



Australian
Nursing &
Midwifery
Federation

4 Yearly Review of Modern Awards (AM2016/31)

Submissions regarding
substantive claims re *Nurses Award*

12 February 2018

Introduction

1. The Australian Nursing and Midwifery Federation (ANMF) makes the following submissions in accordance with Directions regarding the *Nurses Award 2010* ('the Award') issued by the Fair Work Commission on 28 November 2017.
2. These submissions should be read in conjunction with previous written submissions and draft determinations filed on 17 March 2017, reply submissions dated 22 May 2017, and oral submissions of 27-28 November 2017.
3. There are four broad categories of ANMF claims regarding the Nurses Award:
 - allowances
 - on-call and recall
 - rest break between rostered work
 - meal breaks

Allowances

In-charge allowance

4. The ANMF submits that the written evidence (discussed in previous submissions) and oral evidence (discussed below) shows that registered nurses (RNs) in charge of facilities assume significant additional responsibilities in addition to their normal duties and, as such, should be compensated for those responsibilities under the Nurses Award in the form of an in-charge allowance.
5. These duties are significant in the sense that they take up a considerable amount of time, adding to an RN's workload.
6. These responsibilities are also significant in the sense that many of these additional duties would fall within a higher classification in the award, for example Registered Nurse level 3 (RN3) whose descriptors include "allocation and rostering of staff" and being "accountable for the management of human and material resources." The evidence of the ANMF witnesses clearly falls within some of these RN3 duties.
7. It is important to note that, if employed directly under the award, these additional duties are not being compensated for. They are not RN1 or RN2 duties but are duties performed at a higher level. The ANMF submits that the safety net is not fair and relevant to the extent that it does not include an allowance for being in charge.
8. The individual factors in the modern awards objective has been previously dealt with in earlier submissions, however in relation to objections to the allowance on the grounds of employment costs, the ANMF submits that the amount that would be added to labour

costs would not be high as the allowance would be applicable to (at most) one RN on each shift.

Oral evidence regarding maintenance duties

9. Sometimes nurses in charge are required to perform maintenance duties, which can take significant amounts of time.
10. In addition to her written evidence,¹ the ANMF witness Ms Matthews noted that she was required to fix a gate to secure the premises so that residents could not escape from the facility. She would need to get out a screwdriver and fix it night after night because it was not attended to, even when she raised it with the maintenance officer.²
11. As Matthews notes, specialist maintenance employees were either not on duty or not available to assist. In her case, there was a maintenance officer on site from 5.30am until 1.30pm but had left by the time she would get to work for her evening shift (at 2.15pm). Additionally, she was not allowed to call him after hours. When she would call the help desk for assistance, or her manager, no one would answer. The same thing would occur regarding an on call property number for her to call.³
12. Ms Fletcher makes clear that maintenance duties are not duties that would normally be done by an RN1/2 nurse: "if the manager was there they would probably maybe take it to the manager."⁴
13. Ms McLaughlin-Rolfe confirms that nursing staff will be asked to perform maintenance duties (as well as supervise kitchen staff and deal with security issues) if they arise outside ordinary business hours (ie an evening or weekend shift).⁵

Oral evidence regarding telephone calls

14. Ms Matthews noted in her oral evidence that carers usually cannot deal with any calls they get and so they put them through to her.⁶

Oral evidence regarding answering the front door for visitors

15. Ms Matthews constantly raised at RN meetings 'the time that it took to be constantly answering the front door'. Families would have to 'constantly ring the staff to let them in'. There was talk of a solution, but this had not occurred by time she resigned.⁷

¹ Matthews at [6]

² PN182-183

³ PN 178-180

⁴ PN340-345

⁵ [7c], PN 402-404

⁶ PN186-189, statement at [7]

⁷ PN195-197, statement at [9]

Oral evidence regarding supervision of other staff

16. Ms Matthews affirmed that she was “responsible for managing [AIN’s] time as well as [her] own”.⁸

17. Ms McLaughlin-Rolfe statement is consistent with the evidence of ANMF witnesses regarding duties performed by in-charge nurses:

The additional duties performed by nurses that are ‘in charge’ differ depend on the facility requirements in question, but normally include supervising staff, overseeing patient care, communicating directly with management and (if necessary) organising replacement staff.”⁹

18. There is therefore no dispute between the parties regarding the types of duties performed by in-charge RNs.

19. In her oral evidence, Ms McLaughlin-Rolfe agreed that:¹⁰

- it is not uncommon for staff to call in to say they cannot attend work
- if you are the person trying to replace staff, it will be the case that potential replacements will sometimes not answer their phones
- potential replacements may take some time to respond to any messages they receive; and
- if you are the person trying to replace staff, sometimes you will have to call an agency to obtain a replacement.

