

EXPLANATORY STATEMENT

Issued at the authority of the Minister for Aged Care

Aged Care Act 1997
Aged Care (Transitional Provisions) Act 1997

Aged Care Legislation Amendment (Subsidies) Instrument 2023

The *Aged Care Act 1997* (the Aged Care Act), the *Aged Care (Transitional Provisions) Act 1997* (the Transitional Provisions Act) and the *Aged Care Quality and Safety Commission Act 2018* (the ACQSC Act) provide for the regulation and funding of aged care services. Providers who are approved under the ACQSC Act to provide aged care (approved providers) may be eligible to receive subsidy and supplement payments in respect of the care they provide to care recipients who have been approved under the Aged Care Act as recipients of aged care (approved care recipients). The Aged Care Act and the Transitional Provisions Act provide that, for each type of aged care, the Minister may determine the amount of subsidy and supplements payable to an approved provider for the provision of that type of aged care.

Purpose

The *Aged Care Legislation Amendment (Subsidies) Instrument 2023* (Amending Instrument) amends aged care subordinate legislation to provide for two new residential care supplements. These two new supplements are applicable in the calculation of residential care subsidy from 1 July 2023:

- *hotelling supplement*, to provide more subsidy to approved providers of residential care for providing hotel services to residential care recipients; and
- *registered nurse supplement*, to provide more subsidy to approved providers of residential care for registered nurses providing, or directing the provision of, care to residential care recipients.

The Amending Instrument provides that both supplements are applicable in the calculation of residential care subsidy in respect of residential care provided to care recipients (who are subject to the Aged Care Act and its legislative instruments) and continuing residential care recipients (who are subject to the Transitional Provisions Act and its legislative instruments).

The Amending Instrument also amends the formula used to calculate the amount of flexible care subsidy payable in respect of flexible care that is provided through a multi- purpose service to give effect to the 15 per cent increase in minimum wage for certain aged care workers (as a result of the Fair Work Commission Decision of 21 February 2023) in eligible non-state/territory government operated multi-purpose services.

The Amending Instrument amends the following subordinate legislation:

- *Subsidy Principles 2014* (Subsidy Principles)
- *Aged Care (Subsidy, Fees and Payments) Determination 2014* (Subsidy Determination)

- *Aged Care (Transitional Provisions) Principles 2014* (Transitional Provisions Principles)
- *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014* (Transitional Provisions Determination).

Background

Hotelling supplement

The introduction of the hotelling supplement was announced as part of the aged care measures of the 2023-24 Budget as, from 1 July 2023, \$10.80 per day for each eligible care recipient who is provided with residential care.

The amount of the hotelling supplement, together with other funding sources, is intended to sufficiently cover the costs of providing the hotel services in Part 1 of Schedule 1 of the *Quality of Care Principles 2014* (Quality of Care Principles) to care recipients. This will also assist with the costs of employing staff for such services, which include catering, cleaning and gardening. In addition to the hotelling supplement, approved providers currently receive a *standard resident contribution* which is intended to go towards meeting the costs of providing hotel services (see section 52C-4 of the Aged Care Act for residential care recipients and section 58-3 of the Transitional Provisions Act for continuing residential care recipients).

The introduction of a hotelling supplement aims to clearly identify the part of subsidies paid to approved providers of residential care that relate to the provision of hotel services in Part 1 of Schedule 1 of the Quality of Care Principles. This aims to differentiate between the provisions of these services with the provision personal and clinical care and services in Parts 2 and 3 of Schedule 1.

A dedicated hotelling supplement also communicates the Government's expectation that the *basic subsidy amount* (see section 44-3 of the Aged Care Act and section 44-3 of the Transitional Provisions Act) is intended to meet the costs of delivering personal and clinical care services in Parts 2 and 3 of Schedule 1 of the Quality of Care Principles. This includes the costs of employing and paying the wages of aged care staff to deliver that care. The *basic subsidy amount*, in contrast to the hotelling supplement, is not intended to subsidise the costs of hotel services listed in Part 1 of Schedule of the Quality of Care Principles, and other accommodation-related services.

Registered nurse supplement

The registered nurse supplement was announced through the 2022-23 Budget, with additional funding announced through the 2023-24 Budget.

The registered nurse supplement aims to support approved providers of residential care to provide registered nurse care to care recipients. This will assist approved providers in meeting their responsibility under subsection 54-1A(2) of the Aged Care Act which is to ensure, at all times on and after 1 July 2023, there is at least one registered nurse (within the meaning of the *Health Insurance Act 1973*) on site, and on duty, at each residential facility through which the approved provider provides residential care (the 24/7 RN responsibility).

The registered nurse supplement recognises that meeting the 24/7 RN responsibility may be more difficult for an approved provider who is operating a residential facility that, on average, has few care recipients and receives small amounts of basic subsidy that can be used to employ sufficient registered nurses to meet the 24/7 RN responsibility.

Consistent with this, the registered nurse supplement will be payable to an approved provider in respect of residential care provided to certain care recipients at a residential facility that meets the following criteria:

- the approved provider was not exempt from the 24/7 RN responsibility with respect to the facility; and
- the approved provider provided a specified report about 24/7 RN responsibility at the residential facility in accordance with relevant form, content and timing requirements for that report; and
- there were, on average, 60 or fewer subsidised residential care recipients per day over the payment period; and
- a registered nurse was not on site and on duty during the payment period for equal to or less than a specified maximum amount of time.

The amount of the registered nurse supplement is calculated on the basis that the amount is the same for each day of residential care an eligible care recipient of a given residential care service receives at that service during a particular payment period, but the calculated daily amount may vary between payment periods, as the output of the calculation that produces the amount may vary between payment periods.

Amount of subsidy for flexible care provided through a multi-purpose service
Schedule 2 of the Amending Instrument amends the Subsidy Determination to provide for a new multi-purpose service subsidy amount, known as the aged care wage supplement amount (ACWSA).

This will give effect to measures announced by the Hon Anika Wells MP, Minister for Aged Care, on 4 May 2023, and by the Hon Mark Butler MP, Minister for Health and Aged Care, on 9 May 2023, of increased aged care funding to support the Fair Work Commission's decision of 21 February 2023 varying minimum wages for aged care employees across three awards to reflect the value of the work performed by workers in the aged care sector. The Government recognises that aged care is critical and faces significant staffing challenges. This additional funding will also help to ensure the viability of the sector.

