

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
ARISING FROM THE DECISION [2024] FWCFB 298**

A. Introduction

1. These submissions of the Australian Nursing and Midwifery Federation (“**ANMF**”) are made in response to the provisional view expressed at [44] of aged care decision [2024] FWCFB 298 (“**decision**”) and the potential consequences of the adoption of this view identified at [45].
2. The position of the ANMF is that the panel would proceed to implement the *provisional view* expressed at [44] of the decision such that Nursing Assistants (“**AINs**”) working in home care would be covered by the *Social, Community, Home Care and Disability Services Industry Award 2010* (“**SCHCADS Award**”), with grandparenting provisions to protect AINs additional entitlement to an additional week’s annual leave.

B. The provisional view regarding AINs in home care

B.1 AINs working in home care

3. The ANMF position in these proceedings has always been that there are AINs providing services to aged persons in private residences.
4. This position has been identified by, *inter alia*:
 - (1) The ANMF’s Form F46 application of 17 May 2021 which sought increases to award minimum wages for AINs performing services for aged persons in private residences at Schedule F.1.2 and F.2 of Annexure 1.
 - (2) The ANMF’s Stage 1 Closing Submissions of 22 July 2022 at Part D.6 “*Personal carers in community care*” which addressed why an increase to award minimum wages for AINs in home care was justified by work value reasons. Those submissions adopted [128]–[149] of the Report to the Full Bench by (then) Commissioner O’Neill, dated 20 June 2022, as it dealt with personal carers in community care. That evidence was relied on as relevant to the ANMF’s application with respect to the Nurses Award 2020 (“**Nurses Award**”) to the extent that it related to the provision of “*nursing care*”.
 - (3) The ANMF Stage 1 Reply Closing Submissions of 17 August 2022 at Part C.3.3, which addressed “*Award coverage of Home Care Employees*” observing that:

“Some home care employees will, of course, be covered by [the

SCHCADS Award]. But others will not be. Any “*home care worker*” who is a nursing assistant within the meaning of Sch A cl A.1–A.2 of the Nurses Award will be covered by that award rather than the SCHCADS Award.”

5. The decision of the Full Bench of the Commission in stage 1 of these proceedings ([2022] FWCFB 200) (“**Stage 1 decision**”) did not differentiate between AINs and PCWs working in home care. “*Direct aged care workers*” were defined to be “[e]mployees in the aged care sector covered by the Awards in caring roles, including nurse practitioners, RNs, ENs, AINs, PCWs and HCWs.”
6. The Stage 1 decision at [931] (addressing a submission identified at [887]) also declined to distinguish between PCWs/AINs in home care and residential care in terms of the application of an interim increase.
7. The ANMF position remains that there are AINs providing services to aged persons in private residences, as would be covered by the Nurses Award. Should it assist the panel, the ANMF can adduce further evidence from an official as to the existence of ANMF members, employed as AINs, who are employed to provide services to aged persons in private residences.
8. The issue of AINs performing home care work is not merely hypothetical. Nor is it of negligible practical significance.

B.2 The provisional view

9. It is accepted that the reasons identified at [190] – [191] of the *Stage 3 Aged Care decision* would apply with respect to aged care AINs in home care. As there identified, PCWs and AINs in aged care are functionally indistinguishable. As such, subject to the provisions identified below, AINs performing work in home care may be excised from the Nurses Award so that the SCHCADS Award will solely cover the work of aged care PCWs and AINs in home care.
10. As with PCWs and AINs in residential care, there are some differences in conditions of employment as between the Nurses Award and the SCHCADS Award, predominantly that employees under the Nurses Award are entitled to an additional week’s annual leave. The panel would therefore vary the SCHCADS Award to “*grandparent*” this benefit for any existing employee who is entitled to it.

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12 July 2024

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