



DECISION

Fair Work Act 2009

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

Aged Care Award 2010

(AM2020/99 and AM2021/63)

Nurses Award 2020

(AM2021/63)

Social, Community, Home Care and Disability Services Industry Award 2010

(AM2021/65)

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

SYDNEY, 27 JUNE 2024

Applications to vary modern awards – work value – Aged Care Award 2010 – Nurses Award 2020 – Social, Community, Home Care and Disability Services Industry Award 2010 – Stage 3 decision – operative date and phasing-in of increases – submissions in response to draft determinations – provisional view concerning assistants in nursing working in home care.

Introduction

[1] On 15 March 2024, we issued a decision in these matters¹ (*Stage 3 Aged Care decision*) in which, among other things, we determined the wage rates and classification structure for direct care workers (consisting of personal care workers (PCWs) and assistants in nursing (AINs)) and indirect care workers in residential aged care, and for home care workers (HCWs) in aged care, which we considered to be justified on work value grounds. We reserved for future consideration the operative dates and phasing-in arrangements in respect of the wage increases which would flow from this. We also determined in the decision that award coverage of AINs in residential aged care should be transferred from the *Nurses Award 2020*² (Nurses Award) to the *Aged Care Award 2010*³ (Aged Care Award). Together with the decision, we published draft determinations varying the Aged Care Award, the Nurses Award and the *Social, Community, Home Care and Disability Services Industry Award 2010*⁴ (SCHADS Award) which would (apart from the issues of operative date and phasing-in) give effect to the decision. The parties were given the opportunity to file written submissions concerning the issues of operative date and phasing-in and in response to the draft determinations. Those submissions have now all been received, and it is agreed that the matters identified can be determined on the

papers without the need for a further hearing. This decision deals with the issues we have identified.

Operative date/phasing-in

Submissions

[2] The *Stage 3 Aged Care decision* allowed the Commonwealth the first opportunity to file submissions concerning operative date and phasing-in, and the other parties were then given an opportunity to respond. The Commonwealth submitted that, as a result of a decision of the Commonwealth Government, it was committed to provide funding for wage increases (including on-costs) for aged care workers as follows:

- (1) for indirect care workers — full increases from 1 January 2025; and
- (2) for direct care workers and HCWs — 50 per cent of the increases from 1 January 2025 and 50 per cent from 1 January 2026.

[3] The Commonwealth contended that the question for the Commission was: given the Commonwealth's decision on the timing of its funding of the Stage 3 wage increases, what timing and phasing-in of the Stage 3 wage increases is necessary or appropriate, including to meet the modern awards objective and minimum wages objective? It submitted that an initial funding date of 1 January 2025 would ensure that:

- the amount of funding necessary could be correctly calculated and applied based on pricing advice from the Independent Health and Aged Care Pricing Authority;
- necessary subordinate legislation to effect the increases could be developed and put in place;
- relevant information and communications technology changes required to implement the increased funding could be developed and put in place;
- for funding through Home Care Packages, the Commonwealth Home Support Programme and other small aged care and related programs, the necessary program changes could be developed and contractual arrangements negotiated to give effect to the increased funding; and
- taxpayers' money would be used efficiently and value for money was achieved by establishing accurate distribution and appropriate accountability mechanisms.

[4] In relation to its decision to fully implement the funding for direct care workers and HCWs over 12 months, the Commonwealth submitted that it was prudent to adopt a phased approach in circumstances where large wage increases might draw workers from other sectors of the economy facing labour shortages and that its funding commitment had been made in the context of its fiscal strategy of improving the budget position in a measured way.

