[2023] FWC 943 [Note: An appeal pursuant to s.604 (C2023/2642) was lodged against this decision - refer to Full Bench decision dated 19 September 2023 [[2023] FWCFB 162] for result of appeal.]

DECISION

Fair Work Act 2009
s.739 - Application to deal with a dispute

Australian Nursing and Midwifery Federation

v

Johnson Stenner Aged Care Pty Limited T/A New Auckland Place
(C2022/8153)

COMMISSIONER SIMPSON BRISBANE, 21 APRIL 2023

Alleged dispute about any matters arising under the enterprise agreement and the NES;[s186(6)]

[1] On 9 December 2022, the Australian Nursing and Midwifery Federation (**ANMF / the Applicant**) made an application to the Fair Work Commission (**the Commission**) under s.739 of the *Fair Work Act 2009* (**the Act**) to deal with a dispute. Johnson Stenner Aged Care Pty Limited T/A New Auckland Place is the Respondent in the matter (**the Respondent**).

[2] I listed the matter for a private conference on 13 January 2023 and a subsequent report back conference on 30 January 2023. The matter did not resolve at conference and was ultimately referred for arbitration.

[3] Directions were issued for the filing of evidence and submissions, and the matter was listed for hearing on Tuesday 28 and Wednesday 29 March 2023 in Brisbane with the parties to attend by way of video through Microsoft Teams. Prior to the hearing after all material had been filed, the parties consented to the matter being determined on the papers as no evidence had been filed by either party.

THE DISPUTE & BACKGROUND

[4] The dispute relates to payment of wages to registered nurses, enrolled nurses and assistants in nursing (**nursing staff**) employed by the Respondent in relation to the time spent undertaking Rapid Antigen Tests (**RAT/s**) in accordance with the Respondent's directions.

[5] On 7 July 2022, the Respondent issued a "communication note" to all staff labelled "Staff Self RAT Testing" and an attachment labelled "Staff Self RAT Testing Requirements". On 18 July 2022, the Respondent sent a text message to all staff stating that staff will be required to complete a RAT prior to every shift effective 19 July 2022. All ANMF members employed

by the Respondent have been required by it to perform a RAT and to send proof of the completion of this task prior to attending the workplace.

[6] The Respondent acknowledged in its submissions that the subject matter of the dispute is a matter arising under the Agreement and / or an industrial matter as per cl 9.1(a) of the Agreement.

AGREED STATEMENT OF FACTS

[7] As directed by the Commission, the parties filed an Agreed Statement of Facts on 21 February 2023. The Agreed Statement of facts was adopted by both the ANMF and the Respondent in their respective submissions and is as follows:

> **"**PRELIMINARY
>
> 1. The parties agree on the following facts for the purpose of this proceeding.
>
> BACKGROUND
>
> 2. The Applicant is a registered trade union with coverage of registered nurses, enrolled nurses and assistants in nursing employed in residential aged care facilities in the State of Queensland.
>
> 3. The Respondent is a national system employer of employees who delivers services in residential aged care in Gladstone, Queensland.
>
> 4. The *Johnson Stenner Aged Care Enterprise Agreement* (AG2021/8708) (**the Agreement**) covers and applies to the Applicant, the Respondent and employees engaged as registered nurses, enrolled nurses, assistants in nursing (**nursing staff**) and other positions in the classifications contained in Schedules A and B of the Agreement, including members of the Applicant.
>
> 5. The Applicant and the Respondent made attempts to resolve the dispute at the workplace level through correspondence dated 24 October 2022 and 4 November 2022. Copies of the correspondence dated 24 October 2022 and 4 November 2022 are "**Attachment 1**" and "**Attachment 2**" respectively.
>
> 6. The Applicant and the Respondent were unable to resolve the dispute at the workplace level.
>
> DIRECTION TO PERFORM RAPID ANTIGEN TESTS
>
> 7. On 7 July 2022, the Respondent issued a "communication note" to all staff labelled "Staff Self RAT Testing" and an attachment labelled "Staff Self RAT Testing Requirements". A copy of this communication note and Attachment is "**Attachment 3**".
>
> 8. On 18 July 2022, the Respondent sent a text message to all staff stating that staff will be required to complete a Covid-19 Rapid Antigen Test (**RAT**) prior to every shift effective 19 July 2022. A copy of this text message is "**Attachment 4**".

9. On 7 November 2022, the Respondent published a memo to all staff referring to a continuing requirement of staff to complete a RAT daily prior to their shift. A copy of this memo is "**Attachment 5**".

10. From 19 July 2022, the Respondent has required its nursing staff to:

a. Collect and take home RATs that have been supplied by the Respondent,

b. Complete a RAT prior to commencing each rostered shift.

c. Take a photo of their completed RAT with their name and the date.

d. Show the photo of the RAT to a person nominated by the Respondent at, or prior to, the commencement of their rostered shift.

11. Notwithstanding paragraph 8, nursing staff who test positive for Covid-19 are not required by the Respondent to complete RATs for 28 days following their positive test.

12. Since July 2022, the Respondent has, from time to time, allowed staff members to complete a RAT during working hours, if that staff member has advised that they are unable to complete the RAT prior to the commencement of their rostered shift.

13. Since 7 July 2022, the Respondent has not paid any nursing staff member for undertaking a RAT prior to the rostered start of a shift.

ROSTERS

14. The Respondent produces a fortnightly roster of the daily ordinary working hours and starting and finishing times of nursing staff, as required by clause 24.2 of the Agreement.

15. This roster is displayed on the noticeboard in the staff room prior to the commencement of the roster period.

16. The time spent by nursing staff in completing RATs is not included in the rosters displayed by the Respondent.

RAPID ANTIGEN TESTS

17. As a residential aged care facility, the Respondent's workplace is considered to be a "high-risk setting" by the Queensland Government, as it is an environment where people are more vulnerable or at higher risk of severe disease or higher risk of widespread transmission of Covid-19.

18. The Australian Government provides RAT kits to residential aged care facilities in Queensland, including the Respondent, with a recommendation that they be used for:

a. testing of all residential aged care staff, including volunteers and subcontractors; and

b. testing regular visitors on arrival at the service, including family and friends of residents, visiting allied health and other service providers.

19. Since July 2022, the Respondent has supplied RATs to employees free of charge. Employees have also been able to obtain RATs from the Respondent free of charge for members of employees' families and households to undertake RATs.

20. The RATs that are supplied to employees by the Respondent are manufactured by MP Biomedicals.

21. The RATs are packaged with a pamphlet containing the manufacturer's instructions for use, which are on page 2. A copy of page 2 of MP Biomedical's pamphlet is "**Attachment 6**".

CONTRACT OF EMPLOYMENT

22. The Respondent's nursing staff are employed according to a standard form employment contract. A copy of the standard contract is "**Attachment 7**".

23. Nursing staff employed by the Respondent are required to adhere to the organisation's code of conduct. A copy of the Respondent's code of conduct is "**Attachment 8**"

HAND HYGEINE

24. The Respondent has implemented standard and transmission-based precautions to prevent and control infection, including by ensuring its employees maintain appropriate hand hygiene. This has been achieved through the provision of educational material and mandatory training.

25. The World Health Organisation's hand washing instructions are displayed at the Respondent's New Auckland Place facility at the hand washing stations. A copy of the World Health Organisation's hand washing instructions is "**Attachment 9**"."

QUESTION FOR ARBITRATION

[8] In their initial submissions filed on 28 February 2023, the ANMF proposed the following questions for arbitration:

"1. In complying with the Respondent's direction to undertake a COVID-19 Rapid Antigen Test prior to commencing their rostered shift, were the Registered Nurses, Enrolled Nurses and Assistants in Nursing employed by the Respondent:

a. performing work to which the Johnson Stenner Aged Care Enterprise Agreement 2021 applied?

b. entitled to be paid wages for the time spent complying with the direction?

2. If the answers to questions 1 (a) and (b) are "yes", are full-time nursing staff (except for Registered Nurses Level 4 and 5) and part-time nursing staff entitled to be paid at the relevant overtime rate specified in clause 27?"

[9] In the Respondent's submissions of 16 March 2023, it noted the ANMF proposed 2 questions for arbitration in its submissions for the Commission to determine in this matter. The Respondent contended that the proposed Questions 1(a) and (b) are the appropriate questions for the Commission to determine; and Question 2 is not able to be determined in the present dispute application, as there is no evidence at all before the Commission as to any relevant material fact that could allow the Commission to make a finding, or express an opinion or recommendation as to the appropriate payment (if any) for any time spent by an employee in accordance with the Agreement.

