

BEFORE THE FAIR WORK COMMISSION

***NURSES AWARD 2010***  
**(MA000034)**

*4 yearly review of modern awards – Nurses Award 2010*

*AM2016/21*

**SUBMISSIONS IN-REPLY BY**  
**AGED CARE EMPLOYERS**

19 March 2018

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## Overview

1. Section 156 of the *Fair Work Act 2009* (**the FW Act**) requires the Fair Work Commission (**the Commission**) to review all modern awards every four years (**the Review**).
2. As part of the Review, the Australian Nursing & Midwifery Federation (**ANMF**) has made claims for variations to the *Nurses Award 2010* (**the Nurses Award**).
3. These submissions are made by Aged Care Employers (**ACE**),<sup>1</sup> in reply to the variations sought by the ANMF. Such variations are set out in the ANMF's written submissions dated 12 February 2018.

## General observations – ANMF claims ought to be dismissed

4. The ANMF proposes significant variation to the Nurses Award. These variations:
  - (a) have previously been advanced for approval by the Commission, and been rejected (both at initial award modernisation in 2009, and in the 2012 Review);
  - (b) are not supported historically by reference to former federal awards and NAPSAs;
  - (c) are not supported by evidence of any general application or probative value; and
  - (d) are not matters, even on their merits alone, that warrant inclusion in a modern award safety net.<sup>2</sup>
5. Flowing directly from the foregoing is the fact that the ANMF variations ought to be dismissed in that they are not necessary to meet the modern awards objective.<sup>3</sup>

## ANMF evidence does not engage industry settings, and does not support variations sought

6. The status of the Nurses Award as an occupational award does not, and cannot, alter consideration of the ANMF's evidence in the context of the different

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<sup>1</sup> Aged and Community Services Australia and Leading Age Services Australia

<sup>2</sup> *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (especially at [23], [31]-[34], and [39])

<sup>3</sup> Section 138 of the FW Act; *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (at [39])

workplaces and industries in which those occupations perform work. In this regard, nursing classifications perform work across the health care sector, including private medical practices, home care, private hospitals, retirement villages and residential aged care facilities.

7. It is readily apparent that the ANMF evidence falls well short of being reflective of the aged care, private hospital or home care sectors / industries, let alone the health care sector at large.
8. All of the ANMF lay witnesses work (or worked) in Queensland and are Registered Nurses. Three of the ANMF lay witnesses work for one organisation, Blue Care. The other two ANMF lay witnesses work for one private hospital, Gympie Private Hospital. It can hardly be asserted that the scope of the evidence of the ANMF's lay witnesses is a representative cross-section of nursing classifications, health care services, health care businesses, or the sectors or industries within the health care sector.
9. To the extent that the ANMF expert witness evidence is to be considered, it is at best an academic research summary absent any factual foundation or linkage to lay evidence before the Commission. Although it satisfies the very low bar of broad relevance, it is not evidence upon which any of the ANMF's variations will turn upon in terms of probative evidence justifying alteration of the award safety net.

#### **ANMF Claim 1: In-charge allowance – Registered Nurses Levels 1 and 2**

10. The ANMF submissions deal with the variation in respect of a new in-charge allowance under the Nurses Award at paragraphs [4]-[23].
11. The first point to highlight is that none of the ANMF's submissions or evidence deal with changed circumstances since the consideration of this claim during the initial award modernisation process in 2009. Importantly, none of the ANMF's submissions engage with the findings made by his Honour, Vice President Watson, in the 2012 Review of the Nurses Award in [2012] FWA 9420 (at [23]).
12. Although it is true that the findings of VP Watson are not binding on this Full Bench, it is submitted that this Full Bench, if it is going to make a finding in this Review contrary to that of his Honour, will need to identify a clear basis upon which his Honour's findings no longer apply. The ANMF has done nothing to assist the Full Bench in this Review to that end, by way of evidence or submission.

13. The second point to highlight is the scope of the in-charge allowance proposed. It is not just a facility that the Registered Nurses would be in-charge of to qualify for the allowance, but extends to a “section of a facility”. Exactly what “section” means or extends to has not been defined or explained by the ANMF. Exactly why such an allowance should extend so broadly is likewise unexplained (on the evidence or by way of submission).
14. It is submitted that the ANMF’s claim for an in-charge allowance ought to be dismissed. The claim is unconvincing as a matter warranting variation of the safety net by reference to previous decisions of the Commission, and the manner in which it has been framed. It remains a matter best left for bargaining at the enterprise level.

**ANMF Claim 2: Leading Hand allowance – Nursing Assistants and Enrolled Nurses**

15. Given the ANMF makes no submissions as to its claim for a leading hand allowance, it is unclear as to whether the claim is still pressed.
16. In any event, there has been no evidence advanced by the ANMF in this Review to support its claim for a leading hand allowance. It is submitted that the ANMF claim for a leading hand allowance must be dismissed. It simply cannot succeed, and indeed warrants no consideration in the first place, absent any evidence to support it.

**ANMF Claim 3: The on-call claims (remote call, excessive on-call (additional annual leave), free from duty and on-call, and rest breaks between rostered work)**

17. All of the ANMF’s on-call claims centre around nurses who are on-call receiving significantly new entitlements, both as to time off, leave and money.
18. ACE has put forward a “remote communication allowance” as the appropriate safety net change to deal with the occurrence of nurses “agreeing” to be on-call outside of their rostered shift.
19. ACE’s submissions dated 19 February 2018 (from paragraph [3.1] onwards) identify the basis upon which its claim in respect of on-call ought to be made, and the ANMF’s on-call claims ought to be dismissed. ACE rely upon these submissions in reply.

#### **ANMF Claim 4: Meal breaks (timing and compensation)**

20. The ANMF's claim to regulate the time at which meal breaks are taken during a shift was rejected in the 2012 Review.<sup>4</sup>
21. The ANMF in this Review (by way of submissions or evidence) has identified no changed circumstances since the 2012 Review warranting reconsideration by this Full Bench of that rejection. Further, the ANMF in this Review has failed to engage with the findings made by his Honour, Vice President Watson, in the 2012 Review.
22. Again, the ANMF's evidence in the Review is limited to Blue Care, and Gympie Private Hospital. It hardly reflects endemic non-compliance across the health care sector.
23. If there be any issue as to the ability of nurses to take meal breaks, it is not to be resolved by further regulation (and further exposure to pecuniary penalty for non-compliance). Under existing award provisions, employees are to receive the benefit of a meal break. If such benefit is not provided, award dispute procedures, and enforcement proceedings through the courts, enable the matter (or related concerns) to be resolved. Further regulation in the form proposed by the ANMF takes the matter no further.

#### **Aged Care Employers**

19 March 2018

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<sup>4</sup> [2012] FWA 9420 (at [42])