



DECISION

Fair Work Act 2009

s.158—Application to vary or revoke a modern award

Applications by Australian Nursing and Midwifery Federation

(AM2021/63, AM2024/11)

NURSES AWARD 2020

[MA000034]

Health and welfare services

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT ASBURY
DEPUTY PRESIDENT O'NEILL
PROFESSOR BAIRD
DR RISSE

SYDNEY, 6 DECEMBER 2024

Applications to vary the Nurses Award 2020 – work value cases – aged care industry – nurses and midwives – finalisation of classification and pay structure for registered and enrolled nurses in the aged care sector.

Background

[1] This decision concerns two applications made by the Australian Nursing and Midwifery Federation (ANMF) seeking variations to the minimum rates of pay in the *Nurses Award 2020* (*Nurses Award*). The first application, in matter AM2021/63, sought increases of 25 per cent to the rates of pay for nurses covered by the *Nurses Award* engaged in the aged care sector, together with equivalent increases for personal care workers (PCWs) in the residential aged care sector covered by the *Aged Care Award 2010* (*Aged Care Award*). For the purposes of hearing and determination, this application travelled together with applications by the Health Services Union (HSU) and a number of individuals for a 25 per cent increase to the minimum rates of pay for all employees covered by the *Aged Care Award* (matter AM2020/99) and a further application by the HSU for the same level of increase to the minimum rates of pay for home care workers (HCWs) in the aged care sector covered by the *Social, Community, Home Care and Disability Services Industry Award 2010* (*SCHADS Award*) (matter AM2021/65).

[2] An initial decision in respect of the applications was issued by a Full Bench¹ on 4 November 2022² (*Stage 1 decision*). In that decision, the Full Bench made a finding that modern award minimum wage rates for ‘direct care employees’ in the aged care sector (comprising registered nurses (RNs), enrolled nurses (ENs) and nursing assistants (AINs) covered by the *Nurses Award*, PCWs covered by the *Aged Care Award* and HCWs covered by the *SCHADS*

Award) do not properly compensate for the value of the work performed and determined that an interim increase of 15 per cent in modern award minimum wages for direct care employees was justified by work value reasons. The Full Bench reserved the position with respect to ‘indirect care employees’ covered by the *Aged Care Award*. Importantly for present purposes, the Full Bench accepted a submission that, independent of the work value matters considered in the *Stage 1 decision*, an ‘anomaly’ existed in the rates of pay for nurses. In this regard the Full Bench said:

[942] The Joint Employers³ identify what they characterise as a ‘significant anomaly’ when the existing rates in the Nurses Award are compared to the C10 Metals Framework, in that the minimum rates in the Nurses Award do not correspond to the minimum qualifications of the position when compared to the AQF and the C10 Metals Framework.

[943] At [7.5] of their closing submissions, the Joint Employers identify the extent of the non-alignment of the RN classification to the Metals Framework, including that:

- the minimum rates for ENs currently align at 102 per cent relativity, which sits between C10 and C9, despite the fact that an EN is required to obtain a Diploma of Nursing, which is the qualification requirement at the C5 rate in the Metals Framework
- the minimum rates for a RN currently align just below a C8, but the standard qualification for a RN is an accredited tertiary degree—which is an AQF Level 7 qualification that aligns with C1 in the Metals Framework, and
- the minimum rates for a Nurse Practitioner currently align with a C2(b) with a qualification requirement of an Advanced Diploma, yet the qualification for Nurse Practitioner is a post-graduate degree.

[944] The weekly rate for an RN at Level 1, pay point 1 under the Nurses Award is currently \$1,025.20. The Joint Employers accept that the role of RN corresponds to AQF Level 7 and aligns with level C1 in the Metals Framework. Both levels—RN Level 1 in the Nurses Award and C1(a) in the Manufacturing Award—have a degree as a minimum qualification. If existing relativities were then to be retained (as contemplated by step 2 from the *ACT Child Care Decision*), the ANMF submitted that the result would be the following (based on the rates of pay applicable as at 21 April 2022:

[Table 18 not included]

[945] The application of the C10 Metals Framework Alignment Approach in accordance with the 3 step process set out in [the] *ACT Child Care Decision* would result in a 35 per cent pay increase across all levels.

...

[954] We accept that in determining this matter we are not confined to the terms sought in the Applications and may determine the claims other than in the terms sought by the ANMF but that if we were to contemplate such a course, we would be obliged to provide interested parties procedural fairness.

[955] We agree with the Joint Employers’ assessment that the comparison between the C10 Metals Framework and the Nurses Award discloses an anomaly. The realignment of the classification rates in the Nurses Award would also be consistent with the approach taken in the *Teachers Decision*. In our provisional view, there is considerable merit in such an approach. But that is not what we propose to do in this decision.

[956] The realignment of the rates for nurses in the aged care sector would have implications for nurses employed in other sectors and for the employers in those sectors. Given the position taken by the ANMF in these proceedings and the fact that other parties likely to have an interest in the matter are entitled to be heard on the matter, we have not taken this particular issue any further in these proceedings. As we mention later in this chapter, it is open to the ANMF to simply make an application to vary the Nurses Award.⁴

(footnotes omitted)

[3] The next stage in the proceedings was that a reconstituted Full Bench⁵ determined, in a decision published on 21 February 2023⁶ (*Stage 2 decision*), that the interim award wage increase of 15 per cent for direct care workers was necessary to achieve the modern awards objective and the minimum wages objective and would have an operative date of 30 June 2023.⁷

[4] The outstanding issues requiring determination after the *Stage 2 decision* in stage 3 of the proceedings were:

- (1) whether any further wage adjustments were justified on work value grounds for direct care employees granted interim wage increases as a result of the *Stage 1 decision* and the *Stage 2 decision*;
- (2) whether any wage adjustments were justified on work value grounds for indirect care employees;
- (3) a more detailed consideration of the classification definitions and structures in the *Nurses Award*, the *Aged Care Award* and the *SCHADS Award* as they applied to aged care sector employees.

[5] The *Fair Work Act 2009* (Cth) (FW Act) was amended by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), effective from 7 December 2022, to (relevantly) add s 157(2B) requiring the Commission's assessment of work value to be free of assumptions based on gender and to include consideration of whether historically the work has been undervalued because of assumptions based on gender. The modern awards objective and the minimum wages objective, in ss 134(1) and 284(1) respectively, were also amended to include the need to achieve gender equality as a matter required to be taken into account. The consideration of the stage 3 issues was therefore required to be undertaken within this amended statutory framework.

[6] On 7 March 2023 the ANMF filed a submission in which it contended for the first time that the classification of RN Level 1, Pay Point 1 should be aligned with classification C1(a) under the C10 Metals Framework in stage 3 of the proceedings, consistent with the provisional view expressed in paragraph [955] of the *Stage 1 decision*. This became one of the issues to be determined in stage 3 of the proceedings.

[7] The stage 3 issues were the subject of a hearing before the currently-constituted Expert Panel on 4–8 and 12–14 December 2023. On 9 February 2024, prior to us issuing our decision concerning these issues, the ANMF filed its second application (matter AM2024/11). By this application, the ANMF seeks a determination varying the *Nurses Award*, in respect of employees other than aged care employees, to increase the minimum rate of pay for a Registered Nurse Level 1, Pay Point 1 to \$1472.60 per week (based on award rates as they were at the

time), and to increase the rates of pay for all other classifications and pay points of RNs, ENs, student ENs, nurse practitioners and occupational health nurses by a proportionate amount. The application also seeks that the minimum rates for Nursing Assistants be increased by 26.5 per cent. The application is advanced on the grounds that the minimum rates for nurses, midwives and AINs under the *Nurses Award* were never properly fixed and involve historical undervaluation because of assumptions based on gender, and that the minimum rates have not increased commensurately with changes over the past several decades in the nature of the work, the level of skill and responsibility involved in doing the work, and the conditions under which the work is done.

