

BEFORE THE FAIR WORK COMMISSION

**SUBMISSION
by AGED CARE EMPLOYERS**

4 yearly review of modern awards –

Nurses Award 2010 - AM2014/207 & AM2016/31

Health Professionals and Support Services Award 2010 - AM2014/204 & AM2016/31

***NURSES AWARD 2010
(MA000034)***

***HEALTH PROFESSIONALS and SUPPORT SERVICES AWARD 2010
(MA000027)***

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INTRODUCTION

- 1.1 Aged Care Employers (**ACE**) makes this submission in respect to the four (4) year review of the *Nurses Award 2010* ("**the Nurses Award**") and the *Health Professionals and Support Services Award 2010* ("**the Health Professionals Award**") in accordance with directions issued by the Fair Work Commission ("**Commission**") on 28 November 2017.
- 1.2 ACE is comprised of the following national peak bodies for the aged care industry¹:
- Aged and Community Services Australia ("**ACSA**"); and
 - Leading Aged Services Australia Ltd ("**LASA**").
- 1.3 On 13 November 2017, the FWC uploaded to its website revised exposure drafts of the Nurses Award ("**the Nurses Exposure Draft**") and the Health Professionals Award ("**the HP Exposure Draft**").
- 1.4 It is well understood that as part of the 4 year reviews of modern awards, the Commission is required to ensure that modern awards meet the modern awards objective which is set out in s 134(1) of the Fair Work Act 2009 ("**the Act**") as follows:

The modern awards objective

What is the modern awards objective?

- (1) *The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*
- (a) *relative living standards and the needs of the low paid; and*
 - (b) *the need to encourage collective bargaining; and*
 - (c) *the need to promote social inclusion through increased workforce participation; and*
 - (d) *the need to promote flexible modern work practices and the efficient and productive performance of work; and*
 - (e) *the need to provide additional remuneration for:*
 - (i) *employees working overtime; or*
 - (ii) *employees working unsocial, irregular or unpredictable hours; or*
 - (iii) *employees working on weekends or public holidays; or*
 - (iv) *employees working shifts; and*
 - (f) *the principle of equal remuneration for work of equal or comparable value; and*
 - (g) *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;*
and

¹ ACE is presently comprised of ACSA and LASA and has previously been comprised of LASA and ACSA and/or their predecessor organisations.

(h) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(i) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

*This is the **modern awards objective***

1.5 ACE continues to seek the following variations to the Nurses Award:

- (a) Vary the rostering clause to allow rosters to be changed with less than 7 days' notice, provided the roster change is agreed by the employer and employee; and
- (b) Introduce a new Remote Communication Allowance which, if adopted, would provide a new entitlement where employees are on-call to be recalled to perform work remotely as opposed to the current on-call clause which applies where employees are on-call to be recalled to actually return to work physically.

It is noted that ACE's proposed Remote Communication Allowance competes with the proposals by the Australian Nursing and Midwifery Federation ("**ANMF**") to vary the "*Recall to work when on call*" clause and the "*Recall to work when not on call*" clause.

1.6 ACE also seeks to vary the rostering clause in the Health Professionals Award to allow rosters to be changed with less than 7 days' notice provided the roster change is agreed by the employer and employee.

1.7 ACE's proposed variations will be described in more detail later in this submission.

1.8 In respect to the variations that ACE seeks to the Nurses Award², ACE repeats and relies on its written submissions dated 17 March 2017³ and 15 July 2015⁴ as well as paragraphs 2, 3, 15 and 16 of its written submission dated 22 May 2017⁵. In that regard ACE particularly relies on paragraphs 3 and 4 of ACE's written submissions dated 15 July 2015 in respect to ACE's proposed variation to the rostering clause for the Nurses Award as follows:

3. ACE submit that without this variation, subject to clause 8.2(f), an employer cannot alter an employee's roster absent seven days' notice to the employee, ie even where the employee agrees to such a roster change. In respect of clause 8.2(f), such roster alteration is limited to "illness" or "emergency".

² For clarity, the "*Remote Communication Allowance*" that ACE seeks to introduce into the Nurses Award is that is set out in paragraph 3 of ACE's submission dated 17 March 2017 as it has superseded and replaced the initial version that was contained paragraph 5 of ACE's submission dated 15 July 2015

³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201631-207-sub-ace-170317.pdf>

⁴ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014207-sub-acs-150715.pdf>

⁵ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201631-207-sub-reply-ace-220517.pdf>

Clearly, there are many other matters beyond just illness or emergency that an employer might require a roster to be altered. For example, an employee's car may have broken down, an employee may have abandoned duty, and an employee may have taken leave at short notice for a family matter.

