

FAIR WORK COMMISSION

Matter No: AM 2014/35

Fair Work Act 2009

**4 Yearly Review of Modern Awards – Penalty Rates**

**SUBMISSION OF THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION**

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1. The Australian Nursing and Midwifery Federation (ANMF) makes this submission in response to the Statement and Directions contained in the decision of the Fair Work Commission of 18 April 2017, [2017] FWCFB 1933.
2. This submission addresses penalty provisions and related matters in the Nurses Award 2010 (the NA 2010).
3. The ANMF is opposed to changes of the term 'penalty' to the extent that the use of such term would deviate from its use or interpretation within the current award. The industrial interpretation of this term (and different meaning attributed to this term) emanates from important industrial history and must not lightly be disturbed. Any variation would require an in-depth consideration of the term and the context within it is used in the Award. We urge the Commission to proceed with caution with respect to this matter
4. The NA 2010 is an occupational award covering nurses, midwives and nursing assistants employed by employers in the health industry.
5. While the delivery of health services may be found across a diverse range of businesses, a principal characteristic of the industry is that health services are provided around the clock, 7 days a week.
6. Employers in nursing generally decide the days or nights upon which employees work and the times between which they work on those days or nights. While some health facilities do have agreed rosters, most of the other national-system employers in health and aged care set the rosters with limited employee choice.
  - 6.1 Most nurses, midwives and assistants in nursing work according to a roster with changing shift patterns and at anti-social periods day and night. Whether this be a hospital, aged care or community setting a nurse, midwife or assistant in nursing is required to ensure care is maintained , invariably working in a high pressure , stressful environment for employers who operate on a 24 hour a day, 7 days a week basis.

6.2 As nurses, midwives and assistants in nursing are required to be at the frontline of the provision of health care they often suffer stress and other ill health effects from working not only long hours but also non-standard hours. Their obligations as employees, coupled with their professional commitment to the care and wellbeing of their clients, results in exploitation including having to shoulder unacceptable workloads, working short staffed, double shifts and excessive overtime. This in turn leads to burnout and contributes to recruitment and retention problems in specific health and aged care settings.

6.3 Health is also an industry beset with staff shortages, increased patient demands, and pressures on hospital budgets. For nurses, this working environment often increases the pressure to work long and unsociable hours.

7. In so far as it is relevant to this submission the term 'penalty' is to be found in the following provisions of the NA 2010:

7.1 **28 Overtime**

[28 varied by [PR995202](#), [PR585802](#)]

- (a) Hours worked in excess of the ordinary hours on any day or shift prescribed in clause 21 – Ordinary hours of work, are to be paid as follows:
  - (i) Monday to Saturday (inclusive)—time and a half for the first two hours and double time thereafter;
  - (ii) Sunday—double time; and
  - (iii) Public holidays—double time and a half.
- (b) Overtime penalties as prescribed in clause 1.1(a) do not apply to Registered nurse levels 4 and 5.

[28.1(c) substituted by [PR995202](#) ppc 23Mar10]

- (c) Overtime rates under this clause will be in substitution for and not cumulative upon the shift and weekend premiums prescribed in clause 26 – Saturday and Sunday work and clause 29 - Shift work.
- (d) **Part-time employees**

All time worked by part-time employees in excess of the rostered daily ordinary full-time hours will be overtime and will be paid as prescribed in clause 1.1(a).

7.2 **29. Shift work**

**29.1 Shift penalties**

- (a) Where an employee works a rostered afternoon shift between Monday and Friday, the employee will be paid a loading of 12.5% of their ordinary rate of pay.
- (b) Where an employee works a rostered night shift between Monday and Friday, the employee will be paid a loading of 15% of their ordinary rate of pay.
- (c) The provisions of this clause do not apply where an employee commences their ordinary hours of work after 12.00 noon and completes those hours at or before 6.00 pm on that day.