[8] We issued our decision concerning the stage 3 issues on 15 March 2024⁸ (*Stage 3 decision*). Relevant to the *Nurses Award*, we reviewed the history of the development of the award and its predecessors and concluded:

[135] This history confirms what is apparent on the face of the *Nurses Award*, as set out in paragraphs [942]–[955] of the *Stage 1 decision*. The rates of pay for degree-qualified nurses in the *Nurses Award* are not properly fixed minimum rates because the principles set out in the *Paid Rates Review decision* and the *ACT Child Care decision* (see paragraphs [82]–[83] above) were never properly applied. It is apparent that nursing has undergone a revolutionary transformation from an occupation which in 1958 was equated to a trade to a recognised profession for which a university degree is required for entry. However, the federal award system has failed to set minimum award rates of pay which properly recognise the addition to work value effected by this transformation and, in the context of this being a female-dominated occupation, this can only be characterised as historic gender undervaluation.⁹

(footnotes omitted)

[9] We subsequently found at paragraph [156] in respect of direct care employees covered by, relevantly, the *Nurses Award* that there were work value reasons, within the meaning of s 157(2A) of the FW Act, for a further increase to minimum award rates of pay beyond the 15 per cent interim increase already awarded. We further determined at paragraph [191] that, because the work of AINs in the aged care sector under the *Nurses Award* and PCWs under the *Aged Care Award* were indistinguishable in terms of function and work value, that coverage of such AINs should be excised from the *Nurses Award* and placed within the *Aged Care Award*.

[10] In relation to aged care RNs and ENs remaining under the *Nurses Award*, we established benchmark rates as follows:

[204] The current minimum rate for a four-year degree qualified RN in aged care under the *Nurses Award* is \$1301.90 per week. The proper application of the C10 Metals Framework Alignment Approach in a manner free from gender assumptions and consistent with the principles stated by the Full Bench in the *Teachers decision* (see paragraph [955] of the *Stage 1 decision*) would result in this rate being set at \$1470.80 per week, with this becoming the benchmark rate for the fixation of minimum wages for RNs in aged care. We consider that this is a rate justified by the work value reasons identified in the *Stage 1 decision* and this decision. Having regard to our earlier discussion concerning the ERO applicable to social and community services employees under the *SCHADS Award*, the fixation of this rate could confidently be regarded as one free from gender assumptions since it approximately equates to the rate (\$1466.77 per week) for a four-year degree-qualified social and community services employee under the ERO.

[205] We also consider, having regard to the work value reasons identified in the *Stage 1 decision* and this decision, that the rate for an EN in aged care who has responsibility for

supervising other PCWs should be set at the same rate which we propose for a Level 6 direct care employee (Team Leader) with supervisory responsibilities, namely \$1370.80 per week.¹⁰
(footnotes omitted)

[11] We note at this point that, following the *Annual Wage Review 2023–24* decision,¹¹ the weekly rate identified for a four-year degree qualified RN would be \$1525.90, and the weekly rate for an EN supervising other PCWs would be \$1422.20.

[12] At paragraph [207] in the *Stage 3 decision*, we indicated that we would not at that time finalise the full classification structure for RNs and ENs in aged care for three reasons. The first of these was as follows:

We do not consider that the proper application of the C10 Metals Framework Alignment Approach necessarily involves simply increasing all rates of pay for aged care nurses in the existing classification structure by the same percentage amount as for the benchmark rate. The Nurses Award contains a classification structure in which each classification allows for automatic annual increments in pay. In the *Teachers decision*, classification structures of this type were described as not properly reflective of ‘the essential elements of qualifications, displayed competence and acquired experience and responsibility’ and ‘an anachronism in the context of the current statutory regime for the fixation of minimum wage rates’. We do not consider that this issue has been properly addressed by the parties by way of evidence and submissions. Nor have other issues which would necessarily arise in any reform of the classification structure been properly addressed to date, including the appropriate pay relativity between a three-year and a four-year degree-qualified RN.

(footnotes omitted)

[13] The second reason was that the analysis in paragraphs [942]–[955] of the *Stage 1 decision* concerning the ‘anomaly’ in the award rates of pay for nurses and the analysis at paragraphs [111]–[135] of the *Stage 3 decision* concerning the historical development of the rates of pay in the *Nurses Award* suggested that the work of *all* RNs and ENs covered by the *Nurses Award*, not just those in the aged care sector, had been subject to a failure to properly apply the C10 Metals Alignment Framework and gender undervaluation. There would ‘therefore be a risk that the finalisation of a new classification and pay structure for aged care nurses only in this proceeding would establish a *fait accompli* in respect of all other nurses, and their employers, covered by the *Nurses Award*, without other interested parties being given an opportunity to be heard’.¹² The third reason was that the overlap between the subject matter of the ANMF’s application in matter AM2024/11 and the outstanding issues concerning RNs and ENs in aged care made it ‘desirable to at least explore with interested parties in the first instance whether they should be determined together’.¹³

[14] For these reasons, we determined at paragraphs [208] and [281] of the *Stage 3 decision* that the appropriate course was to finalise the classification structure and pay rates for RNs and ENs in conjunction with the ANMF’s application in matter AM2024/11. However, that is not what ultimately happened. On 4 April 2024, the presiding member conducted a conference of interested parties. This was attended by representatives of various private hospital employers and other private health entities¹⁴ (Private Hospitals) as well as the Joint Employers and the ANMF. At this conference, the parties present who were involved in the aged care work value proceedings expressed significant concern at the prospect of having the determination of the outstanding issues in that matter deferred until parties interested in (only) the second application were given an opportunity to be heard. A consensus was reached that parties should first have

further discussions in relation to matter AM2024/11, informed by a without-prejudice draft classification structure to be prepared by the ANMF, with a report-back hearing listed for 17 May 2024. Whether to finalise the aged care work value proceedings separately from the second application was accordingly not determined at that stage.

[15] At the 17 May 2024 report-back hearing, the parties involved in the aged care work value proceedings indicated support for finalising that matter separately from the second application. The Private Hospitals, who were by now jointly represented, submitted:

In our submission, there are some fundamental differences between the two sectors [aged care and private health / hospitals] and what we're proposing is a hearing to identify those differences for the Full Bench so that that could then be taken into account, either in fixing the classifications in the aged care sector, or alternatively, as we have foreshadowed, by ring fencing, if you like, those classifications so that they don't flow on to nurses more generally in the hospital sector.¹⁵

[16] Thus, at that stage, it appeared that the Private Hospitals wished to be heard both in relation to the outstanding issues in the aged care work value proceedings relating to nurses and matter AM2024/11. Having regard to the parties' respective positions, on 8 July 2024 the presiding member issued directions indicating that the matters were to be separated, and that parties other than the ANMF were to file their material in relation to the outstanding issues in the aged care work value proceedings relating to nurses by 26 August 2024. The directions contemplated the involvement of the Private Hospitals in the proceedings, but ultimately they did not file any materials pursuant to the directions and made no further appearance.

Submissions and further evidence

[17] In directions issued by the presiding member on 4 April 2024, parties were invited to file submissions in relation to the following outstanding issues concerning RNs and ENs in the aged care sector:

- a. whether the registered nurse level 1, year 1 benchmark minimum rate of pay (aligned with classification C1(a) in the C10 Metals Framework) should apply to a registered nurse holding a three-year or a four-year university degree (refer paragraph [204] of the *Stage 3 decision* [\[2024\] FWCFB 150](#));
- b. which enrolled nurse classification should correspond to the new Level 6 – Team Leader direct care employee classification in the *Aged Care Award 2010* (refer paragraph [205] of the *Stage 3 decision*); and
- c. what the minimum rate increments within each classification of registered and enrolled nurses, and the relativities between those classifications, should be, including the relativity between a registered nurse holding a three-year university degree and one holding a four-year university degree (refer paragraph [207(1)] of the *Stage 3 decision*).

