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Sent: Thursday, May 16, 2024 4:54 PM
To: Chambers - Hatcher J <Chambers.Hatcher.J@fwc.gov.au>; Awards <Awards@fwc.gov.au>
Cc: Kate Plowman <Kate.Plowman@minterellison.com>; Jim Fox <Jim.Fox@minterellison.com>;
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Geoff.taylor@awu.org.au; iainb@asmof.org.au
Subject: AM2024/11 - Application to vary the Nurses Award 2020 - Work value case [ME-
ME.FID8452091]

You don't often get email from zara.dwyer@minterellison.com. [Learn why this is important](#)

Dear Associate

Please find attached a Form F1 in respect of AM2021/63 and AM2024/11 and Submissions in respect of AM2021/63, AM2020/99, AM2021/65 and AM2024/11, for filing.

We have copied representatives from other interested parties in this matter to this correspondence, by way of service.

Yours faithfully
MinterEllison

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MinterEllison.

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ACKNOWLEDGEMENT OF COUNTRY

MinterEllison respectfully acknowledges the Traditional Custodians on whose lands we live, work and learn. We offer our respects to Elders past and present.

Form F1 – Application (no specific form provided)

Fair Work Commission Rules 2013, subrule 8(3) and Schedule 1

This is an application to the Fair Work Commission.

The Applicant



These are the details of the person who is making the application.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)			
Surname			
Postal address			
Suburb			
State or territory		Postcode	
Phone number		Fax number	
Email address			

If the Applicant is a company or organisation please also provide the following details

Legal name of business	Australian Private Hospitals Association Limited
Trading name of business	Australian Private Hospitals Association
ABN/ACN	ABN 82 008 623 809
Contact person	Michael Roff

If the Applicant is a company or organisation please also provide the following details

Legal name of business	Catholic Health Australia Limited
Trading name of business	N/A

ABN/ACN	ABN 30 351 500 103
Contact person	Jason Kara

If the Applicant is a company or organisation please also provide the following details

Legal name of business	Day Hospitals Australia Limited
Trading name of business	Day Hospitals Australasia
ABN/ACN	ABN 37 054 719 050
Contact person	Jane Griffiths

How would you prefer us to communicate with you?

Email (you will need to make sure you check your email account regularly)

Post

Does the Applicant have a representative?



A representative is a person or organisation who is representing the Applicant. This might be a lawyer or paid agent, a union or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative's details below

No

Applicant's representative



These are the details of the person or business who is representing the Applicant.

Name of person	Kate Plowman
Firm, union or company	MinterEllison
Postal address	Level 40, Governor Macquarie Tower, 1 Farrer Place
Suburb	Sydney

State or territory	NSW	Postcode	2000
Phone number	02 9921 8580	Fax number	
Email address	kate.plowman@minterellison.com ; bernadette.mccabe@minterellison.com		

Is the Applicant’s representative a lawyer or paid agent?

Yes

No

The Respondent



These are the details of the person or business who will be responding to your application to the Commission.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)			
Surname			
Postal address	Level 1, 365 Queen Street		
Suburb	Melbourne		
State or territory	VIC	Postcode	3000
Phone number	(03) 9602 8500	Fax number	
Email address	kwischer@anmf.org.au		

If the respondent is a company or organisation please also provide the following details

Legal name of business	Australian Nursing and Midwifery Federation
Trading name of business	
ABN/ACN	41 816 898 298

Contact person	Kristen Wischer
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1. The Application

1.1 Please set out the provision(s) of the Fair Work Act 2009 (or any other relevant legislation) under which you are making this application.

1. This application is made pursuant to section 590 of the *Fair Work Act 2009 (FW Act)*. The application seeks orders permitting each of the Australian Private Hospitals Association (**APHA**), Catholic Health Australia (**CHA**) and Day Hospitals Australia (**DHA**) to participate as parties in each of the applications numbered AM2021/63 and AM2024/11.
2. Under section 590(1) of the FW Act, the Fair Work Commission is empowered to '*inform itself in relation to any matter before it in such manner as it considers appropriate*', subject to any relevant exceptions in the FW Act.
3. Section 590(2) of the FW Act sets out a non-exclusive list of ways that the FWC may inform itself, including by conducting a hearing, inviting submissions and taking evidence.

2. Order or relief sought

2.1 Please set out the order or relief sought.



Using numbered paragraphs, set out what you are asking the Commission to do.

1. The Commission grant leave for APHA, CHA and DHA to participate as parties to each of the applications AM2021/63 and AM2024/11.

2.2 Please set out grounds for the order or relief sought.



Using numbered paragraphs, set out the grounds, including particulars, on which you are seeking the relief set out in question 2.1.

1. The APHA, CHA and DHA (**Applicants**) are all industry associations which represent employers in the health industry who employ nurses.

