relevance to the current matter. In respect of s 134(1)(h), there is a clear relationship between containing the COVID-19 pandemic and restoring the health of the national economy. To the extent that a paid pandemic leave measure will assist the effectiveness of infection control measures in the residential aged care sector, we consider that this potentially might benefit employment growth and the sustainability and performance of the national economy. This consideration therefore weighs in favour of the award of a paid pandemic leave entitlement.

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<sup>14</sup> See [2020] FWCFB 1760 at [89], Chart 4 for *Health care and social assistance*

[59] The “fine balance” upon which we decided not to award any paid pandemic leave in the 8 July Decision has now tipped the other way in relation to the residential aged care sector. Aged care workers are in the “frontline” of the community’s efforts care for and to protect from infection the aged, who are the group most vulnerable to fatality in the current pandemic. The establishment of a paid pandemic leave entitlement for such workers is necessary to support them in their critical work. Such an entitlement has the explicit support of the Victorian Government, which is at the centre of the current crisis, as a “*further valuable resource in the broad package of economic and public health responses to help contain transmission of the virus*”. The establishment of such an entitlement will also be supported by the financial assistance measures introduced by the Commonwealth Government which we have earlier described.

[60] As the employer submissions correctly point out, the relevant effect of s 154 of the FW Act is to prohibit the establishment of a paid pandemic leave entitlement in Victoria only, and accordingly the award of such an entitlement would therefore necessarily extend to all residential aged care employers across Australia. However, we do not consider that this constitutes a proper basis not to proceed with the award of such an entitlement in the face of the matters we have adverted to at this point. For those employers not affected by the current outbreak, the entitlement is likely to have little if any operative effect. More importantly, it cannot be assumed that the current outbreak will remain confined to Victoria. The recent events in that State demonstrate how rapidly circumstances can change, and confirm the evidence given by Professor MacIntyre in that respect referred to in paragraph [130] of the 8 July Decision. Recent developments in New South Wales are not encouraging. The award of the entitlement remains necessary notwithstanding that the current locus of the pandemic is in Victoria.

[61] We have noted the submissions made by ACCI regarding the position of suppliers of casual agency nurses and other casual staff by labour hire employers to residential aged care facilities and ACCI’s concern that a paid pandemic leave entitlement might compromise the capacity or willingness of labour hire employers to continue to supply staff. We acknowledge the importance of this supply of labour in the current circumstances. However, as discussed in the 8 July decision and further below, the entitlement will only apply to regular and systematic casual employees, and the extent to which the casual labour hire staff the subject of ACCI’s concern fall into this category is unclear. In any event, ACCI’s submission proceeds on the basis of the assertion that the new entitlement would be “*unfunded and unrecoverable*”. We do not necessarily accept this to be the case. We have earlier described the funding support that will be provided by the Commonwealth Government. We see no reason why, if a labour hire agency charges a residential aged care facility for the cost of the new entitlement in connection with any casual staff supplied, why that cost would not then be recoverable by the facility from the Government under the funding arrangements (as a wages cost associated with any required self-isolation of industry workers). We are confident that this is a matter that will be the subject of productive discussion between the industry and the Commonwealth Government.

### **Form of the award variations**

[62] In paragraph [4] of the 22 July Statement (including by reference to paragraph [131] of the 8 July Decision), we outlined the features of the paid pandemic leave scheme which we proposed to establish. In summary:

- the leave entitlement is for workers who are required by their employer or a government medical authority or on the advice of a medical practitioner to self-isolate because they display COVID-19 symptoms or have come into contact with a person suspected of having contracted COVID-19;
- the leave entitlement is limited to up to two weeks' paid leave on each occasion of self-isolation;
- workers who are able to work at home or remotely during self-isolation are not entitled to paid leave;
- the entitlement will extend to casual employees engaged on a regular and systematic basis, and would entitle them to payment based on an average of their earnings over the previous six weeks; and
- the entitlement will initially operate for a period of 3 months.

[63] The ACTU submitted that it was not clear why casual employees who are not employed on a regular and systematic basis should be excluded from the proposed paid leave entitlement, given its identified purpose. However, we do not consider that the provision of paid leave can be justified in relation to employees who have no established connection to the relevant workplace, and we presume such employees will simply not be re-engaged if required to self-isolate. We do not intend to place any minimum time period requirement on the “regular and systematic basis” criterion, and this criterion will not require a consistent pattern of engagement in the number of days worked each week, the days of the week worked or the duration of each shift.<sup>15</sup>

[64] ACCI made a number of submissions in the alternative about the form of any variation to establish a paid pandemic leave entitlement which we deal with as follows:

- (1) *Where an employee is sick and has an entitlement to paid leave, this should be taken first.* We accept that an employee should exhaust any entitlement to paid personal leave that they are able to access before becoming entitled to paid pandemic leave.
- (2) *Government benefits provided to an employee should off-set any payment under an award clause.* The only government benefit directly payable to employees who are required to self-isolate which we are aware of is the Victorian WSP amount of \$1,500. As we have noted above, it appears that an employee who has an award entitlement to paid pandemic leave will not be entitled to receive the Victorian WSP.
- (3) *Where an employee is actually diagnosed with COVID-19, leave should not apply.* Where, following a positive COVID-19 test, an employee becomes entitled to workers' compensation benefits, the leave entitlement will cease to apply.

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<sup>15</sup> See *Chandler v Bed Bath N'Table Pty Ltd* [2020] FWCFB 306 at [11]-[14] and the cases there cited.

- (4) *Any clause which is introduced should seek to incentivise immediate testing.* We agree. It will be a condition of receipt of the leave entitlement that the relevant employee has agreed to undertake a COVID-19 test at the earliest opportunity.
- (5) *The trigger for symptom-caused leave would need to be sufficiently clear and verifiable.* Where the self-isolation results from the advice of a medical practitioner (as distinct from a requirement of the employer or a government medical authority), it will be necessary for a medical certificate to be produced.

**[65]** Attached to this decision are draft determinations for the variation of the Aged Care Award, the Nurses Award and the Health Professionals Award. Any submissions in response to these draft determinations must be filed by **2.00pm** on **Tuesday 28 July 2020**. The variations will take effect from **Wednesday 29 July 2020** and will remain in effect for a period of 3 months.

**[66]** This decision and the award variations we intend to make will not conclude this proceeding. The paid pandemic leave entitlement which we have awarded in the current urgent circumstances may require adjustment, in light of continuing developments, and it is possible that future events may require the consideration of the extension of the entitlement to other awards. The matter is adjourned, but any party may apply to have the matter relisted at short notice, and the Commission itself will continue to monitor developments and may relist the matter of its own initiative.



VICE PRESIDENT

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