SUBMISSION TO
FAIR WORK COMMISSION

Matter No:

AM2016/31

4 YEALY REVIEW OF MODERN AWARDS

NURSES AWARD
(MA000034) AM2014/207

MARCH 2018

SUBMISSION IN REPLY

SUBMISSION BY
PRIVATE HOSPITAL INDUSTRY EMPLOYER ASSOCIATIONS

Australian Private Hospitals Association
Australian Private Hospitals Association – South Australia
Australian Private Hospitals Association – Tasmania
Australian Private Hospitals Association – Victoria
Catholic Health Australia
Day Hospitals Australia
Private Hospitals Association of Queensland
Private Hospitals Association of New South Wales
Private Hospitals Association of Western Australia

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PARTIES TO THIS SUBMISSION

[1] This submission is being lodged on behalf of the Private Hospital Industry Employers' Associations (PHIEA) which includes: Australian Private Hospitals Association (APHA), the Private Hospitals Association of Queensland (PHAQ), APHA – South Australia, APHA – Tasmania; APHA – Victoria, Private Hospitals Association of New South Wales, Private Hospitals Association of Western Australia, Catholic Health Australia and Day Hospitals Australia. These organisations collectively represent approximately 95% of licensed private hospital beds in Australia and in addition, represent approximately 90% of all Free Standing Day Hospitals.

[2] This submission is being lodged in response to claims to vary a number of provisions within the *Nurses Award 2010* but primarily relates to the proposals advanced by the Australian Nursing & Midwifery Federation (ANMF).

PHIEA relies on its previous written submission dated May 2017 and oral submissions of 27 November 2017.

[3] Published private hospital data from the Australian Bureau of Statistics (ABS) for the 2015-16 financial year identifies that the private hospital sector employed 37,471 FTE nursing staff of which 31,569 FTE were Registered Nurses (RN) and 5,902 FTE were Enrolled Nurses (EN).

Hospital staffing data published by the Australian Institute of Health and Welfare (AIHW) and Australian Bureau of Statistics (ABS) is expressed in FTEs rather than headcount, however PHIEA would conservatively estimate that the 37,471 FTE nursing staff employed in the private hospital sector equates to a headcount in excess of 75,000 nursing personnel and therefore the sector is a very significant employer of nurses in Australia.

Data source: AIHW – Australian Hospital Statistics 2015-16 & ABS Private Hospitals 2015-16

[4] The Australian Nursing and Midwifery Federation (ANMF) is seeking substantive variations to the Nurses Award in relation to the following matters:

- In Charge Allowance – Registered Nurses
- Leading Hand Allowance – Enrolled Nurses and Nursing Assistants
- Recall to work when on call
- Recall to work when not on call
- Excessive on call
- Free from duty and on call
- Rest breaks between rostered work
- Meal Breaks

[5] This reply submission briefly summarises PHIEA's position in relation to each of these ANMF claims but would rely on our May 2017 submission in reply for the underlying reasoning for our views.

[6] As noted in our May 2017 submission, not only have some of these items previously been considered both during the making of the Modern Awards and in the Transitional Review, but also we believe that the minimal evidence provided by the ANMF falls well short of the threshold which would be necessary to support such substantive variations to the minimum safety net provisions of the current Nurses Award.

Clause 16.6 In Charge Allowance – Registered Nurses

[7] The ANMF proposes the insertion of the following new clause into the Award:

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.

As we outlined in our May 2017 submission (paragraphs 8-14), an in-charge allowance was considered during the development of the modern Nurses Award.

[8] It was considered again in 2012 and rejected. PHIEA strongly agrees with the comments made by Vice President Watson in his decision of 14 November 2012 [2012] FWA 9420 when he stated that:

> *[23] I do not consider that a case has been established for inserting this allowance. The matter was addressed in the award modernisation process. In my view, in an award such as this with wide-ranging application, there are sound reasons for leaving matters of this nature to the agreement or over award area where the precise circumstances can be considered and appropriate compensation can be given to the extent that it is agreed to be warranted.*

[9] Despite an in-charge allowance having been considered on two previous occasions, the ANMF is not only making a third attempt for the inclusion of an in charge allowance, but on this occasion, is seeking to significantly expand the scope of the proposed allowance from only being applicable when '*in charge of a facility'* to now also being proposed to apply when a nurse is '*in charge <u>of a section of</u> a facility'*,

for which no definition has been provided by the Union but could potentially include a ward or specialty unit within a hospital. In addition, the proposed allowance is not limited to nights, weekends and public holidays but has been extended to apply to any shift.