ANMF

[18] The ANMF addressed these issues in submissions filed on 26 April 2024. As to the first issue, the ANMF submitted that the benchmark rate determined in the *Stage 3 decision* should become the RN Level 1 pay point 1 rate, the entry rates for a three-year degree-qualified RN and a four-year degree-qualified RN should be aligned at this level, and the current prescribed entry-level rate for a four-year degree-qualified RN should be abolished. It submitted that the work value reasons justifying the amount that RNs should be paid do not differ by reason of the

length of the undergraduate degree completed, since a RN who has completed a Bachelor of Nursing and is registered by the Nursing and Midwifery Board of Australia (NMBA) is fully qualified and capable of exercising the skills and discharging the responsibilities of the profession in an unsupervised and autonomous way whether the degree completed was a three-year or four-year degree. To become an RN at any level under the *Nurses Award*, a person must have successfully completed a program of study accredited by the Australian Nursing and Midwifery Accreditation Council (ANMAC) and approved by the NMBA, and the RN accreditation standards do not prescribe the length of the program to be delivered. In practice, the overwhelming majority of programs accredited by the ANMAC are delivered over three years. It was submitted that, once a RN is fully qualified and has obtained registration with the NMBA, they can practise as a nurse without supervision and should be entitled to the benchmark rate at the RN Level 1 classification. The ANMF said that the current four-year degree entry rate (at clause 15.2(c)(ii) of the *Nurses Award* for aged care nurses) was an anomaly and had no identifiable historical basis.

[19] The ANMF's position in relation to the second issue was that the classification of EN pay point 1 should align with the new rate for a Level 6 direct care employee (Team Leader) under the *Aged Care Award* to give effect to the conclusion stated at paragraph [205] of the *Stage 3 decision*. The ANMF submitted that the evidence concerning ENs in aged care in the proceedings demonstrated that ENs were generally involved in the supervision of PCWs and therefore that this alignment was appropriate.

[20] As to the third issue, the ANMF's position was that all RN classifications, and those for Nurse Practitioners, should retain their current relativity to RN Level 1 pay point 1, and that EN pay points would likewise retain their current relativity to EN pay point 1. The ANMF submitted that progression between RN classifications was by appointment and that each classification level involved differentiated duties with different rates of pay reflective of the value of the work required to be performed at each classification level. In respect of incremental pay levels within classifications, the ANMF submitted that these only applied within the classifications of EN and RN Levels 1, 2 and 3 and recognised increasing work value within those classifications by providing for some time-based progression. This position was, it was submitted, distinct to that considered in the *Teachers decision*¹⁶ where, at the relevant time under the *Educational Services (Teachers) Award 2020 (EST Award)*, there were no classification definitions at all and progression was entirely based on years of service. The ANMF pointed to two decisions of the Australian Industrial Relations Commission, namely the *Paid Rates Review decision*¹⁷ and the *South Australian Progression Determination Appeal*,¹⁸ as having endorsed the current incremental structure as forming part of previous work value assessments of nurses' rates of pay. The ANMF also pointed to the evidence of Associate Professor Anne Junor as recognising that the skills exercised by aged care workers would increase with experience. The ANMF's submissions concluded:

This classification structure, like the current structure under the *EST Award*, reflects a hybrid of professional career standards and time-based increments. It also provides for classifications based upon roles to which an employee might be appointed. By also providing for annual increments, it provides a proper reflection of increasing work value, including the proper recognition of 'invisible' skills, as will increase with experience acquired through engagement in work tasks.

The existing classification structure in the *Nurses Award* also provides an equitable basis to recognise different degrees of professional attainment, skill and responsibility. Annual progressions provide the only recognition of increasing work value for those employees who are unable (due to staffing profile and arrangements) or unwilling to obtain appointment to a higher classification.

(footnotes omitted).

[21] The ANMF relied on three witness statements in addition to the evidence it had adduced earlier in the proceedings. The first was made by Tanya Vogt, who is the Chief Executive Officer of the ANMAC and has previously held the position of Executive Officer of the NMBA. The ANMAC is the external accreditation authority appointed by the NMBA to assess and accredit nursing and midwifery education programs leading to eligibility to apply for registration or endorsement with the NMBA under Australia's National Registration and Accreditation Scheme. Ms Vogt gave evidence in her witness statement dated 23 April 2024¹⁹ that approximately 38 university or higher education providers have programs accredited by the ANMAC and approved by the NMBA for registration as a registered nurse and, of these, 36 offer a three-year Bachelor of Nursing degree. The others are Curtin University, which offers a three-and-a-half year degree, and Western Sydney University, which offers a four-year degree. Ms Vogt said that the delivery of accredited and approved programs over four years has the effect that the program is less intense but the ANMAC/NMBA program requirements do not differ from those delivered in three-year degrees. Ms Vogt also identified that some nursing degrees are offered as part of a dual degree program, in which case they are generally delivered over four years. Additionally, there are two-year master's degrees that have been accredited by ANMAC for candidates already holding an associated first degree and also an accelerated two-year program for persons already registered as enrolled nurses. Ms Vogt opined that 'the overwhelming majority of applicants for registration as registered nurses do so on the basis of the completion of a three-year bachelor[']s level degree and as such it can be readily regarded as the benchmark professional qualification for registration by the NMBA as a registered nurse'.²⁰

[22] Julianne Bryce, the Senior Federal Professional Officer of the ANMF, similarly gave evidence in her witness statement dated 26 April 2024²¹ that RNs almost universally complete a three-year Bachelor of Nursing degree to meet the NMBA standards for registration or a program of equivalent value in terms of content. Ms Bryce gave as an example of the latter that the University of Technology Sydney offers a two-year Bachelor of Nursing Accelerated Course, accessible by an enrolled nurse with at least 12 months of relevant experience in recognition of course credit towards what would otherwise be a three-year degree program. Ms Bryce also referred to double-degree courses for four to five years, and said that a small number of RNs complete a two-year Master of Nursing, with graduate entry, as their entry qualification for registration. Ms Bryce said that higher education providers in Australia generally do not offer an undergraduate qualification longer than three years solely in nursing apart from the same two exceptions identified by Ms Vogt, which deliver the same course content across a longer period.

[23] Heila Brooks, the Care Manager at St Catherine's Hostel in Victoria, said in her witness statement dated 22 April 2024²² that in her experience the four-year degree entry rate currently found in the *Nurses Award* was not applied in the residential aged care sector because the registration standard for a RN was a three-year degree and the practice requirements/competencies and scope of practice in accordance with Australian Health Practitioners Regulation Authority did not differentiate between different degree lengths for RNs. Ms Brooks said that St Catherine's Hostel did not differentiate between three-year and

four-year degrees, that employment was based on registration and suitability for the role, and that she did not personally ever recall any RN presenting for employment on the basis of a four-year degree.

[24] In relation to ENs, Ms Brooks' evidence was that, as part of the nursing team in a residential aged care setting, ENs provide guidance and supervision to PCWs in relation to the delivery of care. Ms Brooks said:

Because of the scope of their educational preparation, all ENs are equipped to supervise and assist PCWs in all aspects of the care PCWs deliver. A central role of the EN in aged care is providing oversight and assistance to PCWs in respect of the care needs of residents not requiring the involvement of an EN or RN.²³

[25] Ms Brooks also gave evidence that an EN (including an entry-level EN) in the aged care sector is expected to assist the RN in the supervision of PCWs, including orientation and providing day-to-day supervision as relevant to the EN scope of practice, to provide clinical support for PCW staff which may be in the form of demonstrating correct technique for care procedures, or coaching, to act as a resource to PCW staff, and to follow directions of the Care Manager/RN in the undertaking of any specialised nursing care requirements. She said that RNs 'rely heavily on ENs for consistent supervision of PCWs throughout ENs' shifts... [i]t is an innate part of the role'.²⁴

[26] As to career progression for RNs, Ms Brooks said that some RNs do not seek classification above RN level 1, for which appointment is required, and she was not aware of any objective mechanism which could function as an alternative to experience as a means to recognise the attainment of increased skill and expertise. She also said that, for other RNs, there may be no opportunity in their work setting for appointment to a higher level because of the staffing profile and arrangements and, for such RNs, incremental progression was also the only identifiable way of recognising and rewarding increased expertise and capacity achieved over time.

Joint Employers

[27] The Joint Employers filed their response to the ANMF's submissions on 16 May 2024. As to the first issue identified in the 4 April 2024 directions, the Joint Employers agreed with the ANMF. The Joint Employers also agreed with the ANMF's position as to the second issue and submitted that it was not controversial that the EN works under the indirect or direct supervision of the RN, since this is expressly referred to in the award classification definitions of the EN and the RN. They submitted that it was also not controversial that ENs may provide support and supervision to direct care employees. That supervision is general in that it is focused upon ensuring care is provided in accordance with the care plan, established protocols and guidelines. This may be contrasted with the supervisory role of the RN as a clinical leader with ultimate supervisory responsibility.

