

## **FAIR WORK COMMISSION**

**Matter No.:** AM2020/99; AM 2021/65; AM2021/63

**S 158 – APPLICATION TO VARY OR REVOKE A MODERN AWARD (AGED CARE AWARD 2020);**

**S 158 – APPLICATION TO VARY OR REVOKE A MODERN AWARD (NURSES AWARD 2010)**

**s 158 APPLICATION TO VARY OR REVOKE A MODERN AWARD (SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010)**

### **FINAL SUBMISSIONS OF THE UNITED WORKERS' UNION**

1. In these proceedings UWU has made submissions in support of the applications including Final Submissions (25 July 2022) and Reply Submissions (21 April 2022).
2. In these submissions we address the questions raised by Background Document 5.
3. Prior to the filing of these submissions, we have had the benefit of reading the submissions filed by the Health Services Union in reply to the closing submissions of the "Joint Employers". UWU supports those submissions.
4. We make no further submissions in reply to closing submissions nor in respect of the Commonwealth's submissions filed on 8 August 2022.

### **THE QUESTIONS POSED IN BACKGROUND PAPER 5**

**Question 1 for the HSU: Where does the HSU derive the proposition of the 'social utility of the work' from? In particular, which part of the legislative framework supports the proposed construction? How should the 'social utility of the work' be measured?**

1. Question 1 is directed at HSU and UWU makes no comment about this question.

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**Question 2 for all other parties: do you agree with the HSU submission that the above additional propositions are uncontentious?**

2. UWU agrees with the submission of HSU, that these two additional propositions are uncontentious.
3. In relation to proposition (2), UWU refers FWC to the evidence of Karen Roe<sup>1</sup>, Maria Moffat<sup>2</sup>, Ngari Inglis<sup>3</sup>, Susan Morton<sup>4</sup>, Teresa Hetherington<sup>5</sup>.

**Question 3 for the CCIWA: the CCIWA is asked to respond to question 17 of BD1. If the CCIWA does not respond, the Commission may assume that the CCIWA does not represent anyone covered by any of the awards subject to these proceedings and as a result may not place weight on their submissions.**

4. Question 3 is directed at CCIWA and UWU makes no comment about this question.

**Question 4 for the ANMF: Does the ANMF agree with the Joint Employer's characterisation of their application (at sections 3.12 – 3.19 of the Joint Employer's closing submissions)?**

5. Question 4 is directed to the ANMF and UWU makes no comment about this question.

**Question 5 for the Joint Employers: What is being proposed in this aspect of the submission? What, if any, changes to the Aged Care Award classification structure are being proposed by the Joint Employers?**

6. Question 5 is directed at the Joint Employers and UWU makes no comment about this question.

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<sup>1</sup> Statement of Karen Roe at [20], [33]

<sup>2</sup> Statement of Maria Moffat at [25], [27], [30],

<sup>3</sup> Statement of Ngari Inglis at [11], [28], [36]

<sup>4</sup> Statement of Susan Morton at [22] – [41]

<sup>5</sup> Statement of Teresa Hetherington at [105] – [107]

**Question 6 for the Joint Employers: What, if any, changes to the Nurses Award classification structure are being proposed by the Joint Employers?**

7. Question 6 is directed at the Joint employers and UWU makes no comment about this question.

**Question 7 for the Joint Employers: What is being proposed in this aspect of the submission?**

8. Question 7 is directed at the joint employers and UWU makes no comment about this question.

**Question 8 for the Joint Employers: Are the Joint Employers contending that an increase in minimum wages is justified on work value grounds in respect of these classifications of employees? If so, what quantum of increase is proposed in respect of each classification of employees? Do the Joint Employers oppose any increase in respect of any classification not mentioned at [174] above?**

9. Question 8 is directed at the Joint Employers. and UWU makes no comment about this question.

**Question 9 for the Joint Employers: A comparison with the C10 framework suggests if the Joint Employer submission is accepted, that the minimum rates for RNs should be increased by 35 per cent, is that what is being proposed by the Joint Employers?**

10. Question 9 is directed at the Joint Employers and UWU makes no comment about this question.

**Question 10 for the ANMF and the HSU: what is the ANMF and the HSU’s response to the Joint Employers submission about the expert evidence and the weight that should be placed on that evidence?**

11. While question 10 is directed to ANMF and HSU, UWU agrees with the submissions made by ANMF at part C.6 of its Closing Submissions in Reply, as well as the submission made by the HSU in their Closing Submission in Reply.

