



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT

AM2024/11

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

**Application by Australian Nursing and Midwifery Federation
(AM2024/11)**

**Application by Australian Nursing and Midwifery Federation
(AM2021/63)**

Nurses Award 2020

Melbourne

2.00 PM, THURSDAY, 4 APRIL 2024

Continued from 29/02/2024

PN1

JUSTICE HATCHER: I'll take appearances. Mr Hartley, you appear with Ms Wischer and Mr White for the applicant?

PN2

MR J. HARTLEY: Yes, sir.

PN3

JUSTICE HATCHER: Mr Taylor, you appear for the Australian Workers Union.

PN4

MR G. TAYLOR: I do, sir.

PN5

JUSTICE HATCHER: Mr Broanda, for Catholic Health Australia, and also the Australian Private Hospitals Association?

PN6

MR D. BROANDA: Sorry, what was that again?

PN7

JUSTICE HATCHER: The Australian Private Hospitals Association, and Day Hospitals Australia. There are three industry associations within that group.

PN8

MR PROIETTO: Yes, your Honour.

PN9

And Mr Proietto, you appear for Healthscope Operations and Adelaide Community Health Care Alliance.

PN10

MR D. PROIETTO: That's correct, your Honour.

PN11

JUSTICE HATCHER: Mr McCullough, you appear for the Victorian Hospitals Industrial Association?

PN12

MR S. MCCULLOUGH: That's correct, your Honour.

PN13

JUSTICE HATCHER: And Mr Ward, you appear via Teams for Australian Business Industrial?

PN14

MR N. WARD: And Aged & Community Care Providers Association, your Honour.

PN15

JUSTICE HATCHER: Yes, all right. Right, have I got all the appearances? All right. I might start off with you, Mr Hartley. First of all, has your client engaged in any further consideration of the application in light of the Aged Care decision?

PN16

MR HARTLEY: I'm sorry, your Honour. I missed the middle of your Honour's question.

PN17

JUSTICE HATCHER: I said has your client engaged in any further consideration of the application, both in substance and process in light of the Aged Care decision?

PN18

MR HARTLEY: Your Honour, yes is the short answer. My client has considered and continues to consider what the effect of the Aged Care decision should be on the (indistinct) the second application. At the moment I'm not instructed to amend that application in any way, though that is still the subject of consideration.

PN19

And in part, I think something that would be highly relevant to that consideration is what is going to be the position of the other parties in proceeding 2. So, we have things to say about proceeding 1. I think your Honour listed today, also in relation to paragraphs 204 to 208 of the stage 3 decision, and we have things to say about that which I could say now or later.

PN20

But in respect of proceeding 2 which most people are here for - - -

PN21

JUSTICE HATCHER: Yes.

PN22

MR HARTLEY: Substantively, as I understand it and I wasn't here as your Honour knows, on the last occasion but I understood that your Honour stood the matter over in order to allow the stage 3 decision to come out, for people to consider their positions and in particular, the call on respondents or interested parties to consider what their stance would be in respect of that second proceeding. And what their answer is to that question would affect the way that we approach proceeding 2, your Honour.

PN23

JUSTICE HATCHER: I understand. All right. Well, in order you prefer, what attitude to the employer respondents have to the application of the current timing?

PN24

MR BROANDA: Thank you, your Honour. Your Honour, the application that's on foot today is challenging the application for the employer sector. And if I deal directly with the position of the applicant first, your Honour. We would propose to have a timetabling put forward that would initially enable the respondents to

engage with the applicant to see where we can have a meeting of the minds and reduce the number of matters that are in contention.

PN25

I anticipate that the focus of our exploration, your Honour, would be around the degree of adjustment that needs to occur in the private hospital sector which is a very different entity to the aged care sector. Additionally, there are multiple layers of matters that haven't yet been considered by the Tribunal or aren't dealt with in the application, at least as it's currently prepared. Your Honour, for example, it doesn't deal with midwives. But midwives - - -

PN26

JUSTICE HATCHER: I'm sorry, deal with what?

PN27

MR BROANDA: Midwives.

PN28

JUSTICE HATCHER: Midwives, yes.

PN29

MR BROANDA: Which is a profession that's also covered by the award. So, we need to explore what is the effect on the proposal, the outcome of the aged care decision on a number of occupations that exist within that Nurses Award. But additionally, your Honour, there are issues of commonwealth funding at play.