20. The ANMF submits that when all these additional tasks are considered, on top of regular duties, there are serious workload issues. In the circumstances, it is entirely justified that compensation be provided for in the safety net.

Assistance from other staff

21. Other parties have asserted that nurses in charge can contact their manager or other staff for assistance.

22. The ANMF submits that this argument misses the point. The evidence establishes that most of the additional duties performed by RNs in charge are *expected* to be done by the nurse in charge of the facility *without* contacting other staff, for example rostering, answering phones, and letting people into the facility.¹¹ It would not be expected that the manager would be called in relation to most of these issues. It is only if there is an ‘emergency’-like event that they would be expected to call the manager or another staff member. Even in the situation of urgent maintenance, which might fall into this category, the evidence

⁸ PN206

⁹ [6]

¹⁰ PN397-401

¹¹ See also Ms Fletcher PN308-314. PN314: “It’s because you’re the responsible person on duty. You’re the responsible person. You’re the only person. You will have to deal with whatever ...”..

shows that frequently the nurse in charge needs to fix the problem themselves, for example because phones are not answered.

23. Further, even in relation to day shifts, the registered nurse will frequently be the only RN on premises because a manager may or may not be there.¹²

On-call and recall

Remote recall

24. To ensure that the Nurses Award is a fair and relevant safety net, the ANMF submits that there must be suitable compensation for nurses who are required to perform work during otherwise off-duty hours, including work performed by telephone or computer or text message.
25. As noted in the November 2017 hearing, the only argument on this clause is really how much should be paid.¹³
26. The ANMF submits that it needs to be clear in the award what the rate is. The rate should be an overtime rate and there should be a minimum amount paid for each time somebody gets called up to perform work remotely.
27. In determining the suitable rate, the number and length of telephone calls (or other methods of contact) and follow up work should be taken into account. Similarly, the impact on the witnesses including disruptions to sleep should be considered.

Excessive on-call

28. The ANMF submits that the current award amount is insufficient to compensate employees for the impacts on them of being rostered on-call, especially if significant amounts are performed.
29. The ANMF evidence shows how frequent being rostered on call can be at particular workplaces and that significant amounts of rostered on call is occurring, including on top of actual duty.
30. Ms Ball's evidence shows how frequent being rostered on call can be at particular workplaces.

¹² PN273

¹³ PN97 per Catanzariti VP

31. In her written statement, Ms Ball stated that in addition to her 38 hours per week work, on average once every fortnight, she was rostered to be on-call on both Saturdays and Sundays from 06:00 to 19:00.¹⁴ This statement should be accepted for the following reasons.
32. Ms Ball was cross-examined on this statement by reference to a Blue Care report (exhibit BC2) which purported to show that she only performed on-call work on Saturdays. Ms Ball was adamant that when she did on-call work for Blue Care, she did it for both Saturday and Sunday (and sometimes public holidays)¹⁵ and could not understand why the report suggested otherwise.¹⁶
33. Ms Ball also stated, when questioned on the report, that she found it hard to believe she was not on-call between 2008 and 2012.¹⁷
34. Ms Ball's oral evidence was that, from memory, she was paid for on-call "about \$70 for a weekend ... for both days."¹⁸
35. Blue Care was requested by the Bench to produce payroll records (payslips) if it was asserting that Ms Ball only worked Saturdays.¹⁹
36. Blue Care sent a letter to the Commission dated 7 December 2017 which attached wage slips for the period from 28 April 2015 until 23 May 2016. The letter stated that after reviewing these payslips it no longer relied on paragraph [18] of Ms McLaughlin-Rolfe's statement (which had relied on the Exhibit BC2).
37. Many of the payslips provided by Blue Care have a notation "NEA OC Sat" and "NEA OC Other":
- 26 May 2015 to 8 Jun 2015
 - 9 Jun 2015 to 22 Jun 2015
 - 7 Jul 2015 to 20 Jul 2015
 - 21 Jul 2015 to 3 Aug 2015
 - 4 Aug 2015 to 17 Aug 2015
 - 18 Aug 2015 to 31 Aug 2015
 - 1 Sep 2015 to 14 Sep 2015
 - 13 Oct 2015 to 26 Oct 2015
 - 27 Oct 2015 to 9 Nov 2015
 - 19 Jan 2016 to 1 Feb 2016
 - 16 Feb 2016 to 29 Feb 2016
 - 26 Apr 2016 to 9 May 2016

¹⁴ [4]

¹⁵ PN566

¹⁶ PN582-583

¹⁷ PN600.