[5] In response to the Commonwealth's submission, the Health Services Union (HSU), the United Workers' Union (UWU) and the Australian Nursing and Midwifery Federation (ANMF) submitted that the wage rates determined in the *Stage 3 Aged Care decision* should take effect from 30 June 2024 at the latest. The HSU submitted that:

- a commencement date of 30 June 2024 would essentially be consistent with the presumption in s 166(1)(a) of the *Fair Work Act 2009* (Cth) (FW Act) that a determination varying modern award minimum wages takes effect from 1 July in the next financial year after the determination is made;
- it would be appropriate for 30 June 2024 to be the operative date in order to avoid confusion with the increases flowing from the annual wage review taking effect on 1 July 2024 and to make clear that the annual wage review increases would be applied to the increases arising from the *Stage 3 Aged Care decision*;
- any delay beyond 1 July 2024 would result in all aged care workers continuing to receive rates significantly below the true value of the work they perform and will have the effect of perpetuating the historic and gender-based undervaluation of work in the aged care sector;
- the reasons advanced by the Commonwealth for the delay are unsupported by evidence and are unpersuasive, and to treat the purported decision of the Commonwealth with respect to funding as determinative would abdicate the proper role of the Commission, elevate the factor in s 134(1)(f) beyond other considerations and assume such a decision was immutable;
- the proposed delay is inconsistent with the interests of aged care workers, will damage the financial interests of those workers and is likely to accentuate difficulties in the attraction and retention of staff in aged care and the proper recognition of the value of that work; and
- the wage increases arising from the *Stage 3 Aged Care decision* were not of such a magnitude as to require phasing-in.

[6] Together with its submissions, the HSU filed a witness statement made by Christopher Friend, the Divisional Secretary — Aged Care & Disability of the HSU. Mr Friend referred in his witness statement to a survey conducted by the Department of Health and Aged Care which showed that 95 per cent of aged care workers agreed with or were neutral towards the proposition that wages were an essential consideration for working in aged care, 83 per cent of aged providers either agreed with or were neutral towards the proposition that aged care workers felt more valued due to the interim 15 per cent wage increase, that 76 per cent of providers either agreed with or were neutral as to the improvement in workforce retention and that 65 per cent of providers agreed or were neutral as to the proposition that the wage increase improved workforce attraction to the sector. Mr Friend also stated that he had observed a significant decline in bargaining in the aged care sector and expressed the opinion that bargaining would remain depressed until the outcome of these proceedings was fully implemented.

[7] The UWU and the ANMF made submissions of similar effect to those of the HSU. The UWU's submissions focused on the need to give weight to the consideration in s 134(1)(a) of the FW Act, namely relative living standards and the needs of the low paid. It referred to a recent survey it had conducted that demonstrated how the rising cost of living combined with the relatively low wages in the aged care sector had had a detrimental effect on the living standards of aged care workers, particularly for women with caring responsibilities who were predominant amongst the UWU's membership in the sector. The UWU filed a witness statement of Catalina Gonzalez, the UWU's Deputy Director of Aged Care, which annexed the survey results referred to in the UWU's submissions. The ANMF's submissions stressed the importance of rectifying gender undervaluation as soon as practicable having regard to the length of time the aged care work value proceedings have been on foot. The ANMF also made submissions about the operative date for pay increases for registered and enrolled nurses under the Nurses Award arising from the *Stage 3 Aged Care decision* but, for the reasons explained in paragraphs [207]–[208] and [281] of that decision, the finalisation of the position of registered and enrolled nurses in aged care will be dealt with in a separate process and therefore do not arise for consideration in this decision.

[8] The Aged & Community Care Providers Association Ltd and Australian Business Industrial (Joint Employers) submitted that while the timing and phasing-in of the wage increases arising from the *Stage 3 Aged Care decision* proposed by the Commonwealth was 'disappointing and concerning'⁵ to aged care employers and employees, the role of the Commonwealth as the principal funder of the aged care sector meant that the Joint Employers were 'commercially compelled'⁶ to support the Commonwealth's position. The Joint Employers submitted that the displacement of the standard date in s 166(1) of the FW Act was appropriate because of four factors:

- (1) The wage increases arising from the *Stage 3 Aged Care decision* apply to the majority of aged care employees, with very few exceptions, are not uniform in quantum, encompass indirect care workers, and impact on allowances because the 'standard rate' in the Aged Care Award will be increased.
- (2) The evidence in the proceedings, and the findings in the *Stage 1 Aged Care decision*,⁷ demonstrate that employers in the aged care sector do not have the capacity to absorb the wage increases or recover their costs by increasing prices or reducing labour. If the operative date is not aligned to the availability of Commonwealth funding, aged care employers would be forced to consider reducing placement offers for residents and clients, redundancies due to the employers' inability to operate, or total business closure due to their inability to sustain the wage increases absent funding.
- (3) There is insufficient time before 1 July 2024 for home care operators to procure new home care agreements with clients incorporating the pricing necessary to pay for wage increases. The process to obtain new agreements requires the Commonwealth to communicate with home care operators as to the mechanism by which funding is to be provided and with home care package recipients to provide information about the increased funding for their packages to cover the increased prices. This process is complicated by the non-uniform nature of the increases, the transitioning process to the new classification structure, the need to

implement the annual wage review decision increase and the need for operators to undertake planning and financial analysis prior to the operative date.

- (4) There is also insufficient time for residential aged care providers to ensure all essential preparatory steps are undertaken and necessary communications received prior to 1 July 2024. The actions described in the Commonwealth's submission as necessary to implement additional funding would take time and, in addition, providers would have to complete all necessary pricing and financial analysis and engage in appropriate communications with employees having regard to the non-uniform amounts of the increases and the distinction in pay rates between direct care workers and indirect care workers.

[9] The Joint Employers therefore submitted that the phasing-in timetable proposed by the Commonwealth provided an appropriate solution to these difficulties.

Consideration

[10] The framework for the consideration of the operative date for modern award wage increases occurring outside of the annual wage review process is provided by s 166 of the FW Act, which relevantly provides:

166 When variation determinations setting, varying or revoking modern award minimum wages come into operation

Determinations generally come into operation on 1 July

- (1) A determination under this Part that sets, varies or revokes modern award minimum wages comes into operation:
- (a) on 1 July in the next financial year after it is made; or
 - (b) if it is made on 1 July in a financial year—on that day. Note: Modern award minimum wages can also be set, varied or revoked by determinations made in annual wage reviews. For when those determinations come into operation, see section 286.

...

FWC may specify another day of operation if appropriate

- (2) However, if the FWC specifies another day in the determination as the day on which it comes into operation, the determination comes into operation on that other day. The FWC must not specify another day unless it is satisfied that it is appropriate to do so.
- (3) The specified day must not be earlier than the day on which the determination is made, unless:
- (a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and
 - (b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations may take effect in stages

- (4) The FWC may specify in the determination that changes to modern award minimum wages made by the determination take effect in stages if the FWC is satisfied that it is appropriate to do so

...

[11] For any determination varying modern award wages, s 166(1) establishes a default date of effect of 1 July in the financial year following the date of the making of the determination, unless the determination is made on 1 July in a financial year in which case that date is the default date. The submissions before us proceed on the assumption that, by operation of s 166(1), the default date for the purpose of the wage increases arising from the *Stage 3 Aged Care decision* is 1 July 2024. However, it is important to note that s 166(1) operates by reference to the date of the variation determination. For reasons which will become apparent later in this decision, it will not be possible for the determinations varying the wage rates in the Aged Care Award and the SCHADS Award to be varied prior to, or on, 1 July 2024. Accordingly, the actual default date for those determinations will be 1 July 2025. Under s 166(2), the default date may be displaced by another date if the Commission is satisfied that it is appropriate to do so but, in this matter, it cannot be a date that is earlier than the date of the determinations (s 166(3)). This means that the 30 June 2024 operative date sought by the unions is not permissible on the basis that the variation determinations cannot be made on or before that date. We will therefore consider the unions' submissions on the basis that they would seek the earliest date of effect permissible under s 166.

