



## Modern Awards Review 2023-24 (AM2023/21)

### Submission cover sheet

#### Name

Lauren Palmer

#### Organisation

Australian Nursing and Midwifery Federation

#### Contact details:

Street Address 1: Level 1, 365 Queen Street

Street Address 2:

Suburb/City: Melbourne, Victoria

Postcode: 3000

Email: lpalmer@anmf.org.au

Telephone: 0460 640 864

#### Modern Award Review Stream:

Work and Care:

Signature:

Name:

Lauren Palmer

Date:

26 March 2024

## ANMF submission in reply

1. The Australian Nursing and Midwifery Federation (**'ANMF'**) welcomes the opportunity to provide a submission in reply as part of the Work and Care Stream of the *Modern Awards Review 2023-24* (the **'Review'**). This submission should be read in conjunction with the ANMF's submission filed 12 March 2024.
2. The ANMF has had the opportunity to view the submissions of the Australian Council of Trade Unions (**'ACTU'**) and supports their positions.
3. The ANMF will not respond to all statements made by employer representatives in these proceedings but will selectively respond to certain assertions.

## Response to submissions

### Legislative reform

4. A number of employer representative submissions contend that some issues raised in this stream of the review are, or already have been, more appropriately addressed through legislative reforms and in the National Employment Standards (**'NES'**).<sup>1</sup> Modern Awards set out minimum entitlements for employees and variations to their provisions can and should be made to ensure those provisions continue to appropriately meet the Modern Award objectives. Such variations can in turn facilitate significant, universally applied changes to the NES, as was the case with Family and Domestic Violence Leave. It is inappropriate to suggest that the Fair Work Commission (**'FWC'**) should not proceed with Award variations on the basis that this would somehow preclude or occur in isolation from legislative change.

### Part-time employment

5. The ANMF strongly opposes the position put forward by The Australian Industry Group (**'AiG'**) to 'liberalise access to part-time employment' through greater flexibility as to ordinary hours of work, greater scope to vary hours of work, and an option to work additional hours without overtime.<sup>2</sup>
6. The ANMF disputes the position put by AiG that the Standard Part-time Model is overwhelmingly rigid and inflexible and [this] results in employers instead employing casual employees or adopting other forms of engagement'.<sup>3</sup> Part-time employment is the predominant type of employment for women, including nurses and midwives, who are also more likely to have unpaid caring responsibilities. This evidence is reinforced by the reports prepared for the FWC in this and the Gender Pay Equity streams of the Modern Award reviews.<sup>4</sup> The extensive evidence set out in the reports demonstrates that employers readily and easily access part-time employment, negating the argument for the proposals put forward by AiG.

---

<sup>1</sup> For example, ACCI submission at [7f] and AiG submission at [51].

<sup>2</sup> AiG submission at [89].

<sup>3</sup> Ibid at [87].

<sup>4</sup> See Cortis, N., Naidoo, Y., Wong, M. and Bradbury, B. (2023) *Gender-based Occupational Segregation: A National Data Profile*. Sydney: UNSW Social Policy Research Centre, pp. 6-7, 28-29 and 33-34; and Smith, M and Charlesworth, S (2024) *Literature Review for the Modern Awards Review 2023-24 Relating to the Workplace Relations Settings Within Modern Awards That Impact People When Balancing Work and Care*, Western Sydney University, pp. 14-15, 20 and 25.

7. The ANMF reiterates our position that part-time employment, while providing an important means by which working carers can balance their responsibilities, is subject to misuse by employers who already utilise part-time employment flexibly and to the detriment of the employee.<sup>5</sup> We strongly oppose any proposals that seek to expand employer flexibility at the cost of eroding existing protections and entitlements for part-time employees.

#### Individual Flexibility Agreements

8. The ANMF does not support any variations to clause 6 of the Nurses Award for Individual Flexibility Agreements (IFAs). The ANMF shares the concerns of the ACTU regarding the poor oversight and regulation of IFAs.<sup>6</sup> The proposal put forward to by AiG to expand the application of IFAs to prospective employees<sup>7</sup> assumes an even playing field of bargaining power and workplace and industrial knowledge.
9. A prospective employee has not yet had any opportunity to determine what arrangements would leave them better off overall, nor is a prospective (or indeed existing) employee likely to have an intimate understanding of the relevant Award terms in the same way, or with the same resources to ascertain this understanding, as the employer.

#### Facilitative Provisions

10. The ANMF opposes the proposal by AiG to vary the Nurses Award in accordance with the Category 3 variations AiG sets out regarding facilitative provisions.<sup>8</sup> The Nurses Award at clause 13.1(a) provides for a generous span of hours for a day worker between 6.00 am and 6.00 pm, Monday to Friday. The span of hours clause has an important relationship to the definition of shiftworker and attraction of overtime rates of pay and an additional week of annual leave.
11. Varying the Nurses Award to allow for a facilitative provision that expands the span of hours would introduce unnecessary complexity and allow the employer to avoid paying other penalties and entitlements to these employees. As the variation would only apply to those employees utilising facilitative provisions it is likely the employee would be worse off.

#### Work From Home

12. The ANMF reiterates its position that working from home, for the ANMF members to which it could be appropriately applied, must be subject to strong protections for the employee. The ANMF acknowledged the benefits of working from home for employees with caring responsibilities, provided their entitlements and rights elsewhere under the Award and other legislative frameworks, such as occupational health and safety and the *Fair Work Act 2009* (Cth), are not diminished.
13. The ANMF opposes the proposal put forward by the Australian Chamber of Commerce and Industry ('**ACCI**') to allow agreements to disapply span of hours and minimum engagement

---

<sup>5</sup> ANMF submission at [26-27].

