



# **Submission to the Senate Standing Committee on Education and Employment**

Inquiry into Corporate Avoidance  
of the *Fair Work Act 2009*

November, 2016

## Table of Contents

<b>Introduction .....</b>	<b>3</b>
<b>Recommendations .....</b>	<b>3</b>
<b>Labour Hire as an Employment Strategy .....</b>	<b>5</b>
<b>Prevalence .....</b>	<b>6</b>
<b>Labour Hire in Health Services – Consumer Directed Care .....</b>	<b>7</b>
<b>Effects of Labour Hire .....</b>	<b>8</b>
<b>(a) The use of labour hire and/or contracting arrangements that affect workers’ pay and conditions.....</b>	<b>11</b>
Case study 1 .....	11
<b>(b) Voting cohorts to approve agreements with a broad scope that affect workers’ pay and conditions.....</b>	<b>12</b>
Case study 2 .....	13
<b>(c) the use of agreement termination that affect workers’ pay and conditions .....</b>	<b>15</b>
Case study 3 .....	15
<b>(d) The effectiveness of transfer of business provisions in protecting workers’ pay and conditions.....</b>	<b>18</b>
Case study 4 .....	19
<b>References .....</b>	<b>20</b>

*If you ask the CEO of some major corporation what he does he will say, in all honesty, that he is slaving 20 hours a day to provide his customers with the best goods or services he can and creating the best possible working conditions for his employees. But then you take a look at what the corporation does, the effect of its legal structure, the vast inequalities in pay and conditions, and you see the reality is something far different.”*

**Noam Chomsky**

## Introduction

The Queensland Nurses’ Union (QNU) thanks the Senate Standing Committee on Education and Employment for the opportunity to make a submission to Inquiry into the Incidence of and trends in corporate avoidance of the *Fair Work Act 2009* (the inquiry).

Nursing and midwifery is the largest occupational group in Queensland Health (QH) and one of the largest across the Queensland government. The QNU is the principal health union in Queensland covering all categories of workers that make up the nursing workforce including registered nurses (RN), registered midwives, enrolled nurses (EN) and assistants in nursing (AIN) who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 54,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses in Queensland are members of the QNU. The QNU’s submission addresses items (a), (b), (c) and (d) of the inquiry’s terms of reference. For each item we have provided a case study to demonstrate our concerns.

## Recommendations

The QNU recommends:

- Licensing of labour hire companies. These companies must be able to demonstrate they have the capital to operate a legitimate business;
- Section 518 of the *Fair Work Act 2009* - Entry to Investigate Suspected Contravention - should be amended to read<sup>1</sup>:

(1) A permit holder may enter premises and exercise a right under section 482 or 483 for the purpose of investigating a suspected contravention of this Act, or a term of a fair work instrument, that relates to, or affects, **any worker** ~~a member of the permit holder’s organisation~~:

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<sup>1</sup> Deletions in ~~strike through~~ - additions in **bold**.

- (a) whose industrial interests the organisation is entitled to represent; and
- (b) who performs work **for the employer who occupies** ~~on~~ the premises.

~~Note 1: Particulars of the suspected contravention must be specified in an entry notice or exemption certificate (see subsections 518(2) and 519(2)).~~

~~Note 2: FWA may issue an affected member certificate if it is satisfied that a member referred to in this subsection is on the premises (see subsection 520(1)).~~

(2) The fair work instrument must apply or have applied to the member.

(3) The permit holder must reasonably suspect that the contravention has occurred, or is occurring. The burden of proving that the suspicion is reasonable lies on the person asserting that fact.

Note: A permit holder who seeks to exercise rights under this Part without reasonably suspecting that a contravention has occurred, or is occurring, is liable to be penalised under subsection 503(1) (which deals with misrepresentations about things authorised by this Part).

- section 318 of the *Fair Work Act 2009* - Orders relating to instruments covering new employer and transferring employees - be amended to read:-

In deciding whether to make the order, FWA must take into account the following:

(a) **the relevant information the new employer gives to employees;**

~~(i) the new employer or a person who is likely to be the new employer; and~~

(ii) the **views of the** employees who would be affected by the order;

**(ii) the results of any independent ballot or survey of employees sanctioned by the FWC.**

(b) whether any employees would be disadvantaged by the order in relation to their terms and conditions of employment;

(c) if the order relates to an enterprise agreement--the nominal expiry date of the agreement;

~~(d) whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace;~~

- ~~(e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;~~
- ~~(f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;~~
- (gd) the public interest.