[12] The Commonwealth's submissions, and the submissions made in response, raise three related issues. The first concerns whether the wage increases for direct care workers and HCWs should flow in a single tranche, or should be phased in over two stages, as proposed by the Commonwealth. The second concerns whether the operative date for the wage increases (whether for a single tranche or the first of two tranches) should be earlier than the date of 1 January 2025 proposed by the Commonwealth. The third only arises if we decide to phase in the wage increases for direct care workers and HCWs over two stages and concerns the operative date of the second stage.

[13] It was fundamental to the outcome determined in the *Stage 3 Aged Care decision* that, subject to the issues of operative date and phasing-in, the Commonwealth had made a commitment to funding the pay increases that might arise from the decision. This is most readily seen in our consideration of the modern awards and minimum wages objectives in paragraphs [211]–[212] and [277]–[278] of that decision. In particular, it was substantially this commitment which caused us to conclude that the factors of security of employment (s 134(1)(aa)), the impact upon employment costs (s 134(1)(f)) and the effect on the national economy (ss 134(1)(h) and 284(1)(a)) were either neutral considerations or did not weigh significantly against the wage rates we proposed to award. We did not contemplate in the decision that we would be requiring aged care employers to themselves fund the cost of the wage increases to be awarded.

[14] As earlier recounted, the Commonwealth has submitted that it has made a decision about the dates from which the wage increases proposed to be awarded in the *Stage 3 Aged Care decision* will be funded. At least with respect to the 2024–25 financial year, this must be assigned significant weight in our determination of the first two issues we have identified above.

The 2024–25 Federal Budget delivered on 14 May 2024 has presumably allocated funding for the aged care sector based on this decision (although that is not clearly discernible on the face of the budget papers). Although the Commonwealth’s funding decision is theoretically alterable, we are not prepared in determining the operative date issue to proceed on the assumption that the Commonwealth will alter funding arrangements announced in the 2024–25 Federal Budget having regard to the likely consequences for employers if no further funding is provided in response to any decision we make.

[15] We further accept the submissions of the Commonwealth, supported and elaborated upon by the Joint Employers, that significant practical difficulties would attend an operative date that is much before the 1 January 2025 date proposed by the Commonwealth. Those submissions found no satisfactory response in the submissions made by the unions.

[16] We note the unions’ submissions, expressed in varying ways, that delay in the delivery of the wage increases arising from the *Stage 3 Aged Care decision* would disadvantage employees because they are under pressure from increases in the cost of living and postpone the rectification of the gender undervaluation found in the *Stage 3 Aged Care decision*. While employees would obviously prefer to have the benefit of the wage increases at the earliest available date, the weight to be given to this is diminished by two matters. First, the wage increases awarded in the *Annual Wage Review decision 2022–23*⁸ and the *Annual Wage Review decision 2023–24*⁹ will ensure that the real value of the wages of award-reliant aged care workers will have been maintained over the period since the interim 15 per cent increase took effect on 30 June 2023. Second, for direct care workers and HCWs, that interim increase represents for most classifications at least two-thirds of the total wage increases to flow as a result of these work value proceedings. Thus, the gender undervaluation of work found in the *Stage 3 Aged Care decision* has already been remedied to a substantial degree.

[17] Accordingly, we consider it appropriate that:

- (1) the wage increases for direct care workers and HCWs awarded in the *Stage 3 Aged Care decision* should, as proposed by the Commonwealth, flow in two tranches; and
- (2) the operative date for the first tranche of increases for direct care workers and HCWs, and the full increases for indirect care workers, should be 1 January 2025.

[18] The Commonwealth proposed that 50 per cent of the wage increases for direct care workers and HCWs should be payable in the first tranche. We intend to modify this aspect of the Commonwealth’s proposal to take into account that, for some direct care worker and HCW classifications, the additional increases awarded in the *Stage 3 Aged Care decision* were small or, in two cases, zero. We consider that where half of the entire increase is less than 3 per cent, a 3 per cent minimum increase (or the entire increase where it is less than 3 per cent) should take effect on 1 January 2025 (unless there is no increase payable at all). That is, the first tranche of increases for direct care workers and HCWs will consist of three categories:

- if half of the total increase is more than 3 per cent, half of the total increase should take effect on 1 January 2025;

- if the total increase is more 3 per cent, but half of the total increase is less than 3 per cent, a 3 per cent increase should take effect on 1 January 2025; and
- if the total increase is less than 3 per cent, the total increase should take effect on 1 January 2025.