This new subsidy amount will be payable to each non-state/territory government MPS provider. The additional subsidy amount will provide non-state/territory government MPS providers an increase in funding to support the Fair Work Commission's decision of 21 February 2023, which varied the minimum wages for aged care employees.

Consultation with state and territory government health departments identified that staff are engaged under respective state health awards or other enterprise agreements rather than the impacted awards and are therefore out of scope for the additional subsidy.

Authority

Under section 96-1 of the Aged Care Act, the Minister may, by legislative instrument, make Subsidy Principles providing for matters required or permitted by Parts 3.1, 3.2 and 3.3 of the Act, or necessary or convenient, in order to carry out or give effect to those Parts.

Under section 96-1 of the Transitional Provisions Act, the Minister may, by legislative instrument, make Principles providing for matters required or permitted by the Act, or necessary or convenient, in order to carry out or give effect to the Act.

The Aged Care Act and the Transitional Provisions Act provide that, for each type of aged care, the Minister may determine the amount of particular components of subsidy and the amount of supplements payable to an approved provider for the provision of that type of aged care. Specifically, subsection 44-27(3) of the Aged Care Act and subsection 44-27(3) of the Transitional Provisions Act specify that the Minister may determine by legislative instrument, in respect of each other supplement applicable in the calculation of residential care subsidy, the amount of the supplement or the way in which the amount of the supplement is to be worked out.

Subsection 52-1(1) of the Aged Care Act specifies that the Minister may, by a legislative instrument, determine the amount of flexible care subsidy that is payable.

Reliance on subsection 33(3) of the *Acts Interpretation Act 1901*

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Commencement

The Amending Instrument commences on 1 July 2023.

Consultation

Hotelling supplement

In March 2023, the Residential Aged Care Funding Reform Working Group met and were consulted on the hotelling supplement. Residential care provider, care recipient and workforce representative attended and participated in the consultation. These representatives were supportive of the hotelling supplement.

In May 2023, a webinar was held, where officials of the Department discussed the residential aged care funding announcements from Budget 2023-24, including the introduction of the hotelling supplement. The webinar was attended by approximately 1400 participants, including residential care provider, care recipient and workforce representatives. Attendees asked questions that included clarifying how the amount of the supplement had been worked out and about arrangements for changes to the amount of the supplement over time.

The hotelling supplement, as legislated in this Amending Instrument, is consistent with the arrangements discussed at the Residential Aged Care Funding Reform Working Group meeting and in the webinar.

Registered nurse supplement

Since October 2022, officials of the Department have consulted on the policy for the registered nurse supplement with residential care provider, workforce and care recipient representatives through the Residential Aged Care Funding Reform Working Group and has engaged on technical design issues with vendors of residential aged care subsidy reconciliation software.

In June 2023, a webinar was held where officials of the Department discussed matters relating to the 24/7 RN responsibility, including the registered nurse supplement. The webinar was attended by approximately 500 participants, including residential care provider, care recipient and workforce representatives.

Stakeholders supported the concept of the registered nurse supplement, with different views about the eligibility parameters, including the ideal average number of care recipients per day at a residential facility during a payment period before eligibility to receive the registered nurse supplement ceases, and the specified maximum amount of time a registered nurse is not on site and on duty during a payment period before eligibility ceases.

Generally, approved providers and their representatives advocated for a higher average number of care recipients and greater specified maximum time a registered nurse is not on site and on duty during a payment period before eligibility for receiving the registered nurses supplement ceases. Care recipient and workforce representatives tended to advocate for a lower average number of care recipients and lesser registered nurse absences before eligibility ceases. All stakeholders agreed the amount of the registered nurse supplement should be higher when approved providers are providing residential care to fewer care recipients on average, and in rural and remote areas, to reflect higher labour costs.

The Government's intention is to review eligibility for the registered nurse supplement during 2023-24 as better data becomes available on registered nurse coverage in residential care, including data about variation in coverage by location and by average numbers of care recipients. Subject to decisions of Government, findings may inform future amendments where necessary.

Amount of subsidy for flexible care provided through a multi-purpose service

Officials of the Department sought advice from each state and territory health department to find out which employment awards covered the MPS staff employed in their respective jurisdictions, before determining that the new ACWSA would only be payable to each non-government MPS provider.

Impact Analysis

The Office of Impact Analysis has assessed the hotelling supplement, the registered nurse supplement and the changes to the amount of subsidy for flexible care provided through a multi-purpose service (MPS Aged Care Wage Supplement Amount) as having no more than minor impacts (OIA ID OIA23-04521).

General

The Amending Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the Amending Instrument are set out in **Attachment A**.

The Amending Instrument is compatible with the human rights and freedoms recognized or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in **Attachment B**.

Details of the Aged Care Legislation Amendment (Subsidies) Instrument 2023

Section 1 provides that the name of the instrument is the *Aged Care Legislation Amendment (Subsidies) Instrument 2023* (Amending Instrument).

Section 2 states that the Amending Instrument commences on 1 July 2023.

Section 3 provides the authority for making the Amending Instrument is the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act).

Section 4 provides that each instrument that is specified in a Schedule to the Amending Instrument is amended or repealed as set out in the applicable items in the relevant Schedule and other items in the Schedules have effect according to its terms.

SCHEDULE 1—Residential care subsidy

Subsidy Principles 2014

Item 1 – Section 4

This item inserts the following definitions:

day of eligible residential care is defined in subsection 70AM(2).

operational places has the same meaning as in Chapter 2A of the *Aged Care (Subsidy, Fees and Payments) Determination 2014* (the Subsidy Determination).

The effect of this definition is that operational places means the total number of places allocated under Part 2.2 of the Aged Care Act to a person in respect of the residential care service to which all of the following apply:

- the places are not provisionally allocated (under section 15-2 of the Aged Care Act) on the relevant day;
- if a notice relating to the service has been given under subsection 27B(2) of the *Accountability Principles 2014* (the Accountability Principles)—the places are not places specified in the notice as offline places (within the meaning of paragraph 27B(3)(b) of those principles) for a period in which the relevant day occurs;
- the places are places in respect of which subsidy would be payable under Part 3.1 of the Aged Care Act, or Part 3.1 of the Transitional Provisions Act, if a care recipient were provided with residential care through the service on the relevant day.

qualifying facility, for a payment period, is defined in subsection 70AM(1).