[10] In reply, the ANMF submitted that this dispute is about how the Agreement should be interpreted regarding the payment of wages. Central to this question is whether the time spent by employees in complying with the RAT direction is "time worked" (or "hours worked") for the purposes of subclauses 27.1 (a) and 27.2 (b) of the Agreement, or alternatively, whether such time spent is part of "hours of work" for the purposes of clause 21 of the Agreement.

[11] The ANMF submitted that the facts necessary for the Commission to determine its proposed question 2 are the following facts contained in the Agreed Statement:

a. the Respondent has required all nursing staff to complete a COVID-19 Rapid Antigen Test (**RAT**) prior to commencing each rostered shift, since 19 July 2022 (**the RAT direction**),

b. the Respondent has not paid any nursing staff member for undertaking a RAT prior to the commencement of their rostered shift, and

c. the time spent by nursing staff in complying with the RAT direction is not included in the Respondent's rosters.

[12] The ANMF proposed to re-word their proposed Question 2 slightly to avoid any ambiguity as follows:

"2. If the answers to questions 1 (a) and (b) are "yes", is an employee who complied with the RAT direction, and is either a full-time nursing employee (but not at Registered Nurses Level 4 or 5) or a part-time nursing employee, entitled to be paid at the relevant overtime rate specified in clause 27?"

SUBMISSIONS

[13] The ANMF submitted that all of the nursing staff employed by the Respondent are employed within the classifications contained in the Agreement, those being the classifications of Registered Nurse, Enrolled Nurse and Assistant in Nursing, who are employed in Queensland. The ANMF referred to Clause 4 of the Agreement which provides as follows:

> "Clause 4: Coverage
> …
> This Agreement shall apply to all employees of the employer performing work within the classifications contained in this agreement and employed by the employer in Queensland."

[14] The ANMF therefore submitted that the question of whether the nursing staff are "performing work" for the purposes of Clause 4 when they comply with the RAT direction will determine whether the Agreement applies to this activity.

[15] With respect to defining the term "work", the Applicant referred to Clause 11.1 of the Agreement which provides as follows:

> "Clause 11.1 – Employment categories
>
> … An employer may direct an employee to carry out such duties that are within the limits of the employee's skill, competence and training, consistent with the respective classification."

[16] The ANMF submitted that the Respondent's RAT direction to all of its nursing employees required the performance of duties by those nursing employees that are within the limits of their skill, competence and training, consistent with the respective classification.

[17] The ANMF relied on the decision in *Australian Nursing and Midwifery Federation v Jeta Gardens (QLD) Pty Ltd T/A Jeta Gardens* [2022] FWC 3039 (**Jeta Gardens**), where the Commission held that, in the context of an aged care facility, a direction to undertake a RAT is an infection control measure, and that:

> "[320] A direction to comply with an infection control measure is consistent with what would be expected as falling within the role of a nurse or personal carer, and I am satisfied undertaking an infection control measure is consistent with what is contemplated by the classification definitions in the Agreement. It is a duty that is "within the limits of the Employee's skill, competence and training consistent with the classification structure of this Agreement."

[18] The ANMF submitted that the above extract from *Jeta Gardens* and Clause 11.1 of the Agreement are almost identical in wording. The classification definitions in the Agreement are also similar to those referred to in the *Jeta Gardens* decision, in that they are drafted in very broad and inclusive language.

[19] The ANMF referenced the Nursing Classification Definitions contained in Schedule A of the Agreement which includes a non-exhaustive list of indicative tasks that may be required of nursing staff at different levels. All classifications list the provision of nursing care (or

assistance in the provision of nursing care) as key among these indicative tasks. "Nursing care" is defined in Schedule A of the Agreement as follows:

> "Nursing Care means:
> …
> • Nursing includes the promotion of health, prevention of illness, and the care of ill, disabled and dying people.
> • Advocacy, promotion of a safe environment, research, participation in shaping health policy and in patient and health systems management, and education are also key nursing roles.
> …"

[20] The ANMF therefore submitted that the Respondent's RAT direction was issued to staff as an infection control measure, to prevent the spread of illness (specifically of COVID-19) and to promote a safe environment.

[21] The ANMF referenced *Jay Seo v Bindaree Food Group Pty* [2021] FWCFB 2691 (**Seo**) where a Full Bench of the Commission considered whether certain duties amount to 'work'. Specifically, the Full Bench considered in that matter whether activities that the employer required the employee to perform during his 'meal break' was work in the context of the Award which applied to the employee's employment. The Full Bench found:

> "[43] … we consider that whether particular activities constitute "work" within the meaning of an industrial instrument depends on the proper construction of the relevant instrument and the facts of the particular case.
>
> ……
>
> [46] The ability of an employee to be "called upon to work during [a] meal break" in accordance with clause 15.1(b) of the Award is consistent with the notion of "work" referring to an employee who is under the instruction or direction of their employer, or required by their employer, to do certain things and while they are doing those things they are "working"."

[22] The ANMF therefore submitted that the nursing staff are required by their employer to do certain things, such as comply with the RAT direction, so it follows that while they are doing those things, they are working.

[23] The ANMF elaborated further regarding how the Full Bench came to the conclusion in *Seo*, by way of considering the leading authorities on the question of "what is work", including the finding of the Western Australian Industrial Appeal Court in *Hospital Employees' Industrial Union of Workers, WA v Proprietors of Lee-Downs Nursing Home* 1977 WAIG 455 (***Lee-Downs***). The ANMF referenced the following extract from the decision of Burt CJ:

> "[26] In my opinion time is 'time worked' within the meaning of the award if it can be seen that the worker is during the time under consideration doing, whatever it is that he is doing, upon instructions, express or implied given to him by his employer. What he is doing need not involve any physical activity. It may be that he is required to be in a

> certain place at and during a certain time so that he can act should a certain event happen and in such a case, as it seems to me, the time so spent is 'time worked' whether the event initiating physical activity happens or does not happen. He also serves who only stands and waits."

[24] The ANMF noted that the Respondent has supplied its nursing staff with RATs and given them express instructions to complete a test before attending the workplace for each shift. The nursing staff subsequently spend time completing RATs prior to every shift under the instruction of their employer.

[25] The ANMF additionally made reference to *Warramunda Village Inc v Pryde* [2002] FCAFC 58 (**Warramunda**) where the Full Bench of the Federal Court held (Gyles J dissenting):

> "[29] ... An employee who attends at the place of employment pursuant to the employer's direction to be at the employer's premises for a period of time and be available to provide service at the premises as required by the employer, is not carrying on private activities but is providing service to the employer. Such an employee is at "work" for the purposes of the 1995 Award and is entitled to be remunerated according to the terms of the Award.
>
> ... the words "work" or "worked" when used in provisions such as cl 13 and cl 15 do not bear the meaning assigned to them by the appellant. The authorities show that when such words are used in instruments of the type presently under consideration, what is referred to is an employee who is under the instruction of an employer: the time under instruction is time worked…"

[26] The ANMF therefore submitted that whenever the nursing staff comply with the Respondent's RAT direction, they perform that duty under the instruction of their employer. For that period of time, they are not conducting private activities, but rather are providing service to the employer. The ANMF noted that the Respondent directed the nursing staff to perform the duty away from the Respondent's premises, rather than on the premises, however the ANMF submits that this does not change the fact that the employer required the employee to provide service within a period of time (prior to their rostered start time) and at a specified location (away from the employer's premises). Further, it is now widely accepted that a direction to perform work remotely, so to reduce the risk of exposure to, or spread of a contagious illness, is a lawful and reasonable employer direction in most cases. In this case, considering the present risk of COVID-19 in Queensland and the vulnerability of the residents for whom the nursing staff provide care, such a direction to perform work remotely (especially where the work is for the purpose of identifying infection) is undoubtedly reasonable.

