



# STATEMENT AND DIRECTIONS

*Fair Work Act 2009*

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

## **Aged Care Award 2010**

(AM2020/99; AM2021/63 and AM2021/65)

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT ASBURY  
COMMISSIONER O'NEILL

MELBOURNE, 1 JULY 2021

*Applications to vary modern awards – work value – Aged Care Award 2010 – Nurses Award 2010 – Social, Community, Home Care and Disability Services Industry Award 2010 – mention listed – joinder of applications – future programming – directions issued.*

[1] Three applications to vary modern awards in the aged care sector have been filed and have been allocated to this Full Bench:

- [AM2020/99](#) – an [application](#) by the Health Services Union (HSU) and a number of individuals to vary the minimum wages and classifications in the *Aged Care Award 2010*. The application was made on 12 November 2020 and subsequently [varied](#) on 17 November 2020.
- [AM2021/63](#) – an [application](#) by the Australian Nursing and Midwifery Federation (ANMF) to vary the Aged Care Award and the Nurses Award. The application was made on 17 May 2021.
- [AM2021/65](#) – an [application](#) by the HSU to vary the SCHADS Award. The application was made on 31 May 2021.

[2] The Commission has established a [dedicated Major Cases webpage](#) for these matters.

[3] A conference in respect of the programming of these applications was held on 24 June 2021 before Commissioner O'Neill. A copy of the transcript from the conference is [here](#). The purpose of the conference was to discuss the following matters:

1. Whether the 3 applications should be joined and heard together.
2. Future programming.
3. Any information or data that might be requested from the Government in these matters.

**[4]** Taking into account the views expressed by interested parties at the Conference, we have decided to issue the attached directions in respect of this matter.

PRESIDENT

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<PR731129>



# DIRECTIONS

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JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT ASBURY  
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[1] Further to the Conference on 24 June 2021, the following directions are made:

1. AM2020/99, AM2021/63 and AM2021/65 will be dealt with jointly by one Full Bench and any evidence given in the matters will be admissible in relation to all of them.
2. The directions dated 18 December 2020 in relation to application in AM2020/99 are set aside.
3. The Australian Government is to confer with the Applicants in relation to the requests for information and data in Schedule 1.
4. The Australian Government is to file its response to the request for information and data, specifying what information and data it can provide and by when, by 4pm on **16 July 2021**.
5. The Australian Government is to file the information and data then available by **23 July 2021**, and any additional information and data as soon as it is available.
6. The Applicants will file any agreed position involving union parties, employers, employer associations and/or the Australian Government in relation to the matters by 4pm on **Friday 20 August 2021**.
7. The Applicants and other union parties will file evidence and submissions by 4pm on **Friday 8 October 2021**. This includes any updated submission or evidence already filed in matter AM2020/99 in accordance with the directions dated 18 December 2020.

8. Employers and employer organisations will file evidence and submissions by 4pm on **Friday 18 February 2022**.
9. The Applicants and other union parties will file evidence and submissions in reply by 4pm on **Thursday 14 April 2022**.
10. The matters will be listed for Mention at 9.30am on **Tuesday 19 April 2022**. The purpose of the Mention is to discuss witness scheduling and which witnesses will be called for cross-examination.
11. The matters will be listed for the hearing of evidence from **26 April to 11 May 2022** (inclusive), with 12 and 13 May reserved.
12. The parties will file closing written submissions regarding the evidence by 4pm on **3 June 2022**.
13. The parties will file submissions in reply regarding the evidence by 4pm on **24 June 2022**.
14. The matters will be listed for oral hearing on **6 and 7 July 2022**.
15. Submissions to be filed in both word and PDF formats to [amod@fwc.gov.au](mailto:amod@fwc.gov.au).
16. The parties are granted liberty to apply to vary the above directions.

## SCHEDULE 1

### ANMF REQUEST FOR INFORMATION AND DATA

#### A. Background

1. The Health Services Union of Australia (**HSU**) has made an application to vary the *Aged Care Award 2010* (AM2020/99) to increase rates of pay by 25 percent.
2. The **Australian Nursing and Midwifery Federation (ANMF)** has made an application (AM2021/63) seeking the following:
  - (1) the amendment of the *Nurses Award 2020* by inserting a new schedule, applicable to aged care workers only and expiring after four years, which increases rates of pay by 25 per cent; and
  - (2) the amendment of the *Aged Care Award 2010* by removing Personal Care Workers from the main stream of “aged care employee” in Schedule B, and creating a new classification structure for them—and increasing their rates of pay by 25 per cent.
3. The HSU has made a further application to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* (AM2021/64) to increase rates of pay for home aged care employees of 25 percent.