[28] As to the third issue, the Joint Employers submitted that the retention of yearly pay increments in the *Nurses Award*, in the absence of evidence that the work value of a particular role increases year by year, is not appropriate and is contrary to the Full Bench's reasoning in the *Teachers' decision*. The *Stage 3 decision*, it was submitted, held that the pay rates in the *Nurses Award* were not properly fixed minimum rates because of the principles set out in the

Paid Rates Review decision and the *ACT Child Care Decision* and by reference to the historical development of the *Nurses Award*. Reference to the historical development of the *Nurses Award* did not support a conclusion that the incremental pay point scale for each RN level is based on applied competence or acquiring experience and responsibility occasioning a discernible change in work value akin to a new classification, and this was even less clear with respect to the EN structure. The Joint Employers submitted that none of the findings in the *Stage 1 decision* or the *Stage 3 decision* supported a conclusion that the work value of an EN, RN or NP increases year by year simply by the effluxion of time. They described annual advancement between pay points as an ‘anachronistic device carried over from the public sector’ and submitted that, on the basis of the reasoning in the *Teachers’ decision*, the pay points for ENs, the pay points for RN Levels 1–3, and the grades for RN Levels 4–5 should be removed or changed. The Joint Employers did, however, accept that after a period of time, such as 3–4 years, ENs and RNs will demonstrate greater competency and proficiency through having practically applied their competence in the workplace setting and this should reasonably be factored into any reconsideration of the structure. However, the Joint Employers did not advance any specific proposal for a new classification structure for aged care RNs and ENs.

[29] On 27 June 2024, we issued a further decision in the aged care proceedings concerning the issues of operative date and phasing-in, as well as outstanding issues concerning the new classification structure for employees under the *Aged Care Award* and the *SCHADS Award*²⁵ (*Stage 4 decision*). Relevant to this decision, in the *Stage 4 decision* we determined that pay increases for PCWs under the *Aged Care Award* and HCWs under the *SCHADS Award* would be phased in in two tranches, with the first operative from 1 January 2025 and the second from 1 October 2025. Following the *Stage 4 decision*, the ANMF on 18 July 2024 filed a further submission in which it contended that pay increases for RNs and ENs covered by the *Nurses Award* should have the same operative date and phasing-in as determined for PCWs and HCWs in the *Stage 4 decision*.

[30] The Joint Employers addressed the issue of the operative date for pay increases for aged care RNs and ENs in submissions filed on 26 August 2024. Without advancing any specific proposal for an operative date or phasing-in, the Joint Employers identified two factors as being essential to the consideration of these issues:

- (1) the financial viability of the aged care sector, having regard to the impact of no additional Commonwealth funding and the uncertainty around whether employers paying above-award rates can absorb increases; and
- (2) the importance of ensuring aged care providers in both residential aged care and home care have sufficient time to prepare for the implementation of any variations to the *Nurses Award*.

[31] As to the first of these factors, the Joint Employers referred to evidence adduced throughout the aged care proceedings, and findings made in the *Stage 1 decision*, concerning the financial fragility of the aged care sector, and its dependence on Commonwealth funding, which it submitted demonstrated that the sector would not have the capacity to absorb wage increases that were not fully funded by the Commonwealth. It also referred to evidence in the proceedings that a large majority of nurses in aged care were covered by enterprise agreements providing for above-award minimum rates, and submitted that it was not clear whether the funding arrangements proposed by the Commonwealth would permit absorption or if employers would be obliged to pass on any increase. The Joint Employers submitted that if absorption was

permissible, the effect of any increase to the minimum award wages of ENs and RNs would be ‘likely to have a modest economic impact’. However, they submitted, the impact would be material if employers were either required to pass on the funded increase or if, in order to maintain a competitive position in the market, they chose to pass on the funded increase. In relation to the second factor, the Joint Employers submitted that aged care employers required sufficient time prior to the operative date of any variations to the *Nurses Award* to take all essential preparatory steps and necessary communications, including confirming and securing funding, which is dependent upon steps being taken by the Commonwealth, and communicating with all affected nursing employees about the nature of the variations to be implemented.

Commonwealth

[32] On 26 August 2024, the Commonwealth filed a submission in which it identified its position as to funding for any aged care nurses wage increases as follows:

- for any wage increases up to 3 per cent — on 1 July 2025;
- for any wage increases up to a further 3 per cent (i.e. up to 6 per cent total) —on 1 October 2025;
- for any wage increases up to a further 7 per cent (i.e. up to 13 per cent total) —on 1 October 2026;
- for any wage increases up to a further 7 per cent (i.e. up to 20 per cent total) —on 1 October 2027.

[33] The Commonwealth submitted that, while some aged care providers pay ‘market rates’ in line with the ANMF proposed pay rates, this is not true for all providers. It explained that Commonwealth funding for the aged care sector is predominantly provided through the payment of subsidies to providers and, as a result, any further increases to award wage rates for aged care nurses would increase the funding required of the Commonwealth in respect of all providers, and therefore the overall cost to the Commonwealth. In this regard, the Commonwealth noted that, in relation to the \$11.3 billion committed over four years (from 2023–24 to 2026–27) to meet the cost of the 15 per cent increase in award wages for direct care employees, including registered and enrolled nurses, approximately \$2.6 billion was estimated as relating to wage increases for nurses employed in aged care. The Commonwealth also noted that:

- residential aged care funding is calculated and applied based on pricing advice from the Independent Health and Aged Care Pricing Authority, which is provided mid-year to support changes operative from 1 October in the same year;
- significant aged care reforms are due to be introduced in 2025 following the introduction and expected passage of the new *Aged Care Bill 2024*, which will include changes to pricing arrangements for in-home care;
- preparations are also underway for the Commonwealth Home Support Programme (CHSP) to be recontracted for another two years, commencing 1 July 2025, and it is not possible to vary existing CHSP grant agreements to take into account wage increases for nurses prior to that date.

[34] At the hearing which occurred on 19 September 2024, the parties elaborated on their previously-stated positions. However, the Joint Employers advanced a more specific position concerning the operative date issue, namely that they agreed with the ANMF that the operative dates and phasing-in of award wage increases for aged care nurses should align with what was determined in the *Stage 4 decision*.²⁶

Provisional views and submissions in response

[35] On 23 October 2024, we published a statement²⁷ (Statement) in which we expressed *provisional* views concerning a new classification structure and the operative dates and phasing-in of the wage rates in that classification structure. In relation to the former, we said:

- (1) We accept the agreed position that the entry-level wage rates for three-year degree qualified and four-year degree-qualified aged care nurses should be aligned. However, we consider that the benchmark rate of \$1525.90 per week should only apply upon the completion of the first year of employment, with an entry level rate set at 95 per cent of the benchmark rate.
- (2) In respect of ENs, it is sufficient for the purpose of the aged care sector to set a single pay level set at the benchmark rate of \$1422.20, on the basis that all such ENs will be required to supervise PCWs. A broader consideration of the roles of ENs in the nursing sector as a whole, and their classifications, will be required when the ANMF’s application in matter AM2024/11 is fully considered.
- (3) The classification structure for RNs in aged care should be restructured to remove yearly increments and set proper minimum rates of pay to align with the rates of pay for teachers under the *Educational Services (Teachers) Award 2020* established as a result of the *Teachers decision*.²⁸

[36] The classification structure proposed in the Statement, and the range of percentage wage increases that would result based on the translation table also proposed in the Statement, were as follows:

Classifications	Weekly rate (\$)	Wage increase
Enrolled nurse supervising PCWs	1422.20	11.8–17.6%
Registered nurse		
Level 1		
1 st year	1449.60	12.1%
Completion of 1 st year (1 year plus)	1525.90	9.9–15.6%
Completion of 4 years (4 years plus)	1661.20	6.9–16.1%
Level 2		
1–3 years	1796.50	8.9–12.6%
Completion of 3 years	1887.10	12.6%
Level 3	1931.70	5.9–11.6%
Level 4	2204.80	0–11.6%
Level 5	2500.70	0–25.5%
Nurse practitioner		
1 st year	1991.00	0%
2 nd year	2050.10	0%

[37] In relation to operative date and phasing-in, our *provisional* view was that the above wage rates should be phased in over three tranches, from 1 January 2025, 1 October 2025 and 1 August 2026.²⁹

[38] Interested parties were invited to file submissions in response to the *provisional* views by 8 November 2024.