For the purposes of this clause:

- (i) **Afternoon shift** means any shift commencing not earlier than 12.00 noon and finishing after 6.00 pm on the same day; and
  - (ii) **Night shift** means any shift commencing on or after 6.00 pm and finishing before 7.30 am on the following day.
  - (d) The shift penalties prescribed in this clause will not apply to shift work performed by an employee on Saturday, Sunday or public holiday where the extra payment prescribed by clause 26 – Saturday and Sunday work and clause 32 – Public holidays applies
  - (e) The Provisions of this clause will not apply to Registered nurse levels 4 and 5.
8. It is uncontroversial to note that penalties have existed alongside awards and agreements for the entire period of industrial regulation in Australia. The history of the establishment and review of penalty rates demonstrates the important role of penalties to deter aberrant behaviour by employers.
9. Industrial tribunals have historically set penalty rates to compensate employees for working outside standard hours (daytimes between Monday and Friday) and to ensure that employers generally maintained standard hours for employees by placing a labour rate premium on work outside those hours.
- 9.1 In *Barrier Branch of Amalgamated Miners Association v Broken Hill Pty Company Ltd* (1909), Justice Higgins awarded penalty payments valued at time-and-a-half of ordinary payments be made for work on the seventh day in any week, an official holiday and all time of work done in excess of the ordinary shift during each day of twenty hours'. Higgins awarded the penalty rates, firstly as compensation to employees being made to work at inconvenient times, but secondly to act as a deterrent against 'long or abnormal hours being used by employers'. (3 CAR commencing at p21)
- 9.2 In seeking to give meaning to the term 'penalty rates' the Full Court of the Conciliation and Arbitration Court in 1947 stated :
- Usually an award provides for an ordinary rate of remuneration, payable for the ordinary work of a standard period performed under normal conditions, and for additional amounts to be paid where work is done under special conditions of time, place or circumstance. In one sense the use of the term "penalty" as applied to such additional amounts is a misnomer, there is no question of punishment about the matter. But in another sense it expresses accurately enough the operation of the requirement of additional payment as, inter alia, a deterrent against calling upon employees to work in the circumstances in which the additional payment is required to be made. Re Rates of Pay for work performed on Saturdays and Sundays (58 CAR 610 at 615)*
- 9.3 Seventy years on, the reasoning is just as sound. Penalty rates act both as a deterrent to employers to engage workers outside standard hours and as compensation to workers who work outside standard hours.
10. Over-reliance on working long hours remains a serious issue across many sectors and where possible this should be discouraged. In our submission there remains an important place for a penalty on employers as an explicit signal and deterrent to working excessive hours, particularly during weekends and at other unsociable times.

Further it is important references to penalties remain in awards because in our view the term connotes something different to additional remuneration.

11. While today 'modern' awards bear little resemblance to the comprehensive and important industrial instruments of the past, in nursing they continue to operate in conjunction with agreements to set wages and conditions of employment.
- 11.1 The establishment of a modern award must be consistent with the modern awards objective (s134). Section 134(da) provides that awards need to provide additional remuneration for work that is unsocial , irregular , unpredictable or may be defined as overtime in the particular award.
- 11.2 Section134 (da) was incorporated into the Act as a result of the passing of the *Fair Work Amendment Bill 2013 (the Bill)*. There is nothing in the terms of the Bill or the Explanatory Memorandum to the Bill that would suggest the need for consequential changes to the terminology of modern award provisions. Rather the reference in s134(da) to 'additional remuneration' merely requires the Commission to have regard to the need to provide additional remuneration for work that was unsocial, irregular, and unpredictable or work that may be defined as overtime.
- 11.3 Section 139 sets out terms that may be included in modern awards:
  - (1) A modern award may include terms about any of the following matters:
    - (e) Penalty rates, including for any of the following:
      - (i) employees working unsocial, irregular or unpredictable hours;
      - (ii) employees working on weekends or public holidays;
      - (iii) shift workers; ..."
- 11.4 We note sections 16, 18, 62, 114 and 323 of the Act also refer to "penalty rates".
12. The Commission must have regard to the principle Object of the Act vis, ... *to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*
- 12.1 Modern awards contribute to providing a balance between the rights and obligations of both employers and employee.
- 12.2 In most workplaces, including where nurses are engaged, employers have broad control over employees. In most cases this control includes the largely unfettered right to:
  - Set the roster arrangements;
  - Set the numbers of employees;
  - Set the skill mix.
- 12.3 Other rights to control employees are constrained. In awards this is generally by the application of a penalty, for example where the employer requires an employee to work excessive hours.

13. Finally, in considering the merit of changing award terminology the Commission should guard against the potential for unintended consequences where award entitlements may interact or be referenced in other commonwealth or state legislation. The way a particular additional payment is characterised may have implications for the operation of state-based long service leave and workers compensation legislation. For example the definition of ordinary pay in the Long Service Leave (NSW) Act 1955.
  
14. Given the nature of the environment in which nurses work the attacks on penalty rates in their various guises has been of fundamental concern to our members. Accordingly the ANMF through its branches has been at the forefront of campaigns both independently and as an affiliate of the ACTU, to ensure these important conditions are not lost.