**Question 11 for all parties: Noting that the summary of submissions is a high-level summary only, are there any corrections or additions that should be made?**

12. In relation to question 11, the summary of the UWU submissions is accurate.

**Question 12 for all parties: To the extent that there is a degree of tension between the Pharmacy Decision and the Teachers Decision in the application of the principles in the ACT Child Care Decision is it common ground that the ACT Child Care Decision was made under a different statutory regime to the Commission’s statutory task under s.157(2A)?**

13. UWU submits it is clear that the *ACT Child Care Decision* was made under a differing statutory regime<sup>6</sup>. The decision was made pursuant to s.881B of the *Workplace Relations Act 1996*.

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<sup>6</sup> *Four Yearly Review of Modern Awards – Pharmacy Industry Award 2010* [2018] FWCFB 7621 at [197]

**Question 13 for all parties: At [16] of its closing submissions, the HSU suggests that ‘all significant stakeholders agree that some variation to wages is justified by work value reasons and that the view of all major stakeholders is that wages need to be “significantly increased”’. What do the other parties say in response to the HSU’s submission?**

14. UWU agrees with the assertion made by HSU at [16] of its closing submissions. The first line of the “Aged Care Sector Stakeholder Consensus Statement” to which all of the major stakeholders were a party, states:

*“The stakeholders agree that wages in the aged care sector need to be significantly increased ...”<sup>7</sup>*

**Question 14 for all parties: Do the parties agree with the points of agreement identified at paragraphs [194]–[201] above? Are there any other significant points of agreement that should be identified?**

15. UWU agrees that:

- a. The propositions set out at paragraph [116] of Background Document 1 are uncontentious.
- b. The rates in the three awards have never been properly fixed
- c. FWC does not need to consider “significant net addition or find a fixed datum point”.
- d. The *ACT Child Care Decision* was made under a different statutory regime.

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<sup>7</sup> Aged Care Sector Stakeholder Consensus Statement, 17 December 2021, p. 2

**Question 15 for the ANMF: The ANMF’s attention is drawn to the above paragraphs. How does the ANMF reconcile the Penalty Rates Review with its submission that s.157(2A) exhaustively defines ‘work value reasons’?**

16. Question 15 is directed to ANMF and UWU makes no comment about this question.

**Question 16 for the ANMF: is the ANMF suggesting that attraction and retention are considerations relevant to the assessment of ‘work value’ under s.157(2A)? If so, on what authority does the ANMF rely to support that proposition? Alternatively, is it being put that the increases sought are ‘necessary to attract and retain the number of skilled workers needed to deliver safe and quality aged care’ is a consideration relevant to the achievement of the modern awards objective?**

17. Question 16 is directed to ANMF but UWU makes the following submission.

- a. UWU supports the submissions made by ANMF at [30] – [37] of its closing submissions.
- b. Whether or not these factors are relevant to s.157(2A), they are plainly relevant to the consideration of the achievement of the modern award objective, and thus relevant to the overall inquiry. To this end, these factors are relevant to:
  - i. The need to promote social inclusion through increased workforce participation (s.134(1)(c));
  - ii. The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)).

18. In relation to the relevance of s.134(1)(h):

- a. A report authored by the Committee for Economic Development of Australia (**CEDA report**) found:

*“Improving the quality of care for older generations is not only a social imperative, but also an economic one. The sector currently receives more than \$22 billion of government funding per year, supports more than 7.3 million people receiving some form of care service’ and employs more than 360,000 people.”*<sup>8</sup>

- b. The CEDA report also found that by 2030 there will be a shortfall of at least 110,000 workers in the aged care sector if the workforce expands at its current pace and 17,000 more direct aged care workers are required each year to meet basic standards of care.<sup>9</sup>

- c. In its Final Report, the Royal Commission into Aged Care Quality and Safety said:

