

FAIR WORK COMMISSION

AM2021/63; AM2024/11

APPLICATIONS BY AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

SUBMISSION RESPONDING TO PROVISIONAL VIEWS OF THE EXPERT PANEL:

THE WORK VALUE OF REGISTERED NURSES AND ENROLLED NURSES IN THE AGED

CARE SECTOR

AGED & COMMUNITY CARE PROVIDERS ASSOCIATION LTD

AUSTRALIAN BUSINESS INDUSTRIAL

(“THE JOINT EMPLOYERS”)

8 NOVEMBER 2024

1. PROVISIONAL VIEWS OF THE COMMISSION

- 1.1 On 23 October 2024, the Fair Work Commission (**the Commission**) published a Statement setting out its provisional views concerning the outcome of the Commission's consideration of the work value of registered nurses (**RNs**) and enrolled nurses (**ENs**) in the aged care sector who are covered by the *Nurses Award 2020* (**Nurses Award**).¹
- 1.2 There are two categories of provisional views:
- (a) minimum rates and classification structure; and
 - (b) operative date and phasing-in.
- 1.3 This submission sets out the position of the Joint Employers; addressing each category in turn.

¹ *Statement* [2024] FWCFB 405 at [10]-[12].

2. SUMMARY OF POSITION

2.1 The Joint Employers welcome the opportunity to respond to the provisional views published by the Commission on 23 October 2024.

2.2 As the Commission observed, the proposed variations to the minimum rates and classification structure of the *Nurses Award* attracts “complexity”² and requires careful consideration prior to any final determination.

2.3 Importantly, that same complexity also necessitates that aged care providers operating in residential aged care and home care are provided with adequate time to prepare for implementation and commencement of the changes.

Minimum rates and classification structure

2.4 We fully support the provisional views of the Commission with respect to the proposed variations to the minimum rates and classification structure of nursing employees working in the aged care sector.³

2.5 The variations proposed (and set out in Attachment A to the Statement)⁴ are consistent with the evidentiary findings made in the *Stage 1 – Aged Care Decision* [2022] FWCFB 200 and the reasoning set out in the *Stage 3 – Aged Care Decision* [2024] FWCFB 150.

Operative date and phasing-in

2.6 Having now had the opportunity to review the proposed changes to the minimum rates and classification structure in the *Nurses Award*, the Joint Employers can no longer support an operative date of 1 January 2025.

² See *Statement* [2024] FWCFB 405 at [10].

³ *Statement* [2024] FWCFB 405 at [10], Attachment A.

⁴ *Statement* [2024] FWCFB 405.

- 2.7 Aged care providers operating in residential aged care and home care require time to ensure all essential preparatory steps and necessary communications are made and received *prior* to the operative date of any variations to the *Nurses Award*.
- 2.8 The proposed period of less than two months would present an onerous and insurmountable deadline that aged care providers will not be able to meet, especially given that they are also working towards the implementation of the award changes for non-nursing classifications from 1 January 2025.
- 2.9 For the reasons set out in this submission, aged care providers will require a minimum of 4 months from the publication of a final determination.
- 2.10 Provided that adequate time is provided in advance of the operative date, the phasing-in arrangements proposed for 1 October 2025 and 1 August 2026 could be maintained.

3. MINIMUM RATES AND CLASSIFICATION STRUCTURE

Provisional Views of the Commission

3.1 The provisional views with respect to minimum rates and the classification structure are extracted below:

“(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 align with the rates of pay for teachers under the Educational Services (Teachers) Award 2020 established as a result of the Teachers decision.”⁵

3.2 A proposed new structure for ENs and RNs in aged care, consistent with the above provisional views, was annexed to the Statement.⁶ The Commission also attached proposed transitional arrangements to the Statement for consideration by the parties.⁷

⁵ *Statement* [2024] FWCFB 405 at [10] (footnotes omitted).

⁶ *Statement* [2024] FWCFB 405 at [11], Attachment A.

⁷ *Statement* [2024] FWCFB 405 at [11], Attachment B.

