

BEFORE THE FAIR WORK COMMISSION

NURSES AWARD 2010
(MA000034)

4 yearly review of modern awards – Nurses Award 2010

AM2014/207

FURTHER SUBMISSIONS BY
AGED CARE EMPLOYERS

17 March 2017

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Overview

1. Aged Care Employers¹ (**ACE**) make this submission in accordance with the Fair Work Commission's (**Commission**) Amended Directions issued 3 March 2017² in respect of the 4 yearly review of the *Nurses Award 2010* (**the Award**).

Variation 1 – Vary clause 8.2 of [Exposure Draft] Award re “Rostering” – Substantive variation

2. ACE press the proposed variation to clause 8.2 of the Award as set out at paragraphs 2 to 4 of its submissions dated 15 July 2015.³ ACE relies upon the witness statements filed 4 August 2016 in support of this variation.⁴

Variation 2 – New clauses 11.3(b) and 15.2(d) of [Exposure Draft] Award re “Remote Communication Allowance” – Substantive claim

3. ACE does not press the variation set out at paragraph 5 of its submissions dated 15 July 2015.⁵ Rather, ACE presses new clauses 11.3(b) and 15.3(d), and new clause additions to clauses 8.4, 15.5 and 15.6, as follows:

New clause 11.3(b)

“Remote Communication Allowance and payment for work performed

- (i) 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.
- (ii) An employee who agrees to be on call to provide advice or assistance remotely will receive:
 - a. 50 percent of the on call allowance specified in clause 11.3(a) for the relevant on call period; and
 - b. 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.

By way of examples, an employee who provides advice or assistance remotely for 10 minutes during an on call period will receive one hour's overtime payment. An employee who provides advice or assistance remotely for four 15 minute periods

¹ Aged Care Employers: Aged and Community Services Australia, Leading Age Services Australia Ltd

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014204-corr-dir-fwc-020317.pdf>

³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014207-sub-acs-150715.pdf>

⁴ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014204-sub-ws-lasa-040816.pdf>

⁵ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014207-sub-acs-150715.pdf>

(continuously or separately) during an on call period will receive one hour's overtime payment. An employee who provides advice or assistance remotely for six 15 minute periods (continuously or separately) during an on call period will receive one and a half hour's overtime payment.

- (iii) An employee seeking payment under clause 11.3(b)(ii)(b) 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 or 5.

New clause (addition) to clause 8.4

The provisions of this clause will not apply in circumstances where an employee performs work under clause 11.3(b)

New clause 15.3(d)

Notwithstanding clauses 15.3(a) to (c), this clause will not apply where an employee performs work under clause 11.3(b) for less than three hours.

New clause (addition) to clause 15.5

The provisions of this clause will not apply in circumstances where an employee performs work under clause 11.3(b).

New clause (addition) to clause 15.6

The provisions of this clause will not apply in circumstances where an employee performs work under clause 11.3(b)."

- 4. The intention of this claim is to provide for the payment of on call and remote communication allowance to employees who provide advice or assistance remotely. In other words, where an employee's advice or assistance via telephone, text, web chat or email is sought as opposed to the employee being physically required to return to the workplace or place of work.
- 5. ACE identifies the following matters in support of this claim:
 - (a) This is not a novel claim or provision. Similar types of provisions appear in the *Local Government Award 2010* (at clauses 24.4(d) and 24.6(d)); *Local Government (State) Award 2014* (NSW) (at clause 19E); *Water Industry Award 2010* (at clauses 26.4(d) and 26.6(d)); *Business*

Equipment Award 2010 (at clauses 30.6(d) and 30.7); and the *Contract Call Centres Award 2010* (at clauses 26.4(d), 26.6(d) and 26.7).

- (b) This is not to be associated with a “recall to work overtime” scenario. The disutility associated with an employee being physically recalled to work overtime at the workplace is not evident in an “on call remote work” scenario. An employee can be on call remotely from anywhere. They do not need to remain static at a particular location, be in readiness to attend work or be in (or change into) work clothing to perform the work. No travel to/from the workplace is required. Further, provided the employee is able to respond in a reasonable timeframe, they are able to provide the remote advice or assistance at their own convenience.
 - (c) The claim in this matter is not only consistent with the reasoning on the difference between “recall to work” and “overtime” in *Polan v Goulburn Valley Health* [2016] FCA 440 (**the Polan case**),⁶ but is more beneficial to employees under the Award than if the proposed clause did not exist.
6. The Remote Communication Allowance being sought by ACE stands in stark contrast to the claim by the ANMF to expand recall to work overtime provisions.⁷ In this regard, the basis upon which the ANMF makes its claim is contrary to the reasoning in the Polan case, and makes remote advice and assistance cost prohibitive and inaccessible.
 7. ACE will further expand on the matters set out in these submissions orally at the hearing.

Aged Care Employers

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⁶ The fact that the Polan case related to the interpretation of a specific set of facts by reference to the construction of the terms of an enterprise agreement is not to the point. The relevance of the case flows from his Honour Justice Mortimer’s findings as to the difference (at large) between “recall to work” and “overtime” (ie they are not the same and they have a different industrial history).

⁷ ANF Submission dated 15 July 2015 (at paragraphs 20-22), found at: <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014207-sub-anmf-150715.pdf>