DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Nurses Award 2010
(AM2016/31)

Health and welfare services

VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT BOOTH
COMMISSIONER CRIBB SYDNEY, 3 DECEMBER 2018

4 yearly review of modern awards – Nurses Award 2010 – substantive issues.

1. Introduction and background

[1] This Full Bench was constituted to hear and determine the substantive claims relating to the *Nurses Award 2010* (Nurses Award) as part of the 4 yearly review of modern awards (the Review) conducted in accordance with s.156 of the *Fair Work Act 2009* (Cth) (the Act).

[2] This matter was heard before the Full Bench on 27 and 28 November 2017. Witness evidence was given by Ms Felicity Ball, Ms Susan Fletcher and Ms Cherise Matthews on behalf of the Australian Nursing and Midwifery Federation (ANMF) and Ms Maria McLaughlin-Rolfe on behalf of Blue Care.

[3] The ANMF also tendered the witness statements of Mr Drew Dawson, Ms Sherrelle Fox, Ms Sonia Le Compte and Ms Jessica Patterson. Aged Care Employers (ACE) tendered the witness statements of Mr Mark Douglas, Mr John Favaloro, Ms Karen Foster and Ms Kalina Jefferson. None of those witnesses were the subject of cross examination. Ms Kym Fell made a written submission concerning the importance of primary health care and the significant role of the Practice Nurse.

[4] Permission to appear was granted to Ms L Doust of Counsel on behalf of the Health Services Union of Australia (HSU); Mr Boyce of Counsel on behalf of ACE; Ms C Brattey on behalf of Blue Care and Ms K Thomson on behalf of the Australian Business Industrial and the New South Wales Business Chamber (ABI and NSWBC).

[5] Before dealing with the specific claims before us we outline the legislative context relating to the Review.

2. The legislative context

[6] Section 156 of the Act requires the Commission to conduct a 4 yearly review of modern awards as soon as practicable after 1 January 2014.

[7] Subsection 156(2) deals with what must be done in the Review:

> (2) In a 4 yearly review of modern awards, the FWC:
>
> (a) must review all modern awards; and
>
> (b) may make:
>
> (i) one or more determinations varying modern awards; and
>
> (ii) one or more modern awards; and
>
> (iii) one or more determinations revoking modern awards.
>
> (c) must not review, or make a determination to vary, a default fund term of a modern award.
>
> Note 1: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).
> Note 2: For reviews of default fund terms of modern awards, see Division 4A.

[8] Subsection 156(5) provides that in a Review each modern award must be reviewed in its own right. In *National Retail Association v Fair Work Commission* the Court noted the purpose of the 'in its own right' requirement is to ensure the review is 'conducted by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations'.[1]

[9] The 'scope' of the Review was considered in the Preliminary Jurisdictional Issues Decision. It was acknowledged in that decision that 'the Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a stable modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variations'.[2]

[10] The modern awards objective is set out in s.134(1) of the Act, as follows:

> **134 The modern awards objective**
>
> *What is the modern awards objective?*
>
> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

> (a) relative living standards and the needs of the low paid; and
>
> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
>
> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
>
> This is the modern awards objective.
>
> *When does the modern awards objective apply?*
>
> (2) The modern awards objective applies to the performance or exercise of the FWC's modern award powers, which are:
>
> (a) the FWC's functions or powers under this Part; and
>
> (b) the FWC's functions or powers under Part 2 6, so far as they relate to modern award minimum wages.
>
> Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

[11] No particular primacy is attached to any of the above considerations and not all will necessarily be relevant in the context of a particular proposal to vary a modern award.[3]

[12] Section 138 of the Act provides that terms included in modern awards must be 'necessary to achieve the modern awards objective'. What is 'necessary' will involve a value judgment based on the assessment of the considerations stated in s.134(1)(a)-(h), having regard to the submissions and evidence.[4]

[13] The modern awards objective applies to the exercise of the Commission's modern award powers which are defined to include the Commission's functions or powers under Part 2–3 of the Act. The Review function is set out in s.156, which is in Part 2–3 and therefore will involve the performance or exercise of the Commission's modern award powers.

3. The claims

[14] The initial claims sought by the parties were summarised in a document that was published on the Commission's website in November 2017. Claims relating to the Nurses Award were made by the ANMF, the Australian Industry Group (Ai Group), and ACE. Each of these claims is dealt with below.

[15] The ANMF proposes the introduction of an in-charge allowance for registered nurses.[5] They seek to insert a new clause into the Nurses Award in the following terms:

> "16.6 In charge allowance
>
> (a) A registered nurse who is designated to be in charge of a facility during the day, evening or night shall be paid in addition to his or her appropriate salary, whilst so in charge, the per shift allowance set out as follows:
>
> (i) in charge of facility of less than 100 beds – 2.75% of standard rate
>
> (ii) in charge of facility, 100 beds or more – 4.44% of standard rate
>
> (iii) in charge of a section of a facility – 2.75% of standard rate
>
> (b) This clause shall not apply to registered nurses holding classified positions of a higher grade than registered nurse – level 2."[6]

Submissions

ANMF

[16] The ANMF submits that its proposed variation seeks to address the situation where a registered nurse of a lower classification is required to take charge of a facility which results in the nurse taking on significant additional responsibilities in addition to their normal duties without appropriate compensation under the Award.[7] The ANMF submits that the types of responsibilities assumed by nurses when in charge are not encompassed within the existing classification descriptors of registered nurse levels 1 and 2, and therefore such classifications are not adequately compensated when performing 'in charge' duties. The ANMF submits that the absence of appropriate compensation in such circumstances means that the Award is not meeting the modern awards objective as it is not providing for a fair and relevant minimum safety net.

[17] Although a similar claim was previously rejected in the 2012 Transitional Review,[8] the ANMF submits that the scope of the 4-yearly review is wider than that of the 2012 review

and there are other factors in the modern awards objective that were not referred to during the 2012 review process.

ACE and Private Hospital Industry Employers' Associations (PHIEA)

[18] ACE and the PHIEA oppose the ANMF's claim, submitting that the claim is merely a re-agitation of items previously considered during the award modernisation process and in the 2012 Transitional Review. [9] The PHIEA further submit that the evidence provided by the ANMF falls short of the threshold which should be necessary to support a substantive variation to the minimum safety net provisions of the Nurses Award.[10]

Blue Care

[19] Blue Care opposes the ANMF's proposed variation to the Award claiming that the ANMF's submissions have already been considered and rejected by the Commission in the 2012 Transitional Review.[11] Blue Care submits that the quantum of the allowance sought by the ANMF far exceeds the amount contained in the Blue Care Enterprise Agreement and goes beyond what is fair and appropriate compensation as a minimum safety net for additional 'in charge' duties required to be performed.[12]

Ai Group

[20] Ai Group opposes the ANMF's claim and submits that the witness evidence relied on by the ANMF fails to establish any cogent reasons supporting their claim.[13] Ai Group submits that the witness statements do not identify the relevant industrial instruments covering the witnesses and some do not reveal the witnesses' respective classification levels. In respect to the additional duties identified in Ms Le Compte's witness statement, the Ai Group submits that these duties are contemplated by the classification definition under the Award for a registered nurse – level 2 and therefore the minimum rate payable under the Award is intended to compensate her for such work. Ai Group also claims that the witness statements of Ms Matthews and Ms Fletcher refer to a 'supervisory allowance' which is not payable under the Award and which would indicate that the witnesses' are receiving an above-award allowance. The Ai Group submits that this undermines any argument that the allowances sought by the ANMF are 'necessary' in circumstances where employers are already making above-award payments to employees.

Australian Business Industrial and NSW Business Chamber

[21] ABI and NSWBC support the submissions of Ai Group, ACE, the PHIEA and Blue Care in relation to this matter.[14]

Witness evidence

[22] Susan Elizabeth Fletcher, a registered nurse employed at Blue Care, gave evidence in relation to the duties she performs while acting 'in-charge'.[15] Her duties include residents' admission, attending all medication rounds, briefing doctors and attending visits with the General Practitioner. She also claimed additional 'in-charge' duties involved regularly updating quarterly care plans, responding to walk in visitors, answering phone calls on

weekends and after the receptionist leaves and attending to maintenance issues such as kitchen equipment failures or loss of power.

