

**From:** Mikayla Kuhne [<mailto:mikayla.kuhne@corrs.com.au>]  
**Sent:** Monday, 22 May 2017 3:22 PM  
**To:** AMOD  
**Cc:** Nick Le Mare; Leanne Dorricott  
**Subject:** AM2016/31 - 4 yearly review of modern awards - Nurses Award 2010

Dear Registrar

In accordance with the Directions issued by Vice President Catanzariti on 23 November 2016 in relation to proposed variations to the *Nurses Award 2010* and the extension granted on 8 May 2017 for filing submissions in reply, please see **attached**:

- Submissions by Blue Care; and
- Supporting statement of Maria McLaughlin-Rolfe (Blue Care employee).

Please kindly confirm receipt of the attached.

Kind regards

**Mikayla Kuhne**  
Graduate Lawyer

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## IN THE FAIR WORK COMMISSION

**Matter No:** AM2016/31

**Applicant:** Australian Nursing & Midwifery Federation

**Respondent:** Blue Care

### Outline of Submissions of Blue Care

#### Overview

- 1 These submissions are made by Blue Care in response to the submissions by the Australian Nursing & Midwifery Federation (**ANMF**) dated 17 March 2017 to vary the *Nurses Award 2010* (**Award**).
- 2 Blue Care provides residential aged care and community care services in Queensland. Relevantly, this includes employing approximately:
  - a. 8,381 employees; and
  - b. 1,940 nursing employees under the *Blue Care/ Wesley Mission Brisbane Nursing Employees Enterprise Agreement 2013* (**Blue Care Enterprise Agreement**) that is underpinned by the Award.<sup>1</sup>
- 3 Blue Care opposes the following Award variations proposed by the ANMF:
  - a. In-charge and leading hand allowance;
  - b. Recalled to work clarification;
  - c. Extra leave for excessive on-call;
  - d. Free from duty and on-call clarification;
  - e. Increase to minimum rest break between shifts; and
  - f. Timing of meal breaks and compensation.

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<sup>1</sup> See paragraph 2 of Statement of Maria McLaughlin-Rolfe.

## **In-charge and leading hand allowance**

- 4 In respect of the submission by the ANMF to introduce an ‘in charge’ and ‘leading hand’ allowance under the Award, the matters that underpin these submissions have already been considered and rejected by the Fair Work Commission (**FWC**) in the 2012 awards review.
- 5 There is nothing materially new now advanced by the ANMF that would warrant revisiting the FWC’s decision. Blue Care supports the reasoning adopted by the FWC in declining to include an allowance of this kind. Such an allowance (if warranted) should continue to be regulated by enterprise specific arrangements so that the precise circumstances of the employer and employee can be considered, and an appropriate determination made as to whether the allowance is justified.
- 6 The addition of a component dealing with a ‘leading hand’ allowance doesn’t alter the fundamental position previously advanced and, for the same reasons outlined above, should be rejected.
- 7 Further, the quantum of the allowances sought by the ANMF far exceeds the Blue Care Enterprise Agreement<sup>2</sup> and goes beyond what is fair and appropriate compensation as a minimum safety net for additional ‘in charge’ duties required to be performed. If applicable to Blue Care, the proposed variation would increase labour costs.<sup>3</sup>

## **Recalled to work clarification**

- 8 ANMF’s submission in respect of the recalled to work clarification rests on the proper construction of clauses 28.5 and 28.6 of the Award.
- 9 Relevantly, these clauses require that an employee who is ‘recalled to work’ be compensated for a minimum of three hours work at the appropriate overtime rate. Clause 28.6 further requires that an employee not required to be on-call, and recalled to work after leaving the employer’s premises, be compensated for time spent travelling to and from the place of duty.

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<sup>2</sup> See Schedule 2 of the Blue Care Enterprise Agreement.

<sup>3</sup> See paragraph 8 of Statement of Maria McLaughlin-Rolfe.