4. *ACE will bring witnesses from the aged care industry (who employ nurses) to highlight the many and varied ways in which employees may be absent from duty at short notice other than for reasons of illness or emergency, and why the provision of seven days' notice in such circumstances is impractical and unnecessary where another employee agrees to the roster change.*

And paragraph 6 of ACE's written submissions dated 15 July 2015 in respect to ACE's proposed Remote Communication Allowance for the Nurses Award as follows:

6. *The intention of this variation is to provide for the payment of on call and remote communication allowances 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 to be "hands-on".*

And paragraphs 2 to 6 of ACE's written submissions dated 17 March 2017 as follows:

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.*

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 (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), 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.*

And paragraphs 15 and 16 of ACE's written submissions dated 22 May 2017 as follows:

ANMF Claim 3 – Recall to work when on-call, and when not on-call

15. *The ANMF claim seeks that employees who take a work call from their lounge chair for 1 minute are paid at least 3 hours for such a call. Such a claim defies common sense. It is not supported on the evidence as being a fair safety net entitlement. There is no historical basis to support such a claim. Being physically recalled to the workplace is not the same as answering a telephone. Not all work performed by a part-time or casual employee will automatically be overtime during a period of on-call.*

16. *The ANMF recall to work when on-call and when not on-call is a substantial claim not supported by cogent evidence or other reasons. It ought to be dismissed. It is a matter for bargaining.*

And paragraph 26 of ACE's written submissions dated 22 May 2017 as follows:

26. *The ANMF proposes significant variations to the Award in circumstances where such matters have been considered previously and rejected, are not supported historically and are not supported by the limited evidence advanced by the ANMF in these proceedings. On that basis, there is warrant to vary the Award as sought by the ANMF.*

1.9 In respect to the variations that ACE seeks to the Health Professionals Award, ACE repeats and relies on its written submissions dated 17 March 2017⁶ and 15 July 2015⁷. In that regard ACE particularly relies on paragraph 2 its written submissions dated 17 March 2017 which states:

Variation 1 – Vary clause 8.3 of [Exposure Draft] Award re “Rostering” – Substantive variation

2. *ACE press the proposed variation to clause 8.3 of the Award as set out at paragraphs 2 to 4 of its submissions dated 15 July 2015. ACE relies upon the witness statements filed 4 August 2016 in support of this variation.*

And paragraphs 2 to 4 of its written submissions dated 15 July 2015 which states:

Substantive claim/variation – Vary clause 8.3 of [Exposure Draft] Award

2. *ACE propose to vary clause 8.3 of the Award, as follows:*

“8.3 Rostering

(a) The ordinary hours of work for each employee will be displayed on a fortnightly roster in a place conveniently accessible to employees. The roster will be posted at least two weeks before the commencement of the roster period.

(b) Unless the employee otherwise agrees, seven days' notice will be given of a change in a roster. However, a roster may be altered at any time to enable the functions of the hospital, facility or organisation to be carried on where another employee is absent from duty on account of illness or in an emergency.

⁶ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201631-204-sub-ace-170317.pdf>

⁷ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014204-sub-ace-150715.pdf>

(c) Unless the employer otherwise agrees, an employee desiring a roster change will give seven days' notice except where the employee is ill or in an emergency."

3. ACE submit that without this variation, an employer cannot alter an employee's roster absent seven days' notice to the employee, ie even where the employee agrees to such a roster change. In this respect, such roster alteration is limited to "illness" or "emergency". Clearly, there are many other matters beyond just illness or emergency that an employer might require a roster to be altered. For example, an employee's car may have broken down, an employee may have abandoned duty, and an employee may have taken leave at short notice for a family matter.

4. ACE will bring witnesses from the aged care industry to highlight the many and varied ways in which employees may be absent from duty at short notice other than for reasons of illness or emergency, and why the provision of seven days' notice in such circumstances is impractical and unnecessary where another employee agrees to the roster change.

1.10 ACE also relies on the witness statements of John Favalaro, Karen Foster, Kalena Jefferson and Mark Douglas which were lodged on 4 August 2016 to advance its claim for variation to the rosters clause of both the Nurses Award and Health Professionals Award.

1.11 For convenience, John Favalaro, Karen Foster, Kalena Jefferson and Mark Douglas are referred to collectively in this submission as the **"ACE Witnesses"** and their witness statements lodged on 4 August 2016 are referred to collectively in this submission as the **"ACE Witness Statements"**.

1.12 All of the ACE Witness Statements were tendered at both the hearing of the Nurses Award on 27 November 2017⁸ and at the hearing of the Health Professionals Award on 12 December 2017.⁹

1.13 It is submitted that the adoption of ACE's proposed variations will help the Nurses Award and the Health Professionals Award to better meet the modern awards objective.

ACE'S PROPOSED VARIATION TO THE ROSTERING CLAUSES IN THE NURSES AWARD AND THE HEALTH PROFESSIONALS AWARD

2.1 ACE press its proposed variations to the rostering clauses in both the Nurses Award and the Health Professionals Award to provide for rosters to be changed with less

⁸ PN352 to PN365 of the transcript for 27 November 2017 - <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/271117-am201631.htm>

⁹ PN1941 to PN1950 of the transcript for 12 December 2017 - <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/121217-am201631.htm>

than 7 days' notice where the roster change is agreed by both the employer and the employee.