¹⁸ PN584

¹⁹ PN587-589, PN613.

38. "NEA" probably refers to "Nurses EA".
39. The amounts paid for "NEA OC Sat" correspond to the amount payable for being rostered on-call on Saturday pursuant to clause 7.5.1(b) and Schedule 2 of the *Blue Care/Wesley Mission Brisbane Nursing Employees Enterprise Agreement 2013* (\$36.00 per shift from January 2015, \$36.72 from July 2015, \$37.08 from January 2016).
40. Similarly the amounts paid for "NEA OC Other" correspond to the amount payable for being rostered on-call on a Sunday, public holiday or ADO (\$47.99 from January 2015, \$48.95 from July 2015, \$49.44 from January 2016).
41. For each period on-call was performed, there is at least one entry corresponding to "NEA OC Other", ie. Sunday or public holiday. For all except one period (16 Feb 2016 to 29 Feb 2016), Ms Matthews was also paid the rate for performing on-call on a Saturday. The amounts paid also suggest that sometimes *two* Sundays/public holidays were worked in a fortnight (eg. 9 Jun 2015 to 22 Jun 2015 (\$72 paid), 18 Aug 2015 to 31 Aug 2015).
42. The dates in the payslips also match those in the on-call report (**exhibit BC2**), which only referred to "Saturday". For example, the payslip for 26 May 2015 to 8 Jun 2015 shows two payments for on-call (one for Saturday and one for "other"), while exhibit BC2 suggests that on-call was only performed during this period on Saturday 30 May 2015.
43. This demonstrates conclusively that exhibit BC2 is completely unreliable for the period from April 2015 until May 2016, and should also be considered probably incorrect for the period between 2008 and 2012. The conclusion should be drawn that, when rostered on-call, Ms Ball was rostered on-call for the whole weekend, not just Saturdays.
44. The payslips provided by Blue Care thus support Ms Ball's witness statement and oral evidence. The payslips show that Ms Ball was rostered on-call 28 times in 11 months and, within this period, 22 occasions in just over 5 months (30 May 2015 until 7 November 2015).
45. It is also likely that Ms Matthews was on call Sundays and public holidays as well as Saturdays in the period prior to April 2015 (ie. where payslips have not been provided) and therefore that the amount of on-call in Exhibit BC2 should be at least doubled.
46. The ANMF submits that performing on-call 28 times in 11 months is a significant number, in fact more frequent than the "on average once every fortnight" referred to in Matthews' statement. 22 occasions in five months is a very high level of on-call. The ANMF submits that such evidence supports the ANMF's contention that the existing levels of compensation for performing on-call is inadequate and needs to be increased.

The Wirunya etc roster (exhibit ANMF6)

47. Exhibit ANMF6 similarly shows significant levels of on-call.²⁰ Unlike Ms Ball, whose on-call shifts were in community aged care, Exhibit ANMF6 is a residential aged care roster relating to three residential aged care facilities.²¹
48. The roster is for a four month period from December 2016 until March 2017. The roster also shows that RNs who were rostered on for Saturday were also rostered on for Sunday and Friday.²²
49. The roster shows that the relevant RNs were rostered on for between 5 and 16 on call shifts over this 4-month period, as follows:²³
- Esther - 16
 - Patrice - 13
 - Jenni – 12
 - Yamin - 12
 - Susanne – 9
 - Charity - 9
 - Pauline – 8
 - Pawan – 8
 - Weina - 8
 - Sue F – 7
 - Angelica – 7
 - Kahchan - 7
 - Cherise – 5
50. Thirteen people are on the roster performing 121 shifts over the four months. The average on-call is therefore 9.3 shifts per person over the 4 months.²⁴ If this amount was extrapolated, then the average amount of on-call shifts performed by an RN over a full year would be about 28 shifts.
51. The ANMF submits that such evidence also supports the ANMF's contention that the existing levels of compensation for performing on-call is inadequate and needs to be increased.

Free from duty

52. The evidence also demonstrates that nurses experience a lack of time free from both duty and on-call, and has significant impacts upon them.