PN30

The hospital sector is not immune from the difficult times, financially. There are restrictions in place at a commonwealth legislative level on private health funds that limit the amount of funding that can flow through for health care into the private hospital sector. The application, if it were granted as apparently stands, presents significant challenges financially on that front.

PN31

We would need time to talk to the commonwealth, your Honour. Additionally, amongst the respondent groups there are many entities that have contracts with the state and territories to deliver public health services. Those contractual arrangements with the states and territories have limitations within them that would also need to be explored to free up, I would suggest, the respondent's position in relation to a number of issues that are likely to be agitated in this process.

PN32

Your Honour, what we would be seeking, those groups that I represent, your Honour, is a timetabling that would incorporate at least a couple of months for us to talk with the applicant in the proceedings; suitable time either concurrently or post that to talk with the commonwealth and the states and the territories; and then a timetabling of material, post at that point.

PN33

But perhaps, your Honour, if we could bring it on for a further conference in a matter of a month's time to see whether the parties are at in terms of narrowing the issues that are between us, and certainly engaging with the commonwealth and the states and territories.

PN34

JUSTICE HATCHER: If you've read the Aged Care decision the expert panel in that matter said that it was deferring finalising classifications and rates for nurses in aged care because of the risk that that would, in effect, create a *fait accompli* for nurses elsewhere covered by this award. One of the problems which I think the Commission has to grapple with is, one, there's been a decision in principle to increase wages for nurses in aged care based upon a number of work value findings, and there's a timing issue.

PN35

That is that there is some scope not to finalise the aged care matter if the award for all nurses can be, as it were, I'll just say modified or reformed. But if that process takes too long the Commission can't wait forever to flow increases to nurses in aged care which its found that are already, in effect, owing. So, I think – and this is to the employer interest generally, I think you need to balance those considerations.

PN36

That is, if we're going to have a full-blown work value proceeding for nurses under this award then it may be that we will have to move on aged care nurses and you will, in effect, be confronted with something of a *fait accompli* in that sense that it will finalise the classification structure and rates for nurses in aged care. And then you'll be put to the task of demonstrating why they shouldn't simply follow on with everyone else. So, obviously that's not to put you under any pressure but we need to balance those matters in mind.

PN37

MR BROANDA: Yes your Honour. I appreciate that.

PN38

JUSTICE HATCHER: So, I mean, have you had the opportunity to sit down with your, I'll just call it clientele, and discuss this matter in detail? Or how far down the track are you to that?

PN39

MR BROANDA: Your Honour, I've been appointed to represent those entities, only a matter of three or four days ago.

PN40

JUSTICE HATCHER: Right.

PN41

MR BROANDA: We have had discussions and so far we've not been able to narrow our position in relation to each of the elements that will need to be satisfied here beyond, your Honour, and this is perhaps poorly phrased, beyond a superficial approach around what are the things that we're going to focus on and

where are the areas that we can probably talk to the ANMF about not spending too much time on.

PN42

We would welcome the opportunity to explore those with the applicant. We do have preliminary positions that we are looking to narrow within our organisations, your Honour.

PN43

JUSTICE HATCHER: All right. And the last matter I wanted to trouble you with at this stage, I'm trying to get an understanding of the extent to which the increases, either as proposed in the ANMF's application, or as contemplated in the Aged Care decision here. So, I'm trying to get an understanding of the extent to which the increases, either as proposed in the ANMF's application or as contemplated in the Aged Care decision, if flowed on will have an actual effect on nurses' wages.

PN44

That is, the impression, I think at least I received in the Aged Care case, was that the actual market rates of nurses are well above the current award, well above 15 per cent increase, and may still even be above the further increases that are contemplated. Obviously you're representing employers outside of the aged care sector. Can you give me, without going to chapter and verse, any impression as to how nurses' market rates or actual rates compare to what is contemplated in the application?

PN45

MR BROANDA: Look, I can. I can give you an idea, your Honour. My day job, if you like, is with the Mater Hospital Network in Queensland.

PN46

JUSTICE HATCHER: Yes.

PN47

MR BROANDA: Within the Mater Hospital Network in Queensland, if the aged care decision were applied to the nursing workforce, we're talking about a seven figure increase in wages immediately, not taking into account all the issues that arise from bargaining where the flexibilities that have been incorporated into bargaining have been accommodated by employers in recognition of we can't afford greater salaries than that that's already been provided in the enterprise agreements.