[23] In cross examination, Ms Fletcher was questioned in relation to her statement about the duties she was required to perform whilst being 'in-charge'. She stated that duties relating to 'care plans', 'attending meetings', 'issues' and any events arising from the day were not duties relating to being 'in-charge' they were just additional duties that arise from being the '*responsible person on duty'*.[16]

[24] Sonia Le Compte, registered nurse at Gympie Private Hospital, gave evidence in her witness statement in relation to in-charge duties.[17] She claimed the role includes delegation of duties, replacing staff for absences, dispensing medication, assessing the health of patients and other general nursing duties.

[25] Cherise Nicole Matthews, registered nurse, gave evidence in her witness statement which detailed the duties she is required to complete while in-charge'.[18] These included replacing staff that are sick, attending to care plan reviews, attending to specialist doctor rounds and maintenance issues such as broken perimeter gates, stiff door hinges and fixing faulty air mattresses.

[26] Blue Care called evidence from Maria McLaughlin-Rolfe, General Manager of the Metro South region. Ms McLaughlin-Rolfe gave evidence in respect of the submissions and supporting witness statements filed by the AMNF.[19]

[27] In respect to the in-charge and leading hand allowance claims, Ms McLaughlin-Rolfe stated that the quantum of the allowances sought by the ANMF far exceeds the current allowances under the Blue Care Enterprise Agreement and would impact the organisations labour costs. She stated that the duties and tasks identified in the witness statement of Cherise Matthews' are not tasks generally performed by nurses and nursing managers should be available to deal with such issues when they arise.

Consideration

[28] We are not satisfied that the occurrence of Level 1 and 2 registered nurses being placed in charge is demonstrated such as to warrant a new allowance of the type and quantum sought by the ANMF. The witness evidence did not sufficiently disclose the 'in charge' duties said to be undertaken by Level 1 and 2 registered nurses placed in charge and we are not convinced that the classification descriptors do not already contemplate the duties that were described, especially at Level 2 of the Nurses Award. We do not intend to vary the award as sought by the ANMF.

3.2 Leading Hand allowance

[29] The ANMF proposes the introduction of a leading hand allowance for enrolled nurses and nursing assistants.[20] It seeks to insert a new clause into the Nurses Award in the following terms:

> "**16.7 Leading hand allowance**
>
> (a) A leading hand is an enrolled nurse or nursing assistant who is placed in charge of not less than two other employees of the classification of enrolled nurse or nursing assistant.
>
> (b) A leading hand will be paid a weekly allowance of the amount specified in the following scale:
>
> | **Leading hand in charge of:** | **% of standard rate** |
> |---|---|
> | 2-5 OTHER EMPLOYEES | 2.67 |
> | 6-10 other employees | 3.81 |
> | 11-15 other employees | 4.81 |
> | 16 or more other employees | 5.88 |
>
> (c) This allowance will be part of salary for all purposes of this award.
>
> (d) An employee who works less than 38 hours per week will be entitled to the allowances prescribed by this clause in the same proportion as the average hours worked each week bears to 38 ordinary hours.

Submissions

ANMF

[30] The ANMF submits that supervisory responsibilities of enrolled nurses and nursing assistants are not currently recognised or compensated for in the Nurses Award and are not taken into account in the rates of pay under the Nurses Award.[21]

[31] The ANMF referred to other modern awards in which the leading hand allowance was present as justification for the appropriateness of the allowance in the Nurses Award as a means of achieving the modern awards objective.[22]

PHIEA

[32] The PHIEA opposes the ANMF's claim disagreeing with the ANMF's position that supervisory responsibilities of enrolled nurses and nursing assistants are not recognised or compensated for in the Award or taken into account in the rates of pay. The PHIEA submits that the fact the Nurses Award does not contain a leading hand allowance does not mean it wasn't considered during the making of the Nurses Award. The PHIEA is of the view that the claim would be better confined to enterprise bargaining negotiations.

Blue Care

[33] Blue Care opposes the ANMF's claim and submits that it is a re-agitation of a previous claim which was determined by the Commission in the 2012 Transitional Review process. Blue Care further submits that the ANMF has not provided any new evidence to demonstrate that there are any changed circumstances that require the Commission to revisit the matter.[23]

Ai Group

[34] Ai Group opposes the ANMF's proposed variation. It says that there is no material before the Commission that establishes that employees in relevant classifications are in fact being required to perform supervisory functions, or to the extent that employees are so required, the introduction of the leading hand allowance is necessary. Ai Group submits that the ANMF has not presented any material that might explain the quantum of the allowance sought, and further that the existence of a leading hand allowance in other modern awards does not establish that the allowance is also necessary for the Nurses Award.

ACE

[35] ACE opposes the ANMF's claim and submits that it does not accept the assertion that Enrolled Nurses and Assistants in Nursing are sometimes placed in supervisory roles.[24] ACE submits that both classifications report to registered nurses. ACE further submits that the ANMF has not identified a historical basis where enrolled nurses and assistants in nursing were entitled to the leading hand allowance.

ABI and NSWBC

[36] ABI and NSWBC support the submissions of the Ai Group, ACE, the PHIEA and Blue Care in relation to this matter. [25]

Consideration

[37] The evidence was insufficient to support this claim. There was no evidence that disclosed Enrolled Nurses or Assistants in Nursing being placed in charge that would warrant the provision of a leading hand allowance as claimed by the ANMF. We do not intend to vary the Nurses Award as sought by the ANMF.

3.3 Telephone and other remote recall and Remote Communication Allowance and payment for work performed

[38] The ANMF's claim for 'Telephone and other remote recall' and the ACE's claim for 'Remote Communication Allowance' will be dealt with together.

[39] The ANMF proposes to vary the existing telephone and recall clauses to confirm that they apply to situations where nurses are recalled to perform work remotely, for example via telephone.[26]

[40] The changes they seek to the current award clauses 28.5 and 28.6 are highlighted below in red:

> "**28.5 Recall to work when on call**
>
> (a) An employee, who is required to be on call and who is recalled to work, will be paid or a minimum of three hours work at the appropriate overtime rate. To avoid doubt, this includes any occasion where the work can be managed without the employee having to return to the workplace, such as by telephone.
>
> **28.6 Recall to work when not on call**
>
> (a) An employee who is not required to be on call and who is recalled to work after leaving the employer's premises will be paid for a minimum of three hours work at the appropriate overtime rate. To avoid doubt, this includes any occasion where the work can be managed without the employee having to return to the workplace, such as by telephone."

[41] ACE seeks the insertion of a new clause to provide for the payment of on call and remote communication allowance to employees who provide advice or assistance remotely.[27] That is, where an employee's advice or assistance is sought by means of telephone, text, web chat or email, as opposed to the employee being physically required to return to the workplace or place of work, the employee will be entitled to an allowance for the provision of that advice. Amendments to clause 23 and 28 of the current award are also proposed.

[42] ACE's proposed new clause would be inserted into clause 16 of the current award and read as follows:

> "**16.5 Remote Communication Allowance and payment for work performed**
>
> (a) This clause applies to an employee who agrees to be on call to provide advice or assistance remotely, including via telephone, text web chat or email.
>
> (b) An employee who agrees to be on call to provide advice or assistance remotely will receive:
>
> (i) 50% of the on call allowance specified in clause 16.4 for the relevant on call period; and
>
> (ii) A remote communication allowance equivalent to the employee's overtime hourly rate of pay for time actually worked (rounded up to the nearest 15 minutes), with a minimum payment of one hour, irrespective of the number of calls/communications received (continuously or separately) during the relevant time period.
>
> (iii) An employee seeking payment under clause 16.5(b)(ii) is required to maintain and provide to the employer a work or time sheet setting out for each day:

A. An appropriate description of each matter dealt with; and

B. The length of time taken in dealing with each matter

(iv) This clause shall not apply to employees classified at Registered nurse levels 4 and 5.