#### A.1 Underlying premises

4. The following are the premises that underpin the requests for information and data:
  - (1) The Commonwealth presently bears the primary burden of funding aged care.<sup>1</sup>
  - (2) Wages and wage growth are by far the most significant drivers of input costs for approved providers of residential care.<sup>2</sup> The Commonwealth’s indexation of funding levels for aged care services has not, to date, kept up with input costs for aged care providers, including wages.<sup>3</sup>
  - (3) The way that the Commonwealth funds the aged care sector directly affects how employers negotiate pay and conditions.<sup>4</sup>

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<sup>1</sup> See *e.g.*, Royal Commission into Aged Care Quality and Safety, Final Report, (“**Final Report**”) Vol 1, page 11. This may be as much as three-quarters of its funding (Final Report, Vol 1, page 25), or (based on 2018–19 figures), \$19.9B of the \$27B spent on aged care (Final Report, Vol 1, page 63).

<sup>2</sup> Final Report, Vol 3, page 643, which suggests that wages and salaries are around 80–90 per cent of aged care costs.

<sup>3</sup> Final Report, Vol 2, page 193, Fig 3; Vol 3, page 637, 641.

<sup>4</sup> Final Report, Vol 2, page 214.

- (4) There is likely to be a requirement for employers in the aged-care industry to employ additional staff in order to ensure that the minimum staff time standards for residential care being recommendation 86 in the Final Report, which was accepted by Government,<sup>5</sup> are met.
5. The primary conclusion drawn from these premises is that the degree to which the Commonwealth will provide further funding for the aged care sector, in addition to funding necessary to meet minimum staff requirements, will directly inform the degree to which employers will consider themselves able to meet wage increases of the kind sought by the employee associations.
6. The secondary conclusion is that the degree to which the Commonwealth will provide such further funding is likely to be a consideration of significance in determining the attitude of employer associations to the employee-association applications.
7. In that light, the information and data requested from the Commonwealth is as follows.

**B. Information and data requested of the Commonwealth**

*{Nota bene: the extent to which information and data available to the Commonwealth enables answers to the following questions is not known; in every case, what is sought is the best of the Commonwealth's information and data. And, in each case, what is sought is not only the answers to the questions, but also the information and data responsive to the question, so far as it is able to be provided}*

8. Please provide the most up-to-date data / information in relation to the matters set out in [4(1)] and [4(2)] above (*i.e.*, what is the latest data / information in relation to the proportion of aged care expenditure borne by the Commonwealth, and in relation to wages as a proportion of input costs to aged care providers).
9. What has been the total amount of Commonwealth funding of the aged care sector (including, specifically, for residential care and home care) in the financial years FY10–FY21?
10. What is the total amount of Commonwealth funding budgeted or forecast for the aged care sector (including, specifically, for residential care and home care) in the financial years FY22–FY26?
11. Of the new aged care funding announced as part of the FY22 budget:
  - (1) What is the total of that new funding?
  - (2) What part of the funding is responsive to the recommendations made in the Final Report?

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<sup>5</sup> Australian Government Response to the Final Report of the Royal Commission into Aged Care Quality and Safety, May 2021, pages 56–57.

- (3) What amount is available to be spent by employers in the aged-care industry on wages and salaries (*i.e.*, which is not required to be spent otherwise than on wages and salaries), and in particular on the wages and salaries of employees to be covered by the Nurses Award, the Aged Care Award, and the SCHADS Award?
  - (4) What amount is available to be spent on wages and salaries increases beyond the funding necessary to meet minimum staff requirements as identified in recommendation 86 in the Final Report?
  - (5) What percentage wage increase (if any) for aged care workers in the classifications affected by the applications in AM2020/99, AM2021/63 and AM/2021/64 would that cover?
  - (6) What is the amount that is required by the Commonwealth Government to be spent on other initiatives to be implemented in the residential Aged Care sector and the home care Aged Care industry?
12. What percentage wage increase for aged care workers in the classifications affected by applications in AM2020/99, AM2021/63 and AM/2021/64 will budgeted and forecasted funding cover in the financial years FY23–FY26?
13. Will the Commonwealth commit to providing funding sufficient to meet any wage increase for aged care workers arising out of any determination(s) by the Fair Work Commission varying modern award(s) in applications AM2020/99, AM2021/63 and AM/2021/64?
14. If the answer to the question in [13] is “no”, what percentage wage increase for aged care workers in the classifications affected by applications in AM2020/99, AM2021/63 and AM/2021/64 will the Commonwealth commit to funding?