[27] The ANMF also relied on *Shop, Distributive & Allied Employees' Association v Aldi Foods Pty Ltd* [2022] FedCFamC2G 799 (**Aldi**), with respect to the question of whether pre-commencement activities necessary to ready an employee for work (such as safety checks and warmups) constitute "work" for the purpose of the relevant Enterprise Agreement. The following is an extract from the decision of Humphreys J:

> "[39] in this case, the pre-commencement activities cannot be characterised as private activity in that they do not involve any activities that are of benefit to the employee, such

> as storing of personal effects, putting on uniforms or PPE. Each of the activities outlined above was solely to the benefit of the employer, in that by the time the employee arrived at a designated location for the commencement of shift, all necessary activities for the employees to get immediately to work had been completed. There was no personal benefit to the employee in the activities carried out. Each was to the benefit of the employer. In these circumstances, the Court is satisfied that the activities constitute work."

[28] The Respondent submitted that the ANMF identified that the key question for the Commission's determination in dispute is whether or not employees are "performing work" for the purposes of the Agreement when complying with the Respondent's direction to undertake RATs prior to the commencement of each shift, which the Respondent described as another way of wording what the ANMF has set out as Question 1(a) for the Commission's determination.

[29] The Respondent submitted that the concept of what constitutes "work" in the context of an industrial dispute has been considered in a number of different factual scenarios by the Commission (and its predecessors) and Courts. The Respondent referred to the decision in *Lee-Downs*, where the Court considered time spent by a nursing assistant on nursing home premises under instructions to report emergencies which arose relative to the residents at the home was "time worked". The dispute was about time spent on-call which was expressly provided for in the industrial instrument. Burt CJ (at 456) held:

> "In my opinion time is 'time worked' within the meaning of the award if it can be seen that the worker is during the time under consideration doing, whatever it is that he is doing, upon instructions, express or implied given to him by his employer. What he is doing need not involve any physical activity. It may be that he is required to be in a certain place at and during a certain time so that he can act should a certain event happen and in such a case, as it seems to me, the time so spent is 'time worked' whether the event initiating physical activity happens or does not happen. He also serves who only stands and waits.…
>
> The worker was not on call in the sense that she could be called upon by the employer to work. She was, I think, under a continual duty to act if called by a patient and she falls into the category of persons who serve while waiting."

[30] The Respondent also referred to the decision in *Federated Municipal & Shire Council Employees Union of Australia v Shire of Albany* [1990] FCA 58 (***Albany***), where a dispute arose as to whether the employer was obliged to pay employees for their time spent travelling from the job site to the employer's depot at the end of work on a day. The Respondent submitted that while it was not clear in that matter as to whether that travel was on the instruction of the employer, the Court inferred it to be an incident of the instruction requiring such travel to the site at the beginning of the day.

[31] The Award that applied provided for payment of excess travel time when an employee had to attend a workplace in excess of the usual travel time between home and work, but noted that time was distinct from time worked. (Then) French J considered earlier authorities before concluding at [22] as follows:

> "While the general principles enunciated in that line of cases indicate criteria for the determination of "time worked" where that expression is used in industrial awards, the decision in any particular case must depend upon the construction of the relevant award, whether it makes specific provision for the activity in question, and the facts of the case."

[32] The Respondent submitted that in *Warramunda*, the dispute concerned employees who were required by their employer, a residential aged care hostel, to perform a shift at the hostel and a "sleepover shift" immediately following that shift from 10.00pm until 7.30am the following day. During the sleepover shift, the employees could be called on to render assistance to an employee on duty at the time, but otherwise would be not on active duty and can eat, listen to the radio or sleep as they please. The Respondent submitted that this decision provides judicial consideration for when an employee is "on-call" and on a sleepover shift as succinctly put by Finkelstein J at [43]:

> "An employee who is required to be "on call" is an employee who must attend at work when called to do so. Until the employee is called to attend work, he is not working. A worker on a sleepover shift, by contrast, is always at work. A worker cannot be "on call" and at work at the same time."

[33] The Respondent submitted that in *Polan v Goulburn Valley Health* [2016] FCA 440 (***Polan***), the dispute before Mortimer J was in relation to a claim by an employee to "recall" payments according to the terms of the applicable enterprise agreement, for times when she had been rostered on call outside of her rostered ordinary hours of work to respond to telephone calls. The Respondent submitted that this decision provides judicial consideration of the term "recall" where the following was said at [74]:

> "Recall suggests a conscious decision by or on behalf of an employer to require an employee to perform specific duties of employment outside the employee's ordinary hours of duty."

[34] The Respondent submitted that in *TWU v Jetstar Services Pty Limited* [2017] FWC 2535 (***Jetstar***), Sams DP considered a dispute as to whether approved leave (such as personal/carer's leave) was "work" or "time worked" for the purpose of calculating overtime under the relevant industrial instrument. In so doing, Sams DP held at [46]:

> "The word 'works' or 'worked' must mean being physically at work and performing work or other functions associated with work, at the employer's direction. This conclusion accords with what the Full Court of the Federal Court said in *Warramunda Village Inc v Pryde* [2002] FCA 250 where Lee, Finkelstein and Gyles JJ said at para [17]:.."

[35] The Respondent submitted that in *Seo,* a Full Bench of the FWC considered an appeal in which the underlying dispute was a claim by an employee that he was being denied a 30 minute unpaid meal break, because he was required to undertake a range of activity at his employer's instruction in that period (walking, washing boots and hands etc.). The Full Bench reviewed the authorities and then held, at [43]:

> "whether particular activities constitute "work" within the meaning of an industrial instrument depends on the proper construction of the relevant instrument and the facts of the particular case."

[36] The Respondent submitted that in *Aldi*, Judge Humphreys considered whether time taken by employees to perform tasks prior to the commencement of their shift should be regarded as time "worked" and therefore should be paid. The pre-commencement tasks Aldi employees were required to perform included:

> (a) walking to a materials handling equipment area;
> (b) locating and then undertaking various safety checks on stock pickers;
> (c) driving the picker to a central location;
> (d) picking up and checking a communication device; and
> (e) recording various things on a sign in sheet.

[37] The Respondent submitted that in finding that the above tasks constituted 'work', Judge Humphreys stated:

> "the characterisation as to whether or not activities will constitute work will depend upon the construction of the relevant industrial instrument and whether it makes a specific provision for the activity in question, and the facts in the case.
>
> In this case, the pre-commencement activities cannot be characterised as private activity in that they do not involve any activities that are of benefit to the employee, such as storing of personal effects, putting on uniforms or PPE. Each of the activities outlined above was solely to the benefit of the employer, in that by the time the employee arrived at a designated location for the commencement of shift, all necessary activities for the employees to get immediately to work had been completed. There was no personal benefit to the employee in the activities carried out. Each was to the benefit of the employer. In these circumstances, the Court is satisfied that the activities carried out constitute work."

[38] The Respondent submitted that in each of the above authorities, the facts involved an employee (or group of employees) each of whom was required to be at a particular place and at times directed by their employer to undertake a specific activity. These authorities support a contention that "work" or "time worked" can only occur where:

> (a) the activity is within the scope and coverage of activities or job functions covered by an award or enterprise agreement;
>
> (b) the employer has directed the employee to be at a particular place and at specific times; and
>
> (c) the employer has directed the employee to perform the activity, or remain in readiness at that place at that time to do that activity if called upon to do so.

[39] The Respondent submitted that the factors as identified in the authorities need to be considered in the context of the particular factual circumstances of any particular case, and in

this respect, it should be noted that none of the authorities above considered factual circumstances that were in any way similar to the present dispute:

> (a) *Seo* and *Aldi* considered the specific factual context of tasks and functions that, by their nature, could only occur at the workplace either immediately before, during or immediately after rostered shifts;
>
> (b) *Lee-Downs*, *Warramunda* and *Polan* considered the specific factual context of employees being required to remain on-call and/or to be recalled to work when not on duty;
>
> (c) *Albany* considered the specific factual context of employees travelling between a job site and the depot at the beginning and end of the day; and
>
> (d) *Jetstar* considered the very specific circumstance of whether leave could be considered work in the context of a particular industrial instrument.

[40] The Respondent submitted that the decision in *Jeta Gardens* involved consideration of the concept of "work" in the factual circumstances of that matter, where employees had been directed to undertake RATs at a particular location within a residential aged care facility (or immediately outside in an area adjacent to that residential aged care facility) at the direction of their employer in Queensland in the context of the COVID-19 pandemic.