[43] The related changes proposed to clauses 23 and 28 of the Nurses Award are highlighted below in red:

"**23 Rest breaks between rostered work**

An employee will be allowed a rest break of eight hours between the completion of one ordinary work period or shift and the commencement of another ordinary work period or shift. The provision of this clause will not apply in circumstances where an employee performs work under clause 16.5.

…

28.3 Rest period after overtime

(d) Not withstanding clauses 28.3(a) to (c), this clause will not apply where an employee performs work under clause 16.5."

…

28.5 Recall to work when on call

An employee, who is required to be on call and who is recalled to work, will be paid for a minimum of three hours work at the appropriate overtime rate. The provision of this clause will not apply in circumstances where an employee performs work under clause 16.5."

…

28.6 Recall to work when not on call

(e) The provision of this clause will not apply in circumstances where an employee performs work under clause 16.5."

Submissions

[44] The ANMF submits that 'recall to work' includes situations where an employee is required to perform work away from the usual workplace such as receiving telephone calls at home. In support of this construction, the ANMF referred to the decision in *Polan v Goulburn Valley Health* (*Polan*) which it submitted confirmed the view that an employee does not necessarily have to return to the usual workplace to be recalled to work.[28] The ANMF also

submitted that *Polan* determined that a telephone call and other duties performed away from the workplace may in certain circumstances be considered to be overtime rather than recall.

[45] The ANMF submits that current ambiguity exists regarding clauses 28.5 and 28.6 and the appropriate compensation for 'remote' work. The AMNF submits that the relevant compensatory rate should take into account the impact of 'remote' work on employees and act as a disincentive on employers. The ANMF concludes that this rate must therefore be an overtime rate and there should be a minimum amount paid for each occasion an employee performs duties remotely. In determining the suitable rate, the ANMF submits that regard must be had to the number and length of telephone calls, or other methods of contact, and follow up work should be taken into account. Additionally, it submits the impact of on call and recall work on employees should be a consideration.

[46] In respect to ACE's claim, the ANMF opposes the proposed halving of the amount of the existing on call allowance on the basis that there is no rationale specified by ACE for such a reduction. The ANMF opposes the introduction of a remote communication allowance as it seeks to remove any doubt that the existing recall to work clauses already apply to situations where an employee is required to perform work without needing to return to their usual workplace.

[47] The ANMF also questions what would arise in situations where an employee who has not agreed to be on call provides advice or assistance remotely. The ANMF claims that ACE's proposal does not deal with this type of scenario.

[48] The ANMF further opposes the variations proposed to the provisions relating to rest breaks between rostered work. The ANMF considers these variations unnecessary because the provision is not generally relevant to the situation of a rest period after remote recall work.

ACE

[49] ACE relies on a number of arguments to support its claim.[29] Firstly it submits that the proposed variation is not a novel claim and similar types of provisions appear in a number of modern awards. Examples identified include the *Local Government Award 2010*, the *Water Industry Award 2010*, the *Business Equipment Award 2010* and the *Contract Call Centres Award 2010*.

[50] Secondly, ACE submits that the 'remote communication' claim should not be associated with 'recall to work overtime' situations. ACE claims that unlike on call/recall to work situations, the level of disutility to employees who are on call or recalled to perform remote work is less as they are not required to stay in the vicinity of the workplace while on call; keep themselves, their work clothes and transport in a state of readiness while on call for a possible recall to work; spend time travelling to or from work if recalled to work; or incur additional travelling expenses, such as public transport fares or petrol if recalled to work.

[51] ACE referred to the decision in *Polan* as supporting their reasoning in relation to difference between 'recall to work' and 'overtime'. In this regard ACE submits that their claim is in stark contrast to the ANMF's claim to expand recall to work overtime provisions. ACE submits that the ANMF's claim is made contrary to the reasoning in *Polan.*

[52] In respect to the ANMF's claim, ACE strongly opposes the proposed variations submitting that the claim defies 'common sense' and is not supported on the evidence as being a fair safety net entitlement.[30]

PHIEA

[53] The PHIEA opposes the ANMF's claim and submits that the ANMF has not provided a merit-based argument in support of its application to vary the current provisions to include telephone calls. The PHIEA is of the view that the evidence provided by the ANMF is limited and suggestive of some workload management issues, rather than any underlying deficiency in the award safety net provisions.

Blue Care

[54] Blue Care opposes the ANMF's claim submitting that the true purpose of clauses 28.5 and 28.6 is to ensure that an employee required to return to duty at a time when the employee would not ordinarily be at work, and without prior notice or warning is compensated accordingly. [31]

[55] Blue Care submits that the *Polan* decision does not support the construction proposed by the ANMF and is instead authority for the proposition that physically returning to the workplace is not always a necessary precursor for the performance of one's duties and depending on the wording of a particular industrial instrument, may trigger recall for duty entitlements.[32] However, the recall to work entitlement is triggered on the specific instruction or direction from the employer that requires the employee to return to duty. Blue Care also submits that *Polan* clarified the proposition that where work is performed remotely, but outside the employee's ordinary hours of work, this will be analogous to the performance of overtime and attract overtime penalties in addition to any on call allowance payable.

[56] Blue Care submits that the ANMF's proposed variation would mean compensating nurses for phone calls made or received at home for a minimum of three hours at the overtime rate. Blue Care submits that this would increase labour costs and goes beyond what is fair and appropriate compensation as a minimum safety net for the work performed.

Ai Group

[57] Ai Group does not consider that clauses 28.5 and 28.6 apply where an employee is required to perform the type of work that is contemplated by the ANMF's claim and opposes the changes sought to the provisions on that basis.[33]

[58] Ai Group submits that the claim would be unfair to employers as it would involve additional costs to the employer in circumstances that are not considered 'necessary' to ensure the award achieves the modern awards objective. Ai Group submits it is also unfair that an employee would be entitled to payment for three hours at overtime rates each time an employee performs the relevant work, even if the work may be completed in as little as ten minutes without so much as having to leave the employee's home.

[59] Ai Group submits that, should the FWC decide that it is necessary to address the issue of employees performing work remotely, the claim made by ACE should be preferred to the claim sought by the ANMF.[34]

ABI and NSWBC

[60] ABI and NSWBC support the submissions of Ai Group, ACE, the PHIEA and Blue Care in relation to this matter.[35]

HSU

[61] The HSU opposes ACE's claim and supports the ANMF's claim in relation to remote recall.[36]

Witness evidence

[62] Felicity Claire Ball, registered nurse for various organisations including Casino Memorial Hospital, Northern Rivers Area Health Services and Blue Care, gave evidence that during her 13 years working at Blue Care, she was only physically recalled to work 6 times, however she was regularly required to give advice to carers and nurses in the community.[37] She claims that she never received any compensation for giving telephone advice, and was only paid the on call allowance which she considers 'inadequate'.[38] Ms Ball stated that on an ordinary on call shift, she would receive between two and five phone calls, although there were quieter weekends when she was not called at all. The average length of each call is claimed to be between five and ten minutes.

[63] Sherrelle Fox, registered nurse also gave evidence in her witness statement that while on call she is scarcely recalled to work as it would require her employer to pay her overtime.[39] However, she considers that the on call allowance is insufficient and describes being on call as "like working without actually being at work and without proper remuneration".[40]

[64] McLaughlin-Rolfe gave evidence on behalf of Blue Care that under the Blue Care Enterprise Agreement, nurses are remunerated for time spent giving telephone advice while on call provided they submit a log detailing the time spent performing such duties.[41] In Ms McLaughlin-Rolfe view, the requirement to provide a minimum three hour payment at overtime rates each time a nurse receives a phone call while on call would be grossly disproportionate to the work they perform and would result in increased labour costs.

[65] ACE did not provide any witness evidence in support of its claim.

Consideration

[66] We intend to deal with the ANMF claim for 'Telephone and other remote recall' and ACE's claim for 'Remote Communication Allowance' together.

[67] We consider that the evidence discloses that nurses are required to perform work via telephone and other electronic communications away from the workplace while on call. We consider that taking a telephone call, answering a text, replying to an email or responding via

other form of electronic communication is work, albeit without the requirement to return to the workplace.