- 10 The general rule for interpreting an industrial instrument is that the instrument should be construed in accordance with its ordinary language, taking into account the context or wider scheme of the instrument.<sup>4</sup> However, it is also important that any construction reflect industrial realities and the practical field in which the provisions operate.<sup>5</sup>
- 11 When viewed as a whole, it is clear that the true purpose of the provisions 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. This construction is supported by the language and structure of the Award, particularly when viewed against the overtime provisions in clause 28, which do not inherently involve a return to the workplace, but are designed to compensate employees for work performed in excess of their ordinary hours.
- 12 Contrary to the assertions of the ANMF, the *Polan*<sup>6</sup> decision does not support a construction of the recalled to work provisions in the Award applying to situations where an employee performs work remotely (eg by receiving telephone calls at home).
- 13 The decision 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 may, in some circumstances, depending on the wording of the particular industrial instrument, trigger recall for duty entitlements. However, this will ordinarily require a specific instruction or direction from the employer that the employee return to duty on a particular occasion for a specific purpose.
- 14 The *Polan* decision further clarified that where work is performed remotely (eg from home) as part of an ongoing arrangement between the employer and employee, but is outside the employee's ordinary hours of work, this will be analogous to the performance of overtime. In the case of non-salaried employees, the employer will be required to compensate the employee for work performed at the overtime rate in addition to any on-call allowance provided (if applicable).

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<sup>4</sup> *Lacey v Attorney-General (Qld)* [2011] HCA 10.

<sup>5</sup> *Polan v Goulburn Valley Health* [2016] FCA 440.

<sup>6</sup> *Polan v Goulburn Valley Health* [2016] FCA 440; *Polan v Goulburn Valley Health (No 2)* [2017] FCA 30.

- 15 In Ms Polan’s case, the Court determined that receiving and making calls to rearrange rosters, whilst at home and on-call, did not constitute a ‘recall to duty’. This work formed part of Ms Polan’s ordinary duties, albeit in excess of her ordinary hours, and was therefore compensable at the appropriate overtime rate.
- 16 The impact of the proposed variation, if applicable to Blue Care, would mean compensating nurses for phone calls made or received at home (whether on-call or not) for a minimum of three hours work at the overtime rate. This is not currently required under the Blue Care Enterprise Agreement<sup>7</sup> and would increase labour costs<sup>8</sup>. The proposed variation to the Award goes beyond what is fair and appropriate compensation as a minimum safety net for the work<sup>9</sup> and does not reflect the industrial realities in which the provisions operate.

#### **Extra leave for excessive on-call**

- 17 In respect of the submission by the ANMF to compensate nurses required to be on-call through the accrual of additional annual leave entitlements, the proposed variation exceeds the Blue Care Enterprise Agreement<sup>10</sup> and goes beyond what is fair and appropriate compensation as a minimum safety net for the work.<sup>11</sup>
- 18 Nurses are already compensated under the Award for being on-call by way of an allowance. Under the Award, nurses receive an on-call allowance, calculated by reference to the shift they are required to be on-call for, from \$20.05 to \$35.24 per shift.<sup>12</sup> The on-call allowances provided for under the Blue Care Enterprise Agreement exceed the Award entitlements.<sup>13</sup> Nurses are also paid for work performed while on-call.<sup>14</sup>

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<sup>7</sup> See clause 7.4.1 of the Blue Care Enterprise Agreement.

<sup>8</sup> See paragraph 15 of Statement of Maria McLaughlin-Rolfe

<sup>9</sup> See paragraph 14 of Statement of Maria McLaughlin-Rolfe.

<sup>10</sup> See clause 7.5.1 of the Blue Care Enterprise Agreement.

<sup>11</sup> See paragraph 17 of the Statement of Maria McLaughlin-Rolfe.

<sup>12</sup> See clause 16.4 of the Award.

<sup>13</sup> See clause 7.5.1 of the Blue Care Enterprise Agreement and paragraph 10 of Statement of Maria McLaughlin-Rolfe.

<sup>14</sup> See submissions on “Recalled to work clarification” above and paragraphs 10 to 12 of Statement of Maria McLaughlin-Rolfe.