## HSU REQUEST FOR INFORMATION AND DATA

1. Data about the workforce to assist in understanding any changes in the structure of the workforce over the last 5 years that may be relevant to the case, and to give insight into the situation of workers including:
  - (1) How many workers are employed in aged care (residential care and home care, separately);
  - (2) How many workers are employed in each occupational group (registered and enrolled nurses, allied health workers, allied health assistants, personal care workers, community care workers, various ancillary occupations, management);
  - (3) Workers' employment arrangements – share of each occupation working parttime, full-time, casually; share of each occupation holding multiple jobs; and
  - (4) Data about occupational groups and employment arrangements by ownership of provider, by size of provider and by size of unit (residential facility, home care outlet).

This data has previously been collected in the National Aged Care Workforce Census and Survey, last conducted in 2016. Five years later, updated information is highly desirable to understand the structure of the aged care workforce today.

This should also include any additional data analysis from Australian Institute of Health and Welfare (AIHW) of National Aged Care Workforce Census and Survey 2016 (beyond the published report) on the demographics, employment conditions and skills of workers in the aged care occupations covered under the Aged Care Award and the SCHADS Award.

2. Any initial data on the demographics, employment conditions, skills of the aged care occupations covered under the Aged Care Award and the SCHADS Award from the 2020 NACWCS survey run by the AIHW in December 2020.
3. Any information and data the Commonwealth Government has on the numbers and demographics of workers in different occupations in the aged care providers funded by the Commonwealth to provide both residential and community-based aged care
4. Any information about any current or planned work through the Australian Bureau of Statistics to address the data deficiencies in the:
  - (1) ANZSIC industry classifications that make it impossible to identify the community-based aged care sector; and
  - (2) ANZSCO occupational classifications do not recognise the skills currently employed in both personal care worker occupations and aged and disabled carer (home care workers) occupations.



5. In Recommendation 108 of the Royal Commission's Final Report (relating to data governance and a national aged care dataset) the Royal Commission recommended that the AIHW is to perform a number of relevant functions including:
  - a. to collect (directly or in association with other bodies or people), store and manage aged care-related information and statistics (including information on the aged care workforce, the economics of aged care, the operation of the aged care market, and the delivery of aged care services), in consultation with the Australian Bureau of Statistics if necessary and specifically at
    - (i) to curate and make publicly available a National Aged Care Data Asset, which should at a minimum include data on:
      - (II) the demographics, skills and wages and conditions of the aged care workforce.

In its response to the Recommendations the Commonwealth Government states:

*The Government agrees with the intention of this recommendation as a positive and valuable extension of various public-facing data activities already underway.*

The HSU seeks information from the Commonwealth Government on what public facing data activities it has already underway on the demographics, skills, and wages and conditions of the aged care workforce.

6. Data about providers' expenditure and revenues to assist in understanding capacity to pay, and allocation of resources to care and support of older people. Data about home care, residential care and mixed care providers should be provided separately including:
  - (1) Data about the share of staffing costs in total costs, the level of profit, the share of government funding in total revenues, and ownership type, for each (deidentified) provider for the last 10 years;
  - (2) The proportion of providers' total expenditure for the last 10 years on each of the following categories of staff, by ownership type and by quartile of proportion of total spending on staff:
    - (a) direct care staff;
    - (b) ancillary staff that provide services indirectly to older people (hospitality, leisure and accommodation/facilities services);
    - (c) administrative staff;
    - (d) management of facilities/units; and
    - (e) management of the larger aged care provider organisation, where relevant

This information should be provided in a form where providers are divided into four groups from lowest to highest proportion of total expenditure on staff. For each of these groups, provide the proportion of spending on each category of staff listed above, by ownership type.

7. Aged Care Funding Instrument (**ACFI**) data for each year since 2010 showing the proportion of residents assessed as being high, medium and low need on each of the three ACFI domains, being:
  - (1) activities of daily living,
  - (2) behaviour; and
  - (3) complex health care.
8. Any other data the Commonwealth Government holds on the changing needs of aged care residents in residential and home care since 2010.
9. Projections in relation to the number of residents who will be in residential and home care aged care into the future;
10. Current and planned Commonwealth Government policy decisions that relate to improving the quality and safety of aged care by increasing the skills and competency of the workforce. This includes any plans to mandate minimum standards for training, minimum competencies, other mandatory requirements (e.g, vaccination) and any plans for professional registration and reporting.