[68] We do not agree with the submission that being on call to perform work via electronic communication has a sufficiently lower level of disutility than being on call to return to the workplace to justify a lower on call allowance. The same constraints of making contingency plans that disrupt family and personal life apply.

[69] We consider that a nurse who is on call for electronic communication and is required to work should be remunerated at overtime rates. We do not consider that it is appropriate for payment to be made for a minimum of three hours because the nurse does not have to return to the workplace. We do consider that a minimum period is appropriate because the disutility of performing work extends beyond the precise number of minutes spent in responding to the electronic communication. We will provide for a minimum of one hour at the appropriate overtime rate with payment for each occurrence outside the first hour rounded up to the nearest 15 minutes.

[70] We will provide the same remuneration for a nurse who is not on call but is required to perform work via electronic communication.

[71] We do not consider that this time should be remunerated via an allowance so we will not adopt the changes to the Nurses Award proposed by ACE.

[72] We propose that clause 28.5 will read as follows:

28.5 Recall to work when on call

(a) An employee who is required to be on call and who is recalled to work at the workplace will be paid a minimum of three hours work at the appropriate overtime rate.

(b) An employee who is required to be on call and who is required to perform work via electronic communication away from the workplace will be paid a minimum of one hours work at the appropriate overtime rate. An employee who is required to perform work for longer than one hour will be paid for the time worked rounded to the nearest 15 minutes at the appropriate overtime rate.

[73] We propose that clause 28.6 will read as follows:

28.6 Recall to work when not on call

(a) An employee who is not required to be on call and who is recalled to work at the workplace after leaving the employer's premises will be paid a minimum of three hours work at the appropriate overtime rate.

(b) An employee who is not required to be on call and who is required to perform work via electronic communication away from the workplace will be paid a minimum of one hours work at the appropriate overtime rate. An

employee who is required to perform work for longer than one hour will be paid for the time worked rounded to the nearest 15 minutes at the appropriate overtime rate.

Interested parties are invited to file submissions in relation to the proposed wording of clause 28.5 and clause 28.6.

[74] Interested parties are invited to file submissions in relation to the proposed wording of clause 28.5 and clause 28.6.

3.4 Excessive on call and additional annual leave

[75] The ANMF also proposes additional amendments which would provide for the accrual of additional annual leave when a particular amount of on call duty is performed.[42] The amount of additional annual leave would be accrued on a sliding scale based on the amount of on call work performed in a particular period. The changes sought are highlighted below in red:

"**16.4 On call allowance**

(a) An on call allowance is paid to an employee who is required by the employer to be on call at their private residence, or at any other mutually agreed place. The employee is entitled to receive the following additional amounts for each 24 hour period or part thereof:

(i) between rostered shifts or ordinary hours Monday to Friday inclusive–2.35% of the standard rate;

(ii) between rostered shifts or ordinary ours on a Saturday–3.54% of the standard rate; or

(iii) between rostered shifts or ordinary hours on a Sunday, public holiday or any day when the employee is not rostered to work–4.13% of the standard rate.

(b) For the purpose of this clause the whole of the on call period is calculated according to the day on which the major portion of the on call period falls.

(c) Employees shall accrue up to an additional 5 days of annual leave if they are placed on call for 50 or more times in any one year, according to the following:

(i) Placed on call for 10 or more times in any one year – 1 day additional annual leave

(ii) Placed on call for 20 or more times in any one year – 2 days additional annual leave

(iii) Placed on call for 30 or more times in any one year – 3 days additional annual leave

(iv) Placed on call for 40 or more times in any one year – 4 days additional annual leave

(v) Placed on call for 50 or more times in any one year – 5 days additional annual leave

This leave is paid at ordinary rates and is exclusive of leave loading."

Submissions

ANMF

[76] The ANMF submits that their evidence demonstrates the significant effect working on call has on the work/life balance and health of nurses.[43] Such effects include negative impact on employees' sleep patterns and personal life as well as increasing stress and decreasing mental wellbeing. The ANMF submits that this evidence reveals that the existing on call allowance provided by the Award does not sufficiently compensate employees for such work and is not acting as a sufficient disincentive to employers to rostering employees on for excessive amounts of on call work.

PHIEA

[77] The PHIEA opposes the ANMF's claim on the basis that there is no historical precedent in the awards covering private hospital nurses for an allowance of this type to be considered for inclusion as a safety net provision.[44] The PHIEA submits that the issue of additional annual leave linked to the number of times placed on call or called back to work is a matter better left during enterprise agreement negotiations where any site specific matters may be considered and developed.

ACE and Blue Care

[78] Both ACE and Blue Care oppose the ANMF's claim.[45] Blue Care submits that nurses are already appropriately compensated for performing on call work through the provision of the on call allowance. Blue Care also notes that the Nurses Award offers nurses an enhanced entitlement to five weeks' annual leave for day workers and six weeks' annual leave for shift workers.

[79] ACE submits that the basis for the ANMF's claim is not supported by any evidence and the matter can more appropriately be dealt with through bargaining.[46]

Ai Group

[80] Ai Group opposes the ANMF's claim submitting that the claim would be unfair on employers as it would provide employers with additional costs in circumstances where the Nurses Award already provides nurses with enhanced annual leave entitlements and

contemplates an allowance for on call work.[47] Ai Group also submits that the ANMF has not identified any authority for the proposition that the on call allowance is intended to serve as a disincentive and refer to the Penalty Rates Case where the Commission determined that 'deterrence is no longer a relevant consideration in the setting of weekend and public holiday penalty rates'[48] to support their submission.

[81] In respect to the ANMF's claim that its proposed clause would act as a deterrent to employers from excessively requiring employees to be on call, Ai Group submits that the ANMF has not established that the current on call allowance is not already acting in such a manner.

ABI and NSWBC

[82] ABI and NSWBC support the submissions of the Ai Group, ACE, the PHIEA and Blue Care in relation to this matter.[49]

Witness evidence

[83] Ms Ball gave evidence that in addition to working 38 hours per week, she was rostered on call once every fortnight on both Saturdays and Sundays on average.[50] During on call shifts she texted on and off with four carers and two nurses and received between two and five phone calls per shift. However she stated that there were some quiet weekends when she was not called. The calls often related to resolving issues such as clients not being home at the time medication was meant to be administered. She claimed that the average length of a call was between five and ten minutes and the average length of any follow up work was thirty minutes.

[84] Ms Fletcher also gave evidence in her witness statement in respect to on call work.[51] She gave evidence that she is rostered to be on call once every fortnight. The on call roster is arranged so that nurses work the day shift (6:30am-2:30pm) and then are on call from 4:00pm-6:00am. Ms Fletcher stated that the nurse on call is required to return to work the next day for the morning shift.

[85] In respect to on call work, Ms Le Compte claimed that she is usually rostered on call once per month but this is not ideal as it is usually on the only weekend she is rostered off.[52]

[86] Professor Drew Dawson, Director of the Appleton Institute at CQ University and Dr Jessica Paterson, Senior Lecturer in the School of Medical and Applied Sciences at CQ University gave evidence in the form of a written statement.[53] In respect to on call work, Professor Dawson and Dr Paterson gave evidence that the sleep obtained during on call periods is not comparable to the sleep obtained during an off-duty period. For example, doctors sleeping at home on call reported shorter total sleep time even without receiving a call, compared to nights at home and not on call. Professor Dawson and Dr Paterson referred to a study where it was found that on call work was associated with increased risks of musculoskeletal disorders in 2,617 registered nurses and another study where on call work was found to be associated with increased irritation, negative moods and decreased participation in social and household activities.

[87] Ms McLaughlin-Rolfe also gave evidence in respect to the excessive on call and additional annual leave claim.[54] She stated that Blue Care's on call rostering requirements are not excessive and adequate compensation is provided to nurses who are rostered on call. She also provided comments on the witness statement of Ms Ball, stating that despite Ms Ball's claim that she was rostered once a fortnight on both Saturdays and Sundays, Ms Ball's rostering records indicate she was rostered on call for a total of 37 occasions between June 2013 and April 2016 and was not rostered on call on Sundays.