## **Labour Hire as an Employment Strategy**

Labour hire is a form of indirect employment in which an agency supplies workers to work at a workplace controlled by a third party (the host), usually in return for a fee from the host (O'Neill, 2004). Labour hire arrangements are similar to employment placement services, and comprise a part of the employment services industry. However, it may be assumed that when an employment placement agency secures a worker a job, their relationship will finish. With labour hire arrangements, the three-way relationship between host, agency and worker will continue for the period of the assignment (O'Neill, 2004). Many organisations appear to have turned to labour hire after they have reduced or contracted out their own internal human resource function.

Whilst labour hire presents potential difficulties for vulnerable workers who have less capacity to assert their own employment rights, the emerging 'sharing economy' is particularly concerning for the union movement as nations struggle with population growth and increasing density. The 'sharing' economy is a collaborative consumption model based on access rather than ownership. Collaborative consumption startups use the internet and social media to facilitate peer-to-peer exchanges, allowing people to share assets and services directly with those who require them. It is broadly defined as the peer-to-peer-based activity of obtaining, giving, or sharing access to goods and services, coordinated through community-based online services (Hamari, Sjöklint, Ukkonen, 2014).

Where labour hire is breaking down traditional employment practices, the sharing economy will present greater risks to workers as they move into even less regulated work platforms based on the exchange of goods, labour and services.

## **Prevalence**

Labour hire in the form of temping agencies has been a feature of the Australian labour market since the 1950s (Hall, 2002). Throughout the late 1980s and 1990s the labour hire industry grew significantly as a flexible alternative to a workforce of permanent employees

across a range of industries. There are now around 5,798 temporary staff services enterprises across Australia (IBISWorld, 2016).

Estimating the number of Australian labour hire workers varies according to methodologies, data sources and time periods. According to the ACTU (2012), the number of labour hire workers is between 2 and 4 per cent of the workforce.

The most recent ABS data (2010) indicates in 2008 there were 122,200 people who were paid by a labour hire firm. Almost two thirds (61%) of labour hire workers were men. The age profile of male and female labour hire workers was quite different. Male labour hire workers had a younger age profile, with over a third aged 15 to 24 years, compared with 9% of female labour hire workers. A greater percentage of female labour hire workers were aged 45 to 59 years.

This in part reflects the occupations and industries that labour hire firms supply labour for, and that men and women commonly work in, such as technicians and trade workers and machinery operators and drivers for younger men, and clerical and administrative workers for older women. Labour hire workers had an age distribution that was concentrated more around the younger age groups than for employees generally (ABS, 2010).

IBISWorld publishes a large collection of industry reports indicating industry's supply chain, economic drivers, key buyers and markets. According to their recent report (2016), the major industries using labour hire services nationally are information technology and telecommunications, construction and trades, health care and medical sectors. Government, defence, and the mining, energy and utilities sectors also play a part.

Host businesses use labour hire workers and suppliers in a variety of ways. These include:

- Filling very short term vacancies with labour hire workers, in a conventional 'temping' model;
- Filling regular seasonal requirements with labour hire workers, such as in the agricultural or food processing industries;
- Filling specific functions within the business with labour hire workers with particular skills, such as maintenance;
- Using labour hire as a longer-term supplement to an ongoing workforce, with ongoing and labour hire employees working alongside each other performing the same work;
- Using labour hire to entirely replace an ongoing workforce, such as in the meat industry (Victorian Government, 2015).

In the health sector, nurses and midwives working for agencies and locum doctors can account for a significant component of the workforce in certain regions. For example, in the Torres Strait and Cape York Hospital and Health Service, we have been advised anecdotally around 30-40% of the nursing and midwifery workforce are 'agency' staff. These arrangements can have an adverse impact on the continuity care for patients as well as the budget. In 2016, this HHS spent \$11 million on medical and nursing agency staff (Torres and Cape York HHS, 2016, p. 34).