Item 2 – At the end of paragraph 20(e)

Section 20 provides that the purpose of Part 3 of Chapter 2 of the Subsidy Principles is to set out matters in relation to the amount of residential care subsidy payable to an approved provider of a residential care service in respect of a care recipient who is

being provided with residential care through the service, including, among other things, the other supplements that may apply to the care recipient.

This item inserts:

- an additional subparagraph (viii) in paragraph 20(e) to list the hotelling supplement as another supplement that may apply to a residential care recipient; and
- an additional subparagraph (ix) in paragraph 20(e) to list the registered nurse supplement as another supplement that may apply to a residential care recipient.

Item 3 – At the end of Division 5 of Part 3 of Chapter 2

Subdivision J—Hotelling supplement

This item inserts a new Subdivision J into Division 5 of Part 3 of Chapter 2 of the Subsidy Principles to provide for an additional other supplement, the hotelling supplement.

This item inserts new section 70AI, which introduces the hotelling supplement. The new section provides that, for the purposes of paragraph 44-27(1)(c) of the Aged Care Act, the hotelling supplement for a care recipient in respect of a payment period beginning on or after 1 July 2023 is the sum of all the hotelling supplements for the days during the period on which the care recipient was provided with residential care through the residential care service in question and the care recipient was eligible for a hotelling supplement under new section 70AJ.

Subsection 70AJ(1) provides that a care recipient is eligible for a hotelling supplement on a particular day if the care recipient is being provided with non-respite residential care on that day.

Subsection 70AJ(2) provides that a care recipient is also eligible for a hotelling supplement on a particular day if, on that day:

- the care recipient is being provided with residential care as respite care; and
- under Division 3 of Part 3 of Chapter 2A of the Subsidy Determination, the basic subsidy amount for the day for the care recipient is not nil.

The reference to Division 3 of Part 3 of Chapter 2A of the Subsidy Determination means that a care recipient is eligible for a hotelling supplement if the care recipient is being provided with residential care as respite care and the basic subsidy amount for the day for the care recipient is not nil. The basic subsidy amount will not be nil if the number of days that the care recipient has been provided with residential care as respite care is less than the number applicable under paragraph 23(1)(c) of the Subsidy Principles.

This eligibility criteria does not apply to the hotelling supplement in respect of continuing residential care recipients, as continuing residential care recipients cannot, in practice, receive residential respite care (see item 8).

Subdivision K—Registered nurse supplement

This item inserts a new Subdivision K into Division 5 of Part 3 of Chapter 2 of the Subsidy Principles to provide for an additional other supplement, the registered nurse supplement.

This item inserts new section 70AK, which introduces the registered nurse supplement. The new section provides that, for the purposes of paragraph 44-27(1)(c) of the Aged Care Act, the registered nurse supplement for a care recipient in respect of a payment period beginning on or after 1 July 2023 is the sum of all the registered nurse supplements for the days during the period on which the care recipient was provided with residential care through the residential care service in question, and the care recipient was eligible for a registered nurse supplement under new section 70AL.

Subsection 70AL(1) provides that a care recipient is eligible for a registered nurse supplement on a particular day during a payment period if:

- the care recipient is being provided with non-respite residential care on that day; and
- during the period, residential care is provided through the residential care service at at least one residential facility that is a qualifying facility for the period.

Subsection 70AL(2) provides that a care recipient is also eligible for a registered nurse supplement on a particular day during a payment period if:

- on that day, the care recipient is being provided with residential care as respite care; and
- under Division 3 of Part 3 of Chapter 2A of the Subsidy Determination, the basic subsidy amount for the day for the care recipient is not nil; and
- during the period, residential care is provided through the residential care service at at least one residential facility that is a qualifying facility for the period.

The reference in subsection 70AL(2) to Division 3 of Part 3 of Chapter 2A of the Subsidy Determination means that a care recipient is eligible for a registered nurse supplement if the care recipient is being provided with residential care as respite care and the basic subsidy amount for the day for the care recipient is not nil. The basic subsidy amount will not be nil if the number of days that the care recipient has been provided with residential care as respite care is less than the number applicable under paragraph 23(1)(c) of the Subsidy Principles.

This eligibility criteria does not apply to the registered nurse supplement in respect of continuing residential care recipients, as continuing residential care recipients cannot, in practice, receive residential respite care (see item 8).

‘Residential care service’ in new sections 70AI, 70AK and 70AL means an undertaking through which residential care is provided (see definition of ‘residential care service’ in Schedule 1, Aged Care Act and Schedule 1, Transitional Provisions Act).

References to ‘residential facility’ in new section 70AL may include a building or complex of buildings used for the purpose of delivering residential aged care.

There may be circumstances where a residential facility may consist of more than one residential service, and a residential care service provide residential care through more than one residential facility. For example:

- A residential facility may consist of more than one residential care service where multiple residential care services operated by the same approved provider are co-located at the same address or on the same site.
- A residential care service may operate more than one residential facility where residential care is delivered under the umbrella of one service across multiple sites that contain building(s) for the purpose of delivering residential care and the sites are sufficiently distant from each other that each site must be considered a separate facility.

This item also inserts new section 70AM, which inserts the definition of a qualifying facility.

Subsection 70AM(1) provides that a residential facility is a qualifying facility for a payment period if all of the following criteria are met:

- an exemption from the 24/7 RN responsibility in relation to the facility is not in force at any time during the period;
- a report in relation to the facility and the period has been submitted in accordance with section 44B of the *Accountability Principles 2014*;
- the total number of days of eligible residential care provided in respect of care recipients at the facility during the period, divided by the number of days in the period, is no more than 60;
- the total number of hours, on days during the period on which residential care was provided at the facility, that a registered nurse was not on site and on duty at the facility is no more than the number of such days in the period multiplied by 4.