[88] In cross-examination, the ANMF put to Ms McLaughlin-Rolfe that registered nurses listed on a particular on call roster (between December 2016 and March 2017) were rostered on call over the weekend between five to sixteen times over a four month period. Ms McLaughlin-Rolf agreed with the position put to her based on the roster before her.[55]

Consideration

We do not agree that excessive on call should be dealt with by additional annual leave. We consider that the decision we have made in response to clause 21.4 below places a natural constraint on the occurrence of on call which addresses the concerns underlying the ANMF claim. We do not intend to adopt the ANMF proposal.

3.5 Free from duty and on call

[89] The ANMF proposes to make clear that the existing clause 21.4, which requires an employee to be free from duty for specified periods, includes periods when an employee is on call.[56] The changes sought are highlighted in red below:

> "21.4 Each employee must be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28-day cycle. Where practicable, such days off must be consecutive. For the purposes of this sub-clause, duty includes time an employee is on call."

Submissions

ANMF

[90] The ANMF relies on the statements of its witnesses to demonstrate that nurses experience a lack of time free from both duty and on call work,[57] the implications of which negatively impact their sleep, health and safety. The ANMF refers to the *Nurses and Midwives (Victoria) State Reference Public Sector Award 2015*, which they claim provides that free from duty includes 'on call/recall work'.

[91] The ANMF submits that the Nurses Award should be varied to provide that 'free from duty' includes any periods that an employee is rostered to be on call so that the award provides for a fair and relevant safety net of terms and conditions.

PHIEA

[92] In opposing the ANMF's claim, the PHIEA submits that private hospitals must have the ability to call employees back to work if unexpected absences occur within the rostered team.[58] The PHIEA submits that the ANMF's proposed variation would introduce rostering restrictions that may not meet the needs of patients or businesses.

Blue Care

[93] Blue Care opposes the ANMF's claim and submits that the proposed variation would mean significant alterations to Blue Care's rostering arrangements and would require increasing the number of nurses Blue Care employs.[59] This would in turn increase administrative and labour costs and might also affect the number of shifts and on call shifts nurses can be rostered to perform and potentially reduce their overall compensation.

ACE and Ai Group

[94] ACE and Ai Group oppose the changes sought by the ANMF on the basis that the proposed variation would import additional inflexibilities on employers and disturb existing rostering arrangements.[60]

ABI and NSWBC

[95] ABI and NSWBC support the submissions of the Ai Group, ACE, the PHIEA and Blue Care in relation to this matter.[61]

Witness evidence

[96] Ms Ball gave evidence that due to the amount of on call work she performed, she did not have two full days free from duty each week. [62] Similarly, Ms Le Compte claimed that she is usually rostered on call on the only weekend she is rostered off.[63]

Consideration

[97] We agree with the ANMF that a nurse should be free from work or the contingency of work for two days in each week, four days in each fortnight or eight days in a 28-day cycle. We consider that being on call gives rise to the constraints of making contingency plans that disrupt family and personal life. Being on call does not provide the opportunity to rest and to pursue personal and family activities in the same way as being free from work.

[98] We propose to change the award as sought by the ANMF.

[99] We propose the following wording for Clause 21.4:

> **21.4** Each employee must be free from duty for not less than two full days in each week or four full days in each fortnight or eight full days in each 28-day cycle. Where practicable, such days off must be consecutive. For the purposes of this sub-clause, duty includes time an employee is on call.

[100] Interested parties are invited to file submissions in relation to the proposed wording of clause 21.4.

3.6 Rest breaks between rostered work

[101] The ANMF proposes that the minimum rest break between ordinary shifts be increased to ten hours except where an individual employee agrees to an eight hour break.[64]

[102] In addition, the ANMF proposes the introduction of a penalty for breach of this entitlement. That is, an employee returning to work without having had the minimum rest break would be entitled to be paid at overtime rates until they have taken the minimum rest break.

[103] The changes sought by ANMF to clause 23 of the Award are highlighted in red below:

> "**23. Rest breaks between rostered work**
>
> 23.1 An employee will be allowed a rest break of ~~eight~~ ten hours between the completion of one ordinary work period or shift and the commencement of another work period or shift.
>
> 23.2 By mutual agreement between the employer and employee, the ten hour rest break may be reduced to eight hours.
>
> 23.3 If, on the instruction of the employer, an employee resumes or continues to work without having had ten consecutive hours off duty, or eight hours as agreed, they will be paid at the rate of double time until released from duty for such period."

Submissions

ANMF

[104] The ANMF submits that quick returns often occur in rosters that involve rotational schedules, typically when an evening shift is followed by a morning shift the next day.[65] The ANMF claims that such shifts can occur quite frequently and the existing eight hour break provided by clause 23 is insufficient to allow employees an adequate period of rest and recuperation before recommencing work. The ANMF notes that clause 28.3 of the Award provides a penalty where the full rest period after overtime work is not adhered to, however no such penalty exists where the rest period between rostered work is breached.

[105] The ANMF referred to a number of study reports which indicate the negative effects associated with being awake for extended periods and ongoing reduced sleep. The ANMF claim that a fair and relevant safety net requires an adequate break from work between rostered shifts and clause 23 should be amended to ensure that the break between rostered shifts is sufficient to maximise the health and safety of employees and their work/life balance.

PHIEA

[106] PHIEA opposes the ANMF's claim and submits that the minimum duration of a rest break between periods of rostered ordinary work was considered during the making of the Nurses Award and the current clause reflects the majority provision of the previous industrial instruments.[66] The PHIEA submits that the ANMF has failed to provide evidence of a deficiency in the current eight hour minimum break and, in the absence of any evidence highlighting significant deficiency, the proposal should be rejected.

ACE, Ai Group and Blue Care

[107] ACE, Ai Group and Blue Care oppose the ANMF's proposed changes to clause 23 of the current award, submitting that the variation proposed is not necessary to achieve the modern awards objective. ACE further submits that the proposed variation is a re-agitation of previous claims considered in the 2008 and 2012 award review processes and was rejected on both occasions.

ABI and NSWBC

[108] ABI and NSWBC support the submissions of the Ai Group, ACE, PHIEA and Blue Care in relation to this matter.[67]

Witness evidence

[109] Ms Fox, gave evidence in her witness statement in relation to in-charge duties, rest breaks between rostered work and on call work.[68] She claimed that at least once per fortnight she worked a late shift followed by an early shift having less than 10 hours break between shifts. She claimed her travel time to and from work also affects the amount of rest time she has between shifts and the lack of sleep results in fatigue. She claimed whenever she works a late shift followed by an early shift she does not get to see her children as they are already asleep by the time she gets home and are yet to wake up when she is required to return to work the next morning.

[110] Ms McLaughlin-Rolfe gave evidence that it was a well-established practice in the industry that nurses can be and are rostered to be on call during a rest break between shifts.[69] Ms McLaughlin-Rolfe stated that the Blue Care Enterprise Agreement provided nurses with a minimum rest break of ten hours or nine hours in certain circumstances, and there is no penalty for a breach of the rest break provision. However, Ms McLaughlin-Rolfe stated that if rest breaks were increased to 10 hours in all circumstances, it would mean significant alterations to rostering arrangement and may require employing the number of nurses which would increase labour costs.

[111] In respect to rest breaks, Professor Dawson and Dr Paterson gave evidence that there is a significant body of research demonstrating the negative effects associated with breaks of less than 11 hours between the end of one shift and the beginning of the next.[70] These include poor sleep quality, short sleep, exhaustion, difficulty unwinding, dissatisfaction with work hours and greater work-family-interference.

Consideration

[112] We are persuaded by the evidence before us that the minimum rest break between ordinary shifts should be increased to ten hours except where an individual employee agrees to an eight hour break.

[113] The majority of modern awards provide either 10 hour break between shifts, a 10 hour break between shifts except by agreement or an 8 hour break plus travel time.

[114] We consider that this is for the good reason that an employee needs to sleep between shifts to manage fatigue and for there to be a safe workplace. It will often be impractical for an employee to leave the workplace, travel home, eat and sleep for a healthy duration and travel back to work with an 8 hour break between shifts. For this reason the employee's agreement should be obtained to reduce from 10 hours as the employee will be in the best position to manage their own fatigue.