[41] The Respondent submitted that in *Jeta Gardens* the Commission considered the parties' submissions referencing many of the same decisions referred to above, and determined the following:

> "[318] I agree with the Respondent's submission that the authorities appear to support the conclusion that in order for a task or duty to be work, it must fall within the coverage of the industrial instrument that applies to the employer and employee. However, I also agree with the ANMF submission that a task or duty does not need to be specifically referenced in an industrial instrument in order for it to be work, covered by the instrument, and applying to the employer and employee.
>
> [319] The evidence of Mr Carter was clear that the OMT had taken a decision to make RATs mandatory from 13 May and for employees to attend designated testing areas as a condition of entry 15 minutes before their rostered shift. I am satisfied that the direction by the Respondent for employees to undertake a RAT prior to entry is to be considered 'work'. In reference to relevant authorities set out above, it is clear that the direction required employees to be at a certain place, undertaking a certain duty, at a particular point in time."

[42] The Respondent submitted that *Jeta Gardens* considered 3 discrete scenarios which related to different circumstances, directions and expectations of employees in relation undertaking RATs at different points in time between February 2022 and September 2022, which can be summarised as follows:

(a) Employees were first requested (but not directed) to complete a RAT prior to entry to the facility each day they were rostered to work. There was no requirement for employees to be at the workplace at a specified time prior to the commencement of their shift to complete a RAT, or to undertake a RAT within any specified time period before their start time. (**Scenario 1**)

(b) Employees were then at a later time directed to complete a RAT prior to entry to the facility each day they were rostered to work. There was no requirement for employees to be at the workplace at a specified time prior to the commencement of their shift to complete a RAT, or to undertake a RAT within any specified time period before their start time. (**Scenario 2**)

(c) Employees were then directed to arrive at the facility 15 minutes before their rostered start time, complete a RAT, and remain in a designated testing area for 15 minutes until the RAT result was known each day they were rostered to work. (**Scenario 3**)

[43] The Respondent submitted in relation to each of the respective Questions in *Jeta Gardens*, the Commission determined each Question on the basis of whether, in each respective Scenario: (a) the enterprise agreement applied to the employer and employees; and (b) employees were entitled to be paid for any relevant time. In scenarios 1 and 2, the Commission determined that employees were not covered by the enterprise agreement and were not entitled to payment for any time taken undertaking RATs prior to the commencement of shifts. Scenario 3 resulted in a positive finding in terms of establishing enterprise agreement coverage and entitlement to payment.

[44] The Respondent submitted that whilst none of the respective Scenarios in *Jeta Gardens* are the same as the factual circumstances of this dispute, of those Scenarios the closest is Scenario 2 and the Commission's findings are relevant in the context of the present dispute. The Respondent notes the following key points as apposite:

(a) the employer had made a decision to move to a protocol of employees undertaking daily RATs when rostered to work; and

(b) there was no direction to employees that they must commence work or report to the facility at any particular time before their rostered shift commenced for the purpose of undertaking RATs.

[45] The Respondent submitted that it should be noted that there were other important factors relevant in scenario 2 in *Jeta Gardens* that need to be distinguished from the present matter, namely;

(a) during the time period relevant to Scenario 2, employees were required to undertake RATs at the workplace; and

(b) there was evidence before the Commission from employees that they held a belief there was a requirement for them to attend the workplace for a certain period of time prior to the commencement of their rostered shift to undertake a RAT in Scenario 2.

[46] The Respondent submitted that in contrast in the present dispute the Respondent:

(a) did not direct or require the employees to attend the workplace, or be at any specific place to undertake a RAT;

(b) did not direct or require the employees to undertake the RAT at a particular time.

[47] The Respondent submitted that further, there is no evidence before the Commission from any employee of the Respondent in relation to any understanding or belief they may have in relation to undertaking a RAT prior to the commencement of any rostered shift.

[48] The Respondent submitted that a further observation made by the Commission in *Jeta Gardens* in relation to Scenario 2 compounds what would appear to be an insurmountable difficulty with the ANMF's case in this matter. That is, considering the evidence that was before the Commission in *Jeta Gardens,* the Commission observed that:

> "In the circumstances, the state of the evidence is such that it would be difficult to determine an amount of "work" that would be required to be paid, if the Commission were to be satisfied from the evidence that it could be found that employees had been directed to work before the commencement of their start time."

[49] The Respondent submitted that consistent with the Commission's findings in *Jeta Gardens,* whilst the Respondent acknowledges and agrees that a task such as undertaking a RAT does not necessarily need to be specifically referenced within an industrial instrument to be capable of being considered "work", all other necessary elements for the task to be considered as "work" based on the authorities are notably absent in this matter – the Respondent has not required employees to be at a certain place, undertaking a certain duty, at a particular point in time.

[50] The Respondent submitted that the ANMF has not identified any authority that has extended the concept of "work" or "time worked" to a situation that is similar to the circumstances in this matter.

[51] The Respondent submitted that the ANMF has not made out any case to extend the principles of work any further than what has been examined in the existing authorities, or for the Commission to make a determination which is inconsistent with what was decided in *Jeta Gardens* in similar circumstances.

[52] In reply, the ANMF submitted that "Work" does not have a narrow meaning, and certainly not as narrow and limited as that for which is contended in the Respondent's Submissions.

[53] The ANMF submitted that the Respondent's argument that work "can only occur when" the "employer has directed the employee to be at a particular place and at specific times" is not viable, nor is it supported by the authorities cited, and there can be no doubt that "work" includes those circumstances specified by the Respondent at paragraph 19 of its submissions, but none of the authorities relied upon by the Respondent support the contention that work *only* occurs in those circumstances.

[54] The ANMF submitted that the primary indicator of whether an employee is performing "work" is whether the employee is under the "instruction or direction of their employer" while performing the task, and whether that task is consistent with the employee's employment. The ANMF submitted that the Respondent has admitted that the RAT direction is "*entirely consistent with the ability of the Respondent to provide employees with lawful and reasonable instructions as noted in clause 2.2 and 2.3 in employees' employment contracts, as well as generally at common law*".

[55] The ANMF submitted it did not say that compliance by an employee with every condition of employment is work, for example compliance by an employee with an enduring direction by their employer to *refrain* from reputation damage, or to *maintain* confidentiality is not 'time worked'. However, the ANMF submit in this case, the RAT Direction is a pre-commencement task that the employer has directed the employee to perform, and while doing those things the employee is working.

[56] The ANMF submit that the Respondent's very narrow definition of 'work' is incompatible with the reality of the modern workplace. The performance of work by employees in Australia outside of a single, usual workplace has risen considerably with the widespread use of technology such as mobile telephones and computers. In the first few months of the COVID-19 pandemic, most of Australia's workforce was forced to rapidly adopt flexible working arrangements, including remote work, and many such arrangements have remained in place.

[57] The ANMF submitted that if an employer allows an employee some flexibility as to the place or the time in which work is performed, the performance of that work by the employee is service rendered to the employer for its benefit, as is work performed by an employee with less flexibility allowed by the employer.

[58] The ANMF submitted that the Respondent seems to argue that a task that would ordinarily constitute "work" would suddenly no longer be considered work, if the employer chooses to no longer concern itself with where or when the task is being performed. Such a proposition made at any time would be absurd, but it is especially absurd in the post-covid industrial context.

[59] The ANMF submit that from the Commission's decision in *Jeta Gardens*, if the employer had required its nursing staff to complete the RAT from the usual workplace in unpaid time, it would be classed as work and attract wages. There can be no distinction drawn here simply because the employer is directing the exact same task to be done remotely.

[60] The ANMF submits that in any case, the Respondent has directed its employees to complete a RAT away from the workplace before every shift. In doing so, the Respondent has directed the nursing staff to complete the task at a certain time (before the commencement of their rostered shift) and at a certain place (away from the usual workplace). Even if the Commission were to accept the Respondent's very narrow definition of "work", the nursing staff in the current case would still be held to be performing work when complying with the RAT direction.

[61] The ANMF submitted that the Respondent has misconstrued some of the facts and therefore misrepresented the findings in the *Jeta Gardens* decision. This has led the Respondent

to incorrectly conclude that the facts of the current case more closely align with the facts of Scenario 2 of the *Jeta Gardens* decision, rather than correctly with Scenario 3.