[39] The Statement also proposed a translation table for the transition from the current to the new classifications. Submissions were subsequently filed by the Joint Employers, the ANMF and the Commonwealth.

[40] In their submissions, the Joint Employers fully supported the *provisional* views concerning the proposed classification structure and the wage rates. However, they submitted that they could no longer support an operative date of 1 January 2025 since there would be insufficient time to ensure all essential preparatory steps and necessary communication could be undertaken prior to that date. The Joint Employers submitted that they would require the initial operative date to be a minimum of four months from the publication of a final determination. However, they submitted that the phasing-in arrangements proposed for 1 October 2025 and 1 August 2026 could be maintained provided that adequate time was provided in advance of the operative date.

[41] The ANMF submitted that:

- (1) Pay points for ENs should not be eliminated. The effect of that elimination would be to eliminate career progression for ENs who do not choose to go and seek further degree qualifications and was inconsistent with the proposition that there should be a career-based classification structure with a clear means to transition from one level to another.
- (2) The proposed reduction in pay points or grades at each RN level (from a total of 25 to eight pay increments) was ‘too drastic’, unsupported by the evidence and not necessary to achieve the modern awards objective. Further, the elimination of grades at RN Levels 4 and 5 was not supported by *provisional* view (3) because the grades are not, objectively, ‘yearly increments’. There should, the ANMF proposed, be at least one additional pay point at RN Levels 1 and 3, and the grades at RN Levels 4 and 5 should be retained.
- (3) NPs should receive a pay increase. It is unsound to draw an equivalence between a NP and a Level 5 teacher under the EST Award, since the former must have completed at least three years or 5,000 hours in the advanced clinical nursing practice level and completed a Masters’ Degree (AQF 9). NPs are highly-skilled and highly-trained professionals that can be trusted to deliver care in autonomous settings, particularly in rural and remote areas where there are barriers to aged persons obtaining primary care. The minimum rate for an aged care NP, 1st year, is currently 154 per cent of the rate for RN Level 1 pay point 1, which recognises that NPs’ scope of practice and competence sits somewhere above a RN and below a general practitioner and that some of a NP’s activities are unashamedly of a much higher order than those undertaken by a RN. Departure from the existing

relativities is unjustified, has not been sought by any party and no evidence supports it.

- (4) The pay increases should be phased in over two rather than three tranches, from the same dates as determined in the *Stage 4 decision*. Alternatively, the increases should be ‘front-loaded’ rather than phased in by thirds to avoid aged care ENs and RNs initially falling behind direct care employees.

[42] The Commonwealth reiterated its submissions concerning the impediments to implementing funding for wage increases for aged care nurses before 1 July 2025. It submitted that the Commission’s *provisional* view concerning operative date and phasing-in would result in wage increases for aged care nurses commencing before the commencement of the Commonwealth’s funding commitment in relation to the corresponding wage increases, with the result that the increased costs would be borne by aged care providers. The Commonwealth expressed its concern about the effect this would have on the viability of some aged care providers, particularly ones that are already in financial difficulty. The Commonwealth also reiterated its earlier submissions about the fiscal impact of further wage increases for aged care nurses.

Consideration

Classification structure and pay rates

[43] The task we are required to undertake following the *Stage 3 decision* is to construct a classification structure for RNs and ENs in aged care, with corresponding wage rates, based on:

- a benchmark weekly rate of \$1525.90 for a four-year degree qualified RN; and
- an alignment between an EN supervising other PCWs and the new rate for an ‘Aged care employee – direct care – level 6 – Team Leader’ of \$1422.20 (after phasing-in, and subject to the 2024–25 Annual Wage Review).

[44] In undertaking this task, the key issues we have to decide are those identified in the directions of 4 April 2024 (reproduced at paragraph [17] above). As to the first issue, the parties agree, and we accept, that the benchmark rate of \$1525.90 should apply equally to a three-year and four-year degree qualified RN. The evidence of Ms Vogt and Ms Bryce establishes that a three-year degree is the standard qualification for entry into the nursing profession, and those few longer degree courses do not differ as to course content but are simply less intensive across their duration. The *Nurses Award* currently provides, at clause 15.2(c)(ii) in respect of aged care nurses, for a minimum entry-level rate for an employee with a four-year degree which is slightly beneath the rate for a RN Level 1 pay point 3, with progression then being to pay point 4. As submitted by the ANMF, no historic justification for this rate is readily identifiable. We also note that clause 15.2(c)(ii) also establishes a minimum entry-level rate for a RN with a master’s degree which is slightly above the RN Level 1 pay point 3, with progression then being to pay point 5. The evidence of Ms Vogt and Ms Bryce was to the effect that a small number of nurses enter the profession by undertaking a two-year Master of Nursing course following the completion of an associated undergraduate degree. Again, the historical justification for this is not apparent. We therefore consider that the benchmark rate should be equally applicable to any degree qualification which permits registration as a nurse.

[45] However, we do not consider that the benchmark rate should be the entry-level rate for a RN, as proposed by the ANMF. In the *Teachers decision*, the same benchmark rate (calculated on the basis of an alignment with Level C1(a) in the C10 Metals Framework) was not applied to an entry-level teacher. The Full Bench in the *Teachers decision* determined at paragraph [653] that the ‘key classification’ (to which the benchmark rate would apply) for a new classification structure for early childhood education and school teachers was to be established on the following basis:

... The key classification, in our view, would be a Proficient Teacher who has a degree and has obtained registration (or, in the case of an early childhood teacher, if registration is not yet required in their jurisdiction, has met the requirements for registration as if they applied). A teacher at that level is fully qualified and capable of exercising the skills and discharging the responsibilities of the profession in an entirely unsupervised and autonomous way. In reaching this conclusion, we accept the submission made by the AFEI that a graduate teacher will not be the appropriate anchor classification for fixing wage rates because at that level the skills and responsibilities of the profession are not yet being fully exercised, as is recognised in the national registration system requirements.

[46] Consequently, in the five-level classification structure in the EST Award established by the *Teachers decision*, the benchmark rate applies to a Level 2 Teacher, defined as a ‘Teacher with proficient accreditation/registration or equivalent’. The Level 1 classification, which has a relativity of 91.5 per cent of the benchmark rate (calculated by an alignment with Level C2(b) in the C10 Metals Framework), is defined as applicable to a ‘Graduate teacher and all other teachers (as defined) including those holding provisional or conditional accreditation/registration’.

[47] The position in the nursing profession is somewhat different to the teaching profession because a nurse can obtain registration upon graduation, with the result that they can commence employment as a fully-registered nurse and immediately work without supervision. However, from a work value perspective, there is a partial analogy in that a RN in their first year of employment cannot be expected from commencement to be fully capable of exercising their skills and discharging the responsibilities of their profession. As with any employment, an initial period of experience is necessary before an employee becomes fully competent. Accordingly, we consider that there should be an entry-level rate applicable during the first year of nursing employment which is set below the benchmark rate. We will set the rate at \$1449.60 per week, 95 per cent of the benchmark rate, which is higher than the Level 1 rate in the EST Award in acknowledgement of the fact that entry-level RNs are, unlike teachers, already fully registered.

[48] As to the second issue, we do not accept that the rate established in the *Stage 3 decision* for an EN supervising PCWs should be equated with the current EN pay point 1 classification. As was made clear at paragraph [205] of the *Stage 3 decision*, which we have earlier quoted, the establishment of the alignment with the new Level 6 Team Leader rate in the *Aged Care Award* was based on the proposition that ENs and Team Leaders would both have responsibility for supervising PCWs. The further evidence of Ms Brooks to which we have earlier referred establishes that such supervisory responsibility, involving oversight of and assistance to PCWs, is a central role of *all* ENs in residential aged care. There was no evidence of ENs in aged care not having this responsibility.