According to IBISWorld, the temporary staff services industry in Australia generates annual revenue of \$18.5 billion and is expected to have annualised growth of 1.4 per cent through to 2020-21 (slightly down on the annual 1.8 per cent growth level in the five years to 2015-16). IBISWorld notes there are many significant foreign players in the domestic market which contributes to the temporary staff services industry's globalisation level. Many large international companies have established offices in Australia as their major international client companies are global in their operations. IBISWorld anticipates further globalisation within this industry over the next five years (IBISWorld, 2016, p.4).

### **Labour Hire in Health Services - Consumer Directed Care**

The community care sector in Australia is gradually moving towards a demand driven model of service delivery in the disability and aged care service sector under the National Disability Insurance Scheme (NDIS) and Consumer Directed Care (CDC). Where once these services were delivered in a block funding model spread across consumers, providers will now operate within individualised budgets. From 2017, these individualised budgets will be attached to the consumer rather than the provider. Substantially increased expenditure on aged care and disability support should see an increase from 72,000 to 100,000 Home Care Packages by 2017/18, with more than 40,000 additional packages expected to be available between 2017/18 to 2021/22 (Department of Social Services, 2016; Deloitte, 2015).

CDC allows the consumer to choose the services they want within an allocated budget. Consumer choice will drive behaviour for individuals to consider personality and likeability in their buying behaviour. In some cases, consumers may increasingly demand 'softer' skills from support workers more so than formal qualifications or experience. Customer service skills such as communication and attentiveness to the needs of the individual will be highly valued by consumers and therefore service providers. Increasingly, consumers will seek access to a workforce with specific cultural, linguistic and technical skills. As a result, providers will need to compete and tailor support to meet the individual needs of their customer base (Deloitte, 2015).

The move to CDC reflects the very clearly expressed preference of most older Australians to stay in their own home as long as possible, with individualised support and to have some

level of control of the design and delivery of the services they receive, including flexibility in the timing and scheduling. CDC is an increasingly common feature of community care strategies around the OECD countries. The 2015/16 Federal Budget announced home care reforms explicitly designed to privatise choice and control over aged care and further reduce regulation for aged care providers.

As CDC is becoming embedded in the home care sector, there has been an associated rise of in the number of agencies that seek to match clients to care workers including registered and enrolled nurses. These workers are not directly employed by the agencies and therefore not subject to the rigorous recruitment and training requirements of regulated services.

Within the health sector, the emergence of these unregulated services raises concerns on many levels about the quality of care people might receive and the level of protection for both the workers and the public. Community care providers may increasingly leverage their carer workforce as a more cost effective alternative to more highly trained resources i.e. nurses, especially for customers with less complex needs (Deloitte, 2015). This may put patient safety at risk.

Any shift towards a reduction in occupational licensing, reliance on private certification schemes and reputation mechanisms, avoidance of industry specific regulatory frameworks and the exclusion of certain types of health workers from employment law will inevitably impact on the nature of the aged care nursing workforce.

The QNU maintains that only qualified nurses can deliver total nursing care that delivers high quality and cost-effective outcomes.

## **Effects of Labour Hire**

There may be some potential benefits of labour hire arrangements. For businesses, labour hire provides flexibility in managing areas and times of operational need. For some workers labour hire arrangements may:

- provide greater flexibility in hours of work;
- provide a path to other employment, and/or ongoing employment;
- provide an opportunity to gain skills and experience in an industry where they may not otherwise have been able to secure employment.

However, the growth of unstable, non-regular patterns of work that characterise labour hire has implications for the living standards of these workers. The growth of labour hire and the many problems it has generated for workers is of concern for the union movement. The rising prevalence of contracting-out of services to include labour changes the employment



relationship. Contractual mechanisms for regulating labour may replace collective labour law, but they are a poor substitute. This has important implications for the way governments should approach the monitoring and enforcement of employment standards (Holley, 2014).

