

**FAIR WORK COMMISSION**

AM2021/63

**THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION**

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO  
AMEND THE *AGED CARE AWARD 2010* AND *NURSES AWARD 2020***

First Matter

AM2020/99

**HEALTH SERVICES UNION**

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO  
AMEND THE *AGED CARE AWARD 2010***

Second Matter

AM2021/65

**HEALTH SERVICES UNION**

Applicant

**APPLICATION UNDER SECTION 157 OF THE *FAIR WORK ACT 2009* (CTH) TO  
AMEND THE *SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES  
INDUSTRY AWARD 2010***

Third Matter

**AUSTRALIAN NURSING AND MIDWIFERY FEDERATION SUBMISSIONS ON  
PROVISIONAL VIEW EXPRESSED IN [2024] FWCFB 405**

**A. Introduction**

1. On 23 October 2024, the Expert **Panel** issued a decision with medium-neutral citation [2024] FWCFC 405 (“**October Decision**” or **OD[X]**). At OD[10] and [12], the Panel expressed provisional views which are summarisable thus:
  - (1) The entry-level rate for **Registered Nurses** should be set at 95 per cent of the “*benchmark rate*” for an undergraduate degree-qualified professional occupation — *i.e.*, at \$1,449.60, which is 95 per cent of \$1,525.90 being the current Level 2 rate under the classification structure set in the *Educational Services (Teachers) Award 2020*;
  - (2) A single rate should apply for all **Enrolled Nurses** in aged care, being \$1,422.20, the rate applicable to the “*Aged care employee—direct care—level 6—Team Leader*” **Personal Care Worker** role under the *Aged Care Award 2010*. This involves eliminating EN pay points 2–5 in aged care;
  - (3) The classification structure for RNs in aged care should have yearly increments removed, and should be aligned with the rates of pay in the *Teachers Award*;
  - (4) The wage rates resulting from the foregoing and set out in OD Attachment A should be phased in over three tranches, on 01 January 2025, 01 October 2025, and 01 August 2026.
2. Of course, the Australian Nursing and Midwifery Federation (“**ANMF**”) has already made submissions on all of the issues the subject of the provisional views. It adheres to those submissions. In view of the opportunity for comment on the provisional views, the ANMF by this submission identifies matters of particular concern to it arising out of the provisional views. It has endeavoured in this submission to focus only on points that really do matter — in its submission matter a great deal — rather than re-litigating every issue that has already been the subject of submissions. The Panel may proceed on the basis that the issues addressed in this submission are issues of real and considerable concern to the ANMF. The issues are four in number:
3. *First*, pay points for ENs should not be eliminated. The effect of that elimination is to eliminate career progression for ENs who do not choose to go and seek further degree qualifications. That is inconsistent with the approach that has been common ground since Background Document 10 dated 23 December 2022 (“**BD 10**”), *i.e.*, that any

classification structure should be a “*career-based classification structure*” with “*a clear means to transition from one level to another.*”

4. *Second*, and similarly, the reduction in pay points / grades from:

- (1) eight to three in RN Level 1;
- (2) four to two in RN Level 2;
- (3) four to one in RN Level 3;
- (4) three to one in RN Level 4; and
- (5) six to one in RN Level 5,

is, with respect, too drastic. A reduction in pay increments from twenty-five to eight (*i.e.*, by more than two-thirds) is unsupported by evidence, and is not necessary to achieve the modern awards objective. Further, in respect of RN Levels 4 and 5, elimination of grades is not in fact even supported by the provisional view stated in OD[10(3)], because the grades are objectively not “*yearly increments.*” If the Panel remains of the view that it is necessary to reduce pay points, it should (with respect):

- (6) reduce less swingingly at Levels 1, 2, and (especially) 3;
- (7) not reduce at all at Levels 4 and 5.

