

IN THE MATTER OF THE NURSES AWARD 2010 (2008/13)
IN THE MATTER OF AN APPLICATION BY THE AUSTRALIAN NURSING FEDERATION (AM2009/17)

REPLY SUBMISSIONS OF THE AUSTRALIAN NURSING FEDERATION

These reply submissions are in response to

1. The submissions of aged care employers in New South Wales and Queensland, namely the Aged Care Association – NSW, the Aged and Community Services Association of NSW & ACT and Aged Care Queensland.
- 2 The Australian Federation of Employers and Industries (AFEI).

The aged care employers

For the most part the aged care employers simply restate a number of the observations of the Commission in its decision AIRCFB 800 “the transitional decision” as justification as to why the application should be rejected. The principle reason being that the Commission has adopted a uniform approach to the phasing of wages and specified employment conditions.

This one size fits all argument ignores the fact that the Commission has included a model commencement and transitional review clause in modern awards that allows the transitional provisions to be reviewed and varied on the Commissions’ own motion or upon application (AIRCFB 800 at paragraph 22). In doing so the Commission noted that the model provision may not satisfactorily deal with all of the issues that may arise during the transition period.

We agree with the importance placed by the aged care employers in their submission regarding Item 2 (5) (c) of the Fair Work (Transitional Provisions and Consequential Amendment) Act 2009. We submit that the application to vary the model provisions is consistent with Item 2(5) (c) because:

- Productivity will be maintained or enhanced as employers will be better placed to recruit and retain nursing staff. Granting the application will reduce confusion and potential industrial unrest and it will provide the industry participants a reasonable period of time to constructively address the differences in pay as between the NAPSA’s and the modern award.
- Should the application be granted in the terms sought increases in labour costs will be negligible. Although the aged care employers assert, without detail or supporting evidence, that the modern award will substantially increase their labour costs , the ANF rejects this and we set out below our response to the alleged cost increases.
- The regulatory burden on business will not change.

The ANF believes that the application to delay the reductions in wage rates in the *Nurses' Aged Care Award 2005* (the Queensland NAPSA) and the *Nursing Homes &c., Nurses' (State) Award* (the NSW NAPSA) is moderate and balanced. If successful it would extend a wages freeze rather than giving rise to wage cuts from 1 July 2010 for NAPSA reliant nurses from New South Wales and Queensland consequently enabling further time for bargaining to occur.

At paragraph 15 of their submissions the aged care employers name specific clauses in the New South Wales NAPSA they submit will lead to increased costs. In respect to these provisions we note the following:

- Progression through pay points

The current arrangement is 1976 hours (52 weeks x 38 hours per week). The modern award is 1786 hours (1976 hours minus five weeks annual leave). Given the high proportion of part time employees in the aged care sector and the length of time it actually takes to qualify for progression to a higher pay point the real cost increase over the transitional period will be so negligible the employers should be embarrassed to include it.

- Length of nightshift

The modern award provides for a maximum of ten hour shifts exclusive of meal breaks (Clause 21.2) Ten hour night shifts are by far the most common practice in aged care.

- Increase annual leave

Shift workers already get six weeks annual leave (and can accrue up to seven weeks) under the NAPSA. Some employees are currently entitled to four but have the option to accrue more leave if they work Sundays and/or public holidays. The NAPSA provides for payment of double time and a half for working a public holiday. Employees can elect to be paid time and a half and accrue a day of leave.

- Casual loading

The potential cost impact can be minimised by reducing the reliance on casuals. While the casual loading in the NAPSA is currently 10% it is supplemented by state regulation providing additional leave and allowances which compounds the loading to around 18% of the relevant NAPSA wage rate.

- Introduction of overtime for casuals

Any cost implications in relation to the introduction of overtime for casuals can be managed through appropriate rostering arrangements.

- Introduction of afternoon and night shift penalties

Introduction of afternoon and night shift penalties for employees working less than 38 hours per week: Effectively there is no change under the new award because **all employees** have to finish after 6.00pm to attract the afternoon shift penalty. (The NAPSA provides in Clause 12(i) "...employees who works less than 38 hours per week shall only be entitled to the additional rates where their shifts commence prior to 6.00am or finish subsequent to 6.00pm").

In our submission while the aged care employers claim they will be disadvantaged should the application be granted they have fundamentally failed to provide any detailed evidence that the new award will lead to significant increases in their current labour costs. Where cost increases are evident they are minimal at best. On the other hand the model transitional provisions mean real and significant decreases to the current NAPSAs wage rates. For example should the application not be granted the weekly award wage rate for a registered nurse level 1 year 8 will be reduced by \$58.90 on 1 July 2010. (In our submission of 9 October 2009 the ANF provided tables detailing the annual decreases to the NAPSAs wage levels for Nursing Assistants, Enrolled Nurses and entry level Registered Nurses based on the model transitional provisions. We again attach these tables).

At paragraph 12 the aged care employers complain that the ANF has been selective in only seeking to delay the absorption of the NAPSAs wage rates. Our application does seek to protect the interest of our nursing members in the NSW and QLD aged care sectors. It is open to the employers to make applications to amend the model arrangements and they have chosen not to do so.

