

FAIR WORK COMMISSION

AM2020/99; AM2021/63; AM2021/65

WORK VALUE CASE – AGED CARE INDUSTRY

SUBMISSION – THE DRAFT DETERMINATIONS

AGED & COMMUNITY CARE PROVIDERS ASSOCIATION LTD

AUSTRALIAN BUSINESS INDUSTRIAL

(“THE JOINT EMPLOYERS”)

26 APRIL 2024

BACKGROUND AND OVERVIEW

1. On 15 March 2024, the Fair Work Commission (**the Commission**) published the *Stage 3 Decision* [2024] FWCFB 150 (**Stage 3 Decision**), together with three draft determinations and tracked awards for the *Aged Care Award 2010*, *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHADS Award**) and *Nurses Award 2020*.
2. The draft determinations set out the variations intended to give effect to the *Stage 3 Decision* (exclusive of any issues of operative date and phasing in).
3. The parties were provided with “*a period of six weeks from the date of this decision, to 4:00 pm (AEST) on Friday, 26 April 2024, to file any written submissions commenting upon the draft determinations*”.¹
4. This submission addresses six issues in relation to the draft determinations.
5. By way of overview:
 - (a) **Issues 1 and 2** arise in relation to the Aged Care Award and SCHADS Award Draft Determinations and concern the following text:
 - (i) “*4 years post-qualification industry experience as a direct care employee*”; and
 - (ii) “*as a requirement for the performance of their duties by the employer*”.
 - (b) **Issue 3** addresses the SCHADS Award Draft Determination and the likely inadvertent removal of ‘*general employees*’ from the “*home care employee—aged*” classification structure.
 - (c) **Issue 4** addresses the Aged Care Award Draft Determination and the supervisory responsibilities of the “*Senior*” and “*Specialist*” direct care employees.
 - (d) **Issue 5** addresses the Aged Care Award Draft Determination and the operation of the “*quantum of annual leave*” provision at clause 28.3.
 - (e) **Issue 6** addresses the Nurses Award Draft Determination. Specifically the following text: “*This award does not cover employees working as nursing assistants as defined in clause A.1 in the aged care industry*”.

¹ *Stage 3 Decision* [2024] FWCFB 150 at [179] (**Stage 3 Decision**).

ISSUE 1

6. The classification definition for “Level 4” in the Aged Care Award and SCHADS Award Draft Determinations, respectively, includes reference to the following requirements:

*“...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]**”² (emphasis added).*

7. The following comments concern the words “4 years post-qualification industry experience as a direct care employee”.
8. We understand the proposition that accumulated experience over a 4-year period will demonstrate a stepping point in competency and proficiency. That inclusion, however, raises a question as to whether, as a matter of equity, a slightly different formulation would commend itself for part time and casual employees. This is because those persons could be employed for 4-years of elapsed time and have materially different levels of experience depending upon the extent to which they undertake working hours in that period.
9. As such we would query whether to give effect to the intention of the *Stage 3 Decision* that “4 years” experience of casual and part time employees to be equivalent to full time would need to be calculated in hours of work rather than simply elapsed time (years).
10. If the Commission formed the view that this is consistent with the *Stage 3 Decision*, we suggest a practical approach may be to include words to the following effect:

“For casual and part-time employees, 4 years post-qualification industry experience is calculated on a pro rata basis by reference to the hours of a full-time employee (i.e. 38 hours per week). To obtain 4 years post-qualification industry experience the employee must complete 7,296 hours work as a direct care employee.”³

² See Aged Care Award Draft Determination clause B.2.4; SCHADS Award Draft Determination clause F.4.

³ These hours have been calculated on the basis of 38 hours per week over 48 weeks, allowing for to 4 weeks annual leave per year.