[10] According to AIHW data – Hospital Resources 2015-16, there are 289 overnight private hospitals and 341 free standing day hospitals collectively operating 33,074 beds and yet the ANMF has only provided witness statements from 2 employees of one 40 bed regional private hospital in Australia (Gympie Private Hospital).

As noted in paragraph 13 of our May 2017 submission, Gympie Private Hospital has an enterprise agreement in place in which, on average, L1 RN rates are 28.6% above the award minimum hourly rates and L2 RN rates are on average 44.8% above the minimum hourly rates in the award. Self-evidently, this paucity of evidence is manifestly inadequate to support a case for such a significant change to the minimum safety net.

[11] There are very few private hospital organisations which do not have enterprise agreements in place covering their nursing staff. Therefore, it is open to the ANMF at any time to make a claim for an in-charge allowance as part of its enterprise agreement negotiations.

Leading Hand Allowance – Enrolled Nurses and Nursing Assistants

[12] The ANMF is proposing the introduction of a Leading Hand Allowance for Enrolled Nurses and Nursing Assistants performing supervisory functions.

None of the Awards applicable to private hospital nurses prior to the introduction of the Nurses Award 2010 contained Leading Hand Allowances. Of significance, neither did the ANF's proposed *Exemplar Nursing Occupational Award*. Quite simply, 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.

PHIEA notes paragraph [60] of the Preliminary Jurisdictional Issues Decision [2015] FWCFB 1788, in which the Full Bench stated that *"In the absence of cogent reasons for not doing so, the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made."*

[13] As noted in paragraph [20] of our May 2017 submission, the Nursing and Midwifery Board of Australia (NMBA) - *Standards for Practice for Enrolled Nurses (Indicator 3.8 within Standard 3)* clearly states that support and supervision to assistants in nursing, EN students and others is an inherent part of the EN role.

Team based care has been an integral part of the nursing model in private hospitals for several decades but the precise role and responsibilities of ENs and nursing

assistants varies significantly depending on the healthcare setting within which they practice.

Similar to the in-charge allowance, PHIEA is of the view that any discussion regarding a Leading Hand Allowance should be confined to enterprise agreement negotiations.

[14] PHIEA submits that the ANMF has failed to provide a merit based argument or any probative evidence in support of such a significant new allowance, which would apply as a safety net provision across the whole of the health industry where nurses are employed. Accordingly, PHIEA considers the application should be rejected.

Telephone & Other Remote Call

[15] The ANMF is proposing to vary existing clauses 28.5 and 28.6 to specify that the provisions would be extended to apply to situations where nurses are recalled to perform work remotely, for example via telephone.

In the private hospital industry, if a nurse is recalled to work, it generally means that the person needs to physically return to the hospital. In some other sectors of the health industry in which nurses' work – such as aged care – there may well be circumstances where staff are specifically rostered to provide remote telephone advice but this is very different to triggering a 'recall to work overtime' scenario as proposed by the ANMF.

There are of course occasions where a nurse may be contacted at home to address a simple query which may have arisen since the person concluded their shift e.g. something in a patient's chart may not be particularly legible, so a call is made to clarify the previous nurse's entry. Under the ANMF proposal, calls such as this would trigger a minimum 3 hour overtime provision which we consider to be patently excessive.

[16] The Nurses Award satisfied the modern awards objective at the time it was made and PHIEA does not consider the ANMF has provided a sufficient merit based argument in support of its application to vary the existing provisions to include telephone calls. The evidence provided is limited and suggestive of some work load management issues, rather than any underlying deficiency in the award safety net provisions.

PHIEA does not support the ANMF proposal to amend the Recall to Work provisions and considers that this should be a matter for discussion during enterprise agreement negotiations.

Excessive On Call

[17] The ANMF is proposing to expand the existing on call provisions to introduce a new clause which would provide for the accrual of additional annual leave on a sliding scale of one additional day of annual leave for each 10 occasions of being placed on call, to a maximum of 5 days in any one year.

None of the Awards applicable to private hospital nurses prior to the introduction of the Nurses Award 2010 contained provision for the accrual of additional annual leave based on the number of times a nurse was placed on call, nor did the ANF's proposed *Exemplar Nursing Occupational Award*. Like many of the claims in the current ANMF application, 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.

