



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

Submissions in reply regarding  
substantive claims re *Nurses Award*

22 May 2017

## Introduction

1. The Australian Nursing and Midwifery Federation (ANMF) refers to the Directions regarding the *Nurses Award 2010* ('the Award') issued by the Fair Work Commission on 23 November 2016 and subsequent extensions. The ANMF accordingly makes the following submissions in reply to substantive variations to the Award sought by other parties.
2. The ANMF also refers to and relies on its submissions dated 17 March 2017 regarding the ANMF's substantive claims.

## Rostering

3. In paragraph 2 of its Further Submissions dated 17 March 2017, the Aged Care Employers (ACE) propose a variation to clause 8.2 (Rostering) of the exposure draft of the Nurses Award.<sup>1</sup> The ACE submissions refer to a proposed draft clause contained in previous submissions dated 15 July 2015.

4. The proposed variation would amend clause 8.2(e) of the exposure draft clause so that it reads (proposed variation underlined):

Subject to clause 8.2(f), unless the employee otherwise agrees, seven days' notice of a change of roster will be given by the employer to an employee.

5. No change has been proposed to clause 8.2(f), which states:

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, an alternative day off will be taken at an agreed time.

6. In summary, the existing rostering clause provides that an employer must provide seven days notice of a change of roster, except in situations 'where another employee is absent from work due to illness or in an emergency'. The ACE proposal would therefore enable an employee to agree to less than seven days notice of a change of roster initiated by the employer.
7. The ANMF opposes the proposed change.

---

<sup>1</sup> The most recent exposure draft of the Award is dated 2 November 2016. The equivalent clause in the current version of the Nurses Award (as last amended 20 December 2016) is clause 25 (Rostering). The exposure draft version has made only minor (not substantive) changes to the existing clause.

8. The aged care employers have not demonstrated that amendment of the clause is necessary to meet the modern awards objective.
9. The ANMF refers to the four witness statements filed on 4 August 2016 and relied on by the aged care employers in support of this variation. At paragraph 6 of each witness statement, the relevant witness states "... given the terms of the EBA, my organisation does not have this problem and restriction...".
10. This demonstrates that employers desiring to amend the existing award roster clause can, and do, undertake the option of entering into an enterprise agreement to amend the relevant clause. The rostering clauses in the relevant enterprise agreements are all significantly different to the existing award clause.
11. The ANMF also has concerns that the imbalance in bargaining power between employers and employees means that employees may feel pressured to agree to changes they do not really wish to agree to. As pointed out by a seven member Australian Industrial Relations Full Bench in *Re Award Modernisation* (2009) 181 IR 19 at [148] in relation to the making of the *Nurses Award* among other health awards:

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

### Remote communication allowance

12. The aged care employers propose a set of provisions regarding employees who provide advice or assistance remotely.<sup>2</sup>
13. The proposal would, regarding such employees:
  - introduce a new remote communication allowance<sup>3</sup>

---

<sup>2</sup> Paragraphs 3-6 of 17 March 2017 submissions

<sup>3</sup> Proposed (exposure draft) clause 11.3(b)(ii)b, an addition to the existing on call allowance clause. The most recent version of the exposure draft is dated 2 November 2016. The on call allowance clause in the current version of the Nurses Award (last amended 20 December 2016) is clause 16.4.

- halve the existing on-call allowance<sup>4</sup>
- remove the existing entitlement to an eight hour rest break between rostered work<sup>5</sup>
- remove the existing entitlement to a ten hour break after performing overtime, except where an employee performs remote work for three or more hours<sup>6</sup>
- specify that the existing recall to work provisions do not apply<sup>7</sup>

14. The ANMF opposes the Aged Care Employers' proposals for the reasons outlined below.

15. The ANMF opposes the proposed halving of the amount of the existing on-call allowance for employees required to be on call to provide assistance remotely. No rationale is specified for why the on-call allowance should be reduced by 50% for these employees. On the contrary, expecting to work remotely poses the same inconvenience to an employee as expecting to be called back physically to work.

16. The ANMF opposes the proposal to introduce a remote communication allowance. As outlined in submissions dated 17 March 2017, the ANMF 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. We reject the assertion that the ACE claim "is more beneficial to employees under the Award than if the proposed clause did not exist"<sup>8</sup> because the ACE proposal would represent a reduction in the existing entitlement.

17. The ACE proposal additionally does not specify what happens if an employee who has *not* agreed to be on call provides advice or assistance remotely. The remote communication allowance, according to the ACE proposal at clause 11.3(b)(ii)b, is expressed to be payable only to 'an employee who agrees to be on call' and who is receiving an on-call allowance.