2.2 The clause references of the rostering clauses that ACE seeks to vary are:

- Clause 8.2 in the Nurses Award Exposure Draft; and
- Clause 8.3 in the HP Award Exposure Draft.

2.3 The same grounds and reasons for ACE's proposed variation to the rostering clauses apply to both awards.

2.4 ACE relies on the ACE Witnesses Statements to support ACE's proposed variations to the rostering clauses in both the Nurses Award and the Health Professionals Award.

2.5 ACE's proposed variation to the clause 8.2 of the Nurses Exposure Draft is set out at paragraph 2 of ACE's submission dated 15 July 2015, as follows:

8.2 Rostering

(a) Employees will work in accordance with a weekly or fortnightly roster fixed by the employer.

(b) The roster will set out employees' daily ordinary working hours and starting and finishing times.

(c) The roster will be displayed in a place conveniently accessible to employees at least seven days before the commencement of the roster period.

(d) Unless the employer otherwise agrees, an employee desiring a roster change will give seven days' notice except where the employee is ill or in an emergency.

(e) 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.

(f) 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.

2.6 ACE's proposed variation to the clause 8.3 of the HP Exposure Draft is set out at paragraphs 2 of ACE's submission dated 15 July 2015, as follows:

8.3 Rostering

(a) The ordinary hours of work for each employee will be displayed on a fortnightly roster in a place conveniently accessible to employees. The roster will be posted at least two weeks before the commencement of the roster period.

(b) Unless the employee otherwise agrees, seven days' notice will be given of a change in a roster. However, a roster may be altered at any time to enable the functions of the hospital, facility or organisation to be carried on where another employee is absent from duty on account of illness or in an emergency.

(c) Unless the employer otherwise agrees, an employee desiring a roster change will give seven days' notice except where the employee is ill or in an emergency.

- 2.7 ACE seeks these variations to both awards to enable rosters to be changed with less than 7 days' notice if the change is agreed by both the employer and the employee.
- 2.8 It is submitted that the current clause 8.2 in the Nurses Award Exposure Draft and clause 8.3 in the HP Award Exposure Draft are too inflexible for both employers and employees as they do not adequately provide for the situations where employees and/or employers may need to change shifts with less than 7 days' notice.
- 2.9 As indicated in the ACE Witness Statements, quality of care is of paramount importance in the aged care industry and that quality of care is often dependent on employers being able to roster additional staff with less than 7 days' notice.
- 2.10 Importantly, late roster changes are often prompted at the request of employees, by unexpected employee absences or by changes in circumstances that are beyond the employer's control. ACE understands that employees often want to change their shifts due to their own personal circumstances. For example, an employee may wish to change a shift at late notice in order to attend their child's school events, such as sport or an awards assembly.
- 2.11 Further to this, ACE asserts that the circumstances outside of employee illness or in an emergency that require a roster to be changed with less than 7 days' notice are vast, and are common occurrences.
- 2.12 Paragraph 7 of Karen Foster's witness statement provides the following list of circumstances that may require that rosters be changed with less than 7 days' notice:
- (a) Sudden resignation whereby an employee walks off the shift.*
 - (b) An employee is required to attend Jury Duty.*
 - (c) An employee needs to take immediate compassionate leave due to a family member being taken seriously ill.*
 - (d) An employee needs to return home to attend to, or cannot leave a sick/injured pet.*
 - (e) An employee has to take carer's leave to look after a sick child/parent, etc.*
 - (f) An employee has a non-work related injury and is unable to work their rostered shift.*

- (g) *The employee's availability to work suddenly needs to change due to personal or family commitments.*
- (h) *An employee has not arrived for work, is uncontactable and considered to be absent without approved leave.*
- (i) *An employee is involved in or party to a domestic violence incident and they are waiting for the police/at the police station.*
- (j) *An employee's car breaks down and they are unable to travel to work or use public transport.*
- (k) *An employee cannot afford petrol for their vehicle and can't use public transport.*
- (l) *An employee's vehicle registration has expired and they cannot afford to renew it.*
- (m) *An employee's car has been stolen or they are involved in some other criminal matter and they are waiting for the police to attend/ at the police station.*
- (n) *An employee has suddenly lost their driver's licence due to DUI or speeding and they are unable to travel to work or use public transport.*
- (o) *An employee arrives at a client's residence to take them on a social outing and the client is unable to physically get into the employee's car (i.e. 4 wheel drive).*
- (p) *Traffic incident en route preventing the employee travelling to a client's Home.*
- (q) *Client refuses an employee entrance at their door for a variety of reasons including does not like the employee and does not want them in their house.*
- (r) *Client changes, cancels or moves their service on the morning or within 7 days of the scheduled service.*
- (s) *Services are cancelled due to a client's unplanned admission to hospital or respite care, or client is deceased.*
- (t) *Client's needs suddenly change requiring a higher skilled employee to attend to the service than the employee originally rostered.*
- (u) *A new or unscheduled client has an urgent need requiring an experienced staff member to attend and another employee to backfill the staff member's original client.*
- (v) *The employee's work visa is suddenly cancelled or changed and the employee no longer has the right to work in Australia.*
- (w) *An employee's professional registration is suspended or suddenly cancelled.*
- (x) *An employee will be late returning from holiday due to being unable to travel (i.e. ash cloud preventing air travel).*
- (y) *Natural disaster or bad weather preventing an employee from attending their place of work or being able to drive to a client's home.*
- (z) *An employee wins the lottery or a competition and will not be attending work.*