2. The APHA is a peak industry body representing operators in the private hospital and day surgery sector of Australia's health industry. APHA members operate about 70 percent of overnight hospitals and half of all day surgeries in Australia. APHA members operate 160 private hospitals and 151 day hospitals across Australia.
3. CHA is the largest non-government provider grouping of health services in Australia, and includes Calvary Health Care (Little Company of Mary), St Vincent's Health Australia, St John of God and the Mater Misericordiae. CHA members operate 63 private hospitals and 19 public hospitals across Australia.
4. DHA consists of members who operate stand-alone day hospitals in Australia. A day hospital is a medical facility that is not attached to an inpatient hospital. DHA has 281 members who operate more than 350 day hospitals across Australia.
5. Collectively, the Applicants represent members which operate hundreds of facilities and which employ many thousands of employees covered by the Nurses Award.
6. If the Application is granted, the Applicants intend to participate in the two proceedings (primarily AM2024/11, but also AM2021/63 to the extent that issues remain to be determined that are relevant to nursing beyond the aged care sector) on the basis that they will represent the interests of their collective membership. It is proposed that the Applicants (and their members) be represented by a single representative (MinterEllison) and a Form F53 notice regarding representation will be filed in due course. Through this means, the Commission will have the benefit of input from the significant majority of the employers impacted by the proceedings other than the Victorian government and those aged care providers already represented in AM2021/63, without the burden of many (possibly 100s) individual employer parties. The Applicants and their members consider this to be the most effective method to participate in the two proceedings, which have very material potential consequences for each of the members.

3. The employer

3.1 What is the industry of the employer?

Private healthcare

4. Industrial instrument(s)


4.1 Please set out any modern award, agreement or other industrial instrument relevant to the application and their ID/Code number(s) if known.

Nurses Award 2020 (MA000034)

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	
Name	Kate Plowman
Date	16 May 2024



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS

**IN THE FAIR WORK COMMISSION
REGISTRY: MELBOURNE**

MATTER No: AM2021/63, AM2020/99, AM2021/65 and AM2024/11

Applications by Australian Nursing and Midwifery Federation

**THE AUSTRALIAN PRIVATE HOSPITALS ASSOCIATION, CATHOLIC HEALTH AUSTRALIA,
DAY HOSPITALS AUSTRALIA AND HEALTHSCOPE'S OUTLINE OF SUBMISSIONS
REGARDING MATTERS ARISING FROM THE AGED CARE AWARD 2010 [2024] FWCFB 150**

Introduction

1. These submissions are made on behalf of the Australian Private Hospitals Association (**APHA**), Catholic Health Australia (**CHA**), Day Hospitals Australia (**DHA**) Healthscope Operations Pty Limited and the Adelaide Community Health Care Alliance (**Private Sector Employers**) pursuant to order 4 of the directions of Justice Hatcher, President, dated 4 April 2024, regarding the material filed by the Australian Nursing and Midwifery Federation (**ANMF**) on 26 April 2024 concerning outstanding issues arising from the *Aged Care Award 2010 [2024]* FWCFB 150 (**Stage 3 Decision**).
2. These submissions also address procedural matters relevant to the report back listed for Friday, 17 May 2024 regarding the case management of the applications to increase the minimum wage rate of aged care sector employers (**Aged Care Application**)¹ and the application by the ANMF to increase the minimum rates for all classifications under the *Nurses Award 2020 (Nurses Award)* (**Broader Nurses Application**).
3. Each of the APHA, CHA and DHA are industry associations representing private hospitals and day hospitals. APHA members, including Ramsay Health Care, operate 154 private hospitals and 146 day hospitals across Australia. CHA members, include Little Company of Mary (Calvary Health Care), St Vincent's Health Australia, St John of God and Mater Misericordiae, among many others. CHA members operate 63 private hospitals and 19 public hospitals across Australia. DHA represents many day hospital operators, including Macquarie Health

¹ Application by the Health Services Union and a number of individuals to vary the *Aged Care Award 2010* (AM2020/99); Application by the ANMF to vary the *Aged Care Award* and the *Nurses Award 2020* (AM2021/63) and Application by the HSU to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* (AM2021/65).

Lodged by: The Australian Private Hospitals Association, Catholic Health Australia, Day Hospitals Australia and Healthscope

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and Icon. These associations collectively represent almost every provider of hospital and health care services outside of the public health system in each State and Territory.

Stage 3 Decision

4. The Full Bench in the *Stage 3 Decision* identified the following three outstanding issues regarding the classification structure and minimum rates of pay for nurses in aged care:
 - (a) whether the benchmark minimum rate of pay should apply to a nurse with a three or four year degree;
 - (b) which enrolled nurse classification should correspond to the new Level 6 – Team Leader direct care worker; and
 - (c) the minimum rate increments for registered and enrolled nurses and the relativities between classifications.²
5. The Full Bench deferred the finalisation of these three outstanding issues for reasons including the “*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 interested parties being given an opportunity to be heard.*”³
6. At the conference of interested parties held before the President, Hatcher J, on 4 April 2024, Hatcher J raised with the interested parties the issue of the potential “*fait accompli*” for nurses other than aged care nurses covered by the Nurses Award and two considerations that needed to be balanced: *first*, that there had been a decision in principle to increase wages for nurses in aged care based upon work value findings and, *second*, the issue of timing.⁴ Hatcher J recognised that there is some scope to defer finalising the aged care matter if the Nurses Award can be modified or reformed but that the work value case in respect of nurses generally should not significantly delay wage increases for nurses in aged care.⁵
7. Following the conference, Hatcher J directed:
 - (a) the ANMF to serve on the interested parties a without prejudice document setting out its proposed classification structure in the Nurses Award and the appropriate minimum rates of pay for each classification; and

² *Stage 3 Decision* at [204], [205] and [207(1)].