[19] In respect of the second tranche of increases for direct care workers and HCWs, on the basis that this will occur in the 2025–26 financial year, we give less weight to the Commonwealth’s decision concerning the timing of funding. The Commonwealth will be in a position to make a further decision about funding the second tranche of increases having regard to this decision when it prepares the 2025–26 Federal Budget. We consider that an appropriate date for the second tranche is 1 October 2025.

[20] Accordingly, on the basis detailed above, we consider that the operative dates of 1 January 2025 and 1 October 2025 are appropriate to displace the default date of 1 July 2025 under s 166.

Aged Care Award - draft determination

[21] The HSU, the ANMF and the Joint Employers made submissions concerning various aspects of the draft determination for the Aged Care Award. We deal with the more substantive matters raised by the parties below. Some of the matters raised by the parties concerned only minor drafting changes, most of which we propose to adopt, and do not require further consideration in this decision.

HSU — Definition of ‘aged care employee — direct care’

[22] The draft determination for the Aged Care Award contains a definition of ‘aged care employee — direct care’ in order to aid the identification of those employees entitled to the rates for direct care workers as distinct from indirect care employees. The definition includes, in paragraph (b), employees whose primary responsibility is to directly provide ‘recreational/lifestyle services to residents’, which are then delineated. The HSU proposes that the drafting of the definition be altered so that (1) the duties required are those ‘of the following kind’, (2) the duties are listed disjunctively, and (3) it is clarified that such employees will assist with clinical care and the provision of medical treatments and procedure ‘where qualified to do so’. These amendments are consistent with our intention and will, subject to minor drafting adjustments, be made.

HSU — Classification descriptors — industry experience

[23] The Level 1 and Level 2 classification descriptors for direct care workers refer to 3 months’ ‘industry experience’. The HSU proposes drafting changes to make it clear that aged care experience both in residential and home care settings should count for this purpose. We accept the substance of this submission, but we will use a different drafting method to achieve this outcome.

HSU — Classifications descriptors — qualifications

[24] The HSU proposes that the descriptors for those direct care worker classifications which contain a qualification requirement be amended to add the words ‘or possesses equivalent knowledge and skills’. The effect of this change would be, in substance, to vitiate the qualification requirement by allowing an equivalency assessment by some indeterminable means.

[25] We reject this proposal. Our intention was to create a clear and contemporary classification structure under which progression is, to a substantial degree, based on the acquisition of qualifications in accordance with the operational requirements of the employer. For each such classification descriptor, the draft determination specifies a qualification but allows for an equivalent qualification. The Australian Qualifications Framework allows for recognition of prior learning in the acquisition of qualifications, but it remains the case that the qualification is still required. The HSU’s proposal would confuse the design of the classification structure by allowing progression without the requisite qualifications. This is liable to cause doubt and disputation since there is no identified means by which ‘equivalent knowledge and skills’ can objectively be determined.

[26] The HSU’s proposal appears to be intended to address a concern that existing employees may potentially be downgraded from their current classification if they are experienced but do not have a strict equivalent to the formal classification requirement in the new structure. However, the translation arrangements specified in the draft determination (new Schedule I) make it clear to which classification an existing employee will translate, irrespective of qualifications. For example, an existing PCW currently classified at Level 4 will translate to the new Level 3 even if they do not hold a Certificate III, and will get the full benefit of the wage increase associated with this translation. However, the employee will not be able to progress to the next classification level under the new structure unless they hold the qualification required for that level. In the case of the example given, the Level 4 definition in the draft determination (clause B.2.4) currently provides:

B.2.4 Aged care employee—direct care—level 4—Senior

An employee whose primary role is to provide direct care to residents and who has obtained a Certificate III in Individual Support or equivalent and has obtained 4 years’ post-qualification industry experience as a direct care employee after XX MONTH 2024 [day the changes take effect].