5. *Third*, NPs should receive a pay increase. It is, with respect, unsound to draw equivalence between an NP and a Level 5 teacher under the *Teachers Award*. The former must have completed a Masters’ Degree (AQF 9). The latter need not have done so. The responsibilities are very different. Departure from existing relativities in the *Nurses Award* is unjustified; no party has sought it; no evidence could support it.

6. *Fourth*, pay increases should be in two rather than three tranches.

#### **B. Enrolled Nurses**

7. The *Stage 1 decision* [2022] FWCFB 200 commenced by recognising findings of the Royal Commission into Aged Care Quality and Safety, including that aged care workers should have a “*clear vision for career progression*” and including career pathways “*mapped to facilitate opportunities for nurses, personal care workers and other workers to advance in the aged care sector*” (*Stage 1 decision* at [4]).

8. An EN is a person registered as such with the NMBA. The requisite qualification for an EN is an eighteen-month Diploma of Nursing. Compliance is required with the nursing registration standards when registration is renewed. ENs may, but of course need not, undertake additional tertiary study if they wish to become registered as an RN or NP. Equally, an EN may remain an EN for her entire career. For those people, being an EN is a career in and of itself.
9. The provisional view identified in the OD would fail to provide any career progression for an aged care EN. It would provide no opportunity to advance in the aged care sector. It would be antithetical to the recommendations of the Royal Commission. It would also stand in contrast with the principles underpinning classification structures, identified in BD10 to include “*career-based classification structure*” with “*a clear means to transition from one level to another.*” The issues summary dated 02 August 2023 correctly records that the HSU, ANMF, UWU, and Commonwealth substantially agreed with the principles articulated in BD10. The Joint Employers agreed that there should be “*career-based*” structures, with means of progression, but emphasised that progression should be based on competencies rather than time.<sup>1</sup>
10. No party has ever contended for elimination of all EN pay points. Even the Joint Employers, the only party which raised the issue of consistency of the *Nurses Award with Independent Education Union of Australia* [2021] FWCFB 2051 (“**Teachers’ Case**”), recently submitted as follows:<sup>2</sup>

“Having said this, as we advocated throughout the case in respect of personal care workers, we do accept that after a period of time, such as 3-4 years, ENs and RNs will demonstrate greater competency and proficiency through having practically applied their competence in the workplace setting and this should reasonably be factored into any reconsideration of the structure.”
11. The Commission would not find elimination of all Award-based career progression for aged-care ENs to be “*necessary*” to achieve the modern awards objective or the minimum wages objective in circumstances where no interested party seeks that outcome and no evidence has been directed to the effects of so doing. Facially, serious questions are raised as to the consistency of such elimination with s 134(1)(ab) so far as it speaks of “*providing workplace conditions that facilitate women’s full economic*

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<sup>1</sup> Submissions of Joint Employers dated 07 March 2023, [14].

<sup>2</sup> Submissions of Joint Employers dated 16 May 2024, [24].

*participation.*” It would be a retrograde step in terms of retaining ENs in the aged-care workforce, in circumstances where the Commission has heard ample evidence to the effect that ENs are already an endangered species in aged care.

12. The Panel would, in these circumstances, refrain from acting on its provisional view. In the alternative, were the Panel satisfied that some variation is necessary, a varied classification would retain some capacity for an aged care EN to progress during their career from the base rate, aligned to the Level 6 direct care employee (Team Leader). That might involve elimination of some, but not all, pay points. To be clear, however, the ANMF’s primary submission is that the current progression points for ENs would be retained without any reduction in number.
13. Finally on the topic of ENs, a new minimum rate for “*Enrolled nurse supervising PCWs*” would not reflect the Classification Definitions at Schedule A to the *Nurses Award*. Should the Panel consider it necessary to specify that the proposed base weekly rate for aged care ENs reflects supervisory duties, this may be identified in revised Classification Definitions at Schedule A to the *Nurses Award*. The language proposed by the Joint Employers could be inserted as a chapeau to cl A.4. The Joint Employer’s proposed wording is as follows:

“Under the supervision of a registered nurse, an enrolled nurse may provide support and supervision to an aged care employee – direct care under the Aged Care Award 2010 to ensure care is provided as outlined in the care plan and according to the employer’s policies, protocols and guidelines.”