PN48

So, on a very simple figure, one employer amongst the many that I represent, and we're talking about a seven figure increase that is in a situation, your Honour, where that employer, and I'm not speaking out of school, the Mater's financial returns published in the Australian Charity and Not for Profit Commission website lost \$130,000,000 last year, lost \$80,000,000 the year before. So, when we're talking a seven figure increase, not taking into account the flexibilities that can no longer be all set, and that's just with one employer, your Honour. The cost across the sector is significant.

PN49

JUSTICE HATCHER: I'm just trying to understand. Why would it have the effect of removing flexibilities in the current enterprise agreement?

PN50

MR BROANDA: Your Honour, I'll give you, for example in the enterprise agreement to which the Mater is a party to. The overtime for nurses, for example, moves from time and a half to double time after three hours. I believe in the award currently it moves to double time after two hours. Now, we can accommodate that third hour and pass the BOOT requirements because our base rate is so much higher.

PN51

So, the base rate times time and a half for that third hour is a better off over all provision than the award rate plus double time. Now, if we lost that gap that presents a problem for us, just on that one example about how the overtime would be applied to a person who is subject to that enterprise agreement. And your Honour, there are various examples along those lines.

PN52

JUSTICE HATCHER: So, on the example you've just given, how long ago was that enterprise agreement struck?

PN53

MR BROANDA: That went through the Fair Work Commission's interest based bargaining process and concluded, your Honour, in July last year. I believe it was registered either in July or August of last year.

PN54

JUSTICE HATCHER: So, it's still got some time to run if we have to think about
- - -

PN55

MR BROANDA: Another 12 to 18 months, your Honour, yes.

PN56

JUSTICE HATCHER: Right. Okay. Anything else you want to raise at this stage?

PN57

MR BROANDA: No, not at this stage. Thank you.

PN58

JUSTICE HATCHER: All right. So, Mr Proietto and Mr McCullough, what do you want to say?

PN59

MR PROIETTO: Yes, thank you, your Honour. Look, I would endorse the submissions made by my learned friend, Mr Broanda, in relation to how we see the process playing out. We do think that there would be some benefit in having

some preliminary conversations with the ANMF. That hasn't happened to this point, potentially the opportunity to narrow the areas that may be in dispute.

PN60

Your Honour's point regarding the aged care classification structure and the likely changes is one that I haven't taken instructions on. I accept what your Honour says about that. And given the timing involved though, I do suspect that the timetable that we would want, which is similar to what my learned friend has set out, would mean that we probably are in that world where we would need to say to the Commission, well, you've said this but we disagree for the following reasons, rather than being in a position to influence that now, I think, realistically.

PN61

I think the other reason why more time would be beneficial from our side of the table, and I have spoken to my friend about this, is that there is a possibility from the employer side of having one voice. I'm not sure if there are any more employer entities. There are approximately 20 employer entities of size, and obviously it would help with the efficient rating of this process if there were one, rather than two or three or 20 voices.

PN62

But there needs to be alignment amongst those groups and that's a process that we're still working through. And so, some more time would assist with that. In terms of the economic effect I haven't taken detailed instructions on that point but I do know as a preliminary point that the vast majority of the, approximately 12,000 nurses that are employed by my two clients are covered by enterprise agreements.

PN63

Those enterprise agreements do have rates that exceed the award minimum. But notwithstanding that, if the percentage increase that's being proposed in aged care workload (indistinct) would have a significant impact on the wage rates that my clients have to pay. There would be varying increases. It depends on the classification level, your Honour. At some classification levels the increase would be profound. In others it would be less.

PN64

And there may be isolated examples where there is no increase needed, at all, such as the current gap in the EBA. But my instructions are that it will definitely have a financial impact. And my friend has said, and we would agree with the submissions, that the industry is an industry – the privatised industry at the moment is facing some significant head winds and the vast majority of the workforce are nurses and would be affected by this decision.

PN65

So, if I make those observations. Otherwise I would endorse what my learned friend says about the proposal and the proposed timetable.

PN66

JUSTICE HATCHER: All right. Mr McCullough, do you want to add anything?

PN67

MR MCCULLOGH: Thank you, your Honour. I might – this is my first appearance in this matter, so just by way of context, the Victorian Hospitals Industrial Association is a registered organisation that represents Victorian public hospitals and standalone community health centres. There are approximately 60,000 nurses and midwives within that sector.

PN68

With respect to the submissions that have been made and some process by which to narrow the differences between the parties, we think that that would be a sensible way to proceed. I'll just make some observations about the two key components of the application as I understand it, and I'll apologise in advance if I misapprehend any component.