Based on various sources (Hall, 2002; Taylor, 2003, p. 302; O'Neill, 2004; Graham, 2007; Victorian Government, 2015; Senate Education and Employment References Committee, 2015) we have identified the following disadvantages:

- Employers avoid their employment obligations by contracting out. This contributes to the growth of non-standard employment, degrading employment standards and less protections for employees;
- Employees working under these conditions appear disinclined to speak out about their conditions largely out of fear;
- Labour hire substitutes the existing workforce with a more compliant and cheaper workforce with lesser pay and conditions;
- Labour hire offers limited employment security. It relies on casual employment, including many long-term casuals. This largely negates the protection of unfair dismissal afforded to other employees;
- Labour hire divides the recruitment and appointment functions between the employer and the client or host;
- Employees of labour hire companies have considerably less bargaining power;
- Ambiguities in the employment relationship poses a potential threat to occupational health and safety standards with a lack of clarity over parties' specific responsibilities
- There is serious under-reporting of workplace injuries. The obligation and ability to rehabilitate injured workers is often limited;
- Labour hire firms often do not invest in training and development of staff;
- The use of sham independent contractors typically occurs where the labour hire contractor claims that a worker is an independent contractor when they are in fact an employee, usually in an effort to avoid the responsibilities associated with having employees;
- Labour hire may be used to replace rather than supplement an ongoing workforce;
- Labour hire structures have been linked to instances of 'phoenix' activity, namely the transfer of assets of an indebted company into a new company (such as an associated labour hire entity operated by the same director/s), to evade tax, employment and other legal obligations;
- Labour hire workers may have less of a 'workplace voice' in the host's workplace than directly employed workers, may find it harder to join a union and may be excluded from collective bargaining about the conditions which apply to their work;

- Low barriers to entry into the labour hire sector allow opportunistic operators to easily enter and work in an industry. Some labour hire suppliers are driven by price considerations to the detriment of compliance with workplace laws;
- Labour hire workers may be denied access to the benefits of the collectively negotiated labour agreements of the principal business and these businesses may not accept responsibility for the welfare of this class of worker, particularly in the areas of health and safety and training. The problems for injured labour hire workers are compounded in that they are less likely to have a specific work site to which to return for rehabilitation and return-to-work duties;
- One of the obvious inequities occurs when labour hire workers at a particular site may be paid the award rate, while their directly employed colleagues at the same site may be paid at a higher enterprise bargaining rate.

The Productivity Commission (2015) noted so-called ‘jump-up’ clauses that require businesses to engage subcontractors on the same terms as employees, or that limit the employment of casual and labour hire employees are, in spirit, contrary to the *Competition and Consumer Act 2010*. According to the Productivity Commission, employers should be able to use subcontractors, casual and labour hire employees as suits their business operations and the workers themselves. The Productivity Commission recommended the *Fair Work Act 2009* should be amended to prohibit restrictions on such employment arrangements in enterprise agreements.

The QNU rejects the Productivity Commission’s recommendation as a blatant acknowledgement that managerial prerogative must be advanced at the expense of protections for workers. Numerous inquiries<sup>2</sup> have shown the potential for exploitation of workers under this type of employment arrangement. Allowing enterprise agreements to provide for pay equity between direct employees and contractors and employees of contractors is desirable and necessary.

Instead, the QNU seeks restoration of the federal rights of trade unions to investigate suspected breaches of labour hire protections. At present, unions can only investigate on behalf of a member (section 481 of the *Fair Work Act 2009*). They also have to give notice which allows employers to hide evidence, (although they can make application not to have to provide notice). In our view, improving workers’ rights is a better alternative to reliance on the powers and resources of the Fair Work Ombudsman (FWO) to monitor and enforce regulation.

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<sup>2</sup> See for example Victorian Government (2015) Victorian Inquiry into the Labour Hire Industry and Insecure Work; Senate Education and Employment References Committee (2015) *Australia’s Temporary Work Visa Programs* Interim Report; Department of Industrial Relations (2001) *Labour Hire Task Force Final Report*, Report of the Task Force to the Department of Industrial Relations, New South Wales.

The QNU recommends section 481 of the *Fair Work Act 2009* - Entry to Investigate Suspected Contravention - should be amended to read<sup>3</sup>:

(1) A permit holder may enter premises and exercise a right under section 482 or 483 for the purpose of investigating a suspected contravention of this Act, or a term of a fair work instrument, that relates to, or affects, **any worker** ~~a member of the permit holder's organisation~~:

(a) whose industrial interests the organisation is entitled to represent; and

(b) who performs work **for the employer who occupies** the premises.

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Note: A permit holder who seeks to exercise rights under this Part without reasonably suspecting that a contravention has occurred, or is occurring, is liable to be penalised under subsection 503(1) (which deals with misrepresentations about things authorised by this Part).