[18] If the review is being conducted "*on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made",* PHIEA submits that the ANMF has failed to provide sufficient evidence to warrant the consideration of a change to the safety net of this magnitude.

The ANMF has only provided 5 witness statements in support of its entire suite of proposals, all of which are from Queensland and which relate to just 2 employer organisations, hardly sufficient evidence to demonstrate any underlying deficiency in the existing safety net provisions.

The issue of additional annual leave linked to the number of times placed on call or called back to work, is a matter for discussion during enterprise agreement negotiations where any site specific matters may be duly considered and if agreed, a clause developed which is appropriate for that particular enterprise and its employees. It is not a provision that should be included in a safety net award.

Free from Duty and On Call

[19] The ANMF is proposing to introduce a new requirement that would not allow an employee to be placed on the on-call roster on their day off.

Private Hospitals provide care for their patients 24/7 and must have the ability to call employees back to work if unexpected absences occur within the rostered team or if patient demand should increase unexpectedly.

Nurses and midwives can only be placed on the on-call roster when they are not rostered to work – i.e. out of work hours and on their days off. To remove days off from this equation, which historically have always been included, would be to introduce on-call rostering restrictions that may not meet the needs of the patients or the business.

There is no historical precedent in the awards covering private hospitals to justify the inclusion of such a clause as part of the minimum safety net.

PHIEA maintains that the ANMF has not provided sufficient evidence to justify consideration of a change to the safety net of this magnitude and therefore the proposal should be rejected.

Rest Breaks Between Rostered Work

[20] The ANMF is not only proposing to increase the rest break between periods of work from eight (8) hours to ten (10) hours, but also to introduce an overtime penalty should the break not be taken.

As noted in paragraph [34] of our May 2017 submission, PHIEA submits that the minimum duration of a rest break between periods of rostered ordinary work was considered during the making of the Nurses Award 2010 and the current clause reflects the majority provision of the previous industrial instruments.

Only one witness statement makes reference to the break between rostered periods of ordinary work, therefore we consider that the ANMF has failed to provide comprehensive evidence of a systemic and widespread deficiency with the current 8 hour minimum break between rostered periods of ordinary work. Accordingly, PHIEA does not consider that any change to the current safety net provision is necessary.

There is no historical precedent relating to the ANMF proposal to introduce an overtime penalty in circumstances where an employee has not had the minimum break period between ordinary rostered shifts. Penalties are of course applicable if employees do not have the minimum rest period after overtime.

Given the lack of evidence highlighting a significant deficiency with the existing provision, the ANMF proposal should be rejected. It is of course always open to the ANMF to pursue its claim as part of enterprise agreement negotiations.

Meal Breaks

[21] The ANMF has proposed an amendment to the existing meal break clause to (a) specify that the meal break should be taken between the 4th and 6th hour and (b) clarification to entitlements when required to either be on duty during a meal break or to remain available but free from duty during a meal break.

As noted by the ANMF in paragraph 99 of its submission of 17 March 2017, during the 2012 Awards Review, a similar claim to prescribe when meal breaks should be taken, was rejected by Vice President Watson on the grounds that the proposed variation would inhibit flexibility. In his decision of 14 November 2012 [2012] FWA 9420 he stated:

In my view the employers have correctly acknowledged the obligations under the Award. Any practice whereby an employee is not provided with a meal break must result in overtime payments being made until the scheduled meal break is given. A small amount of give and take based on operational requirements is understandable, but a failure to provide a break, or overtime payments until the end of a shift would not be consistent with the intent of the clause. Nevertheless, I do not consider that a case has been made out for regulating the time for the meal break in the way proposed by the ANF. Such an approach would inhibit the existing flexibility which is no doubt necessary in many operations covered by this Award. The clarifications of obligation in this decision and the availability of the disputes procedure should assist in the event of further difficulties with regard to meal breaks."

[22] Whilst PHIEA does not object to there being some indicative time frame as to when a meal break should be taken, we do not support the wording proposed by the ANMF as it is too prescriptive and in our opinion does not take into consideration 8 hour shifts where the 4th and 6th hour may not straddle a logical meal time.

For nurses working 7.00 am – 3.00 pm a specified break between the 4th & 6th hour would straddle the 11.00 am – 1.00 pm lunch period which is entirely reasonable, however for nurses working a 10.00 am to 6.00 pm shift, specifying that a meal break must be taken between the 4th and 6th hour would mean that the earliest time these nurses would have a meal break would be 2.00 p.m. and it may not be until 4.00 pm which some staff may well consider is too late in the day for their 30 minute 'lunch' break.