Position of the Joint Employers

- 3.3 The Joint Employers agree with the provisional views of the Commission set out at paragraph [10].
- 3.4 The provisional views are consistent with the evidentiary findings made in the *Stage 1 – Aged Care Decision* [2022] FWCFB 200 and reasoning set out in the *Stage 3 – Aged Care Decision* [2024] FWCFB 150.
- 3.5 In particular, the provisional view that “[t]he classification structure for RNs in aged care should be restructured to remove yearly increments and set proper minimum rates of pay” is consistent with the following observation of the Expert Panel in the *Stage 3 – Aged Care Decision*:

*“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.”*⁸

⁸ *Stage 3 – Aged Care Decision* [2024] FWCFB 150 at [207(1)] (emphasis added).

- 3.6 As a result of the *Teachers Decision*,⁹ the minimum award rates in the *Educational Services (Teachers) Award 2020* can be described as properly set rates.
- 3.7 The Joint Employers also support the approach identified in paragraph [11] of the Statement, namely, “[w]here the new rate is lower than the current rate, existing employees will have their current award rate of pay preserved”.
- 3.8 We make one further observation in relation to the Nurse Practitioner (**NP**). Whilst the Commission has as a matter of principle removed annual increments from the classification structure in the *Nurses Award*, the Commission appears to have maintained them for the NP.¹⁰ There may be unexplained reasons for this, or it is possible it may have been an oversight. We simply raise this to assist the Commission to give effect to the principle issue.¹¹

⁹ *Teachers Decision* [2021] FWCFB 2051.

¹⁰ See *Statement* [2024] FWCFB 405, Attachment A .

¹¹ See *Statement* [2024] FWCFB 405 at [10(3)]; *Teachers Decision* [2021] FWCFB 2051 at [647], [653].

4. OPERATIVE DATE AND PHASING-IN

Provisional Views of the Commission

4.1 As to the question of operative date and phasing-in, the Commission stated:

“It is also our provisional view that the wage rates set out in Attachment A should be phased in over three tranches, from 1 January 2025, 1 October 2025 and 1 August 2026.”¹²

Position of the Joint Employers

4.2 In circumstances where it is anticipated that a final decision and final determination will be published prior to 1 January 2025 but no earlier than 11 November 2024, the Joint Employers can no longer support an operative date of 1 January 2025.

4.3 Due to the passage of time, the circumstances that existed when initial support was advanced for an operative date that aligned with the Stage 3 – Aged Care work value increases no longer exist.¹³

4.4 A position of support was previously confirmed at the Final Hearing on 19 September 2024. The timing of the Final Hearing is relevant because it was:

- (a) at least 3 months prior to the proposed operative date;
- (b) conducted prior to consideration of any draft determination; and
- (c) conducted prior to consideration of any provisional views regarding a restructure of the classifications in the Nurses Award and any transitional arrangements.

4.5 As set out in submissions filed 26 August 2024, aged care providers operating in residential aged care and home care require time to ensure all essential preparatory steps and necessary

¹² *Statement* [2024] FWCFB 405 at [12].

¹³ That position of support was confirmed at the Final Hearing on 19 September 2024.

communications are made and received prior to the operative date of any variations to the Nurses Award.

4.6 Those submissions are extracted below:

“4.1. Aged care providers operating in residential aged care and home care require time to ensure all essential preparatory steps and necessary communications are made and received prior to the operative date of any variations to the Nurses Award.

4.2. That preparation includes:

(a) confirming and securing funding, which is dependent upon steps being taken by the Commonwealth;

(b) communications to all affected nursing employees about the nature of the variations to be implemented.

4.3. Importantly, as set out below, the timing with respect to that preparation is impacted by multiple factors that are beyond the control and remit of the aged care provider.