(underlining added)

[27] A note under clause I.1 explains that the requirement for ‘4 years’ post-qualification industry experience’ refers only to industry experience acquired after the date the changes take effect. However, in the case an existing Level 4 employee who translates to the new Level 3 without holding a Certificate III, the use of the phrase ‘post-qualification’ industry experience infers that the employee must first obtain a Certificate III *and then* work in the industry for a further 4 years. This is not our intention. Instead, we envisage that such an employee could progress to Level 4 if they work in the industry for a further 4 years at the new Level 3 and *during that period* obtain the Certificate III qualification. The determination will be amended to make this clear.

HSU — Level 4 classification descriptor

[28] As stated above, progression from the new Level 3 for direct care workers to the new Level 4 requires a further 4 years' industry experience. The HSU proposes that this be reduced to 3 years, with previous experience being counted for this purpose. This is rejected. It would involve substantive changes to a fundamental aspect of the new structure which was arrived at after careful deliberation and was designed to support employee retention.

HSU — Level 5 classification descriptor

[29] The HSU proposes that the Level 5 classification descriptor for direct care workers be altered so as to include as a separate qualifying criterion that the employee 'performs the majority of their work in a specialised unit such as a dementia ward or palliative care, or delivers a specialised model of care'. This is rejected. We intended, after careful deliberation, to introduce a qualification-based classification structure, with the progression to Level 5 requiring a Certificate IV or equivalent. The practical effect of the HSU proposal would be to escalate the cost of the changes arising from the *Stage 3 Aged Care decision* significantly beyond the level we intended.

HSU — Most senior food services employee

[30] Clause 14.2 currently provides for separate rates of pay for the 'single most senior food services employee engaged by any employer at the facility or site'. Such employees were separated out and given the benefit of the 15 per cent increase operative from 30 June 2023 as a result of the *Stage 2 Aged Care decision*.¹⁰ Such employees will not receive any further increases as a result of the *Stage 3 Aged Care decision* and are accordingly not referred to in the draft determination. The HSU proposes that an amendment to clause 14.2 should be added to the determination which would apply the prescribed rates to a wider class of employees, namely those 'in the most senior classification rostered to work on a particular shift'.

[31] This proposal is rejected. The current clause 14.2 uses terminology directly derived from the *Stage 2 Aged Care decision* and thus accurately reflects the Full Bench's intention in that decision. No case was advanced by the HSU in Stage 3 of the proceedings that the 15 per cent increase should be awarded to a wider class of employees on work value grounds or that the terms of clause 14.2 had caused any practical difficulty.

ANMF and HSU — classification descriptors for Level 5 and Level 6

[32] The ANMF and the HSU propose the removal of the condition that the qualifications referred to in the classification descriptors for new Levels 5 and 6 must be 'a requirement for the performance of their duties'. This is rejected. There is no proper basis to require an employer to pay a higher level of minimum wages to an employee who has independently acquired an additional qualification which is not required by the employer for the performance of their duties.

ANMF — definition of ‘standard rate’

[33] Clause 3 of the Aged Care Award currently defines the ‘standard rate’ as ‘the minimum wage for an Aged care employee—general—level 6 in clause 14.1’. Allowances for leading hands (clause 15.3), nauseous work (clause 15.5) and sleepovers (clause 22.9(d)) are calculated as a specified percentage of the standard rate. The ANMF proposes that the definition of ‘standard rate’ be modified so that, for direct care workers, the standard rate would be the minimum wage at Level 5 for direct care workers.

[34] This is rejected. Its effect would be to give direct care workers higher allowances than indirect care workers for the same duties or disabilities. For example, a direct care worker would receive a higher allowance for ‘nauseous work’ than an indirect care worker despite the same level of disability apparently being involved. No work value or other rational basis for this has been demonstrated.