[49] Clause A.4 of the *Nurses Award* provides what is effectively a classification definition for each pay point level within the single EN classification. Clause A.4.1 relevantly describes an EN at pay point 1 as follows:

- ...
- (b) An employee will be appointed based on training and experience including:
- having satisfactorily completed a hospital based course of training in nursing of not more than 12 months duration leading to enrolment as an EN; or
 - having satisfactorily completed a course of training of 12 months duration in a specified branch of nursing leading to enrolment on a register or roll maintained by the Nursing and Midwifery Board of Australia or its successor; and
 - having practical experience of up to but not more than 12 months in the provision of nursing care and/or services, and, the undertaking of in-service training, subject to its provision by the employing agency, from time to time.
- (c) **Skill indicators**
- The employee has limited or no practical experience of current situations; and
 - The employee exercises limited discretionary judgment, not yet developed by practical experience.

[50] This classification definition relates to an entry-level employee, and the references to the EN having practical nursing experience not in excess of 12 months, having limited or no practical experience of ‘current situations’, and exercising only limited discretionary judgement not developed by practical experience is plainly inconsistent with the evidence that ENs in aged care supervise PCWs and provide them with advice and support. Nor do the classification descriptions for EN pay points 2, 3, 4 or 5 (set out at clauses A.4.2, A.4.3, A.4.4 and A.4.5 respectively) make any reference to the EN having supervisory responsibility over other employees. Accordingly, we do not consider that any of the existing EN classification definitions match, in terms of work value, the role of the EN in aged care disclosed by the evidence before us for which we have set the rate of \$1422.20.

[51] We consider that the appropriate approach in respect of ENs in aged care is to remove the existing table of rates in clause 15.2(b)(ii) and replace it with a single classification of ‘Enrolled nurse supervising other direct care employees’ with a rate of \$1422.20. We anticipate that a wider review of the work, roles and rates of pay of ENs across the entire health sector will be necessary when the ANMF’s application in AM2024/11 is heard and determined. This review is necessary not least because, for ENs outside the aged care sector, their rates of pay at all pay points are significantly *below* the current C5 classification rate in the *Manufacturing and Associated Industries and Occupations Award 2020* despite new entrants being required to be diploma-qualified. We anticipate that this review will result in an integrated classification structure for all ENs covered by the *Nurses Award* which will incorporate the single classification which we intend to apply in the aged care sector.

[52] We now turn to the third matter identified in the 4 April 2024 directions. We have already dealt with the issues concerning the increments with the EN classification and the relativity between RNs holding three-year and four-year degrees, so the remaining issue is what the classification structure and rates of pay for RNs should be, based on our earlier determination that the benchmark weekly rate for a degree-qualified RN should be \$1525.90 and that the entry-level first year rate should be 95 per cent of this (\$1449.60 per week).

[53] We see no reason not to retain the current five-level classification structure for RNs in aged care in clause 15.2(c)(i) of the *Nurses Award*, which replicates the structure for all other nurses in clause 15.1(c)(i). These classifications are defined in clause A.5 in a way which articulates the differences between the qualifications, skill and responsibility required at each level and are thus properly based on relative work value.

[54] However, we have a different view in relation to the pay points which are incorporated into the RN Level 1, 2 and 3 classifications and the grades incorporated into the RN Level 4 and 5 classifications. In relation to the pay points, clause 51.3 provides that progression will be ‘by annual movement’ (or 1786 hours of experience for part-time and casual employees), meaning that the pay points are effectively automatic annual pay increments. Clause 15.3(b) provides in addition that progression to the next pay point ‘will have regard to ... the acquisition and use of skills described in the definitions in Schedule A—Classification Definitions; and... knowledge gained through experience in the practice settings over such a period’, but there is no suggestion that clause 15.3(b) qualifies the automaticity of progression. In the *Teachers decision*, the Full Bench at paragraph [647] said the following in relation to proposed variations to the EST Award which would retain the existing service-based incremental pay structure:

We do not consider that either proposed variation would result in a rate structure that properly reflects the work value of teachers. The fundamental problem with both proposed variations is that they retain a classification structure which, we consider, is inappropriately based on years of service rather than the essential elements of qualifications, displayed competence and acquired experience and responsibility. It may be accepted, at a high level of generalisation, that a certain level of experience in an occupation will usually lead to an incrementally higher level of work value on the part of an employee, even if the nominal role of the employee has not changed. However, as the ACA submitted, there is no evidence before us to suggest that the work value of a teacher increases year by year for (in the case of a four-year qualified teacher) the first seven years of employment. Such a proposition is entirely counter-intuitive. As we have earlier outlined in our discussion of the federal award history of teachers, the current rate structure has its origins in the structure applicable to Victorian Government teachers in the early 1990s. Annual incremental pay scales were long a feature of government service employment conditions, but we consider them to be an anachronism in the context of the current statutory regime for the fixation of minimum wage rates....

[55] The above position reflects that stated in the *Paid Rates Review decision* by an AIRC Full Bench in 1998:

We now turn to consider whether incremental payments should have any role in the award system. The legislative scheme requires that the great majority of awards, being made under Part VI, will be of a minimum rates character. This fact, together with a consideration of the history of service increments in awards generally, leads us to the conclusion that increments which are not based on work value should not appear in minimum rates awards. In our view the abolition of advancement between pay points based primarily on service is also consistent with increased flexibility and the encouragement of agreement making. Performance management, for example, may be made more difficult where the award contains an incremental structure which is unrelated to change in the nature of the work. When the Commission is fixing appropriate minimum rates in awards which contain increments it will be necessary, subject to exceptions, to make arrangements for increments to be phased out. Additional payments which are geared primarily to length of employment are not consistent with properly fixed minimum rates because they are not based on work value... Where the relevant award does not make progression through the incremental scale dependent on changed work value, the incremental

payments cannot be treated as part of the minimum rate. Where it can be demonstrated, however, that incremental payments were included in the award pursuant to the relevant work value principle or on grounds of structural efficiency and work value, the retention of such payments is permissible.³⁰

[56] The above reasoning was incorporated in the principles established by the Full Bench for the conversion of paid rates awards into minimum rates awards. Principle 8 stated: ‘Increments will only be retained where they have been included in the award pursuant to the relevant work value principle or where it can be established that the increments were inserted by the Commission on grounds of structural efficiency and work value’.³¹

[57] As recounted at paragraphs [131]–[135] of the *Stage 3 decision*, the classification structure in the *Nurses Award* as it relates to ENs and RNs is largely derived from a pre-modernisation award, the *Nurses (ANF – South Australian Private Sector) Award 2003*, which in turn reflected the classification structure in two awards which were originally paid rates awards, the *Nurses (South Australian Public Sector) Award 1991* and the *Nurses (ANF – South Australian Private Sector) Award 1989*. These two awards were converted into minimum rates awards as part of the *Paid Rates Review decision*.³² As earlier stated, the ANMF relies in its submissions on the retention of annual increments in the two awards in the *Paid Rates Review decision* as supportive of the proposition that the increments were based on work value.³³ However, we consider that the ANMF’s reliance on the *Paid Rates Review decision* is misplaced because, as explained at paragraphs [131]–[133] of the *Stage 3 decision*, that decision did not properly apply to the two nurses’ awards the very principles purported to have been established in that case for the conversion of paid rates awards to minimum rates awards, with the result that the rates of pay in the *Nurses Award* were not properly fixed minimum rates of pay. The history of the development of nurses’ award rates of pay explicated in the *Stage 3 decision* makes plain enough that annual pay increments have their origin in public sector paid rates awards and determinations. In particular, as discussed at paragraphs [128]–[129] of the *Stage 3 decision*, the nationally-uniform rates for RNs in the federal system established by the AIRC Full Benches in decisions in 1989 and 1990³⁴ were substantially based on paid rates classification structures applicable to NSW and Victorian public hospital nurses. In circumstances where it has previously been found that the history of the development of nurses’ award rates of pay is demonstrative of gender undervaluation, and this finding forms the foundation of the fundamental review of aged care nurses’ minimum rates we are undertaking in this decision, it is not appropriate to attempt to cherry-pick from that history a justification for the retention of annual pay increments. We conclude that the current scheme of pay points in the RN Level 1, 2 and 3 classifications should not be retained since they are not consistent with properly-fixed minimum rates of pay based on work value.

