

SUBMISSION BY THE AUSTRALIAN NURSING AND MIDWIFERY FEDERATION

INQUIRY INTO THE FAIR WORK COMMISSION ANNUAL REPORT 2019-2020

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**Australian
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Australian Nursing and Midwifery Federation / Inquiry into the FWC Annual Report 2019-2020

Annie Butler
Federal Secretary

Lori-Anne Sharp
Federal Assistant Secretary

Australian Nursing and Midwifery Federation
Level 1, 365 Queen Street, Melbourne VIC 3000
E: anmffederal@anmf.org.au
W: www.anmf.org.au



Introduction

The Australian Nursing and Midwifery Federation (**ANMF**) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 300,000 nurses, midwives and carers across the country.

Our members work in the public and private health, aged care and disability sectors across a wide variety of urban, rural and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, fulfil their professional goals and achieve a healthy work/life balance.

Our strong and growing membership and integrated role as both a professional and industrial organisation provide us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.

Through our work with members we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.

FWC reports

The ANMF welcomes the opportunity to contribute to the inquiry by the House of Representatives Standing Committee on Employment, Education and Training concerning examining certain aspects of the *Fair Work Commission Annual Report 2019-20 (2020 Report)*.

The ANMF notes that the inquiry is focussed on President Justice Iain Ross' AO observation that "while responding to the consequences of the pandemic, the Commission has also seen an increase in its caseload with substantial increases in the number of unfair dismissal matters and workplace disputes." ¹

¹ [2020 Report](#), p6

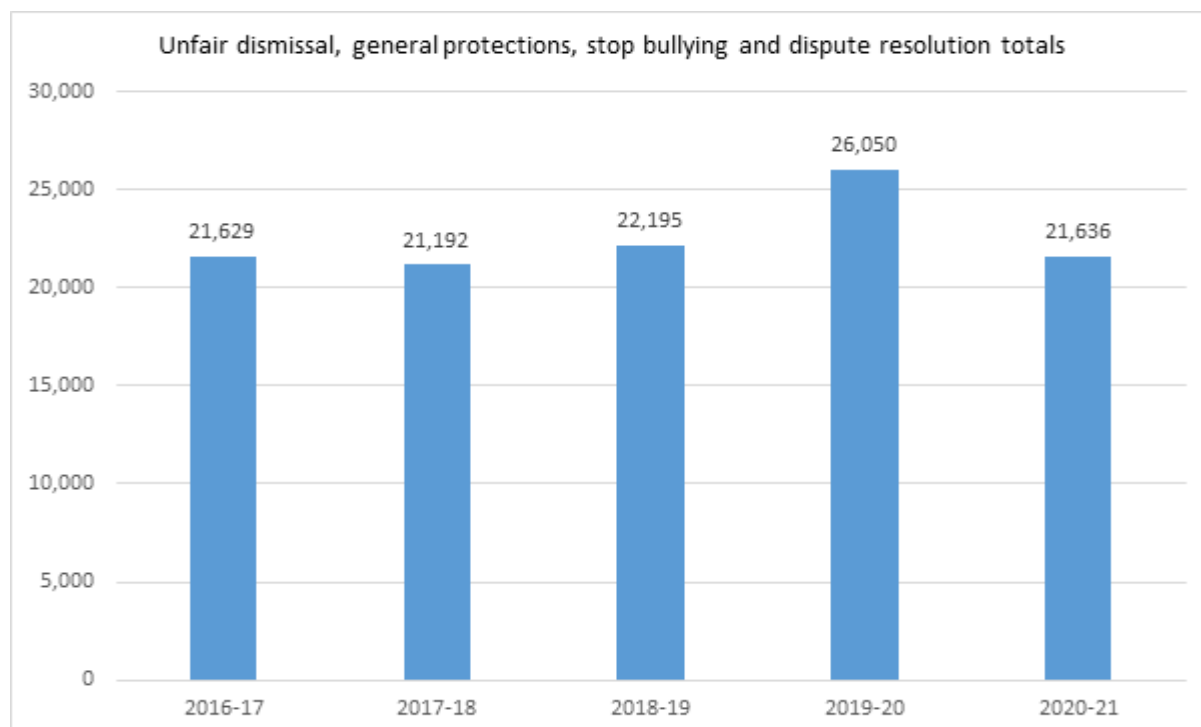


Since the publishing of the 2020 Report, the Fair Work Commission (**FWC**) has published its latest **2021 Report**.² The ANMF believes that Justice Ross' comments mostly concern the application numbers for unfair dismissals, general protections involving dismissal and otherwise, orders to stop bullying and dispute resolution. Taking these numbers from the past five FWC annual reports demonstrates a clear trend that the data from 2019-2020 in the 2020 Report is largely an outlier, as Table 1 below shows:

Table 1

Type of application lodged	2016-17 ³	2017-18 ⁴	2018-19 ⁵	2019-20	2020-21
Unfair dismissals	14,135	13,595	13,928	16,558	13,281
General protections involving dismissal	3,729	4,117	4,508	4,823	4,102
General protections - other	937	992	1,132	1,050	1,156
Dispute resolution	2,106	1,767	1,876	2,255	2,024
Orders to stop bullying	722	721	751	820	782
JobKeeper	N/A	N/A	N/A	544	291
TOTAL	21,629	21,192	22,195	26,050	21,636

Chart 1



² [Fair Work commission Annual Report 2020-21](#)

³ [Fair Work Commission Annual Report 2016-17](#)

⁴ [Fair Work Commission Annual Report 2017-18 online](#)

⁵ [Fair Work Commission Annual Report 2018-19](#)



The number of unfair dismissals in the 2020-21 year decreased by almost 20% when compared to the previous year and is broadly consistent with the long-term trend of case numbers.

Issues of concern during the COVID-19 pandemic

The ANMF is a federated union with a devolved structure. We have consulted with our branches in preparing this submission. They have reported on the following issues which played out during the time of the COVID-19 pandemic.

Bargaining applications and disputes

Overall, branches have reported to Federal Office that fewer applications have been made to the FWC this year when compared to previous years. For major private hospitals, this has been largely because there has been less bargaining, which has been stalled by the COVID-19 pandemic.

With respect to aged care, bargaining has been delayed by a combination of two significant factors:

1. **COVID-19 pandemic** - This has had disastrous effects for the sector, particularly in Victoria and New South Wales.⁶
2. **Royal Commission:** The Royal Commission into Aged Care Quality and Safety delivered its Final Report on 1 March 2021.⁷ The sector as a whole has been waiting on the government's response to this inquiry as the funding and oversight mechanisms have a significant influence on the wages of nurses and carers in this sector.

⁶ See for example, the [Independent review of COVID-19 outbreaks in Australian Residential Aged Care Facilities](#) (1 November 2021)

⁷ [Royal Commission into Aged Care Quality and Safety, Final Report](#) (1 March 2021)



Aged care work across multiple sites

Before government guidelines were clearer, some ANMF branches such as the Victorian Branch and QNMU Branch (Queensland Branch) had disputes with aged care employers around the issue of members working at multiple workplaces.

With respect to QNMU Branch, in April 2020, at the height of Queensland's COVID-19 outbreak, aged care provider Bolton Clarke asked nursing staff who had a second job to choose between taking unpaid leave for at least three months, using up their paid leave, stopping work in their second job, or being stood down without pay.

Five QNMU members were stood down. In Federal Court, the QNMU Branch pursued compensation for these ANMF members for the money they lost during the unlawful stand down.

Using expert evidence from Professor David Paterson (Director of UQ Centre for Clinical Research and Infectious Diseases Physician at RBWH), the QNMU Branch argued that Bolton Clarke's original justification for standing down ANMF members without pay was unsubstantiated – that is, Bolton Clarke believed nurses who worked in another facility posed an increased risk of bringing COVID-19 into their workplace.

Despite refusing numerous offers by the QNMU Branch to settle, Bolton Clarke ultimately agreed to some significant parts of the QNMU Branch's original offer.⁸

This case was not pursued through the FWC.

In the case of the Victorian Branch, in April 2020 aged care employer TLC similarly tried to implement a policy that would have forced their staff members to only be able to work at one site, which meant choosing to only work at TLC or resigning.

⁸ QNMU Branch, [Member win! Unlawful stand down sees members recover \\$18,000](#) (17 February 2021)



After correspondence from the Victorian Branch and discussions at senior levels of the branch and the employer, this direction was withdrawn before being implemented. This case was also not pursued through the FWC as a satisfactory outcome was achieved before the formal dispute resolution procedure in the TLC Aged Care Victoria, ANMF and HSU Enterprise Agreement 2017-2022 needed to be invoked.

With respect to the South Australian Branch, one dispute in relation to a single site directive was lodged at the FWC concerning a directive to work at a single aged care facility. This dispute was resolved at conference.

Committee's terms of reference

The ANMF notes the committee's focus for this inquiry is "...how policy responses designed to manage the COVID-19 pandemic may impact the Fair Work Commission's caseload, including vaccine mandates, shutdowns, lockdowns, self-isolation and quarantine, and inconsistencies between the public health orders of the states and territories."

On the whole ANMF members have been affected only marginally by shutdowns and lockdowns as nearly all employers in the health sector have been operating, albeit sometimes with changed practices in order to protect workers and the general public. Early in the pandemic, some lockdowns were threatened by private health care providers and were temporarily implemented however arrangements put in place by the Commonwealth and state/territory governments ensured that these employers could continue to operate.⁹

The ANMF does not believe there is evidence that inconsistencies between public health orders between states and territories will lead to more or less work for the FWC. Laws concerning a variety of matters on industrial relations (such as work, health and safety, child labour, licensing and a range of other areas), have always varied between the various states and territories.