*“There are other reasons why the sector as a whole has had difficulties attracting and retaining well-skilled people to work in aged care. These include low wages and poor employment conditions, lack of investment in staff and, in particular, staff training, limited opportunities to progress or be promoted, and no career pathways.”*<sup>10</sup>

- d. UWU submits the exercise of award powers to increase wages in a sector in which low wages and poor employment conditions are having a detrimental effect on the attraction and retention of employees, in circumstances where

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<sup>8</sup> Reply Witness statement of Lauren Elizabeth Beamer Hutchins, LH-12, “Introduction”

<sup>9</sup> *Ibid* at [50]

<sup>10</sup> Royal Commission into Aged Care Quality and Safety, Final Report: Care, Dignity and Respect, Volume 2, section 4.10, p.213

that sector is critical to the sustainability and performance of the national economy, is consistent with and necessary to achieve the modern awards objective.

**Question 17 to all parties: do the parties agree with the points of contention identified at paragraph [202]–[219] above?**

19. UWU agrees the matters identified in paragraphs [209] – [219] remain points of contention in this proceeding.

**Question 18 for the ANMF and HSU: what is the basis for the difference between the number of classification levels in the HSU and ANMF’s proposed classification structure for personal care workers?**

20. Question 18 is directed at ANMF and HSU and UWU makes no comment about this question.

**Question 19 for the ANMF and HSU: there are some differences in the classification definitions proposed by each party. How does each party respond to the classification definitions proposed by the other party?**

21. While question 19 is directed at ANMF and HSU, UWU submits that:

- a. UWU is not supportive of the removal of personal care workers into a separate classification structure, where the consequence of such a change is to confine an increase in wage rates only to personal care workers, and not to apply such increases to support staff as well.
- b. UWU is not supportive of any alteration to classification definitions which would have the effect of reducing the classification of any aged care worker.



**Question 20 for the Joint Employers: What is the Joint Employers' position in respect of the ANMF and HSU classification proposals?**

22. Question 20 is directed to the Joint Employers and UWU makes no comment about this question.

**Question 21 for the ANMF: Why is it necessary, in the sense contemplated by s.138, that the schedule expire after 4 years?**

23. Question 21 is directed to the ANMF and UWU makes no comment about this question.

**Question 22 for the ANMF: How does the proposition advanced by the ANMF at [57](4) of its closing submissions fit with the observations in the SCHADS decision? On what basis is it put that the funded nature of the sector is relevant to a consideration of work value?**

24. Question 22 is directed to the ANMF and UWU makes no comment about this question.

**Question 23 for all parties: What do the parties say about the Aged Care Amendment (Implementing Care Reform) Bill 2022 (Cth). Will it affect the propositions in Contention 6?**

25. In relation to question 23, UWU submits that at this stage it would only be possible to speculate on the effect of *the Aged Care Amendment (Implementing Care Reform) Bill 2022* ('the Bill'). This is because, amongst other things:

- a. The Bill requires one Registered Nurse to be on site and on duty at a facility, but contains a number of exceptions. The application of the exemptions remains unclear (and it could be that a number of aged care providers qualify).

- b. The Commonwealth Government has foreshadowed that it will introduce subordinate legislation to mandate minimum care time in the near future, and that such subordinate legislation will provide an average of 200 hours minimum care to residents, each day on average.<sup>11</sup>
- c. At this stage, it is not clear who the care will be provided by. It seems most likely that these care hours will be filled by personal care workers ('PCWs'). In such circumstances, the ratio of PCWs to nurses will increase and it seems probable that current tasks assigned to PCWs would remain unchanged, albeit with more PCWs.

**Question 24 for the ANMF: What authority is relied on in support of that proposition?**

**Is the ANMF contending that dangerous work warrants a work value increase?**

26. Question 24 is directed to the ANMF. and Uwu makes no comment about this question.

United Workers Union

19 August 2022

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<sup>11</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 28 July 2022, 22 (Anika Wells, Minister for Aged Care and Minister for Sport)  
<[https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/25918/toc\\_pdf/House%20of%20Representatives\\_2022\\_07\\_27.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/25918/toc_pdf/House%20of%20Representatives_2022_07_27.pdf;fileType=application%2Fpdf) >