[115] We propose the following terms for Clause 23:

> **23. Rest breaks between rostered work**
>
> 23.1 An employee will be allowed a rest break of ten hours between the completion of one ordinary work period or shift and the commencement of another work period or shift.
>
> 23.2 By mutual agreement between the employer and employee, the ten hour rest break may be reduced to eight hours.
>
> 23.3 If, on the instruction of the employer, an employee resumes or continues to work without having had ten consecutive hours off duty, or eight hours as agreed, they will be paid at the rate of double time until released from duty for such period.

[116] Interested parties are invited to file submissions in relation to the proposed wording of clause 23.

3.7 Meal breaks

[117] The ANMF and Ai Group are seeking to vary the meal breaks clause of the Nurses Award.

[118] The ANMF proposes two changes to the existing meal breaks clause. The first change relates to the timing of meal breaks and the second change relates to employees remaining available during a meal break.[71]

[119] The changes to clause 27.1 of the Award sought by ANMF are highlighted in red:

"**27.1 Meal breaks**

(a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes. Such meal breaks will be taken between the fourth and the sixth hour after beginning work, unless otherwise agreed by the majority of employees affected. Provided that, by agreement of individual employees, employees who work shifts of six hours or less may forfeit the meal break.

(b) Where an employee is required to ~~remain available or~~ be on duty during a meal break, the employee will be paid overtime for all time worked until the meal break is taken.

(c) Where an employee is required by the employer to remain available during a meal break, but is free from duty, the employee will be paid at ordinary rates for a 30 minute meal break. If the employee is recalled to perform duty during this period the employee will be paid overtime for all time worked until the balance of the meal break is taken."

[120] The Ai Group proposes to vary clause 27.1 of the Award to enable an employee to work a shift of six hours or less, without taking a meal break, subject to the employer's agreement.[72]

[121] The change to clause 27.1 sought by Ai Group is highlighted below:

"**27.1 Meal breaks**

(a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes. Provided that, an employee who works not more than six hours may elect to forgo the meal break, with the consent of the employer.

(b) Where an employee is required to remain available or on duty during a meal break, the employee will be paid overtime for all time worked until the meal break is taken."

Submissions

ANMF

[122] In respect to the timing of meal breaks, the ANMF submits that clause 27.1(a) does not specify *when* during the shift the meal break must be taken and may mean that an employee works excessive hours before taking a break.[73] The ANMF relies on witness evidence to claim that employees are either taking their breaks after working long hours, taking meal breaks at unsuitable times or not getting meal breaks at all due to workload levels. The ANMF also refers to rosters which do not specify the timing of a meal break.

[123] In respect to the matter of remaining available during a meal break, the ANMF submits that the phrase 'remain[ing] available' at clause 27.1(c) is unclear as an employee may take all or part of their meal break but may still be required to 'remain available' during the meal break in order to return to work at short notice. In addition, the ANMF submit that employees receive no compensation for being required to remain available because of the fact that the minimum thirty minimum meal break is unpaid. The ANMF claims that employees are effectively being requested to be 'on call' during their meal breaks without the appropriate compensation.

[124] The ANMF submits that the effect of its proposal would be to require employers to enable employees to take their meal break free from any expectation that they will be required to perform duties or compensate them for being prevented from doing so.

[125] As to the Ai Group's claim, the ANMF submits that the claim resembles part of the ANMF's own claim regarding meal breaks and only opposes the claim where it deviates from the ANMF's own claim. [74]

Ai Group

[126] Ai Group submits that clause 27.1(a) does not provide an ability to vary the number of hours that must be worked by an employee to trigger an entitlement to a meal break and is therefore inflexible in operation.[75]

[127] Ai Group submits that its proposed variation is specifically designed to address circumstances in which an employee seeks to work a five-and-a-half to six-hour shift. This situation may arise for example, for parents who wish to be able to drop off or pick up their children from school. Ai Group referred to the Australian Workplace Relations Study First Findings Report (AWRS Report) which was produced by the Commission's research department on 29 January 2015. Ai Group submits that the AWRS Report found that employees who participated in the study were most satisfied with having flexibility to balance work and non-work commitments above other aspects of their current jobs.[76]

[128] Ai Group further submits that the variation proposed is consistent with s.65 of the Act and it is arguable whether clause 27.1(a) of the award undermines s.65 by precluding an employer from agreeing to a request made under s.65.[77]

[129] Ai Group also references other modern awards which contain provisions that enable agreement to be reached as to the period of time that must be worked to trigger an entitlement to a meal break. In this respect, the Ai Group referred to the *Children's Services Award 2010,* the *Hospitality Industry Award 2010*; the *Manufacturing and Associated Industries and Occupations Award 2010;* the *Textile, Clothing, Footwear and Associated Industries Award 2010,* the *Pharmaceutical Industry Award 2010* and the *Food, Beverage and Tobacco Manufacturing Award 2010.*

[130] Ai Group submits that this variation meets the modern awards objective and would afford employees a flexibility that is not presently contained in the award. Ai Group submits that this variation would not be contrary to the need to encourage collective bargaining, would promote social inclusion and flexible work practices and have a positive impact on

employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

[131] As to the claim advanced by the ANMF regarding the timing of meal breaks, Ai Group opposes the claim, however submits that in the alternative, the clause should accommodate for circumstances in which it is not practicable for an employee to take a break between the fourth and sixth hour of a shift and permit agreement between an employer and majority of employees as well as the ability to agree to forego a meal break.

[132] In respect to the issue of remaining available during a meal break, the Ai Group does not object to the variation and acknowledges some merit to the ANMF's proposal.

PHIEA

[133] In respect to ANMF's claim, the PHIEA submits that it does not object to there being some indicative time frame as to when a meal break should be taken, however does not support the wording proposed by the ANMF. The PHIEA considers that this wording is too prescriptive and claims that it does not take into consideration 8 hour shifts where the fourth and sixth hour may not provide a logical meal time.[78] The PHIEA refers to a similar claim made by the HSU in respect to the *Health Professionals and Support Services Award 2010,* and submits that this claim is preferable due to the inclusion of the words "where reasonably practicable". The PHIEA submits that the HSU's claim retains some necessary flexibility which the ANMF's claim lacks.

ACE and Blue Care

[134] ACE and Blue Care oppose the ANMF's claim submitting the matter has already been considered and rejected by the Commission in the award modernisation proceedings and the 2012 Transitional Review.[79] In respect to the timing of meal breaks, Blue Care submits that this is a matter to be agreed between the employer and individual employee, taking into account the operational requirements and employee preference. Blue Care claims that the ANMF's proposed variation would restrict the scheduling flexibility that currently exists under the Award to the benefit of both the employer and employee.[80]

ABI and NSWBC

[135] ABI and NSWBC are not opposed to the proposed introduction of a new clause 27.1(c) and support the submissions of Ai Group in this respect.[81] Further, ABI and NSWBC are not opposed to the alternative formulation in respect of clause 27.1(a) as set out in Ai Group's submission, nor to the alternative formulation of clause 27.1(a) as set out in the PHIEA submission.

Witness evidence

[136] In respect to meal breaks, Ms Fletcher stated in her witness statement that it is a 'rare occurrence' that she receives her thirty minute meal break at a suitable time as she is often too busy catching up with work.[82] Ms Fletcher stated that her meal breaks are always interrupted

by phone calls from relatives, doctors and carers and such interruptions impact her fatigue and stress levels.

[137] Ms Le Compte gave evidence claiming that there is no set time for meal breaks and there is sometimes only two staff rostered on her shifts and they are unable to take a meal break.[83] She said that on quieter shifts meal breaks are usually disturbed by patient needs however the thirty minute meal break is paid as staff are not able to leave the facility.

[138] Ms Matthews gave evidence claiming not to have had a meal break since the beginning of 2013 due to 'horrendous' workload levels.[84] Ms Matthews stated that day sheets were required to be filled and signed on a daily basis and attaches samples of her day sheets to her witness statement. She stated that she would include meal breaks and overtime on her day sheet, however these were never paid. She claimed there is no set time for meal breaks and she is always required to remain on premises in case she is urgently needed. Ms Matthews stated that if she were to take a meal break it would be constantly interrupted.