2.13 ACE contends that its proposed changes to the rostering provisions in the Nurses Award and the Health Professionals Award would bring these awards into better alignment with industrial standards set out in other modern awards, which allow for rosters to be varied at any time by mutual agreement. Some of these awards include the *Alpine Resorts Award 2010*,¹⁰ the *Chullora Printing Award 2015*¹¹ and *Hospitality Industry (General) Award 2010*.¹²

¹⁰ Clause 23.2(a) of the *Alpine Resorts Award 2010*

¹¹ Clause 18.2(d) of the *Chullora Printing Award 2015*

¹² Clause 30.2 of the *Hospitality Industry (General) Award 2010*

2.14 ACE further submits that no other parties have advanced any arguments or adduced any evidence as to why the rostering clauses of the Nurses Award and the Health Professionals Award should not be varied as proposed by ACE. The issue was briefly touched on in the hearing of the Health Professionals Award on Monday 11 December where Ms Doust for the HSU said she would seek instructions and that the HSU “*may nonetheless have concerns about it creating an environment where there's some sort of pressure*”. For convenience, an extract of PN930 to PN948 from transcript to Health Professionals Award hearing on 11 December 2017¹³ follows:

PN930

VICE PRESIDENT CATANZARITI: In any event, you said there's only one issue outstanding for aged care.

PN931

MR BOYCE: Yes.

PN932

VICE PRESIDENT CATANZARITI: What's that issue?

PN933

MR BOYCE: It's to vary clause 8.3(b), rostering of the award. Currently, there is a requirement for an employer to give seven days' notice of a change in roster, even where the employee agrees. So this simply allows where the employee agrees, less than seven days' notice can be provided with change of roster to the employee.

PN934

VICE PRESIDENT CATANZARITI: What's the objection to that from the union?

PN935

MR BOYCE: There isn't any objections to it on any of the material that I have seen.

PN936

VICE PRESIDENT CATANZARITI: Right.

PN937

MR BOYCE: And that's reflected in the - - -

PN938

VICE PRESIDENT CATANZARITI: So who is the relevant union spokesperson on that?

PN939

MR BOYCE: I would have thought it's the HSU.

¹³ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/111217-am201631.htm>

PN940

VICE PRESIDENT CATANZARITI: Yes. Well, Ms Doust, you might get some instructions about that if there's no objection to that clause.

PN941

MR BOYCE: Certainly, in the - - -

PN942

MS DOUST: I am surprised to hear that, Vice President, but I'll clarify our position.

PN943

VICE PRESIDENT CATANZARITI: Yes, clarify that because, as I understand, it's simply saying the current clause is seven days' notice and the proposed clause is unless by agreement.

PN944

MS DOUST: Yes.

PN945

VICE PRESIDENT CATANZARITI: Which on one view it would seem okay if it's by agreement.

PN946

MS DOUST: Yes, we may nonetheless have concerns about it creating an environment where there's some sort of pressure.

PN947

VICE PRESIDENT CATANZARITI: Yes, I follow what can happen in the field is different to the spirit of a clause.

PN948

MS DOUST: Yes, I think that's - and I think similar issues were canvassed in the Nurses Award matter, so I'll clarify what our position is and see.

- 2.15 ACE submits that the Commission should give little if any weight to any such arguments against the proposed change on the basis of *“it creating an environment where there's some sort of pressure”*, as in ACE's respectful view there would be no agreement if an employer compelled an employee to agree to a late roster change.

ACE'S PROPOSED INTRODUCTION OF A NEW REMOTE COMMUNICATION ALLOWANCE IN THE NURSES AWARD

- 3.1 ACE press the proposed insertion of a new clauses 11.3(b) and 15.3(d) of the Nurses Award Exposure Draft and new clause additions to clauses 8.4, 15.5 and 15.6 of the

Nurses Award Exposure Draft, as set out at paragraph 3 of ACE's submission lodged on 17 March 2017.

3.2 ACE's proposed changes to these clauses in the Nurses Award Exposure Draft are 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 (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).”