- 19 In addition, the Award provides nurses with an enhanced entitlement to five weeks annual leave (or six weeks for shift-workers), which is reflected in the Blue Care Enterprise Agreement.<sup>15</sup>
- 20 The impact of the proposed variation, if applicable to Blue Care, would be an increase to its labour costs and it could also mean having to increase the number of nurses employed to either reduce on-call shifts per nurse or to cover this additional annual leave.<sup>16</sup>

### **Free from duty and on-call clarification**

- 21 In respect of the submission by the ANMF to require that the 'free from duty' period include time an employee spends rostered on-call, this would involve a significant change to well established industry practice, which is reflected in both the Award and the Blue Care Enterprise Agreement.<sup>17</sup>
- 22 The impact of the proposed variation, if applicable to Blue Care, could mean significant alterations to rostering arrangements. This could require increasing the number of nurses Blue Care employs and hence increasing both administrative and labour costs. In addition, it would affect the number of shifts and on-call shifts nurses can be rostered to perform and potentially reduce their overall compensation.<sup>18</sup>

### **Increase to minimum 'rest break' between shifts**

- 23 In respect of the submission by the ANMF to increase the minimum 'rest break' required between shifts from eight hours to ten hours and to provide a penalty for breach of this entitlement in the form of payment at overtime rates, the proposed variation exceeds the Blue Care Enterprise Agreement.<sup>19</sup>

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<sup>15</sup> See clause 31.1 of the Award and clause 8.1.1 of the Blue Care Enterprise Agreement.

<sup>16</sup> See paragraph 19 of Statement of Maria McLaughlin-Rolfe.

<sup>17</sup> See clauses 7.1.10 and 7.5.1 of the Blue Care Enterprise Agreement and clause 23 of the Award. See paragraph 22 of Statement of Maria McLaughlin-Rolfe.

<sup>18</sup> See paragraph 23 of Statement of Maria McLaughlin-Rolfe.

<sup>19</sup> See clause 7.1.10 of the Blue Care Enterprise Agreement.

- 24 Under the Blue Care Enterprise Agreement, nurses are provided a minimum rest break of ten hours between shifts, or eight hours in certain circumstances, and there is no penalty.<sup>20</sup> Failure to meet the minimum requirements would be a breach of the industrial instrument, which is sufficient incentive for compliance.<sup>21</sup>
- 25 The impact of the proposed variation, if applicable to Blue Care, could mean significant alterations to rostering arrangements, particularly if coupled with the variation sought to clause 21.4 of the Award. This could require increasing the number of nurses Blue Care employs and hence increasing both administrative and labour costs. In addition, it would affect the number of shifts nurses can be rostered to perform and potentially reduce their overall compensation.<sup>22</sup>

#### **Timing of meal breaks and compensation**

- 26 In respect of the submission by the ANMF to regulate when a meal break must be taken, this has already been considered and rejected by the FWC in the 2012 awards review.
- 27 There is nothing materially new now advanced by the ANMF that would warrant revisiting the FWC's decision. The circumstances in which an employee will be entitled to take a meal break are clear (ie where an employee works a shift in excess of 5 hours) and the Award provides for the payment of overtime rates in circumstances where a meal break is not provided in the first 5 hours.<sup>23</sup>
- 28 The precise timing of the meal break is necessarily a matter to be agreed between the employer and individual employee, taking into account operational requirements and employee preference. If this proposed variation to the Award were implemented, such that meal breaks would be required to be taken between the fourth and sixth hour of an employee's shift, it would unreasonably

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<sup>20</sup> See clause 7.1.10 of the Blue Care Enterprise Agreement.

<sup>21</sup> See paragraph 25 of Statement of Maria McLaughlin-Rolfe.

<sup>22</sup> See paragraph 26 of Statement of Maria McLaughlin-Rolfe.