[62] The ANMF said in all three of the factual scenarios that were considered in *Jeta Gardens*, the employees were required to complete the RAT from the employer's premises, and there is only one distinction between the facts in Scenarios 2 and 3, being in Scenario 3, nursing staff were required to complete a RAT onsite 15 minutes before their rostered start time. In Scenario 2, staff were required to complete a RAT onsite, but the FWC found that they were not required to attend the workplace 15 minutes early.

[63] The ANMF submitted that this means that in Scenario 2, the employees were given the option to complete the RAT within their rostered shift time, and so receive payment for this work, and the Respondent has not given any such option to its nursing staff, and as such the Commission's findings in Scenario 2 of *Jeta Gardens* are not relevant to this matter.

[64] The ANMF submitted that the Respondent misrepresented the facts and findings of Scenarios 1 and 2 of the *Jeta Gardens* where it said as follows in its submissions: *"employees undertaking RATs in an aged care setting:… prior to the commencement of shifts but not at, or within a designated time period at the workplace were not performing work…"*

[65] The ANMF submitted that this is not correct as for Scenario 1, the FWC found that the RAT was not work because it was not mandatory, but rather optional. For Scenario 2, the Commission found that the RAT was not work because employees were not directed to do it outside of their rostered shifts, but rather had the option to do it in paid time.

[66] The ANMF submitted the facts of this case most closely align with the facts in Scenario 3 of the *Jeta Gardens* decision because the nursing staff:

a. have been given a mandatory (non-optional) direction to perform the RAT, and
b. have not been given the option of completing the RAT in paid time.

Beneficiary of a RAT

[67] The ANMF submitted that the pre-commencement RAT Direction cannot be characterised as private activity as it does not involve any activities that are of benefit to the employee, such as the storing of personal effects. Further, there is no benefit to nursing staff whatsoever in undertaking a RAT prior to their shift commencement. Conversely, the ANMF submitted that there is a potential detriment to these employees, as if their RAT result is positive they will be:

(a) prevented from working, possibly for multiple weeks, and denied wages for that time and/or;

(b) forced to denude their paid personal leave balance, and if they do not have a sufficient balance of personal leave;

(c) forced to denude their balances of other forms of paid leave, such as annual leave or long service leave (if they have qualified for it) without being able to go on holidays or do most of the reactional activities that employees generally enjoy during such leave.

[68] The ANMF therefore submitted that the undertaking of RATs by employees prior to their rostered commencement time was and is solely for benefit of the employer, in that by the time the employee arrives for the commencement of shift, all necessary infection-control activities for the employees to get immediately to work have been completed. The ANMF submitted that it is likely that there were also reputational benefits for the Respondent associated with having a rigorous staff testing protocol in place, regardless there is no personal benefit to the employee undertaking a RAT.

[69] The ANMF submitted that when applying the findings in *Aldi*, the RAT direction constitutes work because the only party to benefit from the tasks required to be completed was the Respondent. In *Aldi*, the Court concluded as follows:

"[46] If the Court finds, as it has, that the pre-commencement tasks are work, then the time taken to perform those tasks is liable for payment by the employer."

[70] The Respondent submitted that the undertaking of a RAT is not an activity performed for the sole benefit of the Respondent. It is something that benefits all persons associated with a residential aged care facility, including the Respondent, its employees, its residents, visitors, and other personnel who enter the facility. Employees, along with any other visitor to the facility, undertaking RATs safeguards the safety of all persons at the facility by ensuring that COVID-19 does not enter the facility. Ensuring that COVID-19 does not enter the facility protects the individual wellbeing of all persons at the facility – but in particular, the residents of the facility, individuals who are particularly vulnerable and at higher risk of transmission of COVID-19 and/or severe health consequences from contracting COVID-19.

[71] The Respondent submitted in this respect, and noting the Commission's comments in *Jeta Gardens* in relation to the public health benefit that is provided from aged care employees undertaking RATs prior to commencing shifts, it is surprising that the ANMF submits that employees undertaking RATs at a time convenient to them prior to the commencement of a shift provides no benefit to the employee whatsoever, and it is perhaps even more surprising that the ANMF further submits that the potential for an employee to return a positive RAT is in some way a potential detriment to an employee.

[72] The Respondent submitted that whilst an employee may need to access paid leave entitlements in the event that they do return a positive RAT, to the extent that could be considered a detriment, this needs to be considered against what the Respondent submits are far more important and relevant considerations in the circumstances, such as:

(a) the employee will be able to identify, at as early a stage as possible, whether they are able to attend the workplace, consistent with Government public health advice that individuals should not attend high-risk settings such as aged care facilities, until at least 7 days after testing positive to COVID-19;

(b) the Respondent can take appropriate measures at the earliest possible stage to implement an appropriate response plan to a COVID-19 outbreak at the facility, in accordance with current Government guidance;

(c) the employee will be able to identify at an early stage whether they will need to travel to the workplace, so in the event of a positive test, unnecessary travel can be avoided (including the risk of potentially exposing other members of the public to infection during the course of the employee's travel to the workplace); and

(d) the employee is able to take the necessary precautions for themselves, their family members and other contacts as necessary.

[73] In reply on this point, the ANMF submitted that there is minimal if any personal benefit to employees in complying with the RAT direction. With regard to the Respondent's submissions about the affect the RAT direction may have on other persons at the facility, the ANMF noted that these also benefit the employer for the following reasons:

a. An employee undertaking a RAT may slightly reduce the risk of other employees becoming infected by COVID-19, which will prevent the employer having to pay personal leave for that employee, or to replace that employee in an industry affected by workforce shortages.

b. Reputational advantage to the employer in adopting a rigorous infection control policy.

c. Improved service to the employer's customers (the residents) as nursing staff are undertaking infection-control work tasks in addition to (not instead of) time spent providing care.

d. By the time employees arrive 'on the floor' of the nursing home, all pre-commencement work activities for the employees to get immediately to work have been completed.

[74] The ANMF submitted that undertaking of RATs by employees of the Respondent is principally (if not solely) for the benefit of the employer.

Contracts of Employment

[75] The ANMF also makes reference to *Master Builders' Association of Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* [1981] FCA 58 (**Master Builders**), where the Full Court of the Federal Court was called upon to consider whether time spent by an employee driving a vehicle was "working time" under the relevant Award. The following is an extract from the decision of the Full Court:

"[38] The true answer is to be found by considering the terms of the contract of employment and the terms of the award providing for payment of wages. The interpretation is sought in circumstances where the employee is required, pursuant to his contract of employment, to drive the vehicle. During other hours of work he performs

> work admittedly that of a builder's labourer. This must mean that as part of his duties as an employee he is required to drive the vehicle from his home to his place of employment and return on any one day. Put another way, when the employee is driving the vehicle, he is performing a duty required of him by his employer; he is performing an obligation imposed upon him by his contract of employment. Such a man is in our view a builder's labourer within the meaning of the award."

[76] The ANMF therefore submitted that the relevant terms of the Contract must be considered alongside the relevant terms of the applicable industrial instrument. The contracts of employment issued by the Respondent to its nursing staff are standard, in that they do not contain any express term about how wages are earned, nor an express definition of "work".

[77] The ANMF made reference to *The Contract of Employment*, 2nd Edition, Mark Irving B Juris, LLB, member of the Victorian Bar, and the extract contained at [4.30] on p.212:

> "First, in standard employment contracts wages are not earned by the performance of work. They are ordinarily earned by the agreed service. Most of the time the agreed service involves obeying the instructions of the employer who directs the employee to perform actual work (usually at its premises), and so the failure to comply with those instructions results in no wages being earned. An employee directed to stay at home earns wages, though he or she does not perform actual work. ….
>
> It is suggested that ordinarily it is the obedience of instructions about the performance of work that is the part of the service that earns the remuneration. Each employee owes a series of obligations: to obey instructions, to keep confidences, to perform faithfully, to perform duties with care etc: …"

[78] The ANMF submitted that the standard employment contracts issued by the Respondent do not contain any express term about what it is that earns wages. The contracts relevantly provide the following terms as to what is meant by "agreed service" for the purposes of the employment relationship:

> "2.2: Your duties will be in accordance with your position description as provided, those stated within the relevant industrial instrument, the policies and procedures of this organisation and all lawful and reasonable instructions as issued by your, manager who may vary from time to time over the duration of your employment with us.
>
> 2.3: During any engagement by the New Auckland Place you must:
> …
>
> (e) Comply with all directions of New Auckland Place.
> …"

[79] Thus, the ANMF submitted that it is ordinarily the obedience of instructions or to do what is required by the employer, that is considered service and that earns wages. In this case, the nursing staff render 'agreed service' to the employer in accordance with the Agreement and their employment contracts by their compliance with the RAT direction.