For the purposes of paragraph 70AM(1)(a), evidence that may be relied on to determine whether an exemption from the 24/7 RN responsibility is in force in relation to a residential facility of an approved provider includes:

- whether the Secretary has granted an exemption from the 24/7 RN Responsibility under section 15T of the *Quality of Care Principles*; and
- whether the Secretary has revoked an approved provider's exemption from the 24/7 RN responsibility under section 15V or 15W of the *Quality of Care Principles*.

For the purposes of paragraph 70AM(1)(b), the specified report is in relation to registered nurses at residential facilities. The report must, in accordance with subsections 44B(2) and (3) of the *Accountability Principles* (which come into effect on 1 July 2023):

- be given to the Secretary within 7 days after the end of the calendar month, or within a longer period specified by the Secretary by notice in writing given to the approved provider;
- be in a form approved, in writing, by the Secretary; and
- include the following information in relation to the residential facility:

- each period, on a day during the calendar month on which residential care was being provided to care recipients in the residential facility, of 30 minutes or more that a registered nurse was not on site and on duty at the residential facility;
- for each such period, the reason a registered nurse was not on site or not on duty (or both) during the period;
- for each such period, the alternative arrangements that were made for the period to ensure the clinical needs of care recipients in the facility were met, or a statement that no alternative arrangements were made;
- any other information required by the approved form to be included in the report.

For the purposes of paragraph 70AM(1)(c), days of eligible residential care provided in respect of care recipients at the facility is determined in accordance with subsections 70AM(2) and (3), and the total number of days of eligible residential care provided in respect of care recipients at the facility during the period, divided by the number of days in the period, must be no more than 60.

The criteria in paragraph 70AM(1)(c) is consistent with the Government’s intention to provide approved providers with additional funding support for the provision of registered nurse care at residential facilities through which residential care is, on average, provided to a smaller number of care recipients and so where the costs per care recipient of achieving 24/7 registered nurse coverage are subsequently higher.

For the purposes of paragraph 70AM(1)(d), the policy intention of this criteria is that, on average, over the days during a payment period on which residential care was provided at the residential facility, at least 20 hours a day of registered nurse coverage is provided. In determining whether a residential facility meets the criteria in paragraph 70AM(1)(d), the evidence that may be relied upon includes data in the report referenced in paragraph 70AM(1)(b) and further information and documents under section 44C of the Accountability Principles about a matter that is included in, or is required to be included in, the report as required.

A note to subsection 70AM(1) states that residential care might be provided at a residential facility through more than one residential care service. An example of this is where multiple residential care services operated by the same approved provider are co-located at the same address or on the same site.

Subsection 70AM(2) defines the phrase, a ‘*day of eligible residential care*’, which is used to determine the total number of days of eligible residential care that has been provided during a period (see paragraph 70AM(1)(c)). A day of eligible residential care is provided in respect of a care recipient if:

- residential care is provided to the care recipient during a day:
 - other than as respite care; or
 - as respite care and, under Division 3 of Part 3 of Chapter 2A of the Subsidy Determination, the basic subsidy amount for the day for the care recipient is not nil; and
- the approved provider of the residential care service through which the care is provided is eligible for residential care subsidy in respect of the day.

The effect of the reference in subparagraph 70AM(2)(a)(ii) to Division 3 of Part 3 of Chapter 2A of the Subsidy Determination is that a day of eligible residential care provided in respect of respite care provided to a care recipient will be a day if the basic subsidy amount for the day for the care recipient is not nil. The basic subsidy amount will not be nil if the number of days that the care recipient has been provided with residential respite care is less than the number applicable under paragraph 23(1)(c) of the Subsidy Principles.

To avoid doubt, the criteria in subparagraph 70AM(2)(a)(ii) does not apply in respect of eligibility of continuing residential care recipients for the registered nurse supplement, as continuing residential care recipients cannot, in practice, receive residential respite care (see item 8).

Subsection 70AM(3) provides that if, during a payment period, the days of eligible residential care are provided in respect of care recipients through the same residential care service at more than one residential facility then, for the purposes of paragraph 70AM(1)(c), the total number of days of eligible residential care provided at each facility is taken to be proportional to the number of operational places allocated in respect of the service, on the last day of the payment period, in respect of the location of each facility.

The effect of subsection 70AM(3) is to account for circumstances where an approved provider has multiple facilities at which it delivers residential care through one residential care service. As approved providers are not required to separately report on the number of days in which residential care was provided at each residential facility, the policy intention of this provision is to consistently apportion the total number of days of eligible residential care provided through the residential care service.

Aged Care (Subsidy, Fees and Payments) Determination 2014

Item 4 – Section 64H

This item inserts the following definitions:

day of eligible residential care has the same meaning as in the Subsidy Principles.

qualifying facility has the same meaning as in the Subsidy Principles.

The effect is that qualifying facility, for a payment period, is defined in subsection 70AM(1) of the Subsidy Principles.

Item 5 – At the end of Part 7 of Chapter 2A

Division 5—Hotelling supplement

This item inserts a new Division 5 to provide for the amount of the hotelling supplement.

This item inserts a new section 64ZT that provides, for the purposes of subsection 44-27(3) of the Aged Care Act, the amount of the hotelling supplement for a day for a care recipient is \$10.80.

A note to section 64ZT states that the hotelling supplement and eligibility for the supplement is set out in Subdivision J of Division 5 of Part 3 of Chapter 2 of the Subsidy Principles.

Division 6—Registered nurse supplement

This item inserts a new Division 6, which deals with matters relating to the registered nurse supplement.

This item inserts a new section 64ZU which deals with the amount of registered nurse supplement.

Subsection 64ZU(1) provides that section 64ZU is made for the purposes of subsection 44-27(3) of the Aged Care Act.

A note to subsection 64ZU(1) states that the registered nurse supplement and eligibility for that supplement is set out in Subdivision K of Division 5 of Part 3 of Chapter 2 of the Subsidy Principles.

Subsection 64ZU(2) provides that the amount of the registered nurse supplement for a day for a care recipient during a payment period is calculated by dividing the service supplement amount by the total service care days, where:

- **service supplement amount** is the service supplement amount for the payment period, determined under subsections 64ZU(3) and (4), for the residential care service through which residential care is provided to the care recipient; and
- **total service care days** is the total number of days of eligible residential care provided in respect of care recipients during the payment period through that residential care service.