[139] In cross examination, Ms Matthews was questioned in relation to her statement that she submitted day sheets with claims to overtime for untaken meal breaks. The day sheets attached to her witness statement did not include any claims for meal breaks. She claimed that this was due to her manager requesting that she no longer include claims for overtime for untaken meal breaks in her day sheets "*as there was no money for overtime*".[85]

[140] Ms McLaughlin-Rolfe gave evidence in respect to the meal break provisions under the Blue Care Enterprise Agreement.[86] Ms McLaughlin-Rolfe stated that the ANMF's proposal to vary the timing of the meal break provision would have restrictive effects and reduce the flexibility of the organisation to meet operational requirements and employee preferences.

Consideration

[141] We propose to deal with the ANMF and Ai Group claims together. We consider that nurses should be able to have an uninterrupted meal break at a juncture during a shift that is appropriate to the needs of the nurse and the operational requirements of the workplace. We consider that the ANMF proposal that the meal break be taken between the fourth and the sixth hour of work unless otherwise agreed by the majority of employees affected is problematic. We anticipate that a workplace could have operational requirements that do not readily allow all nurses to take their meal break between the fourth and the sixth hour of work. We anticipate that each nurse will have individual needs and this does not lend itself to "a majority of those affected" type of exception. We are attracted to the formulation "where reasonably practicable", and we will adopt that formulation.

[142] We agree with Ai Group that an employee may wish to work a shift of six hours or less without taking a meal break and we will vary the award to provide for this.

[143] We agree with the ANMF that there needs to be a provision to cover the circumstances where a nurse is required to perform work or be available to perform work during a meal break.

[144] We propose that clause 27.1 will read as follows:

27.1 Meal breaks

(a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes. Such meal breaks will be taken between the fourth and the sixth hour after beginning work, where reasonably practicable. Provided that by agreement of an individual employee, an employee who work shifts of six hours or less may forfeit the meal break.

(b) Where an employee is required to be on duty during a meal break, the employee will be paid overtime for all time worked until the meal break is taken.

(c) Where an employee is required by the employer to remain available during a meal break, but is free from duty, the employee will be paid at ordinary rates for a 30 minute meal break. If the employee is recalled to perform duty during this period the employee will be paid overtime for all time worked until the balance of the meal break.

[145] Interested parties are invited to file submissions in relation to the proposed wording of clause 27.1.

3.8 Rostering

[146] ACE proposes to vary clause 8.2 of the Nurses Award exposure draft (clause 25 of the current award) in order to provide an employer with the ability to alter an employee's roster without the requirement of giving the employee seven days' notice, in circumstances where the employee has agreed to the roster change.[87]

[147] The changes sought by ACE to clause 25 of the current award are highlighted in red below:

"25. Rostering

25.1 Employees will work in accordance with a weekly or fortnightly roster fixed by the employer.

25.2 The roster will set out employees' daily ordinary working hours and starting and finishing times and will be displayed in a place conveniently accessible to employees at least seven days before the commencement of the roster period.

25.3 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.

25.4 Subject to clause 25.5, unless the employee otherwise agrees, seven days' notice of a change of roster will be given by the employer to an employee.

~~25.4~~ 25.5 ~~Seven days' notice of a change of roster will be given by the employer to an employee. Except that,~~ The employer may alter a roster at any time to enable the functions of the hospital or facility to be carried out where another employee is absent from work due to illness or in an emergency. Where any such alteration requires an employee working on a day which would otherwise have been the employee's day off, the day off instead will be as mutually arranged."

Submissions

ACE

[148] ACE submits that without its proposed variation, an employer cannot alter an employee's roster in the absence of seven days' notice to the employee.[88] They submitthat the current provision limits roster alternations to 'illness' or 'emergency' when there are other circumstances where a roster may need to be altered at short notice.

ANMF

[149] The ANMF opposes ACE's claim on the basis that ACE has not demonstrated that the proposed variation is necessary to the meet the modern awards objective. The ANMF submits that it 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 agree to. In this regard, the ANMF refers to the decision in *Re Award Modernisation* (2009)[89] in relation to the making of the Nurses Award among other health awards where the ANMF claim that the full bench expressed 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.

HSU

[150] The HSU supports the submissions of the ANMF in this matter.[90] The HSU further submits that the witness statements relied on by the ACE are of little to no relevance, as the witnesses' acknowledge in their statements that their evidence is relates to employers covered by enterprise agreements, to which the rostering clause does not apply.[91]

Witness evidence

[151] ACE relied on four witness statements to support their claim. Each witness gave evidence that their employees were employed under an enterprise agreement.

[152] John Favaloro, Human Resources Manager at Living Care, gave evidence that he would consider the requirement to give seven days' notice of a roster change restrictive because of the nature of the work performed at the organisation which may require staff on hand at short notice for a variety of reasons such as unplanned leave, non-attendance of staff, unexpected surges in resident care, the need to backfill staff undergoing training and unanticipated recruitment delays.[92]

[153] Karen Foster, Director People and Culture at Feros Care, gave evidence that Feros Care would find a provision requiring the employer to give seven days' notice of a roster change restrictive and unworkable.[93] Ms Foster also identified a number of reasons given by employees who have advised that they will be absent from work on short notice that were beyond personal/family illness or emergency.

[154] Kalena Jefferson, General Manager People and Culture at Southern Cross Care, gave evidence that the requirement for an employer to give employees 7 days' notice of a roster change (notwithstanding any agreement to the roster change by the employee) is restrictive.[94] Ms Jefferson stated that the provision is unworkable as it may result in shifts not being covered when employees do not attend work which would leave nursing cover at unacceptably low levels. She also stated that in the absence of permanent staff, agency staff or casual workers may have to be used to cover employees on short notice.

[155] Mark Douglas, Human Resources Manager at Carrington Centennial Care Ltd (CCCL), gave evidence in his witness statement that he would find the rostering provisions under the Nurses Award restrictive and unworkable if they were to apply to CCCL.[95] He stated that short notice absences that are not a result of illness or emergency occur on a regular basis and it is common for CCCL to backfill positions using permanent employees as casuals are often utilised to fill annual leave absences. Mr Douglas claimed that if employee absences were not filled on short notice it would mean the workload of remaining staff would increase. This could result in work related injuries as the temptation by employees to take 'short cuts' is increased where the workload is increased

Consideration

[156] ACE seeks, in effect, to be able to ask an employee to agree to a change in the roster within the 7 day period before the commencement of the roster period. We have considered the ANMF's submission concerning the possibility that an employee may feel pressured to agree to a change to the roster within the 7 day period and we agree with it.

[157] We echo the concerns expressed by the Full Bench in Re Award Modernisation.[96] We consider that the nature of the employer-employee relationship is such that if a supervisor asks an employee to change rosters within the 7 day period before the commencement of the roster period the employee's decision making may be compromised by fear (even if unwarranted) of repercussions if the request is declined.

[158] However, based on the evidence before us we consider that the clause should provide the employer with the flexibility to change a roster to fill a gap created by an unplanned absence. We consider that the current wording is too restrictive and that absences occurring as a result of the use of personal leave, carers leave and domestic violence leave should enable the employer to change the roster within the 7 day period before the commencement of the roster period. This is because these leave entitlements may be accessed by the employee on short notice and the employer may not become aware of the use of such leave until after the leave has commenced.

[159] We do not intend to make the change proposed by ACE however we will provide greater flexibility. We will remove the words "due to illness" from clause 25.4 and insert the

words "pursuant to clauses 33 – Ceremonial leave; 34 – Personal/carers' leave and compassionate leave and 36 – Leave to deal with Family and Domestic Violence."

[160] We propose that clause 25.4 will read as follows:

> **25. Rostering**
>
> …
>
> 25.4 Seven days' notice of a change of roster will be given by the employer to an employee. Except that, a roster may be altered at any time to enable the functions of the hospital or facility to be carried out where another employee is absent from work pursuant to clauses 33 – Ceremonial leave; 34 – Personal/carers' leave and compassionate leave and 36 – Leave to deal with Family and Domestic Violence, or in an emergency. Where any such alteration requires an employee working on a day which would otherwise have been the employee's day off, the day off instead will be as mutually arranged.