ANMF — translation arrangements

[35] In respect of the translation arrangements (Schedule I), the ANMF proposes the addition of the following provision:

For the avoidance of doubt, if an employee described in clause I.2(a) falls within a description in clauses B.2.4–B.2.6 (Aged care employee—direct care—level 4—Senior through to Aged care employee—direct care—level 6—Team Leader), the employee is classified in accordance with whichever of clauses B.2.4–B.2.6 is applicable, rather than in accordance with the table in clause I.2(a).

[36] This is rejected. The table in clause I.2 is intended to govern the translation process, and the ANMF amendment would circumvent it. It has not been demonstrated that the translation table would operate unfairly in any particular instance.

Joint Employers — Level 4 classification descriptor

[37] As explained above, progression to Level 4 requires 4 years’ further industry experience. The Joint Employers propose that this requirement be modified for casual and part-time employees to take into account that they are working less than full-time hours. They propose that, for such employees, the qualification should be expressed as 7,296 hours’ work as a direct care employee.

[38] This is rejected, for three reasons. First, it adds unnecessary complexity. We envisage particular difficulty as to how the Joint Employers’ proposal would work in practical terms if an employee changes employers in the period after being classified at the new Level 3. Second, we intended, as earlier explained, that the requirement for 4 years’ additional industry experience would support retention of employees. By this, we generally contemplated employees staying a further 4 calendar years in their current role, irrespective of the number of hours worked per week. The Joint Employers’ proposal would, in practical terms, extend the period by a number of calendar years and might thereby diminish or vitiate the intended retention benefit. Third, the Joint Employers’ proposal is inconsistent with a classification structure based on qualifications and skills required to be exercised by employees, and with

providing employees with an incentive to obtain the Certificate III qualification to progress to Level 4.

Joint Employers — supervisory responsibilities

[39] The Joint Employers propose that the descriptors for the new Level 4 and Level 5 be amended to include: ‘The employee may assist with the supervision of others’. This is rejected for two reasons. First, the new classification structure is not intended to prescribe or list the duties of any particular position beyond describing its primary purpose and, where relevant, the qualification required. Beyond that, it is a matter for the employer to allocate duties which fall within the employee’s level of skill and competence and are within the scope of their contract of employment. Second, on the premise that ‘aged care employee – direct care’ is defined (except for those providing recreational/lifestyle activity services) as directly providing ‘personal care services to residents under the supervision of a registered or enrolled nurse’ (underlining added), it is not clear to us what are the implications of Level 4 and 5 employees ‘assist[ing] with the supervision’ of other employees, especially when it comes to clinical care and the provision of medical treatments and procedures.

SCHADS Award – draft determination

[40] A number of matters raised in respect of the new classification structure for home care workers in aged care under the SCHADS Award are equivalent to those raised in respect of the Aged Care Award and dealt with above, since the new classifications structures largely parallel each other (see paragraph [199] of the *Stage 3 Aged Care decision*). It is not necessary to detail these; the same or equivalent outcomes will apply.

HSU — classifications descriptors

[41] The classification descriptors in the new classification description describe the role of employees at each level as being to ‘provide direct care to aged care clients’. The HSU proposes that it should be described as ‘home care’ rather than ‘direct care’. We agree and this terminology will be adopted.

HSU — translation table

[42] The HSU proposes an addition to the translation table (new Schedule G) whereby employees who are ‘in a role requiring the employee to roster employees, undertake administration or planning and/or oversee service provision’ will translate to the new Level 5, and employees ‘whose role requires the employee to be responsible for resource and/or care co-ordination’ will translate to Level 6. The necessity for or import of this proposal is unclear. The translation table identifies where each employee in each existing classification will fit within the new structure. Existing Level 4 employees without a Certificate IV will translate to new Level 4, existing Level 4 employees who hold a Certificate IV will translate to new Level 5, and all existing Level 5 employees will translate to new Level 6. The first aspect of the proposal would appear to pull out employees from the translation arrangement which would otherwise apply and place them in Level 5 if they perform duties of a certain type, regardless of the significance of those duties for the overall role and without them satisfying the qualification requirement. Such employees have the opportunity to advance to new Level 5 if they obtain a

Certificate IV, presuming that it is required for the performance of their duties. The practical effect of the HSU proposal will be the provision of wage increases beyond those which we contemplated in the *Stage 3 Aged Care decision*. The proposal is rejected.