⁹ Parliamentary Library, [COVID-19: Major partnership with private hospitals](#) (28 April 2020)



In addition, the vast bulk of ANMF membership work in the public sector which is covered by state industrial relations tribunals in New South Wales, Queensland, South Australia, Tasmania and Western Australia.

With respect to COVID-19 vaccine mandates, vaccine mandates are not a new concept in the health setting. Various public sector employers have mandated a variety of vaccines for nurses, from the time a student nurse begins their placement in a workplace as part of their studies. The ANMF Position Statement: Covid-19 Vaccination, which was recently endorsed by the Federal Council of ANMF, acknowledges this.¹⁰ It explains the position of the ANMF with respect to COVID-19 vaccination mandates from an industrial, work health and safety and professional point of view.

Concerning the self-isolation and quarantine that has sometimes been necessary for ANMF members, state and territory governments (as the largest employers of ANMF members) have ensured that members are not financially worse off for having to isolate as a result of exposure to COVID-19 in their workplace.

With respect to the private sector, on 8 April 2020 a Full Bench of the FWC issued a Decision¹¹ varying 99 modern awards to insert a new Schedule X: Additional measures during the COVID-19 pandemic. Schedule X provides for unpaid pandemic leave and annual leave at half pay. Schedule X is still located in all modern awards and will operate until at least 31 December 2021.

During the course of the proceedings to insert Schedule X, the ACTU, ANMF, the HSU and APESMA made submissions regarding the particular circumstances of health care workers. As a result, the FWC decided to establish a separate process to address the issues raised. This eventually resulted in paid pandemic leave being inserted into the *Nurses Award 2010* (with respect to aged care only) and the *Aged Care Award 2010*, with the addition of Schedule Y to those awards, from 29 July 2020.

¹⁰ [ANMF Position Statement: Covid-19 Vaccination](#) (27 August 2020)

¹¹ [\[2020\] FWCFB 1837](#)



With respect to the *Nurses Award 2010*, Clause Y.4 of Schedule Y provided:

Y.4 Paid pandemic leave

Y.4.1 Subject to clauses Y.4 to Y.4.9, an employee engaged in the aged care industry is entitled to take up to 2 weeks' paid pandemic leave on each occasion the employee is prevented from working (including working from home):

- (a) because the employee is required by government or medical authorities to self isolate or quarantine;
- (b) because the employee is required by their employer to self isolate or quarantine;
- (c) because the employee is required on the advice of a medical practitioner to self isolate or quarantine because they are displaying symptoms of COVID-19 or have come into contact with a person suspected of having contracted COVID-19;
- (d) because the employee is in isolation or quarantine while waiting for the results of a COVID-19 test; or
- (e) because of measures taken by government or medical authorities in response to the COVID-19 pandemic.¹²

The provision in the *Aged Care Award 2010* was similar. Schedule Y ceased operation on 26 March 2021.¹³

With respect to specific pandemic measures the FWC was pro-active in trying to assist workers, unions, employers and employer organisations. However, it was constrained by powers it has in the *Fair Work Act 2009 (FW Act)* to provide the help which would have been immediately useful.

¹² [PR721364](#) (29 July 2020)

¹³ [PR728137](#) (26 March 2021)



Victoria had a long second lockdown in the second half of 2020 due to high COVID-19 case numbers. Schedule Y would have made the biggest impact there, however it did not operate for most aged care employers in the state as they are bound by enterprise agreements. In accordance with section 57 of the FW Act this meant that the award did not apply.

Since at least July 2020, the union movement through its peak body, the Australian Council of Trade Unions (**ACTU**) has called for paid pandemic leave for all workers. Specifically, “Paid pandemic leave – which would be in addition to any other leave entitlement, available to all working people and funded by the Government – is essential to allowing workers to get tested and isolate when they need to.” Ultimately the Commonwealth parliament needed to step up to create enforceable rights with respect to paid pandemic leave. It chose not to do this.

Conclusion

It is difficult to predict future trends with regards to application numbers. If the committee does recommend any additional resources for the FWC, any additional appointments of FWC members need to be done in an open and transparent manner similar to the processes used by the New South Wales Industrial Relations Commission, which advertises new positions to the public.

Recent appointments to the FWC have been largely with employer backgrounds, with no open process for suitably qualified people to apply. This has undermined the confidence of stakeholders in the FWC as an impartial body.

¹⁴ ACTU, [Paid Pandemic Leave: ACTU Policy Brief](#) (29 July 2020)