³ *Ibid* at [207(2)].

⁴ Transcript, 4 April 2024, PN 34.

⁵ *Ibid* at PN 35-36.

- (b) the ANMF and interested parties to exchange materials in relation to the three outstanding issues referred to paragraphs 204, 205 and 207(1) of the *Stage 3 Decision*.
8. The ANMF has served the without prejudice document and materials in respect of the issues arising from the *Stage 3 Decision* (and four other issues identified in its written submissions).
 9. Having regard to the materials filed by the ANMF, the observations of the Full Bench and the matters ventilated at the conference on 4 April 2024, the Private Sector Employers are concerned to ensure that they have had a proper opportunity to be heard on the impact of the *Stage 3 Decision* on other nursing settings and to avoid the “*fait accompli*” foreshadowed by the Full Bench in the *Stage 3 Decision* and Hatcher J at the conference on 4 April 2024.
 10. Given the nature of the Aged Care Application, the *Stage 3 Decision* was appropriately focused on the work value reasons for the nursing profession (and other employees) in aged care. There has not yet been a work value case in respect of nurses in any setting other than aged care. Given the diversity of settings in which nurses are employed, there are likely to be fundamental differences in work value and considerations relevant to the modern awards objectives between aged care and other nursing settings. In these circumstances, it is necessary to first determine the extent to which the outstanding issues for determination in the Aged Care Application will impact other nursing settings prior to the finalisation of those issues.

Proposed approach to case management

11. Balancing the above considerations, the Private Sector Employers propose that the Aged Care Application be listed for a hearing to determine:
 - (a) the outstanding issues arising from the *Stage 3 Decision* for registered and enrolled nurses in aged care; and
 - (b) the extent to which those outstanding issues have flow on effects for nurses in settings other than aged care.
12. If the Full Bench accepts the relevant distinction between aged care and other settings, the Private Sector Employers would seek the modification of the proposed classification structure to take into account its application to nurses in other settings. Alternatively, if such modification is not capable of being resolved in the proposed hearing, a separate classification structure in the Nurses Award ought be established for nurses working in aged care on the basis that the classification structure for other nurses under the Nurses Award will be the subject of further determination as part of the Broader Nurses Application.

13. The Private Sector Employers have prepared a proposed timetable for the programming of the proposed hearing on the discrete issues identified above in the Aged Care Application (see Annexure). The proposed timetable is intended to ensure that the outstanding discrete issues arising from the *Stage 3 Decision* are determined in respect of aged care nurses in a timely manner, aligning with the timing of the Commonwealth's funding commitment in respect of wage increases for other aged care workers, being 50% by 1 January 2025 and the remaining 50% in January 2026.⁶ Such an approach is consistent with the Commission's obligations under s 577(1)(a) and (b) of the *Fair Work Act 2009* (Cth) to perform its functions and exercise its powers in a manner that is fair, just and quick.

Conclusion

14. For the reasons outlined above, the Private Sector Employers seek that the matters proceed as outlined above and the directions in the Annexure be made in the Aged Care Application.

16 May 2024

**CHRIS O'GRADY KC
FRANCESKA LEONCIO**

**Counsel for the Australian Private Hospitals Association, Catholic Health Australia,
Day Hospitals Australia, Healthscope Operations Pty Limited and
the Adelaide Community Health Care Alliance**

**MinterEllison
Solicitors for the Australian Private Hospitals Association, Catholic Health Australia,
Day Hospitals Australia and Healthscope Operations Pty Limited and
the Adelaide Community Health Care Alliance**

⁶ Commonwealth's Submissions concerning Operative Date and Phasing In dated 12 April 2024, [3].

ANNEXURE

1. Any interested parties are to file, by email to awards@fwc.gov.au submissions and evidence in relation to:
 - a. The outstanding issues arising from the *Aged Care Award 2010* [2024] FWCFB 150 for registered and enrolled nurses in aged care settings; and
 - b. the extent to which those outstanding issues have flow on effects for registered and enrolled nurses in settings other than aged careby **5:00pm (AEST) on Friday, 12 July 2024.**
2. The Applicant is to file, by email to awards@fwc.gov.au, submissions and evidence in response to the material filed pursuant to item 1 of these directions by **5:00pm (AEST) on Friday, 16 August 2024.**
3. The Aged Care Application be listed before a Full Bench for hearing of the matters outlined in item 1 of these directions on a date after **9 September 2024.**