18. The ACE proposal to insert a new (exposure draft) clause clause 15.3(d) would entail that the existing minimum rest period after overtime of ten hours would not apply where an employee performed remote recall work for less than three hours. The ANMF opposes this amendment.

19. The ACE submissions provide examples of an employee providing advice or assistance remotely for four or six periods (continuously or separately) during an on call period. If those calls were spaced over several hours, especially at times when an employee would otherwise be sleeping, then the ACE proposal would mean that the employee would not be entitled to *any* rest break after performing the remote recall work if the amount of work performed was less than three hours in total. Such a proposal is unfair and would lead to

---

<sup>4</sup> Proposed (exposure draft) clause 11.3(b)(ii)a.

<sup>5</sup> Proposed addition to (exposure draft) clause 8.4

<sup>6</sup> Proposed (exposure draft) clause 15.3(d)

<sup>7</sup> Proposed addition to (exposure draft) clauses 15.5 and 15.6

<sup>8</sup> at paragraph 5(c)

inadequate breaks between work. The ANMF submissions dated 17 March 2017 provide evidence regarding the effects on health and safety of inadequate breaks between work.

20. The aged care employers also propose that existing exposure draft clause 8.4 regarding rest breaks between rostered work would not be applicable where an employee performs remote recall work. The current clause specifies that an employee will be allowed an eight hour rest break between two 'ordinary work periods or shifts'. The ANMF opposes the proposal as unnecessary because, unlike the rest period after overtime clause, the existing clause is not generally relevant to the situation of a rest period after remote recall work (which is overtime work). It deals instead with rest breaks between *ordinary* work periods or shifts. Remote recall work is not an 'ordinary work period or shift'.
21. Finally, the aged care employers do not provide any witness evidence to support their proposal. Among other things, the lack of evidence provided means that the assertions made in paragraph 5(b) of their submissions should not be accepted at face value.

### Meal breaks

22. The AIG's submission dated 14 March 2017 proposes an amendment to the existing clause 27.1(a) of the Nurses Award, so clause 27.1 (Meal breaks) would read (amendment underlined):
  - (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.<sup>9</sup>
  - (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.
23. While the AIG's proposal resembles part of the ANMF's own proposal regarding the meal breaks clause,<sup>10</sup> the ANMF does not support the AIG's proposal in isolation from the other aspects of the ANMF proposal referred to in our 17 March 2017 submissions.
24. The AIG submissions assert that their proposals would benefit some employees, however to date the AIG has opposed ANMF proposals regarding other meal breaks provisions which would benefit employees. The ANMF proposals regarding meal breaks would, among other things, provide employees with more certainty when meal breaks occur.

---

<sup>9</sup> at [20]. The equivalent exposure draft clause (latest version dated 2 November 2016) is clause 9.1 (Unpaid meal breaks), which is not substantively different from the existing award clause.

<sup>10</sup> ANMF 17 March 2017 submissions paragraphs [89-119]

25. The AIG partly relies on the presence in other awards of a similar provision.<sup>11</sup> The ANMF notes in response that the other awards relied upon all have different provisions to those contained in the Nurses Award, for example all or most of those awards are more explicit than the Nurses Award about the *timing* of the meal break.
26. For example the *Children’s Services Award* states that “[a]n employee will *not be required to work in excess* of five hours without an unpaid meal break...” (emphasis added). Unlike the Nurses Award clause, which does not explicitly specify *when* during a shift a meal break must be taken (a point also made by AIG: see paragraph [19]), the Children’s Services Award reads as requiring a meal break *no later than* 5 hours after the commencement of work. The Manufacturing Award is similarly clear: “An employee *must not be required* to work for more than five hours...”
27. The ANMF queries why, if the AIG is relying on the presence in other awards of the clause it seeks, it does not also propose the parts of those clauses which provide more certainty for employees.
28. The ANMF notes the AIG’s assertion at paragraph 18 of its submission that the meal breaks clause in the *Health Professionals Award* is ‘in relevantly similar terms’ to the provision in the Nurses Award.<sup>12</sup> The ANMF points out that the clauses are *not* the same in several important respects including that the Nurses Award does not contain an equivalent clause to clause 27.1(b) of the Health Professionals Award which provides that “[t]he time of taking the meal break may be varied by agreement between the employer and employee”.

---

<sup>11</sup> at [35-36]

<sup>12</sup> see also [22] ‘are in relevantly similar terms and by their design, [the variations] would have the same effect’