²⁰ See oral evidence from PN430

²¹ PN431-432

²² PN460-461

²³ PN481-282

²⁴ PN484

53. There is evidence that there are inadequate breaks from *all* work commitments, ie. both work *and* on-call.
54. The payslips provided by Blue Care support Ms Ball's witness statement and oral evidence, and therefore support the free from duty claim. As noted above, Ms Ball was rostered on-call 28 times in 11 months and, within this period, 22 occasions in just over 5 months. Ms Ball's evidence is that she was rostered on-call *on top of* a 38-hour week.²⁵ In other words, on average she would not receive four full days clear from work and on-call in each fortnight (as sought by the ANMF). Ms Ball has outlined in her statement the impact of such arrangements.²⁶

Rest break between rostered work

55. Oral evidence in the November 2017 hearings did not directly relate to this ANMF proposal, however the ANMF notes and relies on the submissions and evidence previously filed.

Meal breaks

Timing of meal break

56. The ANMF submits that the evidence shows that nurses are either not getting meal breaks at all or, if they are, these meal breaks occur after many hours of work.
57. The oral evidence of Ms Matthews supports her written statement²⁷ that she usually had no time to take a meal break:

There was just not any time. I could either look after the residents or I could have a meal break, but I couldn't do both unless I wanted to leave something undone."²⁸

58. It got to the point where even her assistants were not having breaks.²⁹
59. Even if it is correct that Ms Matthews did not submit claims for ordinary time/overtime for missed meal breaks,³⁰ this does not contradict her evidence of being unable to take meal breaks. In any event, she provided a reason for not submitting claims for payment regarding meal breaks, ie. she was told by a manager in 2015 to stop writing overtime on her time sheets because Blue Care could not afford it. She therefore would not always write that she had missed a meal break because she knew she was not going to be paid for it.³¹

²⁵ Matthews statement at [4]

²⁶ Matthews statement at [9-10]

²⁷ [13] – [23]

²⁸ PN207

²⁹ PN208

³⁰ PN213nn

³¹ PN214, PN226, PN233-238

60. The numerous workload forms attached to her statement also demonstrate that Ms Matthews consistently had workload problems and raised these with management. It is perfectly logical in that context that meal breaks would be missed. If any criticism can be made about the form of her complaints, it is that Ms Matthews focused on the risks to the safety of the residents she had responsibility for rather than on her own financial entitlements.
61. In any event it is noted that, in the attachments, there is a document headed “Workload concerns for registered staff for both 0700-1500hrs and 1445-2115hrs shifts” (from 2015). The last dot point referring to the 1445-2115hrs shift (the evening shift) states that “Staff regularly do not have a dinner break.”
62. Susan Fletcher’s oral evidence is of similar import to that of Cherise Matthews,³² highlighting the high workloads which leads to meal breaks not being taken, for example:
- ... actually [being paid for not taking the meal break] isn’t really the point. It’s the workload that makes it so you don’t get your meal break. The point of my statement is that the workloads are untenable really.³³*
63. As previously submitted, the existing award clause which provides for overtime if a meal break is not taken is effectively redundant. This is because, if there is no set time to take a break, there is nothing in the award which can trigger the overtime entitlement.
64. Ms McLaughlin-Rolfe confirms the ANMF submission that, under the Blue Care agreement and in practice at the workplace, there is no set time to take a meal break.³⁴
65. It is evident from the wording of the award, and of the Blue Care enterprise agreement, that because there is no set time to take a meal break, it is very difficult to establish when the entitlement to overtime would commence. The ANMF submits therefore that its claim to require the meal break to be taken between the fourth and sixth hour after commencing work is necessary to ensure that the award is fair and relevant.
66. The argument that this proposal would increase employer costs is a broad assertion without evidence. In any event, it is essentially an argument that employers should be able to avoid employment of additional staff (or implementation of better meal break practices) by passing on unsustainable workloads to employees. While it is preferable that employees are able to take meal breaks at a time which will avoid fatigue, the award to be fair and relevant requires that employers have to pay overtime if meal breaks are delayed or not occurring, and there needs to be a clause which clearly triggers that overtime payment.

³² In addition to her statement at [19-27]

³³ PN326

³⁴ Statement at [29], [30b], PN494-497

67. The ANMF notes that the Private Hospital Industry Employer Association agrees with the ANMF that clarification around the words 'remaining available' is required. The ANMF is considering an alternative wording for the clause proposed by the PHIEA.³⁵

³⁵ PN121