The number of days of eligible residential care is defined and worked out in accordance with subsections 70AM(2) and (3) of the Subsidy Principles.

The effect of subsection 64ZU(2) is that the amount of the registered nurse supplement is the same for each day of eligible residential care a care recipient of a given residential care service receives at that service during a particular payment period. However, the calculated amount for a day at that service may vary between payment periods as the output of the calculation that produces the amount varies between payment periods. In other words, the supplement amount is the same for each day of a particular payment period in respect of each day of eligible residential care provided at a given residential care service, but the supplement amount may vary between each payment period.

Service supplement amount

Subsection 64ZU(3) provides that, subject to subsection 64ZU(4), the service supplement amount for a payment period for a residential care service is the sum of the facility amounts, determined under subsections 64ZU(5) and (6), for each qualifying facility for the period during which days of eligible residential care are provided in respect of care recipients during the period through that service.

Subsection 64ZU(4) provides that, if, during a payment period, the days of eligible residential care are provided in respect of care recipients at a qualifying facility for the period through more than one residential care service, the facility amount for the facility is to be apportioned between the services, in proportion to the number of days of eligible care provided at the facility through each service.

A ‘qualifying facility’, for a payment period, is defined in subsection 70AM(1) of the Subsidy Principles.

The effect of subsections 64ZU(3) and (4) is that the total amount of registered nurse supplement payable in respect of a residential care service for a payment period (that is, the service supplement amount) takes into account certain characteristics of the qualifying facilities of the service.

The characteristics taken into account include the location of the qualifying facility and the average daily care count of the facility (as discussed further in subsection 64ZU(5) and (6)). This is consistent with the policy intention in calculating the amount of the registered nurse supplement, which is to vary an amount of subsidy for approved providers for the provision of registered nurse care depending on where the residential facility is located and to how many care recipients care is provided, on average, during a payment period.

Facility amount

Subsection 64ZU(5) provides the facility amount for a payment period for a qualifying facility for the period with a street address in the Modified Monash Model MM category known as MM1, MM 2, MM 3 or MM4. The facility amount is set out in the table in subsection 64ZU(5), with different amounts depending on the average daily care count for the facility for the period. The average daily care count is worked out in accordance with subsections 64ZU(7) and (8).

‘Modified Monash Model’ and ‘MM category’ have the same meanings as in section 64H of the Subsidy Determination. Modified Monash Model means the 2019 model developed by the Department to categorise areas according to geographical remoteness and population size, as the model exists on 1 October 2022. MM Category means a category for an area provided for by the Modified Monash Model and known as MM 1, MM 2, MM 3, MM 4, MM 5, MM 6 or MM 7.

The table in subsection 64ZU(5) sets out the facility amount for qualifying facilities in MM categories 1 to 4 (that is, qualifying facilities in metropolitan to regional areas), and the amount, depending on the average daily care, is as follows:

- where the average daily care count is less than or equal to 30, the facility amount is \$27,667 for the payment period.
- where the average daily care count is more than 30 but less than or equal to 35, the facility amount is \$19,167 for the payment period.
- where the average daily care count is more than 35 but less than or equal to 40, the facility amount is \$14,750 for the payment period.
- Where the average daily care count is more than 40 but less than or equal to 45, the facility amount is \$13,167 for the payment period.
- where the average daily care count is more than 45 but less than or equal to 50, the facility amount is \$11,750 for the payment period.

- where the average daily care count is more than 50 but less than or equal to 55, the facility amount is \$9,833 for the payment period.
- Where the average daily care count is more than 55 but less than or equal to 60, the facility amount is \$7,917 for the payment period..

The table in subsection 64ZU(6) provides that the facility amount for the period for qualifying facilities in MM categories 5 to 7 (that is, facilities in rural to very remote areas) depends on the average daily care count (provided for in subsections 64ZU(7) and (8)) as follows:

- where the average daily care count is less than or equal to 5 the facility amount is \$77,083 for the payment period.
- where the average daily care count is more than 5 but less than or equal to 10 the facility amount is \$69,000 for the payment period.
- where the average daily care count is more than 10 but less than or equal to 15 the facility amount is \$63,500 for the payment period.
- where the average daily care count is more than 15 but less than or equal to 20 the facility amount is \$53,250 for the payment period.
- Where the average daily care count is more than 20 but less than or equal to 25 the facility amount is \$42,250 for the payment period.
- where the average daily care count is more than 25 but less than or equal to 30 the facility amount is \$32,083 for the payment period.
- Where the average daily care count is more than 30 but less than or equal to 35 the facility amount is \$23,833 for the payment period.
- where the average daily care count is more than 35 but less than or equal to 40 the facility amount is \$17,750 for the payment period.
- where the average daily care count is more than 40 but less than or equal to 45 the facility amount is \$15,750 for the payment period.
- where the average daily care count is more than 45 but less than or equal to 50 the facility amount is \$13,583 for the payment period.
- where the average daily care count is more than 50 but less than or equal to 55 the facility amount is \$11,250 for the payment period.
- where the average daily care count is more than 55 but less than or equal to 60 the facility amount is \$8,917 for the payment period.

Subsection 64ZU(7) provides that, for the purposes of subsections 64ZU(5) and (6), the average daily care count for a qualifying facility for a payment period is the total number of days of eligible residential care provided in respect of care recipients at the facility during the period, divided by the number of days in the period.

Days of eligible residential care is defined in subsections 70AM(2) and (3) of the Subsidy Principles (see item 3).

For subsection 64ZU(7), in circumstances where there are two or more residential care services providing residential care through one qualifying facility, the total service care days (see subsection 64ZU(2)) is calculated to produce the total number of days of eligible residential care provided in respect of care recipients at each facility during the period. This amount is then divided by the number of days in the period to identify the average daily care count.

Subsection 64ZU(8) provides that, if, during a payment period, days of eligible residential care are provided in respect of care recipients through the same residential care service at more than one residential facility then, for the purposes of subsection 64ZU(7), the total number of days of eligible residential care provided at each facility is taken to be proportional to the number of operational places allocated in respect of the service, on the last day of the payment period, in respect of the location of each facility.