- 3.3 As mentioned, ACE’s proposal to insert new clause 11.3(b) into the Nurses Exposure Draft, is as an alternative to the ANMF proposal to vary clauses 28.5 and 28.6 of the Nurses Award [clauses 15.5 and 15.6 in the Nurses Exposure Draft].
- 3.4 ACE vigorously opposes the ANMF proposal to vary clauses 28.5 and 28.6 in the Nurses Award.
- 3.5 ACE has proposed that a new clause, 11.3(b) be inserted into the Nurses Exposure Draft as it believes the changes proposed by the ANMF are misconceived, excessive and unsustainable. Indeed, ACE submits that the ANMF’s proposed changes are disproportionate to the lower levels of disutility involved with remote work (as compared to actual recalls to work).
- 3.6 Further to this, ACE is of the view that the ANMF proposal is out of alignment with common provisions relating to on call, recall to work and remote work in other modern awards and that the ANMF application is predicated on an erroneous assumption that the definition of “*recalled to work*” in the Nurses Award extends to remote work. That said, ACE believes that the award should be amended to include provisions specifically tailored to the situation where nurses are on call for remote work only, and where they perform remote work while so on call. ACE also believes that those provisions should be fair, balanced and proportionate to the lower level of disutility associated with remote work. ACE contends that its proposed clause 11.3(b) meets these requirements and that it would help the Nurses Award to better meet the modern awards objective.
- 3.7 In ACE’s view, unlike the traditional on-call /recall to work situations, the level of disutility to employees who are on-call for or recalled to perform remote work is less, as they are not required to:
 1. stay in the vicinity of the workplace while on-call;
 2. keep themselves, their work clothes and transport in a state of readiness while on-call for a possible recall to work;

3. spend time travelling to or from work if recalled to work; or
4. incur additional travelling expenses (such as public transport fares, petrol or road tolls) if recalled to work.

ACE further notes that the higher level of disutility that exists when an employee is on-call for an actual recall to work is highlighted in the witness statement of Felicity Ball (who gave evidence for the ANMF). In her statement, Ms Ball states that:

“...Furthermore, being on call limited the weekend activities with my family, as I needed to be at home or close by and I was unable to travel too far on weekends”¹⁴.

- 3.8 Under the Remote Communication Allowance proposed by ACE, employees would be entitled to receive the equivalent of 50% of the current on-call allowance when they are on-call and may be recalled for remote work only.
- 3.9 ACE contends that it is fair and appropriate to set the monetary remuneration for the new Remote Communication Allowance at 50% of the current on-call allowance, particularly having regard to the relatively low degree of disutility associated with being on call for remote work only.
- 3.10 Importantly, ACE’s proposed clause 11.3(b)(i) will only apply if an employee *“agrees to be on call to provide advice or assistance remotely”*. Therefore, an employee cannot be compelled to be on call to provide advice or assistance remotely. In our submission this provides adequate and appropriate protection to nurses as they will be able to refuse a request by an employer to be *“on call to provide advice or assistance remotely”*. As indicated in Susan Fletcher’s statement, nurses can and do refuse requests to be on call.¹⁵
- 3.11 Under ACE’s proposal, nurses would also be entitled to be paid for all time worked (i.e. performing the remote work) at the applicable overtime penalty rate (rounded up to the nearest 15 minutes), with a minimum payment of one hour. Some examples illustrating how this would be calculated are contained in ACE’s proposed new clause 11.3(ii)(b) of the Nurses Exposure draft¹⁶.
- 3.12 Under this proposal, employees will continue to be entitled to the current on-call allowance in the Nurses Award when they are on-call to actually be recalled to work.
- 3.13 The applicable allowance payable when an employee is on-call will depend upon whether the employee is required to be available (while on-call) for a recall to work:
 - which may require an actual return to work; or

¹⁴Paragraph 9 of witness statement of Felicity Ball signed 27 February 2017
<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201631-sub-anmf-170317.pdf>

¹⁵ Paragraph 16 of the statement of Susan Fletcher signed 27 February 2017
<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201631-sub-anmf-170317.pdf>

¹⁶ Clause 11.3(b)(ii).b of ACE’s proposed new clause 11.3(b)

- to do remote work only.

3.14 For clarity however, employees who are on-call will only ever be entitled to the current on-call allowance or the proposed Remote Communication Allowance, but not both.

3.15 ACE's proposal for nurses to be paid for all time worked remotely (while on call) at the applicable overtime penalty rate (rounded up to the nearest 15 minutes), with a minimum payment of one hour is in keeping with industrial standards set in a number of other modern awards and industrial instruments. For example the *Nurses and Midwives (Victoria) State Reference Public Sector Award 2015* [MA000125]¹⁷ provides for a minimum of one hours pay at overtime rates if an employee is recalled to work *without "having to return to the workplace"* but a minimum of three hours pay for an actual recall to work as follows:

25.6 Recall to work when on call

An employee, who is required to be on call and who is recalled to work, will be paid for a minimum of three hours' work at the appropriate overtime rate.

Where recall to duty can be managed without the employee having to return to the workplace, such as by telephone, the employee will be paid a minimum of one hour's overtime, provided that multiple recalls within a discrete hour will not attract additional payment.