ISSUE 2

11. The classification definitions for “Level 5” and “Level 6” in the Aged Care Award and SCHADS Award Draft Determinations, respectively, include reference to the following requirement:

*“obtained a Certificate IV in Ageing Support or equivalent **as a requirement for the performance of their duties by the employer**”⁴ (emphasis added).*

12. The words “as a requirement... by the employer” indicate that obtaining a Certificate IV alone is not enough to meet the classification definition of either “Level 5” or “Level 6” (i.e. a “Specialist” or “Team Leader”). The employer must also *require* the employee to obtain that qualification for the performance of their duties.

13. It may be more helpful for lay persons reading the instrument to refine the drafting to reinforce the requirement being a requirement of the employer and this could be achieved as follows:

*“obtained a Certificate IV in Ageing Support or equivalent as a requirement **by the employer** for the performance of their duties ~~by the employer~~”.*

⁴ See Aged Care Award Draft Determination clauses B.2.5, B.2.6; SCHADS Award Draft Determination clauses F.5, F.6.

ISSUE 3

14. Issue 3 concerns the SCHADS Award Draft Determination.
15. The Commission has currently adopted references to “*direct care employee*” throughout the classification structure.⁵
16. As we understand it, that is a reference to a home care employee that undertakes the following work:
 - (a) domestic assistance and support services to an aged person;
 - (b) personal care services to an aged person; and
 - (c) social support services to an aged person.
17. Those services capture a variety of tasks that may be provided by a home care employee directly to an aged person, including: attending to cleaning, vacuuming, washing; attending to minor maintenance jobs; assisting with the preparation and cooking of meals; assisting in dressing; supervising daily hygiene; changing of catheter bags and monitoring medications; accompanying clients on outings, etc.
18. By only referring to “*direct care employee*” (or “*provide direct care*”⁶) throughout the classification structure, that appears to have inadvertently not commented upon a variety of classifications that currently exist within the classification structure that are not direct care employees (or otherwise providing “*direct care*” as their primary role). Examples of such roles include:
 - (a) maintenance;
 - (b) rostering;
 - (c) scheduling; and
 - (d) care managers (not RN); and
 - (e) coordinators (not RN).
19. We query whether such an omission was intended by the Commission.
20. Whilst we note the earlier observations of the Full Bench in the *Stage 2 Reasons for Decision* at [75]: “*We accept that employees at Home care employee level 4 and/or level 5 are direct care workers, regardless of the level of supervisory responsibility they*

⁵ See example, SCHADS Award Draft Determination clauses F.1, F.2, F.4, F.6.

⁶ See example, SCHADS Award Draft Determination clauses F.1, F.2, F.3, F.4, F.5.

may hold”.⁷ In practice, employees that perform maintenance, rostering, etc are not identified as “*direct care employees*”.

21. It would be unhelpful to confuse such employees with direct care employees. We also note that the classification structure in the Aged Care Award currently distinguishes between “*direct care*” and “*general*” employees, with the general stream including maintenance and administrative services employees.
22. Having regard to the approach taken in the Aged Care Award, a way to resolve any possible confusion would be to create a new category of “*general employee*”. If the Commission formed the view that such an approach is consistent with their decision, we suggest the following definitions may assist with distinguishing between “*direct care*” and “*general*” employees:

“*direct care employee* is an employee whose primary responsibility is to directly provide:

- (a) *domestic assistance and support services to an aged person;*
- (b) *personal care services to an aged person;*
- (c) *social support services to an aged person;*

including but not limited to undertaking the following duties:

- *attending to cleaning, vacuuming, washing;*
- *attending to minor maintenance jobs;*
- *assisting with the preparation and cooking of meals;*
- *assisting in dressing;*
- *supervising daily hygiene;*
- *changing of catheter bags and monitoring medications;*
- *accompanying clients on outings.”*

“*general employee* is an employee whose primary responsibility is to provide services ancillary or related to the provision or organisation of direct care to aged care clients; including but not limited to:

- (a) *office and administrative services (including rostering);*
- (b) *maintenance services;*
- (c) *coordination.”*

⁷ Stage 2 Reasons for Decision [2023] FWCFB 93.