The effect of subsection 64ZU(8) is that, in a situation where one residential care service is providing care at more than one residential facility, a separate total number of days of eligible residential care is determined for each residential facility, so there will be different facility amounts for each residential facility. These separate facility amounts are summed to make the service supplement amount (subsection 64ZU(3)).

The combined effects of subsections 64ZU(5) to (8) are:

- the facility amount will likely increase as the number of days of eligible residential care provided at a residential facility during a payment period (and the total amount of basic subsidy and other forms of residential care subsidy associated with them) decreases; and
- the facility amount is higher for residential facilities located in rural to very remote areas compared to those located in a metropolitan to regional areas. This is in line with costs of registered nurse care generally being higher in rural to very remote areas.

Aged Care (Transitional Provisions) Principles 2014

Item 6 – Section 4

This item inserts the following definition:

qualifying facility, for a payment period, has the same meaning as in the Subsidy Principles 2014.

The effect is that qualifying facility, for a payment period, is defined in subsection 70AM(1) of the Subsidy Principles.

Item 7 – At the end of paragraph 17(h)

Section 17 provides that the purpose of Part 3 of Chapter 2 of the Transitional Provisions Principles is to set out matters in relation to the amount of residential care subsidy payable to an approved provider of a residential care service in respect of the care recipient's to whom the Transitional Provisions Principles apply – continuing residential care recipients (see below) – who is being provided with residential care through the service, including, among other things, the other supplements that may apply to these care recipients.

Continuing residential care recipient is defined in Schedule 1 of the Aged Care Act, and means a person who:

- entered a residential care service before 1 July 2014; and
- has not:

- ceased to be provided with residential care by a residential care service for a continuous period of more than 28 days (other than because the person is on leave); or
- before moving to another residential care service, made a written choice, in accordance with the *Fees and Payments Principles 2014*, to be covered by Chapters 3 and 3A of the Aged Care Act in relation to the other service.

This item inserts:

- an additional subparagraph (vii) in paragraph 17(h) to list the hotelling supplement as another supplement that may apply to a care recipient; and
- an additional subparagraph (viii) in paragraph 17(h) to list the registered nurse supplement as another supplement that may apply to a care recipient.

Item 8 –At the end of Division 8 of Part 3 of Chapter 2

Subdivision I—Hotelling supplement

This item inserts a new Subdivision I into Division 8 of Part 3 of Chapter 2 of the Transitional Provisions Principles that provides an additional other supplement, the hotelling supplement.

This item inserts a new section 64E providing that, for the purposes of paragraph 44-27(1)(e) of the Transitional Provisions Act, the hotelling supplement for a care recipient in respect of a payment period beginning on or after 1 July 2023 is the sum of all the hotelling supplements for the days during the period on which the care recipient was provided with residential care through the residential care service in question.

Subdivision J—Registered nurse supplement

This item inserts a new Subdivision J into Division 8 of Part 3 of Chapter 2 of the Transitional Provisions Principles that provides an additional other supplement, the registered nurse supplement.

This item inserts new section 64F, which deals with the registered nurse supplement, providing that, for the purposes of paragraph 44-27(1)(e) of the Transitional Provisions Act, the registered nurse supplement for a care recipient in respect of a payment period beginning on or after 1 July 2023 is the sum of all the registered nurse supplements for the days during the period on which the care recipient was provided with residential care through the residential care service in question, and the care recipient was eligible for a registered nurse supplement under new section 64G.

New section 64G provides that a care recipient is eligible for a registered nurse supplement on a particular day if:

- the care recipient is being provided with residential care on that day (that is, non-respite residential care); and
- during the period, residential care is provided through the residential care service at least one residential facility that is a qualifying facility for the period.

A ‘qualifying facility’ is defined in section 4 of the Transitional Provisions Principles.

Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014

Item 9 – Section 81

This item inserts the following definitions:

day of eligible residential care has the same meaning as subsection 70AM(2) in the Subsidy Principles.

qualifying facility has the same meaning as in subsection 70AM(1) of the Subsidy Principles.

Item 10 – At the end of Part 5 of Chapter 3

Division 5—Hotelling supplement

This item inserts a new Division 5 to the list of Divisions for amounts of other supplements used in the calculation of residential care subsidy.

This item inserts a new section 91R providing that, for the purposes of subsection 44-27(3) of the Transitional Provisions Act, the amount of the hotelling supplement for a day for a care recipient to whom the Transitional Provisions Act applies (continuing residential care recipient) is \$10.80.

A note to section 91R states that the hotelling supplement is set out in Subdivision I of Division 8 of Part 3 of Chapter 2 of the Transitional Provisions Principles, which also deals with eligibility for the supplement.

Division 6—Registered nurse supplement

This item inserts a new section 91S that deals with the amount of registered nurse supplement.

Subsection 91S(1) provides that this section is made for the purposes of subsection 44-27(3) of the Transitional Provisions Act.

A note to subsection 91S(1) states that the registered nurse supplement is set out in Subdivision J of Division 8 of Part 3 of Chapter 2 of the Transitional Provisions Principles, where eligibility for the supplement is also dealt with.

Subsection 91S(2) provides that the amount of the registered nurse supplement for a day for a care recipient during a payment period is determined by a calculation that divides the service supplement amount by the total service care days, where:

- ***service supplement amount*** is the service supplement amount for the payment period, determined under subsections 91S(3) and (4), for the residential care service through which residential care is provided to the care recipient; and
- ***total service care days*** is the total number of days of eligible residential care provided in respect of care recipients during the payment period through that residential care service.

Days of eligible residential care is defined in subsections 70AM(2) and (3) of the Subsidy Principles.

The effect of subsection 91S(2) is that the amount of the registered nurse supplement is the same for each day of eligible residential care a care recipient of a given residential care service receives at that service during a particular payment period.

However, the calculated amount for a day at that service may vary between payment periods as the output of the calculation that produces the amount varies between payment periods. In other words, the supplement amount is the same for each day of a particular payment period in respect of each day of eligible residential care provided at a given residential care service, but the supplement amount may vary between each payment period.