Residential aged care

4.4. Starting with the question of funding, the action required to affect implementation of increases to minimum award wages inevitably takes time because:

(a) it is necessary to ensure that increased funding is distributed accurately and that there are appropriate accountability mechanisms in relation to the expenditure of additional funding;

(b) the Australian National Aged Care Classification (AN-NAC) funding model is not automatically re-assessed by the Independent Health and Aged Care Pricing Authority (IHACPA) to include wage increases determined by the Commission – the Commonwealth must direct that assessment to occur and the

timing of that direction (assuming it is provided at all) will be critical to the availability of any funding;

(c) the calculation of the actual rate of any increases for nursing employees working in aged care based on independent pricing advice from the IHACPA is a comprehensive, complicated and lengthy undertaking (with the duration expected to take months as opposed to weeks);

(d) the implementation of any subordinate legislation necessary to affect the increases for nursing employees working in aged care is developed and in place ahead of the operative date; and

(e) relevant information and communications technology changes required to implement the increased funding must be correctly developed and in place ahead of the operative date.

4.5. Importantly, providers may be grappling with material changes to the classification structure and will require time to consider any transitional arrangements and conduct financial analysis. That analysis will also be relevant to communications sent out to employees about the implementation and impact of the variations on their employment.

Home care

4.6. The following factors necessitate that sufficient time be provided to home care providers that employ ENs and RNs:

(a) The Commonwealth must once again confirm the mechanism by which funding will be provided to home care operators (i.e. to the home care operators directly or through the home care package). Whilst the Commonwealth indicated in the Aged Care proceedings that it will likely adopt the same funding practices as occurred with the first aged care work value increases, that is not a guarantee. Anticipatory statements do not enable home

care providers to take any meaningful preparatory steps: a clear and fixed outline of the commitment is required.

(b) Subject to the funding arrangements determined by the Commonwealth (including with respect to absorption practices), home care providers will need to determine whether any adjustments to home care package agreements are required.

(c) Further, if the funding is to be provided via the home care packages, it is crucial that the Commonwealth communicates with all home care package recipients regarding the increase in funding for their packages and the linkage of this to any further increases announced by the Commission.

(d) Home care operators require time to procure this change in service pricing by a change to the home care agreement with the clients. Providers cannot make changes to home care agreements without informed consent and agreement from care recipients. Further, clients may be less receptive to participation in this process given the frequency of changes arising from decisions of the Commission that have (and will likely continue in the near future) to necessitate entering a new agreement. For example:

(i) the annual wage review decisions commencing from the beginning of the first full pay period after 1 July 2024 (and 1 July 2025);

(ii) the first tranche of Stage 3 increases commencing from the beginning of the first full pay period after 1 January 2025;

(iii) the second tranche of the Stage 3 increases commencing from the beginning of the first full pay period after 1 October 2025; and

(iv) subject to a future determination of the Commission – any increases to the minimum award wages of ENs and RNs.

Absent securing that agreement, two consequences may arise:

(v) even with alignment to Commonwealth funding, home care providers could be required to pay any further increases without the ability to recover costs from the increased package funding; and/or

(vi) the client may simply use any allotted government funding to acquire additional services at the original pricing as contracted with the operator.”

4.7 Even with an indication of transitional arrangements provided,¹⁴ a period of less than two months is entirely inadequate; it would present an onerous and insurmountable deadline that aged care providers will not be able to meet especially given that they are also working to implement the award changes for non-nursing classifications from 1 January 2025. The unresolved questions of the unions to the Expert Panel regarding the award wage rates published on 11 September 2024 are also providing hurdles to a smooth implementation process.

4.8 Having now reviewed the proposed changes to the Nurses Award, aged care providers will require a minimum of 4 months from the publication of a final determination given that the Christmas/New Year period is approaching.

4.9 In circumstances where aged care providers fully support the provisional views with respect to minimum rates and classification structure, it would be an entirely unfortunate circumstance if aged care providers were put at the risk of non-compliance with the Nurses Award due to an impractical commencement date.

Phasing-in

4.10 Provided that adequate time is provided in advance of the operative date, the phasing-in arrangements proposed for 1 October 2025 and 1 August 2026 could be maintained.

¹⁴ See *Statement* [2024] FWCFB 405, Attachment B.

For the Joint Employers

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