A minimum payment of one hour for clinical appraisals carried out remotely is also provided for in in the *Public Hospital Medical Officers Award*, a state award of the New South Wales Industrial Relations Commission. Clause 12(xii) in the *Public Hospital Medical Officers Award* provides that:

(xii) A clinical appraisal provided remotely pursuant to subclause (xi) (a) above shall attract a minimum payment of one hour at the appropriate overtime rate only in circumstances where, if it had not been provided remotely, the on-call resident medical officer or registrar would have otherwise needed to have returned to the workplace. Any additional requirement to provide further clinical appraisal falling within the hour from which the initial clinical appraisal commenced shall not attract an additional payment. Any time worked beyond the expiration of one hour shall be paid at overtime rates. Time where work is not being performed will not be counted as time for the purposes of overtime payment.

3.16 Comparable arrangements for such remote work also exist under the *Contract Call Centre Award 2010*, the *Telecommunications Award 2010*¹⁸ and the *Business*

¹⁸ This provision at clause 21.7 in the *Telecommunications Award 2010* only applies to employees in the technical stream in that award.

*Equipment Award 2010*¹⁹. The *Business Equipment Award 2010* provides for a minimum entitlement for such remote work of either half an hour or for one hour at the appropriate overtime rate depending on the time that the remote work is carried out. The *Contract Call Centre Award 2010* and the *Telecommunications Award 2010* provide for a minimum entitlement for such remote work of either half an hour, one hour or an hour and half at the appropriate overtime rate depending on the time that the remote work is carried out.

- 3.17 Notably, the *Local Government Industry Award 2010* [MA000112],²⁰ the *Water Industry Award 2010* [MA000113]²¹ and the *Victorian Local Government Award 2015* [MA000132]²² contain remote response arrangements that potentially provide remuneration for a lesser minimum periods of time when an employee responds remotely than the minimum payment of one hour at applicable overtime rates proposed by ACE. For example, clauses 24.6(d) and (e) of the *Local Government Industry Award 2010* [MA000112] provide that an employee who is on-call and required to remotely respond will be paid at the “*applicable overtime rate for the time actually taken in dealing with each particular matter*”²³ and that “*...the total overtime paid to an employee for all time remotely responding in any day commencing from the first response will be rounded up to the nearest 15 minutes*”²⁴.
- 3.18 Notably some other modern awards such as the *Cleaning Services Award 2010* [MA000022]²⁵, the *Corrections and Detention (Private Sector) Award 2010* [MA000110]²⁶ and the *Port Authorities Award 2010* [MA000051]²⁷ have call back/recalled to work provisions which expressly state those provisions only apply if employees are actually required to return to a different location such as to “*any workplace of the employer*”, “*the employer’s premises*”, “*or any other location*”. ACE contends that the express exclusion of remote work from the recall to work provisions in these three modern awards lends, further weight to ACE’s submission that it is neither appropriate, reasonable, logical, fair or balanced to include remote work in the recall to work provisions in a modern award.
- 3.19 Indeed, ACE is not aware of any modern awards that contain recall to work provisions that extend to remote work. Moreover, the ANMF have not provided any examples of any other modern awards that contain recall to work provisions that extend to remote work.
- 3.20 It is noted that ACE’s proposed new clause 15.3(d) of the *Nurses Award Exposure Draft* and proposed new clause additions to clauses 8.4, 15.5 and 15.6 are machinery

19 This provision at clause 30.7 in the *Business Equipment Award 2010* only applies when employees are providing technical services or support remotely.

²⁰ See clauses 24.6(d) and (e) of the *Local Government Industry Award 2010*

²¹ See clauses 26.6(d) and (e) in the *Water Industry Award 2010*

²² See clauses 22.6(d) and (e) in the *Victorian Local Government Award 2015*

²³ See clause 24.6(d) in the *Local Government Industry Award 2010*

²⁴ See clause 24.6(e) in the *Local Government Industry Award 2010*

²⁵ Clause 28.8 of the *Cleaning Services Award 2010*

²⁶ Clause 22.5 in the *Corrections and Detention (Private Sector) Award 2010*

²⁷ Clause 21.2(c) in the *Port Authorities Award 2010*

provisions to give effect to ACE's new clause 11.3(b) in the Nurses Award Exposure Draft.

- 3.21 ACE respectfully submits that its proposed new clause 11.3(b) provides a fair, reasonable and balanced entitlement which helps the Award to meet the modern awards objective for employees who are on-call to perform remote work only or where they are recalled to actually perform remote work.