[80] The Respondent submitted that the ANMF contends that clauses 2.2 and 2.3 in employees' employment contracts which contain a general obligation for employees to comply with all directions of the Respondent is equivalent to providing "agreed service" such that it is relevant to the wages-work bargain.

[81] The Respondent submitted that this general obligation in employees' contracts cannot serve to extend the concept of work as contended by the ANMF. An employee may be subject to their employer's policies, procedures and practices at times when they are not "working" or "at work".

[82] The Respondent provided examples of where an employee of the Respondent is required to (amongst other things):

> (a) Always maintain confidentiality in relation to the Respondent's confidential information during employment and after the employment ends; and
>
> (b) not attend work whilst under the influence of alcohol or drugs.

[83] The Respondent submitted that these obligations do not create a contractual entitlement for an employee to regard the time spent by the employee maintaining confidentiality, or not drinking / consuming drugs before the commencement of work to be "time worked". Despite this, the employee is expected to comply with and remains contractually bound to these obligations.

[84] The Respondent submitted that the direction to undertake RATs at some point in time prior to the commencement of a rostered shift, at a time convenient to them and at a place of their choosing is entirely consistent with the ability of the Respondent to provide employees with lawful and reasonable instructions as noted in clause 2.2 and 2.3 in employees' employment contracts, as well as generally at common law. However, it does not follow, as contended by the ANMF, that the obedience of instructions at large necessarily equates to the performance of service for which wages are payable.

Entitlement to wages under the Agreement

[85] The ANMF makes reference to the following extract from the Agreement:

> "27. Overtime
>
> 27.1. Overtime penalty rates
>
> (a) All overtime must be approved prior to it being worked when an employee works in excess of 10 hours per day, or 38 hours per week or 76 hours per fortnight depending on the pay period. Payment of such overtime penalties shall be on the hourly rate (1/38th). Hours worked in excess of 38 ordinary hours in any week prescribed in clause 21—Ordinary hours of work, are to be paid as follows:
>
> (i) Monday to Friday (inclusive)–time and a half for the first two hours and double time thereafter;

(ii) Saturday and Sunday–double time;

(iii) Public holidays–double time and a half

(b) Overtime penalties as prescribed in clause 27.1(a) do not apply to Registered nurse levels 4 and 5.

(c) Overtime rates under this clause will be in substitution for and not cumulative upon the shift premiums prescribed in clause 25-Saturday and Sunday work and clause 28-Shiftwork.

27.2. Part time employees

(a) Subject to clause 27.1(a)(i),(ii),(iii) all time worked by part-time employees in excess of 38 hours per week or 76 hours per fortnight will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Saturday and Sundays where such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

(b) Nurses
All time worked by part-time employees in excess of the rostered daily ordinary fulltime hours will be overtime and will be paid as prescribed in clause 21.7(a).

…"

[86] The ANMF noted that a full-time employee is defined at clause 11.2 of the Agreement as "*one who is engaged to work 38 hours per week or an average of 38 hours per week pursuant to clause 21(a) [Ordinary hours of work] of this agreement*". The ANMF goes on further to note that the Respondent produces a fortnightly roster of the ordinary working hours of nursing staff, which, for full-time employees is 38 ordinary hours (or an average of 38 hours) per week. These rosters do not include the time spent by nursing staff in complying with the RAT direction prior to their rostered start time. The ANMF therefore submitted that all of the time worked by full-time nursing staff in complying with the RAT Direction was in excess of 38 hours (or an average of 38 hours) per week.

[87] The ANMF submitted that the Respondent expressly directed its nursing staff to comply with the RAT direction prior to commencing their rostered shift. As such, the employer clearly approves of the additional 20 minutes of work performed per shift by nursing staff outside of rostered hours. Therefore, full time nursing staff (except for Registered Nurses at levels 4 and 5, if any), are entitled to be paid for the time spent complying with the RAT direction at the overtime rate specified in clause 27.1(a) (i), (ii) and (iii).

[88] The ANMF referenced clause 27.2(b) of the Agreement which provides specifically for the overtime entitlements of part-time nursing staff. The ANMF submits that it is clear from the context of clause 27.2(b) that the reference to "21.7(a)" is an error, and that it should read "27.1(a)". There is no clause 21.7(a) in the Agreement.

[89] Prior to the determination of this matter an application was brought by the ANMF under section 218A of the Act to amend the Agreement on that basis that it contained an error. The Respondent consented to the application, and it was granted addressing the error referred to in the ANMF submissions.

[90] The ANMF submitted that the rostered daily ordinary hours of part-time staff are contained in a fortnightly roster that is produced by the Respondent and displayed on the noticeboard in the staff room prior to the commencement of each roster period (refer to paragraphs 14 and 15 of the Agreed Statement). The time spent by nursing and care staff in complying with the RAT direction is not included in the rosters published by the Respondent (refer to paragraph 16 of the Agreed Statement).

[91] The ANMF referred to the following extract from the Agreement regarding changes that may be made to published rosters:

> "24. Rosters
> …
> 24.3 Unless the employer otherwise agrees, an employee desiring a roster change will give seven days' notice except where the employee is ill or in an emergency.
>
> 24.4 Seven days' notice of a change of roster will be given by the employer to an employee. Except that, a roster may be altered at any time to enable the functions of the facility to be carried out where another employee is absent from work due to illness or in an emergency. Where any such alteration requires an employee working on a day which would otherwise have been the employee's day off, the day off instead will be as mutually arranged.
>
> 24.5 This clause will not apply where the only change to the roster of a part-time employee is the mutually agreed addition of extra hours to be worked such that the part-time employee still has two rostered days off in that week or four rostered days off in that fortnight, as the case may be."

[92] The ANMF submitted that Clauses 24.3, 24.4 and 24.5 of the Agreement allow changes to be made to an employee's roster without seven days' notice, only where:

> (a) the employee requests the change, and the employer agrees to it,
>
> (b) the employee requires the change due to illness or in an emergency,
>
> (c) the employer requires the change because another employee is absent from work due to illness or an emergency, or
>
> (d) the employer and a part-time employee mutually agree to the working of additional hours (subject to compliance with rostered days off).

[93] The ANMF submitted that it is agreed between the parties that the Respondent has required, rather than obtained the agreement of nursing staff to comply with the RAT direction (refer to paragraph 10 of the Agreed Statement). The ANMF submits that the Respondent's

direction for nursing staff to perform work before their rostered shift start time was not made because another employee was absent from work due to illness or emergency.

[94] The ANMF submitted by reason of the above, the rosters published by the Respondent did not include the work performed by employees in complying with the RAT direction, nor were there any changes made to the roster after they were published, to include this time, and the work performed by part-time nursing staff in complying with the RAT direction was work performed in excess of their rostered ordinary hours on each shift. Pursuant to clause 27.2 (b) of the Agreement, this work must be paid at the overtime penalty rates set out in subclauses 27.1 (a) (i) to (iii).

[95] The ANMF submitted that the RATs that are supplied to nursing staff by the Respondent are manufactured by MP Biomedicals and are packaged with a pamphlet containing instructions for use (refer to paragraphs 20 and 21 of the Agreed Statement).

[96] The ANMF referred to the following extract from the manufacturer's instructions for use:

> "PREPARATION
>
> • Wash your hands.
> • Clear clean and dry a flat surface.
> • Check the kit contents.
> • Make sure that nothing is damaged or broken.
> • Have a timer ready.
> • Blow your nose several times before taking the sample.
> • Wash your hands again.
>
> PROCEDURE
>
> 1. Place the extraction tube in the tube stand to avoid spilling the liquid.
>
> 2. Rotate the lid of the sample extraction buffer bottle. CAUTION: Open it away from your face and be careful not to spill any of the liquid.
>
> 3. Squeeze all the extraction buffer out of the bottle into the extraction tube. CAUTION: Avoid touching the bottle against the tube.
>
> 4. Find the swab in the sealed wrapper. Identify the soft, fabric tip on the swab.
>
> 5. Peel open the wrapper of the swab and carefully pull out the swab. CAUTION: Do not touch the soft, fabric tip of the swab with your hands.
>
> 6. Carefully insert the swab into one nostril. The swab tip should be inserted at least 2.5 cm from the edge of the nostril. Roll the swab 3-4 times along the mucosa inside the nostril to ensure that both mucus and cells are collected. Leave swab in the nostril for several seconds. Using the same swab, repeat this process for the other nostril.