<sup>23</sup> See clause 27.1 of the Award.

restrict the scheduling flexibility that exists to benefit both the employer and employee.<sup>24</sup>

- 29 In respect of the related submission by the ANMF which seeks payment at ordinary rates for remaining available during a meal break, this proposed variation goes beyond what is fair and appropriate compensation as a minimum safety net.
- 30 Such compensation (if warranted) is more appropriate as an allowance, as provided in the Blue Care Enterprise Agreement.<sup>25</sup> Further, this allowance should continue to be regulated by enterprise specific arrangements so that the precise circumstances of the employer and employee can be considered, and an appropriate determination made as to whether the allowance is justified.<sup>26</sup>

### **Overall impact**

- 31 All of the variations sought by the ANMF have the potential to increase Blue Care's administrative and labour costs, and otherwise impact its ability to meet operational requirements. If all of the proposed variations were to apply to Blue Care, the financial consequences could have a material impact on Blue Care's business.<sup>27</sup>
- 32 Neither the submissions nor the supporting evidence filed by the ANMF address the additional administrative and labour cost burdens to be placed on employers as a result of the variations being granted.

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<sup>24</sup> See paragraphs 28 to 31 of Statement of Maria McLaughlin-Rolfe.

<sup>25</sup> See clause 7.2.3 of the Blue Care Enterprise Agreement.

<sup>26</sup> See paragraphs 32 to 33 of Statement of Maria McLaughlin-Rolfe.

<sup>27</sup> See paragraph 34 of Statement of Maria McLaughlin-Rolfe.



## IN THE FAIR WORK COMMISSION

**Matter No:** AM2016/31

**Applicant:** Australian Nursing & Midwifery Federation

**Respondent:** Blue Care

### Statement of Maria McLaughlin-Rolfe

I, Maria McLaughlin-Rolfe of c/ 129 Dennis Road, Springwood in the State of Queensland, state as follows:

1. I am employed by Blue Care as General Manager of the Metro South region. I have been employed in this position since February 2017 and am authorised to make this statement on Blue Care's behalf. I am also a registered nurse with 30 years of post-registration experience in nursing. Attached and marked "**MMR-1**" is a true copy of my curriculum vitae and qualifications.
2. Blue Care provides residential aged care and community care services in Queensland. Relevantly, this includes employing approximately:
  - a. 8,381 employees; and
  - b. 1,940 nursing employees under the *Blue Care/ Wesley Mission Brisbane Nursing Employees Enterprise Agreement 2013 (Blue Care Enterprise Agreement)* that is underpinned by the *Nurses Award 2010 (Award)*.
3. I have read the submissions and supporting witness statements filed by the Australian Nursing & Midwifery Federation (**ANMF**) dated 17 March 2017 in support of proposed changes to the Award and provide the following comments in respect of those matters.

#### **In-charge and leading hand allowance**

4. As I understand it, the ANMF seeks the introduction of:
  - a. An 'in charge' allowance for registered nurses (RN 2 or lower) designated to be 'in charge' of a facility during the day, evening or night; and

- b. A 'leading hand' allowance for enrolled nurses and nursing assistants placed in supervisory roles.
5. Under the Blue Care Enterprise Agreement, a nurse designated as 'in charge' for a shift is paid a supervisor allowance to compensate them for this.<sup>1</sup> A registered nurse receives an additional \$12.40 for the shift and an enrolled nurse receives an additional \$11.26.
6. The additional duties performed by nurses that are 'in charge' differ depending on the facility requirements in question, but normally include supervising staff, overseeing patient care, communicating directly with management and (if necessary) organising replacement staff.
7. In paragraphs 5 to 7 of Cherise Matthews' statement, she gives evidence that she is often required to attend to maintenance issues, supervise kitchen staff, answer phones and deal with security issues. I provide the following comments about those matters:
  - a. Tasks such as these are not generally performed by nurses but by others (e.g. maintenance staff for maintenance related tasks) and any issues arising are dealt with by their manager;
  - b. In any event, a manager is always available to nursing staff during their shift, even if that manager is not physically present on site. During ordinary business hours, a manager can typically be on site within 15-30 minutes after being contacted;
  - c. Typically, the times during which nursing staff will be asked to attend to maintenance issues, supervise kitchen staff and deal with security issues is outside ordinary business hours (ie an evening or weekend shift). Even during these times, a manager is still available to be contacted; and
  - d. In any event, the performance of these tasks is incidental to the nurses' normal duties and a small component of all duties they actually perform.

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<sup>1</sup> See clause 6.8.3 of the Blue Care Enterprise Agreement.