## **(a) The use of labour hire and/or contracting arrangements that affect workers' pay and conditions**

### **Case study 1**

We have provided the following Queensland case study where a labour hire company sought to employ nurses on sub-class 457 visas.

#### **Labour Hire Company**

In 2013, the QNU became aware that a labour hire company had applied for a 'Labour Agreement' with the federal government to bring 150 nurses per year to work in Australia on sub-class 457 visas.

The company provided our peak body, the ANMF with a list of job titles of various nursing jobs, as part of its obligation to consult. The company indicated some positions were

<sup>3</sup> Deletions in ~~strike through~~ - additions in **bold**.

located in 'Brisbane' or 'Queensland' as well as the Gold Coast, Rockhampton Townsville and Cairns.

At that time, there was a large number of unemployed graduate nurses in Queensland and the previous government had cut more than 1800 full time equivalent (FTE) positions in the public sector. The QNU was concerned about the employment of overseas nurses to fill these vacancies.

The QNU used its communications network to seek expressions of interest in the positions. Within the first 3 days, we received calls from 48 members expressing interest in the jobs. Ultimately, we compiled a list of 55 members interested in these positions.

The labour hire company contacted these nurses and told all of them that they were unsuitable for the positions, despite many of them being very experienced nurses. The QNU wrote to the (then) Minister for Immigration urging him to consider terminating the Labour Agreement.

## **(b) Voting cohorts to approve agreements with a broad scope that affect workers' pay and conditions**

In the aged care sector, the QNU has ongoing experience of employers who have sought to disadvantage certain groups of workers by certifying enterprise agreements with differing rates of pay for work of the same or similar nature. Assistants in Nursing (AiNs) and Personal Care Workers (PCWs)<sup>4</sup> are the lowest paid of the direct aged care workforce with AiNs generally receiving marginally more than PCWs. The QNU has consistently argued that any of these workers who perform nursing duties must be classified as such i.e. an AiN and paid accordingly.

Aged care staff generally are the lowest paid health workers in Queensland. Registered Nurses looking after the elderly in private facilities can expect to earn almost \$600 a fortnight less than their counterparts in the public health system.

In our experience, employers will engage PCWs to perform nursing work, often amongst other duties, with the express aim of keeping wages low. In the interests of patient safety, we have long campaigned for licensing of AiNs with a requirement for appropriate education and professional standards. Nursing cannot be broken into a series of tasks that employers can delegate to unqualified employees.

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<sup>4</sup> However titled.

Nursing is a holistic profession that is the sum of its parts. Where PCWs perform any duties that fall within nursing, they should be designated and remunerated as AiNs. The following case studies demonstrate the ways in which some aged care employers will manipulate the provisions of the *Fair Work Act 2009* to abrogate their responsibilities around pay and conditions.

## Case Study 2

### Blue Care/Wesley Mission Brisbane (WMB)

Blue Care/WMB has two separate EBAs covering over 120 communities across Queensland, one for 'nursing staff' that includes AiNs and another for 'care and support staff' that includes Personal Services Assistants (PSAs).

By doing so, they have created two superficially distinct voting cohorts. Both EBAs cover employees undertaking work normally prescribed to an AiN, but the nursing EBA provides a higher rate of pay for these workers than does the EBA which covers the workers the employer labels as Personal Services Assistants (PSAs). Blue Care/WMB refused the QNU's proposal to include PSAs who are doing nursing work in the nursing agreement.

In our view, the provisions of the *Fair Work Act 2009* (FWA) are deficient in that they do not prohibit an employer from having two agreements made with superficially distinct voting cohorts, but with one agreement having a lower rate of pay for the same or similar work than the other.

After three rounds of negotiations, nurses and carers rejected the Blue Care/WMB Brisbane agreement that offered staff less pay and conditions than those agreed to in 2013. These included:

- The removal of overtime resulting in below award wages for hours worked;
- The encouragement of broken shifts, some broken into two or three shifts per day of as little as one hour each; and
- The reduction of hours and wages despite existing work contracts and the loss of job security for part-time employees.

A protected action ballot of United Voice members<sup>5</sup> is currently underway.