PN69

But starting with the issue of whether the rates are properly fixed and the application for the C10 Metals Framework Alignment, I'm mindful that the application precedes the third stage of the Aged Care decision. And for us there are some questions about how to reconcile elements of the application with elements of that ultimate decision.

PN70

Those include the starting point for the application about framework; the difference between the application and the rate that it chooses as the starting point but with the same end point, and that might be, I think it's the entry rate that's been utilised in the application as opposed to the rate flag 4 year degree; the issue of the structure and increments which has been the subject of comment in the previous proceeding including that it is yet to be addressed.

PN71

It is difficult for us to assess the impact of any outcome without those issues being ventilated, at least to some extent; the issue of the appropriate relativity between the three and the four year degree is a matter that's not yet been engaged with and it might be of use to do so. And in terms of the observation in the stage three case that the proper application of the C10 Metals Alignment Framework approach does not necessarily involve increasing of the rates for aged care nurses in the existing classification by the same percentage of the benchmark rate, again that goes to the issue of making it difficult to judge the effect of the application (indistinct), having regard to those issues not being engaged with or addressed.

PN72

I suspect that a process of further discussion would help narrow those issues but from our perspective they are currently unreconciled between the application and the stage 3 decision. On the second elements of the change to work value I note that in terms of the application there are matters that may overlap in terms of a Venn diagram since with the aged care application. But there are likely additional matters and the application seems to foreshadow the need to call evidence with respect to that element of the application.

PN73

In terms of the potential impact it is true that rates under enterprise agreements including for the Victorian Public Sector are higher than the current rates prescribed by the award. An increase of the magnitude that's proposed has certainly the potential to overtake some of the rates and result in an additional cost. I'll just supplement one thing in terms of the impact point.

PN74

Whilst if the rates under the award overtake those under the agreement that has an obvious and apparent cost in the first instance, classification structures are delicate things. And that will raise then the issue of relativity. It would be in that structure which would likely necessitate additional cost beyond that arising directly from any change to the modern award. Your Honour, unless you have any questions for me?

PN75

JUSTICE HATCHER: Thank you. Mr Ward?

PN76

MR WARD: Thank you, your Honour. Can I thank your Honour for letting me appear by Teams today, as well. I think I'd want to start by saying that for our part we understand with great clarity that some of the principle issues have now been disposed of in the Aged Care case as they relate to the (indistinct), particularly in relation to paragraph 204, 205 and 206 of the decision. Also, we don't cavil with those, but those matters have been resolved.

PN77

It seems to us that all we have left to do for our part is to dispose of the matters arising from paragraph 2071 which was effectively the question of annual steps or some alternative annual question of (indistinct) qualified (indistinct). We came to have those matters resolved in the aged care sector, as fast as possible. I have had some discussion with Mr Hartley yesterday. I think he's (indistinct). My clients are reflecting on those two issues. And if we were dealing with this purely on aged care I would probably be inclined to ask for a conference to see if we could reach some accord, at least solve a part of that, and if not then a timetable that would dispose for it as (indistinct) that is possible.

PN78

We are very mindful that after three years of the aged care case we're at the back end where (indistinct) is obviously heavily involved in (indistinct) funding arrangements to give effect to the decision. We don't feel disturbed by the possibility that the aged care matter might be adjourned for many, many months to allow others to (indistinct) out their views.

PN79

And now respectfully we understand their position and we accept that. But our idea would be that we should allow the aged care case to be wrapped up as quickly as possible. And if that involves the resolution of those two residual matters to be dealt with independently for the aged care case then that's what we would seek to have happen.

PN80

It would be industrially disadvantageous for wide parts of our workforce to have the benefit of the decision and for registered and enrolled nurses, in particular, to (indistinct) and that would materially impact and confuse the conversation with the commonwealth around funding. So, don't need to be waiting for another four or five or six months to allow the ANMF and private hospital providers to have conversations, or private hospital providers to have conversations.

PN81

We would prefer to have all those matters wrapped up quickly so we get the aged care finished in its entirety. I do appreciate that that might involve some degree of prejudice to other parties but I think that's the cross that one bears.

PN82

JUSTICE HATCHER: All right. Well, the current timetable in the aged care case indicates that we'll have all the submissions by 10 May. And then there may be another hearing beyond that depending upon what the submissions say. But I think the parties can reasonably anticipate in approximately June we'll be determining the outstanding issue of operative date and any question of phasing in.