8. The quantum of the allowances sought by the ANMF far exceeds the current allowances under the Blue Care Enterprise Agreement. The impact of this proposed change, if applicable to Blue Care, would be an increase to its labour costs.

**Recalled to work clarification**

9. As I understand it, ANMF seeks to amend clause 28 of the Award to require a minimum three-hour payment in circumstances where a staff member performs work remotely while on-call (e.g. by taking a phone call).
10. Under the Blue Care Enterprise Agreement, nurses are paid an allowance to be on-call.<sup>2</sup> The allowance is calculated by reference to the shift they are required to be on-call for, as follows:

<b>Shift</b>	<b>Allowance</b>
Monday – Friday	\$30.91
Saturday	\$37.08
Sunday or Public Holiday	\$49.44

11. In addition to this on-call allowance, nurses are paid for time actually spent performing duties while on-call (such as time spent on a phone call). Nurses are required to submit a log detailing the time spent performing such duties while on-call so that this time can be paid.
12. In addition, if a nurse is required to actually attend a worksite while on-call (including visiting a patient in their home), they are paid a minimum three-hour payment at the relevant overtime rate.
13. In paragraph 12 of Felicity Ball's statement, she gives evidence that she has never received any compensation for giving telephone advice while on-call and was only paid the on-call allowance. However, as I have outlined above, nurses are paid for time spent giving telephone advice while on-call provided they submit the relevant log.

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<sup>2</sup> See clause 7.5.1 of the Blue Care Enterprise Agreement.

14. In my view, requiring 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.
15. The impact of this proposed change, if applicable to Blue Care, would be an increase to its labour costs.

#### **Extra leave for excessive on-call**

16. As I understand it, ANMF seeks to introduce a mechanism whereby nurses that are required to be on-call more than 10 times in any one year accrue additional annual leave entitlements (calculated on a sliding scale by reference to the number of times they are placed on-call during the year, up to a maximum of five additional days of annual leave per year).
17. In my view, our on-call rostering requirements are not excessive and adequate compensation is already provided to nurses (see paragraphs 10 to 12 above). I have reviewed the on-call rostering records for the last 12 months and, based on that review, the average on-call requirement for nurses across all facilities in the Metro South region is approximately nine on-call shifts per year. Managers also work closely with individual nurses to minimise any impact on family or personal commitments.
18. In paragraph 4 of Felicity Ball's statement, she gives evidence that she is rostered to be on-call, on average, once every fortnight on both Saturdays and Sundays from 06:00 to 19:00. I have reviewed Ms Ball's rostering records and provide the following comments:
  - a. From June 2013 to April 2016, Ms Ball was rostered to be on-call a total of 37 occasions, as follows:
    - i. In 2013, Ms Ball was rostered to be on-call on 8 occasions;
    - ii. In 2014, Ms Ball was rostered to be on-call on 9 occasions;
    - iii. In 2015, Ms Ball was rostered to be on call 18 occasions; and
    - iv. In 2016, Ms Ball was rostered to be on-call on 2 occasions.
  - b. From June 2013 to April 2016, all of these 37 occasions were on a Saturday shift; and

- c. From June 2013 to April 2016, Ms Ball was never rostered to be on-call for a Sunday shift.

19. The impact of this proposed change, if applicable to Blue Care, would be an increase to its labour costs and it could also mean having to increase the number of nurses we employ to either reduce on-call shifts per nurse or to cover this additional annual leave.

#### **Free from duty and on-call clarification**

- 20. As I understand it, ANMF seeks to amend clause 21.4 of the Award to require that the 'free from duty' period include time an employee spends rostered on-call.
- 21. Under the Blue Care Enterprise Agreement, nurses are rostered rest breaks between shifts of at least 10 hours (or eight hours in certain circumstances, for example, if required to account for changes in rostering).<sup>3</sup> In practical terms, similar to the Award, this allows nurses to be rostered on-call during a rest break between shifts.
- 22. In my experience, it is a well-established practice in the industry that nurses can be and are rostered to be on-call during a rest break between shifts.
- 23. The impact of this proposed change, if applicable to Blue Care, could mean significant alterations to rostering arrangements. This could require increasing the number of nurses we employ and hence increasing both administrative and labour costs. In addition, it would affect the number of shifts and on-call shifts nurses can be rostered to perform and potentially reduce their overall compensation.