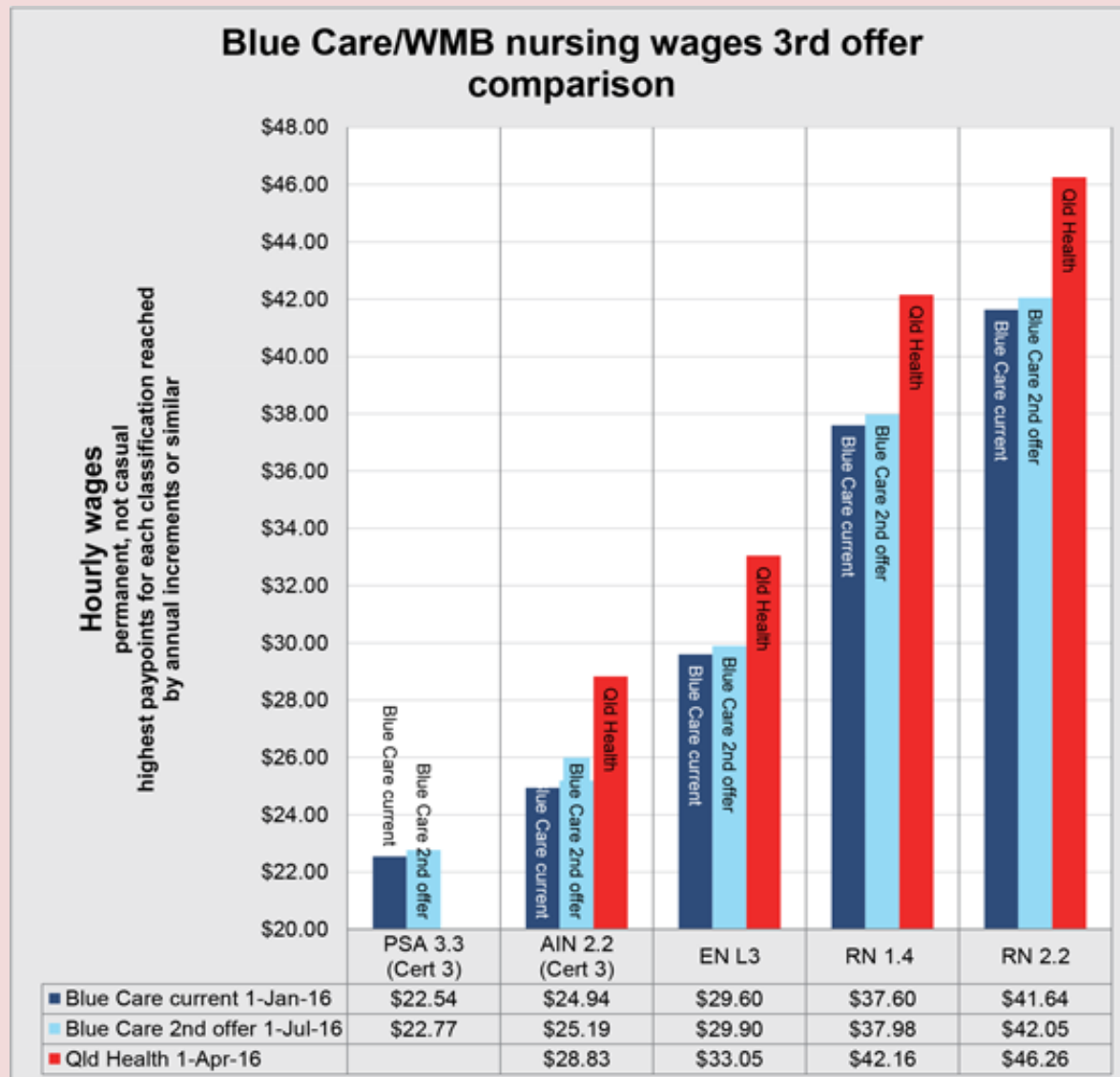
The third wages offer made a slight improvement of 0.10% to one of its proposed increases, from 0.65 % to 0.75% to take effect in March 2017. Blue Care/WMB's total proposal

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<sup>5</sup> United Voice is the trade union covering PSAs.

remains equivalent to about **1.7% each year** (in July). Qld Health nurses received a 2.5% pay increase in 2015 and have received another 2.5% increase backdated to 1 April, 2016.

The graph below shows how base wages would compare to Queensland Health under the Blue Care/WMB's rejected proposal.