CAUTION: This may feel uncomfortable. Do not insert the swab any deeper if you feel strong resistance or pain.

7. Place the swab with the sample into the extraction tube. Rotate the swab 3-5 times. Leave the swab in the extraction solution for 1 minute.

8. Pinch the extraction tube together with fingers while removing the swab to leave as much solution in the tube as possible. Place the swab back into the swab wrapper.

9. Install the nozzle cap onto the sample extraction tube tightly. Replace the tube in the tube holder.

10. Open the foil pouch and remove the test card. Place the test card on a flat and level surface. CAUTION: Once opened the test card must be used immediately.

11. Invert the extraction tube and add 3 drops only of test specimen into the specimen well (S), by gently squeezing the extraction tube. CAUTION: Do not add drops to the larger well. Do not add more than 3 drops. Do not agitate the tube. Avoid the formation of air bubbles.

12. Read the results at 15-20 minutes. CAUTION: Results after 20 minutes may not be accurate.

DISPOSAL INSTRUCTIONS

13. Place all the used test components into a tear-resistant waste bag and dispose of them in the trash according to local waste regulations."

[97] The ANMF submitted that users are instructed to wash their hands twice during the 'preparation' stage.

[98] The ANMF submitted that all residential aged care providers are expected to meet the Quality Standards set by the Australian Government Aged Care Quality and Safety Commission (ACQSC). To meet Standard 3: Personal care and clinical care, a provider must implement standard and transmission-based precautions to prevent and control infection, including by ensuring its employees maintain appropriate hand hygiene.

[99] The ANMF submitted that the Respondent complies with Standard 3 by developing and implementing an infection control standard and by providing training and education materials to nursing staff regarding hand hygiene (refer to paragraphs 24 and 25 of the Agreed Statement). The Respondent displays the World Health Organisation's hand washing instructions at its New Auckland Place facility, containing a hand washing process that takes 40 to 60 seconds from start to finish (refer to paragraph 25 of the Agreed Statement).

[100] The ANMF submitted that it typically takes nursing staff at least 20 minutes to comply with the RAT instructions.

[101] The Respondent submitted that the ANMF makes a number of submissions in relation to what appear to be assumptions about the time spent by employees undertaking RATs and how that supposed time relates to the hours of work and rostering provisions of the Agreement for full-time and part-time employees, and the ANMF's submissions then detail the RAT manufacturer's instructions and refer to the Respondent's instructions to employees in relation to hand hygiene practices whilst at work at the facility.

[102] The Respondent submitted that it is not clear as to what the purported relationship is between the Respondent's instructions to employees in relation to hand hygiene practices at the facility and undertaking a RAT. Further, there is no evidentiary basis whatsoever for the broad assertion at paragraph 65 of the ANMF submissions that it "*typically takes nursing staff at least 20 minutes to comply with the RAT instructions*".

[103] The Respondent submitted that as best it can ascertain, this appears to be a misguided assertion based on the fact that the manufacturer's instructions specify that the results of a RAT should be read 15 – 20 minutes after completing a swab and squeezing extraction solution onto the test card. The Respondent submitted that aside from the fact that the ANMF has not led any evidence from any employee in relation to actually undertaking testing, the submission appears to be based on the assertion that whilst an employee waits the requisite 15 – 20 minutes to read the test results, they have no practical ability to do anything else and must effectively maintain some form of vigil with the test card for that period of time.

[104] The Respondent submitted that whilst neither party has led any witness evidence in this matter in relation to the actual process of undertaking a RAT, the Respondent submits that it is a far more reasonable assumption, given the prevalence of RATs in Australia as a result of the COVID-19 pandemic and the frequency of testing required for aged care employees, that the amount of time actually required for an employee to undertake a test would, in any event, be considered to be *de minimis*.

[105] In reply the ANMF submitted that the Respondent's submission that the time spent by employees in complying with the RAT direction should be considered *de minimis* is not reasonable and must be dismissed.

[106] The ANMF submitted that the Respondent issued nursing staff with RATs from MP Biomedical and directed them to complete one prior to each shift. MP Biomedical's instructions for completing a RAT include a 7-step preparation process and then a 12-step process for performing each RAT (together, 19 steps). The first 18 steps involve active duties, and the 19th step requires the user to wait for 15 minutes before reading the result.

[107] The ANMF submitted that the Respondent also requires its nursing staff to take a photo of their completed RAT with their name and the date. The Respondent has instructed the nursing staff to complete a RAT, including to wait for the RAT result and read and record it at the appropriate time. Those who stand and wait also serve. For the entire period that an employee is complying with this lawful and reasonable direction, they are working and providing service to the employer.

[108] The ANMF submitted that it is also worth noting that during the 15-minute waiting period at step 19, the employee is complying with the Respondent's direction to 'stand and

wait'. During this time, the employee will be restricted as to the private activities that they would be able to engage in were it not for the employer's direction. For example, during the 15-minute waiting time, an employee would not be able to travel more than 10 minutes from the prepared surface on which their RAT was performed, as they must return between the 15- and 20-minute mark.

[109] The ANMF submitted that for an action to be considered *de minimis*, it must be so minimal or trivial as to be of no material significance. This question was considered briefly by the Full Bench of the FWC in *Seo.* In considering whether around 3 to 5 minutes of "meal break activities" (including a 90 second walk, 1 minute of donning and doffing and 10 seconds of scrubbing) are substantive activities, the Full Bench ruled as follows:

> "[56] Nor is this a case where it could be seriously contended that the amount of time taken to undertake the meal break activities was so minimal it should be regarded as de minimis. We are not, for example, dealing with a requirement that an employee put on a safety helmet, safety glasses and a hi-vis vest on their way out of the crib room at the end of a meal break. "

[110] The ANMF submitted that the 19-step process that the Respondent has directed its nursing staff to complete prior to each shift is undoubtedly substantive. This was also confirmed by the Commission in *Jeta*, where it was held that the performance of a RAT on the direction of an employer outside of rostered hours was 'work' for which wages were payable.

CONCLUSION

[111] The ANMF submitted the answer to its proposed questions 1(a) and (b) must be "yes". Further for full-time nursing staff (except for registered nurses level 4 and 5) and for all part-time nursing staff, this work will be payable at the applicable overtime rate. This is the case because the Respondent did not include the time spent complying with the RAT direction in the published rosters (containing the ordinary working hours of nursing staff). The ANMF submitted Full-time employees work 38 ordinary hours (or an average of 38 ordinary hours) per week, so the additional time spent complying with the RAT direction is time worked in excess of ordinary hours, and as such, the answer to the Applicant's proposed question 2 must be "yes".

[112] The Respondent submitted that the RAT is a specific safety measure implemented by the Respondent at its New Auckland Place facility at Gladstone in Queensland to ensure employees can work safely without risk of transmission of COVID-19, and to ensure there is a healthy working and residential environment for staff, residents and visitors to the facility, as well as the family and household members of the Respondents' staff and the broader community. The testing regime should rightly be regarded as a public health activity in line with the mutual and individual responsibilities of staff and the Respondent in accordance with the *Work Health and Safety Act 2011* (Qld).

[113] The Respondent submitted that the Commission recently made the determination in *Jeta Gardens* that employees undertaking RATs in an aged care setting:

(a) prior to the commencement of shifts, but not at, or within, a designated time period at the workplace were not performing work; and

(b) subject to a direction of the employer that the RAT must be done at the workplace at or by a specific time were performing work.

[114] The Respondent further noted that the distinction in relation to entitlement to payment for time spent undertaking RATs before attending the workplace, as opposed to undertaking RATs whilst at the workplace, is entirely consistent with the general advice provided by the Fair Work Ombudsman in relation to eligibility for payment where employees are required by an employer to undertake RATs. The Respondent does not contend the view of the Fair Work Ombudsman is binding on the Commission.

[115] The Respondent submitted that there has been no direction from the Respondent to employees to undertake a RAT at a particular time or at a particular place. As such, the answers to the proposed questions 1(a) and (b) must be "No".