Service supplement amount

Subsection 91S(3) provides that, subject to subsection 91S(4), the service supplement amount for a payment period for a residential care service is the sum of the facility amounts, determined under subsections 91S(5) and (6), for each qualifying facility for the period during which days of eligible residential care are provided in respect of care recipients during the period through that service.

Subsection 91S(4) provides that, during a payment period, days of eligible residential care are provided in respect of care recipients at a qualifying facility for the period through more than one residential care service, the facility amount for the facility is to be apportioned between the services, in proportion to the number of days of eligible care provided at the facility through each service.

Qualifying facility, for a payment period, is defined in subsection 70AM(1) of the Subsidy Principles.

The effect of subsections 91S(3) and (4) is that the total amount of registered nurse supplement payable across the eligible care recipients of a residential care service for a payment period (that is, the service supplement amount) takes into account certain characteristics of the qualifying facilities of the service.

The characteristics taken into account include the location of the qualifying facility and the average daily care count of the facility. This is consistent with the policy intention in calculating the amount of the registered nurse supplement, which is to vary an amount of subsidy for approved providers for the provision of registered nurse care depending on where the residential facility is located and to how many care recipients care is provided, on average, during a payment period.

Facility amount

Subsection 91S(5) provides that the facility amount for a payment period, for a qualifying facility for the period with a street address in the Modified Monash Model MM category known as MM1, MM2, MM3 or MM4. The facility amount is set out amount set out in the table in subsection 91S(5), with different amounts depending on the average daily care count for the facility for the period.

Modified Monash Model classification has the same meaning as in section 81 of Chapter 3 of the Transitional Provisions Determination, and means the model known as the Modified Monash Model (MMM) 2019 developed by the Department to categorise areas according to geographical remoteness and population size, as the

model exists on 1 October 2022. MM Category means a category for an area provided for by the Modified Monash Model and known as MM1, MM2, MM3, MM4, MM5, MM6 or MM7.

The table in subsection 91S(5) provides the facility amount for qualifying facilities in MM categories 1 to 4 (that is, those located in metropolitan to regional areas) and the amount, depending on the average daily care, is as follows:

- where the average daily care count is less than or equal to 30 the facility amount is \$27,667 for the payment period.
- where the average daily care count is more than 30 but less than or equal to 35 the facility amount is \$19,167 for the payment period.
- where the average daily care count is more than 35 but less than or equal to 40 the facility amount is \$14,750 for the payment period
- where the average daily care count is more than 40 but less than or equal to 45 the facility amount is \$13,167 for the payment period
- where the average daily care count is more than 45 but less than or equal to 50 the facility amount is \$11,750 for the payment period
- where the average daily care count is more than 50 but less than or equal to 55 the facility amount is \$9,833 for the payment period
- where the average daily care count is more than 55 but less than or equal to 60 the facility amount is \$7,917 for the payment period.

The table in subsection 91S(6) provides that the facility amount for the period for qualifying facilities in MM categories 5 to 7 (that is, those located in in rural to very remote areas) depends on the average daily care count (provided for in subsections 91S(7) and (8)) as follows:

- where the average daily care count is less than or equal to 5 the facility amount is \$77,083 for the payment period
- where the average daily care count is more than 5 but less than or equal to 10 the facility amount is \$69,000 for the payment period
- where the average daily care count is more than 10 but less than or equal to 15 the facility amount is \$63,500 for the payment period
- where the average daily care count is more than 15 but less than or equal to 20 the facility amount is \$53,250 for the payment period
- where the average daily care count is more than 20 but less than or equal to 25 the facility amount is \$42,250 for the payment period
- where the average daily care count is more than 25 but less than or equal to 30 the facility amount is \$32,083 for the payment period
- where the average daily care count is more than 30 but less than or equal to 35 the facility amount is \$23,833 for the payment period
- where the average daily care count is more than 35 but less than or equal to 40 the facility amount is \$17,750 for the payment period
- where the average daily care count is more than 40 but less than or equal to 45 the facility amount is \$15,750 for the payment period
- where the average daily care count is more than 45 but less than or equal to 50 the facility amount is \$13,583 for the payment period
- where the average daily care count is more than 50 but less than or equal to 55 the facility amount is \$11,250 for the payment period

- where the average daily care count is more than 55 but less than or equal to 60 the facility amount is \$8,917 for the payment period.

Subsection 91S(7) provides that, for the purposes of subsections 91S(5) and (6), the average daily care count for a qualifying facility for a payment period is the total number of days of eligible residential care provided in respect of care recipients at the facility during the period, divided by the number of days in the period.

Days of eligible residential care is defined in subsections 70AM(2) and (3) of the Subsidy Principles.

For subsection 91S(7), in circumstances where there are two or more residential care services providing residential care through one qualifying residential facility, the total service care days (see subsection 91S(2)) is calculated to produce the total number of days of eligible residential care provided in respect of care recipients at the facility during the period. This amount is then divided by the number of days in the period to identify the average daily care count.

Subsection 91S(8) provides that, if, during a payment period, days of eligible residential care are provided in respect of care recipients through the same residential care service at more than one residential facility then, for the purposes of subsection 91S(7), the total number of days of eligible residential care provided at each facility is taken to be proportional to the number of operational places allocated in respect of the service, on the last day of the payment period, in respect of the location of each facility.

The effect of subsection 91S(8) is that, in situations where a single residential care service is providing care at more than one residential facility, a separate total number of days of eligible residential care is determined for each residential facility, leading to separate facility amounts for each residential facility. These separate facility amounts are summed to make the service supplement amount (see subsection 91S(3)). The combined effects of subsections 91S(5) to (8) are:

- the facility amount will likely increase as the number of days of eligible residential care provided at a residential facility during a payment period (and the total amount of basic subsidy and other forms of residential care subsidy associated with them) decreases; and
- the facility amount is higher at rural to very remote services than at metropolitan to regional services, consistent with costs of registered nurse care generally being higher in rural to very remote areas.

Schedule 2—Flexible care subsidy

Schedule 2, which commences on 1 July 2023, amends the following legislative instrument:

- *Aged Care (Subsidy, Fees and Payments) Determination 2014* (Subsidy Determination).