\* PSA (Personal Services Assistant), AiN (Assistant in Nursing), EN (Enrolled Nurse), RN (Registered Nurse)

In light of the Reserve Bank's inflation forecasts, the third wage proposal carries a significant risk for a cut in real wages. Such small wage increases are vastly outweighed by the reductions in wages and conditions still pursued by the employer. The QNU also urged the employer to ensure our members' wages provide remuneration equal to that which is paid in male-dominated industries.

Following the employees' rejection of the agreement through the ballot, the QNU wrote to Blue Care/WMB management asking them to show good faith by paying a wage increase of 2.4% equal to the *Nurses Award 2010* and other federal awards backdated to 1 July 2016. Blue Care/WMB management advised they would not bargain with the QNU until after late October, 2016 and told employees it may be many months before they are asked to vote on another enterprise agreement. Management's EB proposals to reduce employment conditions, and their overwhelming rejection by staff, has damaged the relationship between employees and the employer

The QNU and Blue Care/WMB are due to resume bargaining in December, 2016.

### **(c) The use of agreement termination that affect workers' pay and conditions**

In the following case study, we outline the QNU's actions to terminate an enterprise agreement with aged care provider TriCare to raise wages and conditions up to the level of the *Nurses' Award 2010*. We support changes to the FW Act to prevent termination of agreements where reduced wages and conditions would result, but do not support changes that make termination of agreements more difficult where improved wages and conditions are the outcomes.

We recognise this may present a conundrum, however, although industrial awards are intended to set minimum wages and conditions there are some enterprise agreements in the aged care sector where the award actually offers a better outcome as the following case study demonstrates. At all times we seek to gain fair and decent outcomes for employees, particularly those who are already some of the lowest paid in the health industry.

#### **Case study 3**

##### **TriCare**

During negotiations for a new agreement (EA6), TriCare nursing staff rejected the low wage increase on offer. In order to obtain better wages and conditions for nursing staff, including PCA's, the QNU lodged an application in the Fair Work Commission (FWC) to terminate TriCare's existing agreement (EA5). This followed a QNU survey of TriCare members in which 100% of respondents voted to terminate EA5 which had passed its expiry date by almost a year.

TriCare increased base wages above EA5 rates in July 2015 and again in July 2016 by 2.4% because Award base rates had been increased above EA5 rates.

The QNU filed comprehensive submissions and an affidavit in the FWC in support of our application to terminate EA5. TriCare management did not oppose the application or support it. The Australian Workers' Union (AWU) and UV had the same position initially and for some time, but later opposed our application.

The QNU and other unions battled TriCare through the Fair Work Commission (FWC) for about 18 months in 2012/2013 to improve the agreement to the *Nurses Award 2010* standards for nursing staff including PCWs. There were some significant improvements, but many employment conditions in the final TriCare agreement remained below those of the Award.

If the FWC terminates EA5, there will be three minimum sets of employment conditions that will apply to employment with TriCare:

- the National Employment Standards of the *Fair Work Act*, and;
- the *Nurses Award 2010*, (the *Aged Care Award 2010* applies to TriCare's non-nursing staff) and;
- the contract of employment.

If there are differences between any of those sets of conditions, the most beneficial condition applies.

Awards are intended to be the minimum entitlements for the employees they cover, yet a number of Award entitlements are better than the current EA5 entitlements. The employees' entitlements would be improved in the following ways under the *Nurses Award 2010* if the EA5 were terminated:

1. Guaranteed minimum hours for part-time employees by agreement;
2. Rostering arrangements for part-time workers must be agreed with the employee;
3. Appropriate matching of wages to duties, skills and responsibilities;
4. Staff allowed to be paid overtime (EA5 requires agency staff or contractors to be used where extra work is needed rather than paying overtime to TriCare staff);
5. 6 weeks annual for employees who regularly work weekends on a 7-day roster, regardless of whether day, afternoon or night shifts are worked;
6. The employer is obliged to consult staff about all major changes as soon as possible (EA5 limits the kinds of changes for which consultation must occur and does not require consultation as soon as possible);
7. Staff/Unions can pursue wage increase or other improvements to employment conditions at any time (EA5 prevents any such claims);
8. 8 hour break between ordinary shifts;
9. Entitlement to a meal break after 5 hours work (6 hours under EA5);