Nurses Award — draft determination

[43] The draft determination for the Nurses Award only concerns the exclusion from the award’s coverage of nursing assistants (otherwise referred to as AINs) working in the ‘aged care industry’ and the deletion of their classifications and rates of pay. This is intended to give effect to paragraphs [190]–[191] of the *Stage 3 Aged Care decision*. The ANMF proposes variations intended to make it clear that that AINs working in home care remain within the coverage of the Nurses Award and to restore their rates of pay. The ANMF submits that AINs working in home care remain covered by the Nurses Award and, because the classifications and rates of pay for all AINs in aged care have been entirely deleted, the effect of the draft determination (unless altered as proposed) would be that they would lose the interim 15 per cent increase and the final increases resulting from the *Stage 3 Aged Care decision*.

[44] It may be accepted that paragraphs [190]–[191] of the *Stage 3 Aged Care decision* only refer to the transfer of coverage of AINs in residential aged care from the Nurses Award to the Aged Care Award. That is because we did not contemplate that there were AINs working in home care. We cannot identify any evidence having been adduced in the proceedings that concerned or referred to AINs working in home care. Our *provisional* view is that if such employees exist (as the ANMF appears to assert), they should be covered by the SCHADS Award, and the exclusion from coverage in the Nurses Award should make clear that it applies to aged care AINs in both residential and home care. The logic of the approach in paragraphs [190]–[191] of the *Stage 3 Aged Care decision* supports this *provisional* view.

[45] On one view, the consequence of the adoption of this *provisional* view would be that a translation table for AINs should be included in the determination for the SCHADS Award in equivalent terms to that in the determination for the Aged Care Award (see clause I.2), and also that there needs to be a grandparenting provision protecting AINs’ entitlement to an additional week’s annual leave in the same terms as that in the Aged Care Award determination (cl 28.3). An alternative view is that these steps are not necessary because the issue of AINs performing home care work is only hypothetical or of negligible practical significance. We will invite parties to make submissions concerning our *provisional* view, and the potential consequences of this *provisional* view. Because the resolution of this issue affects two of the three draft determinations, it is necessary to defer issuing final determinations until after this issue is resolved.

Next step

[46] Any submissions concerning the *provisional* view expressed in paragraph [44] above, and the potential consequences of the adoption of this view identified in paragraph [45], shall be filed by **5:00 pm (AEST) on Friday, 12 July 2024**.



PRESIDENT

Final written submissions:

Commonwealth of Australia: 12 April 2024.

Fair Work Ombudsman: 24 April 2024.

Australian Nursing and Midwifery Federation: 10 May 2024.

Health Services Union: 10 May 2024.

United Workers' Union: 10 May 2024.

Aged & Community Care Providers Association Limited and Australian Business Industrial:
10 May 2024.

Isaac Fullerton: 17 April 2024.

Printed by authority of the Commonwealth Government Printer

<PR776509>

¹ [\[2024\] FWCFB 150](#).

² MA000034.

³ MA000018.

⁴ MA000100.

⁵ [Aged & Community Providers Association Ltd and Australian Business Industrial submissions, 10 May 2024](#) at [5] and [95].

⁶ Ibid.

⁷ [\[2022\] FWCFB 200](#) at [904].

⁸ [\[2023\] FWCFB 3500](#).

⁹ [\[2024\] FWCFB 3500](#).

¹⁰ [\[2023\] FWCFB 40](#) at [16]; [\[2023\] FWCFB 93](#) at [72]–[74].