[23] The prescribing of a timeframe for when meal breaks should be taken has also been raised in the Health Professionals & Support Services Award, with a proposed clause submitted by the HSU. PHIEA considers that the HSU's clause is preferable as, whilst it indicates that the meal break should be taken between the 4th and 6th hour it retains some necessary flexibility, by the inclusion of the words "*where reasonably practicable."*

The HSU clause reads:

Unpaid meal breaks

(a) An employee who works in excess of five hours will be entitled to an unpaid meal break of between 30 minutes and 60 minutes. The meal break will, wherever reasonably practicable, be taken between the fourth and sixth hours of commencing work.

(b) The time of taking the meal break may be varied by agreement between the employer and employee.

(c) An employee who works not more than six hours may elect to forgo the meal break, with the consent of the employer.

As PHIEA indicated at the Nurses Award hearing on 27 November 2011 [PN121] because the current clause blurs the significant difference between remaining available and being on duty during a meal break, we agree that some clarification is required however the wording of the clause may require further discussion between the parties before being finalised.

SUBMISSIONS OF OTHER PARTIES

Aged Care Employers (ACE)

Variation to Rostering Clause

[24] PHIEA supports the ACE proposal to vary the rostering clause to allow rosters to be changed with less than 7 days' notice, provided the roster change is agreed by both the employer and the employee.

[25] New Remote Communication Allowance

ACE has proposed a new Remote Communication Allowance which, if adopted, would provide a new entitlement to employees who are on-call and recalled to work remotely as opposed to the current on-call clause which applies where employees are on-call and are physically required to return to the workplace when recalled.

In considering a new entitlement, it is critical not to lose sight of the fact that the Nurses Award is an occupational award and in consequence, has application to a range of operations such as private hospitals, aged care facilities and nurses in private practice settings, which are necessarily very different in terms of their methods of operation and associated staffing requirements.

As noted in paragraph [15] of this submission, in the private hospital sector, when nurses are recalled to work, they are almost always required to physically return to the hospital, however, there will of course be occasions where a call may be made to a nurse to clarify something which may have occurred on that nurse's previous shift. PHIEA considers that simple calls of clarification or minor inquiry should not be considered eligible for a remote communication allowance.

[26] We acknowledge that the Aged Care industry has situations and scenarios that are unique to that industry. Should the Commission determine that the ACE proposal has merit and a clause is to be placed into the modern award, we request that it be quarantined to nurses working in aged care or community settings where nursing services may be delivered remotely, and expressly exclude nurses employed in private hospitals. Unless the clause were to specify that it did not apply to nurses working in private hospitals, it may well generate confusion in circumstances where a person may have been contacted for clarification regarding something which may have occurred on their shift.

SUMMARY

[27] In closing, as we noted in our May 2017 submission, the ANMF has proposed a number of significant variations to the Nurses Award 2010, some of which have been considered previously, both during the making of the modern award and in the 2012 review; others are completely new and without historical precedent in the previous

awards covering nurses and some are significant expansions to existing provisions, for which minimal evidence has been submitted.

Noting that the *'Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made",* PHIEA considers that in each of its claims, the ANMF has failed to provide sufficient evidence that the proposed variation is **necessary** to achieve the modern awards objective.

[28] It would be reasonable to estimate that a very significant percentage of Australia's approximately 370,000 practising nurses would be covered by the Nurses Award, and yet in support of its claim for some very substantive amendments to the safety net provisions, the ANMF has only provided a total of 5 employee witness statements from staff employed by just 1 private hospital organisation and 1 aged care organisation, both from the same state (Queensland).

By any objective metric, this paucity of evidence cannot be considered to be reflective of the industry as a whole, such that in order to satisfy the modern award objectives, it is necessary to amend the safety net provisions as proposed.

[29] The health industry is highly complex and nursing personnel are employed in a myriad of enterprises of differing size, complexity and scope of nursing services provided, such that any consideration of in charge or leading hand allowances should only be addressed at the enterprise level.

Similarly, PHIEA considers that the ANMF proposals relating to recall, excessive on call, free from duty and on call, and rest breaks between rostered work are all matters for enterprise bargaining, particularly in those situations where a workload management issue may have been identified.

In closing PHIEA does not support any of the variations proposed by the ANMF.

[END OF SUBMISSION]