[161] Interested parties are invited to file submissions in relation to the proposed wording of clause 25.4.

Conclusion

[162] We have decided to change the Award and the exposure draft of the Award in a number of ways. Interested parties are invited to file written submissions in relation to the proposed wording set out above at paragraphs [72], [73], [99], [115], [144] and [160]. Any proposed change is to be filed in the form of a draft determination. Submissions should be forwarded to amod@fwc.gov.au by **4.00 pm on 7 December 2018**, with any responses to be filed by **4.00 pm on 14 December 2018**.

[163] The matter may be listed for conference or hearing at the initiative of the Full Bench or at the request of the parties. If the matter does not proceed to conference or hearing it may be concluded on the papers after our consideration of the parties' submissions.

VICE PRESIDENT

Appearances:

Ms L *Doust* of Counsel on behalf of the Health Services Union of Australia.

Mr G *Boyce* of Counsel on behalf of Aged Care Employers.

Ms C *Brattey* on behalf of Blue Care.

Ms K *Thomson* on behalf of the Australian Business Industrial and the New South Wales Business Chamber.

Hearing details:

Sydney, Melbourne, Brisbane.

November 27 and 28.

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[1] [2014] FCAFC 118, at [85].

[2] [2014] FWCFB 1788.

[3] [2017] FWCFB 1001at [115].

[4] [2014] FWCFB 1788 at [36].

[5] ANMF submissions - 17 March 2017 at para 6.

[6] Ibid.

[7] ANMF Submission – 17 March 2017 at paras 6-26.

[8] [2012] FWA 9420 at [21]-[23].

[9] ACE Submission in Reply – 22 May 2017 at paras 4-8; PHIEA Submission in Reply – 19 May 2017 at paras 7-11.

[10] PHIEA Submission in Reply – 19 May 2017 at paras 7-11.

[11] Blue Care Submission in Reply – 22 May 2017 at paras 4-7.

[12] *Blue Care/ Wesley Mission Brisbane Nursing Employees Enterprise Agreement 2013* (AE400881).

[13] Ai Group Submission in Reply – 22 May 2017 at para 19-99.

[14] ABI and NSWBC Submission in Reply – 23 May 2017 at para 13.

[15] Witness Statement of Elizabeth Fletcher of 27 February 2017.

[16] Transcript of 27 November 2017, PN314.

[17] Witness Statement of Sonia Le Compte of 25 February 2017.

[18] Witness Statement of John Favaloro of 23 February 2017.

[19] Witness Statement of Maria McLaughlin-Rolfe of 24 May 2017.

[20] Ibid at para 28.

[21] ANMF Submission – 17 March 2017 at paras 27-34.

[22] Ibid at paras 33-34.

[23] Blue Care Submission – 22 May 2017 at paras 4-7.

[24] ACE Submission – 22 May 2017 at paras 9-14.

[25] ABI and NSWBC Submissions in Reply – 23 May 2017 at para 13.2.

[26] Ibid at para 35.

[27] ACE Submission – 15 July 2015 at para 5 and ACE Submission – 17 March 2017 at para 3-4.

[28] *Polan v Goulburn Valley Health* [2016] FCA 440; *Polan v Goulburn Valley Health (No 2)* [2017] FCA 30.

[29] ACE Submission – 15 July 2015 at paras 5-7.

[30] ACE Submission – 22 May 2017 at para 15.

[31] Blue Care Submission – 22 May 2017 at para 8-11.

[32] Ibid para 12-16.

[33] Ai Group Submission – 22 May 2017 at para 153.

[34] Ibid at para 201.

[35] ABI and NSWBC Submission in Reply – 23 May 2017 at para 13.2.

[36] HSU submission in reply – 12 February 2018 at para 2 and HSU Submission in Reply - 19 March 2018 at para 12

[37] Witness Statement of Felicity Claire Ball of 27 February 2017.

[38] Ibid at 12.

[39] Witness Statement of Sherrelle Fox of 27 February 2017.

[40] Ibid at para 8.

[41] Witness Statement of Maria McLaughlin-Rolfe of 24 May 2017.

[42] Ibid at para 51.

[43] ANMF Submission – 17 March 2017 at paras 51-63.

[44] PHIEA Submission in Reply – 19 May 2017 at paras 27-28.

[45] ACE Submission – 22 May 2017 at para 17-18; Blue Care Submission – 22 May 2017 at para 17-20.

[46] ACE Submission – 22 May 2017 at para 17.

[47] Ai Group Submission – 22 May 2017 at para 215-222.

[48] Ibid at para 220.

[49] ABI and NSWBC Submission in Reply at para 13.2.

[50] Witness Statement of Felicity Claire Ball of 27 February 2017.

[51] Witness Statement of Elizabeth Fletcher of 27 February 2017.

[52] Witness Statement of Sonia Le Compte of 27 February 2017.

[53] Statement of Prof. Drew Dawson and Dr Jessica Patterson of 16-17 March 2017.

[54] Witness Statement of Maria McLaughlin-Rolfe of 24 May 2017.

[55] Transcript of 27 November 2017 at PN481, PN484.

[56] Ibid at para 64.

[57] ANMF Submission – 17 March 2017 at paras 64-71.

[58] PHIEA Submission in Reply – 19 May 2017 at paras 29-32.

[59] Blue Care Submission in Reply – 22 May 2017 at paras 21-22.

[60] ACE Submission in Reply – 22 May 2017 at paras 19-21; Ai Group Submission in Reply – 22 May 2017 at paras 254-297.

[61] ABI and NSWBC Submission in Reply at para 13.2.

[62] Witness Statement of Felicity Claire Ball of 27 February 2017.

[63] Witness Statement of Sonia Le Compte of 27 February 2017.

[64] Ibid at para 72.

[65] ANMF Submission – 17 March 2017 at paras 72-88.

[66] PHIEA Submission in Reply – 22 May 2017 at paras 33-36.

[67] ABI and NSWBC Submission in Reply at para 13.2.

[68] Witness Statement of Sonia Le Compte of 27 February 2017.

[69] Witness Statement of Maria McLaughlin-Rolfe of 24 May 2017.

[70] Statement of Prof. Drew Dawson and Dr Jessica Patterson of 16-17 March 2017.

[71] Ibid at paras 89-109.

[72] Ai Group Submission – 14 March 2017 at paras 18-21.

[73] ANMF Submission – 17 March 2017 at paras 89-105.

[74] ANMF Submission in Reply– 22 May 2017 at paras 22-28.

[75] Ai Group Submission – 14 March 2017 at para 19.

[76] Ibid at paras 27-30.

[77] Ibid.

[78] PHIEA Submission in Reply – 19 May 2017 at para 40.

[79] ACE Submission in Reply – 19 March 2018 at paras 20-23; Blue Care Submission – 22 May 2017 at paras 26-30.

[80] Blue Care Submission – 22 May 2017 at paras 26-30.

[81] ABI and NSWBC Submission – 23 May 2017 at paras 13.1-13.3.

[82] Witness Statement of Elizabeth Fletcher of 27 February 2017.

[83] Witness Statement of Sonia Le Compte of 27 February 2017.

[84] Witness Statement of John Favaloro of 23 February 2017.

[85] Transcript of 27 November 2017, PN226.

[86] Witness Statement of Maria McLaughlin-Rolfe of 24 May 2017.

[87] ACE Submission – 15 July 2015 at para 2-4; ACE submission - 17 March 2017 at para 2.

[88] ACE Submission – 15 July 2015 at para 3.

[89] Re Award Modernisation (2009) 181 IR 19 at [148].

[90] HSU Submissions in Reply – 19 March 2018 at para 3.

[91] Ibid at para 10.

[92] Witness Statement of John Favaloro of 1 August 2016.

[93] Witness Statement of Karen Foster of 25 July 2016.

[94] Witness Statement of Kalena Jefferson of 26 July 2016.

[95] Witness Statement of Mark Douglas of 1 August 2016.

[96] Re Award Modernisation (2009) 181 IR 19 at [148].