PN83

And of course, once the operative date is determined that will set the clock ticking to finalise aged care nurses by about the same timetable. So, I think the parties would need to bear that sort of timeframe in mind. Now, Mr Hartley, having heard all that, what do you say should happen?

PN84

MR HARTLEY: Your Honour, one might have been over optimistic in hoping that everyone would turn up today and say aged care decisions (indistinct), let's roll it out across the entire nursing industry. Had that happened we may not be faced with this issue about what to do with aged care nurses.

PN85

But we are faced with that issue. We agree with what Mr Ward says about it being industrially undesirable, and undesirable for other reasons for aged care nurses to be kept out of the increases that the panel has determined are appropriate. That was made, I think, reasonably clear to other parties in the stage three decision that that might be a consequence, that there'd be this, call it a fait accompli.

PN86

In those circumstances an appropriate thing to do in our submission would be to grant the increases to aged care nurses within the sort of timetable that your Honour just outlined and then leave the second proceeding to run its course after that. In addition to the matters that my friend, Mr Ward, raised there are some issues that we would need to advance, at least submissions, possibly also evidence about in the context of aged care.

PN87

At 204 of the decision, your Honour, the panel expressed the view that it should be the four year degree and that was fixed at 14.70.80. The position of the ANMF

is that the four year degree is not an appropriate benchmark, including because there are very few comparatively four year degree nurses.

PN88

And so, we'd seek an opportunity of putting on at least a submission to persuade the panel of that and possibly evidence to show the fact that, which has been the subject of some evidence before but perhaps not targeted, that the three year degree qualified nurse is the benchmark, is the standard registered nurse and the four year degree is not, for reasons that we would develop, meet the appropriate benchmark. So, we'd seek an opportunity to persuade the Commission about that.

PN89

JUSTICE HATCHER: All right. I don't think the paragraph forecloses - - -

PN90

MR HARTLEY: Yes. No.

PN91

JUSTICE HATCHER: The possibility that the same rate might apply to a three year degree.

PN92

MR HARTLEY: Yes. Well, your Honour is right. It doesn't.

PN93

JUSTICE HATCHER: But that may point to the need to have, on that issue alone, a further hearing in the aged care matter.

PN94

MR HARTLEY: I think it very well might, your Honour, yes. Paragraph 205 – on reading of paragraph 205 is that the enrolled nurse, who has supervisory responsibilities, should be paid around the rate of a level 6PCW. That would accord with the ANMF's application.

PN95

Another reading of it is that only those enrolled nurses who do have supervisory responsibilities as opposed to those that do not, would be at the level 6, and the EN's who don't have any supervisory responsibilities, my instructions are that there'd be very few of those, if any, but one reading is that the panel is contemplating two classifications for EN's, or two streams perhaps, one with supervision, one without. That's not a course, that the ANMF would support.

PN96

And so, if that were what was to be understood in that paragraph that's another matter that we'd seek to be making submissions about.

PN97

JUSTICE HATCHER: But again, the paragraph doesn't say anything more than it says.

PN98

MR HARTLEY: Yes. That's right. Yes.

PN99

JUSTICE HATCHER: But I understand what you put.

PN100

MR HARTLEY: Yes. And then Mr Ward is correct with respect that 2071 raises these issues about what should be the classification structure (indistinct) based and (indistinct) appropriate, what should be the relativity between 3 and 4. So, those are the issues that we think can and should be ironed out relatively quickly and consistently with the sort of timetable that your Honour has just identified.

PN101

In the meantime we have no difficulty, of course, with speaking with the private hospitals in conference to see if issues can't be narrowed in respect of proceeding 2. But it's important industrially and for other reasons that the aged care nurses should be wrapped up, as Mr Ward says. That's the position of the ANMF.

PN102

JUSTICE HATCHER: On the aged care timetable, practically speaking, we have at least until mid-May before anyone has to decide whether we can finalise these matters together or have to (indistinct).

PN103

MR HARTLEY: Yes.

PN104

JUSTICE HATCHER: So, is there any reason why in response to what the employers have said this afternoon, we shouldn't use, at least, that time to unpack the sort of discussion process which they contemplate? And then bring the matter back on then and see what's left, or what is in dispute?

PN105

MR HARTLEY: I can think of no reason why that shouldn't be done. But it might be worthwhile in the interim that the Commission expressing its expectations in the aged care case about what will be the subject matters that will be dealt with on the, call it, existing aged care timetable.