At paragraph 17 the employers submit that the take home pay orders are available to existing employees who have their overall pay reduced. Given the thousands of employees both in Queensland and New South Wales who may be adversely affected we do not believe that take home pay orders are a feasible or practicable mechanism. Secondly, we envisage that there may be difficulties applying these provisions to nurses given the complex and often changing nature of their working hours and consequent entitlements under the NAPSAs to various loading and penalties. Finally take home pay orders are on application and retrospective, these criteria of itself will ensure that some workers will fall through the net.

The aged care employers submit that in consideration of the application the Commission should have regard to the fact that the NAPSAs are derived from a different history to nursing awards established under federal industrial laws. While it is true that the NAPSAs were created, reviewed and amended under different statutory regimes it is not true that the differences particularly in recent times were significant. Broadly speaking both Queensland and New South Wales have historically adopted wage fixing principles analogous to the federal jurisdiction and typically state tribunals have had regard to relevant developments in the federal jurisdiction when reviewing state awards.

The key difference has been that both NAPSAs have retained their paid rates character through a mechanism of being adjusted to reflect the agreement of the parties, or determined through arbitration.

In the absence of providing any evidence the aged care employers assert that an important aspect of the history of the NAPSAs is the inclusion of "key flexibilities and cost offsets". We do not agree and have been unable to identify such developments.

The AFEI submissions

The AFEI submission (point 9) refers to the casual loading and "more restrictive span of hours". We are at a loss to understand why the span of hours in the new award is more restrictive. In

relation to the potential cost implications relating to the casual loading it should be noted that the existing casual loading in the Queensland NAPSA is 23%.

State referral of industrial powers

Although not raised in our initial submissions the potential impact of recent developments in regard to states referring industrial powers to the Commonwealth on the model award modernisation transitional arrangements may, we submit, be relevant to the consideration of the application.

While the position of New South Wales and Western Australia remains unclear Queensland, Tasmania, South Australia and Victoria have referred or taken steps to refer or have announced an intention to do so.

On 9 September 2009 the South Australian Government introduced the Fair Work Commonwealth Powers Bill 2009 into the South Australian Parliament. That Bill was passed by the South Australian House of Assembly on 13 October and is currently before the legislative council.

On 7 October 2009 the Tasmanian Government introduced the Industrial Relations Commonwealth Powers Bill 2009 into the Tasmanian Parliament. The Tasmanian Bill was passed by the Tasmanian House of Assembly on 14 October and by the Legislative Council on 28 October.

In October 2009 the *Fair Work (Commonwealth Powers) and Other Provisions Bill* was introduced into the Queensland parliament. The Bill refers industrial powers to allow the Commonwealth to cover unincorporated employers and employees in the private sector.

On October 27, 2009 the Queensland Minister for Industrial Relations Cameron Dick issued a media statement asserting that under the Queensland referral transitional arrangements 'private sector employees transferring to the national system will have their state award or agreement entitlements protected'

(<http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=67105>)

The Commonwealth government has introduced the Fair Work Amendment (State Referrals and Other Measures) Bill 2009 into parliament to support the referrals of power these States. The Bill provides for the preservation of state awards (called Division 2B State reference transitional awards) for a period of 12 months after the referral, during which time they will apply to both existing and new employees. Within 12 months of the referral taking effect FWA will be required to review modern awards to determine whether to vary the modern award to deal with terms and conditions that apply to Division 2B state reference employers and employees. This means that in each of these States, despite the referrals of power, nurses working in non-trading corporations will be covered by instruments that contain different conditions than those contained in the modern award for at least 12 months, and potentially for longer. This may include large numbers of nurses employed in aged and community care, particularly in the charitable sectors.

Consequently it may well be the case that NAPSA wages and conditions will apply to employers and employees differently depending whether they come within award modernisation or a referral of powers.

Conclusion

In conclusion the ANF supports paragraph 22 of the Commonwealth submission of 24 July 2009

“The Government believes that transitional arrangements are an important mechanism to enable the impact of any changes to conditions that will arise from the new award to be managed by businesses and employees, whether this is a phasing down, or a phasing up, from a state-based standard to the new national award benchmark. This is especially the case where there are ‘outlying’ state conditions that are significantly above or below the new modern award standard determined by the Commission.”

The Commonwealth supports the ANF application to delay the absorption of NAPSA wages in New South Wales and Queensland until July 2012. It recognizes that the Queensland and New South Wales NAPSA wage rates are ‘outlying’ state conditions that are significantly above the new modern award standard and has also submitted to the Commission that the ANF application is consistent with the Government’s policy intent underpinning the award modernisation process and the provisions of the Fair Work Act 2009 (see Paragraph 3 of the Commonwealth submission of 15 October 2009).

Enclosure

- *Tables setting out the impact of the model transitional arrangements on the Nurses’ Aged Care Award 2005 and the Nursing Homes &c., Nurses’ (State) Award.*