**C. Registered Nurses**

14. The ANMF has previously made submissions in support of retaining existing relativities within the *Nurses Award* (see ANMF Submissions on Matters Raised in the Stage Three Decision, 26 April 2024 at Part D.1). A summary is as follows:
  - (1) The existing classification structure, including annual increments, arose from work value assessments;
  - (2) The Panel would be satisfied on the evidence before it that the work value of RNs, including value associated with hidden skills, increases with the passage of time, justifying time-based increments in value;
  - (3) The Panel would not be satisfied that changing the existing structure is necessary to achieve the modern award or minimum wages objectives.

15. The ANMF submits that, for those reasons, the provisional view would not be pursued at all. But if it were pursued, it would be pursued in far less drastic a manner than that proposed, as outlined below.

**C.1 RN Levels 1–3**

16. The provisional view involves a drastic reduction in the pay points / grades available to RNs working in aged care. For Levels 1 to 3, this involves a reduction from sixteen to six pay points. The ANMF maintains its submissions in support of the retention of pay-points for RNs at these levels as a matter of priority. In the alternative, the provisional view would be amended to include additional pay points, including:

- (1) One or more additional pay-points at Level 1 to provide for progression beyond 4 years at that level. In particular, the classification structure would recognise the work value of a Level 1 RN with 7 or more years of service;
- (2) At least one additional pay point at Level 3.

**C.2 RN Levels 4–5**

17. In addition to removing yearly increments for ENs and RNs at levels 1 to 3, the provisional view also proposes the removal of “*grades*” from the classification structure for Level 4 and Level 5 RNs.
18. Progression through the “*grades*” for RN level 4 and RN level 5 does not involve annual increments covered by cl 15.3(a) of the *Nurses Award*, automatic or otherwise. Rather, appointment to a “*grade*” will depend upon the level of complexity associated with the duties described in the relevant position descriptor where the number of beds in a facility will be a relevant consideration (cll A.5.4(c) and A.5.5(c)).
19. In this light, the reasoning of the Panel at [207] of the *Stage 3 decision* does not apply. Progression through “*grades*” simply does not involve time-based increments. This was accepted by the Joint Employers.<sup>3</sup> The situation, then, is that no party puts forward a principled basis for removal of the grades in Level 4 and 5: they are not caught by the Joint Employers’ general antipathy to time-based increments; they are not inconsistent

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<sup>3</sup> Transcript of 24 September 2024 at PN403.

with the *Teachers' Case*. No evidence has ever been led by any party with a view to demonstrating that those grades should be eliminated.

20. Accordingly, grades within Levels 4 and 5 would be retained.

**D. Nurse Practitioners**

21. NPs would not be aligned with Level 5 teachers under the *Teachers Award*. Rather, they would receive an additional increase that maintains or approaches their current relativity with RN Level 1 pay point 1.

22. The role and duties of an aged care NP include managing most medical clinical needs for residents, prescribing medications, ordering therapeutic interventions and diagnostics, and making referrals to specialists (Report to the Full Bench, 20 June 2022 at [170]). A fair summary of the evidence concerning NPs appears in the Joint Employers' submissions dated 22 July 2022 at [21.3], which outlines that NPs (amongst other things):

- (1) generally have a collaborative agreement with a general practitioner to be able to prescribe medications, order diagnostics, and charge consultations;
- (2) act as a quasi-general practitioner in a residential aged care facility;
- (3) oversee a number of facilities, rather than just one;
- (4) do things that RNs cannot do on account of extended scope of practice;
- (5) may be engaged to do project work such as being clinical leaders on advisory committees, or do complete overhauls of care and care systems in facilities;
- (6) may be contracted in to assist with compliance issues for a provider.