PN106

Otherwise one might have a circumstance where we have discussions, things advance but not far enough, and then we come back before your Honour and say, well, we didn't know what it was that we were meant to be dealing with on the existing timetable.

PN107

JUSTICE HATCHER: Yes. I mean, the difficulty with the aged care timetable is that, at least the Commission doesn't know yet what the federal government is going to say about operative date. They may say the operative date should be 1 July, then they say the operative date should be 1 July 2026, in which case we've got plenty of time.

PN108

MR HARTLEY: Yes, that's so.

PN109

JUSTICE HATCHER: So, until we find out that it's a bit hard to work out what timeframe we're working with.

PN110

MR HARTLEY: I'll see if my instructor signals wildly to me that I'm making a mistake. But the ANMF will proceed on the basis that those issues that I've articulated will be dealt with on the existing aged care timetable, and we'll prepare whatever submissions and evidence we need to prepare.

PN111

In the event that the commonwealth has said what it's said and it appears to the Commission that that course is inefficient then the matter could be convened for a mention and discussion could be had about what should happen. But I think with a view to ensuring that the aged care case can be finalised as quickly as possible, we will, unless the Commission indicates that it would prefer a different course, be proceeding on the basis that we will be making submissions about those points that I articulated in the context of the finalisation of the aged care case.

PN112

JUSTICE HATCHER: All right. So, on the assumption that you deal with those issues in the aged care case alone, how long would you need to put on material relating to that?

PN113

MR HARTLEY: I would need to take some instructions about that, your Honour, I'm sorry. I can do that and we can communicate with your Honour's chambers. But I'm not in a position to answer that on my feet, I'm afraid.

PN114

JUSTICE HATCHER: All right. The other issue I want to raise with you about the broader application in the hope that it might be able to be dealt with on an expedited basis following your discussion with the employers, is whether the ANMF can start working on a statement of, I'll call it contentions, about the work value issues that relies upon which part ultimately then be referred to the employers to see if an agreed statement of facts can be constructed as it was in the aged care case.

PN115

MR HARTLEY: Yes. Yes. In the aged care case, your Honour, that joint statement was the product of a conference, I think a rather lengthy conference over perhaps several days. And we, I think, speaking for myself and perhaps Mr Ward but he can tell me if he disagrees, see some value in a similar sort of document being produced.

PN116

JUSTICE HATCHER: I had the idea that your client would produce its factual contentions and then we could find out to what extent they're in contest or otherwise.

PN117

MR HARTLEY: Yes, your Honour. I can see that into that.

PN118

JUSTICE HATCHER: All right. Well, while you're all here, and I'll adjourn shortly for a short period, what I'm going to ask the parties to do is to construct a timetable for discussions which would allow the parties to come before me for a further conference, a report back and further conference if necessary, some time in the week beginning 13 May. And then we might be in a better position by then to decide whether the matters can go forward as one or they need to be bifurcated.

PN119

MR HARTLEY: Yes. I'll take some instructions, your Honour.

PN120

JUSTICE HATCHER: All right. So, while the parties talk about that and while the parties get instructions, Mr Hartley, can you get instructions about what sort of timetable you would need to put on for the statement of contentions I've discussed in respect of the broader application, and any material you would seek to rely upon in respect of the outstanding issues in the aged care case.

PN121

MR HARTLEY: Yes, your Honour.

PN122

JUSTICE HATCHER: All right. So, I'll leave it to the parties to have those discussions. I'll adjourn until not earlier than 3 o'clock but if the parties need longer they can have it. But what I'm looking for is some clear timetable for these discussions to start, and some substantive progress being made as to what are the issues in dispute, and hopefully whether they can be resolved.

PN123

MR HARTLEY: May it please the Commission.

PN124

JUSTICE HATCHER: All right. I'll now adjourn.

SHORT ADJOURNMENT

[2.36 PM]

RESUMED

[3.16 PM]

PN125

JUSTICE HATCHER: Mr Hartley, what's the position?

PN126

MR HARTLEY: Thank you, your Honour. If I can start with the whole of proceeding 2, my learned friends have indicated to me that the type of document that they would find useful with a view to informing discussion is a document which sets out more concretely, what is the ANMF's position in the proceeding 2 about what should be the rights for particular classifications and what should the classification structure look like.

PN127

So, for the most part, that's things that I've already said orally today but we will put that in a document. It will be a relatively short document. And we can give that to our friends for the purpose of informing discussions by 26 April. That's slightly different from the sort of document that I think your Honour had in contemplation which was a statement of contentions.