GROUNDINGS AND REASONS FOR ACE'S OPPOSITION TO THE ANMF PROPOSAL TO AMEND CLAUSES 28.5 AND 28.6 OF THE NURSES AWARD

- 3.22 The ANMF proposal to vary clauses 28.5 and 28.6 of the Nurses Award would create an additional entitlement that would apply whenever an employee is required to perform any remote work at all (such as telephone call) provided it occurs outside ordinary hours of work and provided that the employee has already left the workplace when the remote work is required / performed.
- 3.23 Under the ANMF proposal, employees would be entitled to at least 3 hours pay at overtime penalty rates on any day when any remote work is performed even if it only takes a few minutes and even if no travel time required and the employee does not need to prepare for work (eg. change into work clothes). For example, an employee who is recalled to take a single 2 minute phone call from home would be entitled to a minimum of 3 hours pay at overtime penalty rates.
- 3.24 As set out earlier, ACE also contends that the ANMF proposal fails to recognise the lower level of disutility associated with remote work.
- 3.25 Moreover, ACE contends that the ANMF proposal is contrary to industrial standards set for remote work while on call, such as that contained in the *Nurses and Midwives (Victoria) State Reference Public Sector Award 2015*.
- 3.26 ACE therefore contends that the ANMF proposal to vary clauses 28.5 and 28.6, would result in a minimum entitlement to remuneration for remote work (such as a short telephone call) which would often be unwarranted, disproportionate and excessive and that it would therefore have an unjust and unfair impact on employers.
- 3.27 Moreover ACE is concerned that the ANMF's proposed variations may be unsustainable for many employers, particularly for employers in the aged care industry who have experienced significant funding cuts in recent years.
- 3.28 Central to the ANMF proposal to vary clauses 28.5 and 28.6, is its contention that the meaning of "recalled to work" in the Nurses Award extends to remote work²⁸. The ANMF application relies on this broader definition of "recalled to work" to assert that

²⁸ Please see paragraph 6 of the ANMF submission dated 25 November 2014 - <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am2014207-sub-anmf-251114.pdf> and paragraphs 35 to 37 of the ANMF submission dated 17 March 2017 - <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201631-sub-anmf-170317.pdf>

that its proposed variations only clarify or confirm that broader definition²⁹. As such, the question of whether the ANMF proposal seeks significant change depends on what “recalled to work” means in the Nurses Award. If as ACE contends, the meaning of “recalled to work” in the Nurses Award excludes remote work the ANMF proposal would be a significant change to the award, in which case it would need to be considered against the Commission’s more onerous criteria for assessing significant changes.

3.29 ACE disputes the assertion by the ANMF that the term “recalled to work” includes a recall to do some remote work. To the contrary, ACE contends that the term as it exists in the Nurses Award, does not ordinarily include a recall to perform remote work. In this regard, ACE relies on:

- (a) The established principles of award / industrial instrument interpretation; and
- (b) The decision of Mortimer J. in *Polan v Goulburn Valley Health*³⁰ which involved an assessment of terms that existed in other industrial instruments that were comparable or analogous to the term “recalled to work”.

3.30 In *Polan*, Mortimer J. determined that an employee who was required to receive phone calls and manage staffing arrangements outside their ordinary hours was not recalled to duty, but was entitled to overtime:

“... I do not consider that what the applicant was doing when she answered and made telephone calls in order to rearrange rosters and fill staffing gaps while she was on-call falls within the ambit of the recall to duty clauses in the relevant industrial instruments. However, in my opinion, the applicant was entitled to overtime payments for the hours she spent discharging such duties, in addition to the payment of an on-call allowance”³¹.

3.31 In arriving at his/her decision, Mortimer J. summarised the key principles of award/industrial instrument interpretation making the following observations:

“..industrial instruments are to be construed in accordance with their language (or text), taking into account their context in the wider scheme or structure of the instrument, and the purpose of the provisions, again as seen in the wider scheme or structure of the instrument..”³².

and

²⁹ Please see paragraph 6 of the ANMF submission dated 25 November 2014 and paragraphs 35 to 37 of the ANMF submission dated 17 March 2017

³⁰ *Polan v Goulburn Valley Health* [2016] FCA 440

³¹ *Ibid* at paragraph 3

³² *Ibid* at paragraph 32

“... ultimately, the purpose of a statute “resides in its text and structure”. Subsequent decisions have confirmed this emphasis, while making it clear that extrinsic materials may also be consulted...”³³.

and

“In relation to industrial instruments, considerations of context include the wider industrial circumstances in which a particular agreement has been negotiated and concluded, taking particular account of the “practical frame of mind” that might often be brought to its drafting and of the “industrial realities” in which such instruments are drafted”³⁴.

- 3.32 As the term “*recalled to work*” is not defined in the Nurses Award, it would generally have its ordinary meaning under the principles of award/industrial instrument interpretation.
- 3.33 In ACE’s view, the ordinary meaning “*recalled to work*” in the Nurses Award is an actual recall to work to the employee’s usual place of work or some other designated workplace.
- 3.34 ACE submits that the meaning of “*recalled to work*” in the Nurses Award as ordinarily being exclusive of remote work is supported by the combination of the words “*recalled to work*” in clause 28.6(a) with the words “*after leaving the employer’s premises*” which in our view suggests a physical recall to work at the “*employers premises*”.
- 3.35 ACE also contends that our view of “*recalled to work*” in the Nurses Award as being limited to an actual recall to work is supported by the words “*travelling to and from the place of duty will be deemed to be time worked*” in clause 28.6(b) which suggests that time travelled when recalled to work is a necessary consideration when an employee is “*recalled to work*”.
- 3.36 ACE further challenges the ANMF’s contention that the *Polan* decision supports its construction of the term “*recalled to work*” in existing clauses 28.5 and 28.6 extends to “*situations where an employee is required to perform work away from the usual workplace*”³⁵. However, in the *Polan* decision, Mortimer J. only goes as far as to say that:

“...In my opinion, it is conceivable that the clause could apply in its terms to the performance by an employee of duties other than at a workplace...”³⁶.

to which Mortimer J. promptly adds the following caveat:

³³ *Ibid* at paragraph 33

³⁴ *Ibid* at paragraph 34

³⁵ Paragraphs 36 to 38 of the ANMF submission dated 17 March 2017

³⁶ *Polan* at paragraph 44

“ ...That conclusion does not resolve the disputed issue in favour of the applicant however, because, in my opinion, the critical question is whether the applicant was “recalled” to duty in the sense that term is used in the relevant clauses. I return to this matter below at [52]....”³⁷.

- 3.37 Moreover, Mortimer, J at 76, further determined that the ‘*performance of overtime by an employee is more likely to be an ongoing arrangement between employer and employee*’ a ‘recall’ involves a ‘*specific instruction or direction to an employee on a particular occasion and for a more particular purpose*’. Similarly, ACE assert that the requirement for an employee to perform work remotely is likely to be subject to an ongoing arrangement as to times and dates, as well as scope of duties to be performed, and as such, is akin to performing overtime.
- 3.38 Ultimately, Mortimer, J determined that an employee who was required to receive phone calls and manage staffing arrangements outside their ordinary hours was not recalled to duty, but performing overtime.
- 3.39 So even if the ANMF is correct and the *Polan* decision supports the proposition that the term “*recalled to work*” can extend in certain circumstances to remote work that would often not be the case. However, that situation would be fundamentally changed if the ANMF proposal was adopted, as “*recalled to work*” would be extended to any situation where remote work is carried out and not just to the current situation where it might possibly extend to remote work depending on the circumstances. As such, ACE contends that the ANMF proposal would still amount to significant change.
- 3.40 Accordingly, ACE contends that changes sought by the ANMF in this regard are significant and that the Commission should therefore assess those proposed changes against its criteria for significant change which is outlined in the Full Bench decision of 17 March 2014 in the 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues proceedings³⁸ in which the Full bench stated at paragraph 23 that:

“[23] where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.”³⁹

- 3.41 Further to this, Felicity Ball and Susan Fletcher are the only ANMF witnesses who state they have carried out remote work while on-call. Notably, both Ms Ball and Ms Fletcher were employed by the same employer, and an enterprise agreement applied to their employment with that employer (not the Nurses Award).

³⁷ *Polan* at paragraph 44

³⁸ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues (2014) FWCFB 1788 - <https://www.fwc.gov.au/documents/decisionsigned/html/2014fwcfb1788.htm>

³⁹ *Ibid* at paragraph 23

- 3.42 ACE notes that had Ms Ball and Ms Fletcher’s employment been regulated by the Nurses Award (and not an enterprise agreement) they would have been entitled to both:
- (a) payment at the applicable overtime penalty rates under clause 28.1 of the Nurses Award for all time worked providing telephone advice remotely while on-call; and
 - (b) the applicable on-call allowance under clause 16.4 of the Nurses Award when they were on-call.
- 3.43 In ACE’s view it is impossible to tell from the ANMF evidence how much time Ms Fletcher or Ms Ball actually spent performing remote work while on call. So it is not possible to assess how much either would have been entitled to receive in overtime payments under clause 28.1 of the Nurses Award for that remote work if it had been carried out under the Nurses Award, which ACE understands was not the case.
- 3.44 Accordingly, ACE contends that the evidence brought by the ANMF in support of its application to vary clauses 28.5 and 28.6 of the Nurses Award is scant at best and that it does not meet the level of probative evidence required by the Full Bench to support such a significant change.
- 3.45 Accordingly, ACE respectfully contends that ANMF’s proposed variations to clauses 28.5 and 28.6 of the Nurses Award are inconsistent with the modern awards objective and that the ANMF proposal should therefore be declined.
- 3.46 ACE respectfully requests that the Commission instead insert ACE’s proposed new clause 11.3(b) into the Nurses Exposure Draft and that it approve the other supporting amendments sought by ACE.

CONCLUSION

- 4.1 Accordingly, ACE submits that its proposed variations to the rosters clauses in both awards and ACE’s proposed introduction of new clause 11.3(b) into the Nurses Award would help both the Nurses Award and the Health Professionals Award to better meet the modern awards objective.
- 4.2 For the abovementioned reasons, ACE respectfully asks the Commission to approve the above variations that are sought by ACE and that it refuse the application by ANMF to vary clauses 28.5 and 28.6 of the Nurses Award.