#### **Increase to minimum 'rest break' between shifts and penalty**

- 24. As I understand it, ANMF seeks to amend clause 23 of the Award to increase the minimum 'rest break' required between shifts from eight hours to 10 hours and to provide a penalty for breach of this entitlement in the form of payment at overtime rates. The Blue Care Enterprise Agreement, provides a minimum rest

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<sup>3</sup> See clause 7.1.10 of the Blue Care Enterprise Agreement.

break of ten hours, or eight hours in certain circumstances, and there is no penalty.<sup>4</sup>

25. In rostering, Blue Care endeavours to provide its nurses with adequate rest breaks, which are generally at least 10 hours and no less than eight hours. Failure to meet the minimum requirements would be a breach of the industrial instrument. In my view, this is a sufficient incentive for employers to comply.
26. The impact of increasing the minimum rest break to 10 hours in all circumstances, if applicable to Blue Care, could mean significant alterations to rostering arrangements, particularly if coupled with the variation sought to clause 21.4 of the Award. This could require increasing the number of nurses we employ and hence increasing both administrative and labour costs. In addition, it would affect the number of shifts nurses can be rostered to perform and potentially reduce their overall compensation.

#### **Timing of meal breaks and compensation**

27. As I understand it, ANMF seeks to amend clause 27.1 of the Award to:
  - a. Require that meal breaks occur between the fourth and sixth hour of a shift; and
  - b. Clarify that compensation be provided to employees required to be 'on duty' or 'remain available' during a meal break.
28. Under Blue Care Enterprise Agreement, a meal break is to be taken at a time not to affect the continuity of work.<sup>5</sup> Our resourcing model is consistent with this.
29. The scheduling of meal breaks differs depending on the facility in question. While all employees who work more than six hours have a thirty minute meal break scheduled as part of their shift, the timing of the meal break depends on a variety of factors, including operational requirements and individual employee preference.

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<sup>4</sup> See clause 7.1.10 of the Blue Care Enterprise Agreement.

<sup>5</sup> See clause 7.2.3 of the Blue Care Enterprise Agreement.

30. In paragraph 19 of Susan Fletcher's statement, she gives evidence that she is often too busy catching up on routine work to take a meal break and that the time to take a meal break is not written anywhere. Similarly, in paragraph 14 of Cherise Matthews' statement, she gives evidence that there is no set time to take a meal break. I provide the following comments about those matters:

- a. We roster meal breaks for all employees that work more than six hours. It is noted in the roster for managers that a meal break is to be provided;
- b. The timing of the meal break is decided between the individual employee and facility manager, taking into account operational requirements and employee preference;
- c. Notwithstanding the above, meal breaks are normally taken between the fourth and sixth hour of an employee's shift;
- d. We expect employees to take their meal break – they are an important part of managing employee fatigue; and
- e. I have observed some employees choose not to take a meal break or to take their meal break at the end of their shift in order to leave work early.

31. The impact of the proposed change in restricting the scheduling of meal breaks, if applicable to Blue Care, would be to reduce flexibility to meet both operational requirements and employee preferences.

32. Under the Blue Care Enterprise Agreement, if an employee is required to remain on the premises and available during a meal break, they are paid an allowance of \$11.26 to compensate them for this.<sup>6</sup> If the employee's meal break is interrupted by work during this period, the meal break is paid at the appropriate overtime rate.

33. The payment sought by the ANMF, of ordinary rates for remaining available during a meal break, far exceeds the current allowance under the Blue Care

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<sup>6</sup> See clause 7.2.3 of the Blue Care Enterprise Agreement.

Enterprise Agreement. The impact of this proposed change, if applicable to Blue Care, would be an increase to its labour costs.

**Overall impact**

34. All of the variations sought by the ANMF have the potential to increase Blue Care's administrative and labour costs, and otherwise impact its ability to meet operational requirements. If all of the proposed variations were to apply to Blue Care, the financial consequences could have a material impact on Blue Care's business.

The contents of my statement are true and correct to the best of my knowledge and belief.



Signed



Witness