10. The employer will deduct voluntary superannuation contributions and pay it to the prescribed super fund (EA5 does not have this);
11. Standard arrangements for paying wages fortnightly by EFT etc. and on termination. EA5 allows the employer to pay monthly and by other means if they choose;
12. Higher duties allowance paid for all higher-level work (EA5 only provides Higher duties allowance if acting as a Team Leader);
13. Wage increases after each year of service (EA5 only has this for PCAs and was not included in EA5 at the time it was voted upon);
14. No broken (split) shifts;
15. Employees cannot be required to work more than one shift in each 24 hours, except for a regular changeover of shifts;
16. Clear entitlement to Accumulated days off (ADOs);
17. Clear entitlement to 7 days notice of a change of roster (except where another employee is absent from work due to illness or in an emergency);
18. 200% penalty for all work on any public holiday (EA5 has no penalty rates at all for work on extra occasional public holidays each year);
19. No reduced wage rates for trainees (EA5 has reduced wages for trainees);
20. Up to ten days unpaid leave per year for Aboriginal ceremonial purposes;
21. The FWC can overrule unfair employer decisions (EA5 only allows FWC to arbitrate if TriCare agrees and only allows the FWC to mediate on a limited range of matters);
22. No disciplinary action for using personal/carers leave (EA5 allows disciplinary action for 'unreasonable' personal/carers leave;
23. Allowances for meals, being on-call and use of employee's vehicle increased yearly (non in EA5).

The few entitlements in EA5 that are better than the *Nurses Award 2010* would not be lost because they are incorporated in TriCare's contracts of employment.

At a directions hearing on 9 November, 2016, the FWC proposed a survey of all Tricare employees for their views on the application to terminate EA5. Tricare did not attend the hearing. The FWC wrote to Tricare with this proposal, but TriCare has responded that they will not co-operate in conducting the survey for which they asked.

#### **(d) The effectiveness of transfer of business provisions in protecting workers' pay and conditions**

In this case study, the transfer of business provisions allowed aged care provider Regis Health Care (Regis) to convince ex-Masonic Care (Masonic) staff who were on a superior enterprise agreement to move onto the Regis agreement when it bought Masonic. Here,

the Act does not prevent an employer from using its much greater resources and access to persuade employees, particularly non-union members, to move onto a lesser agreement.

#### Case Study 4

##### **Regis/Masonic**

When Regis bought Masonic, the QNU negotiated extensively with Regis to preserve the Masonic enterprise agreement (EA). The FWC arranged for Regis to conduct a survey of its new employees who transferred from Masonic. 110 nursing employees responded that they preferred to stay on the Masonic EA and 216 nursing employees responded that they preferred to move onto the Regis EA.

Following that survey result, the QNU contacted members to determine their preference at that time. We found around the same number of QNU members preferred the Regis EA as those who preferred the Masonic EA. This was a significant change from the earlier, almost unanimous desire of QNU members to retain their Masonic EA in its entirety.

We feel this is likely due to Regis conducting meetings during paid time to inform staff that the Regis agreement held better conditions. The QNU had very limited opportunity to communicate with non-union members.

Following the survey result, the FWC has granted Regis' application to move ex-Masonic staff onto the Regis EA.

##### **Recommendations:**

The QNU recommends section 318 of the *Fair Work Act 2009* should be amended to read:<sup>6</sup>

In deciding whether to make the order, FWA must take into account the following:

(a) **the relevant information the new employer gives to employees; and**

~~(i) the new employer or a person who is likely to be the new employer; and~~

**(i) the results of a ballot or survey of employees conducted by the Australian Electoral Commission or another independent ballot agent specified by the FWC.**

(b) whether any employees would be disadvantaged by the order in relation to their terms and

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<sup>6</sup> Additions in **bold**, deletions in ~~striketrough~~

conditions of employment;

(c) if the order relates to an enterprise agreement--the nominal expiry date of the agreement;

~~(d) whether the transferable instrument would have a negative impact on the productivity of the new employer's workplace;~~

~~(e) whether the new employer would incur significant economic disadvantage as a result of the transferable instrument covering the new employer;~~

~~(f) the degree of business synergy between the transferable instrument and any workplace instrument that already covers the new employer;~~

~~(g)~~ the public interest.

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