



## 4 Yearly Review of Modern Awards (AM2016/31)

Submissions in reply regarding  
substantive claims re *Nurses Award*

19 March 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. The ANMF makes the following submissions in reply to substantive variations to the Award sought by other parties.
3. 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, oral submissions of 27-28 November 2017 and submissions dated 12 February 2018.

## **Rostering**

4. The ANMF refers to paragraph [2.5] of the Aged Care Employers (ACE) submissions dated 19 February 2018 which purports to outline the proposed variation to the rostering clause in the Nurses Award.
5. The underlining in the proposed clause is incorrect. It is our understanding that the amendment proposed by ACE is not to clause 8.2(d) but to clause 8.2(e). The words "unless the employer otherwise agrees" are already in clause 8.2(d) of the exposure draft of the Nurses Award dated 10 November 2017 and also are in the existing Nurses Award rostering clause 25.3.
6. On the other hand, the words "unless the employee otherwise agrees" are not in either the exposure draft clause 8.2(e) or the existing rostering clause 25.4.
7. The ACE rostering proposal, as originally set out in its submissions dated 15 July 2015, proposed an amendment to clause 8.2(e) of the exposure draft, not 8.2(d). The ACE's submissions of February 2018 thus appear to have transcribed the proposed amendment wrongly.
8. As such, the ANMF submits that the ACE submissions at [2.10] are irrelevant. If a roster change at short notice is 'prompted at the request of employees' or 'employees often want to change their shifts', then these can be accommodated within the wording of the existing clause 8.2(d) of the exposure draft:

*Unless the employer otherwise agrees, an employee desiring a roster change will give seven days' notice except where the employee is ill or in an emergency.*

9. Pursuant to that clause, an employee requesting a roster change in a time period shorter than seven days *can* obtain it if the employer agrees or in the event that the employee is ill or in an emergency.
10. Regarding the ACE proposal for employer-initiated changes, the ANMF refers to its submissions dated 22 May 2017,<sup>1</sup> including the following comments at paragraphs [11]:

*The ANMF also has concerns that the imbalance in bargaining power between employers and employees means that employees may feel pressured to agree to changes they do not really wish to agree to. As pointed out by a seven member Australian Industrial Relations Full Bench in Re Award Modernisation (2009) 181 IR 19 at [148] in relation to the making of the Nurses Award among other health awards:*

*We have some reservations about the nature of the consent in circumstances where a supervisor directly requests a change in hours on a day where the part-timer had otherwise planned to cease work at a particular time. Existing provisions require that any amendment to the roster be in writing and we have retained this provision. We also have no doubt that many part-time employees would welcome the opportunity to earn additional income. However, there may also be part-timers who would be concerned to ensure that their employment is not jeopardised by declining a direct request from a supervisor to work additional non-rostered hours at ordinary rates. From the submissions of the employers this is a major cost saving and used widely.*

11. The paragraph from the Award Modernisation decision has also been referred to more recently in the *Casual Employment and Part-time employment* Decision of 5 July 2017.<sup>2</sup>
12. These cases and the discussion above highlights that there is a valid reason for different requirements in the existing award clause between, on the one hand, employee requests (which can already be accommodated) and, on the other hand, employer requests for changes to rosters.
13. At the very minimum, as emphasised in the cases referred to above, any clause specifically providing for agreement by employees to changes to rosters initiated by employers should require that any agreement be evidenced in writing.

### **Remote communication allowance, on-call allowance and other provisions**

14. Regarding the ACE proposal to introduce a remote communication allowance and make other changes in relation to work performed away from the workplace, the ANMF refers to its own claim regarding remote recall and to previous submissions.

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<sup>1</sup> [3-11]

<sup>2</sup> [2017] FWCFB 3541 at [95]; see also [96-97]

15. As noted previously, in our submissions of May 2017,<sup>3</sup> the Aged Care Employers proposal would:
- introduce a new remote communication allowance
  - halve the existing on-call allowance
  - remove the existing entitlement to an eight hour rest break between rostered work
  - remove the existing entitlement to a ten hour break after performing overtime, except where an employee performs remote work for three or more hours
  - specify that the existing recall to work provisions do not apply.
16. It is important to note that the ACE proposal has several parts. If one part is granted it does not follow that the other parts need be granted. The issue is not solely about how much should be paid if an employee is required to perform remote work.<sup>4</sup>
17. The following submissions deal with each of these parts in turn.

#### *Remote communication allowance (RCA)*

18. It is important to note that the proposed “remote communication allowance” (RCA) is, in the wording of the ACE’s proposed clause,<sup>5</sup> the payment for the “time actually worked”, not the whole package (including the on-call allowance). Some of the ACE submissions confusingly use the term “remote communication allowance” for the latter.<sup>6</sup>
19. Regarding the RCA itself, we refer to previous ANMF submissions dated 12 February 2018 and 22 May 2017.<sup>7</sup>

#### *On-call allowance*

20. The ANMF opposes the proposal by ACE to halve the amount of the existing on-call allowance for employees required to be on call to provide assistance remotely.
21. The ACE provides no rationale for the proposed reduction of the on-call allowance by 50% for these employees.
22. The ACE’s arguments regarding an alleged lower “level of disutility to employees who are on-call for or recalled to perform remote work”<sup>8</sup> are directed at the circumstance of

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<sup>3</sup> At [13]

<sup>4</sup> PN97 per Catanzariti VP

<sup>5</sup> Proposed clause 11.3(b)(i)b, as contained in [3.2] of ACE subs of February 2018

<sup>6</sup> For example, see the incorrect reference to “Remote Communication Allowance at 50% of the current on-call allowance” in [3.9]

<sup>7</sup> especially [16-17] and [21] of submissions of 22 May 2017.