23. To further assist with distinguishing between the two types of employees throughout the classification structure, the Commission may wish to consider including reference to the “*indicative tasks*” of general employees as occurs in the “*general stream*” within the Aged Care Award. For example:

(a) for “*Home care employee level 3—aged care—Qualified*” those tasks may include:

- “• *maintain mail register and records;*
 - *order foodstuffs and commodities;*
 - *co-ordinate and direct the work of support staff including maintenance (no more than four);*
 - *oversee the provision of domestic services;*
 - *schedule maintenance work programs on a routine and regular basis;*
 - *carry out general maintenance falling within the scope of trades skills”;*
- and

(b) for “*Home care employee level 6—aged care—Team leader*” those tasks may include:

- “• *care co-ordinator;*
- *foreperson or maintenance supervisor;*
- *may co-ordinate resources and/or give support to more senior employees;*
- *may provide direction, leadership and structured training or on-the-job training to supervised employees or groups of employees”.*

ISSUE 4

24. Issue 4 concerns the Aged Care Draft Determination.
25. The classification definition for “*Aged care employee—direct care—level 5*” currently provides that an employee at that level “*may assist with supervision of others*”.
26. Under the proposed transitional arrangements in Schedule I, those “*Level 5*” employees will move to one of two classification levels (subject to whether they hold a Certificate IV):
 - (a) “*Aged care employee—direct care—level 4—Senior*”; or
 - (b) “*Aged care employee—direct care—level 5—Specialist*”.
27. Neither classification definition includes reference to “*supervision*”.
28. We have worked on the assumption that the Commission still intended for both classification levels to continue to have supervisory duties. We do not consider the Commission sought to restrict all forms of supervisory responsibilities to the new “*Level 6—Team Leader*”.
29. We suggest it would be beneficial for the following text to be added to the definitions for “*Level 4—Senior*” and “*Level 5—Specialist*”: “*The employee may assist with the supervision of others*”.

ISSUE 5

30. Issue 5 concerns the Aged Care Draft Determination.

31. Clause 28.3 provides:

“28.3 Quantum of annual leave—employees previously covered by the Nurses Award 2020

(a) Clause 28.3 only applies to an employee who was covered by the Nurses Award 2020 on XX MONTH 20XX [day before changes take effect] and who became covered by this award as a result of PRXXXXXX.

(b) An employee subject to this clause is entitled to the same quantum of annual leave as if they were covered by the Nurses Award 2020.”

32. We understand the purpose of this provision is to give effect to the decision of the Commission to “grandparent” the entitlement of an “additional week’s annual leave” for nursing employees currently classified as a “nursing assistant” and working in aged care that will from the effective date of the final determination be “direct care employees” under the Aged Care Award.⁸

33. We suggest that a slight adjustment to paragraph (a) would ensure the intended scope of that provision is not inadvertently misconstrued to be broader by removing the notion of ‘coverage’ which give rise to the issue in the first place. That adjustment appears in bold below:

*“Clause 28.3 only applies to an employee, ~~who was covered by~~ **employed by their employer as a nursing assistant in accordance with** the Nurses Award 2020 on XX MONTH 20XX [day before changes take effect] and who became covered by this award as a result of PRXXXXXX.”*

⁸ *Stage 3 Decision* at [191].

ISSUE 6

34. Issue 6 concerns the Nurses Award Draft Determination.

35. Clause 4.4 provides:

“This award does not cover employees working as nursing assistants as defined in clause A.1 in the aged care industry.”

36. Having engaged with various client members, some refinement of the language could help such lay persons understand the intended purpose of the clause.

37. While this in no way seeks to change the intent or meaning, upon that basis, we propose an alternative formulation that may be more accessible to lay persons:

*“This award does not cover **nursing assistants as defined in clause A.1 who are working in the aged care industry.**”*

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