<sup>6</sup> Australian Council of Trade Unions Submission to the Work and Care stream of the *Modern Awards Review 2023-24* (12 March 2024) at [36-40].

<sup>7</sup> AiG submission at [96].

<sup>8</sup> AiG submission at [125-127].

provisions where an employee is working from home.<sup>9</sup> The adoption of this proposal would significantly restrict access to overtime and increase variability to employee rosters and pay. The proposal put forward by AiG<sup>10</sup> would have a similar effect to those put forward by the ACCI.

### Minimum engagement periods

14. The ANMF reiterates its clear position that minimum engagement periods of work are critical to employees planning their work and care responsibilities and ensuring hours of engagement provide an economic benefit when accounting for the cost and time spent on formal care services. The issues of low-hour contracts and low or absent minimum engagement periods are compounded for lower-paid employees in undervalued feminised work, particularly where these employees are required to carry out travel in the course of their work and/or are engaged on part-time contracts.<sup>11</sup>
15. The introduction of a 4-hour minimum engagement period, in line with Awards covering male dominated industries such as the Manufacturing Award,<sup>12</sup> would not only promote balanced work and care but would also advance the objective of achieving gender equality.<sup>13</sup>

### Span of Hours

16. Nurses, midwives and care workers work in environments operating on a 24/7 basis, making unsocial hours commonplace and largely unavoidable. The adverse impacts of such work are well documented, as is the importance of penalty rates to compensate employees for the myriad disruptions of working unsocial hours.<sup>14</sup> The operation of the span of hours clause in the Nurses Award does not occur in isolation from other important provisions that address the impacts of shiftwork and unsocial hours. The ANMF strongly opposes the proposal by AiG to vary awards to allow ordinary hours to be performed on weekends.<sup>15</sup>

### Time Off In Lieu

17. The ANMF did not address Time Off In Lieu (TOIL) in initial submissions as the current provision in the Nurses Award<sup>16</sup> is sufficient. AiG proposes that all awards should be varied to allow for standing employee/employer agreements for multiple instances of overtime to be taken as TOIL and for such agreements to allow 'banking' of TOIL for longer periods of time.<sup>17</sup> The submission does not specify the extended period of time being proposed by AiG.

---

<sup>9</sup> ACCI submission at [98 and 100].

<sup>10</sup> AiG submission at [133].

<sup>11</sup> Smith, M and Charlesworth, S (2024) *Literature Review for the Modern Awards Review 2023-24 Relating to the Workplace Relations Settings Within Modern Awards That Impact People When Balancing Work and Care*, Western Sydney University, pp. 39-41.

<sup>12</sup> [MA000010] at cl. 102 and 11.2.

<sup>13</sup> *Fair Work Act 2009* (Cth) s 134(1)(ab).

<sup>14</sup> Smith, M and Charlesworth, S (2024) *Literature Review for the Modern Awards Review 2023-24 Relating to the Workplace Relations Settings Within Modern Awards That Impact People When Balancing Work and Care*, Western Sydney University, p. 41.

<sup>15</sup> AiG submission at [175].

<sup>16</sup> [MA000034] at cl. 19.3.

<sup>17</sup> AiG submission at [199-200].

18. While TOIL can provide an important means of like-for-like compensation when additional hours are carried out, it is for the employee managing work and care responsibilities to determine how they are best able to achieve this balance and be compensated for additional work. For employees working in 24/7 health and care environments, taking additional time off and managing rosters can be difficult to plan for both them and the employer. Additionally, the ANMF has made extensive submissions setting out concerns that employees have difficulty accessing overtime rates of pay and seeking to ensure this is rectified in the Nurses Award.<sup>18</sup>
19. Expanding TOIL in the terms set out by AiG will have the effect of limiting access to overtime rates of pay and an employee's ability to choose how they are compensated for additional hours of work. In health and aged care settings, particularly those that operate on a 24/7 basis, the ability to take banked TOIL, over an extended period of time, is open to misuse and creates the risk of either the time or overtime payment not being taken. On this basis and as the current provision for TOIL in the Nurses Award is sufficient, we oppose the proposal put forward by AiG.

#### Annual Leave

20. The ANMF take this opportunity to make it abundantly clear its proposal to make provision for taking annual leave at half pay, or any other proportionate basis, is contingent on the following:
- that any annual leave taken at half pay, or on a proportionate basis, must only take place upon employee request,
  - must not be unreasonably refused,
  - must be recorded in writing by the employer, and retained as an employee record, and
  - would be subject to proportionate leave loading.
21. The above reflects the proposed term in the Decision to vary Modern Awards in relation to pandemic leave, that 'the employee's full pay for [annual leave at half pay] is the same as the pay the employee would have been entitled to for [annual leave] on full pay (including leave loading under the Annual Leave clause of [this] award)'.<sup>19</sup>

---

<sup>18</sup> ANMF submission to Work and Care stream of the *Modern Awards Review 2023-2024* at [69-81] and ANMF submission to Job Security stream of the *Modern Awards Review 2023-24* at [39-43].

<sup>19</sup> [2020] FWCFB 1873 at [100].