Aged Care (Subsidy, Fees and Payments) Determination 2014

Item 1—Section 91 (formula)

This item repeals the existing formula used to calculate the amount of flexible care subsidy payable for a day in respect of flexible care that is provided through a multi-purpose service and replaces it with a new formula that adds in the *aged care wage supplement amount* (ACWSA), so that the new formula reads:

HCA + LCA + HMA + RSEA + DEA + VEA + DVEA + HMAA + ACWSA

The effect of new section 91 is that the new aged care wage supplement amount is simply summed with all the amounts in the formula as it existed prior to the Amending Instrument with the addition of the ACWSA.

Item 2—Section 91 (before the definition of DEA)

This item inserts the definition of ‘ACWSA’, that is, the Aged Care Wages Supplement Amount. The ACWSA is the amount worked out by multiplying:

- the amount that applies under section 96A for the day for a place allocated in respect of the service; and
- the number of places allocated in respect of the service that are not provisionally allocated.

Item 3 – At the end of Division 3 of Part 1 of Chapter 4

This item inserts a new section 96A to provide for the Aged Care Wage Supplement amount. The ACWSA was determined by applying the 15% wage increase to the reported 2021-22 expenditure on salaries and direct on-costs for each of the eligible non-government MPS Providers and then indexed for inflation. This amount is then divided by the number of operational places and the number of days in a year to determine the rate per operational place to paid on a daily basis. The table below lists these amounts for each non-state/territory government MPS Provider.

New flexible care subsidy amount for the 3 non-government MPS providers:

Aged care wage supplement amount		
Item	Person place allocated to	Amount (\$)
1	Churches of Christ Care in Queensland	18.89
2	Huon Eldercare Limited	22.72
3	Norfolk Island Health and Residential Aged Care Services	11.19
4	Any other person	Nil

The term 'operational places' refers to a place allocated to a provider in respect of an MPS that has taken effect in accordance with section 15-1 of the Aged Care Act, and is not provisionally allocated.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Aged Care Legislation Amendment (Subsidies) Instrument 2023

This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny Act) Act 2011*.

Overview of the instrument

The *Aged Care Legislation Amendment (Subsidies) Instrument 2023* (Amending Instrument) amends aged care subordinate legislation to provide for two new residential care subsidies with effect from 1 July 2023:

- *hotelling supplement*, to provide more subsidy to approved providers of residential care for providing hotel services to residential care recipients; and
- *registered nurse supplement*, to provide more subsidy to approved providers of residential care for registered nurses providing, or directing the provision of, care to residential care recipients.

Both supplements are separately enacted in substantially the same form for residential care recipients (who are subject to the *Aged Care Act 1997* (Aged Care Act) and its legislative instruments) and for continuing residential care recipients (who are subject to the *Aged Care (Transitional Provisions) Act 1997* (Transitional Provisions Act) and its legislative instruments).

The Amending Instrument also amends the formula for calculating subsidy for flexible care provided through a multi-purpose service, to provide additional funding to eligible approved providers of flexible care for direct aged care workers providing residential and home care services.

The Amending Instrument amends the following subordinate legislation:

- *Subsidy Principles 2014*
- *Aged Care (Subsidy, Fees and Payments) Determination 2014*
- *Aged Care (Transitional Provisions) Principles 2014*
- *Aged Care (Transitional Provisions) (Subsidy and Other Measures) Determination 2014*.

Human rights implications

Schedule 1 – hotelling supplement

Schedule 1 to the Amending Instrument, through inserting the hotelling supplement, engages the human rights to an adequate standard of living in article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the adequate standard of living and social protection in article 28 of the Convention on the Rights of Persons with Disabilities (CRPD).

The right to an adequate standard of living, including adequate food, water and housing, and to the continuous improvement of living conditions is contained in article 11(1) of ICESCR. Article 28 of the CRPD also require countries to take appropriate measures to safeguard the right of persons with disabilities to an adequate standard of living. Schedule 1 promotes the right of those receiving care to an adequate standard of living by providing for the subsidised provision of aged care accommodation and services on the basis of care needs. This includes ensuring subsidies are paid in respect of the costs of providing hotel services to residential care recipients.

Schedule 1 – registered nurse supplement

Schedule 1 to the Amending Instrument, through inserting the registered nurse supplement, engages the human rights to health in article 12 of the ICESCR and article 25 of the CRPD.

These articles refer to the right of individuals, including persons with disability, to the highest attainable standard of physical and mental health. The registered nurse supplement promotes the right to health by subsidising the provision of care delivered by registered nurses to residential care recipients.

Schedule 2 – formula for calculating subsidy for flexible care provided through a multi-purpose service

Schedule 2 to the Amending Instrument, through amending the formula for calculating subsidy for flexible care provided through a multi-purpose service, is compatible with the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and mental health as contained in articles 11(1) and 12(1) of the International Covenant on Economic, Social and Cultural Rights, and articles 25 and 28 of the Convention on the Rights of Persons with Disabilities.

The Amending Instrument gives effect to measures announced on 4 May 2023 by the Hon Anika Wells MP, Minister for Aged Care and on 9 May 2023 by the Hon Mark Butler MP, Minister for Health and Aged Care, of funding increases in aged care. The additional funding increases are to support improving wages and conditions for aged care workers resulting from the Fair Work Commission’s decisions of 21 February 2023 to vary minimum wages for aged care employees so that they properly reflect the value of the work performed by those workers.

The Government recognises that aged care is a critical sector that faces staffing challenges. The additional funding increases in this Amending Instrument, help ensure the viability of flexible care approved providers. The Amending Instrument increases the number of subsidies and supplements payable to approved providers for the provision of care and services to people with a condition of frailty or disability who require assistance to achieve and maintain the highest attainable standard of physical and mental health.

Aged Care legislation requires government-subsidised aged care homes meet standards to ensure that quality care and services are provided to all residents. The Government’s spending on aged care will protect residential aged care recipients’

rights to an adequate standard of living and to the enjoyment of the highest attainable standard of physical and mental health.

Conclusion

The Amending Principles are compatible with human rights as it promotes the rights of care recipients to an adequate standard of living and the right to health.

**The Hon Anika Wells MP
Minister for Aged Care**