PN128

That sort of document, a long one, would take a long time to put together, several months, I'm instructed. And so, in light of my friends' position and they'll correct me if I'm wrong, but the document that would assist them for discussions is that shorter document of the kind that I've described. So, we'd proposed that an order of that kind be made but by the 26th, the ANMF produce a document to the respondents outlining the ANMF's position on rates and classification structure in proceeding 2.

PN129

That's the proposal for proceeding 2. For proceeding 2, as your Honour knows, there's an - - -

PN130

JUSTICE HATCHER: Sorry, I - - -

PN131

MR HARTLEY: Yes.

PN132

JUSTICE HATCHER: I've forgotten which is 1 and 2, so let's - - -

PN133

MR HARTLEY: Yes, 1 is aged care.

PN134

JUSTICE HATCHER: All right.

PN135

MR HARTLEY: 1 is aged care. I'm sorry, your Honour. For aged care, your Honour knows that there's an existing date in the timetable which is 26 April, by which the parties are to put on submissions about the draft determinations. By that same date, if it's convenient to the Commission, we'd put on any further evidence and submissions in relation to the three subjects that I raised, being what should be the C1A benchmark, three or four years - we will say three; what should be the position in respect of EN's, that's paragraph 205; and what should be the position in respect of increments and relativities between the classification structure. So, we'd just - - -

PN136

JUSTICE HATCHER: Sorry, can you just outline those three matter again, please.

PN137

MR HARTLEY: Yes. Perhaps it's – sorry, I'll just pull up the stage 3 decision. So, the issue in paragraph 204, which was what should be the classification that is benchmarked to C1A - - -

PN138

JUSTICE HATCHER: All right, benchmark. Yes.

PN139

MR HARTLEY: Yes. The issue in paragraph - - -

PN140

JUSTICE HATCHER: That's the three or four year degree.

PN141

MR HARTLEY: That's right, your Honour. The issue in paragraph 205, which is what should be the EN classification that's roughly approximate to PCW level 6.

PN142

JUSTICE HATCHER: Yes.

PN143

MR HARTLEY: And then 207(1) is what should be the increments within the classification structure, and in particular, what should be the relativity between the three year and four year RN degree. So, we'll address those three matters together with any other issues about the draft determinations, by the existing date which is 26 April. And that would require, we think, some further evidence, not just submissions.

PN144

JUSTICE HATCHER: So, you'll be filing any evidence, as well?

PN145

MR HARTLEY: Yes, your Honour.

PN146

JUSTICE HATCHER: If we just go to the first document, I assume that is, at this stage, a without prejudice document?

PN147

MR HARTLEY: Yes, your Honour.

PN148

JUSTICE HATCHER: Yes. All right. Then when you provide the first document, how long, having regard to the various competing time pressures, might the parties need then to discuss your document before a report back occurs to the Commission?

PN149

MR HARTLEY: I think your Honour mentioned a date around 13 May. I very much doubt that we'd have much substantive to report by then. But it might be that it's worthwhile checking in with the Commission at that time or shortly afterwards just to provide the Commission with an update. But my friends can

probably speak to that question better than me about how long they'll need to consider the document at that time.

PN150

JUSTICE HATCHER: All right. And to prepare the statement of contentions?

PN151

MR HARTLEY: If we then - - -

PN152

JUSTICE HATCHER: You'll need to do that in some shape or form anyway, so -
- -

PN153

MR HARTLEY: We will. But we'd encourage the Commission not to make an order about that today because the level of detail on the subject matters that would go into that statement of contentions might depend on the nature of the discussions that we have based on the slimmer document. So, if the Commission is content we'd submit that it's efficient to park that issue until, perhaps the next time we're before the Commission.

PN154

JUSTICE HATCHER: All right. Anything further?

PN155

MR HARTLEY: No, not from me, your Honour.

PN156

JUSTICE HATCHER: All right. So, what do the employer parties say about that? In particular, if I simply listed the matter for report back on 17 May, we can simply do that via Teams. So, that's three weeks after you'll receive Mr Hartley's document. Will that be sufficient time for the parties at least to make a start on having discussions?

PN157

MR BROANDA: Your Honour, that seems a reasonable time period, at least for us to get an indicative position and indicate the degree of opposition that might arise from the slimmer document.

PN158

JUSTICE HATCHER: As I've indicated, it might be necessary by that time depending upon the commonwealth's funding submission to the aged care matter, to make a decision as to whether matters can stay together or whether they need to be separated. That's the difficulty that gives rise to.