[116] As was referred to above Full Bench in *Seo* said as follows:

"[43] … we consider that whether particular activities constitute "work" within the meaning of an industrial instrument depends on the proper construction of the relevant instrument and the facts of the particular case."

[117] The authorities referred to by both the ANMF and the Respondent are context specific and none of them are on all fours with the facts in this case.

[118] I accept as was the case in *Jeta Gardens* that undertaking a RAT as directed by the Respondent is an infection control measure that is the performance of a duty capable of falling within the coverage of the classification descriptors in the Agreement in this case.

[119] The facts here are distinguishable from the decision in *Lee-Downs* as the nurses in this case are not under a continual duty to act when they take a RAT home and can choose to undertake the test at a time convenient to them. It is also the case that once a nurse undertakes the steps in the test they are free for a period of approximately 15 until they must return and examine and record the test result.

[120] *Warramunda* is also distinguishable as it dealt with circumstances where the employee was required to be at the premises of the employer, and the case wrestled with the distinction between being on call, or alternatively on duty.

[121] The decision in *Aldi* is also distinguishable in that the pre-commencement duties were required to be performed at the workplace. Both *Warramunda* and *Aldi* provide guidance as to what is private activity as compared to work.

[122] The ANMF is correct in rejecting as a general proposition the Respondent's assertion that 'work' must be a duty required to be undertaken by the employer at a certain place and at a particular point in time.

[123] The Respondent is also correct in pointing out that just complying with a direction for example to maintain confidentiality does not suffice to constitute 'work'. A direction of that kind can however be contrasted with a direction to perform some positive activity.

[124] I do not agree with the ANMF claim that a RAT provides no significant benefit to the employee. I agree with the Respondent that the undertaking of RAT's benefits all persons associated with the aged care facility, including the Respondent, its employees, its residents, visitors, and other personnel who enter the facility. The undertaking of RAT's safeguards the safety of all persons at the facility by ensuring that COVID-19 does not enter the facility. Ultimately however, I agree with the ANMF that when a RAT is done under employer direction it is not to be regarded as a 'private activity'.

[125] The central issue is whether the relevant industrial instrument applies to the undertaking of RATs in the specific facts of this case. Assistance can be found in the decision of Judge Humphreys in *Aldi* where in considering the question of whether tasks constituted 'work', it was stated:

> "the characterisation as to whether or not activities will constitute work will depend upon the construction of the relevant industrial instrument (my emphasis added) and whether it makes a specific provision for the activity in question, and the facts in the case."

[126] In circumstances where the direction of the Respondent does not direct or require the employees to attend the workplace or be at any specific place to undertake a RAT, or to undertake the RAT at a particular time other than at a time prior to the commencement of their next shift, a question arises as to whether the Agreement applies to the undertaking of the RAT in those particular circumstances.

[127] If it were to be concluded that in the specific facts of this case, the undertaking of the RAT away from the workplace is covered by the Agreement, an obvious difficulty arises as to what would be required to be paid by the Respondent to employees in those circumstances.

[128] I am satisfied that the direction of the Respondent that employees undertake a RAT in the manner as set out in the Agreed Statement of Facts and the attached documents, is a lawful and reasonable instruction as defined clause 2.2 and 2.3 in employees' employment contracts, as well as at common law.

[129] On one view it might be argued that if an employee is not entitled to any payment for administering the RAT under employer direction, then the direction is not reasonable. In the particular facts of this case the better view is that a direction to undertake a RAT is lawful and reasonable given the present risk of COVID-19 in Queensland and the vulnerability of the residents for whom the nursing staff provide care, and such a direction is consistent with Government recommendations to conduct such tests and obligations under workplace health and safety law.

[130] Undertaking a RAT at another location such as at home can be distinguished from the circumstances in scenario 3 in the *Jeta Gardens* decision because the facts in *Jeta Gardens* were that employees were directed to report to work 15 minutes early and were advised failure to do so could lead to disciplinary action. The requirement to report to work 15 minutes early

was intended to capture both the time to follow the steps in the procedure up to adding the specimen drops on the test card, and the period of waiting to read the test result.

[131] In the facts here, outside the relatively short period of time required to follow the procedure to undertake the RAT test, employees would be free to undertake other private activities. They are not required, as was the case in *Jeta Gardens* to report to the workplace, undertake the test, and wait the requisite approximately 15 minutes to read the result.

[132] As the Respondent submitted, no evidence was led about the time taken to undertake a RAT. The ANMF relied on attachment 6 to the Agreed Statement of Facts to submit that the whole of the time including the waiting period would be in the order of 20 minutes. A reasonable approximation of the time taken to undertake the 18 steps referred to by the ANMF prior to the 15-minute waiting period would be no more than a few minutes.

[133] In keeping with the view of the Full Bench in *Seo* that the time taken to perform the relevant duties in that matter could not be considered as *de minimus*, I am not satisfied that an estimated time of a few minutes could properly be described as *de minimus.*

[134] Whilst I am satisfied that the direction to administer the RAT outside the workplace and outside any rostered shift is a lawful and reasonable direction, and it is not *de minimus*, or a private activity, the question that remains is whether it is 'work' for the purposes of the Agreement.

[135] Clause 11.2 in respect of Full-Time employees, and 11.3 in respect of Part Time employees sets out arrangements for hours of work. Clause 11.5 provides that casual employees are engaged on an hourly basis with a minimum three-hour engagement.

[136] Part 5 of the Agreement is titled "Hours of Work and Related Matters". Contained within Part 5 are clauses dealing with the ordinary hours of work (clause 21); Span of Hours (clause 22); Breaks Between Shifts (clause 23); Rosters (clause 24); Saturday and Sunday work (clause 25); Breaks (clause 26); Overtime (clause 27); Shiftwork (clause 28); and Higher Duties (clause 29).

[137] I have considered the hours of work arrangements in the Agreement in their totality. That includes considering matters such as shift length, ordinary hours within a roster cycle, the span of ordinary hours, the requirement to pay overtime if a rest break of 10 hours between one work period and the commencement of another is not afforded (with certain exceptions), the triggering of overtime penalties where an employee works in excess of 10 hours per day, or 38 hours per week, or 76 hours per fortnight, or recall to work arrangements. It is apparent that the Agreement intends that work on a day be continuous except for meal breaks, noting that there is a provision in the Agreement for an employee to be paid an allowance to be on call.

[138] In my view it is apparent that the Agreement is not intended to be read as covering duties performed remotely from the employer's workplace and outside a shift or other specified work period as designated by one of the clauses contained in Part 5. The exception to that is when an employee is receiving an on-call allowance when an employee is on call at their private residence or other agreed location.

[139] The facts in this case can be contrasted with those in *Hartley v TAFE NSW* [2020] FWCFB 3280 where it was found that the enterprise agreement in that matter which covered teachers, concerned excluded additional payment for additional duties in certain circumstances.

[140] The Full Bench in Hartley said as follows at [25] ;

> "[25] Mr Hartley contended that, if there is an obligation on a PTCT to do *any* related duties associated with direct teaching duties, without constraint, their effective rate of pay would be eroded. But again, the Agreement provides for payments for related duties, in accordance with the table. Below the threshold of 10 teaching hours, no additional hours are payable for related duties, but such duties must nonetheless be reasonable, as the qualification to the Deputy President's answer to question 3 made clear. In our view the Deputy President's interpretation was correct. We reject the first ground of appeal and its challenge to the answer to question 3."

[141] The Agreement in this case does not encompass payment for certain incidental duties, including for example, time taken for example to maintain professional registration, as required under the contract. It follows that the employees when undertaking a RAT in the manner in the specific circumstances of this case, as directed by the employer at a time of their own choosing before the commencement of their rostered hours of work, are not "performing work" as contemplated by clause 4 of the Agreement, and are not covered by the Agreement at that time.

[142] On that basis the answer to the questions for arbitration are as follows:

1. In complying with the Respondent's direction to undertake a COVID-19 Rapid Antigen Test prior to commencing their rostered shift, were the Registered Nurses, Enrolled Nurses and Assistants in Nursing employed by the Respondent:

    a. performing work to which the Johnson Stenner Aged Care Enterprise Agreement 2021 applied? No.

    b. entitled to be paid wages for the time spent complying with the direction? No.

[143] Having concluded the answers to question 1(a) and 1(b) is no, the answer to question 2 must be no because the Agreement does not apply to the disputed activity.

COMMISSIONER

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