23. The Commonwealth's submissions dated 08 August 2022 drew attention to the fact that, along with medical practitioners, NPs are able to make the assessments necessary for a person to be chemically restrained (at [40]–[41], Background Document 6 at [61]).

24. Indeed, the NP's role and value has been further established, as at 1 November 2024, with the commencement of amendments under the *Health Legislation Amendment (Removal of Requirement for a Collaborative Arrangement) Act 2024* (Cth) ("**Amendment Act**"). The Amendment Act removes the legislated requirement for an authorised NP to be in a collaborative arrangement with a medical practitioner in order

to prescribe Pharmaceutical Benefits Scheme medicines or provide services under Medicare.<sup>4</sup> As the Explanatory Memorandum makes clear, the amendment recognises NPs as “*autonomous professionals who can deliver high quality care to patients within their scope of practice*”.<sup>5</sup> The amendment recognises that NPs are highly skilled and highly trained professionals that can be trusted to deliver care in autonomous settings – particularly in rural and remote areas where there are barriers to aged persons obtaining primary care.<sup>6</sup>

25. The minimum rate for an aged care NP, 1<sup>st</sup> year, is currently 154 per cent of the rate for RN Level 1 pay point 1. That relativity reflects the matters recognised at [934] of the *Stage 1 decision*, namely that:
  - (1) an NPs scope of practice and competence sits somewhere above a RN and below a general practitioner; and
  - (2) some of an NPs activities are unashamedly of a much higher order than those undertaken by an RN.
26. Endorsement as an NP requires the completion of at least three years or 5,000 hours in the advanced clinical nursing practice level, and the successful completion of a program of study at Master’s level (ANMF 80(B) *NMBA Guidelines for Registration as a Nurse Practitioner*). Aligning an aged care NP with a Level 5 teacher, and between a Level 3 and Level 4 RN, would fail to recognise the NP’s additional Master’s degree qualifications, responsibilities, and overall work value.
27. No party has submitted that the existing relativities between RNs and NPs should be dislodged. No previous decision of the Panel (or Full Bench before it) suggested that NPs were to be differentiated from RNs in terms of the increase in the value of their work, providing work value reasons for pay increases. There is no evidential basis for the Panel to be satisfied that the work value of an NP is about the equivalent of a Level 3 RN, or about the equivalent of a Level 5 teacher. No party has adduced any evidence

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<sup>4</sup> *Health Legislation Amendment (Removal of Requirement for a Collaborative Arrangement) Act 2024*, Schedule 1, Cl. 6.

<sup>5</sup> *Explanatory Memorandum to the Health Legislation Amendment (Removal of Requirement for a Collaborative Arrangement) Bill 2024 (“Explanatory Memorandum”)*, page 1.

<sup>6</sup> *Explanatory Memorandum*, page 1; Amended Statement of Stephen Andrew Voogt, 9 May 2022 at [28]-[29].



directed at that finding, nor made a submission to that effect. The evidence summarised above makes plain that there is not an equivalence of those work values.