PN159

MR BROANDA: Yes. Thank you, your Honour.

PN160

JUSTICE HATCHER: Does any other employer party want to say anything in relation to that?

PN161

SPEAKER: Nothing further except that I concur with the submissions that have been made.

PN162

SPEAKER: And nothing further from me, your Honour.

PN163

MR WARD: Your Honour, the only thing I would add is that Mr Hartley and I had discussed providing us with the 16 May (indistinct) or with any submissions forwarded, evidence in reply to the material (indistinct) matters he's raised which will follow on 26 April. If that could be in the timetable, as well. And then (indistinct) the Commission if we then continue to engage with the ANMF to see if we can reduce the matters that are in contest that need to be sorted out in relation to those three matters (indistinct).

PN164

JUSTICE HATCHER: All right. Just going back to your aged care document, Mr Hartley, I'm just wondering whether that should include a draft determination.

PN165

MR HARTLEY: So, the broader application document?

PN166

JUSTICE HATCHER: The second document which will be what course you're urging for aged care nurses.

PN167

MR HARTLEY: Yes. Perhaps we are at cross purposes. We'd be filing submissions in evidence on the 26th in respect of aged care. Is that your Honour's
- - -

PN168

JUSTICE HATCHER: Yes. That's what I'm talking about.

PN169

MR HARTLEY: Yes.

PN170

JUSTICE HATCHER: So, I'm just wondering whether that should include a draft determination.

PN171

MR HARTLEY: We could do that, unless my instructor tells me that – yes. Yes, we can do that, your Honour.

PN172

JUSTICE HATCHER: All right. Yes.

PN173

MR BROANDA: Your Honour, to the extent that the applicant will be filing additional evidentiary material by 26 April - - -

PN174

JUSTICE HATCHER: In the aged care case.

PN175

MR BROANDA: In the aged care case, but to the extent that it sounds like that's going to cross over into the classification structure, I wonder whether the employers in the second proceeding in the Nursing Award might be given the opportunity to be heard and/or present evidentiary material if needed in response to the material that's foreshadowed to be filed by 26 April, to the degree it's going to, your Honour, potentially impact on the classification structure and as we've discussed earlier, how that may flow across into the second application, down the track.

PN176

JUSTICE HATCHER: Well, you can do that if you want. That may just simply speak from any fait accompli that emerges if you'd been heard about that. But anyway, Mr Hartley, what do you say to that?

PN177

MR HARTLEY: I don't have instructions about it, your Honour. My immediate reaction is the prospect of an outcome in the aged care industry affecting nurses in other industries would have been obvious to people in other industries for perhaps several years. And to the degree that it introduced inefficiency to allow parties very much at the heel of the hunt to now seek to be heard in respect of matters that they haven't previously sought to be heard about, we wouldn't want that to slow down the process.

PN178

JUSTICE HATCHER: I think you're prepared to comply with Mr Ward's, dated 16 May? That would be the condition of it. I mean, I'm happy to direct that any party who thinks they've got a sufficient interest can respond to the ANMF's submissions, et cetera, on classification in the aged care matter by 16 May, if that's what you want to do.

PN179

MR BROANDA: I understand the point your Honour makes. It's difficult to know, not having seen the evidence or not knowing what that evidence might look like around the timetabling that's involved. Probably at this stage, your Honour, we just wanted to recognise that there may be material that's file but we don't yet know what that could be, that may have consequences that we'd like to address.

PN180

JUSTICE HATCHER: Yes. Well, I'm simply raise it if you want to do that in the aged care matter, the date will have to be 16 May.

PN181

MR BROANDA: I understand, your Honour.

PN182

JUSTICE HATCHER: All right. So, I'll simply make a direction that any interested party, or any party with a sufficient interest can respond to the ANMF's

material by that date. We'll then have the report back on the following day and if there's any new matter you want to raise or any new approach you want to take, we can assess it then. It's a bit hard at this stage to work out where we're going until you've had those discussions.

PN183

MR BROANDA: Yes. Thank you, your Honour.

PN184

JUSTICE HATCHER: All right. Anything else?

PN185

MR HARTLEY: No, your Honour.

PN186

JUSTICE HATCHER: Thank you, everyone, for your attendance today. I'll issue written directions giving effect to what's been proposed, and subject to that we'll now adjourn.

ADJOURNED INDEFINITELY

[3.27 PM]