[58] That is not to say that the acquisition of knowledge and skill through on-the-job experience should not be recognised at all. In the *Teachers decision*, the new classification structure developed by the Full Bench provided for two pay increments for a fully accredited/registered teacher, at three years and six years. The proposed classification in the Statement provides for a four-year increment in the classification of RN Level 1 and a three-year increment in RN Level 2. We consider this is sufficient to recognise increased work value through acquired knowledge and skill. The ANMF contends that this approach involves too drastic a change and will not appropriately reward long-serving employees at RN Level 1 who do not have the opportunity, or do not wish to, progress higher in the classification structure, and proposes that additional pay points be retained at RN Levels 1 and 3. We do not accept this. Data provided by the Commonwealth earlier in the proceedings shows that the proportions of

RNs in the aged care industry engaged at Levels 1 and 2 are about the same, and about 11 per cent of RNs are classified at Level 3.³⁵ This suggests that opportunities exist for RNs in aged care to advance beyond RN Level 1. In any case, RNs currently classified at Level 1 who have over four years of service and would receive annual increments up to eight years of service under the current structure will, under the structure proposed in the Statement, receive substantially higher wage rates (in the range of 6.9–16.1 per cent higher) at an earlier point in time. To add a further pay point in RN Level 1 which fits proportionately below the RN Level 2 rate, and demarcate a sufficient differential between the skill valuation of RN Levels 1 and 2, would require the four-year incremental rate to be reduced, meaning that employees at the lower (or earlier) pay points within RN Level 1 would take longer to receive higher rates of pay than under the proposed structure.

[59] The position with respect to the internal grades in RN Levels 4 and 5 is more straightforward. The only guidance provided in the *Nurses Award* as to appointment to and progression through these grades is provided by clause A.5.4(c) in respect of Level 4 and A.5.5(c) in respect of Level 5. Both clauses provide:

Appointment at a particular grade at this level will depend upon the level of complexity associated with the duties described in clause [A.5.4 or A.5.5 as relevant]. In this connection the number of beds in a facility will be a relevant consideration.

[60] The above provision provides no objective legal prescription based on work value as to how employees are to be graded within RN Levels 4 and 5. It effectively leaves to the employer's subjective judgment the grade to which an employee may be appointed. The spread of the rates between the grades in each classification is significant: within Level 4, the rate for the highest grade is 13.4 per cent higher than the rate for the lowest grade and, within Level 5, the difference is 44.1 per cent. No work value differences of this extent can sensibly be derived from the considerations in clauses A.5.4(c) and A.5.5(c). The classification definition for RN Levels 4 and 5 make it apparent that employees appointed at these levels are undertaking management or leadership roles for which contracts of employment providing for individualised salaries are likely to be the norm. It is not necessary in these circumstances for each classification to have more than a single minimum wage rate.

[61] In relation to the classification of Nurse Practitioner (NP), the pay structure proposed in the Statement provides for no pay increase. This is for two reasons. First, under the current structure, a NP has a very high relativity (54 per cent in the first year and 58.5 per cent in the second year) compared to a RN Level 1 pay point 1, and a first year NP has a rate of pay about the same as a RN Level 5 grade 1, who exercises management and leadership responsibilities. Even with no increase in the rate of pay, the first year NP will have a higher relativity to the benchmark rate of \$1525.90, and a higher rate of pay, than a Level 5 teacher with a highly accomplished/lead teacher accreditation. Noting that NPs in aged care have already received the benefit of the 15 per cent interim increase arising from the *Stage 1 decision* and the *Stage 2 decision*, we do not consider that the evidence before us concerning NPs (who only comprise a very small fraction of the nursing workforce in aged care³⁶) is sufficient to justify further pay increases at this time. In particular, notwithstanding the ANMF's submissions to the contrary, the evidence does not justify NPs in aged care receiving further pay increases such as to place them significantly above the Level 5 teacher who similarly practises their profession at an advanced level of accreditation. However, given the insufficiency of evidence specifically concerning NPs in the aged care work value proceedings to date, we consider it would be

desirable for the position of NPs across the health sector to be the subject of further review, with the benefit of further and more focused evidence on the qualifications and role of NPs, in the Commission's future consideration of matter AM2024/11.

[62] For the above reasons, we confirm the *provisional* view concerning the new classification structure for aged care nurses set out in the Statement. We also confirm the rates of pay proposed in the Statement, which (apart from the ANMF's submission concerning NPs and service-based increments) were not the subject of any comment by the parties. Those rates of pay, apart from those already discussed, have been set on the following basis:

- RN Level 1, after completion of four years' service, aligns with Teacher Level 3 under the EST Award.
- RN Level 2, 1–3 years aligns with Teacher Level 4 under the EST Award.
- RN Level 2, after completion of three years' service, maintains the existing relativity of Level 2 pay point 4 to Level 2, pay point 1.
- RN Level 3 aligns with Teacher Level 5 under the EST Award.
- RN Level 4 maintains the existing relativity of Level 4 grade 1 to Level 3 pay point 1.
- RN Level 5 maintains the existing relativity of Level 5 grade 3 to Level 4 grade 1.³⁷

Operative date and phasing-in

[63] In our consideration of the operative date and phasing-in of the increases to award minimum rates of pay for RNs and ENs which will follow from the introduction of the classification and pay structure set out in the Statement, it is obviously necessary to carefully consider the financial impact of this upon aged care employers. It may broadly be accepted that the aged care sector is heavily reliant on funding from the Commonwealth and that some parts of the sector are financially fragile. It is also the case that increases in minimum rates of pay for RNs and ENs will, generally, be higher than those awarded to PCWs as a result of the *Stage 3 decision* and the *Stage 4 decision*. However, notwithstanding this, the evidence suggests that the impact of these increases on the sector as a whole is not likely to be significant. First, data provided by the Commonwealth indicates that RNs and ENs constitute only about 25 per cent of the workforce of the sector as a whole.³⁸ Second, on the basis of findings made in the *Stage 1 decision* at paragraphs [314] and [471] and the *Stage 3 decision* at paragraph [154], and consistent with the submissions of the Joint Employers, we proceed on the basis that only a small minority of RNs and ENs are actually paid the minimum rates of pay in the Nurses Award and that market rates for nurses sit substantially above the award rates. This means that only a small proportion of aged care nurses are likely to receive the full effect of the increases arising from the new classification and rate structure.

[64] The concerns expressed in the Joint Employers' submissions in relation to 'absorption' are, with respect, misconceived. The relevant power conferred by the FW Act which we propose to exercise by this decision is to set, by award, *minimum* wage rates: see ss 139(1)(a), 157(2) and 284. The determination which we will make arising from this decision will have neither the purpose nor the effect of requiring employers to increase the wage rates paid by them to RNs and ENs who are already paid above the minimum award rates fixed by that determination. The Commonwealth submissions on operative date and phasing-in appear to proceed on the assumption that it will be necessary for it to adjust the funding for all aged care employers to

pay for across-the-board wage increases for respect of their nursing staff, but this is not what the determination will require.

[65] Because, at least potentially, the wage increases which might flow to a minority of aged care nurses are higher than those we have awarded to PCWs and HCWs, we consider that new rates of pay should be phased in over three rather than two tranches. We do not accept the Commonwealth's submission that the first phase needs to await the Commonwealth's funding timetable identified in paragraph [32] above, having regard to the likely very limited cost impact of the first phase and the Joint Employers' position that they are prepared to accede to an earlier operative date. Our *provisional* view in the Statement was that the initial operative date should be 1 January 2025 in line with the first phase of increases for PCWs and HCWs, but we acknowledge the Joint Employers' concern that the passage of time has meant that there is now insufficient time for them to prepare for implementation of the new pay rates. Accordingly, we conclude that the increases should be phased in in three tranches from the following operative dates:

- (1) 1 March 2025.
- (2) 1 October 2025.
- (3) 1 August 2026.

[66] Broadly speaking, the phasing-in will occur in three equal steps. We are satisfied, for the purpose of s 166(2) of the FW Act, that the above operative dates are appropriate having regard to the considerations we have earlier identified.

[67] We are also satisfied that that the minimum wage rates which will be established by the determination we will make are justified by work value reasons, within the meaning of s 157(2A), for the reasons set out in the *Stage 3 decision*.