<sup>8</sup> ACE [3.7]

*performing* work rather than the state of being on-call *per se* (the latter of which is the reason for receiving the *on-call* allowance).

23. In any event, the aged care employers have provided no evidence in support of its assertions, especially those in paragraph [3.7] regarding the alleged lower level of disutility for on call and recall work.
24. On the contrary, being on call to perform work remotely poses the same inconvenience to an employee as being on call for physical recall.
25. In support of this, we note the comment in paragraph [9] of the statement of the ANMF witness Felicity Ball (Exhibit #ANMF7):

*Furthermore, being on call limited the weekend activities with my family, as I needed to be at home or close by and I was unable to travel too far on weekends.*

26. Contrary to the assertion in ACE paragraph [3.7] that Ms Ball's comment demonstrates a higher level of disutility when an employee is on-call for an "*actual* recall to work" (emphasis added), we note that Ms Ball's statement is actually referring to being on-call to perform work *remotely*. The rest of her statement demonstrates that the work she performed while she was on-call was done remotely (eg. by text, phone calls).<sup>9</sup> Her comment regarding needing 'to be at home or close by' and being 'unable to travel too far' applies to work performed remotely.
27. The statement of Professor Drew Dawson and Dr Jessica Paterson (Exhibit #ANMF3) provides further evidence of the impacts of on-call work, even in the absence of a call (ie. even if work is not performed), for example:

*.. on-call work, even in the absence of a call, [is] associated with significant cost to the employee ...<sup>10</sup>*

*... sleep obtained during these on-call periods is not comparable to sleep obtained during an off-duty period, regardless of whether a call occurs.<sup>11</sup>*

*Even sleep that occurs in the individual's home, but which may be disrupted by a call, has been shown to be negatively affected by the anticipation of a call ... even without receiving a call ...<sup>12</sup>*

*"the mere possibility of being disturbed by calls shows negative consequences"<sup>13</sup>*

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<sup>9</sup> Eg. see [5-9]

<sup>10</sup> [6]

<sup>11</sup> [8]

<sup>12</sup> [9]

<sup>13</sup> [11]

28. This evidence demonstrates that the disutility of being on-call arises whether or not the on-call shift is for the purpose of physical recall to work or for performing recall duties away from the usual workplace. Accordingly, the ANMF submits that the ACE proposal to halve the on-call allowance for a subgroup of employees who are on-call should be rejected.
29. The ANMF further notes that the ACE has made references to clauses in other awards in support of its various proposals.
30. In response to this, the ANMF submits that conclusions cannot be drawn from other industries without more detail of the circumstances in those other industries.
31. Further, the ACE's references to other awards is selective in its use of those clauses. For example, while ACE has referred to the clause in the *Nurses and Midwives (Victoria) State Reference Public Sector Award 2015*, we note that they have not pointed out that the *on-call* allowance in that award is the same for all types of on-call work, ie. whether it is for recall work performed in person or for work able to be performed without having to return to the workplace.<sup>14</sup>

#### *Other provisions*

32. The Aged Care Employers have provided no rationale in support of their proposals to:
  - remove the existing entitlement to an eight hour rest break between rostered work
  - remove the existing entitlement to a ten hour break after performing overtime, except where an employee performs remote work for three or more hours, and
  - specify that the existing recall to work provisions do not apply
33. At paragraph [3.20] of its February 2018 submissions, ACE argues that these are "machinery provisions to give effect to ACE's new clause 11.3(b)", ie. the remote communication allowance. The ANMF submits that, on the contrary, these are not merely machinery provisions,<sup>15</sup> but affect actual entitlements. These proposals are not required 'to give effect' to their RCA because the RCA provision could operate without them. The ACE provides no explanation or analysis regarding their import or why they are necessary to give effect to the RCA or to meet the modern awards objective.

#### *Eight hour rest break between rostered work*

34. We refer to our submissions dated 22 May 2017 which outlines why the ACE proposal to provide that the exposure draft clause 8.4 regarding rest breaks between rostered work would not be applicable where an employee performs remote recall is simply unnecessary.<sup>16</sup>

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<sup>14</sup> Clause 14.4(a)

<sup>15</sup> Except perhaps the proposal that the existing recall to work provisions do not apply

<sup>16</sup> see [20] in our May 2017 subs.

*Ten hour break after performing overtime*

35. We refer to our submissions dated 22 May 2017 which outlines the reasons for the ANMF's opposition to the ACE proposal to provide that the existing minimum rest period after overtime of ten hours would not apply where an employee performed remote recall work for less than three hours.<sup>17</sup>

**Meal breaks**

36. We note the submissions of the Australian Industry Group dated 2 February 2018, referring to earlier submissions.
37. In response the ANMF refers to its earlier submissions regarding meal breaks, especially those dated 22 May 2017,<sup>18</sup> 12 February 2018<sup>19</sup> and 17 March 2017.<sup>20</sup>

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<sup>17</sup> see [18-19] of May 2017 subs.

<sup>18</sup> At [22-28]

<sup>19</sup> At [56-67]

<sup>20</sup> At [89-119]