**E. Tranches**

28. The ANMF's position on operative date and phasing in is set out in its submissions of 10 May 2024, as varied in accordance with the correspondence to the chambers of Hatcher J dated 18 July 2024. In short, the ANMF seeks that the increase occur in two tranches in accordance with the methodology identified at [18] of [2024] FWCFB 298, with the operative dates to be 01 January 2025 and 01 October 2025.
29. This is now a position embraced by the Joint Employers.<sup>7</sup> That is, aged care employers do not seek delay beyond 01 October 2025 of implementation of increased minimum wages to mitigate hardship or to ensure fairness to them. Rather, their concern is about disharmony amongst the workforce should the timing of increased minimum rates for aged care nurses differ from the workforce more broadly (PN360). The Joint Employers made that submission knowing that the Commonwealth's funding commitment was slower (and remained slower in its oral submissions — PN476). The ANMF understands it to be common ground that the Commonwealth could not be compelled to fund more quickly than its commitment.
30. So, the situation is that the Commonwealth cannot be compelled to depart from its position (hence is unprejudiced), and the parties whose interests are directly affected (the employers and the employees) are agreed as to 01 January 2025 and 01 October 2025 phasing dates. In the circumstances, the Panel would act on that agreed position rather than enact the provisional view.
31. If the Panel were, however, minded to proceed according to its provisional view at OD[12], the increases would be front-loaded in order to avoid the mischief identified in particular in Schedule 1 to the ANMF's submissions dated 09 September 2024. For example, if the increases for aged-care nurses were phased in in thirds, *i.e.*, one-third of the percentage increase on 01 January 2025, one-third on 01 October 2025, and the final third on 01 August 2026, then ENs at pay point 1 would be paid less than level 5 direct care workers until 01 August 2026 — notwithstanding the finding that their work value is the equivalent of level 6 direct care workers. First-year RNs would be paid

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<sup>7</sup> Transcript of 19 September 2024, PN359.

less than level 6 direct care workers, despite that first-year RNs are degree-qualified (AQF level 7) whereas level 5 direct care workers are Cert IV holders (AQF level 4).

32. This would be (partially) addressed by providing for 50 per cent as at 01 January 2025, and then 25 per cent on each of 01 October 2025 and 01 August 2026. Then, while EN pay point 1 would remain below level 5 direct-care workers until August 2026, the difference would be much smaller. And, this would solve the RN / direct care worker discrepancy.

**F. Conclusion**

33. Apart from the four headline issues raised above, there are two more-minor matters that can be dealt with about a paragraph each.

34. *First*, to the extent that the Commission does enact its provisional view regarding the elimination of pay points — which the ANMF submits it would not — it is assumed that the drafting of the relevant determination will provide that years of service under the old structure will qualify for particular classification under the new structure. For example, if (in fact) a particular Level 1 RN has been an RN for ten years, she or he will be classified, under the new structure, as RN Level 1 (4 years plus), rather than the new structure re-setting everyone's clock and re-commencing all RNs at their first year. Similarly, it is assumed that the references to years of service is a reference to years of service in the occupation as a whole, rather than with a particular employer, and that the drafting would make that clear. Any RN Level 1 who had the benefit of the minimum entry rate for a Master's degree generally would have progressed to pay point 5 in their second year – in order to maintain this, they would need to be classified as 4 years plus regardless of their actual years of service.

35. *Second*, again, to the extent that the Commission does enact its provisional view regarding eliminating pay points — which the ANMF submits it would not — that could be done in two ways:

- (1) Eliminating the pay points as at 01 January 2025, such that (*e.g.*) all EN pay points collapse into the new single EN pay point, as increased by the first tranche, with all subsequent increases applying to that single collapsed pay point;

(2) Eliminating pay points through the process of awarding increases that are smaller (in percentage terms) to pay points that are destined for collapsing, such that by the time the phasing in is complete, all of the pay points destined for collapsing are paid the same amount and the structure can then be collapsed.

36. The latter of these would, in the ANMF's submission, be preferable. The result for ENs, for example, for pay points 1–5 would be the below (assuming 60/20/20 phasing):

	1-Jan-25	1-Oct-25	1-Aug-26
Pay point 1	1336.96	1379.58	1422.20
Pay point 2	1343.40	1382.80	1422.20
Pay point 3	1349.92	1386.06	1422.20
Pay point 4	1357.04	1389.62	1422.20
Pay point 5	1362.12	1392.16	1422.20

37. That involves a more-gradual elimination of pay differences between people who have, for a very long time, had pay differences. It reduces the risk of industrial disharmony.

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8 November 2024

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