Modern awards objective and minimum rates objective

[68] We are satisfied that the variations to the Nurses Award which will be made arising from this decision are necessary to achieve the modern awards objective. In reaching this conclusion, we have taken into account the considerations specified in s 134(1) of the FW Act in the following way (using the paragraph designations in the subsection):

Paragraph (a): Using the measure of 'low paid' as being two-thirds of median adult ordinary-time earnings for full-time employees, the 'low paid threshold' may be quantified in two ways: \$1066.67 per week (using the Australian Bureau of Statistics (ABS) Characteristics of Employment (COE) data for August 2023) or \$1131.33 per week (using the ABS Employee Earnings and Hours (EEH) data for May 2023).³⁹ As a result of the 15 per cent interim increase, all aged care EN and RN rates of pay in clause 15.2 of the Nurses Award are above the low paid threshold on either measure. This is therefore a neutral consideration.

Paragraph (aa): We are satisfied that the pay variations will not endanger the security of employment for ENs and RNs in the aged care sector. As found in the *Stage 3 decision* at paragraphs [148]–[149], there remained at the time of that decision a shortage of staff in the aged care sector, particularly RNs. The minimum staff requirements for '24/7'

presence and care minutes provided by nurses in aged care facilities, which has come into effect arising from the Royal Commission into Aged Care Quality and Safety, is likely to further heighten demand for aged care nurses. This is therefore a neutral consideration.

Paragraph (ab): For the reasons earlier set out in the *Stage 3 decision*, the pay variations will ensure equal remuneration for work of equal value and eliminate gender-based undervaluation of work and will thereby provide workplace conditions that facilitate women's full economic participation and contribute towards achieving gender equality. This weighs significantly in favour of making the variations.

Paragraph (b): As stated in the *Stage 3 decision* at paragraph [211] in respect of PCWs, it is difficult to predict the effect increasing minimum wages for ENs and RNs will have on collective bargaining in the aged care sector. We consider this to be a neutral factor.

Paragraph (c): As found in the *Stage 3 decision* at paragraph [150], the evidence suggests that the interim pay increase resulted in increased participation in the aged care workforce, and there is some reason to believe that this will continue if further increases are granted. However, as also found at paragraph [154] of the *Stage 3 decision*, this effect is likely to be diminished for RNs because of the extent to which market wage rates are already significantly above the award minima. Accordingly, this weighs in favour of the variations but only to a limited degree.

Paragraph (d): We do not consider that this is a relevant consideration in this matter.

Paragraph (da): We do not consider that this is a relevant consideration in this matter.

Paragraph (f): The variations will have an impact on employment costs for aged care employers. However, this impact will be limited because of the extent of over-award wage rates paid to ENs and RNs in the aged care sector, and will further be ameliorated by the Commonwealth's funding commitment. It is possible that if the wage adjustments proposed lead to a greater capacity to recruit and retain directly-employed staff, this may result in savings due to a lower degree of labour hire utilisation which, the evidence demonstrates, have significantly higher costs to the employer than directly-employed staff (see the *Stage 3 decision* at paragraph [149]). An improved capacity to attract and retain staff could also improve the capacity for employers to operate at a higher occupancy rate, which might enhance their financial viability, and their capacity to comply with the regulatory obligations concerning care minutes. The employer cost aspect of the consideration weighs against the variations but not to a significant degree for the reasons explained. The other aspects of the consideration are not relevant.

Paragraph (g): This consideration is largely irrelevant and will be given neutral weight.

Paragraph (h): There is no evidence before us to indicate that the variations will have any material effect upon the national economy. We will therefore treat this as a neutral factor.

[69] We likewise consider that the variations are consistent with the achievement of the minimum wages objective. In respect of the considerations in ss 284(1)(a), (aa), (b) and (c), we

make the same findings as in relation to ss 134(1)(h), (ab), (c), and (a) respectively. Section 284(1)(e) is not relevant to this matter.

Next steps

[70] A draft determination to give effect to this decision is published with this decision. Any comments of a technical nature about this draft determination should be sent to the Commission by **12.00 pm (AEDT) on Friday, 13 December 2024**.

[71] Matter AM2024/11 will be the subject of a further directions hearing and conference at a date and time to be advised in the new year.



PRESIDENT

Appearances:

J McKenna, counsel, with *J Hartley*, counsel and *V Jones*, counsel for the Australian Nursing and Midwifery Federation.

N Ward for the Aged & Community Care Providers Association and Australian Business Industrial.

K Eastman SC for the Commonwealth of Australia.

Hearing details:

2024.

Melbourne:
19 September.

Written submissions:

Australian Nursing and Midwifery Federation: 8 November 2024.

Aged & Community Care Providers Association and Australian Business Industrial: 8 November 2024.

Commonwealth of Australia: 8 November 2024.

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- ¹ Ross J, Asbury DP (as the Vice President then was) and O'Neill DP.
- ² *Aged Care Award 2010; Nurses Award 2020; Social, Community, Home Care and Disability Services Industry Award 2010* [\[2022\] FWCFB 200](#), 319 IR 127 ('Stage 1 decision').
- ³ Aged & Community Care Providers Association and Australian Business Industrial.
- ⁴ Ibid.
- ⁵ Asbury DP (as the Vice President then was), O'Neill DP and Bissett C.
- ⁶ *Aged Care Award 2010; Nurses Award 2020; Social, Community, Home Care and Disability Services Industry Award 2010* [\[2023\] FWCFB 40](#) ('Stage 2 decision').
- ⁷ The *Stage 2 decision* also extended the application of the interim increase to Head Chefs/Cooks and Recreational Activities/Lifestyle Officers covered by the *Aged Care Award*.
- ⁸ *Aged Care Award 2010; Nurses Award 2020; Social, Community, Home Care and Disability Services Award 2010* [\[2024\] FWCFB 150](#), 331 IR 137 ('Stage 3 decision').
- ⁹ Ibid.
- ¹⁰ Ibid.
- ¹¹ *Annual Wage Review 2023–24* [\[2024\] FWCFB 3500](#), 331 IR 248.
- ¹² *Stage 3 decision* [\[2024\] FWCFB 150](#), 331 IR 137 [207].
- ¹³ Ibid.
- ¹⁴ Catholic Health Australia, the Australian Private Hospitals Association, Day Hospitals Australia, Healthscope Operations Ltd, and Adelaide Community Healthcare Alliance Inc.
- ¹⁵ Transcript, 17 May 2024 PN15.
- ¹⁶ *Application by Independent Education Union of Australia* [\[2021\] FWCFB 2051](#) ('Teachers decision').
- ¹⁷ Print Q7661, 20 October 1998.
- ¹⁸ Print S7503, 28 June 2000.
- ¹⁹ Exhibit ANMF 54.
- ²⁰ Ibid [14].
- ²¹ Exhibit ANMF 55.
- ²² Exhibit ANMF 56.
- ²³ Ibid [7].
- ²⁴ Ibid [12].
- ²⁵ [\[2024\] FWCFB 298](#).
- ²⁶ [Transcript, 19 September 2024](#) PN359.
- ²⁷ [\[2024\] FWCFB 405](#).
- ²⁸ Ibid [10].
- ²⁹ Ibid [12].
- ³⁰ [1998] AIRC 1413, Print Q7661, 123 IR 240, 254–255.
- ³¹ Ibid 256.
- ³² Ibid.
- ³³ The second decision relied upon by the ANMF, the *South Australian Progression Determination Appeal* (Print S7503, 28 June 2000), merely concerned a jurisdictional issue arising from the implementation of the *Paid Rates Review decision*.
- ³⁴ [1989] AIRC 1012, 32 IR 170; [1990] AIRC 49, Print J1288; [1990] AIRC 862, Print J4011.
- ³⁵ Commonwealth submissions, 8 August 2022, Annexure B.
- ³⁶ Ibid.
- ³⁷ This relativity was used to provide a proportionate level of increase for RN Level 5. For reasons which are unclear, the pay rate for RN Level 5 Grade 1 is barely above the rate for RN Level 4 Grade 1 and is below the rates for RN Level 4 Grades 2 and 3.
- ³⁸ Ibid.
- ³⁹ *Annual Wage Review 2023–24* [\[2024\] FWCFB 3500](#), 331 IR 248 [72].